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To the
Committee on the Judiciary
United States Senate
Subcommittee on Border Security and Immigration

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Chairman Cornyn, Ranking Member Padilla, and members of the subcommittee, thank you for inviting me here today to discuss criminal deportations.

To address the issues raised by the committee, I have structured my written testimony to first, explain the source of the immigration power in the United States; second, to outline the criminal grounds of removal; third, to describe the laws governing immigration investigations, stops, and arrests; fourth, to delineate the statutes governing detention under the Immigration and Nationality Act; fifth, to explain the standards for due process in the removal process; sixth, to discuss immigration enforcement under the second Trump administration; and seventh, to analyze so-called “sanctuary” policies and their impacts.

I. CONGRESS’ PLENARY AUTHORITY OVER IMMIGRATION

Key to understanding how our immigration laws work—or are supposed to work-- is recognizing where the immigration authority in this country rests.

Article I, sec. 8 of the U.S. Constitution¹ states, in pertinent part: “Congress shall have Power . . . to establish an uniform Rule of Naturalization and to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”.

“Naturalization”² is the process by which a foreign national in the United States—defined as an “alien” in section 101(a)(3) of the Immigration and Nationality Act (INA)³ — becomes a “citizen” (as defined by reference therein and in section 101(a)(22) of the INA⁴). Essential to Congress’s constitutional authority “to establish a uniform Rule of Naturalization,” is its power to regulate immigration.

As the Congressional Research Service (CRS)⁵ has explained: “Long-standing Supreme Court precedent recognizes Congress as having plenary power⁶ over immigration, *giving it almost complete authority to decide whether foreign nationals* (aliens, under governing statutes and case law) *may enter or remain in the United States*” (emphasis added). Reference to Supreme Court precedent illustrates the point.

¹ U.S. CONST. art. 1, § 8 (cleaned up). Source: <https://uscode.house.gov/static/constitution.pdf>.

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

³ See sec. 101(a)(3) of the INA (2025) (“The term ‘alien’ means any person not a citizen or national of the United States.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

⁴ See section 101(a)(22) of the INA (2025) (“The term ‘national of the United States’ means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

⁵ *Constitution Annotated*, Art. 58. C18.8.1 Overview of Congress’s Immigration Powers. CONGRESSIONAL RESEARCH SERV. (undated). Source: https://constitution.congress.gov/browse/essay/artI-S8-C18-8-1/ALDE_00001255/.

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

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

Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. [Emphasis added.]

Thus, when it comes to allowing aliens to enter and remain in the United States, Congress makes the rules, and the executive is duty-bound to carry them out.

Section 212(a) of the INA⁸ presents the various classes of aliens whom Congress has determined should be precluded from admission to the United States (known collectively as the “grounds of inadmissibility”).

The most basic of those grounds, and the one Congress created to control the flow of immigrants to the United States, is section 212(a)(7)(A)(i) of the INA⁹, which bars the admission of any alien “who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document”.

Conversely, section 237(a) of the INA¹⁰ lists the “classes of deportable aliens”, aliens lawfully admitted to the United States who, for assorted reasons, Congress has directed immigration officials to remove from the United States.

Those classes include nonimmigrants who have overstayed their lawful periods of admission or who have otherwise violated the terms of their admission¹¹; aliens convicted of certain criminal acts¹² (as I will describe in section II, *infra*); and aliens who pose a national security, espionage, or terrorism risk¹³.

II. CRIMINAL GROUNDS OF REMOVAL

The INA contains separate grounds of inadmissibility and deportability for aliens who have been convicted of criminal offenses in the United States and abroad, the former applying to aliens who

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

⁸ Sec. 212 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

⁹ Sec. 212(a)(7)(A)(i) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

¹⁰ Sec. 237(a) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

¹¹ Sec. 237(a)(1)(C) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

¹² Sec. 237(a)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

¹³ Sec. 237(a)(4) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

have not been admitted to the United States and the latter applying to those who have been lawfully admitted but are removable on criminal grounds.

A. The Criminal Grounds of Inadmissibility

The criminal grounds of inadmissibility are set forth in section 212(a)(2) of the INA¹⁴.

First, under section 212(a)(2)(A)(i)(I)¹⁵, “any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime” is inadmissible.

Note that inadmissibility under this provision does not require a conviction; rather, pursuant to statute, an “admission” to a “crime involving moral turpitude” or “CIMT” is sufficient.

That said, to constitute a valid admission to a CIMT in this context, the alien must be presented with the statute from the jurisdiction in which the offense is alleged to have been committed; to have that statute explained in plain language; and to admit to the key elements of that offense.¹⁶

In general, as the Board of Immigration Appeals (BIA) has explained:

*Moral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general.*¹⁷

“To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state.”¹⁸ Crimes in which the *mens rea* is negligence or less generally do not constitute CIMTs because such offenses “must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness”.¹⁹

“Fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.”²⁰

Similarly:

¹⁴ Sec. 212(a)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

¹⁵ Sec. 212(a)(2)(A)(i)(I) (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

¹⁶ *Matter of K-*, 7 I&N Dec. 594 (BIA 1957). Source: <https://immigrantdefenseproject.org/wp-content/uploads/2016/10/IN-THE-MATTER-OF-K-7-IN-DEC.-594-B.I.A..pdf>.

¹⁷ *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). Source: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3068.pdf>.

¹⁸ *Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016). Source: <https://www.justice.gov/eoir/file/902461/dl>.

¹⁹ *Matter of Silva-Trevino*, 24 I&N Dec. 687, 697 (A.G. 2008). Source: https://www.ilrc.org/sites/default/files/resources/n.7-crimes_involving_moral_turpitude.pdf.

²⁰ *Jordan v. De George*, 341 U.S. 223, 229 (1951). Source: <https://supreme.justia.com/cases/federal/us/341/223/>.

*A theft offense is a crime involving moral turpitude if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded.*²¹

“Burglary of a dwelling” has also been found to be a CIMT, even if the owner is not present.²² Sex offenses will also generally constitute crimes involving moral turpitude.²³

There are exceptions to inadmissibility under this ground for both age and recency. Section 212(a)(2)(A)(ii)(I) of the INA provides that an alien is not inadmissible based upon a single CIMT if:

*the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States.*²⁴

And, under clause (II) therein²⁵, a single CIMT will not bar an alien from admission if:

the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Finally, there is a waiver for this ground of inadmissibility at section 212(h) of the INA.²⁶

²¹ *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016). Source: <https://www.justice.gov/eoir/page/file/910821/dl?inline>.

²² *Matter of J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017). Source: <https://www.justice.gov/eoir/page/file/990986/dl?inline>.

²³ See generally *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1, 4 (BIA 2017). Source:

<https://www.justice.gov/eoir/page/file/955631/dl?inline>.

²⁴ Sec. 212(a)(2)(A)(ii)(I) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

²⁵ Sec. 212(a)(2)(A)(ii)(II) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

²⁶ See sec. 212(h) of the INA (2025) (“Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E). The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if- (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status, (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and (iii) the alien has been rehabilitated; or (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or (C) the alien is a VAWA self-petitioner; and (2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts

Section 212(a)(2)(A)(i)(II) of the INA²⁷ renders an applicant for admission inadmissible if the alien has been:

convicted of, or . . . admits having committed, or . . . admits committing acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21²⁸).

Again, no conviction is required for a finding of inadmissibility on this ground, and as with CIMTs, there is a waiver available under section 212(h) of the INA for “a single offense” for a crime under this provision involving “simple possession of 30 grams or less of marijuana”.

Pursuant to section 212(a)(2)(B) of the INA²⁹, an applicant for admission is inadmissible if the alien has been:

convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more. . . .

Traffickers³⁰ in controlled substances and other listed substances and chemicals (as defined in 21 U.S.C. § 802³¹) are inadmissible under section 212(a)(2)(C)(i) of the INA³², as are their spouses and adult children (under section 212(a)(2)(C)(ii) of the INA³³) if, “within the previous 5 years”, they “obtained any financial or other benefit from the illicit activity of” their inadmissible spouse

involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.”). Source:

<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

²⁷ Sec. 212(a)(2)(A)(i)(II) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

²⁸ See 21 U.S.C. § 802 (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title21-section802&num=0&edition=prelim>.

²⁹ Sec. 212(a)(2)(B) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

³⁰ See generally 21 U.S.C. § 841 (2025) (“(a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”). Source: <https://www.law.cornell.edu/uscode/text/21/841>; but see *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (social sharing of a small amount of marijuana does not render a legal immigrant deportable). Source: <https://supreme.justia.com/cases/federal/us/569/184/>.

³¹ See 21 U.S.C. § 802 (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title21-section802&num=0&edition=prelim>.

³² Sec. 212(a)(2)(C)(i) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

³³ Sec. 212(a)(2)(C)(ii) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

or parent “and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity”.

Section 212(a)(2)(D)(i) of the INA³⁴ renders inadmissible any applicant for admission who:

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution . . .

Aliens who have asserted immunity from prosecution for a “serious criminal offense” as defined in section 101(h) of the INA³⁵, who have departed from the United States, and who have not subsequently “submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense” are inadmissible under section 212(a)(2)(E) of the INA³⁶.

Under section 212(a)(2)(G) of the INA³⁷: “Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of title 22³⁸, is inadmissible.”

“Significant traffickers in persons”, those aliens who commit or conspire to commit “human trafficking offenses in the United States or outside the United States”, as well as those who federal government officials know or have reason “to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in have engaged in severe forms

³⁴ Sec. 212(a)(2)(D) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

³⁵ See sec. 101(h) of the INA (2025) (“For purposes of section [212(a)(2)(E) of the INA], the term ‘serious criminal offense’ means- (1) any felony; (2) any crime of violence, as defined in section 16 of title 18; or (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.”). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1101%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title8-section1101\)&f=treesort&num=0&edition=prelim](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1101%20edition:prelim)%20OR%20(granuleid:USC-prelim-title8-section1101)&f=treesort&num=0&edition=prelim).

³⁶ Sec. 212(a)(2)(E) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

³⁷ Sec. 212(a)(2)(G) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

³⁸ See 22 U.S.C. § 6402(13) (2025) (“The term ‘particularly severe violations of religious freedom’ means systematic, ongoing, egregious violations of religious freedom, including violations such as— (A) torture or cruel, inhuman, or degrading treatment or punishment; (B) prolonged detention without charges; (C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or (D) other flagrant denial of the right to life, liberty, or the security of persons.”). Source: <https://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter73&edition=prelim>.

of trafficking in persons”, as defined in 22 U.S.C. § 7102(h)³⁹, are inadmissible under section 212(a)(2)(H)(i) of the INA.⁴⁰

Similarly, “any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under” section 212(a)(2)(H)(i) of the INA”, and who “has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible”, with an exception for minor children of such an alien.⁴¹

Finally, under section 212(a)(2)(I) of the INA⁴²:

Any alien- (i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956⁴³ or 1957⁴⁴ of title 18 (relating to laundering of monetary instruments); or (ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section; is inadmissible.

B. The Criminal Grounds of Deportability

Section 237(a)(2) of INA⁴⁵ provides separate grounds of deportability for aliens who have been admitted to the United States, but who are removable on criminal grounds.

Under section 237(a)(2)(A)(i) of the INA⁴⁶, aliens convicted of CIMTs for which a sentence of a year or longer may be imposed committed within five years of admission are deportable.

³⁹ See 22 U.S.C. § 7102(h) (2025) (“Severe forms of trafficking in persons. The term ‘severe forms of trafficking in persons’ means- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”). Source:

[https://uscode.house.gov/view.xhtml?req=\(title:22%20section:7102%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title22-section7102\)&f=treesort&num=0&edition=prelim](https://uscode.house.gov/view.xhtml?req=(title:22%20section:7102%20edition:prelim)%20OR%20(granuleid:USC-prelim-title22-section7102)&f=treesort&num=0&edition=prelim).

⁴⁰ Sec. 212(a)(2)(H)(i) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

⁴¹ Secs. 212(a)(2)(H)(ii) and (iii) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

⁴² Sec. 212(a)(2)(A)(i)(I) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

⁴³ 18 U.S.C. § 1956 (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-2000-title18-section1956&num=0&edition=2000>.

⁴⁴ 18 U.S.C. § 1957 (2025). Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=2000&req=granuleid%3AUSC-2000-title18-section1957&num=0&saved=%7CZ3JhbnVsZWlkOIVTQyOyMDAwLXRpdGxIMTgtc2VjdGlvbjE5NTY%3D%7C%7C%7C0%7Cfalse%7C2000>.

