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Chairman Paul, Ranking Member Peters, and members of the committee, thank you for inviting me here today to discuss the Migrant Protection Protocols (MPP), better known as "Remain in Mexico".

Congress' Plenary Authority Over Immigration

Key to understanding any border policy is identifying where U.S. immigration authority is placed under our nation's constitutional order.

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

"Naturalization"[2] is the process by which a foreign national in the United States—defined as an "alien" in section 101(a)(3) of the Immigration and Nationality Act (INA)[3] — becomes a "citizen" (as defined by reference therein and in section 101(a)(22) of the INA[4]).

Inherent in and essential to Congress' constitutional authority "to establish a uniform Rule of Naturalization", therefore, is its ability and power to regulate immigration.

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

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

> *Policies pertaining* ***to the entry of aliens and their right to remain here*** *are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the*

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

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

[3] *See* sec. 101(a)(3) of the INA (2024) ("The term 'alien' means any person not a citizen or national of the United States."). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.

[4] *See* section 101(a)(22) of the INA (2024) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.

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

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

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

> *procedural safeguards of due process.* ***But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government****. [Emphasis added.]*

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

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

Section 212(a) of the INA[9] lists the various categories of aliens whom Congress has determined the executive should bar from admission to the United States (known collectively as the "grounds of inadmissibility").

The most fundamental of those grounds, and the one that Congress uses to control the flow of new immigrants into the United States, is section 212(a)(7)(A)(i) of the INA[10], which bars the admission of any alien "who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document".

Congress's Inspection Protocol for "Applicants for Admission" in Section 235 of the INA

To guide the executive in implementing its "policies pertaining to the entry of aliens", Congress created an inspection protocol in section 235 of the INA[11] for U.S. Customs and Border Protection (CBP) to follow in considering whether to admit alien "applicants for admission"[12].

That statutory term, "applicant for admission", applies to both aliens seeking admission at the ports of entry and migrants apprehended crossing the land and coastal borders between those ports[13]-- a fact essential to understanding the control of migration at the Southwest border.

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

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[8] *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Source: https://supreme.justia.com/cases/federal/us/408/753/.
[9] Sec. 212 of the INA (2023). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.
[10] *Id*. at cl. (a)(7)(A)(i).
[11] Sec. 235 of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[12] *See id.*at para. (a)(1) ("An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.").
[13] *See id*.

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

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

As its name suggests, the focus of the entry doctrine was on whether an alien had physically "entered" the United States[17], and the circumstances surrounding that entry.

Under that doctrine, aliens who had not made an entry into the United States were placed into exclusion proceedings under then-section 236 of the INA[18] and afforded few constitutional protections.[19] Aliens who deliberately entered the country — even illegally — "free from actual and constructive restraint"[20] were placed into deportation proceedings under then-section 242 of the INA[21], in which they received greater rights and procedural benefits.

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

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

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

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

[17] *Id*. at 1.

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

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

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

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

[22] *See* fn. 19 (*Shaughnessy*).

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

In its IIRIRA amendments to section 235 of the INA, Congress dispensed with this confusion by treating all "arriving aliens" — those at the ports and those apprehended entering illegally between them — as applicants for admission[25], subject to what the INA post-IIRIRA refers to as "inadmissibility" under section 212 of the INA.

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

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

[24] *See id*.

[25] *See* Sec. 235(a)(1) of the INA (2024) ("Aliens treated as applicants for admission. An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission."). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[26] *See* Sec. 240(a)(1) of the INA (2024) ("Removal proceedings. (a) Proceeding (1) In general. An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim. *See also Cruz-Miguel v. Holder*, 650 F.3d 189, 197 (2d Cir. 2011) ("IIRIRA eliminated the bright-line distinction between exclusion and deportation, merging the two into proceedings for 'removal' and replacing the definition of 'entry' with that for 'admission'. . .. After IIRIRA, both aliens arriving at the border and aliens already present in the United States without inspection are deemed 'applicants for admission,' . . . who must 'be inspected by immigration officers' to determine their admissibility . . .. If, upon such inspection, an alien is not 'clearly and beyond a doubt' admissible, he must be placed in removal proceedings.") (citations omitted). Source: https://casetext.com/case/cruz-miguel-v-holder.

A key component of that post-IIRIRA inspection protocol is section 235(a)(3) of the INA[27], which mandates that all applicants for admission be "inspected by immigration officers" to determine whether they're inadmissible under any of the grounds in section 212(a) of the INA.

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

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

If, following that inspection in section 235(a)(3) of the INA, an immigration officer determines that an applicant for admission lacks proper entry documents and is inadmissible under section 212(a)(7)(A)(i) of the INA or is seeking admission via misrepresentation or fraud and is therefore inadmissible under section 212(a)(6)(C) of the INA[29], that officer has a choice.

Section 235(b)(1)(A)(i) of the INA[30] allows the officer to "order the alien removed from the United States without further hearing or review" -- and without CBP first obtaining a removal order from an immigration judge, which is the general rule in cases involving removable aliens[31]-- "unless the alien indicates either an intention to apply for asylum ... or a fear of persecution". This process is known as "expedited removal".

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

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[27] Sec. 235(a)(3) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

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

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

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

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

Citizenship and Immigration Services (USCIS), pursuant to section 235(b)(1)(A)(ii) of the INA[32], to determine whether that alien has a "credible fear of persecution".

The term "credible fear of persecution" is defined in section 235(b)(1)(B)(v) of the INA[33] as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under" section 208 of the INA. Thus, it is a screening standard, to determine whether the alien *may* be eligible for asylum.

Congress is clear, however, in section 235(b)(1)(B)(iii)(V) of the INA[34], that aliens "*shall be detained* pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed", and is equally clear in section 235(b)(1)(B)(ii) of the INA[35] that if an asylum officer "determines at the time of the interview that an alien has a credible fear of persecution ... the alien *shall be detained for further consideration of the application for asylum*" (emphasis added).

The detention of aliens subject to expedited removal is critical to the credibility of this process because credible fear is simply intended to screen asylum claims—not resolve them—because asylum is susceptible to fraud[36] and there is not enough time to probe for that fraud during the credible fear interview.

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

With only extremely limited exceptions[37], the "consideration of the application for asylum" made by an alien who had been subject to expedited removal under section 235(b)(1) of the INA is performed by an immigration judge in removal proceedings under section 240 of the INA[38].

