

Testimony of Andrew R. Arthur
Resident Fellow in Law and Policy
Center for Immigration Studies

To the United States House of Representatives
Committee on Natural Resources

For A Forum On:

“The Biden Border Crisis: Environmental and Humanitarian Consequences”

May 27, 2021

10:00 a.m.

Ranking Member Westerman and Members of the Committee, I want to thank you for inviting me here today to discuss these important issues.

MY BACKGROUND

For more than 24 years, I served in various roles in the federal government in the field of immigration.

I began as a law clerk in the Executive Office for Immigration Review (EOIR), the agency in the Department of Justice (DOJ) with jurisdiction over removal proceedings and adjudications relating to sections 274A (employer sanctions), 274B (unfair immigration-related employment practices), and 274C (civil document fraud) of the Immigration and Nationality Act (INA).¹

From there, I started as a trial attorney at the former Immigration and Naturalization Service (INS), working my way up to the position of Associate General Counsel. For a period of time, I served as the Acting Chief of the National Security Law Division (NSLD), the unit within the INS General Counsel’s Office with jurisdiction over terrorists, espionage risks, and persecutors.

During my term at the INS, Border Patrol, then and now the federal government component with primary jurisdiction for enforcing the immigration laws of the United States between the ports of entry², was an office within the agency. As Associate General Counsel in the INS Enforcement Division, and later in the NSLD, I regularly handled issues relating to border security, and the need for barriers along the Southwest border.

¹ *About the Office*, UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *available at*: <https://www.justice.gov/eoir/about-office>.

² Legal authority for the Border Patrol, U.S. CUSTOMS AND BORDER PROTECTION, *available at*: [https://help.cbp.gov/app/answers/detail/a_id/1084/~legal-authority-for-the-border-patrol](https://help.cbp.gov/app/answers/detail/a_id/1084/~/legal-authority-for-the-border-patrol).

I left the INS six weeks before September 11, 2001, due to concerns about vulnerabilities in our immigration enforcement system that could be exploited by aliens who posed a risk to our national security. Believing that those vulnerabilities could only properly be addressed by Congress, I took a position as Oversight Counsel for Immigration at the House Judiciary Committee.

I was in this position when the committee, responding to the attacks of September 11, drafted the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act,” or USA PATRIOT Act.³ In addition, I played a role in the drafting of the Homeland Security Act of 2002,⁴ which established the Department of Homeland Security in more or less its present form.

I later transitioned to the position of legislative counsel for the House Judiciary Committee’s Subcommittee on Immigration, Border Security, and Claims. It was in this position that I served as one of the primary staff drafters of the REAL ID Act of 2005,⁵ which I will discuss further below.

I left Congress to take the bench as an Immigration Judge (IJ) at the York Immigration Court in York, Pennsylvania, where I served for more than eight years. At the beginning of my service in this position, the vast majority of aliens who appeared before me had been apprehended in the interior of the United States. During my last three years as an IJ, however, I began to see more and more aliens who have been apprehended after entering the United States illegally along the Southwest border and claiming credible fear.⁶

In January 2015, I left the bench to serve as the Staff Director at the House Oversight and Government Reform Committee’s National Security Subcommittee, a position that I held until September 2016. In this role, I had oversight jurisdiction of the activities of U.S. Customs and Border Protection (CBP), among other agencies.

Since April 2017, I have worked as the Resident Fellow in Law and Policy at the Center for Immigration Studies, a nonpartisan, nonprofit research organization located in Washington, DC.

In this role, I toured the border in the Rio Grande Valley (RGV), between McAllen and Roma, Texas, with the Texas Department of Public Safety and the Border Patrol, as well as the border in and near Del Rio, Texas with the Val Verde County Sheriff in August 2017.

Similarly, in February 2019, I visited the Southwest border in and around Yuma, Arizona, where I met with Border Patrol and local law-enforcement officials, and assessed Border Patrol infrastructure from both sides of the border.

³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, Pub. L. 107-56 (2001), available at: <https://www.congress.gov/bill/107th-congress/house-bill/3162/text>.

⁴ Homeland Security Act of 2002, Pub. L. 107-296 (2002), available at: <https://www.congress.gov/bill/107th-congress/house-bill/5005>.

⁵ REAL ID Act of 2005, Pub. L. 109-13, div. B (2005), available at: <https://www.congress.gov/bill/109th-congress/house-bill/1268>.

⁶ See Andrew R. Arthur, *Fraud in the "Credible Fear" Process, Threats to the Integrity of the Asylum System*, Center for Immigration Studies (Apr. 19, 2017), available at: <https://www.cis.org/Report/Fraud-Credible-Fear-Process>.

In January 2020, I traveled to the border in and around Laredo, Texas. Again, I met with officials from the U.S. Border Patrol and traveled along the border to determine the state of border-security infrastructure and assess strategic and tactical planning.

BORDER SECURITY

As I noted above, the Border Patrol is responsible for securing the border between the ports of entry. As CBP describes Border Patrol's enforcement efforts, the agency uses:

[A] layered approach that includes patrolling the border itself, (including the use of electronic surveillance devices), patrolling nearby areas and neighborhoods where illegal immigrants can quickly fade into the general population, and conducting checkpoints - both stationary and temporary.⁷

The Congressional Research Service (CRS) has described the foundations of this border-control strategy:

Since the 1990s, migration control at the border has been guided by a strategy of "prevention through deterrence"—the idea that the concentration of personnel, infrastructure, and surveillance technology along heavily trafficked regions of the border will discourage unauthorized migrants from attempting to enter the United States.⁸

Before I discuss this strategy and its implementation further, I want to list a few of the laws that Border Patrol enforces, and more importantly, its authority to enforce those laws.

POWERS AND AUTHORITY OF THE BORDER PATROL

Section 287(a)(1) of the INA⁹ grants Border Patrol Agents the authority "to interrogate any person believed to be an alien as to his right to be or to remain in the United States", without warrant.

Section 287(a)(2) of the INA¹⁰ provides Border Patrol agents the power, without warrant:

[T]o arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest

⁷ Legal authority for the Border Patrol, U.S. CUSTOMS AND BORDER PROTECTION, *available at*: https://help.cbp.gov/s/article/Article-1084?language=en_US.

⁸ Carla N. Argueta, *Border Security: Immigration Enforcement Between Ports of Entry (R42138)*, CONG RESEARCH SERV. (Apr. 19, 2016), *available at*: <https://fas.org/sgp/crs/homsec/R42138.pdf>.

⁹ Section 287(a) of the INA (2018), *available at*: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9505.html>.

¹⁰ Section 287(a)(2) of the INA (2018), *available at*: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9505.html>.

Section 287(a)(3) of the INA¹¹ provides authority to Border Patrol Agents “within a reasonable distance from any external boundary the United States, to board and search for aliens on any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle” without a warrant. The implementing regulation, 8 C.F.R. § 287.1(a)(2)¹², defines “reasonable distance” as “100 air miles from any external boundary of the United States.” This provides Border Patrol with authority to create and staff checkpoints away from the border.

Border Patrol agents can bring charges against border violators on several different grounds, both civil and criminal.

Under section 212(a)(6)(A)(i) of the INA¹³, “[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General is inadmissible,” meaning that such alien is subject to (or more properly, “amenable to”) removal. Removal under this ground is a civil penalty.

Under section 212(a)(6)(E)(i) of the INA¹⁴, alien smugglers are also amenable to removal. Specifically, that provision states: “Any alien, who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of the law, is inadmissible.”¹⁵

In addition, there are several criminal penalties for illegal entry. For example, section 275(a) of the INA¹⁶ states:

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 2 years, or both.

Section 274(a) of the INA contains criminal penalties for alien smuggling.¹⁷ Specifically, subparagraphs 274(a)(1)(i) through (v) of the INA “prohibit[] alien smuggling, domestic transportation of unauthorized aliens, concealing or harboring unauthorized aliens, encouraging

¹¹ Section 287(g) of the INA (2018), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9505.html>.

¹² 8 C.F.R. § 287.1(a)(2) (2018), available at: <https://www.law.cornell.edu/cfr/text/8/287.1>.

¹³ Section 212(a)(6)(A)(i) of the INA (2018), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-2006.html>.

¹⁴ Section 212(a)(6)(E)(i) of the INA (2018), available at: <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-17138/0-0-0-17444.html#0-0-0-1785>.

¹⁵ *Id.*

¹⁶ Section 275(a) of the INA (2018), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9025.html>.

¹⁷ Section 274(a) of the INA (2018), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-8381.html>.

or inducing unauthorized aliens to enter the United States, and engaging in a conspiracy or aiding and abetting any of the preceding acts.”¹⁸

Section 274(a)(2) of the INA, on the other hand, “prohibits bringing or attempting to bring unauthorized aliens to the United States in any manner whatsoever, even at a designated port of entry.”¹⁹

Border Patrol is not limited in its responsibilities to the enforcement of laws relating to aliens. Under section 287(a)(5) of the INA²⁰, Border Patrol agents have the authority without warrant to make arrests:

(A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or

(B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony, if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

This allows Border Patrol agents to apprehend and charge smugglers of drugs and other contraband into the United States.

THE ROLE OF FENCING AND TACTICAL INFRASTRUCTURE IN BORDER ENFORCEMENT

Fencing and tactical infrastructure plays a significant, but often misunderstood, role in the Border Patrol’s enforcement strategy. CRS has detailed various forms of tactical infrastructure along the border:

*Border tactical infrastructure includes roads, lighting, pedestrian fencing, and vehicle barriers. Tactical infrastructure is intended to impede illicit cross-border activity, disrupt and restrict smuggling operations, and establish a substantial probability of apprehending terrorists seeking entry into the United States.*²¹

Put in layman’s terms, pedestrian fencing, roads, lighting, sensors, and vehicle barriers each play two different, but complementary, roles in border enforcement:

First, they serve as a deterrent to attempted entry. For example, pedestrian fencing increases the difficulty and cost of such entry, and by eliminating easy access across the border, reduces the

¹⁸ *Criminal Resource Manual*, OFFICES OF THE UNITED STATES ATTORNEYS (undated), available at: <https://www.justice.gov/usam/criminal-resource-manual-1907-title-8-usc-1324a-offenses>.

¹⁹ *Id.*

²⁰ Section 287(a)(5) of the INA (2018), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9505.html>.

²¹ Carla N. Argueta, *Border Security: Immigration Enforcement Between Ports of Entry (R42138)*, CONG. RESEARCH SERV. (Apr. 19, 2016) (internal footnote omitted), available at: <https://fas.org/sgp/crs/homsec/R42138.pdf>.

likelihood of attempted entry. Illegal entrants and smugglers follow the same rules of incentives and economics that most other actors follow, and amend their actions accordingly.

Similarly, lighting inhibits the ability of those caught crossing the border illegally to do so under cover of darkness, making it more likely that they will be caught, and less likely that they will be able to enter the United States to, for example, work.

Second, such infrastructure creates an impediment to illicit crossing. Even if an individual attempts illegal entry by going around barriers or over fencing, those impediments will slow entry, providing Border Patrol more time to deploy agents to the incursion point.

In the same way, sensors and cameras notify Border Patrol about illegal entries, again facilitating timely deployment. This enables CBP to direct its limited resources effectively and efficiently to those areas where active incursions are occurring, but sensors and cameras are no substitute for agents and barriers.

And, by any measure, the number of Border Patrol agents is limited.

As of FY 2019, CBP had fewer than 20,000 Border Patrol Agents, total, most of whom (16,731) were stationed on the Southwest border.²² While this number might seem large, the U.S.-Mexican border is approximately 1,933 miles long, and the U.S.-Canadian border spans some 3,987 miles, not including the Canadian border with Alaska.²³ Tactical infrastructure is therefore critical to the Border Patrol's mission.

AUTHORITY FOR BORDER BARRIERS

There has been significant discussion in recent years about the need for additional border barriers (including more walls, pedestrian fencing, and vehicle barriers) along the Southwest border.²⁴

There are, essentially, four different statutes that authorize the Department of Homeland Security (DHS) to erect barriers along the border²⁵: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)²⁶, the REAL ID Act of 2005²⁷, the Secure Fence Act of 2006²⁸, and the Consolidated Appropriations Act, 2008²⁹. These legislative provisions are

²² *United States Border Patrol, Border Patrol Agent Nationwide Staffing by Fiscal Year*, U.S. BORDER PATROL (undated), available at: https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%20%28FY%201992%20-%20FY%202019%29_0.pdf.

²³ Janice Cheryl Beaver, *U.S. International Borders: Brief Facts*, CONG. RESEARCH SERV. (updated Nov. 9, 2006), available at: <https://fas.org/sgp/crs/misc/RS21729.pdf>.

²⁴ See, e.g., Paul Sperry, *This town is proof that Trump's wall can work*, N.Y. POST (Jan. 13, 2018), available at: <https://nypost.com/2018/01/13/we-already-have-a-border-wall-and-it-works/>.

²⁵ See Michael John Garcia, *Barriers Along the U.S. Borders: Key Authorities and Requirements (R43975)*, CONG. RESEARCH SERV. (Jan. 27, 2017), at 1, available at: <https://fas.org/sgp/crs/homesec/R43975.pdf>.

²⁶ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, div. C, §102(c) (1996), available at: <https://www.gpo.gov/fdsys/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf>.

²⁷ REAL ID Act of 2005, Pub. L. 109-13, div. B, § 102 (2005), available at: <https://www.congress.gov/bill/109th-congress/house-bill/1268>.

²⁸ Secure Fence Act of 2006, Pub. L. 109-367, § 3 (2006), available at: <https://www.congress.gov/bill/109th-congress/house-bill/6061>.

consolidated³⁰ at 8 U.S.C. § 1103 note³¹.

A review of those laws emphasizes the need for broader waiver authority to ensure that there is sufficient fencing and tactical infrastructure to support the Border Patrol in its mission.

At the time that I was reviewing the INA for potential national security vulnerabilities in the 109th Congress as a staffer on the House Judiciary Committee, section 102(a) of IIRIRA directed the Attorney General to “to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.”³²

Section 102(c) of that act waived “provisions of the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969 . . . to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this section.”³³ Section 102(d) gave the Attorney General the authority to acquire land “essential to control and guard the boundaries and borders of the United States against any violation of” the INA, including through condemnation.³⁴

Section 102 of the REAL ID Act amended section 102(c) of IIRIRA³⁵ to grant the Secretary of Homeland Security authority to waive all legal requirements the Secretary determined to be necessary to ensure expeditious construction of barriers and roads in the vicinity of the United States border.