⁴⁵ Sec. 237(a)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁴⁶ Sec. 237(a)(2)(A)(i) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

In that vein, under section 237(a)(2)(A)(ii) of the INA⁴⁷:

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct⁴⁸, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

The “aggravated felony” ground of deportation in section 237(a)(2)(A)(iii) of the INA⁴⁹ renders deportable any alien who has been admitted to the United States and who has been convicted of any of the more than 30 aggravated felony offenses defined in section 101(a)(43) of the INA⁵⁰.

Those offenses include: “murder, rape, or sexual abuse of a minor”⁵¹; “illicit trafficking⁵² in a controlled substance (as defined in section 802 of title 21⁵³), including a drug trafficking crime (as defined in section 924(c) of title 18⁵⁴)”; “illicit trafficking in firearms or destructive devices. . . or in explosive materials”⁵⁵ as defined under federal criminal statutes; crimes of violence as defined in 18 U.S.C. § 16⁵⁶ “for which a term of imprisonment of” a year or more was imposed⁵⁷; theft, receipt of stolen property, or burglary offenses for which a sentence of a year or more was imposed⁵⁸; and child pornography offenses as defined in specified federal criminal statutes⁵⁹.

⁴⁷ Sec. 237(a)(2)(A)(iii) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁴⁸ See *Matter of Baeza-Galindo*, 29 I&N Dec. 1 (BIA 2025) (“Two crimes involving moral turpitude, premised on separate turpitudinous acts with different objectives, neither of which was committed in the course of accomplishing the other, constitute separate schemes of criminal misconduct.”). Source: <https://www.justice.gov/d9/2025-01/4085.pdf>.

⁴⁹ Sec. 237(a)(2)(A)(ii) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁵⁰ Sec. 101(a)(43) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

⁵¹ Sec. 101(a)(43)(A) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

⁵² Sec. 101(a)(43)(B) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>; see also fn. 30, *supra*.

⁵³ See 21 U.S.C. § 802 (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title21-section802&num=0&edition=prelim>.

⁵⁴ 18 U.S.C. § 924(c) (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section924&num=0&edition=prelim>.

⁵⁵ Sec. 101(a)(43)(C) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

⁵⁶ 18 U.S.C. § 16 (2025). Source: [https://uscode.house.gov/view.xhtml?req=\(title:18%20section:16%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:18%20section:16%20edition:prelim)).

⁵⁷ Sec. 101(a)(43)(F) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

⁵⁸ Sec. 101(a)(43)(G) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

⁵⁹ Sec. 101(a)(43)(I) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

Admitted aliens convicted of “high speed flight from an immigration checkpoint” under 18 U.S.C. § 758⁶⁰ are also deportable⁶¹, as are lawfully admitted aliens who have been convicted under 18 U.S.C. § 2250⁶² for failing to register as sex offenders⁶³.

Section 237(a)(2)(B)(i) of the INA⁶⁴ renders deportable any alien:

who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21⁶⁵), other than a single offense involving possession for one's own use of 30 grams or less of marijuana

Also deportable, under section 237(a)(2)(B)(ii) of the INA, is “any alien who is, or at any time after admission has been, a drug abuser or addict”⁶⁶, even absent a conviction.

In its 1958 decision in *Matter of F-S-C*⁶⁷, the BIA considered similar language in a predecessor statute to section 237(a)(2)(B)(ii) of the INA and distinguished between “addicts” as used in that provision from mere “users”—the latter of which, the BIA concluded, were not deportable.

Pursuant to section 237(a)(2)(C) of the INA⁶⁸, admitted aliens are deportable if they have been convicted:

under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18⁶⁹) in violation of any law

⁶⁰ 18 U.S.C. § 758 (2025). Source: <https://www.law.cornell.edu/uscode/text/18/758>.

⁶¹ Sec. 237(a)(2)(A)(iv) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁶² 18 U.S.C. § 2250 (2025). Source: [https://uscode.house.gov/view.xhtml?req=\(title:18%20section:2250%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title18-section2250\)&f=treesort&num=0&edition=prelim](https://uscode.house.gov/view.xhtml?req=(title:18%20section:2250%20edition:prelim)%20OR%20(granuleid:USC-prelim-title18-section2250)&f=treesort&num=0&edition=prelim).

⁶³ Sec. 237(a)(2)(A)(v) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁶⁴ Sec. 237(a)(2)(B)(i) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁶⁵ 21 U.S.C. § 802 (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title21-section802&num=0&edition=prelim>.

⁶⁶ Sec. 237(a)(2)(B)(ii) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁶⁷ *Matter of F-S-C*, 8 I&N Dec. 108 (BIA 1958). Source: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/27/Pg108.pdf>.

⁶⁸ Sec. 237(a)(2)(C) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁶⁹ 18 U.S.C. § 921(a) (2025). Source: [https://uscode.house.gov/view.xhtml?req=\(title:18%20section:921%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title18-section921\)&f=treesort&num=0&edition=prelim](https://uscode.house.gov/view.xhtml?req=(title:18%20section:921%20edition:prelim)%20OR%20(granuleid:USC-prelim-title18-section921)&f=treesort&num=0&edition=prelim).

With respect to firearms, note that section 922(g)(5) of title 18⁷⁰ states:

It shall be unlawful for any person- who, being an alien- (A) is illegally or unlawfully in the United States; or (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in [section 101(a)(26) of the INA]⁷¹), to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The exception in 18 U.S.C. § 922(y)(2)⁷² relates to nonimmigrant aliens “admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States”, diplomats and other lawfully admitted foreign government officials, and certain foreign law enforcement officers.

All other aliens, aside from lawful permanent residents (i.e., “green card” holders), are barred by law from possessing or using firearms in this country.

To implement this provision, the Bureau of Alcohol, Tobacco, and Firearms (ATF) issued a regulation at 27 C.F.R. § 478.1, *et seq.*⁷³ defining “illegal alien” and other vague terms in section 922 of title 18.

That ATF regulation⁷⁴ specifically excludes from the definition of “illegal alien” (*inter alia*) aliens who have been paroled into the United States under section 212(d)(5)(A) of the INA⁷⁵ (which I will discuss in section IV.A, *infra*), even though: (1) paroled aliens are not admitted to the United States, either as immigrants or nonimmigrants; (2) most parolees haven’t been vetted for criminality through the consular vetting process⁷⁶; and (3), by my calculations⁷⁷, more than 2.86 million such parolees entered under the Biden administration.

⁷⁰ 18 U.S.C. § 922(g)(5) (2025). Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title18-section922&f=treesort&num=0&saved=%7CKHRpdGxIOjE4IHNIY3Rpb246OTIxIGVkaXRpb246cHJlOGltKSBPUIAoZ3JhbnVsZWlkOI VTQy1wcmVsaW0tdGloGUXOC1zZWNOaW9uOTIxKQ%3D%3D%7CdHJlZXNvcnQ%3D%7C%7C0%7Cfalse%7Cprelim>.

⁷¹ Sec. 101(a)(26) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

⁷² 18 U.S.C. § 922(y)(2) (2025). Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title18-section922&f=treesort&num=0&saved=%7CKHRpdGxIOjE4IHNIY3Rpb246OTIxIGVkaXRpb246cHJlOGltKSBPUIAoZ3JhbnVsZWlkOI VTQy1wcmVsaW0tdGloGUXOC1zZWNOaW9uOTIxKQ%3D%3D%7CdHJlZXNvcnQ%3D%7C%7C0%7Cfalse%7Cprelim>.

⁷³ 27 C.F.R. § 478.1 (2025). Source: <https://www.ecfr.gov/current/title-27/chapter-II/subchapter-B/part-478>.

⁷⁴ 27 C.F.R. § 478.11 (2025). Source: <https://www.ecfr.gov/current/title-27/chapter-II/subchapter-B/part-478>.

⁷⁵ Sec. 212(d)(5)(A) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

⁷⁶ See section IV.F, *infra* (testimony of Rodney Scott).

⁷⁷ Arthur, Andrew. *Did Joe Biden Really Parole In Nearly 3 Million Aliens?* CENTER FOR IMMIGRATION STUDIES (May 28, 2025). Source: <https://cis.org/Arthur/Did-Joe-Biden-Really-Parole-Nearly-3-Million-Aliens>.

That, as I have argued⁷⁸, has created a massive “gun loophole” and a significant criminal vulnerability Congress never intended.

Returning to the criminal grounds of deportability, section 237(a)(2)(D)⁷⁹ of the INA renders deportable certain aliens who have been convicted of a national security offense, including for espionage, sabotage, and “treason and sedition”⁸⁰ for which a sentence of five years or more has imposed; as well as those⁸¹ who have made threats against the president⁸², and those who have made a military expedition against a “friendly nation”⁸³; and violators⁸⁴ of the Military Selective Service Act⁸⁵.

Aliens who have violated presidential travel orders⁸⁶, and those who imported any alien “for the purpose of prostitution, or for any other immoral purpose”⁸⁷ are also subject to deportation under section 237(a)(2)(D)(iv) of the INA⁸⁸.

Finally, lawfully admitted aliens who have been convicted of crimes of “domestic violence”, “stalking”, violations of protection orders, and certain crimes against children are subject to deportation under section 237(a)(2)(E) of the INA⁸⁹, and those who have been convicted of any offense described in the “human trafficking” ground of inadmissibility at section 212(a)(2)(H)⁹⁰ of the INA are also deportable under section 237(a)(2)(F) of the INA⁹¹.

III. LAWS AND REGULATIONS GOVERNING IMMIGRATION ARRESTS

⁷⁸ Arthur, Andrew. *A ‘Gun Loophole’ for More than 2 Million Biden-Harris Migrants Here on Parole. A recipe for mischief, if not disaster.* CENTER FOR IMMIGRATION STUDIES (Nov. 26, 2024). Source: <https://cis.org/Arthur/Gun-Loophole-More-2-Million-BidenHarris-Migrants-Here-Parole>.

⁷⁹ Sec. 237(a)(2)(D) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁸⁰ Sec. 237(a)(2)(D)(i) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁸¹ Sec. 237(a)(2)(D)(ii) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>

⁸² See 18 U.S.C. § 871 (2025). Source: [https://uscode.house.gov/view.xhtml?req=\(title:18%20section:871%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title18-section871\)&f=treesort&num=0&edition=prelim](https://uscode.house.gov/view.xhtml?req=(title:18%20section:871%20edition:prelim)%20OR%20(granuleid:USC-prelim-title18-section871)&f=treesort&num=0&edition=prelim).

⁸³ 18 U.S.C. § 960 (2025). Source: <https://www.law.cornell.edu/uscode/text/18/960>.

⁸⁴ Sec. 237(a)(2)(D)(iii) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁸⁵ 50 U.S.C. App. 451 et seq. (2025). Source: [https://uscode.house.gov/view.xhtml?req=\(title:50%20edition:prelim\)&f=treesort&edition=prelim](https://uscode.house.gov/view.xhtml?req=(title:50%20edition:prelim)&f=treesort&edition=prelim).

⁸⁶ Sec. 215 of the INA (2025). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1185%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title8-section1185\)&f=treesort&num=0&edition=prelim](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1185%20edition:prelim)%20OR%20(granuleid:USC-prelim-title8-section1185)&f=treesort&num=0&edition=prelim).

⁸⁷ 8 U.S. Code § 1328 (2025). Source: <https://www.law.cornell.edu/uscode/text/8/1328>.

⁸⁸ Sec. 237(a)(2)(D)(iv) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁸⁹ Sec. 237(a)(2)(E) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

⁹⁰ Sec. 212(a)(2)(H) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

⁹¹ Sec. 237(a)(2)(F) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

Congress in the INA has given immigration officers expansive powers to investigate, question, and detain aliens.

A. Administrative Arrest Warrants

For example, section 236(a) of the INA⁹² permits immigration officers to issue *administrative* warrants to take into custody aliens believed to be removable from the United States, pending a decision on whether they are to be removed.

To be clear, nothing in the INA requires Immigration and Customs Enforcement (ICE) officers to seek a *judicial* warrant from a federal judge or magistrate before taking an alien into custody (regardless of what some⁹³ may believe the law requires), and in fact – as I have explained⁹⁴ in the past—there is no mechanism in the INA for seeking a judicial warrant for an individual alien’s arrest.⁹⁵

B. Warrantless Questioning and Arrests

Administrative warrants aside, section 287(a)(1) of the INA⁹⁶ allows immigration officers to “interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States”, and paragraph (2) therein⁹⁷ allows officers to “arrest any alien in the United States”, if they have “reason to believe that the alien so arrested is in the United States in violation of the INA and regulations” and “is likely to escape before a warrant can be obtained for his arrest”.