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

[33] Sec. 235(b)(1)(B)(v) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[34] Sec. 235(b)(1)(B)(iii)(V) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

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

[36] *See DHS v. Thuraissigiam*, 591 U. S. ____, slip. op. at 1 (2020) ("Every year, hundreds of thousands of aliens are apprehended at or near the border attempting to enter this country illegally. Many ask for asylum, claiming that they would be persecuted if returned to their home countries. Some of these claims are valid, and by granting asylum, the United States lives up to its ideals and its treaty obligations. Most asylum claims, however, ultimately fail, and some are fraudulent."). Source: https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf.

[37] Arthur, Andrew. *Biden Administration to 'Pause' Radical Asylum Officer Rule*. CENTER FOR IMMIGRATION STUDIES (Apr. 15, 2023). Source: https://cis.org/Arthur/Biden-Administration-Pause-Radical-Asylum-Officer-Rule.

[38] *See* sec. 240 of the INA (2024) ("Removal proceedings"); *see also id*. at para. (a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."); *id.* at para. (c)(4) ("Applications for relief from removal"). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.

The other choice that the immigration officer during the inspection protocol in section 235 of the INA —again, either an OFO CBP officer at the ports or a USBP agent between them— has in the case of an "applicant for admission" who is inadmissible under sections 212(a)(7)(A)(i) or 212(a)(6)(C) of the INA is to treat that applicant like any other inadmissible alien, and to place the alien directly into section 240 removal proceedings, a procedure Congress provided for in section 235(b)(2)(A) of the INA[39].

That option is key to my analysis *infra*.

Parole

Although section 235(b) of the INA requires DHS to detain inadmissible applicants for admission, Congress has given DHS extremely limited authority in section 212(d)(5)(A) of the INA[40] to "parole" individual aliens into the United States in exceptional or emergent circumstances.

That provision[41] states, in pertinent part, that the DHS secretary:

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

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

First, parole may only be granted "on a case-by-case basis"[42], and thus may not be issued on a blanket basis to allow the entry of large numbers of aliens *en masse*, or programmatically to parole a class of aliens.

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[39] *See* section 235(b)(2)(A) of the INA (2024) ("in the case of an alien who is an applicant for admission, if the examining immigration officer *determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted*, the alien shall be detained for a" removal proceeding under section 240 of the INA) (emphasis added). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[40] Sec. 212(d)(5)(A)(1) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.

[41] *Id*.

[42] *Id*.

Second, DHS may only release an alien on parole for either "urgent humanitarian reasons" or for "significant public benefit"[43]. Granting parole for any other purpose is thus *ultra vires*[44], as it exceeds the statutory parole authority.

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

As the Fifth Circuit has explained:

> *parole creates something of legal fiction; although a paroled alien is physically allowed to enter the country, the legal status of the alien is the same as if he or she were still being held at the border waiting for his or her application for admission to be granted or denied.*[45]

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

Congress provided the executive branch parole authority when it initially enacted the INA in 1952[46], with the original language in the parole statute reading as follows:

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

The secretary of Homeland Security, both *de facto* and *de jure*, succeeded the attorney general as the executive-branch officer given the statutory authority to grant parole under the Homeland Security Act of 2002 (HSA)[47], even though the current text continues to show that the attorney general holds that authority.

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[43] *Id*.

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

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

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

[47] Homeland Security Act of 2002, Pub. L. 107-206 (2002). Source: https://www.congress.gov/bill/107th-congress/house-bill/5005/text; *see also id*. at sec. 471(a) ("Upon completion of all transfers from the

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

As my colleague, George Fishman, has explained[48], Congress has more rigidly cabined the parole authority since 1952 because various administrations have abused that power to bypass Congress' plenary power over immigration and exceed the limits it has set on the annual admission of immigrants.

You don't have to trust Mr. Fishman about Congress' intentions, however. The current language of the parole statute was included in IIRIRA[49], under the title "Limitation on the Use of Parole"[50].

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

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

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

Fortunately, the then-INS explained in detail what their predecessor phrases-- "emergent reasons" and "reasons deemed strictly in the public interest" -- meant in promulgating[52] the first parole regulation in 1982:

> *The legislative history of the parole provision shows a Congressional intent that parole be used in a restrictive manner. The drafters of the Immigration and Nationality Act of 1952 gave as examples situations where parole was warranted in cases involving the need for immediate medical attention, witnesses, and aliens*

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Immigration and Naturalization Service as provided for by this Act, the Immigration and Naturalization Service of the Department of Justice is abolished.").

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

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

[50] *Id*.

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

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

> *being brought into the United States for prosecution. . .. In 1965, a Congressional committee stated that the parole provisions "were designed to allow the Attorney General to act only in emergent, individual, and isolated situations, such as in the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside the limit of the law."*

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

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

I note, however, that the current iteration of the parole regulation, 8 CFR § 212.5[53], states:

> *(b) Parole from custody. The parole of aliens within the following groups who have been or are detained . . . would generally be justified only on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding: . . .*
>
> *(5) **Aliens whose continued detention is not in the public interest** as determined by those officials identified in paragraph (a) of this section. [Emphasis added.]*

That seemingly broad regulatory catch-all parole authority, however, actually derives from the aforementioned 1982 regulatory amendment, when that provision[54] read as follows:

> *The parole of aliens within the following groups would generally come within the category of aliens for whom the granting of the parole exception would be "strictly in the public interest", provided that the aliens present neither a security risk nor a risk of absconding: . . .*
>
> *(v) **Aliens whose continued detention is not in the public interest** as determined by the district director. [Emphasis added.]*

As I have explained elsewhere[55] that 1982 regulation was rushed through in a two-week period to comply with a district-court order in *Louis v. Nelson*.[56] Given that, it's not surprising that

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[53] 8 CFR § 212.5 (2024). Source: https://www.law.cornell.edu/cfr/text/8/212.5.

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

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

[56] *See Louis v. Nelson*, 544 F. Supp. 973, 1003-04 (S.D. Fla. 1982) ("Plaintiffs have established that the new detention policy, whereby excludable aliens are placed in detention until they establish to INS' satisfaction a prima facie claim for admission, was not adopted in accordance with the requirements of the Administrative Procedure Act. Because Defendants failed to give interested persons notice and an opportunity to comment on the new

when the predecessor provision to 8 CFR § 212.5(b)(5) was published, it was poorly drafted and failed to track the then-extant limitations on parole in section 212(d)(5)(A) of the INA (1982).

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

The only reading of that language that would not render it *ultra vires* would be as a reiteration of the existing bases for granting parole, that is, for emergency medical treatment or appearance at U.S. criminal proceedings, or for some analogous purpose. When expanded beyond that interpretation, or worse, treated as a catch-all release authority, however, it is plainly be *ultra vires*.