As the Conference Report for that legislation stated:

Section 102 of [IIRIRA] provides for construction and strengthening of barriers along U.S. land borders and specifically provides for 14 miles of barriers and roads along the border near San Diego, beginning at the Pacific Ocean and extending eastward. It provides for a waiver of the Endangered Species Act of 1973 (ESA) and the National Environmental Policy Act of 1969 (NEPA) to the extent the Attorney General determines is necessary to ensure expeditious construction of barriers and roads. Despite the existing waiver provision, construction of the San Diego area barriers has been delayed due to a dispute involving other laws. The California Coastal Commission has prevented completion of the San Diego border security infrastructure because it alleges that plans to complete it are inconsistent with the California Coastal Management Program, a state program approved pursuant to the federal Coastal Zone

²⁹ Consolidated Appropriations Act of 2008, Pub. L. 110-161, div. E, tit. V, §564(a) (2007), available at: <https://www.congress.gov/bill/110th-congress/house-bill/2764>.

³⁰ Michael John Garcia, *Barriers Along the U.S. Borders: Key Authorities and Requirements (R43975)*, CONG. RESEARCH SERV. (Jan. 27, 2017), at 1, available at: <https://fas.org/sgp/crs/homsec/R43975.pdf>.

³¹ 8 U.S.C. § 1103 note, available at: <https://www.law.cornell.edu/uscode/text/8/1103>.

³² Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, div. C, §102(a) (1996), available at: <https://www.gpo.gov/fdsys/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf>.

³³ *Id.* at 102(c).

³⁴ *Id.* at 102(d).

³⁵ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, div. C, §102(c) (1996), available at: <https://www.gpo.gov/fdsys/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf>.

Management Act (CZMA)--notwithstanding the fact that the San Diego border security infrastructure was designed to avoid and/or minimize adverse environmental impacts, and the Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security testified before the California Coastal Commission that the plans for completion were consistent with the Coastal Management Program to the maximum extent practicable without sacrificing the effectiveness of the border security infrastructure. Continued delays caused by litigation have demonstrated the need for additional waiver authority with respect to other laws that might impede the expeditious construction of security infrastructure along the border, such as the Coastal Zone Management Act.

Current Law. Section 102(c) of IIRIRA provided for a waiver of the ESA and NEPA to the extent the Attorney General determines is necessary to ensure expeditious construction of barriers and roads.

Section 102 of the conference report would amend the current provision to require the Secretary of Homeland Security to waive all laws that he or she determines, in his or her sole discretion, are necessary to ensure the expeditious construction of the border barriers.

Additionally, it would prohibit judicial review of a waiver decision or action by the Secretary and bar judicially ordered compensatory, declaratory, or injunctive, equitable, or any other relief or other remedy for damage alleged to result from any such decision or action. As discussed above, current statutes and the Reorganization Plan for the Department of Homeland Security have not amended and clarified references to executive authority throughout the INA. Accordingly, the provision would have replaced the reference in current law to the Attorney General by a reference to the Secretary of Homeland Security.

The Conferees have revised the House provision in the following respects. First, the revised provision authorizes but does not require the Secretary of DHS to waive any legal requirements that he or she, in his or her sole discretion, determines are necessary to ensure expeditious construction of border security infrastructure. Second, the provision clarifies the intent of the conference report by substituting a reference to waiver of "all legal requirements" for the prior reference to waiver of "all laws", clarifying Congress' intent that the Secretary's discretionary waiver authority extends to any local, state or federal statute, regulation, or administrative order that could impede expeditious construction of border security infrastructure. Third, the conferees provided that any such waiver would become effective upon publication in the Federal Register, thereby ensuring appropriate public notice of such determinations. Finally, the Conferees have provided federal judicial review for claims alleging that the actions or decisions of the Secretary violate the United States Constitution. The Conferees have further provided that such claims must be filed within sixty days of the Secretary's action or decision, and that interlocutory or final judgments, decrees,

*or orders of federal district courts on such claims may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States. The Conferees' intent is to ensure that judicial review of actions or decisions of the Secretary not delay the expeditious construction of border security infrastructure, thereby defeating the purpose of the Secretary's waiver.*³⁶

In *Defenders of Wildlife v. Chertoff*³⁷, a judge on the U.S. District Court for the District of Columbia rejected a claim that the waiver authority in section 102 of the REAL ID Act was unconstitutional, a decision the Supreme Court declined to review.

In section 3 of the Secure Fence Act of 2008³⁸, section 102(b)(1) of IIRIRA was amended to identify specific areas where fencing should be installed, and to specify the type of fencing that should be used.

While section 102(b)(1) of IIRIRA was amended again in the Consolidated Appropriations Act, 2008³⁹, those amendments were significantly more legally substantive-- and restrictive-- than the amendments in the Secure Fence Act of 2008. Most importantly, the Consolidated Appropriations Act, 2008 completely rewrote subparagraphs (A), (B), and (C) in that provision. As amended, subparagraph (C) states:

Consultation.—

“(i) In general.—

In carrying out this section, the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.

“(ii) Savings provision.—Nothing in this subparagraph may be construed to—

“(I) create or negate any right of action for a State, local government, or other person or entity affected by this subsection; or

*“(II) affect the eminent domain laws of the United States or of any State.”*⁴⁰

³⁶ H.R. Rep. 109-72, div. B, tit. I, § 102 (2005), available at: <https://www.congress.gov/congressional-report/109th-congress/house-report/72/1?overview=closed>.

³⁷ *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 129-30 (D. D.C. 2007), cert. denied, 554 U.S. 918 (2008).

³⁸ Secure Fence Act of 2006, Pub. L. 109-367, § 3 (2006), available at: <https://www.congress.gov/bill/109th-congress/house-bill/6061>.

³⁹ Consolidated Appropriations Act, 2008, Pub. L. 110-161, div. E, tit. V, §564(a) (2007), available at: <https://www.congress.gov/bill/110th-congress/house-bill/2764>.

⁴⁰ *Id.*

Notwithstanding the caveats in those two subclauses, or the fact that the Consolidated Appropriations Act, 2008, left the waiver authority in section 102(c) of IIRIRA as amended by section 102 of the REAL ID Act in place, a plaintiff could easily assert that this consultation provision requires the Secretary of Homeland Security to alter or abandon a fencing project based on environmental impacts identified by “the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners.”

Clear waiver authority is necessary to overcome such claims, and ensure that the Secretary of Homeland Security is able to erect barriers to protect against, and/or mitigate the effect of, cross-border incursions.

ACTIONS BY THE BIDEN ADMINISTRATION ON BORDER BARRIERS

The Biden administration, however, is unlikely to erect new physical barriers on the Southwest border, at least not anytime soon.

On his campaign website, then-candidate Joe Biden asserted: “Building a wall will do little to deter criminals and cartels seeking to exploit our borders.”⁴¹

Thereafter, on Inauguration Day, President Biden issued a proclamation pausing “work on each construction project on the southern border wall, to the extent permitted by law, as soon as possible but in no case later than seven days from the date of this proclamation”.⁴²

The ostensible purpose of that “pause” was to assess “the legality of the funding and contracting methods used to construct the wall”, assess “the administrative and contractual consequences of ceasing each wall construction project”; and complete a plan “for the redirection of funds concerning the southern border wall, as appropriate and consistent with applicable law”.⁴³

Those assessments and the plan referenced do not appear to have been completed to allow barrier construction to proceed, despite the fact that funding of \$1.375 billion “for the construction of [a] barrier system along the southwest border” was included in both the appropriations bills for FY 2020⁴⁴ and for FY 2021⁴⁵.

On March 17, 40 Republican senators wrote to the head of the Government Accountability Office (GAO), Comptroller General Gene Dodaro, asking for an opinion on the legality of the

⁴¹ The Biden Plan for Securing Our Values as a Nation of Immigrants (undated), *available at*: <https://joebiden.com/immigration/>.

⁴² *Presidential Proclamation 10142, Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction*, White House (Jan. 20, 2021), *available at*: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/>.

⁴³ *Id.*

⁴⁴ Div. D, section 209(a)(1), Consolidated Appropriations Act, 2020, Pub. L. 116-93 (2019), *available at*: <https://www.congress.gov/116/plaws/publ93/PLAW-116publ93.pdf>.

⁴⁵ Div. F, section 210, Consolidated Appropriations Act, 2021, Pub. L. 116-260 (2020), *available at*: <https://www.congress.gov/bill/116th-congress/house-bill/133/text>.

pause in that January 20 proclamation.⁴⁶ To date, Dodaro has not issued a decision with respect to that request, though one is expected in coming weeks.⁴⁷

Biden's recent actions, however, represent a change in position for the president.

Then-Senator Biden (D-Del.) joined 79 of his colleagues-- including future president, then-Senator Barack Obama (D-Ill.) -- in voting in favor⁴⁸ of Secure Fence Act of 2006⁴⁹, which significantly expanded the construction of barriers along the Southwest border. They were not alone – 64 Democrats in the House did the same.⁵⁰

In fact, the “Obama-Biden Administration” built 130 miles of the walls and fencing authorized by that legislation.⁵¹

ILLEGAL CROSS-BORDER INCURSIONS

The enforcement mission of the Border Patrol is vital to protecting our national security and the safety and health of the American people. Unfortunately, that job has become even more difficult in recent weeks.

Crisis at the Border

According to the latest statistics from CBP⁵², Border Patrol apprehended 173,460 migrants between the ports of entry along the Southwest border in April. That was the largest monthly total of migrants apprehended at the border in 21 years, since April 2000.⁵³

⁴⁶ See Mar. 17, 2021 Letter from Sen. Shelley Moore Capito, et al., to the Hon. Gene L. Dodaro, Comp. Gen., available at: <https://www.portman.senate.gov/sites/default/files/2021-03/03-17-2021%20Capito%20GAO%20Border%20Letter.pdf>; see also Andrew Arthur, *Republican Senators Ask GAO to Review Biden Border Wall Freeze, Using 'the power of the purse' to 'complete the dang fence'*, Center for Immigration Studies (Mar. 25, 2021), available at: <https://cis.org/Arthur/Republican-Senators-Ask-GAO-Review-Biden-Border-Wall-Freeze>.

⁴⁷ Niv Elis, *GOP ramps up attacks on Biden's border wall freeze*, THE HILL (May 2, 2021), available at: <https://thehill.com/homenews/house/551278-gop-ramps-up-attacks-on-bidens-border-wall-freeze>.

⁴⁸ Roll Call Vote 262, 109th Congress - 2nd Session on Passage of the Bill (H.R. 6061), U.S. Senate (Sept. 29, 2006), available at: https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00262.

⁴⁹ Secure Fence Act of 2006, Pub. L. 109-367 (2006), available at: <https://www.congress.gov/bill/109th-congress/house-bill/6061>.

⁵⁰ Roll Call 446, Bill Number: H. R. 6061, U.S. House of Representatives (Sept. 14, 2006), available at: <https://clerk.house.gov/Votes/2006446>.

⁵¹ See Susan Montoya Bryan, *Past projects show border wall building is complex, costly*, Associated Press (Jan. 12, 2019), available at: <https://apnews.com/article/north-america-donald-trump-us-news-george-w-bush-immigration-ab1b07e15e6f4e9a9274b576ff3a1d45>.

⁵² *Southwest Land Border Encounters*, U.S. CUSTOMS AND BORDER PROTECTION (modified May 11, 2021), available at: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

⁵³ See *Southwest Border Migration FY 2020*, U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 19, 2020), available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2020>; *U.S. Border Patrol Monthly Apprehensions (FY 2000 - FY 2019)*, U.S. BORDER PATROL (undated), available at: https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Monthly%20Apprehensions%20%28FY%202000%20-%20FY%202019%29_1.pdf;

That said, the 180,050 aliens apprehended by Border Patrol in April 2000 were very different from those apprehended in April 2021.

April 2000 was 17 months before September 11, 2001. Following the terrorist attacks that day, Congress flooded an overwhelmed Border Patrol with resources, and border security was beefed up significantly.⁵⁴

Note that in October 2001, with the country reeling and border security a high priority, Border Patrol made a total of 37,812 apprehensions at the Southwest border⁵⁵ — just 21.8 percent as many as they made last month. Legislators then knew how important *border security* was to *national security*, a lesson that has been seemingly forgotten in Washington, D.C.

Further, before 2011, 90 percent of illegal entrants were single adult males, and before 2009, 90 percent were Mexican nationals.⁵⁶ Single adult Mexican nationals can be quickly processed and repatriated in about eight hours⁵⁷, and CBP facilities were built to accommodate such aliens for a brief period of time.

Last month, by contrast, 48,226 of the migrants apprehended by Border Patrol were in “family units” (FMUs) — that is children and accompanying adults.⁵⁸ Those migrants take days to process, and CBP must scramble to accommodate them in makeshift, temporary, facilities.⁵⁹

Those 48,226 migrants in family units apprehended in April represent the sixth-highest monthly total for which Border Patrol keeps records⁶⁰ (back to October 2012), surpassed only by the month before and by four months (March to June) at the height of the “border emergency”⁶¹ in 2019.

⁵⁴ See Tit. IV of the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. 107-56 (2001) (“Protecting the Border”), available at: <https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.pdf>.

⁵⁵ *Id.*

⁵⁶ *To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard*, U.S. DEPT OF HOMELAND SECURITY (last published Apr. 4, 2018), available at: <https://www.dhs.gov/news/2018/04/04/secure-border-and-make-america-safe-again-we-need-deploy-national-guard>.

⁵⁷ See Andrew Arthur, *Of Baltimore and Borders, Every town is a border town*, CENTER FOR IMMIGRATION STUDIES (Aug. 19, 2019), available at: <https://cis.org/Arthur/Baltimore-and-Borders>.

⁵⁸ *Southwest Land Border Encounters*, U.S. CUSTOMS AND BORDER PROTECTION (modified May 11, 2021), available at: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

⁵⁹ See CBP Announces Opening of Temporary Processing Facility in Donna, Texas, U.S. Customs and Border Protection (Feb.9, 2021), available at: <https://www.cbp.gov/newsroom/national-media-release/cbp-announces-opening-temporary-processing-facility-donna-texas>.