That said, section 287(a)(2) also requires immigration officers to take aliens arrested without a warrant “without unnecessary delay” for a determination by an examining officer on whether those aliens have a “right to enter or remain in the United States”.

C. “Reasonable Suspicion”

The foregoing does not mean ICE officers can arrest or even just temporarily stop individuals based on whim or caprice, however.

⁹² Sec. 236(a) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

⁹³ See Ramirez Uribe, Maria. *NY comptroller Brad Lander demanded a ‘judicial warrant’ in courthouse. Do ICE agents need that?* POLITIFACT (Jun. 18, 2025). Source: <https://www.politifact.com/article/2025/jun/18/Brad-Lander-ICE-required-warrant-arrest-immigrants/>.

⁹⁴ See Arthur, Andrew. *Immigration Judicial Warrants Don’t Exist*. CENTER FOR IMMIGRATION STUDIES (Sep. 17, 2019). Source: <https://cis.org/Arthur/Immigration-Judicial-Warrants-Dont-Exist>.

⁹⁵ *But see* Cadman, Dan. *‘Blackie’s Warrants’ and Sanctuary Jurisdictions*. CENTER FOR IMMIGRATION STUDIES (Jul. 7, 2025) (discussing judicial worksite enforcement warrants). Source: <https://cis.org/Cadman/Blackies-Warrants-and-Sanctuary-Jurisdictions>

⁹⁶ Sec. 287(a)(1) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1357&num=0&edition=prelim>.

⁹⁷ Sec. 287(a)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1357&num=0&edition=prelim>.

The leading precedent on immigration arrests is *INS v. Lopez-Mendoza*⁹⁸, a Supreme Court opinion involving two separate cases in which aliens were subject to worksite arrest—one in an area agents were permitted by the employer to access permission, the other in which they weren't-- issued in 1984.

At issue in *Lopez-Mendoza* was whether the “exclusionary rule”⁹⁹—a judge-made principle that “prevents the government from using most evidence gathered in violation of the United States Constitution” in criminal cases-- also applies in civil deportation cases.

Long story short: it doesn't.

The purpose of the exclusionary rule, as the majority noted, is to deter misconduct by investigating officers by barring the use of improperly obtained evidence, but as the Court held, “Several factors significantly reduce the likely deterrent value of the rule in such [immigration] proceedings.”¹⁰⁰

Specifically, the majority noted that “regardless of how the arrest is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation”¹⁰¹, given the primary question in deportation proceedings is the respondent's identity and alienage.

As the Court noted, the identity of a suspect cannot be suppressed under the exclusionary rule¹⁰², and (as there is no presumption of citizenship under the INA), immigration judges can draw adverse inferences¹⁰³ from the respondent's silence after receiving other proof of alienage.

In addition, as the Court explained, few aliens ever challenge the lawfulness of their arrests, and therefore applying the exclusionary rule in civil deportation proceedings likely wouldn't do much to change agents' behavior.¹⁰⁴

As an aside, the majority at this juncture in its opinion underscored the fact that: “In the course of a year, the average INS agent” was then-arresting “almost 500 illegal aliens”.¹⁰⁵ If ICE were arresting aliens at the same pace today, immigration arrests would top 3 million per annum.

⁹⁸ *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). Source: <https://supreme.justia.com/cases/federal/us/468/1032/>.

⁹⁹ See *Exclusionary rule*. LEGAL INFORMATION INSTITUTE (undated) (“The exclusionary rule prevents the government from using most evidence gathered in violation of the United States Constitution. The decision in *Mapp v. Ohio* established that the exclusionary rule applies to evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment. The decision in *Miranda v. Arizona* established that the exclusionary rule applies to improperly elicited self-incriminatory statements gathered in violation of the Fifth Amendment, and to evidence gained in situations where the government violated the defendant's Sixth Amendment right to counsel. However, the rule does not apply in civil cases, including deportation hearings.”). Source: https://www.law.cornell.edu/wex/exclusionary_rule.

¹⁰⁰ *Lopez-Mendoza*, 468 U.S. at 1043.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1039-40.

¹⁰³ See *Matter of Carrillo*, 17 I&N Dec. 30 (BIA 1979). Source: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/17/2717.pdf>.

¹⁰⁴ See *Lopez-Mendoza*, 468 U.S. at 1044.

¹⁰⁵ *Id.*

D. Simple Questioning and Brief Detentions

Most critically, however, the majority concluded it wasn't necessary for courts to apply the exclusionary rule in civil deportation proceedings because the then-INS had "its own comprehensive scheme for deterring Fourth Amendment violations by its officers."¹⁰⁶

That scheme was promulgated in regulations, which at 8 C.F.R. § 287.8¹⁰⁷ has carried over to ICE enforcement operations.

As paragraph (b)(1) therein explains:

*Interrogation is questioning designed to elicit specific information. An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.*¹⁰⁸

In other words, ICE officers—like any member of the public-- can walk up to an individual and ask them questions, provided those questioned feel free to walk away.

That ICE questioning only becomes subject to legal standards when the subject in question does not feel free to leave, which brings me to 8 C.F.R. § 287.8(b)(2)¹⁰⁹:

If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.

Those brief detentions are often referred to in criminal investigations as "Terry stops", after *Terry v. Ohio*¹¹⁰, the 1968 case that delineated the "reasonable suspicion" standard.

More broadly, the Court there explained that "in justifying the particular intrusion, the police officer must be able to point to *specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion*" (emphasis added).¹¹¹

¹⁰⁶ *Id.*

¹⁰⁷ 8 C.F.R. § 287.8 (2025). Source: [https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8\(b\)\(1\)](https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8(b)(1)).

¹⁰⁸ 8 C.F.R. § 287.8(b)(1) (2025). Source: [https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8\(b\)\(1\)](https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8(b)(1)).

¹⁰⁹ 8 C.F.R. § 287.8(b)(2) (2025). Source: [https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8\(b\)\(2\)](https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8(b)(2)).

¹¹⁰ *Terry v. Ohio*, 392 U.S. 1 (1968). Source: <https://supreme.justia.com/cases/federal/us/392/1/>.

¹¹¹ *Id.* at 21; but see Arthur, Andrew. *Fed Judge Throws Up Roadblocks on ICE Stops, Arrests in L.A.* CENTER FOR IMMIGRATION STUDIES (Jul. 15, 2025) (discussing a recent temporary restraining order in *Perdomo v. Noem*, limiting the factors that ICE officers may consider during immigration stops and arrests). Source: <https://cis.org/Arthur/Fed-Judge-Throws-Roadblocks-ICE-Stops-Arrests-LA>.

E. Formal Arrests

On the other hand, a formal arrest, under the restrictions in 8 C.F.R. § 287.8(c)(2)¹¹², can only occur pursuant to the warrantless arrest authority in section 287(a)(2) of the INA “when the . . . immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States.”

As the nonpartisan Congressional Research Service (CRS) has [explained](#)¹¹³, “reviewing courts have interpreted the ‘reason to believe’ standard for warrantless immigration arrests” under section 287(a)(2) of the INA (and by extension the regulation) as “equivalent to the Fourth Amendment’s probable cause standard.”

CRS continues:

*Under this [probable cause] standard, courts have held that an immigration officer must have sufficient facts that would lead a reasonable person to believe, based on the circumstances, that the alien has violated federal immigration laws and is likely to escape before an ICE warrant can be obtained.*¹¹⁴

As an important aside, I will note that 8 C.F.R. § 287.8(c)(iii)¹¹⁵ states:

*At the time of the arrest, the designated immigration officer shall, **as soon as it is practical and safe to do so**: (A) Identify himself or herself as an immigration officer who is authorized to execute an arrest; and (B) State that the person is under arrest and the reason for the arrest. [Emphasis added.]*

That language, promulgated in June 2003, long predates the current administration.¹¹⁶

IV. DETENTION UNDER THE IMMIGRATION AND NATIONALITY ACT

Detention of aliens subject to removal proceedings is mandatory under various provisions of the INA, both for arriving aliens who are inadmissible “applicants for admission” as defined in

¹¹² 8 C.F.R. § 287.8(c)(2). Source: [https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8\(b\)\(1\)](https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8(b)(1)).

¹¹³ Smith, Hillel R. *Immigration Arrests in the Interior of the United States: A Primer*. CONG. RESEARCH SERV. (Jun. 13, 2025). Source: <https://www.congress.gov/crs-product/LSB10362>.

¹¹⁴ *Id.*

¹¹⁵ 8 C.F.R. § 287.8(c)(iii). Source: <https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287>.

¹¹⁶ See *Powers and Authority of Officers and Employees; Revisions to the Internal Review Process for Alleged Violations of the Standards for Enforcement Activities*, 68 Fed. Reg. 35273, 35280 (Jun. 13, 2003). Source: <https://www.federalregister.gov/documents/2003/06/13/03-14931/powers-and-authority-of-officers-and-employees-revisions-to-the-internal-review-process-for-alleged>.

section 235(a)(1) of the act¹¹⁷ and for certain aliens subject to deportability¹¹⁸ and under final orders of removal¹¹⁹.

A. Detention Mandates in Section 235(b) of the INA

Under section 235(a)(1) of the INA¹²⁰, aliens present in the United States who have not been admitted or who arrive in the United States at ports of entry or elsewhere and who have not been admitted “shall be deemed for purposes of this chapter an applicant for admission” and are subject to inspection under section 235(a)(3) of the INA¹²¹.

If, following that inspection, an immigration officer determines that the applicant for admission is inadmissible under section 212(a)(7)(A)(i) of the INA or is seeking admission via fraud and is therefore inadmissible under section 212(a)(6)(C) of the INA¹²², that officer has two options.

Section 235(b)(1)(A)(i) of the INA¹²³ allows the officer to “order the alien removed from the United States without further hearing or review” -- and without obtaining a removal order from an immigration judge under section 240 of the INA¹²⁴-- “unless the alien indicates either an intention to apply for asylum. . . or a fear of persecution”. This process is known as “expedited removal.”

Pursuant to section 235(b)(1)(A)(ii) of the INA, however, if an alien subject to expedited removal claims a fear of persecution if returned, the immigration officer must “refer the alien for an interview by an asylum officer” from U.S. Citizenship and Immigration Services (USCIS) to determine whether that alien has a “credible fear of persecution”.

The term “credible fear of persecution” is defined in section 235(b)(1)(B)(v) of the INA¹²⁵ as “a significant possibility, taking into account the credibility of the statements made by the alien in

¹¹⁷ Sec. 235(a)(1) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹¹⁸ See sec. 236 of the INA (2025) (“Apprehension and detention of aliens”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

¹¹⁹ See sec. 241(a) of the INA (2025) (“Detention, release, and removal of aliens ordered removed”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim>.

¹²⁰ *Id.*

¹²¹ Sec. 235(a)(1)(3) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹²² See sec. 212(a)(6)(C)(i) of the INA (2025) (“Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible”); *id.* at subcl. (ii)(I) (“In general. Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

¹²³ Sec. 235(b)(1)(A)(i) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹²⁴ See sec. 240 of the INA (2025) (“Removal proceedings”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>.

¹²⁵ Sec. 235(b)(1)(B)(v) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under” section 208 of the INA¹²⁶.

Thus, “credible fear” is a screening standard, used to determine whether the alien *may* be eligible for asylum.

Congress is clear, however, in section 235(b)(1)(B)(iii)(V) of the INA¹²⁷, that aliens “*shall be detained* pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed”, and is equally clear in section 235(b)(1)(B)(ii) of the INA¹²⁸ that if an asylum officer “determines at the time of the interview that an alien has a credible fear of persecution ... the alien *shall be detained for further consideration of the application for asylum*” (emphasis added).

Detention in this context is critical to the credibility of the inspection and removal processes because the credible fear standard is low, and asylum is particularly susceptible to fraud¹²⁹. The release of aliens who receive positive credible fear determinations incentivizes other alien applicants for admission to make weak or bogus claims to gain entry—a clear abuse of humanitarian relief.