Border Security Prior to the Biden Administration, and President Authorities

When President Biden took office, he inherited what his first USBP chief, Rodney Scott, described in a September 2021 letter to Senate leadership as "arguably the most effective border security in" U.S. history.[57] The new administration, Chief Scott complained, quickly allowed that security to "disintegrate" as "inexperienced political appointees" ignored "common sense border security recommendations from experienced career professionals."[58]

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

*Detention*

As noted above, DHS is required by statute[59] to detain inadmissible applicants for admission, with an exception for cross-border returns pending removal proceedings under section 235(b)(2)(C)[60] that I will discuss *infra*.

The Biden administration has contended[61] that various "push factors"—external issues that drive migrants from their homes like "corruption, violence, trafficking, and poverty"—exacerbated by the "COVID-19 pandemic and extreme weather conditions" are to blame for the migrant surge over the past four years.

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detention policy and thereafter to promulgate that policy in the Federal Register 30 days prior to its implementation, the Court finds the rule pursuant to which Plaintiffs are incarcerated to be null and void."). Source: https://law.justia.com/cases/federal/district-courts/FSupp/544/973/1686455/.

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

[58] *Id*.

[59] *See* pp. 7-8, *supra*.

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

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

In his March 8, 2023, opinion[62] in *Florida v. U.S.*-- a state challenge to the administration's border-release policies—Judge T. Kent Wetherell II of the of the U.S. District Court for the Northern District of Florida concluded, however that while:

> *There were undoubtedly geopolitical and other factors that contributed to the surge of aliens at the Southwest Border, but [DHS's] position that the crisis at the border is not largely of their own making because of their more lenient detention policies is divorced from reality and belied by the evidence. Indeed, the more persuasive evidence establishes that [DHS] effectively incentivized what they call "irregular migration" that has been ongoing since early 2021 by establishing policies and practices that all-but-guaranteed that the vast majority of aliens arriving at the Southwest Border who were not excluded under the Title 42 Order would not be detained and would instead be quickly released into the country where they would be allowed to stay (often for five years or more) while their asylum claims were processed or their removal proceedings ran their course—assuming, of course, that the aliens do not simply abscond before even being placed in removal proceedings, as many thousands have done.*[63]

The Biden border release policies are an outlier because while at times President Biden's predecessors struggled to comply with the statutory detention mandate, they generally succeeded in doing so.

The Department of Justice (DOJ) submitted the following chart to the Supreme Court in *Biden v. Texas*[64] on June 6, 2022[65], as an appendix to a letter from the solicitor general to the clerk of the court. DOJ filed that letter to correct factual errors the department had inadvertently included in prior filings:

[62] *Florida v. U.S.*, No. 3:21-cv-1066-TKW-ZCB, Opinion and Order (N.D. Fla. Mar. 8, 2023). Source: https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf.
[63] *Id*. at 21-22.
[64] *See Biden v. Texas*, 142 S.Ct. 2528 (2022). Source: https://scholar.google.com/scholar_case?case=28984563424038397 7&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
[65] Letter from Petitioner to Clerk of the Court, *Biden v. Texas* (Jun. 6, 2022) (No. 21-954). Source: https://www.supremecourt.gov/DocketPDF/21/21-954/227228/20220606154050875_Letter%2021-954%20%206-6-2022.pdf.

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

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

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

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

Excluded from the encounter figures during the fiscal years above are unaccompanied alien children (UACs) encountered by CBP at the Southwest border, who by law[66] are not subject to DHS detention.

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

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

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

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

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

Rodriguez *and* Matter of X-K-

In its 2013 opinion in *Rodriguez v. Robbins*[67] and its progeny[68], the Ninth Circuit affirmed a district court order finding that aliens subject to mandatory detention following inspection under section 235(b) of the INA were entitled to periodic bond redetermination hearings at which they would be considered for release.

In its February 2018 opinion in *Jennings v. Rodriguez*[69], however, the Supreme Court reversed the circuit court, holding that sections 235(b)(1) and 235(b)(2) of the INA "mandate detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin".

Similarly, in its 2005 decision in *Matter of X-K-*[70], the BIA held that aliens who had been subject to expedited removal, passed credible fear, and who were placed into removal proceedings were eligible to seek release on bond from immigration judges, with certain exceptions.

In April 2019, following the Supreme Court's opinion in *Rodriguez*, then-Attorney General William Barr issued a precedent decision in *Matter of M-S-*[71], reversing the BIA's erroneous reading of the mandatory detention provisions in section 235(b) in *Matter of X-K-*.

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

"*Flores Fix*"

Unlike the Ninth Circuit's opinion in *Rodriguez* and the BIA's decision in *Matter of X-K-*, however, the third legal impediment to compliance with the mandatory detention provisions in section 235(b) of the INA remains unresolved—though the executive branch could "fix" it (in the words of a bipartisan panel[72]) through regulation.

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[67] *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013). Source: https://casetext.com/case/rodriguez-v-robbins.
[68] *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). Source: https://casetext.com/case/rodriguez-v-robbins-8.
[69] *Jennings v. Rodriguez*, 583 U.S. ___ (2018). Source: https://supreme.justia.com/cases/federal/us/583/15-1204/#tab-opinion-3858465.
[70] *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3510.pdf.
[71] *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019). Source: https://www.justice.gov/eoir/file/1154747/download.
[72] *See* fn. 107 *infra*.

That impediment has its genesis in an August 2015 district court order in *Flores v. Lynch*[73], which directed DHS to release within 20 days of encounter alien children and adults who entered in "family units" (FMUs). A brief background and history behind that decision is in order.

In 1985, organizations sued[74] the former INS on behalf of alien children being detained by the agency. The suit was brought to challenge INS's procedures regarding the detention, treatment, and release of such children.

That case went through a number of levels of judicial review[75], including by the Supreme Court (in March 1993)[76] on the question of whether a then-regulation[77] limiting the release of UACs violated the Due Process Clause.

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

Justice Scalia, writing for the majority in a challenge to that rule, found that the regulation was not unconstitutional. He noted:

> *The parties to the present suit agree that the Service must assure itself that someone will care for those minors pending resolution of their deportation proceedings. That is easily done when the juvenile's parents have also been detained and the family can be released together; it becomes complicated when the juvenile is arrested alone, i.e., unaccompanied by a parent, guardian, or other related adult.*[78]

The matter was remanded to the U.S. District Court for the Central District of California, where, in January 1997, the Clinton DOJ and the *Flores* plaintiffs entered into a stipulated settlement agreement[79] known as "the *Flores* settlement agreement", or "FSA".