⁶⁰ See *Southwest Border Migration FY 2020*, U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 19, 2020), available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2020>; *Border Patrol Total Monthly Family Units by Sector FY13-19*, U.S. BORDER PATROL (undated), available at: https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%20FY%202013%20-%20FY%202019%29_1.pdf.

⁶¹ *Secretary Kirstjen Nielsen Statement on Border Emergency*, U.S. DEPT OF HOMELAND SECURITY (Mar. 29, 2019), available at: <https://www.dhs.gov/news/2019/03/29/secretary-kirstjen-nielsen-statement-border-emergency>.

In addition, just short of 17,000 (16,933 to be exact) of those migrants apprehended in April were unaccompanied alien children (UACs).⁶²

Again, CBP really does not have permanent infrastructure for those kids, and by law⁶³, most (as I will explain below) are supposed to be transferred to Department of Health and Human Services' (HHS) custody within 72 hours.

Once more, those 16,933 unaccompanied children represent the second-highest monthly total for UAC apprehensions in any month for which Border Patrol keeps records (back to October 2009)⁶⁴; only in the previous month-- March 2021—were apprehensions higher.

By way of comparison, April's monthly total of UAC apprehensions was higher than the total number of Border Patrol UAC apprehensions at the Southwest border in all of FY 2011 (15,949).⁶⁵

On average, CBP satisfied the 72-hour requirement for transfer of those UACs to HHS last month last month (an agency press release⁶⁶ lauding its efforts stated that UACs are now in its custody for a still unacceptable 28 hours on average), but that is only because the Federal Emergency Management Agency (FEMA) stepped into to help HHS establish temporary shelters for those children.

Those shelters were necessary because HHS maintains about 13,700 permanent shelter beds for children, at a cost of \$290 per day for each.⁶⁷ As the number of UACs has surged, however, and due to pandemic limits on bed space, temporary housing has been required for the overflow (at a cost of \$755 per bed, daily).⁶⁸

I will note that immigrants' and children's advocates have raised concerns about the health and safety standards in some of those temporary facilities⁶⁹, and I have expressed my own concerns

⁶² *Southwest Land Border Encounters*, U.S. CUSTOMS AND BORDER PROTECTION (modified May 11, 2021), available at: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

⁶³ Section 235(b)(3) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 (2008), available at: <https://www.congress.gov/bill/110th-congress/house-bill/7311/text?q=%7B%22search%22%3A%5B%22William+Wilberforce+Trafficking+Victims+Protection+Reauthorization+Act+of+2008%22%5D%7D&r=1>.

⁶⁴ See *Southwest Border Migration FY 2020*, U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 19, 2020), available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2020>; *Border Patrol Total Monthly UACs by Sector FY10-19*, U.S. BORDER PATROL (undated), available at: https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20UAC%20Apprehensions%20by%20Sector%20%28FY%202010%20-%20FY%202019%29_0.pdf.

⁶⁵ *Id.*

⁶⁶ *CBP Announces April 2021 Operational Update*, U.S. CUSTOMS AND BORDER PROTECTION (May 11, 2021), available at: <https://www.cbp.gov/newsroom/national-media-release/cbp-announces-april-2021-operational-update>.

⁶⁷ See Andrew Arthur, *Surprising Takeaways in AP Article on Child Migrant Detention, Taxpayer-funded airline tickets for children flying alone, dangerous detention allegations, voluntary family separation, and truncated vetting times*, CENTER FOR IMMIGRATION STUDIES (May 14, 2021), available at: <https://cis.org/Arthur/Surprising-Takeaways-AP-Article-Child-Migrant-Detention>.

⁶⁸ *Id.*

that HHS may be cutting corners in releasing those children to sponsors in the United States.⁷⁰

Title 42 orders

Beginning on March 20, 2020⁷¹, the Centers for Disease Control and Prevention (CDC) issued orders suspending the introduction of persons from a country where a communicable disease exists in response to the COVID-19 pandemic, under authority provided in section 362 of the Public Health Service Act.⁷²

In essence, that provision allows HHS to prohibit the introduction of persons and property from any country in which it concludes there is a communicable disease that could be introduced into the United States, for as long as it deems necessary to prevent the introduction of that disease into this country.

Federal law⁷³ gives Coast Guard and customs officers (including Border Patrol agents and CBP officers) the “duty” to enforce such orders.

Those Title 42 orders have allowed CBP to expel foreign nationals from the United States, in lieu of removal under the INA, if they entered the United States illegally or lacked proper documents to enter.

The CDC director concluded that these orders were necessary to prevent further introduction of COVID-19 into the United States, and because potentially inadmissible aliens are detained for extended periods of time for processing. Ports and CBP processing facilities are not designed to handle aliens who have been exposed to or infected with the disease, or to protect personnel and other individuals (including other aliens) in those facilities from being exposed to COVID-19.⁷⁴

In FY 2020⁷⁵, Border Patrol expelled 197,043 aliens pursuant to this authority, and unlike other Trump-era border policies, the Biden administration has left these Title 42 orders (largely) in place.

⁶⁹ See Garance Burke, Juliet Linderman, and Martha Mendoza, Migrant children held in mass shelters with little oversight, Associated Press (May 11, 2021), available at: <https://apnews.com/article/donald-trump-immigration-health-coronavirus-pandemic-government-and-politics-3b4e480c9021e6a8e02313f4c73a497e>.

⁷⁰ See Andrew Arthur, *Reports Suggest HHS Is Cutting Corners in Vetting Sponsors of Migrant Children The border issue no one’s talking about — yet.*, Center for Immigration Studies (May 6, 2021), available at: <https://cis.org/Arthur/Reports-Suggest-HHS-Cutting-Corners-Vetting-Sponsors-Migrant-Children>.

⁷¹ *Order Suspending Introduction of Persons From a Country Where a Communicable Disease Exists*, 85 Fed. Reg. 16567 (Mar. 24, 2020), available at: <https://www.federalregister.gov/documents/2020/03/24/2020-06241/order-suspending-introduction-of-persons-from-a-country-where-a-communicable-disease-exists>.

⁷² 42 U.S.C. § 265 (2021), available at: <https://www.law.cornell.edu/uscode/text/42/265>.

⁷³ 42 U.S.C. § 268(b) (2021), available at: <https://www.law.cornell.edu/uscode/text/42/268>.

⁷⁴ See Andrew Arthur, *HHS Issues New Title 42 Order in Response to Wuhan Coronavirus Suspension of introductions of inadmissible aliens applies to coastal facilities and will remain in effect indefinitely*, CENTER FOR IMMIGRATION STUDIES (May 22, 2020), available at: <https://cis.org/Arthur/HHS-Issues-New-Title-42-Order-Response-Wuhan-Coronavirus>.

⁷⁵ *FY 2020 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 20, 2020), available at: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020>.

Thus far in FY 2021⁷⁶, Border Patrol has expelled 536,793 aliens under Title 42. I say that the Biden administration has “largely” left those orders in place, because it does not apply them as a rule to unaccompanied children.⁷⁷

While it will expel families from Mexico and the “Northern Triangle” countries of El Salvador, Guatemala, and Honduras to Mexico under Title 42: “Mexico’s limited capacity has strained DHS’s resources, including in the Rio Grande Valley area of Texas. When Mexico’s capacity is reached, [DHS processes] the families and place[s] them in immigration proceedings here in the United States.”⁷⁸

Note that there is no reason that DHS cannot repatriate those UACs and families to any home countries that will accept them (as most do), in lieu of sending them to Mexico.

For perspective, some 48,226 migrants in family units were apprehended by Border Patrol in April, but just 17,538 were expelled under Title 42.⁷⁹

Loopholes Generally

In my opinion, those unaccompanied children and families are being drawn to the United States by “loopholes” in the law that they—and more specifically parents, family members, and smugglers—are exploiting.

There are three main loopholes in U.S. law and policy that are secondary “magnets” drawing foreign nationals to enter this country illegally: Administrative policies favoring — in contravention of statute — the release of aliens who have entered illegally and claimed “credible fear”; the unequal treatment of UACs from non-contiguous countries in the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA); and novel judicial interpretations of the 1997 *Flores* settlement agreement.⁸⁰

Those are “secondary”, because the main magnet that is drawing most migrants to enter illegally is the United States itself.

Release of aliens with positive credible fear determinations

Under section 235(b)(1) of the Immigration and Nationality Act (INA)⁸¹, aliens apprehended by

⁷⁶ *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS AND BORDER PROTECTION (modified May 11, 2021), available at: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>.

⁷⁷ See *Statement by Homeland Security Secretary Alejandro N. Mayorkas Regarding the Situation at the Southwest Border*, U.S. DEPT OF HOMELAND SECURITY (Mar. 16, 2021), available at: <https://www.dhs.gov/news/2021/03/16/statement-homeland-security-secretary-alejandro-n-mayorkas-regarding-situation>.

⁷⁸ *Id.*

⁷⁹ *Southwest Land Border Encounters*, U.S. CUSTOMS AND BORDER PROTECTION (modified May 11, 2021), available at: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

⁸⁰ See Andrew Arthur, *Why Are Central American Migrants Entering Illegally? Part 2, The ‘pull factors’ that are driving illegal immigration, and how they can be easily stopped*, CENTER FOR IMMIGRATION STUDIES (Apr. 26, 2021), available at: <https://cis.org/Arthur/Why-Are-Central-American-Migrants-Entering-Illegally-Part-2>.

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 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.⁸²

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.⁸³ 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.⁸⁴

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.⁸⁵ 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)⁸⁶, but less than 17 percent of those who received a positive credible fear assessment were ultimately granted asylum.⁸⁷

Under section 235(b) of the INA, aliens found to have credible fear are supposed to be detained until their asylum claims are adjudicated.⁸⁸

In December 2009, however, ICE leadership issued a policy directive⁸⁹ that aliens who have received a positive credible fear determination should generally be granted “parole” and released from detention under the circumscribed release authority provided in section 212(d)(5)(A) of the INA⁹⁰.

The number of aliens claiming credible fear climbed thereafter, as smugglers recognized an avenue by which migrants could enter illegally and still have the opportunity to remain in the

⁸¹ 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>.

⁸² 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>.

⁸³ 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>.

⁸⁴ 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>.

⁸⁵ 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>.

⁸⁶ 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>.
⁸⁷ *Id.*

⁸⁸ 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>.

⁸⁹ *Directive 11002.1, Parole of Aliens Found to Have a Credible Fear of Persecution or Torture*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Dec. 8, 2009), *available at*: https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.

⁹⁰ Section 212(d)(5)(A) of the INA, *available at*: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim>.

United States indefinitely— even if they were caught — by claiming a fear of return or by requesting asylum.

For example, in FY 2009⁹¹, asylum officers completed just over 5,500 credible fear cases. That number more than doubled to 11,716 by FY 2011 after that directive was issued, and then more than tripled again to 36,454 in FY 2013.⁹² By the time the migrant “crisis” of FY 2019 occurred, USCIS received 105,439 credible fear claims — more than 18 times as many as it had received in FY 2009, before that directive was issued.⁹³

That December 2009 Obama-era parole directive prompted so many credible fear claims that the detention required under section 235(b)(1)(B)(ii) of the INA would have been prohibitively expensive by FY 2019, and for many migrant families, would not have been legally permissible more than 20 days (as explained below).

The Trump administration effectively implemented that requirement, however, in its 2019 Migrant Protection Protocols⁹⁴ (MPP, better known as “Remain in Mexico”).

By way of background, under MPP (which began in January 2019, but took several months to come into full effect), DHS could return certain aliens who were caught by CBP entering illegally or without proper documentation back to Mexico to await their removal hearings, thus denying them immediate entry into the United States.⁹⁵ The Mexican government agreed to provide those foreign nationals with protection for the duration of their stays.⁹⁶

Some 68,000 migrants who had claimed credible fear were returned to Mexico under MPP⁹⁷, and paroled into the United States for removal hearings. If they were granted asylum, they were admitted, but if they were denied, they weren’t.

Like the detention requirement in section 235(b)(1)(B)(ii) of the INA, MPP ensured that only arriving aliens who had claimed credible fear and received asylum were allowed to live and work in the United States.

⁹¹ *Credible Fear Workload Report, Summary*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (undated), available at: <https://www.uscis.gov/sites/default/files/document/data/CredibleFearWorkloadReport.pdf>.

⁹² *Id.*

⁹³ *Credible Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (undated), available at: https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf.

⁹⁴ *Migrant Protection Protocols*, U.S. DEPT OF HOMELAND SECURITY (Jan. 24, 2019), available at: <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

⁹⁵ Andrew Arthur, *DHS to Admit Aliens in 'Remain in Mexico' Program, and Promises It Will Let in Others Later, Details are sketchy, but you better like frog soup, because it looks like Biden will be 'gigging' the law*, CENTER FOR IMMIGRATION STUDIES (Feb. 16, 2021), available at: <https://cis.org/Arthur/DHS-Admit-Aliens-Remain-Mexico-Program-and-Promises-It-Will-Let-Others-Later#:~:text=The%20Mexican%20government%20agreed%20to,still%20in%20the%20hearing%20process>.

⁹⁶ *Id.*

⁹⁷ Camila DeChalus, *Biden's immigration problem: How to end 'Remain in Mexico', The program is one of many Trump policies that the president-elect has promised to unravel*, ROLL CALL (Dec. 11, 2020), available at: <https://www.rollcall.com/2020/12/11/bidens-immigration-problem-how-to-end-remain-in-mexico/>.

Under MPP, between July and September 2019, the number of credible fear claims USCIS received dropped 59 percent—almost definitely because illegal entrants knew that they would not be released into this country until they had received an asylum grant.⁹⁸

Then-candidate Joe Biden derided MPP⁹⁹, and as president, Biden has ended the program¹⁰⁰ as well as other Trump border initiatives¹⁰¹, but the president could always re-implement it.

Alternatively, Congress could fund sufficient detention space to comply with the non-release requirement in section 235(b)(1)(B)(ii) of the INA. Both detention and MPP deter fraudulent and otherwise worthless asylum claims, while allowing meritorious asylum claims to be granted more quickly.

TVPPRA

The biggest flaw in TVPPRA is that it discriminates between unaccompanied children on the basis of nationality.