Or as the House explained at the time it was drafting what would become the expedited removal provision:

*Existing procedures to deny entry to and to remove illegal aliens from the United States are cumbersome and duplicative. Removal of aliens who enter the United States illegally, even those who are ordered deported after a full due process hearing, is an all-too-rare event. The asylum system has been abused by those who seek to use it as a means of “backdoor” immigration.*¹³⁰

The other choice immigration officers have during inspection under section 235 of the INA in the case of “applicants for admission” who are inadmissible under sections 212(a)(7)(A)(i) or 212(a)(6)(C) of the INA is to treat them in the same manner as aliens inadmissible under the

¹²⁶ See sec. 208 of the INA (2025) (“Asylum”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

¹²⁷ Sec. 235(b)(1)(B)(iii)(V) of the INA (2025) (emphasis added). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹²⁸ Sec. 235(b)(1)(B)(ii) of the INA (2025) (emphasis added). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹²⁹ See Arthur, Andrew. *Fraud in the “Credible Fear” Process*. CENTER FOR IMMIGRATION STUDIES (Apr. 19, 2017). Source: <https://cis.org/Report/Fraud-Credible-Fear-Process>; see also sec. 208(b)(1)(B)(ii) of the INA (2025) (“The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant’s burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

¹³⁰ H. Rep. No. 104-469, at 107 (1996), available at: <https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf>.

other grounds in section 212(a)(2) of the INA, and to place them directly into section 240 removal proceedings, a procedure Congress provided for in section 235(b)(2)(A) of the INA¹³¹.

As with aliens subject to expedited removal, aliens under section 235(b)(2)(A) of the INA who are subject to removal proceedings under section 240 of the INA who are not “clearly and beyond a doubt entitled to be admitted” must “be detained”¹³².

In its May 2005 decision in *Matter of X-K*-¹³³, the BIA held that the restrictions on release in section 235(b) of the INA notwithstanding, applicants for admission subject to expedited removal who were placed into removal proceedings after receiving positive credible fear determinations were eligible for bond redeterminations from immigration judges.

Thirteen years later, however, in *Jennings v. Rodriguez*¹³⁴, the Supreme Court concluded that section 235(b)(1) of the INA “mandate[s] detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin”, calling into question *Matter of X-K*-.

Subsequently, in April 2019, then-Attorney General William Barr issued a precedential decision in *Matter of M-S*-¹³⁵, formally reversing *Matter of X-K*- and concluding that: “An alien who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond.”

The sole avenue for release of an inadmissible applicant pending removal proceedings is parole under section 212(d)(5)(A) of the INA¹³⁶.

That provision¹³⁷ states, in pertinent part, that the DHS secretary:

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

¹³¹ See section 235(b)(2)(A) of the INA (2025) (“in the case of an alien who is an applicant for admission, if the examining immigration officer *determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted*, the alien shall be detained for a” removal proceeding under section 240 of the INA) (emphasis added). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹³² *Id.*

¹³³ *Matter of X-K*-, 23 I&N Dec. 731 (BIA 2005). Source: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3510.pdf>.

¹³⁴ *Jennings v. Rodriguez*, 583 U.S. ____ (2018). Source: <https://supreme.justia.com/cases/federal/us/583/15-1204/>.

¹³⁵ *Matter of M-S*-, 27 I&N Dec. 509 (A.G. 2019). Source: <https://www.justice.gov/eoir/file/1154747/dl?inline=>.

¹³⁶ Sec. 212(d)(5)(A) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

¹³⁷ *Id.*

The congressional limitations on DHS’s authority are apparent from the highlighted portions of that statute.

First, parole may only be granted “on a case-by-case basis”¹³⁸, and thus may not be issued on a blanket basis to allow the entry of large numbers of aliens, or programmatically.

Second, DHS may only grant parole in cases of either “urgent humanitarian reasons” or for “significant public benefit”¹³⁹. Granting parole for any other purpose is thus *ultra vires*¹⁴⁰, as it exceeds the statutory parole authority.

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

Fourth, the DHS secretary may revoke parole at any time in her unreviewable discretion, if she is satisfied that the “purposes of such parole . . . have been served,” after which the paroled alien *must* return or be returned to DHS custody.

B. Section 236(a) and the General Release Authority

Section 236(a) of the INA¹⁴¹ authorizes immigration officers to arrest and detain an alien on an administrative warrant “pending a decision on whether the alien is to be removed from the United States”.

In general, once those aliens are arrested and detained, section 236(a) of the INA permits DHS to continue to detain them or release them on a bond of not less than \$1,500 or on conditional parole (which is distinct¹⁴² from parole under section 212(d)(5)(A) of the INA).

By regulation¹⁴³, and with exceptions, aliens detained by DHS can request release on bond either from DHS or, alternatively, from immigration judges in bond proceedings, which are “separate and apart”¹⁴⁴ from removal proceedings under section 240 of the INA.¹⁴⁵

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See *ultra vires*. LEGAL INFORMATION INSTITUTE (undated) (“Latin, meaning ‘beyond the powers.’ Describes actions taken by government bodies or corporations that exceed the scope of power given to them by laws or corporate charters.”). Source: https://www.law.cornell.edu/wex/ultra_vires.

¹⁴¹ Sec. 236(a) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

¹⁴² *Matter of Cabrera-Fernandez*, 28 I&N Dec. 747 (BIA 2023).

¹⁴³ 8 CFR § 1003.19 (2025). Source: <https://www.law.cornell.edu/cfr/text/8/1003.19>.

¹⁴⁴ 8 CFR § 1003.19(d) (2025). Source: <https://www.law.cornell.edu/cfr/text/8/1003.19>; see also *Immigration Court Practice Manual*. U.S. DEP’T OF JUSTICE, EXEC. OFC. FOR IMMIGRATION REVIEW (undated), at chap. 9.3 (“In certain circumstances, an alien detained by the Department of Homeland Security (DHS) can be released from custody upon the payment of bond. Initially, the bond is set by DHS. Upon the alien’s request, an Immigration Judge may conduct a “bond hearing,” in which the Immigration Judge has the authority to redetermine the amount of bond set by DHS. Bond proceedings are separate from removal proceedings.”). Source: <https://www.justice.gov/eoir/reference-materials/ic/chapter-9/3>.

¹⁴⁵ Sec. 240 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>.

That said, neither section 236(a) of the Act nor the applicable regulations confer any right to release on bond on an alien.¹⁴⁶

Rather, when an alien seeks a redetermination of his or her custody status under section 236(a), that alien “must establish to the satisfaction of the Immigration Judge . . . that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.”¹⁴⁷ Conversely, DHS does not bear the burden of showing that the alien should be detained.¹⁴⁸

C. Mandatory Detention Under Sections 236(c) and 242(a)(2) of the INA

As with the congressional restrictions on DHS’s authority to release inadmissible applicants for admission under section 235(b) of the INA, other aliens – including aliens removable on criminal grounds-- are not amenable to release under statutory restrictions.

For example, section 241(a)(1) of the INA¹⁴⁹ directs DHS to remove all aliens under final orders of removal within 90 days, designated therein as the “removal period”.

Section 241(a)(2)¹⁵⁰ of the INA, in turn, directs the department to detain those aliens during the removal period, and further makes clear that “[u]nder no circumstance during the removal period shall” DHS “release an alien who has been found” removable under the criminal and national-security grounds of inadmissibility and deportability.

Similarly, section 236(c) of the INA¹⁵¹ requires DHS to “take into custody any alien who”: is inadmissible under the criminal grounds of inadmissibility in section 212(a)(2) of the INA¹⁵²; is inadmissible or deportable under the “terrorist activities” grounds of inadmissibility and deportability in sections 212(a)(3)(B) of the INA¹⁵³ and 237(a)(4)(B) of the INA¹⁵⁴ (respectively); is deportable under certain grounds of deportability in section 237(a)(2) of the INA¹⁵⁵; or “is charged with . . . arrested for, . . convicted of” or “admits having committed, or

¹⁴⁶ *Matter of R-A-V-P-*, 27 I&N Dec. 803, 804 (BIA 2020). Source: <https://www.justice.gov/eoir/page/file/1258971/dl>.

¹⁴⁷ *Matter of Siniauskas*, 27 I&N Dec. 207, 207 (BIA 2018). Source: <https://www.justice.gov/eoir/page/file/1030706/dl>.

¹⁴⁸ See *Matter of Fatahi*, 26 I&N Dec. 791, 795 n.3 (BIA 2016) (“Although section 236(a) of the Act does not specifically address the burden of proof, it provides that the Attorney General has broad discretion to detain an alien “pending a decision on whether the alien is to be removed from the United States” and “may continue to detain” or “may release the alien” during that time. We have consistently held that aliens have the burden to establish eligibility for bond while proceedings are pending.”). Source: <https://www.justice.gov/eoir/file/881776/dl?inline=>.

¹⁴⁹ Sec. 241(a)(2) of the INA (2025). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1231%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1231%20edition:prelim)).

¹⁵⁰ Sec. 241(a)(2) of the INA (2025). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1231%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1231%20edition:prelim)).

¹⁵¹ Sec. 236(c) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

¹⁵² Sec. 212(a)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

¹⁵³ Sec. 212(a)(3)(B) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

¹⁵⁴ Sec. 237(a)(4)(B) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

¹⁵⁵ Sec. 237(a)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person.”

DHS must take those aliens described in section 236(c) of the INA into custody “when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense”, and bars DHS from releasing them.

The detention mandate was added to section 236(c) by section 303 of IIRIRA.¹⁵⁶

As Congress explained in a conference report¹⁵⁷ for an earlier iteration of that act, “A chief reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens through the course of their deportation proceedings” – underscoring the crucial role of detention in immigration enforcement.

D. Secretary Mayorkas’s “Guidelines for the Enforcement of Civil Immigration Law”

On September 30, 2021, then-DHS Secretary Alejandro Mayorkas issued a memorandum titled “Guidelines for the Enforcement of Civil Immigration Law”¹⁵⁸ (Mayorkas memo).

Notwithstanding the detention mandates in sections 242(a)(2) and 236(c) of the INA, the Mayorkas memo placed restrictions on the ability of ICE agents, officers, and attorneys to investigate, arrest, detain, prosecute, and deport removable aliens (collectively, take “enforcement action”), including those subject to removal on the delineated criminal grounds.

Relying on what the memo described as DHS’s “prosecutorial discretion,” the Mayorkas memo directed ICE officers and attorneys to consider certain “aggravating” and “mitigating” factors before taking any enforcement action, with limited exceptions.¹⁵⁹

The aggravating factors were general and objective, relating to the facts of aliens’ criminal offenses and prior criminal history.

The mitigating factors, on the other hand, were more individualized and subjective, having to do with the alien’s age, health, eligibility for relief from removal, and — interestingly — whether any of the alien’s family members were in the military or worked for the government.

E. *Texas v. U.S.* and the Laken Riley Act

As the Mayorkas guidelines facially contravened the detention mandates in sections 236(c) and 241, the states of Texas and Louisiana filed an amended complaint¹⁶⁰ in a case then pending

¹⁵⁶ Tit. III, sec. 303 of the Illegal Immigration Reform and Immigrant Responsibility Act, Div. C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208 (1996), 110 Stat. 3009–585 to 587. Source: <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

¹⁵⁷ See H. Rept. 104-469—Immigration in the National Interest Act of 1995 (104th Cong., 2d Sess.).

¹⁵⁸ *Guidelines for the Enforcement of Civil Immigration Law*. U.S. DEP’T OF HOMELAND SECURITY (Sept. 30, 2021). Source: <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

¹⁵⁹ See *id.* at 3-4.

¹⁶⁰ *State of Texas v. U.S.*, Case No. 6:21-cv-00016, First Amended Complaint (S.D. Tex. Oct. 22, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.109.0.pdf>.

before the U.S. District Court for the Southern District of Texas captioned *Texas v. U.S.*¹⁶¹, in which they asked the district court to set the guidelines in the Mayorkas memo aside.

In June 2022, the judge assigned to *Texas* issued a Memorandum Opinion and Order enjoining the Mayorkas memo¹⁶². That injunction eventually made its way to the Supreme Court, where in June 2023, a majority of the justices held the states did not have standing to bring the case.¹⁶³

In essence, the majority held that there is no precedent for a plaintiff — even a state — to request that a third-party (here, aliens removable on criminal grounds) be detained and prosecuted on either criminal or immigration grounds.

Justice Alito, in dissent, however, found:

*In order to reach this conclusion, the Court . . . holds that the only limit on the power of a President to disobey a law like the important provision at issue is Congress’s power to employ the weapons of inter-branch warfare—withholding funds, impeachment and removal, etc. I would not blaze this unfortunate trail.*¹⁶⁴

In response to that decision, the Biden administration’s migrant release policies, and the threat posed by certain criminal aliens who had not been detained by DHS in accordance with the INA, Congress in January 2025 passed Pub. L. 119-1, the “Laken Riley Act”¹⁶⁵.