In its 1993 opinion, the Supreme Court concluded that the entry of 8,500 minors in 1990 — 70 percent of them UACs (the rest logically in FMUs) -- was a "serious" problem.[80]

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[73] *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015). Source: https://cite.case.law/f-supp-3d/212/907/.
[74] *See Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352 (9th Cir. 1991). Source: https://casetext.com/case/flores-by-galvez-maldonado-v-meese-3.
[75] *See id*.
[76] *Reno v. Flores*, 507 U.S. 292 (1993). Source: https://supreme.justia.com/cases/federal/us/507/292/.
[77] *See* 8 CFR § 242.24 (1996). Source: https://www.govinfo.gov/content/pkg/CFR-1997-title8-vol1/pdf/CFR-1997-title8-vol1-sec242-24.pdf.
[78] *Flores*, 507 U.S. at 295.
[79] *Flores v. Reno*, No. No. 85-4544-RJK (C.D. Cal. Jan. 17, 1997) (Stipulated Settlement Agreement). Source: https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf .
[80] *Flores*, 507 U.S. at 295.

By FY 2014, however, CBP was experiencing a much larger surge in UACs and FMUs at the Southwest border. That fiscal year, Border Patrol apprehended more than 68,500 UACs[81] and an additional 68,445 aliens in FMUs[82]— a 77-percent increase in UACs and a 360-percent rise in FMUs from the year before.

The Obama administration responded[83] to that 2014 surge by opening shelters known as "Family Residential Centers" (FRCs) in Karnes City and Dilley, Tex., and Artesia, N.M., to detain FMUs (Artesia was closed shortly thereafter).

As detentions increased, the number of UACs[84] and FMUs[85] apprehended at the Southwest border dropped to just below 40,000, respectively, in FY 2015.

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

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

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

On August 21, 2015, Judge Gee issued an order requiring DHS to release aliens in FMUs within 20 days of encounter. The Obama administration appealed that decision to the Ninth Circuit, which issued an order[86] in July 2016, largely affirming the district court but holding that DHS could detain adults in FMUs—but not children.

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

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

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

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

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

[86] *Flores v. Lynch*, 828 F.3d 898 (2016). Source: https://scholar.google.com/scholar_case?case=12780774456837741811&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

To avoid family separation, however, the Obama administration opted to release both the adults and the children in FMUs. As a likely consequence, by the end of FY 2016[87], apprehensions of families at the Southwest border swelled again, exceeding 77,000.

Overall Southwest border apprehensions cratered in FY 2017[88], the first partial fiscal year of the Trump administration, but FMU apprehensions continued apace, with more than 75,000 aliens[89] in family units being apprehended after entering illegally—nearly a quarter of all apprehensions that year.

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

> *Some migrants have admitted they brought their children not only to remove them from danger in such places as Central America and Africa, but because they believed it would cause the authorities to release them from custody sooner.*
>
> *Others have admitted to posing falsely with children who are not their own, and Border Patrol officials say that such instances of fraud are increasing.*[90]

That FMU surge continued into FY 2018, as USBP agents at the Southwest border apprehended more than 107,000[91] aliens in family units—27 percent of that year's total of apprehensions.

In response to this burgeoning population of FMU migrants, Attorney General Jeff Sessions in April 2018[92] called for "zero tolerance" with respect to prosecutions of illicit entrants— illegal entry being both a civil offense[93] rendering the offender removable and also a federal crime[94], punishable as a misdemeanor for a first offense and a felony for subsequent offenses.[95]

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

[88] *See Total Encounters By Fiscal Year*. U.S. BORDER PATROL (undated) (303,916 Southwest border apprehensions in FY 2017, down from 408,870 in FY 2016). Source: https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/US59B8~1.PDF.

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

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

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

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

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

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

[95] *See id*.

That policy applied to all adults, including adults in FMUs, and in practice it meant those adults had to be sent for at least brief periods to U.S. Marshals Service custody, leaving some of their children — under DHS's interpretation of the law[96] — "unaccompanied".

By statute[97], DHS was therefore required to send those children to shelters run by the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS) for placement with "sponsors" in the United States.

Logically, following the brief period that those FMU adults were in U.S. Marshals Service custody for prosecution, they would have been quickly reunited with their children, but according to the HHS[98], DHS[99], and DOJ[100] inspectors general, that did not happen, almost solely due to poor planning and incompetence.

The policy spurred a media backlash[101], and in response, on June 20, 2018, President Trump issued Executive Order (EO) 13841[102], directing an end to family separations. EO 13841 also ordered Attorney General Sessions to seek to modify the FSA to permit the department to detain FMUs through criminal and immigration proceedings.

Apprehensions of FMUs at the Southwest border rose sharply thereafter, exceeding 473,000 in FY 2019. [103] That fiscal year[104], nearly 56 percent of all aliens apprehended at the Southwest border after entering illegally were in family units.

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[96] *But see* 6 U.S.C. § 279(g)(2) (2024) ("(2) the term "unaccompanied alien child" means a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom— (i) **there is no parent or legal guardian in the United States**; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.) (emphasis added.). Source: https://uscode.house.gov/view.xhtml?path=/prelim@title6/chapter1/subchapter4/partE&edition=prelim.

[97] 6 U.S.C. § 279 (2024). Source: https://uscode.house.gov/view.xhtml?path=/prelim@title6/chapter1/subchapter4/partE&edition=prelim.

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

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

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

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

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

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

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

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

Security at the Southwest border degraded to such an extent that then-DHS Secretary Kirstjen Nielsen was forced to declare a "border emergency" in March 2019.[105]

As she explained at the time:

> *Today I report to the American people that we face a cascading crisis at our southern border.* ***The system is in freefall****. DHS is doing everything possible to respond to a growing humanitarian catastrophe while also securing our borders, but we have reached peak capacity and are now forced to pull from other missions to respond to the emergency.*
>
> *Let me be clear: the volume of 'vulnerable populations' arriving is without precedent. This makes it far more difficult to care for them and to prioritize individuals legitimately fleeing persecution. In the past, the majority of migration flows were single adults who could move through our immigration system quickly and be returned to their home countries if they had no legal right to stay.* ***Now we are seeing a flood of families and unaccompanied children, who—because of outdated laws and misguided court decisions—cannot receive efficient adjudication and, in most cases, will never be removed from the United States even if they are here unlawfully. The result is a massive 'pull factor' to our country****.*
>
> ***My gravest concern is for children****. They are arriving sicker than ever before and are exploited along the treacherous trek. Smugglers and traffickers know that our laws make it easier to enter and stay if you show up as a family.* ***So they are using children as a 'free ticket' into America, and have in some cases even used kids multiple times—recycling them****—to help more aliens get into the United States. Our border stations were not designed to hold young people for extended periods, yet this influx has forced thousands of them into facilities that are getting crowded and overwhelmed.* ***This goes well beyond politics. We must come together to find a way to tackle the crisis and reduce the flows so children are not put at risk.*** *Any system that encourages a parent to send their child alone on this terrible journey—****where they are exploited, pawned, and recycled****—is completely broken.[106] [Emphasis added.]*

[105] *Secretary Kirstjen Nielsen Statement on Border Emergency*. U.S. DEP'T OF HOMELAND SECURITY (Mar. 29, 2019). Source: https://www.dhs.gov/news/2019/03/29/secretary-kirstjen-nielsen-statement-border-emergency.
[106] *Id*.

