HOUSE COMMITTEE ON HOMELAND SECURITY
OPEN BORDERS, CLOSED CASE: SECRETARY MAYORKAS' DERELICTION OF DUTY ON THE BORDER CRISIS
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PREPARED TESTIMONY OF
JOSEPH B. EDLOW
FOUNDER, THE EDLOW GROUP LLC

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

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

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

Executive Order and Memos

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

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

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

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

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

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

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

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

[4] *Id*.

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

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

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

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

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

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

During the period that these memos were in effect, and beyond, the number of encounters along the southwest border steadily climbed. In Fiscal Year 2022, U.S. Customs and Border Protection (CBP) recorded a staggering and unprecedent 2,378,944 encounters.[12] Thus far in Fiscal Year 2023, CBP has already recorded 1,431964 encounters as of the end of April.[13] These are just the known and reported numbers and do not account for the thousands of "got aways" who were able to elude Border Patrol agents.

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[8] *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005).
[9] *Id*. at 761 (citing *Chicago v. Morales*, 527 U.S. 41 (1999)).
[10] U.S. Immig. and Customs Enforcement, *ICE releases FY 2022 annual report* (Dec. 30, 2022), available at: https://www.ice.gov/news/releases/ice-releases-fy-2022-annual-report.
[11] Exec. Off. For Immig. Review, *FY2023 First Quarter Decision Outcomes* (Jan. 16, 2023), available at: https://www.justice.gov/eoir/page/file/1105111/download.
[12] U.S. Customs and Border Protection, *Southwest Land Border Encounters* (May 17, 2023), available at: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.
[13] *Id*.

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

The Regulations

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

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

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

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

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[14] Section 235(b)(1) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[15] Section 235(b)(1)(A)(ii) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[16] *See* section 235(b)(1)(B)(v) of the INA (defining "Credible fear of persecution"), *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[17] Section 235(b)(1)(B)(iii)(III) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[18] Section 235(b)(1)(B)(ii) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[19] Credible Fear and Asylum Process: Fiscal Year (FY) 2008 – FY 2019, U.S. Dep't of Justice, Executive Office for Immigration Review (generated Oct. 23, 2019), *available at*: https://www.justice.gov/eoir/file/1216991/download.
[20] *Id*.

In 2022, DHS issued an interim final rule entitled "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers."[21] Under the new process, a positive credible fear determination by a DHS asylum officer will lead to a non-adversarial asylum interview before another DHS asylum officer. Asylum officers who find an alien eligible for a form of protection lesser than full-fledged asylum, such as statutory withholding of removal[22] or protection under the Convention Against Torture[23], must still refer the matter to a DOJ immigration judge who may consider the entire case. That is hardly streamlining the process.

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

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

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

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

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

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

[25] *Id*.

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

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

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

> (1) *In general.* – The Attorney General shall have such authorities and functions under this Act and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.[27][28]

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

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

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

[27] 8 U.S.C. 1103(g).

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

Relevant to the border, a notice of proposed rulemaking was published on February 23, 2023.[29] Starting with the name, "Circumvention of Lawful Pathways," the proposed role is an ineffective measure and empty gesture. Despite its perceived enforcement provisions, this rule, if implemented, would allow most aliens to arrive at or between ports of entry, make fraudulent claims of fear to enter the U.S. or continue to utilize unlawful mass parole programs to accomplish the same. As the Biden Administration continues to steadfastly grip to its executive order on removing barriers to immigration,[30] this rule, finalized on May 16, 2023 will do exactly that.[31]

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

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

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

[29] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).
[30] Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 2877 (Feb. 5, 2021).
[31] Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (Final on May 16, 2023)(to be codified at 8 C.F.R. parts 208 and 1208).
[32] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11750-11752 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

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

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

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

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

as a for-profit business without regard to their safety. From FY17 through FY21, CBP has reported over 1,700 migrant deaths.[35] FY21 had the most in a single year with 568 deaths.[36] Additionally, in that same time period, Border Patrol rescued over 8,400 individuals.[37] FY21 again saw the most rescues in a single year with 3,423.[38] These numbers only represent the deaths and emergencies reported by CBP, not other federal, state, and local agencies and it is unknown how many bodies have never been discovered. The journey to the southern border of the United States is inherently a journey where an alien will face extreme threats to life and safety from beginning to end. To add this as an exception is to exempt the entire population of migrants that have traveled with the assistance of smugglers and other criminal enterprises.

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

Parole Abuse

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

[35] U.S. Customs and Border Protection, *Border Rescues and Mortality Data* (Feb. 6, 2023), https://www.cbp.gov/newsroom/stats/border-rescues-and-mortality-data.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11752 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).
[40] *Matter of A-K-*, 24 I. & N. Dec. 275 (BIA 2007).

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

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

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

When reviewing the Border Patrol monthly disposition and transfer statistics, it becomes apparent that parole was the path of choice to quickly process and move aliens northward. Border Patrol monthly disposition and transfer statistics for fiscal years 2022 and 2023 demonstrate just how commonplace parole has become. While Border Patrol suggestions that the "processing disposition decision related to each apprehension is made on a case-by-case basis…"[43] the raw numbers belie that disclaimer. In fiscal year 2022, parole numbers steadily rose to culminate in over 95,000 paroles granted in September 2022.[44] That trend has

[41] 8 U.S.C. § 1182(d)(5).
[42] Detention and Parole of Inadmissible Aliens; Interim Rule with Requests for Comments, 47 Fed. Reg. 30044 (Jul. 9, 1982) (codified in 8 C.F.R. parts 212 and 235) (emphasis added).
[43] Customs and Border Protection, *Custody and Transfer Statistics FY2023* (May 19, 2023), available at: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics.
[44] Customs and Border Protection, *Custody and Transfer Statistics FY2022* (Nov. 14, 2022), available at: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy22.

continued in this fiscal year as Border Patrol recorded over 130,000 paroles in December 2022.[45]

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

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

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

The Legal Immigration Backlog

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

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

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

[47] Dep't of Homeland Sec., *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), available at: https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.

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

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

Conclusion

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