Among other things, that act empowers state attorneys general to sue for injunctive relief to require DHS to detain: inadmissible applicants for admission at the borders and ports subject to mandatory detention under section 235(b) of the INA¹⁶⁶; aliens inadmissible on criminal grounds and deportable aliens removable on specified criminal grounds in section 236(c) of the INA¹⁶⁷; and aliens ordered removed pending deportation under section 241(a)(2) of the INA¹⁶⁸ (criminal aliens in particular).

In addition, it allows state attorneys general to sue the federal government for injunctive relief to force the secretary of State to “discontinue granting immigrant visas or nonimmigrant visas, or both, to citizens, subjects, nationals, and residents of” so-called “recalcitrant countries”¹⁶⁹ —

¹⁶¹ *State of Texas v. U.S.*, Case No. 6:21-cv-00016, Complaint (S.D. Tex. Apr. 6, 2021). Source:

https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.1.0_1.pdf.

¹⁶² *State of Texas v. U.S.*, Case No. 6:21-cv-00016, Memorandum Opinion and Order (S.D. Tex. Jun. 10, 2022). Source:

https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.240.0_4.pdf.

¹⁶³ *U.S. v. Texas*, 599 U.S. 670 (2023). Source: https://www.supremecourt.gov/opinions/22pdf/22-58_i425.pdf.

¹⁶⁴ *Id.* at ____ Slip op., dissent at 1.

¹⁶⁵ The Laken Riley Act, Pub. L. 119-1 (2025). Source: <https://www.congress.gov/bill/119th-congress/senate-bill/5/text>.

¹⁶⁶ Sec. 235(b) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹⁶⁷ Sec. 236(c) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

¹⁶⁸ Sec. 241(a)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim>.

¹⁶⁹ *Immigration: “Recalcitrant” Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*. CONG. RESEARCH SERV. (updated July 10, 2020). Source: <https://www.congress.gov/crs-product/IF11025>.

governments that refuse to take back their nationals who have been ordered deported — as provided for in section 243(d) of the INA¹⁷⁰.

Finally, it allows states to sue the federal government to bar DHS from categorically releasing inadmissible applicants for admission on parole, or on any grounds aside from “urgent humanitarian reasons” or “a significant public benefit”, restrictions—as noted-- Congress has already included in the parole provision in section 212(d)(5)(A) of the INA.¹⁷¹

F. Alternatives to Detention

As ICE explains¹⁷²:

ICE’s Alternatives to Detention (ATD) program exists to ensure compliance with release conditions and provides important case management services for non-detained aliens. ATD consists of the Intensive Supervision Appearance Program (ISAP). The ATD-ISAP program utilizes case management and technology tools to support aliens’ compliance with release conditions while on ICE’s non-detained docket. ATD-ISAP also increases court appearance rates.

ATD-ISAP enables aliens to remain in their communities — contributing to their families and community organizations and, as appropriate, concluding their affairs in the U.S. — as they move through immigration proceedings or prepare for departure.

ATD-ISAP has been in place since 2004 and the number of participants has increased over time. Through the end of October 2024, approximately 7.6 million aliens were being overseen on ICE’s non-detained docket. Of those, more than 179,000 participated in the ATD-ISAP program.

Those sanguine assessments of ATD aside, there are any number of issues with that program.

Notably, the agency contends: “The daily cost per ATD-ISAP participant is less than \$4.20 per day — a stark contrast from the cost of detention, which is around \$152 per day.”¹⁷³

That would be a fair comparison if those two figures, and detention and ATD, were equivalent-- but they are not.

According to statistics¹⁷⁴ published by the Executive Office for Immigration Review (EOIR) — the DOJ component with jurisdiction over the immigration courts and the Board of Immigration

¹⁷⁰ Sec. 243(d) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1253&num=0&edition=prelim>.

¹⁷¹ See sec. IV.A, *supra*.

¹⁷² *What are Alternatives to Detention?* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (updated Feb. 27, 2025). Source: <https://www.ice.gov/features/atd>.

¹⁷³ *Id.*

¹⁷⁴ *Median Completion Times for Detained Cases*. U.S. DEP’T OF JUSTICE, EXECUTIVE OFC. FOR IMMIGRATION REVIEW (generated Oct. 12, 2023). Source: <https://www.justice.gov/eoir/page/file/1163621/dl?inline=>.

Appeals (BIA)— the median completion time for a removal proceeding in FY 2023 was 42 days, though as recently as FY 2014 it was 27 days, and in FY 2008, it was just 8 days.

According to the Transactional Records Access Clearinghouse (TRAC)¹⁷⁵, the average processing time for an immigration court case in January 2023 was 1,016 days, though in immigration courts in Virginia it was 1,738 days.

In other words, the total average cost for detention in FY 2023 was \$6,384, whereas the average cost for ATD was \$4,267.20—a more modest savings of \$2,116.80 per case in favor of ATD.

Cost, of course, is not the only consideration. All detained aliens must appear at their hearings in immigration court, unlike aliens who are not in detention, including those on ATD.

ICE statistics¹⁷⁶ reveal, however, that 909 of the 7,553 aliens on ATD and who had final court appearances in FY 2025 through the end of May failed to appear—a non-appearance rate of 12 percent.

That is better than the historic average non-appearance rate in immigration court for non-detained aliens of 34 percent¹⁷⁷, but again it is 12 percent worse than the no-show rate in detained removal cases (0 percent).

The much more significant factor, though, is public safety. Detained aliens pose no risk to the community, a fact not guaranteed under ATD.

According to the House Judiciary Committee¹⁷⁸, nearly 8 million “illegal aliens” entered the United States under the Biden administration. Unlike lawfully admitted aliens, who must prove to a consular or immigration officer that they have no serious criminal history before receiving a visa, none of those aliens was vetted before they arrived, and the vetting they received after arrival and prior to release was questionable, at best.

In that latter regard, as Rodney Scott, President Biden’s first Border Patrol chief, explained to the House Judiciary Committee¹⁷⁹ in September 2023:

*Every decision to allow a foreign national or a foreign product to enter our home must be an **informed and intentional decision**. If either of these criteria are*

¹⁷⁵ *Immigration Court Processing Time by Outcome*. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (through Jan. 2023). Source: https://tracreports.org/phptools/immigration/court_backlog/court_proctime_outcome.php.

¹⁷⁶ *Detention Management*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (undated). Source: <https://www.ice.gov/detain/detention-management#stats>.

¹⁷⁷ *Immigration Courts: Actions Needed to Track and Report Noncitizens’ Hearing Appearances*. GAO-25-106867. Gov’t ACCOUNTABILITY OFC. (Dec. 2024). Source: <https://files.gao.gov/reports/GAO-25-106867/index.html>.

¹⁷⁸ *Quiet Amnesty: How the Biden-Harris Administration Uses the Nation’s Immigration Courts to Advance An Open-Borders Agenda*. H. Comm. on the Judiciary, 118th Cong. (Oct. 24, 2024). Source: <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-10-24%20Quiet%20Amnesty%20-%20How%20the%20Biden-Harris%20Administration%20Uses%20the%20Nation%27s%20Immigration%20Courts%20to%20Advance%20an%20Open-Borders%20Agenda.pdf>.

¹⁷⁹ *Terrorist Entry Through the Southwest Border: Hearing Before the H. Comm. on the Judiciary, 118th Cong.* (Sep. 2023) (testimony of Rodney Scott). Source: <https://judiciary.house.gov/committee-activity/hearings/terrorist-entry-through-southwest-border>.

missing, then we cannot honestly assert that our borders are secure. Many would argue that it is malfeasance, or at a minimum nonfeasance, for authorities to knowingly and willfully ignore threats and vulnerabilities. Unfortunately, this is exactly what is occurring.

. . . .

*Most aliens, and most Americans for that matter, do not understand what criminal history and other information US law enforcement can access. Even more important for this discussion is the fact that most people do not seem to understand what US law enforcement can NOT access. **When law enforcement officers at any level in the US use a person's biographical and biometric information to run records checks, that freshly collected information is being compared to existing records in specific US agency databases. It is extremely rare for any information about criminal acts committed by a foreign national outside the US to be documented within these US criminal history databases.** When Secretary Mayorkas or any US official asserts that aliens are properly vetted, they are really telling you that they checked US databases to see if the alien had any known criminal history inside the US or if the alien had been identified and placed in the Terrorist Screening Database or Data Set.*

To ensure there is no confusion here, running records checks on any alien that has not been arrested by US law enforcement in the past or is not currently known by US intelligence is like looking for something on an empty hard drive. There is simply no data to compare it with. The alien could be a saint, or he/she could be serial killer. There are a few ways to find out more about who the alien really is. One way is to request information from officials in the alien's home nation. At best, that is extremely time-consuming and requires US State Dept. support. In many cases this is not even an option due to a lack of diplomatic relations or a lack of capabilities in the other nation. [Emphasis added.]

At best, ATD makes it more likely an alien will appear in immigration court or that ICE can locate aliens released on ATD. It does nothing to ensure those aliens will not commit crimes following release on ATD.

There was little transparency into the criminal activities of aliens released on ATD under the Biden administration, with notable exceptions.

In April 2024, for example, the ICE Enforcement Removal Operations (ERO) office in Denver, Colo., issued a press release headlined “ERO Denver arrests 9 at-large noncitizens who violated conditions of Alternatives to Detention”.¹⁸⁰

It detailed the results of a five-day ERO operation in the states of Colorado and Wyoming in which nine aliens who had violated the terms of their ATD releases were arrested. They

¹⁸⁰ ERO Denver arrests 9 at-large noncitizens who violated conditions of Alternatives to Detention. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Apr. 16, 2024). Source: <https://www.ice.gov/news/releases/ero-denver-arrests-9-large-noncitizens-who-violated-conditions-alternatives-detention>.

included a Nicaraguan national who had been “was arrested in possession of a firearm and narcotics” and two separate Mexican nationals convicted for “driving while ability impaired.”

Similarly, a July 2024 press release¹⁸¹ from ERO’s Miami office described a three-day operation in Southeast Florida during which 18 criminal aliens who had been released on ATD were taken into custody.

Those arrests included a Honduran national convicted for resisting an officer, trespassing, criminal mischief, assault, and burglary; a Chinese national convicted for conspiracy, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, battery, weapons offense, drug possession and extortion; a separate Honduran national arrested for battery and aggravated assault with a deadly weapon; and a Guatemalan national arrested for battery and child abuse.

In addition, other facts about the dangers posed by (largely unvetted) aliens released on ATD have been revealed by sources outside of DHS.

An interim staff report issued by the House Judiciary Committee¹⁸² in October 2024, for example, discussed the case of Mohammad Kharwin, a national of Afghanistan who was apprehended by Border Patrol agents after he entered illegally near Imperial Beach, Calif., on March 10, 2023.

As that report explains, despite agents’ concerns that Kharwin was on the terror watchlist:

DHS placed him on Alternatives to Detention (ATD) and instructed him to report to an ICE office in Sacramento, California. After Kharwin reported to the ICE field office just 16 days after his initial encounter, he was removed from ATD and “was able to apply for asylum and work authorization and fly domestically.” DHS told the Committee and [immigration] Subcommittee that ICE removed Kharwin from ATD because there was no basis to maintain his elevated supervision.

In March testimony before the House Oversight and Accountability Committee’s Subcommittee on Cybersecurity, Information Technology, and Government Innovation¹⁸³, Simon Hankinson of the Heritage Foundation referenced other instances in which aliens released on ATD committed criminal offenses in the United States:

¹⁸¹ *ERO Miami ATD program nabs 18 for various crimes*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Jul. 22, 2024). Source: <https://www.ice.gov/news/releases/ero-miami-atd-program-nabs-18-various-crimes>.

¹⁸² *Interim Staff Report, The Biden-Harris Border Crisis: At Least 1.7 Million Potential National Security Threats*. H. Comm. on the Judiciary, 118th Cong. (Oct. 3, 2024), at 7-8. Source: <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-10-03%20The%20Biden-Harris%20Border%20Crisis%20-%20At%20Least%201.7%20Million%20Potential%20National%20Security%20Threats.pdf>.

¹⁸³ *Leveraging Technology to Strengthen Immigration Enforcement: Hearing Before the H. Comm. on Oversight and Accountability, Subcomm. on Cybersecurity, Information Technology, and Government Innovation*, 119th Cong. (2025) (testimony of Simon Hankinson), at 7-8. Source: <https://oversight.house.gov/wp-content/uploads/2025/03/Hankinson-Written-Testimony.pdf>.

