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Subcommittee on Immigration Integrity, Security, and Enforcement  
“The Border Crisis: Is the Law Being Faithfully Executed?”

June 7, 2023

Testimony of Aaron Reichlin-Melnick  
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Chairman Jordan, Chairman McClintock, Ranking Member Jayapal, and distinguished members of the Subcommittee:

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

The Council has long brought attention through research, advocacy, and litigation to ways in which the Department of Homeland Security (“DHS”) has responded to migrants at the border and inside the United States. Under the Obama administration, we helped bring a successful lawsuit against the Border Patrol’s Tucson Sector challenging unconstitutional conditions of confinement for adults and children.<sup>1</sup> Under the Obama and Trump administrations, we helped bring a successful lawsuit against U.S. Customs and Border Protection (“CBP”) for its unlawful policy of turning away asylum seekers at ports of entry, in part through a practice known as “metering.”<sup>2</sup> And under the Biden administration, we helped bring a lawsuit against Immigration and Customs Enforcement (“ICE”) for adopting policies preventing people in immigration detention from accessing their attorneys.<sup>3</sup>

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

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<sup>1</sup> American Immigration Council, “Challenging Unconstitutional Conditions in CBP Detention Facilities,” <https://bit.ly/2PhdT0z>.

<sup>2</sup> American Immigration Council, “Challenging Customs and Border Protection’s Unlawful Practice of Turning Away Asylum Seekers,” <https://bit.ly/32Eo4z5>.

<sup>3</sup> American Immigration Council, “Challenging the Government’s Barriers to Access to Counsel in Immigration Detention Centers,” <https://www.americanimmigrationcouncil.org/litigation/challenging-government-barriers-access-counsel-immigration-detention-centers>.

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

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

Nowhere is this more true than in immigration law and enforcement. As Justice Kavanaugh said at oral arguments in *Texas v. United States* in November, “there are never enough resources or almost never enough resources to detain every person who should be detained, arrest every person who should be arrested, [or] prosecute every person who’s violated the law.”<sup>4</sup>

Because of this fact, the Supreme Court and Congress have both empowered the Executive Branch with significant discretion to manage migration and migrants. As Justice Kennedy wrote in 2012, “A principal feature of the removal system is the broad discretion exercised by immigration officials.”<sup>5</sup> Congress itself not only acknowledged this “principal feature,” but it has expressly approved of it. The Homeland Security Act of 2003 provides that a core function of the Secretary is to “establish[] national immigration enforcement policies and priorities.”<sup>6</sup>

The discretion granted to immigration officials includes the decision whether to arrest a person who is removable, whether to initiate removal proceedings following an arrest, whether to detain someone, and even whether to let a person stay. Indeed, Justice Scalia himself wrote in 1999 that “at each stage [of the removal process] the Executive has discretion to abandon the endeavor.”<sup>7</sup>

At the border, this discretion is critical. DHS has the difficult job of satisfying the legal obligations imposed on it by Congress as well as it can, given finite resources. These legal obligations include both the obligation to carry out both immigration enforcement and humanitarian laws. Indeed, for nearly half a century, DHS has been legally required to provide individuals crossing the U.S.-Mexico border with the opportunity to seek asylum or similar humanitarian protections.<sup>8</sup> This duty, arising from the United States accession to the 1967 United Nations Protocol on Refugees, was first codified into U.S. law in the Refugee Act of 1980. It is also a core component of the 1984 United Nations Convention Against Torture, which has also been signed and ratified by the United States.

As the Supreme Court has held, “deportation is a particularly severe ‘penalty,’”<sup>9</sup> and Congress has long ensured that those facing deportation have rights that immigration officials must respect. The Constitution itself also applies key due process protections for individuals facing removal, including migrants arriving at the border. Thus, when processing a migrant for enforcement purposes, immigration officials are required to choose between different legal options available—some of which may not be

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<sup>4</sup> Transcript of Oral Argument at 147, *United States v. Texas*, No. 22-58 (Nov. 29, 2022).