Secertary Nielsen's concerns were echoed in a report[107] issued a month later by a bipartisan federal panel[108] tasked with examining the surge in family entries in FY 2018 and FY 2019[109]. The panelists found:

> ***Migrant children are traumatized during their journey to and into the U.S.*** *The journey from Central America through Mexico to remote regions of the U.S. border is a dangerous one for the children involved, as well as for their parent.* ***There are credible reports that female parents of minor children have been raped, that many migrants are robbed, and that they and their child are held hostage and extorted for money****.*
>
> . . . .
>
> ***Criminal migrant smuggling organizations are preying upon these desperate populations, encouraging their migration to the border despite the dangers****, especially in remote places designed to overwhelm existing [U.S. Border Patrol] infrastructure, and extorting migrants along the way, thereby reaping millions of dollars for themselves and the drug cartels who also charge money to cross the border. [Emphasis added.]*

With respect to the kids, the panel report explained: "In too many cases, children are being used as pawns by adult migrants and criminal smuggling organizations solely to gain entry into the United States. . . ."[110]

According to the panel:

> *By far, the major "pull factor" [drawing family units to the United States] is the current practice of releasing with a [Notice to Appear— "NTA"—the charging document in removal proceedings] most illegal migrants who bring a child with them. The crisis is further exacerbated by a 2017 federal court order in Flores v. DHS expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to unaccompanied children (UAC). After being given NTAs, we estimate that 15% or less of FMU will likely be*

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

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

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

[110] *Id*. at 1.

> *granted asylum. The current time to process an asylum claim for anyone who is not detained is over two years, not counting appeals.*[111]

That report called on DHS to:

> *Establish and staff 3 to 4 Regional Processing Centers (RPCs) along the border, scalable and with sufficient capacity to shelter all FMUs apprehended at the border and, among other things, provide safe and sanitary shelter, to include medical screening and care, credible fear examinations, vetting for identity and familial relationship, and evaluations for public health and safety, national security and flight risk.*
>
> *Resource and require transport from USBP stations and POEs of all FMUs to an RPC, within 24 hours or less of apprehension.*[112]

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

> *The requirement is that that these RPCs have sufficient bed, quarantine infirmary space to detain all FMUs apprehended at or near the SWB for a minimum of 20 days. All locations are to be sited within approximately 250-300 miles at their furthest from any spot on the SWB. Possible locations include Rio Grande Valley, El Paso, Yuma and immediately available current and excess military bases. Establishment of the first RPC should begin immediately, within 30 days.*[113]

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

> *[A] "Flores Fix" -- Roll back the Flores Decision by exempting children accompanied by a parent or relative, who is acting as the guardian of the child. DHS also should be given discretion to detain a close relative with a non-parent family member when this is in the best interest of the child.*
>
> *Amend[ments to the asylum provision in] Section 208 of the Immigration Nationality Acts (INA) to require that border crossers make asylum claims at POEs. . . .*
>
> *Amend[ments to] the Trafficking Victims Protection Reauthorization Act (TVPRA) to permit repatriation of any child when the custodial parent residing in the country of origin requests reunification and return of the child. Currently, this is not permitted by the statute.*[114]

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

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[111] *Id*. at 2.
[112] *Id*. at 2.
[113] *Id*. at 10.
[114] *Id*. at 2-3.

Finally, the panel also recommended that, pending a congressional *Flores* fix, "DHS should act promptly to limit it by emergency regulation".[115]

As CRS has noted, "the parties [in *Flores*] stipulated that the agreement would terminate 45 days after the government publishes final regulations implementing the terms of the agreement" in a 2001 amendment to the FSA.[116]

In response, on August 23, 2019, DHS and HHS issued a final rule[117], captioned "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children", that promulgated regulations implementing the FSA, as well as other provisions that related to UACs, in the TVPRA[118] and the HSA[119].

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

> ***First and foremost**, the new rule permanently establishes standards of care in custody for children and families. These standards are high. In doing so, the rule fulfills one of the central, original purposes of the 1997 Flores court settlement to ensure appropriate care for all children.*
>
> *A national standard of care ensures that care in custody of children and families is not a policy decision, and should not be subject to the ebbs and flows of state and local politics. Instead, all children in the Government's care will be universally treated with dignity, respect, and special concern, in concert with American values and faithful to the intent of the settlement.*
>
> . . . .
>
> ***Second**, the new rule closes the legal loophole that arose from the reinterpretation of Flores–which Congress has refused to do—allowing the federal government to house alien families together in appropriate facilities during fair and expeditious proceedings, as was done by the previous Administration in 2014 and 2015.*
>
> *Prior to the 2015 court ruling that restricted our use of the FRCs, immigration proceedings averaged less than 50 days, granting those with meritorious claims prompt relief and permission to stay in the U.S., while swiftly repatriating those*

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[115] *Id*. at 3.
[116] *The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions*. CONG. RESEARCH SERV. (updated Sept. 17, 2018), at 7 n. 52. Source: https://sgp.fas.org/crs/homesec/R45297.pdf.
[117] *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44392 (Aug. 23, 2019). Source: https://www.federalregister.gov/documents/2019/08/23/2019-17927/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children.
[118] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457 (2008). Source: https://www.congress.gov/110/plaws/publ457/PLAW-110publ457.pdf.
[119] Homeland Security Act of 2002, Pub. L. 107–296 (2002). Source: https://www.congress.gov/107/plaws/publ296/PLAW-107publ296.pdf.

*meritless claims—who have comprised a substantial majority of the families being processed.*

. . . .

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

. . . .

***And fourth**, the new rule will protect children by reducing incentives for adults, including human smugglers, to exploit minors in the dangerous journey to our border, using them to exploit the system and be released into the United States.*[120]

Those regulations were to take effect on October 22, 2019, but three days after the final rule was published, the attorney general of California along with other state attorneys general filed suit[121] to block their implementation.