On January 29 and 30, 2025, Jefferson Ubilla-Delgado and Geiderwuin Bello Morales were arrested in Chicago and charged with the murder and robbery of 63-year-old George Levin.

At the time of the crime, Ubilla-Delgado was wearing an ICE GPS ankle monitor. Morales had been arrested earlier for attempting to lure a 12-year-old girl into his car. Both Ubilla-Delgado and Morales had been in Chicago for over a year, entering the United States illegally from Venezuela and Ecuador respectively at an unknown date and location.

On September 27, 2024, Estefania Primera, nicknamed “La Barbie,” was arrested outside Sacred Heart Church, a location known for serving arriving migrants, including illegal aliens. Primera was a member of the Tren de Aragua (TdA) gang accused of operating a sex-trafficking ring in El Paso, Texas. One sex-trafficking victim alleged Primera was the frontwoman and had drugged her. Primera crossed the border illegally near El Paso in August 2023 and was released into the U.S. with a notice to appear and an ICE-supervised ankle monitor, which she removed within weeks TdA has been caught operating trafficking and forced prostitution rings, such as this, throughout the U.S., in the states of California, Florida, Georgia, Illinois, Nevada, New Jersey, New York and Texas.

Then, there are the cases of Johan Jose Rangel Martinez and Franklin Jose Pena Ramos, two Venezuelan nationals who entered the United States illegally in March and May 2024, respectively.¹⁸⁴

The pair were indicted in September 2024 on capital murder charges in the June 2024 killing of 12-year-old Houston resident Jocelyn Nungaray.¹⁸⁵

Last June, shortly after they were arrested, the local CBS affiliate in Houston detailed¹⁸⁶ facts in court records that alleged Rangel Martinez and Pena Ramos “lured Jocelyn under the bridge, where they stayed for two hours. Court records say the men took off her pants, tied her up, killed her, and threw her body into the bayou.”

¹⁸⁴ Judge sets \$10M bond for second Venezuelan man accused of killing a 12-year-old Houston girl. ASSOCIATED PRESS (Jun. 26, 2024). Source: <https://apnews.com/article/girl-murder-houston-undocumented-venezuelans-bond-22153232c69dbdb0ee62a5ffb19035e0>.

¹⁸⁵ Dorgan, Michael. DA to seek death penalty against illegal immigrants accused in Nungaray murder case. FOX NEWS (Dec. 13, 2024). Source: <https://www.foxnews.com/us/da-seek-death-penalty-against-illegal-immigrants-accused-nungaray-murder-case>.

¹⁸⁶ Homer, Michelle, Miles, Jason, and Galvan, Jaime E. Men charged with killing 12-year-old Jocelyn Nungaray aren't eligible for death penalty but that could change. KHOU 11 (updated Jun. 25, 2024). Source: <https://www.khou.com/article/news/local/12-year-old-jocelyn-nungaray-update-june-24-2024/285-9ba6c14f-06d2-4e20-b5c6-0a3405c6af55>.

Both had been fitted with ATD ankle monitors after they were apprehended entering illegally.¹⁸⁷ Martinez-Rangel’s monitor was removed by DHS “after complying with mandatory check-ins for two months”, while Pena Ramos was still wearing his at the time of the crime for which he was charged, “only removing it himself a few days after his alleged involvement”.¹⁸⁸

Another high-profile criminal absconder from ATD was Diego Ibarra, brother of Laken Riley’s murderer, Jose Ibarra. As my former colleague, Jon Feere, reported¹⁸⁹ in March 2024:

Diego Ibarra reentered the U.S. unlawfully on April 30, 2023, near El Paso, Texas, and was arrested by the U.S. Border Patrol and enrolled by ERO into Alternatives to Detention (ATD) on May 11, 2023. On May 25, 2023, he was removed from ATD and listed as an absconder from the program after GPS abnormalities. He has several arrests in 2023 by the Athens-Clarke County Police Department where ICE detainers were not honored.

....

But what happened after Diego Ibarra absconded from ATD? For the past nine months Diego ha[d] been running free, only arrested last week for possession of a fake green card. . . . All we know from ICE’s statement is that he eventually popped up on ICE’s radar only after being arrested by the Athens-Clarke County Police Department “several” times in 2023. It appears that it was the taking of fingerprints by this police department that alerted ICE to his location (the prints go into a national database that send a ping to ICE’s enforcement systems) — not the ATD program.

According to a “Memorandum of Facts in Support of Government’s Motion for Detention”¹⁹⁰ (detention memo) filed in connection with his federal fake green card charges, that ATD “abnormality” occurred when Diego Ibarra cut off his ankle monitor, which was found by the side of a road in Littleton, Colo.

He thereafter moved to Athens, Ga., where his brother would join him and murder Laken Riley.

Once in Georgia, according to the detention memo, Diego Ibarra was arrested on the night of September 24, 2023, by two officers from the Athens-Clarke County Police Department (ACCPD) for driving 80 miles per hour in a 40-mile zone.¹⁹¹

¹⁸⁷ Lee, Michael. *Tracking program used by Jocelyn Nungaray murder suspects has expanded under Biden*. Fox News (Jun. 26, 2024). Source: <https://www.foxnews.com/politics/tracking-program-used-jocelyn-nungaray-murder-suspects-has-expanded-under-biden>.

¹⁸⁸ *Id.*

¹⁸⁹ Feere, Jon. *Georgia Murder Case Highlights Problems with ‘Alternatives to Detention’*. CENTER FOR IMMIGRATION STUDIES (Mar. 1, 2024). Source: <https://cis.org/Feere/Georgia-Murder-Case-Highlights-Problems-Alternatives-Detention>.

¹⁹⁰ *U.S. v. Ibarra*, Case No. 3:24-MJ-00005-CHW, Memorandum of Facts in Support of Government’s Motion for Detention, at 4 (M.D. Ga. Mar. 6, 2024). Source: <https://static.foxnews.com/foxnews.com/content/uploads/2024/03/Facts-in-Support-of-Motion-to-Detain-Diego-Ibarra-final-version-filed-Doc.-19.pdf>.

¹⁹¹ *Id.*

A search of the vehicle revealed an open can of beer, and while Diego Ibarra initially contended that he had only consumed a single beer, he eventually admitted to having had seven.

That was a curious admission, because according to the detention memo, after his subsequent blood sample was sent to the Georgia Bureau of Investigation (GBI), the lab concluded he didn't have any alcohol in his system at all — though he did test positive for methamphetamine and tetrahydrocannabinol “THC”, the main psychoactive element in marijuana.¹⁹²

He was booked into the county jail, charged with (*inter alia*) driving under the influence (DUI), speeding, and driving without a license, and thereafter released.

He failed to appear at his subsequent court date and a warrant was thereafter issued for his arrest.

Two days after that DUI arrest, on September 26, the detention memo claims, ACCPD officers were called to an Athens apartment in response to a call from a woman identified only as “J.G.”¹⁹³

J.G. told police that her boyfriend — Diego Ibarra — had taken her cell phone from her, and that she had bitten him in the chest to get it back. In response, she claimed, Ibarra slapped her in the face.

Just over a month later, on October 27, 2023, ACCPD officers were called to a shoplifting incident at an Athens-area Walmart involving two males. As the detention memo¹⁹⁴ explains:

The two males were observed stuffing items into bookbags and boarding a bus near the Walmart. An off-duty officer was able to locate the two males, who were identified as Diego Ibarra and his brother, Jose Ibarra (“Jose”). Inside a bookbag in Jose’s possession, officers located items of food taken from the Walmart. Inside Ibarra’s bookbag, officers located stolen t-shirts, shorts, hoodies, and a jacket.

The brothers were cited for shoplifting more than \$200 worth of merchandise, but an officer advised the duo about “a pre-arrest diversion program”, and were released.¹⁹⁵

On December 8, 2023, the detention memo alleges¹⁹⁶, a loss-prevention officer spotted Diego Ibarra at the same Wal-Mart, loading two t-shirts into his bag and attempting to leave.

The police were called again, and this time Ibarra was purportedly¹⁹⁷ placed under arrest for shoplifting and for skipping court for the DUI charge.

¹⁹² *Id.* at 5.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 6.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

Nonetheless, he was apparently released again because he was free on February 23, 2024, when he was arrested¹⁹⁸ as a suspect in Riley’s killing. During that arrest, he provided a responding officer the fraudulent Permanent Resident Card that formed the basis of his federal charges.

He was convicted of that offense and sentenced to 48 months’ imprisonment in March.¹⁹⁹

As the U.S. Attorney’s Office stated in announcing that conviction, “Diego Ibarra is likely affiliated with the Venezuelan gang Tren de Aragua (TdA), based on evidence including his multiple TdA tattoos and photos of him on social media making the TdA gang signs and wearing TdA clothing.”

As an aside, according to that press release:

*while in the custody of the U.S. Marshals Service and housed in the Butts County Detention Center, Ibarra caused “severe water damage” inside the jail when he damaged the fire sprinkler system in a jail cell block. On June 25, 2024, jail officers found Ibarra in possession of two improvised weapons: a sharpened sprinkler head with a make-shift grip and a pen wrapped in saran wrap.*²⁰⁰

V. DUE PROCESS IN THE REMOVAL PROCESS

Of all the clauses in the U.S. constitution, “due process” is the only one to appear twice: once in the Fifth amendment²⁰¹; and again, in the 14th amendment²⁰².

The Fifth amendment provides that “no person shall be. . . deprived of life, liberty, or property, without due process of law”.²⁰³ Similarly, section 1 of the 14th amendment makes clear that no “State” can “deprive any person of life, liberty, or property, without due process of law”.²⁰⁴

That 14th amendment bound the individual states to the other rights enumerated in the constitution, but immigration is a fundamentally federal issue²⁰⁵ and the Fifth amendment has—since its passage—bound the federal government.

Note that the founders didn’t simply state that the Fifth amendment required “process” before such a deprivation of “life, liberty, or property” occurred, only that the process required was what was “due” in the specific situation—an important modifier that expands or contracts the right depending on the situation.

¹⁹⁸ *Id.* at 1-2.

¹⁹⁹ *Three Venezuelans Sentenced to Prison for Possessing Fake Green Cards*. U.S. DEP’T OF JUSTICE, U.S. ATTY’S OFC., M.D. GA. (Mar. 19, 2025). Source: <https://www.justice.gov/usao-mdga/pr/three-venezuelans-sentenced-prison-possessing-fake-green-cards#:~:text=Diego%20Jose%20Ibarra%2C%20aka%20E2%80%9CGocho,document%20on%20July%2015%2C%202024..>

²⁰⁰ *Id.*

²⁰¹ U.S. CONST. amend. V. Source: <https://constitution.congress.gov/constitution/amendment-5/>.

²⁰² U.S. CONST. amend. XIV §1. Source: <https://constitution.congress.gov/constitution/amendment-14/>.

²⁰³ U.S. CONST. amend. V. Source: <https://constitution.congress.gov/constitution/amendment-5/>.

²⁰⁴ U.S. CONST. amend. XIV §1. Source: <https://constitution.congress.gov/constitution/amendment-14/>.

²⁰⁵ See section I, *supra*.

Keep that in mind as I explain that in 2001, the Supreme Court recognized²⁰⁶ that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”, but also held “the nature of that protection may vary depending upon status and circumstance”²⁰⁷.

Just how that process works has been developed through precedent, with the Supreme Court holding at various times that: “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”²⁰⁸; “once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly”²⁰⁹; and that “[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society”²¹⁰.

A. Due Process for Illegal Entrants and Aliens at the Ports

To ensure aliens receive the process they are due, both the legislative and executive branches have crafted various procedures to determine whether aliens should be admitted, should be granted immigration benefits, and, alternatively, should be removed.

Up until 1996, the process due to illegal aliens hinged on whether they had entered the United States, regardless of whether they had been admitted or not, or instead had been stopped at the ports and the borders seeking admission or attempting entry²¹¹.

The former group had more expansive rights; the latter only received whatever process prior to expulsion Congress had provided them²¹².

²⁰⁶ *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Source: <https://supreme.justia.com/cases/federal/us/533/678/>.

²⁰⁷ *Id.* at 694.

²⁰⁸ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). Source: <http://cdn.loc.gov/service/ll/usrep/usrep494/usrep494259/usrep494259.pdf>.

²⁰⁹ *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Source: <http://cdn.loc.gov/service/ll/usrep/usrep459/usrep459021/usrep459021.pdf>.