<sup>5</sup> *Arizona v. United States*, 567 U.S. 387, 396 (2012).

<sup>6</sup> 6 U.S.C. § 202(5).

<sup>7</sup> *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999).

<sup>8</sup> 8 U.S.C. § 1158(a).

<sup>9</sup> *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

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

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

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

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

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

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

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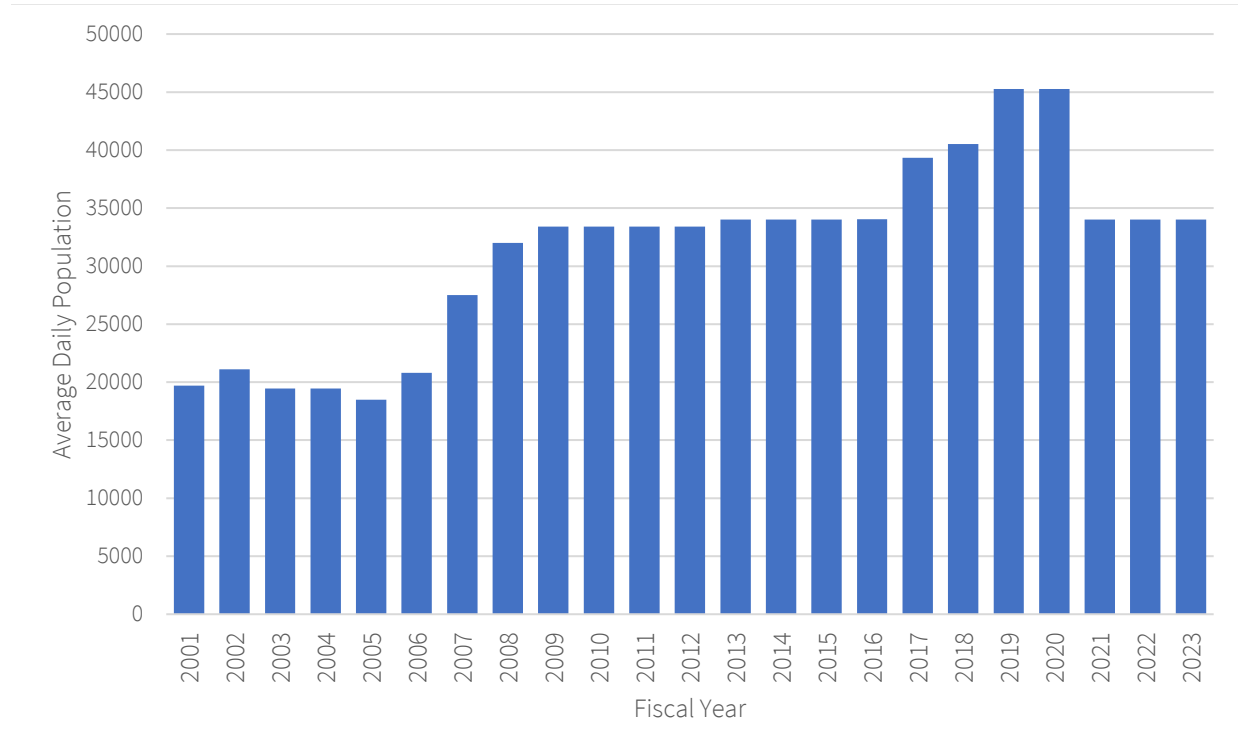
<sup>10</sup> See 8 U.S.C. § 1225(b)(1)(B).

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

<sup>12</sup> U.S. Border Patrol, “Nationwide Encounters Fiscal Years 1925 – 2020” (2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Total%20Apprehensions%20%28FY%201925%20-%20FY%202020%29%20%28508%29.pdf>; U.S. Immigration and Customs Enforcement, “U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report” (2020), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>.

only became available 10.6 times that year.<sup>13</sup> Thus, even in the year where ICE detention reached record capacity, it would still have been literally impossible to detain all migrants.