Under the TVPPRA, DHS can quickly screen and remove UACs who are nationals of “contiguous countries” (Mexico and Canada) if they have not been trafficked and have no fear of return home.¹⁰²

DHS, however, must place unaccompanied children from all other countries into removal proceedings and send them quickly to HHS, first for placement in a shelter run or contracted by HHS, and ultimately for identification of a “sponsor” with which to place that child in the United States and transfer of the child to the sponsor.¹⁰³

⁹⁸ *Credible Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (undated), available at: https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf.

⁹⁹ *The Biden Plan for Securing Our Values as a Nation of Immigrants* (undated) (“[T]hrough his Migrant Protection Protocol policies, Trump has effectively closed our country to asylum seekers, forcing them instead to choose between waiting in dangerous situations, vulnerable to exploitation by cartels and other bad actors, or taking a risk to try crossing between the ports of entry.”), available at: <https://joebiden.com/immigration/>.

¹⁰⁰ *The MPP Program and Border Security Joint Statement by Assistant to the President and National Security Advisor Jake Sullivan and Assistant to the President and Homeland Security Advisor Dr. Elizabeth Sherwood-Randall*, WHITE HOUSE (Feb. 16, 2021), available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/16/the-mpp-program-and-border-security-joint-statement-by-assistant-to-the-president-and-national-security-advisor-jake-sullivan-and-assistant-to-the-president-and-homeland-security-advisor-and-deputy-na/>.

¹⁰¹ See Rob Law, *Biden’s Executive Actions: President Unilaterally Changes Immigration Policy*, CENTER FOR IMMIGRATION STUDIES (Mar. 15, 2021), available at: <https://cis.org/Report/Bidens-Executive-Actions-President-Unilaterally-Changes-Immigration-Policy>.

¹⁰² Section 235(a)(2) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 (2008), available at: <https://www.congress.gov/bill/110th-congress/house-bill/7311/text?q=%7B%22search%22%3A%5B%22William+Wilberforce+Trafficking+Victims+Protection+Reauthorization+Act+of+2008%22%5D%7D&r=1>.

¹⁰³ Sections 235(a)(3) and (b) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 (2008), available at: <https://www.congress.gov/bill/110th-congress/house-bill/7311/text?q=%7B%22search%22%3A%5B%22William+Wilberforce+Trafficking+Victims+Protection+Reauthorization+Act+of+2008%22%5D%7D&r=1>.

In 2017¹⁰⁴, DHS disclosed that most (about 60 percent) of the sponsors of UACs had been those children’s own parents-- also here illegally-- and the Senate disclosed in April 2019¹⁰⁵ that during one six-month period it had studied, almost 79 percent of all UACs were sent to sponsors who were—again-- here illegally.

As I have previously stated: “If you want to know why 29,010 UACs have been apprehended by Border Patrol in FY 2021, start with the parents who are illegally here.”¹⁰⁶ That number reached 64,642 in April¹⁰⁷, making the underlying point even more valid.

Facing his own surge of unaccompanied alien children, then-President Barack Obama asked Congress in June 2014 to give DHS “additional authority to exercise discretion in processing the return and removal of unaccompanied minor children from non-contiguous countries like Guatemala, Honduras, and El Salvador”¹⁰⁸-- that is, to end the unequal treatment of UACs in sections 235(a)(3) and (b) of TVPRA who aren’t from Canada or Mexico.

Even the *Washington Post* editorial board admitted in August 2014 that TVPRA had “encouraged thousands of Central American children to try to reach the United States by granting them access to immigration courts that Mexican kids don’t enjoy”.¹⁰⁹

Sen. Chuck Grassley (R-Iowa), ranking member on the Senate Judiciary Committee, and his House Judiciary Committee counterpart, Rep. Jim Jordan (R-Ohio), sent a letter¹¹⁰ to President Biden on April 15, 2021, asking him if he agreed with then-President Obama on the need to fix the TVPRA. I am unaware of them having received a response.

Flores and Families

As for migrants arriving in family units, there is also bipartisan agreement¹¹¹ that federal court

¹⁰⁴ Memorandum from John Kelly, Secretary, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies”, U.S. DEPT OF HOMELAND SECURITY (Feb. 20, 2017), available at: https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

¹⁰⁵ See Andrew Arthur, *Most UACs Released to Sponsors Without Status, U.S. government completing the conspiracy to smuggle minors*, CENTER FOR IMMIGRATION STUDIES (Apr. 29, 2019), available at: <https://cis.org/Arthur/Most-UACs-Released-Sponsors-Without-Status>.

¹⁰⁶ Andrew Arthur, *It’s Time to Talk About the Kids — and Prosecuting Their Parents*, CENTER FOR IMMIGRATION STUDIES (Mar. 22, 2021), available at: <https://cis.org/Arthur/Its-Time-Talk-About-Kids-and-Prosecuting-Their-Parents>.

¹⁰⁷ *Southwest Land Border Encounters*, U.S. CUSTOMS AND BORDER PROTECTION (modified May 11, 2021), available at: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

¹⁰⁸ *Letter from the President -- Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border*, WHITE HOUSE (Jun. 30, 2014), available at: <https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle>.

¹⁰⁹ Editorial Board, *The Post’s View, Frustration over stalled immigration action doesn’t mean Obama can act unilaterally*, WASHINGTON POST (Aug. 5, 2014), available at: https://www.washingtonpost.com/opinions/frustration-over-stalled-immigration-action-doesnt-mean-obama-can-act-unilaterally/2014/08/05/9c7bc1c6-1c1c-11e4-ae54-0cfe1f974f8a_story.html.

¹¹⁰ *Letter from Sen. Chuck Grassley and Rep. Jim Jordan to Pres. Joseph R. Biden, Jr.* (Apr. 15, 2021), available at: https://www.judiciary.senate.gov/imo/media/doc/grassley_jordan_to_biden_-_tvptra.pdf.

¹¹¹ See *Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019) (“By far, the major ‘pull factor’ [encouraging adult migrants to enter illegally in family units with children]

decisions in 2015¹¹² and 2016¹¹³ interpreting the 1997 *Flores* settlement agreement¹¹⁴ exacerbate border control by encouraging adult migrants to bring children with them on the dangerous trek to the United States.

That settlement agreement governs the conditions of detention and release of children in immigration custody, and until 2015, it was only applied to unaccompanied children-- not children accompanied by parents or other adults.¹¹⁵

In FY 2014, the Obama administration was faced with a surge of migrant families, as the number of aliens in FMUs apprehended by Border Patrol at the Southwest border increased 360 percent from the year before, to 68,445.¹¹⁶

Under *Flores*, children are supposed to be placed in licensed shelters, but Border Patrol under the Obama administration had apprehended so many families that the administration was placing them in unlicensed facilities (including on at least three military bases), and allegedly refusing to release many of them in order to dissuade other illegal entrants.¹¹⁷

The *Flores* plaintiffs went to the district court judge now overseeing the settlement agreement to stop such detention. In August 2015¹¹⁸, the judge held (over the government's objections) that *Flores* covered the detention and release of accompanied children as well, and ordered that both they and their parents be released within 20 days of apprehension.

The Obama DOJ appealed that decision, and in July 2016¹¹⁹, the Ninth Circuit sustained the 20-

is the current practice of releasing with a NTA most illegal migrants who bring a child with them. The crisis is further exacerbated by a 2017 federal court order in *Flores v. DHS* expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to unaccompanied children (UAC).", available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

¹¹² *Flores v. Lynch*, 212 F. Supp. 3d 907 (U.S.D.C. Cent. Cal. 2015), available at: <https://cite.case.law/f-supp-3d/212/907/>.

¹¹³ *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016), available at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf>.

¹¹⁴ *Flores v. Reno* (CV 85-4544-RJK(Px)) (Stipulated Settlement Agreement) (U.S.D.C. Cent. Dist. Cal. 1997), available at: https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf

¹¹⁵ See *Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019) ("The crisis is further exacerbated by a 2017 federal court order in *Flores v. DHS* expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to unaccompanied children (UAC).", available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf).

¹¹⁶ See Andrew Arthur, *Ninth Circuit Flores Decision Puts Biden in a Fix, The more that come, the more that will come*, Center for Immigration Studies (Jan. 11, 2012), available at: <https://cis.org/Arthur/Ninth-Circuit-Flores-Decision-Puts-Biden-Fix>.

¹¹⁷ *Id.*

¹¹⁸ *Flores v. Lynch*, 212 F. Supp. 3d 907 (U.S.D.C. Cent. Cal. 2015), available at: <https://cite.case.law/f-supp-3d/212/907/>.

¹¹⁹ *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016), available at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf>.

day release requirement for the children, but not the parents and other adults who brought them. To avoid “family separation”, however, the parents have subsequently generally been released, as well.

Seeing a new loophole, smugglers encouraged migrants to bring a child with them when entering the United States illegally, and by FY 2019, the number of aliens in family units apprehended by agents at the Southwest border had mushroomed to 473,682¹²⁰ — an almost 600-percent increase over FY 2014.

Correlation may not always indicate causation, but there is no analysis that I have seen that would suggest that this increase in FMU apprehensions resulted from anything other than the 2015 and 2016 *Flores* decisions, and the virtual guarantee that they provide for adult migrants of quick release into the interior of the United States if they enter illegally with a child.

In fact, a bipartisan federal panel tasked with assessing the care of children and families in CBP custody during an earlier “border emergency” in 2019 basically made the same determination.¹²¹

In its April 2019 Final Emergency Interim Report, that panel found that “[b]y far, the major ‘pull factor’” drawing families to enter illegally was the then-“current practice of releasing ... most illegal migrants who bring a child with them” with just a Notice to Appear or “NTA”, the charging document in removal proceedings, “further exacerbated” by the 20-day release requirement in *Flores*.

Not to disagree in any way with that assessment, but the policy of releasing migrant families with an NTA was largely a direct result of the *Flores* decisions, too.

That’s because ICE, which is responsible for detaining most migrants released from CBP processing, didn’t invest in detention space for FMUs after those *Flores* decisions were issued, knowing the agency had to release families in 20 days, anyway.

That panel reported, in fact, that as of April 2019, ICE had only had enough detention space for about 2,500 migrant family members.¹²²

As noted, most Border Patrol stations and processing facilities were built to accommodate single adults (mostly male, mostly Mexican nationals) for a few hours, not non-Mexican migrant families for days. Because ICE didn’t have space for them either during the border emergency

¹²⁰ *Border Patrol Total Monthly Family Units by Sector FY13-19*, U.S. Border Patrol (undated), available at: https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_1.pdf.

¹²¹ See *Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019) (“By far, the major ‘pull factor’ [encouraging adult migrants to enter illegally in family units with children] is the current practice of releasing with a NTA most illegal migrants who bring a child with them. The crisis is further exacerbated by a 2017 federal court order in *Flores v. DHS* expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to unaccompanied children (UAC).”), available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf

¹²² *Id.*

of 2019, CBP began releasing families after processing with NTAs in lieu of placing them in expedited removal, as that panel found.

That problem has only gotten worse during the current border crisis, as CBP is now releasing migrants *without even giving them an NTA or a removal hearing date*¹²³, because it lacks the space to detain them long enough to process them. Instead, apprehended migrants in FMUs are simply being told to report to the local ICE office at their destinations in the United States.

There is no reason to believe that ICE would even be aware that those aliens are present in the United States unless and until the aliens report to the agency (which many, most or all won't do). That means an untold number of aliens apprehended at the border will be at large in this country, with no effective way to keep track of them.

As a consequence, this *Flores*-created pull factor will only get stronger, encouraging an even greater number of foreign nationals to bring their children with them as they attempt to enter the United States illegally.

That will result in even more suffering for both adult migrants and those children, as described by that bipartisan panel:

*Migrant children are traumatized during their journey to and into the U.S. The journey from Central America through Mexico to remote regions of the U.S. border is a dangerous one for the children involved, as well as for their parent. There are credible reports that female parents of minor children have been raped, that many migrants are robbed, and that they and their child are held hostage and extorted for money.*¹²⁴

Respectfully, migrants are exceptionally bad people, and the horrors described in that report have likely only gotten worse in the interim.

“Got-Aways”

Note, however, that Border Patrol was not able to apprehend all migrants who entered the United States illegally last month. Those aliens who elude Border Patrol apprehension are known as “got aways.”¹²⁵

At a May 13, 2021 hearing on “DHS Actions to Address Unaccompanied Minors at the Southern Border”¹²⁶ with DHS Secretary Alejandro Mayorkas, Sen. Rob Portman revealed that Border

¹²³ Adam Shaw, Migrants being released into US without court dates, as border officials struggle to cope with surge, Fox News (Apr. 1, 2021), available at: <https://www.foxnews.com/politics/migrants-released-without-court-dates-border-surge>.

¹²⁴ *Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019), available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

¹²⁵ Todd Bensman, ‘Got-Aways’ at the Border, Why the mass migration crisis is more severe than official reporting suggests, CENTER FOR IMMIGRATION STUDIES (May 3, 2021), available at: <https://cis.org/Bensman/GotAways-Border>.

Patrol “conservatively estimates that over 40,000 people who crossed illegally got away and were not apprehended in April.”¹²⁷

That’s almost definitely because the ability of Border Patrol to apprehend illegal migrants, and its overall ability to enforce federal law along the border, has plainly been degraded by the sheer volume of migrants with which it is dealing at the Southwest border.

In a March 2019 interview¹²⁸, former Secretary of Homeland Security Jeh Johnson explained that he received daily updates on border apprehensions when he had headed DHS, and viewed fewer than 1,000 apprehensions a day as “a relatively good number, and if it was above 1,000 it was a relatively bad number, and I was gonna be in a bad mood the whole day”.

Looking at then-current statistics under the Trump administration showing 4,000 Border Patrol apprehensions per day, Johnson stated: “I know that a thousand overwhelms the system. I cannot begin to imagine what 4,000 a day looks like, so we are truly in a crisis”.¹²⁹

By way of comparison, Border Patrol apprehended an average of 5,782 migrants who had entered illegally along the Southwest border per day in April.¹³⁰

Those are aliens that agents must apprehend, interview, process, detain, and (in particular in the cases of family units and unaccompanied children) care for. That takes a lot of time, and pulls agents “off of the line”.