On September 27, 2019, Judge Gee issued an order[122] blocking the termination of the FSA and enjoining the new regulations, finding they were inconsistent with the *Flores* settlement agreement.

The government appealed that order to the Ninth Circuit, and on December 20, 2020, the circuit court issued an opinion[123] largely affirming the regulations in the final rules issued by HHS and reversing the district court's injunction with respect to them.

The court concluded "the DHS regulations applicable to the care and custody of accompanied minors, by design, depart significantly from the" FSA[124], and that the FSA "flatly precludes" DHS's preferred option of detaining accompanied minors with their parents or guardians[125].

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

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

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

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

[124] *Id*. at 730.

[125] *Id*. at 742.

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

Instead, in December 2021, the Biden administration stopped detaining FMUs entirely.[126]

Likely not coincidentally, USBP Southwest border apprehensions of FMUs rose from just fewer than 451,000 in FY 2021 to nearly 483,000 in FY 2022, and then to more than 621,000 in FY 2023.[127] In FY 2024, USBP apprehensions of FMUs neared 542,000 at the U.S.-Mexico line.[128]

The current administration could have addressed that FSA and *Flores* pull factor by issuing regulations along the lines of the August 2019 rule captioned "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children" [129] that addressed the concerns of the district and the circuit court.

It failed to do so, and also failed to seek Supreme Court review of the Ninth Circuit decision blocking those regulations.

*Section 235(b)(2)(C) of the INA and "Remain in Mexico"*

Which brings me to the subject of today's hearing, the Migrant Protection Protocols (MPP) [130], also known as "Remain in Mexico".

It was the most notable Trump border security policy— and arguably the most effective.

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

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

[127] *Immigration Enforcement and Legal Processes Monthly Tables*. U.S. DEP'T OF HOMELAND SECURITY, OFC. OF HOMELAND SECURITY STATS. (updated Oct. 29, 2024). Source: https://ohss.dhs.gov/topics/immigration/immigration-enforcement/immigration-enforcement-and-legal-processes-monthly.

[128] *Id*.

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

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

Then-DHS Secretary Nielsen first implemented MPP in January 2019[131], and it allowed DHS to return certain "other than Mexican" (OTM) migrants caught entering illegally or without proper documentation at the Southwest border back to Mexico to await removal hearings.[132]

Remain in Mexico was premised on DHS's authority in section 235(b)(2)(C) of the INA[133] to return inadmissible applicants for admission who had crossed a land border back pending removal proceedings.

Aliens subject to MPP were paroled in custody into the United States to apply for asylum at port courts[134], while the Mexican government had agreed to provide them with protection for the duration of their stays in that country.[135]

The program was expanded from a pilot site in San Ysidro, Calif.[136] in late January 2019, to Calexico, Calif.[137], and El Paso, Tex.[138] in March of that year, and then in July 2019[139] to Laredo and Brownsville (both in Texas) before finally being expanded to the Arizona border town of Nogales[140] in the late fall.

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[131] *Id*.

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

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

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

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

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

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

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

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

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

When it was fully implemented, fewer than 68,000 migrants[141] were returned to Mexico to await their removal hearings under MPP. As I have explained elsewhere[142], however:

> *It didn't take many MPP returns to drive the encounter numbers back down. [The DHS Office of Homeland Security Statistics] reports that fewer than 31,250 aliens encountered at the Southwest border were sent back across the border under MPP between June and September 2019 — 84 percent of them aliens in FMUs.*
>
> *In May of that year, CBP encountered about 144,000 aliens at the Southwest border, 65 percent of whom (nearly 88,600) were in FMUs — at the time, monthly records in both categories.*
>
> *As MPP got revved up and news of returns to Mexico spread, that figure dropped to fewer than 52,500 CBP Southwest border encounters in September — some 22,000 of whom (less than 42 percent) were in FMUs.*
>
> *By February 2020, the month before Title 42 was implemented and once MPP was in full swing, CBP Southwest border encounters dropped to fewer than 37,000, and just over 7,100 of those aliens (19.3 percent) were in FMUs.*

In an October 2019 assessment[143] of the program, DHS concluded MPP was "an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system", particularly as related to alien families.

Asylum cases were expedited under the program, and MPP removed incentives for aliens to make weak or bogus claims when apprehended.[144]

That's because many if not most of those aliens requesting asylum at the border aren't seeking protection so much as they are coming to live and work here for the time (usually years[145]) that it takes for their claims to be heard. Remain in Mexico denied them the opportunity to do so.

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[141] *See Immigration Enforcement and Legal Processes Monthly Tables*. U.S. DEP'T OF HOMELAND SECURITY, OFC. OF HOMELAND SECURITY STATS. (updated Oct. 29, 2024) (58,930 migrants apprehended by USBP and 8,770 aliens deemed inadmissible by OFO subject to MPP between March 2019 and January 2021—67,700 in total). Source: https://ohss.dhs.gov/topics/immigration/immigration-enforcement/immigration-enforcement-and-legal-processes-monthly.

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

[143] *Assessment of the Migrant Protection Protocols (MPP)*. U.S. DEP'T OF HOMELAND SECURITY (October 28, 2019). Source: https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf .

[144] *See id*.

[145] *See Actions Needed to Track and Report Noncitizens' Hearing Appearances*. GAO-25-106867. GOV'T ACCOUNTABILITY OFC. (Dec. 2024), at 38 (the median completion time for non-detained cases in FY 2022 was 1,036 days, and in FY 2023 it was 846 days). Source: https://www.gao.gov/assets/gao-25-106867.pdf.

Or, as DHS then[146] put it:

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

Returning those migrants to Mexico also enabled the Trump administration to comply with Congress' detention directives in section 235(b) of the INA[147].

Moreover, deterring adult migrants from bringing children with them when entering the United States illegally not only advances border security, but it also protects the migrants themselves, as the excerpts from the Homeland Security Advisory Council's CBP Families and Children Care Panel's April 2019 report[148] referenced above reveal.

The Biden administration could have reimplemented this program at any time, and for a brief period reluctantly did so under court order[149].

I will note, however, that advocates sued to block the Trump iteration of this program in the U.S. District Court for the Northern District of California, and on April 19, 2019, U.S. district court Judge Richard Seeborg issued an order granting a preliminary injunction in that case.[150]

The Trump DOJ filed an emergency motion[151] with the Ninth Circuit to stay that order pending appeal, which a three-judge circuit panel granted on May 7, 2019.[152]

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[146] *Assessment of the Migrant Protection Protocols (MPP)*. U.S. DEP'T OF HOMELAND SECURITY (October 28, 2019), at 3. Source: https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf .

[147] *See* secs. 235(b)(1)(B)(ii), 235(b)(1)(B)(iii)(IV), and 235(b)(2)(A) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

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

[149] *See* Arthur, Andrew. *SCOTUS Issues Its Judgment in 'Remain in Mexico' Case*. CENTER FOR IMMIGRATION STUDIES (Aug. 3, 2022) ("On December 13, [2021], the Fifth Circuit issued a decision dismissing the Biden administration's appeal of Judge Kacsmaryk's injunction, based largely on Mayorkas' initial termination decision (it largely ignored the second one), which thus teed up the matter for Supreme Court review. Despite the court's order, the Biden administration was slow and reluctant to return illegal migrants back to Mexico. It was only in December that the first 191 migrants were sent back under section 235(b)(2)(C) of the INA, and through the end of June [2022], just 5,733 migrants have been returned pursuant to that provision and the court's order."). Source: https://cis.org/Arthur/SCOTUS-Issues-Its-Judgment-Remain-Mexico-Case.

[150] *Innovation Law Lab. v. Nielsen*, 366 F.Supp.3d 1110 (2019). Source: https://scholar.google.com/scholar_case?case=3275760696436107849&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[151] *Innovation Law Lab v. Nielsen*, No. 19-15716, Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal (9th Cir. Apr. 11, 2019). Source: https://cdn.ca9.uscourts.gov/datastore/general/2019/04/13/Emergency%20Motion.pdf.

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

A separate three-judge Ninth Circuit panel considering the government's appeal from the district court's decision affirmed[153] the injunction of MPP in late February 2020 but stayed that injunction temporarily for aliens apprehended outside of California and Arizona to allow the government to seek Supreme Court review.

Shortly thereafter, in early March 2020, the Supreme Court stayed that injunction[154] pending the government's filing of, and the Court's ruling on, a petition for certiorari on the injunction.

Thereafter, in June 2021, the now-Biden administration moved to vacate the judgment of the Ninth Circuit as moot, given the fact that it had terminated MPP.[155] On June 21, 2021, the Supreme Court vacated the circuit court judgment, "with instructions to direct the District Court to vacate as moot the April 8, 2019 order granting a preliminary injunction."[156]

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

I have explained in-depth elsewhere[157] why I conclude that the Ninth circuit's analysis is in error, but briefly, two provisions in the inspection protocol in section 235 of the INA[158] were key to the court's analysis.

First is the expedited provision at section 235(b)(1) of the INA[159], which as explained *supra* applies solely[160] to two classes of aliens: aliens deemed inadmissible under section 212(a)(6)(C) of the INA[161] because they "by fraud or willfully misrepresenting a material fact, seek[] . . . admission into the United States or other benefit provided under" the INA; and aliens

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[153] *Innovation Law Lab v. Wolf*, 951 F. 3d 1073 (9th Cir. 2020). Source: https://scholar.google.com/scholar_case?case=12716474571221783570&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[154] *Wolf v. Innovation Law Lab*, No. 19A960 (Mar. 11, 2020). Source: https://www.supremecourt.gov/orders/courtorders/031120zr_19m2.pdf.

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

[156] *Mayorkas v. Innovation Law Lab*, No. 19-1212, Docket (Jun. 21, 2021). Source: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1212.html.

[157] Arthur, Andrew. *Ninth Circuit Blocks 'Remain in Mexico' — Sort Of, Misinterpreting the INA and ignoring contrary evidence, while the clock is ticking*. CENTER FOR IMMIGRATION STUDIES (Mar. 2, 2020). Source: https://cis.org/Arthur/Ninth-Circuit-Blocks-Remain-Mexico-Sort.

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

[159] *Id*. at para. (b)(1).

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

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

inadmissible under section 212(a)(7) of the INA[162] because they lack proper admission documents.

As noted, section 235(b)(2)(C)[163] of the INA (also known as the "return clause") is the statutory basis for Remain in Mexico, but that clause only applies to aliens processed under paragraph (2) of 235(b) of the INA, not to aliens subject to expedited removal and processed under paragraph (1) of that provision.

The Ninth Circuit, in essence, determined[164] that MPP does not apply to aliens removable under the grounds of inadmissibility listed in the expedited removal provision because the return clause does not allow the return of aliens to whom expedited removal applies. There are two flaws in this logic.

First, DHS has the discretion to place aliens otherwise be subject to expedited removal directly into removal proceedings under section 240 of the INA, as the BIA held in its 2011 decision in *Matter of E-R-M- and L-R-M*.[165] Those aliens would, therefore, be subject to return under the return clause in section 235(b)(2)(C) of the INA.

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

For example, of the just over 1.496 million aliens apprehended by USBP at the Southwest border in FY 2023 who were not expelled under Title 42, fewer than 178,000[166]—less than 12 percent—were subjected to expedited removal.

Second, and more saliently, the circuit court ignored in its analysis section 212(a)(6)(A)(i) of the INA[167], which states: "An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."

Simply put, aliens entering illegally are inadmissible under both section 212(a)(6)(A)(i) of the INA (for illegal entry) and section 212(a)(7) of the INA (because they lack proper admission documents). The vast majority of the aliens who were subject to MPP entered illegally, not through fraud or misrepresentation, and therefore were also inadmissible under section 212(a)(6)(A)(i) of the INA.

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[162] Section 212(a)(7) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.
[163] *See* section 235(b)(2)(C) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[164] *See Innovation Law Lab*, 951 F. 3d at 1083-87.
[165] *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3716.pdf.
[166] *Custody and Transfer Statistics FY 2023*. U.S. CUSTOMS AND BORDER PROTECTION (modified Dec.19, 2023). Source: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2023.
[167] Section 212(a)(6)(A)(i) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

DHS can charge illegal entrants under either (or both) of those provisions, but aliens charged under section 212(a)(6)(A)(i) of the INA are not subject to expedited removal under section 235(b)(1)(A)(1) of the INA. That means they plainly fall under section 235(b)(2) of the INA and are therefore subject to the return clause in section 235(b)(2)(C) of the INA.

That opinion notwithstanding, I also note than in an October 29, 2021, memo[168] explaining why the Biden administration had decided to terminate Remain in Mexico, DHS cited the dangers migrants face on the other side of the border as a key reason for ending the program.

That memo immediately continued, however: "It is possible that some of these humanitarian challenges could be lessened through the expenditure of significant government resources currently allocated to other purposes."[169]

Respectfully, the migrant surge that has been ongoing at the border and throughout the United States has already resulted in "the expenditure of significant government resources", not only at the federal level (where those costs should be borne), but also at the state[170] and local[171] levels.