**Figure 1: Average Daily Beds Authorized by Congress for Immigration Detention  
Fiscal Years 2001 to 2023**



Indeed, data produced by the DHS Office of Immigration Statistics reveals that in each of the last three presidential administrations, tens of thousands of migrants encountered at the southwest border were released directly from CBP custody without ever being detained by ICE. In every year from FY 2013 to FY 2021, at least 33,000 people were directly released after crossing the southwest border (See Figure 2).<sup>14</sup>

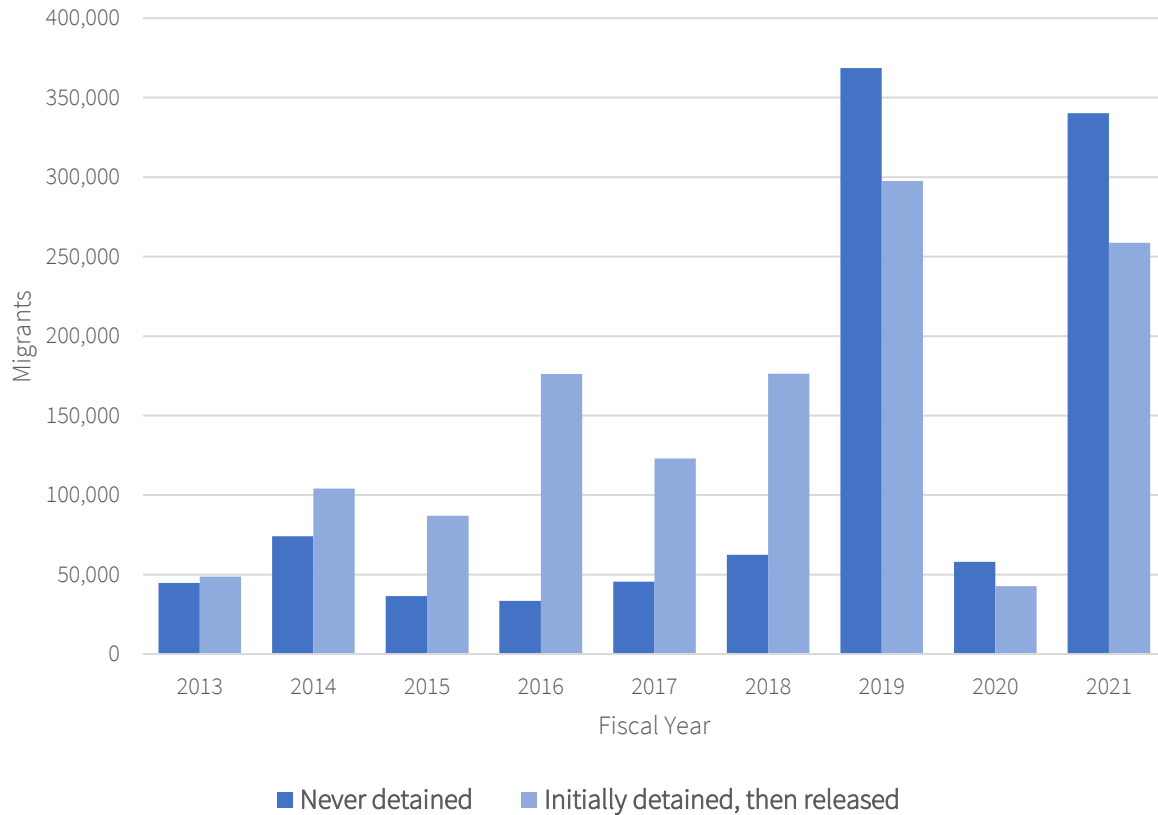
From FY 2017 through FY 2020, over 1.1 million people encountered at the U.S.-Mexico border were eventually released into the United States, including over 500,000 people who were never detained and over 600,000 people who were initially detained and then subsequently released.<sup>15</sup>

<sup>13</sup> U.S. Immigration and Customs Enforcement, “ICE Detention Data, FY2019,” <https://www.ice.gov/doclib/detention/FY19-detentionstats.xlsx>.