Drugs

To complicate matters further, as Sen. Portman explained at that May 13 hearing, smugglers and traffickers send children and family units across to “divert Border Patrol agents” so those smugglers and traffickers can move other migrants, drugs, and contraband into the United States.¹³¹

¹²⁶ Comm. Hearing on DHS Actions to Address Unaccompanied Minors at the Southern Border, S. Comm. on Homeland Security and Governmental Operations (117th Cong. 1st Sess.), *available at*: <https://www.hsgac.senate.gov/hearings/dhs-actions-to-address-unaccompanied-minors-at-the-southern-border>.

¹²⁷ Sen. Portman Exchange with DHS Secretary on Migrants, Senate Hearing on Unaccompanied Minors at U.S.-Mexico Border, C-SPAN (May 13, 2021), *available at*: <https://www.c-span.org/video/?511573-1/senate-hearing-unaccompanied-minors-us-mexico-border>.

¹²⁸ Obama DHS Secretary Jeh Johnson: “We Are Truly In A Crisis” On Southern Border, REALCLEAR POLITICS (Mar. 29, 2019), *available at*: https://www.realclearpolitics.com/video/2019/03/29/obama_dhs_secretary_jeh_johnson_we_are_truly_in_a_crisis_on_southern_border.html.

¹²⁹ *Id.*

¹³⁰ Andrew Arthur, *Border Patrol Apprehensions at the Southwest Border Reach 21-Year Monthly High Paging Jeh Johnson: If 1,000 daily apprehensions ‘overwhelms the system’, what do 5,782 do?*, Center for Immigration Studies (May 12, 2021), *available at*: <https://cis.org/Arthur/Border-Patrol-Apprehensions-Southwest-Border-Reach-21Year-Monthly-High>.

¹³¹ Sen. Portman Exchange with DHS Secretary on Migrants, Senate Hearing on Unaccompanied Minors at U.S.-Mexico Border, C-SPAN (May 13, 2021), *available at*: <https://www.c-span.org/video/?511573-1/senate-hearing-unaccompanied-minors-us-mexico-border>.

Portman explained that, notwithstanding the large amount of drugs that are seized by CBP, “most drugs get through”.

That is a serious concern, because Border Patrol agents have seized an increasing amount of illicit narcotics in FY 2021.

In the first seven months of the fiscal year¹³², agents seized 7,808 pounds of methamphetamine, 12,902 pounds of cocaine, and 671 pounds of fentanyl.

The latter is a drug the Drug Enforcement Administration (DEA) describes¹³³ as “80-100 times stronger than morphine”. Oxford Treatment Center identifies¹³⁴ two milligrams as a lethal dose of fentanyl, meaning that 671 pounds of the drug would be sufficient to kill 152,180,116 people.

In all of FY 2020, Border Patrol seized 20,795 pounds of methamphetamine, 15,360 pounds of cocaine, and 809 pounds of fentanyl.¹³⁵

Projecting forward on an annualized basis, Border Patrol is on track to seize fewer pounds of methamphetamine this fiscal year than last (13,385 pounds projected in FY 2021 based on current trends), but more cocaine (22,118 pounds projected) and about 42 percent more deadly fentanyl (1,150 pounds).

Even that analysis, however, does not tell the full story.

In all of FY 2019, Border Patrol agents apprehended 14,434 pounds of methamphetamine, 11,682 pounds of cocaine, and 226 pounds of fentanyl¹³⁶, meaning that Border Patrol is on track to seize more methamphetamine this fiscal year than in FY 2019, and has already seized more cocaine and almost three times as much fentanyl as it did two fiscal years ago.

Search and Rescues

Border Patrol life-saving efforts are also up this fiscal year. Through April, agents at the Southwest border have performed 5,638 searches and rescues, already eclipsing the totals for all of FY 2020 (5,071) and all of FY 2019 (4,920).¹³⁷

There are many reasons why aliens who have entered illegally fall into distress, but the tens of thousands of aliens who have actively evaded detection and apprehension described by Portman are likely a big part of the reason.

¹³² *Drug Seizure Statistics*, U.S. CUSTOMS AND BORDER SECURITY (modified May 11, 2021), available at: <https://www.cbp.gov/newsroom/stats/drug-seizure-statistics>.

¹³³ *Fentanyl*, U.S. DRUG ENFORCEMENT ADMINISTRATION (undated), available at: <https://www.dea.gov/factsheets/fentanyl>.

¹³⁴ *Fentanyl: What Is a Lethal Dosage?*, OXFORD TREATMENT CENTER (undated), available at: <https://oxfordtreatment.com/substance-abuse/fentanyl/lethal-dose/>.

¹³⁵ *Drug Seizure Statistics*, U.S. CUSTOMS AND BORDER SECURITY (modified May 11, 2021), available at: <https://www.cbp.gov/newsroom/stats/drug-seizure-statistics>

¹³⁶ *Id.*

¹³⁷ *CBP Enforcement Statistics Fiscal Year 2021*, U.S. CUSTOMS AND BORDER PROTECTION (undated), available at: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>.

Those aliens follow more rugged, remote, and rural routes, placing them farther away from help when help is needed. Those are not aliens who are coming to turn themselves over to agents to claim credible fear; they are migrants who do not want to be detected—let alone apprehended—at all.

The increased savagery of the smuggling gangs also plays a big role in the increased number of Border Patrol rescues, as well. The *Wall Street Journal* recently reported on the tactics of one such group, which had placed 65 adults and 152 children on rafts crossing the Rio Grande near Roma Texas.¹³⁸

One of those adults was a Honduran woman who had claimed that she had her leg broken by a smuggler, but who nonetheless paid the smuggler's \$3,500 fee to get on one of those rafts.

Once those migrants and smugglers were on the river, Border Patrol agents and Texas officials appeared on the bank. So the smugglers threw an infant into the waters and capsized the rafts. That required agents and officers to scramble to save the migrants, and allowed the smugglers to escape.

Criminal Aliens

The most recent CBP data¹³⁹ also reveals that Border Patrol apprehensions of aliens with criminal convictions has increased significantly in FY 2021.

In the first seven months of this fiscal year, Border Patrol has “encountered” 5,861 aliens with criminal convictions, more than twice as many as in all of FY 2020 (2,438), and already more than 37 percent more than in all of FY 2019 (4,269).

Projecting forward based on current trends, Border Patrol will apprehend 10,047 aliens with criminal convictions, which would far surpass the totals for FY 2018 (6,698) and FY 2017 (8,531).

Keep in mind that those 5,861 aliens with criminal convictions are in addition to 1,011 aliens with outstanding criminal wants and warrants.¹⁴⁰ The number of aliens apprehended whom federal, state, and local officials are looking for is actually down this fiscal year from FY 2020 (2,054) and FY 2019 (an astounding 4,153).

That said, Border Patrol is on track to apprehend 1,733 aliens with wants and warrants, which would be greater than the total of such apprehensions in FY 2018 (1,550).

Encounters with criminal aliens pose special dangers for agents, because at least some of those aliens have committed violent crimes. For example, on May 18, agents from the El Centro Sector

¹³⁸ Jillian Kay Melchior, *Biden's Border Crisis, Up Close, His policies endanger vulnerable migrants by encouraging them to make perilous illegal crossings*, WALL STREET JOURNAL (Mar. 29, 2021), available at: https://www.wsj.com/articles/bidens-border-crisis-up-close-11617057522?mod=searchresults_pos1&page=1.

¹³⁹ CBP Enforcement Statistics Fiscal Year 2021, U.S. Customs and Border Protection (undated), available at: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>.

¹⁴⁰ *Id.*

intercepted a smuggling event and discovered an illegal alien who was wanted for homicide in Orange County, California.¹⁴¹

Neither he, nor any of the nine other illegal aliens involved wanted to be apprehended, and endangered their own and agents' lives in their escape attempt. As CBP¹⁴² described the event:

The incident occurred at about 3:51 p.m., when agents encountered a navy-blue Chevy Silverado truck near the area of Evan Hewes Road in El Centro. The agents followed the truck westbound toward Plaster City. Agents observed several individuals trying to conceal themselves in the bed of the truck.

Agents attempted to conduct a vehicle stop. The driver of the vehicle drove north onto Juliet Road, an Off-Highway Vehicle road, to attempt to evade agents. The driver was unsuccessful in his attempt and the vehicle got stuck near Superstition Mountain. Once the vehicle came to a stop, all nine individuals exited the bed of the truck and attempted to abscond on foot.

After a brief search of the area, agents apprehended the driver and the nine individuals that fled on foot. Agents determined that all ten individuals were all undocumented and illegally present in the United States. The driver and the nine individuals were placed under arrest and transported to the El Centro Sector's Centralized Processing Center for further processing.

This was not a one-off event. On May 17, agents from the RGV apprehended three migrants affiliated with gangs—a 27-year-old Mexican national male who was a confirmed member of the Paisa gang, a 23-year-old El Salvadoran male who is a member of the 18th Street gang, and a 21-year-old Salvadoran female who is a member of MS-13—all present illegally.¹⁴³

On May 15, agents from the McAllen (Texas) Border Patrol Station apprehended a 28-year-old Salvadoran national who had received a 34-month sentence for Rape of a Child-3 in Washington State; that individual was arrested shortly after entering the United States illegally.¹⁴⁴

Thereafter the same day, agents working in south Mission, Texas, encountered a 49-year-old Salvadoran male who had illegally entered the United States.

At the McAllen Border Patrol Station, agents discovered that he had been arrested by the New York City Police Department for Sexual Contact of a nine-year-old girl in 2014, and was

¹⁴¹ *Wanted Homicide Suspect Arrested in Smuggling Event*, U.S. CUSTOMS AND BORDER PROTECTION (May 18, 2021), available at: <https://www.cbp.gov/newsroom/local-media-release/wanted-homicide-suspect-arrested-smuggling-event>.

¹⁴² *Id.*

¹⁴³ *Rio Grande Valley Border Patrol Agents Arrest Three Gang Members*, U.S. CUSTOMS AND BORDER PROTECTION (May 18, 2021), available at: <https://www.cbp.gov/newsroom/local-media-release/rio-grande-valley-border-patrol-agents-arrest-three-gang-members>.

¹⁴⁴ *South Texas Border Patrol Agents Arrest Two Convicted Sex Offenders*, U.S. CUSTOMS AND BORDER PROTECTION (May 17, 2021), available at: <https://www.cbp.gov/newsroom/local-media-release/south-texas-border-patrol-agents-arrest-two-convicted-sex-offenders>.

subsequently convicted in 2016 for Sexual Abuse 2nd: Sexual Contact with Person Less Than 14 Years Old, for which he was sentenced to a year in jail.¹⁴⁵

CRIMINAL SMUGGLING ORGANIZATIONS

Drug trafficking organizations (DTOs), other transnational criminal organizations (TCOs), and various subsidiary groups are actively involved in illicit cross-border traffic.

With respect to alien smuggling, U.S. Immigration and Customs Enforcement (ICE) has reported: “Moving human beings as cargo pays in the billions of dollars for transnational criminal smuggling organizations.”¹⁴⁶

ICE continues:

*Human smuggling operates as a contract business; an understanding exists among transnational criminal organizations, smugglers and individuals seeking transport that trying to cross the border independently is not an option. Smugglers escort the illegal aliens through the desert, across the border, to stash houses and onto their final destinations within the interior of the U.S. A portion of the smuggling fees paid to the transnational criminal organizations helps fuel their other criminal enterprises.*¹⁴⁷

These DTOs and TCOs have caused tremendous damage in the United States and Mexico, both in terms of human life and societal disruption.

According to the Council on Foreign Relations (CFR): “Mexican drug cartels are leading suppliers of cocaine, heroin, methamphetamine, and other illicit narcotics to the United States.”¹⁴⁸ CFR continues: “The cartels and the drug trade fuel rampant violence in Mexico, contributing to the country’s tens of thousands of homicides every year.”

On this side of the border, Mexican DTOs “pose the greatest crime threat to the United States and have ‘the greatest drug trafficking influence’”.¹⁴⁹

The latest federal government statistics¹⁵⁰ reveal that the number of deaths involving “synthetic opioids other than methadone (primarily fentanyl) continued to rise with more than 36,359 overdose deaths reported in 2019”; that “overdose deaths involving heroin rose from 1,960 in 1999 to 15,469 in 2016”; and that “overdose deaths involving cocaine rose from 3,822 in 1999 to 15,883 in 2019”.

¹⁴⁵ *Id.*

¹⁴⁶ *Human smuggling equals grave danger, big money*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (updated Nov. 9, 2020), available at: <https://www.ice.gov/features/human-smuggling-danger>.

¹⁴⁷ *Id.*

¹⁴⁸ Backgrounder, Mexico’s Long War: Drugs, Crime, and the Cartels, Council on Foreign Relations (updated Feb. 26, 2021), available at: <https://www.cfr.org/backgrounder/mexicos-long-war-drugs-crime-and-cartels>.

¹⁴⁹ June S. Beittel, Mexico: Organized Crime and Drug Trafficking Organizations (R41576), Cong. Research Serv. (updated July 28, 2020), available at: <https://fas.org/sgp/crs/row/R41576.pdf>.

¹⁵⁰ *Overdose Death Rates*, NATIONAL INSTITUTE ON DRUG ABUSE (Jan. 29, 2021), available at: <https://www.drugabuse.gov/drug-topics/trends-statistics/overdose-death-rates>.

Overdose deaths from “psychostimulants with abuse potential (primarily methamphetamine)” have “also continued to increase”.¹⁵¹

Those deaths are on top of the deleterious effects of illegal narcotics on lives, careers, families, and communities.

CRS¹⁵² has identified nine major DTOs in Mexico, “often referred to as TCOs due to their diversification”: the Tijuana/Arellano Félix Organization (AFO); Sinaloa DTO; Juárez/Carrillo Fuentes Organization; Gulf DTO; Los Zetas; Beltrán Leyva Organization (BLO); La Familia Michoacana (LFM); Knights Templar; and *Cártel Jalisco Nuevo Generación* (CJNG).

AFO, based in Tijuana, Baja California, is described as “a regional ‘tollgate’ organization that has historically controlled the drug smuggling route between Baja California (Mexico) to southern California”.

The Juárez/Carrillo Fuentes Organization has its base of operations in the border city of Ciudad Juárez, in the Mexican state of Chihuahua.

The Gulf DTO operates out of the border city of Matamoros, Tamaulipas, and has operations in other Mexican states on the gulf side of Mexico.

