

**HOUSE HOMELAND SECURITY COMMITTEE**

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

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Chairman Green and Representative Thompson:

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

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

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

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

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

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

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

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<sup>1</sup> U.S. CONST. ART. II, § 3 (cleaned up).

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

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

The Trump Administration utilized previously untapped legal authority found in section 235(b)(2)(C) of the Immigration and Nationality Act (INA) to put in place the highly successful Remain in Mexico policy, or Migrant Protection Protocols;<sup>2</sup> President Trump also struck historic Asylum Cooperative Agreements with the Northern Triangle countries to redirect illegal aliens to seek asylum closer to their home country under the authority provided by section 208(a)(2)(A) of the INA.<sup>3</sup> The Trump Administration also issued a third-country transit regulation under section 208(b)(2)(C) of the INA to thwart asylum forum shopping, bolstered internal relocation guidance for adjudicators,<sup>4</sup> streamlined asylum cases at the border to speed up deportations of those found ineligible, and restored the definition of refugee<sup>5</sup> to Congress's intent of requiring persecution by a government actor on one or more of the protected grounds. No Presidential Administration can do more under existing law—and none should do any less.

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

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<sup>2</sup> 8 U.S.C. 1225(b)(2)(C).

<sup>3</sup> 8 U.S.C. 1158(a)(2)(A).

<sup>4</sup> See 8 C.F.R. 208.13(b)(3).

<sup>5</sup> 8 U.S.C. 1101(a)(42).

<sup>6</sup> 8 U.S.C. 1225(b)(1)(A)(i).

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

<sup>8</sup> 8 U.S.C. 1101(A)(42).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>15</sup> *Id.*; see also Arthur, Andrew & Law, Robert, Public Comment Re: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protections by Asylum Officers (Oct. 18, 2021), available at [https://cis.org/sites/default/files/2021-10/JNPRM\\_Asyum\\_Procedures\\_FINAL\\_submitted\\_10-18-2021.pdf](https://cis.org/sites/default/files/2021-10/JNPRM_Asyum_Procedures_FINAL_submitted_10-18-2021.pdf)

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

<sup>17</sup> 8 U.S.C. 1182(d)(5).

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

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

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

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

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

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

<sup>19</sup> *Id.* (cleaned up and alterations made).

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



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

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

Here is the reality:

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

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

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

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

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

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

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

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

<sup>23</sup> 277 U.S. 438, 485 (dissenting opinion) (emphases added).

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

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

Thank you and I look forward to answering your questions.