<sup>14</sup> Dep’t of Homeland Security, Office of Immigration Statistics, “FY 2021 Enforcement Lifecycle Report Appendix Tables,” available at <https://www.dhs.gov/immigration-statistics/special-reports/enforcement-lifecycle>.

<sup>15</sup> Ibid. The latter figure includes unaccompanied children who were initially put in Office of Refugee Resettlement custody.

**Figure 2: Migrants Encountered at the Southwest Border and Released into the United States  
Fiscal Years 2001 to 2023**



At the border, CBP officers are required to abide by more than just the laws relating to detention and removal. Multiple competing legal requirements and concerns apply, including legal obligations relating to the treatment of people in CBP custody. For example, DHS is required by law to transfer unaccompanied children to the care of the Office of Refugee Resettlement within 72 hours of taking them into custody.<sup>16</sup> CBP agents are also bound by the 2015 National Standards on Transport, Escort, Detention, and Search (TEDS), which provide that “Detainees shall generally not be held for longer than 72 hours in CBP hold rooms or holding facilities.”<sup>17</sup> TEDS also mandates certain other standards around medical care, food, hygiene, and basic needs, all of which create additional resource and staffing requirements that may impact other aspects of border processing.

The Constitution also sets minimum standards for treatment of migrants in CBP custody, including the right to basic hygiene, medical assessments, and bedding.<sup>18</sup> As a result, there are hard limits to the number of migrants that the US government can detain in Border Patrol facilities before they become dangerously overcrowded and the government begins to violate its legal and constitutional obligations.

<sup>16</sup> 8 U.S.C. 1232(b)(3).

<sup>17</sup> U.S. Customs and Border Protection, National Standards on Transport, Escort, Detention, and Search (2015), at 4.1.

<sup>18</sup> See *Unknown Parties v. Nielsen*, 611 F. Supp. 3d 786 (D. Ariz. 2020).

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When cells are overcrowded, the risk of people dying in custody increases significantly. This is not idle speculation; this is what has happened repeatedly in the past. In spring 2019, the DHS Office of Inspector General found multiple violations of government policy due to “dangerous overcrowding,” including people being held in “standing-room-only conditions for weeks.”<sup>19</sup> That spring, multiple people died in Border Patrol custody, including several children. In circumstances such as those, DHS is well within its legal rights to release people from custody through parole or through another authority to alleviate the serious risk of death involved with overcrowding at the border. The recent tragic death of 8-year-old Anadith Danay Reyes Alvarez is a reminder that these concerns are very real and the health and safety of vulnerable children must not be taken lightly.<sup>20</sup>

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

Congress itself has acknowledged the inevitability of releases and provided resources to respond to them. The “Alternatives to Detention” program has been congressionally authorized for decades and has been used for migrants apprehended inside the United States and at the border. Congressional funding for the program tripled from 2017 to 2020 under the Trump administration, coinciding with a significant increase in migrant encounters. And in 2019, Congress first authorized the provision of Federal Emergency Management Agency (FEMA) grant-based funding for migrants “released from the custody of the Department of Homeland Security.”<sup>21</sup>