Los Zetas has declined in recent years, and split into factions, but according to the 2020 National Drug Threat Assessment (NDTA), the group and its “most prominent faction, *Cartel del Noreste*, have a presence in northeastern Mexico”.¹⁵³

The NDTA explains: “From there, members smuggle the majority of their illicit drugs through the [Southwest Border] in the areas of Laredo, Texas; Eagle Pass, Texas; and the Mexican states of Coahuila, Nuevo Leon, and parts of Tamaulipas”.

BLO is another organization that is on the decline, but according to the NDTA, the group continues to function, relying on “loose alliances with larger cartels for access to drug smuggling corridors along the” Southwest border.¹⁵⁴

LFM is also now fragmented, though its cells “are still active in trafficking, kidnapping, and extortion in” the central Mexico states of Guerrero and Mexico.¹⁵⁵

The Knights Templar are one of the groups that split off from LFM, although it, too, has fallen on hard times.¹⁵⁶

¹⁵¹ *Id.*

¹⁵² June S. Beittel, Mexico: Organized Crime and Drug Trafficking Organizations (R41576), Cong. Research Serv. (updated July 28, 2020), available at: <https://fas.org/sgp/crs/row/R41576.pdf>.

¹⁵³ 2020 National Drug Threat Assessment (NDTA), Drug Enforcement Administration (Mar. 2021), available at: https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf.

¹⁵⁴ *Id.*

¹⁵⁵ June S. Beittel, Mexico: Organized Crime and Drug Trafficking Organizations (R41576), Cong. Research Serv. (updated July 28, 2020), available at: <https://fas.org/sgp/crs/row/R41576.pdf>.

¹⁵⁶ *See id.*

CJNG, on the other hand, “is one of the fastest growing cartels”.¹⁵⁷ The group is run out of Jalisco state, and operates in central Mexico, including the states of Colima, Michoacán, México State, Guerrero and Guanajuato.¹⁵⁸

The NDTA reports that CJNG smuggles drugs into the United States over the Southwest border through the border cities of Tijuana, Juarez, and Nuevo Laredo.¹⁵⁹

Sinaloa, “one of the oldest and most established TCOs in Mexico”¹⁶⁰, has what’s termed a “significant presence” in 15 of the 32 Mexican states.¹⁶¹ It exports and distributes fentanyl, heroin, methamphetamine, cocaine, and marijuana into the United States through crossing points at the Southwest border.¹⁶²

Sinaloa and remnants of other groups have influence along the border in central Mexico to the Pacific Ocean, while CJNG and remnants have influence in spots along the border adjacent to parts of west Texas, New Mexico, Arizona, and California. The remnants of the Gulf cartel and Los Zetas have influence along the border in Mexico adjacent to east Texas, where it vies in places for control with CJNG.¹⁶³

Drugs are not the groups’ sole source of revenue. Migrants passing through TCOs’ self-described “territories” must pay a “tax”, known as a “*piso*”, to the groups, both in the interior of Mexico and at the border.¹⁶⁴

RAND reports:

*According to U.S. government sources, it is all but impossible for migrants to cross some sections of the border, particularly those most tightly controlled by the drug traffickers, without paying the piso. Collecting the piso requires fairly extensive regulation of migrants passing through a drug-trafficking organization’s territory, pointing to coordination between human smugglers and drug traffickers before a migrant reaches the U.S.-Mexico border.*¹⁶⁵

¹⁵⁷ 2020 National Drug Threat Assessment (NDTA), Drug Enforcement Administration (Mar. 2021), available at: https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf.

¹⁵⁸ June S. Beittel, Mexico: Organized Crime and Drug Trafficking Organizations (R41576), Cong. Research Serv. (updated July 28, 2020), available at: <https://fas.org/sgp/crs/row/R41576.pdf>.

¹⁵⁹ 2020 National Drug Threat Assessment (NDTA), Drug Enforcement Administration (Mar. 2021), available at: https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ June S. Beittel, Mexico: Organized Crime and Drug Trafficking Organizations (R41576), Cong. Research Serv. (updated July 28, 2020), available at: <https://fas.org/sgp/crs/row/R41576.pdf>.

¹⁶⁴ Victoria A. Greenfield, Blas Nunez-Nieto, Ian Mitch, Joseph C. Chang, and Etienne Rosas, *Human Smuggling and Associated Revenues, What Do or Can We Know About Routes from Central America to the United States?*, RAND CORP. (2019), available at: https://www.rand.org/content/dam/rand/pubs/research_reports/RR2800/RR2852/RAND_RR2852.pdf.

¹⁶⁵ *Id.*

My colleague, Todd Bensman, detailed such coordination between the cartels and smugglers recently, and also described the extent that even those criminal organizations are now struggling to keep track of the number of migrants entering illegally.¹⁶⁶

He explained that:

A mass-migration surge along the U.S. southern border has so overwhelmed Mexican cartel-associated smugglers that they are requiring their customers to wear numbered, colored, and labeled wristbands to denote payment and help them manage their swelling human inventory.¹⁶⁷

Bensman reported:

A CBP official confirmed to CIS that Border Patrol agents have been finding the discarded wristbands for nearly two months, coinciding with a migrant surge spawned by President Joe Biden's promises to open the border to all illegal immigrants once he took office.¹⁶⁸

Those wristbands are color-coded and include labeling. For example, a red one with a turtle on it “connotes a smuggling group affiliated with the Gulf Cartel”, according to Jaeson Jones, a retired captain from the Texas Department of Public Safety quoted by Bensman, who specialized for years in combatting Mexican cartels.¹⁶⁹

Why have these criminal organization moved to an identification system more commonly associated with all-inclusive resorts, bars, and rock concerts? According to Bensman:

Not all migrants can afford the steep smuggling fee, which Jones said currently is \$2,500 for a migrant from Mexico. The cartel smuggling groups are charging \$3,000 for migrants from Venezuela, Peru, Ecuador, and Honduras. Chinese migrants pay \$5,000. Russians and Arabs pay top dollar at \$9,000, Jones said his sources inside the organizations told him.

Many end up agreeing to pay off the debt later.

"If they don't pay their debt then the cartel has the information about where they're going, but more importantly, they have the information on their families in home countries," Jones said. "From there, they can start the threats and hold them accountable through debt bondage, a form of human trafficking. Either pay or we're going to come after your family."

¹⁶⁶ Todd Bensman, Overwhelmed Mexican Alien-Smuggling Cartels Use Wristband System to Bring Order to Business, 'It's the sort you'd get at a water park.', Center for Immigration Studies (Mar. 2, 2021), available at: <https://cis.org/Bensman/Overwhelmed-Mexican-AlienSmuggling-Cartels-Use-Wristband-System-Bring-Order-Business>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

As if that all weren't bad enough, according to RAND, "there are some reports that drug-trafficking TCOs coordinate unlawful migrants' border crossing to divert attention from other illicit activities"¹⁷⁰-- consistent with Sen. Portman's assertions at the May 13 hearing¹⁷¹-- and also that TCOs "may recruit or coerce some migrants into carrying drugs for them".¹⁷²

These are dangerous criminal syndicates, and keeping them—and the drugs that they traffic—out of the United States is a key Border Patrol responsibility. As noted above, however, the sheer volume of migrants entering the United States has degraded the office's ability to do this crucial job.

CARRIZO CANE ERADICATION

Not all of the challenges that Border Patrol faces in performing its duties are the work of man, however. Along the Rio Grande River in the RGV and in the populated sections of Del Rio, Texas, I saw the impact of invasive carrizo cane on the agency's ability to prevent cross-border incursions.

As the Texas State the Soil & Water Conservation Board (S&WCB) website¹⁷³ describes the problem:

Large dense stands of non-native carrizo cane (Arundo donax) now occupy the banks and floodplains of the Rio Grande, thwarting law enforcement efforts along the international border, impeding and concealing the detection of criminal activity, restricting law enforcement officers' access to riverbanks, and impairing the ecological function and biodiversity of the Rio Grande.

Arundo is an exceptionally fast growing plant, able to grow about 4 inches per day and reach a mature height of over 25 feet in about 12 months. These stands of invasive riparian weeds present considerable obstacles for the protection of the international border by law enforcement and agricultural inspectors, by both significantly reducing visibility within enforcement areas and by providing favorable habitat for agriculturally-damaging cattle ticks.

Carrizo cane is considered one of the greatest threats to the health of riparian ecosystems in the southwestern United States, with great negative impact to

¹⁷⁰ Victoria A. Greenfield, Blas Nunez-Nieto, Ian Mitch, Joseph C. Chang, and Etienne Rosas, *Human Smuggling and Associated Revenues, What Do or Can We Know About Routes from Central America to the United States?*, RAND CORP. (2019), available at:

https://www.rand.org/content/dam/rand/pubs/research_reports/RR2800/RR2852/RAND_RR2852.pdf.

¹⁷¹ *Sen. Portman Exchange with DHS Secretary on Migrants, Senate Hearing on Unaccompanied Minors at U.S.-Mexico Border*, C-SPAN (May 13, 2021), available at: <https://www.c-span.org/video/?511573-1/senate-hearing-unaccompanied-minors-us-mexico-border>.

¹⁷² Victoria A. Greenfield, Blas Nunez-Nieto, Ian Mitch, Joseph C. Chang, and Etienne Rosas, *Human Smuggling and Associated Revenues, What Do or Can We Know About Routes from Central America to the United States?*, RAND CORP. (2019), available at:

https://www.rand.org/content/dam/rand/pubs/research_reports/RR2800/RR2852/RAND_RR2852.pdf.

¹⁷³ *Rio Grande Carrizo Cane Eradication Program*, TEXAS STATE THE SOIL & WATER CONSERVATION BOARD (undated), available at: <https://www.tsswcb.texas.gov/programs/rio-grande-carrizo-cane-eradication-program>.

biodiversity and ecological processes. Arundo does not provide any food sources or nesting habitats for native wildlife. Carrizo cane is linked to sediment accumulation, channel constriction, and increased flooding frequency threatening the riparian ecosystem of the Rio Grande.

Carrizo cane is a noxious brush species that consumes precious water resources to a degree that is detrimental to water conservation. As a result of this weed's high evapotranspiration capacity, infestations threaten water supplies for agriculture and municipal drinking water uses in south Texas.

Because of the thickness of the cane, and its height, those crossing the border illegally along the river are able to quickly enter stands of the plant and remain or proceed undetected. During my August 2017 trip to the border, I saw numerous paths through the cane that had been worn by illegal entrants, a number of which were marked by the presence of deflated rafts that crossers had used to ford the river.

While Texas law¹⁷⁴ requires SWCB to “develop and implement a program to eradicate Carrizo cane along the Rio Grande River,” the *Texas Tribune* reported in 2016:

[F]earing that herbicides used for the project will pollute the river, the primary water source for several border communities, an environmental group is planning a full-fledged effort to halt the plan and is recruiting local governments to join its side.¹⁷⁵

The results of that effort are not clear. That said, H.R. 1707, the “Border Visibility and Security Act”¹⁷⁶, a bipartisan bill introduced by Rep. Chip Roy (R-Tex.), would direct DHS to “take such actions as may be necessary, including through cooperation with appropriate Federal and State agencies, to permanently eradicate the cane, or *Arundo donax*, that grows along the Rio Grande river.”

Cosponsor Rep. Henry Cuellar (D-Tex.) explained¹⁷⁷: “Large dense strands of invasive carrizo cane and poorly maintained infrastructure, such as inadequate roads and lighting, interfere with law enforcement activities that protect our border and ensure the safety and health of Americans”

Eradicating this invasive plant would significantly facilitate control of the border in the areas where it proliferates, according to both federal and state law-enforcement officials to whom I

¹⁷⁴ TEX. AGRIC. CODE § 201.0225 (2020), available at: <https://codes.findlaw.com/tx/agriculture-code/agric-sect-201-0225.html>.

¹⁷⁵ Julian Aguilar, *New Effort to Wipe Out Carrizo Cane Reignites Environmental Debate*, *Texas Tribune* (Apr. 5, 2016), available at: <https://www.texastribune.org/2016/04/05/new-carrizo-eradication-effort-reignites-old-debat/>.

¹⁷⁶ H.R. 1707 (117th Cong. 2021), available at: <https://www.congress.gov/bill/117th-congress/house-bill/1707/text?q=%7B%22search%22%3A%5B%22HR+1707%22%5D%7D&r=1&s=1>.

¹⁷⁷ *Press Release: Rep. Chip Roy Reintroduces bipartisan border security legislation to assist federal law enforcement* (Mar. 9, 2021), available at: <https://roy.house.gov/media/press-releases/rep-chip-roy-reintroduces-border-visibility-and-security-act>.

have spoken. That plant also presents an officer-safety issue, as it conceals the presence of often-dangerous (and armed) smugglers and traffickers.

BORDER SECURITY ON FEDERAL LANDS

The interplay between the Border Patrol and other federal agencies (and in particular, those with primarily environmental missions) is a significant issue because there are large numbers of federal lands within close proximity of the Southwest border that are managed by those other agencies.¹⁷⁸

CRS, for example, has explained:

Precise estimates of the acreage [within 50 and 100 miles from the U.S.-Mexican border] are not readily available because the agencies do not distinguish their lands by distance from the border. One estimate provided by the agencies to the House Committee on Natural Resources reported that within 100 miles of the border, there were about 26.7 million acres of federal lands. Nearly half of this land (12.3 million acres) was managed by [the Bureau of Land Management (BLM)], and the other federal lands were managed by [the Department of Defense (DOD)] (5.8 million acres), [Forest Service (FS)] (3.8 million acres), [National Park Service (NPS)] (2.4 million acres), [Fish and Wildlife Service (FWS)] (2.2 million acres), and other federal agencies (0.2 million acres).¹⁷⁹

As CRS notes, while Border Patrol “is the lead agency for border security between ports of entry,” at least 40 percent “of the southwestern border abuts federal and tribal lands overseen by the FS and four [Department of the Interior (DOI)] agencies (including the Bureau of Indian Affairs) that also have law enforcement responsibilities.”¹⁸⁰

It admits: “Differences in missions and jurisdictional complexity among these agencies have been identified as potentially hindering border control.”¹⁸¹

CRS reported:

To facilitate control efforts, the three departments—DHS, the Department of Agriculture (for the FS), and DOI—signed memoranda of understanding (MOUs) on border security. These MOUs govern information sharing, budgeting, and operational planning; [Border Patrol] access to federal lands; and interoperable radio communications, among other topics.¹⁸²

¹⁷⁸ See Carol Hardy Vincent, Laura A. Hanson, and Carla N. Argueta, *Federal Land Ownership: Overview and Data (R42346)*, CONG. RESEARCH SERV. (Mar. 3, 2017)(footnote omitted), available at: <https://fas.org/sgp/crs/misc/R42346.pdf>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

The tension among these agencies in executing their individual missions on federal lands was the subject of an October 2010 report¹⁸³ issued by the Government Accountability Office (GAO). In that report, GAO explained:

When operating on federal lands, Border Patrol has responsibilities under several federal land management laws, including the National Environmental Policy Act [NEPA], National Historic Preservation Act, Wilderness Act, and Endangered Species Act. Border Patrol must obtain permission or a permit from federal land management agencies before its agents can maintain roads and install surveillance equipment on these lands. Because land management agencies are also responsible for ensuring compliance with land management laws, Border Patrol generally coordinates its responsibilities under these laws with land management agencies through national and local interagency agreements. The most comprehensive agreement is a 2006 memorandum of understanding intended to guide Border Patrol activities on federal lands.