²¹⁰ *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). Source: <http://cdn.loc.gov/service/ll/usrep/usrep339/usrep339763/usrep339763.pdf>.

²¹¹ See Wiegand III, Charles A. *Fundamentals of Immigration Law*. U.S. DEP’T OF JUSTICE, EXECUTIVE OFC. FOR IMMIGRATION REVIEW (revised Oct. 2011), at 1 (“Before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), the decision as to whether an alien was subject to deportation proceedings or exclusion proceedings was based on whether or not the alien had made an “entry” into the U.S. An alien who had made an entry was entitled to a deportation hearing and the greater procedural safeguards it provided. An alien who had not made an entry was placed in exclusion proceedings. Former section 101(a)(13) of the Act defined entry as ‘any coming of an alien into the U.S. from a foreign port or place.’ . . . These two doctrines caused a great deal of litigation over the issue of whether certain aliens were properly placed in exclusion proceedings. They were rather time consuming and, since they dealt with the issue of whether or not the alien was in the proper proceeding, delayed the addressing of the ultimate issues in the cases, i.e. the issues of excludability and eligibility for relief.”). Source:

https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Fundamentals_of_Immigration_Law.pdf.

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

That calculus largely proved unworkable while at the same time it also encouraged aliens to evade inspection on their way into the United States, so in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996²¹³ (IIRIRA), Congress scrapped it with respect to arriving aliens and recent illegal arrivals and started over.

Most crucially, IIRIRA created the “inspection protocol” in section 235 of the INA²¹⁴, which treats all “arriving aliens”—those at the ports and those attempting to enter illegally between the ports—equally, as “applicants for admission”²¹⁵.

Section 235(a)(3) of the INA requires “immigration officers”—U.S. Customs and Border Protection (CBP) officers at the ports of entry and Border Patrol agents (also in CBP) between them—to “inspect” those aliens to determine whether they’re admissible, or more precisely, whether they’re inadmissible under any of the grounds of inadmissibility in section 212(a) of the INA²¹⁶.

Unless an alien “clearly and beyond a doubt [is] entitled to be admitted,”²¹⁷ as explained in section IV.A, *supra*, the immigration officer must detain the alien for a removal hearing before an immigration judge under section 240 of the INA²¹⁸, with one crucial caveat.

Also as explained *supra*, aliens who are inadmissible because they lack proper documents that would allow them to be admitted (under section 212(a)(7)²¹⁹) or because they sought admission through fraud or misrepresentation (under section 212(a)(6)(C)²²⁰) are subject to “expedited removal”, under section 235(b)(1) of the INA²²¹.

Expedited removal allows immigration officers to bypass immigration judge removal proceedings and order such aliens removed. The only exception²²², as noted, is where the alien subject to expedited removal claims a fear of persecution or other harm if returned or requests asylum.

²¹³ Tit. III, sec. 302 of the Illegal Immigration Reform and Immigrant Responsibility Act, Div. C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208 (1996), 110 Stat. 3009–579 to 584. Source: <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

²¹⁴ Sec. 235 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

²¹⁵ Sec. 235(a)(1) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

²¹⁶ Sec. 212(a) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

²¹⁷ Sec. 235(b)(2)(A) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

²¹⁸ See sec. 240 of the INA (2025) (“Removal proceedings”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>.

²¹⁹ Sec. 212(a)(7) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

²²⁰ Sec. 212(a)(6)(C) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

²²¹ Sec. 235(b)(1) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

²²² Sec. 235(b)(1)(A)(i) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

The immigration officer must send an alien claiming a fear of persecution to be interviewed by a USCIS asylum officer to determine whether the alien has a “credible fear of persecution”²²³, defined as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum” under section 208 of the INA²²⁴.

If the asylum officer finds the alien has a credible fear, the alien leaves expedited removal and is referred to removal proceedings before an immigration judge²²⁵.

If the asylum officer finds that the alien does not have a credible fear, the alien can have that decision reviewed by an immigration judge in a truncated process separate from removal proceedings.²²⁶

If the immigration judge reverses the asylum officer’s negative credible fear determination after review, the alien is then placed into removal proceedings.

If, however, the alien does not claim a fear of harm or does not request an immigration judge review of the asylum officer’s negative credible fear determination, or if the immigration judge on review affirms the asylum officer’s negative credible fear determination, the alien will be expelled.²²⁷

Under section 242(e) of the INA²²⁸, the only issues aliens subject to expedited removal have a right to have reviewed in federal court on habeas are claims they are U.S. citizens; whether they were ordered removed under section 235(b)(1) of the INA; and whether they can prove “by a preponderance of the evidence” they were admitted as lawful permanent residents or refugees or have been granted asylum.

In its June 2020 opinion in *DHS v. Thuraissigiam*²²⁹, the Supreme Court concluded expedited removal without further review under those standards in section 242(e) of the INA satisfied due process, even for aliens who had physically crossed and entered illegally (as opposed to being stopped at the ports).

As the Court held there:

²²³ Sec. 235(b)(1)(B)(v) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>

²²⁴ Sec. 208 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

²²⁵ Sec. 235(b)(1)(B)(ii) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

²²⁶ Sec. 235(b)(1)(B)(iii)(III) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>; see also 8 C.F.R. § 235.6(a)(2)(i) (2025). Source: <https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-235/section-235.6>.

²²⁷ Sec. 235(b)(1)(B)(iii)(I) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>;

²²⁸ Sec. 242(e)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1252&num=0&edition=prelim>.

²²⁹ *DHS v. Thuraissigiam*, 591 US __, slip op. at 11-33 (2020). Source: https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf.

In respondent’s case, Congress provided the right to a “determin[ation]” whether he had “a significant possibility” of “establish[ing] eligibility for asylum,” and he was given that right. [sections 235(b)(1)(B)(ii), (v) of the INA]. Because the Due Process Clause provides nothing more, it does not require review of that determination or how it was made. As applied here, therefore, [section 242(e)(2) of the INA] does not violate due process.²³⁰

B. Due Process for Other Aliens

The expedited removal provisions in section 235(b)(1) of the INA also allow—but do not require—DHS to apply that limited-review process to aliens in the interior who have not “affirmatively shown, to the satisfaction of an immigration officer” that they have “been physically present in the United States continuously for the 2-year period immediately prior to the date” they are encountered by DHS.²³¹

DHS published a notice²³² in late January announcing it would be taking advantage of that expansion in section 235(b)(1)(A)(iii) of the INA by expanding expedited removal to all illegal entrants who are unable to show they have been present here for at least two years.

That expansion is being challenged²³³, though a similar expansion during the first Trump administration was allowed to proceed²³⁴.

The real question, however, is whether the Supreme Court will ultimately find the truncated expedited review procedures in sections 235(b)(1) and 242(e) of the INA satisfy the due process rights of aliens who evaded apprehension and made their way into the interior before being detected, to the same degree they do for aliens stopped by DHS at the borders and the ports.

That decision could go either way, but Congress did permit such an expansion of expedited removal and the justices may leave it to the political branches to settle the matter.

With those “expedited removal” exceptions, Congress has charged immigration judges as an initial matter with ensuring the due process rights of all other aliens during removal proceedings.

²³⁰ *Id.* at 36.

²³¹ See sec. 235(b)(1)(A)(iii) of the INA (2025) (“Application to certain other aliens. (I) In general—[DHS] may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by [DHS]. Such designation shall be in the sole and unreviewable discretion of [DHS] and may be modified at any time. (II) Aliens described --An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

²³² *Designating Aliens for Expedited Removal*. 90 Fed. Reg. 8139 (Jan. 24, 2025). Source: <https://www.govinfo.gov/content/pkg/FR-2025-01-24/pdf/2025-01720.pdf>.

²³³ See *Make the Road N.Y. v. Huffman*, 1:25-cv-00190, Complaint (D.D.C. Jan. 22, 2025). Source: https://storage.courtlistener.com/recap/gov.uscourts.dcd.276674/gov.uscourts.dcd.276674.1.0_6.pdf.

²³⁴ See *Make the Road New York v. Wolf*, 962 F.3d 612 (2020). Source: https://www.judiciary.senate.gov/imo/media/doc/make_the_road_new_york_v_wolf.pdf.

As noted, section 240 of the INA²³⁵ governs removal hearings, and gives immigration judges authority to “administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses” in determining whether aliens should be excluded, admitted, deported, or granted certain immigration benefits²³⁶.

Under section 240(c)(2) of the INA²³⁷, aliens charged with inadmissibility bear the burden of proving “clearly and beyond doubt” they are “entitled to be admitted and” are “not inadmissible under” section 212(a) of the INA.

By contrast, the government under section 240(c)(3) of the INA²³⁸ bears the burden of “establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable” under section 237(a) of the INA.

As that latter provision states: “No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.”²³⁹

In addition to the authorities and procedures for removal hearings in section 240, DOJ has published implementing regulations²⁴⁰ to protect aliens’ due process rights in removal proceedings.

Those regulations ensure aliens understand the nature of the proceedings and their rights²⁴¹, allow them to be represented at no expense to the government²⁴², and provide for interpreters to be made available for those who don’t speak English²⁴³, as well as to govern the submission of evidence²⁴⁴ and the immigration judge’s decision²⁴⁵.

Reviewing courts have found that failures by immigration judges to comply with those procedural regulations constitute due process violations.²⁴⁶

²³⁵ Sec. 240(a)(1) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>.

²³⁶ Sec. 240(b)(1) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>.

²³⁷ Sec. 240(c)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>.

²³⁸ Sec. 240(c)(3) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>.

²³⁹ *Id.*

²⁴⁰ 8 C.F.R. § 1240.1, *et seq.* (2025). Source: <https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240>.

²⁴¹ 8 C.F.R. §§ 1240.10(a)(1)-(4) (2025). Source: <https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240>.

²⁴² 8 C.F.R. §§ 1240.10(a)(1) and (2) (2025). Source: <https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240>.

²⁴³ 8 C.F.R. § 1240.44 (2025). Source: <https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240>.

²⁴⁴ 8 C.F.R. § 1240.7 (2025). Source: <https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240>.

²⁴⁵ 8 C.F.R. § 1240.12 (2025). Source: <https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240>.

²⁴⁶ *See Due Process in Immigration Proceedings*. U.S. COURT OF APPEALS FOR THE NINTH CIR. (Feb. 2024), at pp. E-19- E-20 (“[T]he IJ must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief.” *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (due process violation where IJ failed adequately to explain procedures to pro se applicant; IJ had an obligation to assist the pro se applicant in determining what evidence was relevant, and to explain how he could prove his claims); see also *Zamorano v. Garland*, 2 F.4th 1213, 1225 (9th Cir. 2021) (IJ has an obligation to explain what noncitizen must prove to establish the basis for the relief he seeks); *Jacinto v. INS*, 208 F.3d 725, 728 (9th Cir. 2000) (due process violation where noncitizen appeared pro se and IJ failed sufficiently to explain that noncitizen could be a witness even without an attorney, inadequately explained hearing procedures, and failed to explain what the noncitizen had to prove to establish eligibility for asylum”). Source: https://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/E.pdf.

In addition, 8 C.F.R. § 1240.2²⁴⁷ provides for DHS to appoint counsel (from ICE) in each case to present evidence on behalf of the United States and to interrogate, examine, and cross-examine the alien respondent and all other witnesses.

Note that in *Matter of S-M-J-*, the BIA recognized the specific obligations that both government counsel and immigration adjudicators owe to respondents in asylum cases:

*Because this Board, the Immigration Judges, and the Immigration and Naturalization Service are all bound to uphold this law, we all bear the responsibility of ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim*²⁴⁸.

Under 8 C.F.R. § 1240.15²⁴⁹, both aliens *and the government* are allowed to appeal immigration judge decisions to a different administrative DOJ tribunal, the BIA, as a matter of right (except where the respondent is ordered removed *in absentia*), and notably, section 240(c)(5) of the INA specifically states:

*If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.*²⁵⁰

In addition to their right to appeal adverse immigration judge decisions to the BIA, aliens can also file petitions for review with the federal circuit courts having jurisdiction over the places where their removal hearings were held, under the limits in section 242 of the INA²⁵¹, and can seek certiorari before the Supreme Court. Those courts, of course, can deny such petitions.

Reviewing courts have found that the procedures in sections 240 and 242 of the INA and in 8 C.F.R. § 1240.1 *et seq.* satisfy due process, and as even the Ninth Circuit has held: “Where an alien is given a full and fair opportunity to be represented by counsel, prepare an application for . . . relief, and to present testimony and other evidence in support of the application, he or she has been provided with due process”²⁵².