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

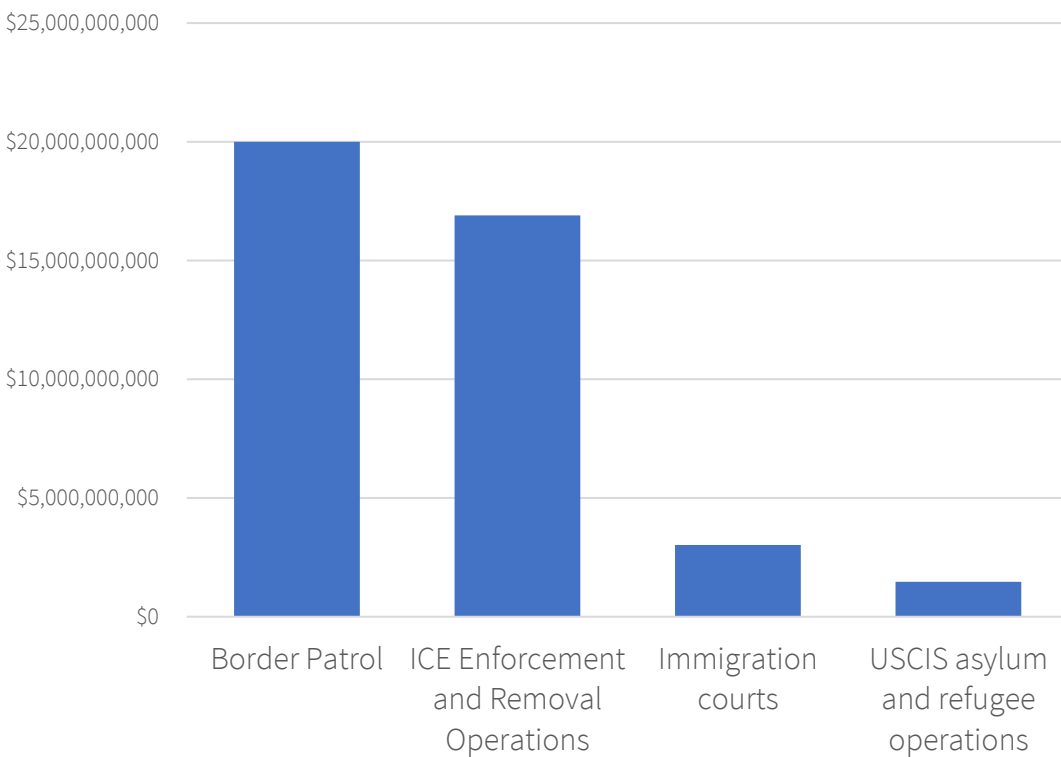
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<sup>19</sup> Dep’t of Homeland Security, Office of Inspector General, “Management Alert - DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing Center (Redacted),” OIG-19-46 (May 30, 2019).

<sup>20</sup> U.S. Customs and Border Protection, “Update: Death in Custody of 8-Year-Old in Harlingen, Texas,” June 1, 2023, <https://www.cbp.gov/newsroom/speeches-and-statements/update-death-custody-8-year-old-harlingen-texas-0>.

<sup>21</sup> Pub. L. 116-26, Emergency Supplemental Appropriations for Humanitarian Assistance and Security at the Southern Border Act, 2019, 133 STAT. 1018, 1020 (2019).