GAO found¹⁸⁴, however:

Border Patrol's access to portions of some federal lands along the southwestern border has been limited because of certain land management laws, according to patrol agents-in-charge for 17 of the 26 stations, resulting in delays and restrictions in agents' patrolling and monitoring these lands. Specifically, patrol agents-in-charge for 14 of the 17 stations reported that they have been unable to obtain a permit or permission to access certain areas in a timely manner because of how long it takes for land managers to conduct required environmental and historic property assessments. The 2006 memorandum of understanding [2006 MOU] directs the agencies to cooperate with one another to complete, in an expedited manner, all compliance required by applicable federal laws, but such cooperation has not always occurred. For example, Border Patrol requested permission to move surveillance equipment to an area, but by the time the land manager conducted a historic property assessment and granted permission--more than 4 months after the initial request--illegal traffic had shifted to other areas. Despite the access delays and restrictions, 22 of the 26 agents-in-charge reported that the overall security status of their jurisdiction is not affected by land management laws.

As an aside, I would note that “overall security status” is a weak benchmark by which to measure the effect of such “access delays and restrictions,” given that it encompasses all operations at the Border Patrol facility in question, and not individual operations. That said, the fact that these “access delays and restrictions” affected the overall security status at four facilities is significant, and any delays affect Border Patrol’s operations, as is apparent from the cite above.

¹⁸³ SOUTHWEST BORDER: More Timely Border Patrol Access and Training Could Improve Security Operations and Natural Resource Protection on Federal Lands (GAO-11-38), GOV'T ACCOUNTABILITY OFFICE (Oct. 19, 2010), available at: <https://www.gao.gov/products/GAO-11-38>.

¹⁸⁴ *Id.*

The 2006 MOU¹⁸⁵ is problematic in a number of ways, but the most fundamental issue with that MOU is that it fails to recognize the exigencies of Border Patrol operations, and in essence requires Border Patrol to seek DOI and/or USDA permission before undertaking its most critical missions. Simply put, it is a September 10th document for a post-September 11th world, and one that fails to recognize, comprehend, or appreciate the sophistication and agility of the criminal entities (and in particular DTOs and TCOs) operating along the Southwest border.

Take for example paragraph IV.A.5 in that MOU.¹⁸⁶ It states:

*The Parties will cooperate with each other to identify methods, routes, and locations for CBP-[Border Patrol (BP)] operations that will minimize impacts to natural, cultural, and wilderness resources resulting from CBP-BP operations while facilitating needed CBP-BP access . . .*¹⁸⁷

By definition, such “cooperation” gives DOI and USDA significant say in how Border Patrol executes its mission. As a practical matter, however, it gives those departments, which do not otherwise have a significant national-security mission, veritable veto power over at least some of the “methods, routes, and locations” of the operations of the law-enforcement component of the United States government with expertise in border security: the Border Patrol.

No one disputes the fact that “impacts to natural, cultural, and wilderness resources” should be minimized to the greatest extent possible. What the 2006 MOU does, however, is to put the “environmental cart” in front of the “national-security horse.”

Congress should reassess the respective roles of the Border Patrol and each of the land management agencies, to ensure that critical law-enforcement activities are not impeded in any way. Given the sophistication and funding of the entities with which it must contend, Border Patrol must be able to act swiftly, without restrictions, to respond to any criminal or national security threat that it faces. Any delay will allow those criminal organizations to exploit critical vulnerabilities along the border, a fact that can have significant safety implications for the United States, as shown above.

ENVIRONMENTAL DAMAGE CAUSED BY CROSS-BORDER INCURSIONS

The large number of cross-border traffickers who have attempted to enter the United States illegally have caused harm to our most vulnerable, and culturally and environmentally valuable, federal lands.

Janice L. Kephart, a former National Security Fellow at the Center for Immigration Studies, described some of these issues in a March 2011 post for the Center.¹⁸⁸ To assess the

¹⁸⁵ Memorandum of Understanding Among U. S. Department of Homeland Security and U. S. Department of the Interior and U. S. Department of Agriculture Regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States' Borders (Mar. 2006), available at:

<https://cis.org/sites/cis.org/files/articles/2010/mou.pdf>. If

¹⁸⁶ *Id.*, at 4.

¹⁸⁷ *Id.* If

environmental impact of illegal immigration on federal lands, Ms. Kephart filed a Freedom of Information Act (FOIA) seeking documentation related to this issue.¹⁸⁹

As she described the results:

Some of the material I received from the request included internal memos discussing the problem within the Department of Interior, as well as PowerPoint presentations created by Park Service personnel from the Tohono O'odham Indian Reservation, Organ Pipe National Monument, and Buenos Aires Wildlife Refuge showing that nearly all national park destruction on these central Arizona border areas was due to illegal alien traffic. The threat from illegal activity is so bad, in fact, that for years the Park Service has completely closed these parks due to the "unacceptable level of risk to the public and staff" from the "high level of illegal activity going on" in these parks.¹⁹⁰

In June 15, 2006 testimony¹⁹¹ before the House Committee on Appropriations, Subcommittee on Interior, Environment and Related Agencies, Tina Terrell, then-Forest Supervisor of the Cleveland National Forest, described the impacts of illegal crossers on that forest:

The Cleveland National Forest in California continues to experience cross-border violators creating unwanted trails and leaving large numbers of abandoned campfires and large amounts of trash on the Forest as they travel through the area. . . . Since 1997, the Cleveland National Forest has staffed a border fire prevention and resource protection crew to remedy impacts created by cross-border violators. Their primary job is to find and extinguish illegal campfires before they expand and become wildfires. Each year these fire prevention efforts have helped reduce resource damage and wildfire costs. Despite these efforts, in 2005, over 370 acres of the National Forest burned due to illegal campfires and over 4 tons of trash was removed from the National Forest, much of which can be attributed to illegal immigration.

She testified, however, that the effects of illegal border traffic on Coronado National Forest had been much greater than on Cleveland National Forest. She noted that:

The natural and cultural resources on the Coronado have regional, national and international importance. There are 12 separate and uniquely distinct mountain ranges, eight designated wilderness areas, containing approximately 203

¹⁸⁸ Janice Kephart, *My Great-Grandfather, President Obama, and Preserving Our Federal Lands*, CENTER FOR IMMIGRATION STUDIES (Mar. 3, 2011), available at: <https://www.cis.org/Kephart/My-GreatGrandfather-President-Obama-and-Preserving-Our-Federal-Lands>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Effects of Illegal Border Activities on the Federal Land Management Agencies Before the H. Comm. on Appropriations, Subcomm. on Interior, Environment and Related Agencies*, 109th Cong. (2006) (statement of Tina Terrell, Forest Supervisor of the Cleveland National Forest, U.S. Dep't of Agriculture, Forest Service), available at: <https://www.doi.gov/ocl/illegal-immigration>.

threatened, endangered, or sensitive species. These resources are suffering significant adverse impacts due to illegal border traffic.

With respect to impacts to natural resources from such traffic in that forest, she asserted:

Activities by cross-border violators sometimes adversely affect the natural resources we protect and manage, and interfere with authorized management activities and uses. Repeated damage to a livestock enclosure fence next to the border established to protect an endangered fish species, the Sonoran Chub, has been so extensive that the enclosure fence has had to be completely rebuilt several times and has often been rendered ineffective in restricting livestock use. This fence damage has allowed the destruction of endangered species habitat to continue and has resulted in very expensive, unplanned repairs.

Literally hundreds of miles of unauthorized trails and roads have been created on the Forest by illegal foot and vehicle traffic. This proliferation of trails and roads damages and destroys cactus and other sensitive vegetation; disrupts or prohibits revegetation; disturbs wildlife, their security and travel routes; causes soil compaction and erosion; impacts stream bank stability; and puts the public at risk by creating confusion as to which routes are lawful and safe.

Perhaps one of the most well[-]known of the impacts of illegal immigration is the litter left behind, which we note, tends to accumulate in higher amounts than found in other urban National Forests. Additionally, cleaning up the litter is difficult due to the lack of facilities and remoteness of the border areas. The presence of trash also detracts from scenic qualities and from the visitors' experience. Water sources near this contamination are often so fouled by pollution that wildlife can no longer use them. Where trash is left behind in designated wilderness or other areas far from roads, expensive and difficult removal by the use of horses or mules is required. Adding to the fire risk and agency expense are the hundreds of vehicles, most stolen, abandoned by smugglers and other cross-border violators or seized during law enforcement operations.

Similarly, in July 2009, *Fox News* reported¹⁹² on a 2007 internal federal government memo that detailed the effect of illegal alien crossings on DOI activities at National Parks in the Southwest:

According to the memo, which was obtained by FOXNews.com, the Department of Interior warns that refuge officers are spending 100 percent of their time at Cabeza Prieta National Wildlife preserve and between 90 to 95 percent of their time in Buenos Aires National Wildlife Refuge and Leslie Canyon dealing with

¹⁹² Stephen Clark, *Memo Reveals Refuge Officers' Struggle to Secure Lands Along Southwest Border*, FOX NEWS (July 9, 2010), available at: <http://www.foxnews.com/politics/2010/07/09/federal-park-rangers-struggle-secure-public-land-southwest-border.html>. That

border-related activities. It also notes that the Cabeza Prieta preserve is spending 60 to 70 percent of its budget on border-related activities.

This includes everything from apprehending illegal immigrants until Border Patrol can arrive, to cleaning up the mountains of trash -- about 500 tons a year - - that they leave behind. More than 1,300 miles of illegal trails had been created on the refuge by illegal border-crossers, the memo says.

Nor are such impacts a thing of the past. The Arizona Department of Environmental Quality (ADEQ) manages the “Arizona Border Trash” website.¹⁹³ It defines “border trash” as:

[I]tems discarded by persons involved in illegal immigration such as plastic containers, clothing, backpacks, foodstuffs, vehicles, bicycles and paper. It can also consist of human waste and sometimes medical products.¹⁹⁴

That website explains¹⁹⁵:

The collection and disposal of waste in remote areas along Arizona's 370-mile border with Mexico poses difficult challenges. The environmental impact caused by illegal border crossings, and the trash left behind, is increasingly being found in areas that are more fragile and remote. A variety of federal and state government entities, Native American tribes and private landowners are affected by the problem; addressing it requires extensive coordination.

The Arizona Border Trash website was created to assist stakeholders with facilitating and tracking border trash cleanups. From 2007 to 2018, stakeholder groups documented cleanup of 460,000 pounds (230 tons) on the Border Trash website.

Arizona Border Trash notes¹⁹⁶ that border trash “has been shown to affect human health, the environment and economic wellbeing.” Included among the specific impacts listed¹⁹⁷ are: “[s]trewn trash and piles;” “[i]llegal trails and paths;” “[e]rosion and watershed degradation;” “[d]amaged infrastructure and property;” “[l]oss of vegetation and wildlife;” and “[c]ampfires and escaped fires.”

My former colleague, Matt Sussis, reported in September 2018 that ADEQ had estimated “each border-crosser leaves an average of six to eight pounds of trash behind.”¹⁹⁸

¹⁹³ *Arizona Border Trash*, ARIZ. DEPT OF ENVIRONMENTAL QUALITY (undated), available at:

<https://www.azbordertrash.gov/about.html>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Arizona Border Trash: About*, DEP’T OF ENVIRONMENTAL QUALITY (undated), available at:

<https://www.azbordertrash.gov/about.html>.

¹⁹⁷ *Id.*

¹⁹⁸ Matthew Sussis, *Trash at the Border Highlights the Environmental Cost of Illegal Immigration*, Center for Immigration Studies (Sept. 19, 2018), available at: <https://cis.org/Sussis/Trash-Border-Highlights-Environmental-Cost-Illegal-Immigration>,

Disposing of that trash is costly for the communities affected: “Landfill fees range from \$37 to \$49 per ton in Southern Arizona. These fees do not include costs for materials, equipment, labor and transportation for the collection and transfer of the trash to the landfill.”¹⁹⁹

Similar points are made in the Southern Arizona Project 2016 Border Report from BLM.²⁰⁰ That report states:

While smuggling has been a long term concern along on the border, by the late 1990s, illegal transnational activity was prompting safety concerns for public land users in Arizona, as well as causing adverse effects on the health of public lands themselves. Initially, most impacts were concentrated near major ports of entry such as Yuma and Nogales. However, as port enforcement increased, smugglers moved to more remote, isolated areas, including BLM-managed public lands.

As law enforcement patrols increased in these more remote areas, smugglers began traveling off-road in order to evade detection. These travelers leave more than tracks. The traffic creates new, ad-hoc roads and trails, damages native vegetation and disturbs wildlife. Drug and human smuggling also generates tons of garbage, including discarded personal items, bicycles, tires and abandoned vehicles. Millions of pounds of trash and waste along with damaged roads, structures, and fences have impacted Wilderness areas, riparian habitat, and other back-country natural resources.²⁰¹

The danger to the environment from these activities is clear from that report:

The Sonoran Desert boasts the highest biological variety of any North American desert. These two National Monuments exemplify this tremendous diversity. The striking vegetation protected by these monuments - saguaro cacti, palo verde, ironwood and mesquite trees, wildflowers - shape the iconic images of the American Southwest. The Monuments also protect a record of human habitation dating back more than 10,000 years. These delicate sites are easily disturbed by off-road travel.