In April 2022[172], I suggested the administration could enter into an agreement with the Mexican government to allow returned migrants to be sent to a place certain on the other side of the border, using Monterrey, Nuevo Leon-- Mexico's 11th largest city—as an example. I explained that the city:

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

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

[169] *Id*.

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

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

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

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

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

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

*The governor of Nuevo Leon, Samuel Alejandro Garcia Sepulveda, has already shown a willingness to work with his Texas counterpart, Governor Greg Abbott (R) on cross-border issues. . . and Sepulveda would also definitely welcome the sort of money that would flow to his state if DHS were to erect and run migrant housing there.*[173]

Plainly, there are other options, but if the sole impediment to reimplementing MPP is money, the costs of the current migrant crisis are already incalculable and rising. And note also that, as with Remain in Mexico, the Biden administration currently requires foreign nationals to wait in Mexico pending the port interviews they schedule using the CBP One app.[174]

Conclusion

In his 1995 State of the Union Address[175], then-President Clinton explained:

*All Americans, not only in the states most heavily affected, but in every place in this country, are rightly disturbed by the large numbers of illegal aliens entering our country. The jobs they hold might otherwise be held by citizens or legal immigrants. The public service[s] they use impose burdens on our taxpayers. . .. We are a nation of immigrants. But we are also a nation of laws. It is wrong and ultimately self-defeating for a nation of immigrants to permit the kind of abuse of our immigration laws we have seen in recent years, and we must do more to stop it.*

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[173] *Id*.

[174] *See CBP One™ Mobile Application*. U.S. CUSTOMS AND BORDER PROTECTION (modified Sep. 23, 2024) ("The number of noncitizens who can be processed through the CBP One™ app will vary by port based on available resources and existing infrastructure. Appointments are available 21 days in advance. Ports may, as operationally feasible, utilize dedicated lanes for individuals with different types of travel documents, or for those without travel documents. Ports may also have dedicated lanes for those with CBP One™ appointments."). Source: https://www.cbp.gov/about/mobile-apps-directory/cbpone.

[175] *Administration of William J. Clinton, 1995/Jan. 24, Address Before a Joint Session of the Congress on the State of the Union*, U.S. GOV'T PRINTING OFF. (Jan. 24, 1995), at 80-81. Source: https://www.govinfo.gov/content/pkg/PPP-1995-book1/pdf/PPP-1995-book1-doc-pg75.pdf.

More than 26 years later, during a September 2021, interview[176] with *ABC*'s "Good Morning America", former President Obama explained the dilemma that faces the United States when it comes to securing the border:

> *Immigration is tough. It always has been because, on the one hand, I think we are naturally a people that wants to help others. And we see tragedy and hardship and families that are desperately trying to get here so that their kids are safe, and they're in some cases fleeing violence or catastrophe. ... At the same time, we're a nation state. We have borders. The idea that we can just have open borders is something that ... as a practical matter, is unsustainable.*

Those two statements—one by a then-serving president and the other by a retired one-- aptly describe the biggest challenges our federal government faces when dealing with the ongoing surge of illegal immigration at the Southwest border: balancing our humanitarian interests as a people with our critical need to prevent exploitation of those interests and control illegal immigration.

As former Rep. Barbara Jordan (D-Tex.), then chairman of the U.S. Commission on Immigration Reform told Congress in September 1994, however:

> *If we cannot control illegal immigration, we cannot sustain our national interest in legal immigration. Those who come here illegally, and those who hire them, will destroy the credibility of our immigration policies and their implementation. In the course of that, I fear, they will destroy our commitment to immigration itself.*[177]

Recent surveys have revealed that the current migrant crisis at the Southwest border, and its impacts on states, cities, and towns across the United States, are having exactly the impact Chairman Jordan warned about and predicted.

Gallup polling in 2024[178] showed that 28 percent of Americans believe that "immigration" is the "most important problem facing the country", up from just 20 percent in January and the leading issue out of 15 surveyed.

Worse, 55 percent of those polled deemed "illegal immigration" to be a "critical threat" to the United States, a new high for an issue that Gallup has surveyed since 2004.[179]

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[176] *See* Zaru, Dayna, Ghebremedhin, Sabina, and Anderson, Jade. *Obama says Haitian migrants' plight is 'heartbreaking,' but Biden knows system is broken*. ABC NEWS (Sep. 28. 2021). Source: https://abcnews.go.com/Politics/obama-haitian-migrants-plight-heartbreaking-biden-system-broken/story?id=80267478.

[177] *Hearing before the Subcomm. on International Law, Immigration and Refugees of the H. Comm. on the Judiciary*, 103d Cong. (1994) (testimony of Barbara Jordan, Chair, U.S. Commission on Immigration Reform), at 2. Source: https://www.numbersusa.com/testimony-of-barbara-jordan-before-the-house-judiciary-committee-august-3-1994-2/.

[178] Jones, Jeffrey M. *Immigration Surges to Top of Most Important Problem List*. GALLUP (Feb. 27, 2024). Source: https://news.gallup.com/poll/611135/immigration-surges-top-important-problem-list.aspx.

[179] *Id*.

Given the importance of legal immigration to the United States, it is incumbent on Congress and the administration to reverse these trends and restore Americans' faith in and commitment to lawful immigration. That starts with securing the border.

Congress must provide the president the resources he needs to accomplish that task. But the current and incoming presidents, like their immediate predecessors, already have ample statutory authorities in the INA to secure the border. How and whether the president chooses to use those authorities, however, is up to him.

It remains to be seen whether the incoming Trump administration will reimplement Remain in Mexico as part of its border strategy. When it first implemented MPP in 2019, however, it proved to be an effective deterrent to illegal entry, and there is sufficient authority in section 235(b)(2)(C) of the INA[180] for President Trump to utilize that power when he again takes office.

To the degree there are concerns about the safety of migrants who are returned to Mexico under the policy, three points should be noted.

First, migrants sent back across the border to await removal proceedings have already made the choice to enter Mexico once and thus should be deemed to have accepted any risks that such entry and any return may entail.

Second, through diplomacy with and funding to Mexican authorities, the Trump administration and Congress can all-but ensure that migrants returned back across the border to await their removal hearings receive the highest degree of security possible.

Third, release of those migrants into the United States also entails some degree of risk. Crime, extortion, and threats are, regrettably, facts of life on both sides of the U.S.-Mexican border.

Thank you again, and I look forward to your questions.

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