**Figure 3: Cumulative Appropriations and Spending Authorization, Fiscal Years 2020 - 2023**



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

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

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

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

**Table 1: Processing Pathways Available to CBP Officers and Constraints on Their Use**

Pathway	Legal Authority	Constraints on use (Logistical, Diplomatic, Policy, Humanitarian-Based)
Expedited Removal	8 U.S.C. § 1225(b)(1)	<ul style="list-style-type: none"> <li>- Some countries may not accept the return of their nationals following the issuance of an order of expedited removal.</li> <li>- Individuals placed into expedited removal who express a fear of persecution must be provided a credible fear interview.</li> <li>- The credible fear process, including immigration judge review, is likely to extend beyond seven days. During that time, DHS generally must hold the person in custody, either CBP or ICE. Both agencies have limited detention space and cannot hold an unlimited number of people for credible fear interviews.</li> <li>- There are a limited number of asylum officers to carry out credible fear interviews and a limited number of immigration judges to carry out appeals.</li> </ul>
Issuance of a Notice to Appear (NTA)	8 U.S.C. § 1229a, <i>Matter of E-R-M- &amp; L-R-M-</i> , 25 I&N Dec. 520 (BIA 2011)	<ul style="list-style-type: none"> <li>- Logistical constraints include processing time (90 minutes).</li> <li>- Eliminates the ability to use expedited removal.</li> <li>- Issuing NTA puts people into lengthy court backlogs.</li> </ul>
Parole	8 U.S.C. 1182(d)(5)	<ul style="list-style-type: none"> <li>- May only be used on a “case-by-case basis for urgent humanitarian reasons or significant public benefit,” which has for decades included situations where officials determine that serious overcrowding represents an urgent humanitarian crisis.</li> <li>- Eliminates the ability to use expedited removal.</li> <li>- Parole backloads the issuance of a notice to appear onto ICE after the person checks in with ICE, which may lead to logistical problems at ICE due to limited capacity at ICE ERO.</li> </ul>
Contiguous territory return (Remain in Mexico)	8 U.S.C. 1225(b)(2)(C)	<ul style="list-style-type: none"> <li>- Requires the cooperation of a contiguous territory such as Mexico, which may impose its own numerical limitations.</li> <li>- Migrants expressing a fear of persecution must be provided a screening to avoid nonrefoulement, which requires both detention space to hold this screening and asylum officers to carry out the screenings.</li> <li>- Providing court hearings to migrants in Mexico requires subsequent extensive and disruptive multi-agency collaboration to provide mandated court hearings.</li> <li>- Subject to extensive litigation risk when used on a programmatic basis.</li> <li>- Human rights concerns led to extensive internal pushback among asylum officers required to carry out screenings.</li> </ul>
Release on order of recognizance/ notice to report	Inherent prosecutorial discretion authority. <i>See Reno v. Am.-Arab Anti-Discrimination Comm.</i> , 525 U.S. 471, 483 (1999).	<ul style="list-style-type: none"> <li>- NTR issuance backloads the issuance of a notice to appear onto ICE after the person checks in with ICE, which may lead to logistical problems at ICE due to limited capacity at ICE ERO.</li> <li>- Notices to report are likely to lead to increased failures to appear because they do not provide individuals with a clear process by which to reconnect with DHS.</li> </ul>

**First**, CBP officers can put a person through the “expedited removal” process, which was created by Congress in 1996.<sup>22</sup> Under expedited removal, an individual CBP officer can issue a removal order within hours. But expedited removal has its own significant limitations. By law, those who are subject to expedited removal who express a fear of persecution must be screened for asylum.<sup>23</sup> Credible fear screenings generally take place in DHS custody, requiring an available bed to hold the person during the screening. DHS has never had sufficient detention bed space to hold all individuals who request asylum in detention for credible fear interviews.

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

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

**Second**, CBP officers may choose instead to bypass the expedited removal process and instead issue a notice to appear in court. As the Board of Immigration Appeals held in 2011, the use of expedited removal is not mandatory, and DHS maintains the inherent authority to issue a notice to appear to individuals who are amenable to placement in expedited removal proceedings.<sup>24</sup> Once a person is in removal proceedings, the individual is permitted to remain in the United States until the conclusion of their removal proceedings. The issuance of notices to appear to individuals seeking asylum at the border has occurred for decades, even before the creation of expedited removal. Individuals issued notices to appear at the border are generally released, as has repeatedly occurred in 2014, 2016, 2018, 2019, and since 2021.

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

**Third**, CBP officers may choose to issue humanitarian parole to individuals in custody. Parole is an authority that the Executive Branch has long held which allows some individuals to temporarily enter the United States for urgent humanitarian reasons or for significant public benefit.<sup>25</sup> As the Supreme Court has noted, this authority may be used on individuals who would otherwise be subject to expedited

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<sup>22</sup> American Immigration Council, “A Primer on Expedited Removal,” July 22, 2019, <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.

<sup>23</sup> 8 U.S.C. § 1225(b)(1)(B).

<sup>24</sup> *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011).

<sup>25</sup> American Immigration Council, “The Use of Parole Under Immigration Law,” January 10, 2023, <https://www.americanimmigrationcouncil.org/research/use-parole-under-immigration-law>.

removal.<sup>26</sup> Immigration officers have long considered the health and safety concerns raised by overcrowding as an urgent humanitarian reason authorizing the use of parole.