Border-related impacts are also felt on other significant public lands near the international border such as the San Pedro Riparian National Conservation Area and Las Cienegas National Conservation Area. Both areas contain intact examples of river and stream habitats that are rare in the Southwest. These riparian areas can also serve as expedient routes for illegal activity.²⁰²

¹⁹⁹ Arizona Border Trash: About, DEP’T OF ENVIRONMENTAL QUALITY (undated), available at: <https://www.azbordertrash.gov/about.html>.

²⁰⁰ Southern Arizona Project 2016 Border Report, U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MANAGEMENT (undated), available at: <https://www.blm.gov/sites/blm.gov/files/documents/files/SAP%202016%20%28508%20Final%29.pdf>.

²⁰¹ *Id.*

²⁰² *Id.*

Cutting the rate of illicit cross-border traffic is critical to protecting these endangered artifacts and environmental treasures. Facilitating the law-enforcement activities of the Border Patrol will deter this flow of traffic, and ensure that these federal lands are maintained in their natural state. Any law or regulation that impedes the Border Patrol's work, but no matter how well-meaning, will thus adversely affect the environment in both the short and long run.

DANGERS TO NATIONAL PARK SERVICE EMPLOYEES

Not all of the dangers posed by cross-border incursions involve the environment, however. I would be remiss if I were not to mention at this point the sacrifice of Park Ranger Kris Eggle. As the National Park Service describes²⁰³ his life:

Kristopher William Eggle was a Law Enforcement Park Ranger from Cadillac, Michigan. He was an Eagle Scout, a National Honor Society Student, and valedictorian of his graduating class at Cadillac High School in 1991. After high school, he attended University of Michigan and earned a degree in wildlife biology. Kris approached his entire life with a kind of contagious enthusiasm that could only inspire everyone who knew him. He constantly gave of himself without ever asking for anything in return.

* * * *

In the wake of 9/11, Kris protected his country by intercepting thousands of pounds of illegal drugs, and guarding a 30-mile stretch of the nation's southern boundary.

Kris Eggle was shot and killed in the line of duty at Organ Pipe Cactus National Monument, on August 9, 2002 while pursuing members of a drug cartel who fled into the United States after committing a string of murders in Mexico.

He was 28 years old.

The dangers facing Park Rangers generally was highlighted by a January 2012 article²⁰⁴ in the *Seattle Times*, captioned "Park rangers' jobs increasingly dangerous."

While that article discussed the risks faced by Park Rangers nationwide, it specifically quoted²⁰⁵ then-NPS chief spokesman David Barna, who stated: "In California and along the border between us and Mexico, we still fight drug cartels growing marijuana. . . ." It also noted²⁰⁶: "The job, like many in federal law enforcement, has become more complex in recent years. With 22 parks along international borders, there are more homeland-security issues."

²⁰³ *Kris Eggle*, U.S. NAT'L PARK SERVICE (updated May 24, 2016), available at:

<https://www.nps.gov/orpi/learn/historyculture/kris.htm>.

²⁰⁴ Craig Welch, *Park rangers' jobs increasingly dangerous*, *Seattle Times* (Jan. 2, 2012), available at:

<https://www.seattletimes.com/seattle-news/park-rangers-jobs-increasingly-dangerous/>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

The dangers that Park Rangers and the public face from cross-border criminals must be recognized, and eliminated.

THE ROLE OF BORDER PATROL ENFORCEMENT IN PROTECTING THE ENVIRONMENT AND LAND-MANAGEMENT AGENCY EMPLOYEES

It is plain from the foregoing that stemming the flow of illegal border crossings serves to protect the environment, prevent the adverse ecological impacts of cross-border traffic, and safeguard land-management agency employees.

The work of the Border Patrol is key to protecting the environment, as the testimony²⁰⁷ of Jon Andrew, the Interagency Borderlands Coordinator for DOI before a subcommittee of this committee in April 2016 made clear:

The deployment of CBP personnel, equipment and infrastructure along the southwest border has led to significant improvements in border security. These improvements have both enhanced the security of our nation, and lead to overall healthier conditions on Interior lands along the border. Many of the natural and cultural resources under Interior's responsibility have been adversely affected by illegal activities due to accumulations of trash, establishment of illegal roads and trails, and overall degradation of the environment. By deploying personnel, equipment, and infrastructure, CBP operations have reduced cross-border illegal activity and the environmental impacts of this illegal activity in a number of areas.

Examples of infrastructure put in place by CBP include: Remote Video Surveillance System towers, Integrated Fixed Towers, rescue beacons, housing for Border Patrol agents, Forward Operating Bases (FOB), equipment storage facilities, horse corrals and mobile surveillance systems such as the Ground Based Operational Surveillance System (GBOSS) used in Arizona.

In his testimony, Mr. Andrew emphasized the cooperation between DOI and the Border Patrol in these efforts:

Tactical communication needs are critical to the security of Border Patrol agents and Interior personnel and we have worked closely to assure adjustments can be made in placement and maintenance of these facilities when they are present on Interior managed lands. Maintenance of roads and fences have also become more routine through issuance of permits and rights-of-way by Interior's land managing agencies.

During deployment of additional border security resources, Interior worked closely with the Border Patrol to avoid or mitigate impacts to the environment by

²⁰⁷ *Border Security: Consequences of Federal Lands Management Along the U.S. Border to Rural Communities and National Security: Hearing Before the House Comm. on Natural Resources, Subcomm. on Oversight and Investigations, 114th Cong. (2016) (statement of Jon Andrew, Interagency Borderlands Coordinator, Dep't of the Interior), available at: <https://www.doi.gov/ocl/border-security-1>.*

coordinating border security work with local federal land managers. These mitigation activities have had no impact on the ability of the Border Patrol to protect the border.

*We have made and are continuing to make significant progress and we recognize DHS's leadership on these issues.*²⁰⁸

It is clear from the foregoing that the Border Patrol has demonstrated respect for the environment and for protecting our national treasures on federal lands along the border.

I am not as confident as Mr. Andrew, however, about the effect that the agency's cooperation with DOI has had on its enforcement activities. Given the dangers that Border Patrol agents face on a daily basis, and the numerous contingencies with which they must constantly deal in carrying out their crucial missions, clear, unimpeded authority should be given to the Border Patrol to access and move on federal land, without restriction, to enable them to carry out their statutory duties.

As stated above, facilitating the ability of Border Patrol agents to perform their duties is critical not only to preventing the illegal entry of aliens into the United States, but also to keeping drugs and criminals off of American streets, and to ensuring that individuals who seek to harm our country and our citizens are not able to do so. It is also crucial to protecting the environment from the effects of illegal cross-border traffic, as well as protecting land-management agency employees.

Congress must carefully review any laws that impede the Border Patrol in its law enforcement efforts, and in particular any laws that inhibit, impede, or delay access and movement by the Border Patrol to any section of the border the agency deems necessary to carry out its duties. Border Patrol must not only be allowed to move freely along the border, but it must also have the ability, in a timely manner, to construct, install, and relocate the necessary tactical infrastructure to respond to cross-border threats.

It is incumbent upon Congress to assess whether any laws that inhibit such movement or the employment of such infrastructure should be restricted or waived, at a minimum to the extent necessary to ensure that the critical mission of the Border Patrol is unhindered and successful.

NEPA

Since it was signed into law in 1970 by President Richard Nixon, NEPA²⁰⁹ has required every agency considering an action that will affect the environment to analyze and publicize those effects before actually implementing the action.

The core purpose of NEPA is to ensure that, before a federal agency undertakes a federal action, decision-makers consider the range of potential environmental impacts the action may have on the "human environment."²¹⁰ NEPA embodies a national policy that aims to ensure that decisions

²⁰⁸ *Id.*

²⁰⁹ 42 U.S. Code § 4331, et seq. (2021), available at: <https://www.law.cornell.edu/uscode/text/42/4331>.

²¹⁰ 42 U.S.C. § 4332(2)(C) (2021), available at: <https://www.law.cornell.edu/uscode/text/42/4332>.

affecting the human environment are made with eyes wide open and in full view of the public, so that all stakeholders (including the voters) can understand the implications of federal actions on the natural resources that we all depend on.

NEPA is also intended to give ordinary members of the public the opportunity to voice their opinions on government actions that will affect their local communities. No exception applies to immigration-related actions, yet DHS and USCIS implement policies and perform duties as if immigration and naturalization programs are exempt from this law.

For example, with respect to its programs that regulate the entry into and settlement of foreign nationals in the United States, DHS is woefully deficient in carrying forth this Congressional obligation.

As noted, NEPA became law in 1970, at which point the former INS administered federal programs authorized by statute regulating the entry into and settlement of foreign nationals in the United States. Despite this fact, INS never undertook any NEPA compliance with respect to these programs.

When the newly formed DHS was given these responsibilities in the Homeland Security Act of 2002²¹¹ (effective March 1, 2003)²¹², DHS adopted its own NEPA procedures, which were finalized in 2014 as DHS Directive 02301, “Implementation of the National Environmental Policy Act (NEPA)”²¹³.

DHS’s adoption of new NEPA procedures presented an opportunity to correct INS’s decades-long failure to recognize environmental impacts resulting from its population-growth inducing programs, a particularly important task in light of the ever-increasing numbers of foreign nationals who were settling in the United States and their obvious environmental impacts.

The Instruction Manual, however, continued to perpetuate the INS blind spot regarding the myriad environmental consequences of its actions concerning the entry into and settlement of mass numbers of people in the United States.

In the Instruction Manual, DHS ostensibly fails even to recognize that one of its core missions is the regulation of the entry into and settlement of foreign nationals in the United States. The Instruction Manual accordingly fails to provide any analysis as to whether the programs that implement that mission might therefore have an effect on the environment.

Those effects are significant. NEPA expressly recognizes Congressional concern for “the profound influences of population growth” on “the natural environment[.]”²¹⁴ It continues:

²¹¹ Homeland Security Act of 2002, Pub. L. 107-296 (2002), available at: <https://www.congress.gov/bill/107th-congress/house-bill/5005>.

²¹² See *Our History*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (updated August 24, 2020) (“On March 1, 2003, U.S. Citizenship and Immigration Services (USCIS) assumed responsibility for the immigration service functions of the federal government.”), available at: <https://www.uscis.gov/about-us/our-history>.

²¹³ Instruction Manual 023-01-001-01, Rev. 01, Implementation of the National Environmental Policy Act (NEPA), U.S. Dep’t of Homeland Security (Nov. 6, 2014), available at: https://cis.org/sites/cis.org/files/Litigation/NEPA/Whitewater-Draw-v-DHS/Amended-Complaint/Exhibit2_DHS-InstMan-0230100101-Rev01-Implementation-NEPA.pdf.

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

. . . .

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities

²¹⁵

It is my conclusion that DHS, however, has failed to analyze the environmental impacts of its programs and actions that have allowed and continue to allow millions of foreign nationals to enter into and reside in the United States. These programs and actions result in significant population growth that produces ongoing myriad environmental impacts.

For example, in 2008, the Pew Research Center concluded:

The nation's population will rise to 438 million in 2050, from 296 million in 2005, and fully 82% of the growth during this period will be due to immigrants arriving from 2005 to 2050 and their descendants. . . .

Of the 117 million people added to the population during this period due to the effect of new immigration, 67 million will be the immigrants themselves, 47 million will be their children and 3 million will be their grandchildren.

The Center's projections indicate that nearly one in five Americans (19%) will be foreign born in 2050, well above the 2005 level of 12%, and also surpassing the historic peaks for immigrants as a share of the U.S. population—14.8% in 1890 and 14.7% in 1910.²¹⁶

Thus, it is incumbent on this, and every other, administration to comply with NEPA in crafting its immigration policies, plans, and programs.

There is no evidence, however, that the Biden administration considered the environmental effects of its “pause” in border barrier construction in Presidential Proclamation 10142.²¹⁷

²¹⁴ 42 U.S.C. § 4331(a) (2021), available at: <https://www.law.cornell.edu/uscode/text/42/4331>.

²¹⁵ 42 U.S.C. § 4331(b) (2021), available at: <https://www.law.cornell.edu/uscode/text/42/4331>.

²¹⁶ Jeffrey S. Passel and D'Vera Cohn, U.S. Population Projections: 2005-2050, Pew Research Center Hispanic Trends (Feb. 11, 2008), available at: <https://www.pewresearch.org/hispanic/2008/02/11/us-population-projections-2005-2050/>.

²¹⁷ Presidential Proclamation 10142, Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction, White House (Jan. 20, 2021), available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/>.

Nor is there any evidence that it considered those impacts in ending MPP (or any of its other rescissions of Trump border policies), or in its application of Title 42.

CONCLUSION

The situation at the border has reached crisis, if not humanitarian and national security disaster, levels.

Loopholes in the law and policies implemented by the current administration have encouraged migrants—and in particular unaccompanied alien children, their parents, and adult migrants with children travelling in family units—to enter the United States, in the expectation of remaining in this country permanently.

The situation at the border has created severe—and extremely deleterious—consequences for those migrants themselves, Border Patrol and other law-enforcement personnel, the people of the United States, and the environment (both at the border and in the interior of the United States).

As Sen. Ron Johnson (R-Wisc.) explained at the aforementioned May 13 Senate hearing²¹⁸: “The first step in solving any problem is admitting that you have one.”²¹⁹ It is beyond time for Congress and the administration to realize that there is a problem at the border, and to respond with something more than apprehending, releasing, and dispersing migrants into communities across the United States.

Thank you, and I look forward to your questions.

²¹⁸ Comm. Hearing on DHS Actions to Address Unaccompanied Minors at the Southern Border, S. Comm. on Homeland Security and Governmental Operations (117th Cong. 1st Sess.), *available at*: <https://www.hsgac.senate.gov/hearings/dhs-actions-to-address-unaccompanied-minors-at-the-southern-border>

²¹⁹ *Sen. Johnson Exchange with DHS Secretary on Migrants, Senate Hearing on Unaccompanied Minors at U.S.-Mexico Border*, C-SPAN (May 13, 2021), *available at*: <https://www.c-span.org/video/?511573-1/senate-hearing-unaccompanied-minors-us-mexico-border>.