Since at least 1992, various administrations have authorized the use of parole for arriving asylum seekers in certain circumstances.<sup>27</sup> The most extensive programmatic use of parole of the border occurred from 1995 to 2017, under the so-called “Wet Foot/Dry Foot” parole policy, which provided that nearly all Cuban nationals who managed to set foot on U.S. soil would be granted parole.<sup>28</sup>

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

**Fourth**, CBP officers have the statutory authority to return individuals to Mexico through the contiguous territory return authority in 8 U.S.C. § 1225(b)(2)(C). This discretionary authority was first exercised on a broad programmatic basis under the Trump administration through the controversial “Remain in Mexico” program. As the Supreme Court recently held, the use of the authority requires the affirmative consent of Mexico.<sup>29</sup>

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

The program also significantly strained border immigration courts, with one Trump administration official telling Congress in June 2019 that the program had “broken the courts.”<sup>30</sup> The program also required significant logistical support from USCIS asylum officers, who were required to carry out “nonrefoulement” screenings for individuals who expressed a fear of persecution or torture in Mexico. In addition, the

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<sup>26</sup> See *Jennings v. Rodriguez*, 138 S. Ct. 830, 834 (2018) (“There is also a specific provision authorizing temporary parole from § 1225(b) detention ‘for urgent humanitarian reasons or significant public benefit.’”).

<sup>27</sup> Memorandum from Gene McNary, Commissioner, Immigration and Naturalization Service, Subj: Parole Project for Asylum Seekers at Ports of Entry and INS Detention (Apr. 20, 1992).

<sup>28</sup> Congressional Research Service, “Rescission of the Wet-Foot/Dry-Foot Policy as to Aliens from Cuba Raises Legal Questions,” January 18, 2017, <https://sgp.fas.org/crs/row/wetfoot.pdf>.

<sup>29</sup> See *Biden v. Texas*, 142 S. Ct. 2528, 2543 (2022) (“The Executive [...] cannot unilaterally return [...] migrants to Mexico”).

<sup>30</sup> Mica Rosenberg, Kristina Cooke, Reade Levinson, “Hasty rollout of Trump immigration policy has ‘broken’ border courts,” *Reuters*, September 10, 2019, [https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1W115?fbclid=IwAR0NTN4KhE6UZ\\_GVAsuqghaH09EYAq40sIRiXfoRtcZ3zqrwdwnwY6Kv2Mo/](https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1W115?fbclid=IwAR0NTN4KhE6UZ_GVAsuqghaH09EYAq40sIRiXfoRtcZ3zqrwdwnwY6Kv2Mo/).

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

**Fifth**, CBP officers may in some circumstances choose to directly release individuals without placing them in removal proceedings, expedited removal, or parole (although individuals placed through this pathway are still subject to security screenings). Notices to report are the fastest means by which CBP officers can process and release an individual at the border in times of dangerous overcrowding. Releases on orders of recognizance or through the “notice to report” process rely on the inherent discretionary authority acknowledged by Justice Scalia in 1999.<sup>31</sup>

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

While the majority of individuals released through the temporary use of the Notices to Report process in 2021 did eventually check in with ICE,<sup>32</sup> the confusion caused by this program cautions against its use.

### Conclusion

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

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

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

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<sup>31</sup> *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999).

<sup>32</sup> See U.S. Government Accountability Office, “Southwest Border: Challenges and Efforts Implementing New Processes for Noncitizen Families,” GAO-22-105456, September 28, 2022, <https://www.gao.gov/products/gao-22-105456> (“As of March 1, 2022, about 75% of these family members had reported to ICE as required.”).

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will it lead to open borders. Instead, creating and funding a flexible, orderly, and safe asylum system will reduce both irregular entries and unjust outcomes.<sup>33</sup>

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

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<sup>33</sup> For more information, read the American Immigration Council’s report “Beyond a Border Solution: How to Build a Humanitarian Protection System That Won’t Break,” available at: <https://www.americanimmigrationcouncil.org/research/beyond-border-solutions>.