That said, as with failures to comply with the procedural regulations, immigration judges have been found to have violated aliens’ due process rights when they prevented the full examination

²⁴⁷ 8 C.F.R. § 1240.2 (2025). <https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240>.

²⁴⁸ *Matter of S-M-J-*, 21 I&N Dec. 722, 723 (BIA 1997). Source: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3303.pdf>.

²⁴⁹ 8 C.F.R. §§ 1240.15 (2025). Source: <https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240>.

²⁵⁰ Sec. 240(c)(5) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>.

²⁵¹ Sec. 242 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1252&num=0&edition=prelim>.

²⁵² *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926-27 (9th Cir. 2007). Source: https://scholar.google.com/scholar_case?case=3469142116965520476&hl=en&as_sdt=6&as_vis=1&oi=scholarrr.

of aliens²⁵³ and pressured aliens to drop certain avenues of relief²⁵⁴, and even when they have stood in “moral judgment” of an alien²⁵⁵ and denied repeated continuances²⁵⁶.

If, however, you are wondering why removal cases can drag on for years, in my experience it’s largely because immigration judges are concerned they will be second-guessed by circuit court judges who are often too quick to find due process violations.²⁵⁷

VI. IMMIGRATION ENFORCEMENT UNDER TRUMP II

Immigration enforcement has changed significantly under the second Trump administration.

A. Border Security

Between February 1 and the end of May, CBP officers and Border Patrol agents encountered just over 116,300 inadmissible applicants for admission²⁵⁸—37,808 illegal entrants apprehended by Border Patrol agents and 78,514 aliens deemed inadmissible by OFO at the Southwest border ports.

That’s a greater than 88 percent decrease compared to overall encounters during the same four-month period in FY 2024 (991,447), a 93 percent decrease in apprehensions (February to May 2024: 533,592), and an 82.8 percent decrease in port encounters (February to May 2024: 457,577).²⁵⁹

The reasons for that decline are many, but none is more obvious than the fact that DHS under the current administration has returned to a historical policy of border deterrence.

The three key components of any successful border deterrence strategy are: (1) apprehension, detention, and removal of inadmissible aliens; (2) prosecutions for illegal entries and reentries; and (3) infrastructure.

²⁵³ *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000). Source: <https://law.justia.com/cases/federal/appellate-courts/F3/210/967/483872/>.

²⁵⁴ *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002). Source: <https://caselaw.findlaw.com/court/us-9th-circuit/1113619.html>.

²⁵⁵ *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007–09 (9th Cir. 2003). Source: <https://caselaw.findlaw.com/court/us-9th-circuit/1292799.html>.

²⁵⁶ *Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir. 2010). Source: <https://cdn.ca9.uscourts.gov/datastore/opinions/2014/08/22/10-72239.pdf>.

²⁵⁷ See Arthur, Andrew. *The Massive Increase in the Immigration Court Backlog*. Center for Immigration Studies (Jul. 24, 2017) (“If an alien is unrepresented, the court will generally grant at least one continuance to find counsel. If the court subsequently goes ahead thereafter, notwithstanding the request of the alien for an additional continuance to find counsel, the case will likely be remanded, and the IJ runs the risk of being accused of denying due process. Similarly, an IJ who refuses to grant multiple continuances to an alien to file an application for relief, or to submit evidence in a case, may be accused by a reviewing court of violating due process. In such an instance, the IJ’s reputation would be besmirched, and the BIA or circuit court would simply remand the case, in essence granting the continuance requested.”). Source: <https://cis.org/Report/Massive-Increase-Immigration-Court-Backlog>.

²⁵⁸ *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

²⁵⁹ *Id.*

Between February and the end of May, Border Patrol agents at the Southwest border released just seven illegal entrants with NTAs²⁶⁰, .09 percent as many as they had in the month of December alone.

And, in March 2025 alone, 1,596 aliens were charged²⁶¹ with misdemeanor improper entry under section 275 of the INA²⁶², 240 percent more than in December, and 1,008 others were charged with felony improper reentry²⁶³ under that provision, 18 percent more than in December.

Finally, in March, nearly 3,000 aliens were charged²⁶⁴ with illegal reentry after removal under section 276 of the INA²⁶⁵, a 45-percent increase compared to December.

In April, DHS Secretary Kristi Noem issued waivers²⁶⁶ for infrastructure construction at the Southwest border to close three “critical gaps” along 2.5 miles of fencing in California. That is just the start of planned improvements along the border that will serve as a force multiplier for agents and an impediment to smugglers.

In addition to deterrence, the Trump administration secured an agreement with the government of Mexico to send 10,000 Mexican National Guard and Army troops²⁶⁷ to the south side of the international boundary to deter smugglers and illegal migrants from approaching the U.S. border.

And at the ports, one of the new president’s first actions was to shut down the CBP One app interview process²⁶⁸—likely the key reason for the marked decline in OFO Southwest border encounters.

That will free up CBO officers to find and interdict migrants and illegal drug smugglers who are attempting to move surreptitiously through those ports of entry and facilitate the free flow of lawful commerce and travel.

B. Executive Actions

²⁶⁰ See *Custody and Transfer Statistics, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

²⁶¹ *Prosecuting Immigration Crimes Report (PICR)*, U.S. DEP’T OF JUSTICE (updated Apr. 9, 2025). Source: <https://www.justice.gov/usao/resources/PICReport>.

²⁶² Sec. 275 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1325&num=0&edition=prelim>.

²⁶³ *Prosecuting Immigration Crimes Report (PICR)*, U.S. DEP’T OF JUSTICE (updated Apr. 9, 2025). Source: <https://www.justice.gov/usao/resources/PICReport>.

²⁶⁴ *Id.*

²⁶⁵ Sec. 276 of the INA (2025): Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1326&num=0&edition=prelim>.

²⁶⁶ *DHS issues waiver to expedite new border wall construction in California*. U.S. CUSTOMS AND BORDER PROTECTION (April 8, 2025). Source: <https://www.cbp.gov/newsroom/national-media-release/dhs-issues-waiver-expedite-new-border-wall-construction-california>.

²⁶⁷ *Mexico deploys the first of 10,000 troops to US border after Trump's tariff threat*. VOICE OF AMERICA (Feb. 6, 2025). Source: <https://www.voanews.com/a/mexico-deploys-the-first-of-10-000-national-guard-troops-to-us-border-after-trump-s-tariff-threat/7964846.html>.

²⁶⁸ Heilweil, Rebecca. *Trump shuts down CBP One app, closing a pathway to America*. FEDSCOOP (Jan. 21, 2025). Source: <https://fedscoop.com/trump-shuts-down-border-app-cbp-one/>.

The new president issued a number of executive actions quickly after returning to office. Here are just a few

On January 20, he issued Executive Order (EO) 14161, “Protecting the United States From Foreign Terrorists and Other National Security and Public Safety Threats”²⁶⁹, which directs DHS and the State Department to implement “enhanced vetting” for visa applicants and aliens in this country.

That day, he also issued EO 14165²⁷⁰, “Securing Our Borders”, which among other things ended CHNV parole, as well as Presidential Proclamation (PP) 10886²⁷¹, “Declaring a National Emergency at the Southern Border of the United States”, which (again, among other things) authorizes the use of Department of Defense assets for border security.

Also on Inauguration Day, the president issued EO 14159²⁷², “Protecting the American People Against Invasion”.

The Center has explained²⁷³ that this EO:

Declares that it is the policy of the United States to faithfully execute the immigration laws against all inadmissible and removable aliens and to achieve the total and efficient enforcement of those laws, including through lawful incentives and detention capabilities.

Revokes former President Biden’s immigration-related executive orders.

Directs executive agencies to take all appropriate action to promptly revoke all memoranda, guidance, or other policies based on former President Biden’s executive orders and to “employ all lawful means to ensure the faithful execution of the immigration laws of the United States”.

Instructs the Secretary of Homeland Security to take all appropriate action to enable the Director of U.S. Immigration and Customs Enforcement, the Commissioner of U.S. Customs and Border Protection, and the Director of U.S. Citizenship and Immigration Services to set priorities for their agencies that protect the public safety and national security interests of the American people, including by ensuring the successful enforcement of final orders of removal.

²⁶⁹ *Protecting the United States From Foreign Terrorists and Other National Security and Public Safety Threats*. 90 Fed. Reg. 8451 (Jan. 20, 2025). Source: <https://www.federalregister.gov/documents/2025/01/30/2025-02009/protecting-the-united-states-from-foreign-terrorists-and-other-national-security-and-public-safety>.

²⁷⁰ *Securing Our Borders*. 90 Fed. Reg. 8467 (Jan. 20, 2025). Source: <https://www.federalregister.gov/documents/2025/01/30/2025-02015/securing-our-borders>.

²⁷¹ *Declaring a National Emergency at the Southern Border of the United States*. 90 Fed. Reg. 8327 (Jan. 20, 2025). Source: <https://www.federalregister.gov/documents/2025/01/29/2025-01948/declaring-a-national-emergency-at-the-southern-border-of-the-united-states>.

²⁷² *Protecting the American People Against Invasion*. 90 Fed. Reg. 8443 (Jan. 20, 2025). Source: <https://www.federalregister.gov/documents/2025/01/29/2025-02006/protecting-the-american-people-against-invasion>.

²⁷³ *Outline of President Trump’s January 20 Immigration and Border Executive Actions*. CENTER FOR IMMIGRATION STUDIES (Jan. 27, 2025). Source: <https://cis.org/Report/Outline-President-Trumps-January-20-Immigration-and-Border-Executive-Actions>.

Directs the Secretary of Homeland Security to ensure that the primary mission of U.S. Immigration and Customs Enforcement's Homeland Security Investigations division is the enforcement of the provisions of the INA and other Federal laws related to the illegal entry and unlawful presence of aliens in the United States and the enforcement of the purposes of this order.

Directs the Attorney General, in coordination with the Secretary of State and the Secretary of Homeland Security, to take all appropriate action to prioritize the prosecution of criminal offenses related to the unauthorized entry or continued unauthorized presence of aliens in the United States.

Instructs the Attorney General and Secretary of Homeland Security to establish homeland security task forces in all states to end the presence of criminal cartels, foreign gangs, transnational criminal organizations, dismantle cross border human smuggling, end human trafficking, and directs the task forces focus on offenses involving children.

Orders the Secretary of Homeland Security and Attorney General to announce and publicize the legal obligation of all unregistered aliens to comply with Chapter 12 of Title 8 of the U.S. Code, including registration requirements and ensure that failure to comply with the legal obligations is treated as civil and criminal enforcement priorities.

C. Interior Enforcement

Perhaps the highest-profile aspect of the president's immigration policies, and the one most pertinent to today's hearing, is interior enforcement—an effort over which ICE has primary jurisdiction.

Spearheading that effort on behalf of the administration is Tom Homan, formally the “White House Executive Associate Director of Enforcement and Removal Operations” but better known as Trump's “border czar”.

As NPR has reported:

Homan, a former police officer and Border Patrol agent, has worked under six presidents during his three decades in law enforcement. He was executive associate director of enforcement and removal operations for Immigration and Customs Enforcement under President Obama. During that administration, ICE carried out a record number of deportations.²⁷⁴

²⁷⁴ Treisman, Rachel. What to know about Tom Homan, the former ICE head returning as Trump's 'border czar'. NPR (Nov. 11, 2024). Source: <https://www.npr.org/2024/11/11/nx-s1-5186522/tom-homan-border-czar-trump>.

Under Homan's direction, ICE has partnered with CBP, the Federal Bureau of Investigation, the U.S. Drug Enforcement Administration, the U.S. Marshals Service and other federal agencies to apprehend aliens- and alien criminals in particular-- for detention, prosecution, and removal.²⁷⁵

ICE and its federal partners arrested an average of 660-plus removable aliens per day during Trump's first 100 days back in office²⁷⁶. Three-quarters were criminals, including ones with "convictions or charges for 9,639 assaults, 6,398 DWIs or DUIs and 1,479 weapon offenses"—as well as "498 . . . accused or convicted of murder".²⁷⁷

In addition, 65,682 aliens were removed in the administration's first 100 days, putting DHS on track for an annual removal rate of around 240,000.

Compared to an unauthorized population that the Center conservatively estimated²⁷⁸ to be around 15.4 million in January 2025, 240,000 removals per year do not appear to be that significant.

Physical removals are not the only strategy that the Trump administration is using to decrease the unauthorized population, however. It's also prompting aliens to self-deport.

To that end, DHS launched a multi-million-dollar media campaign²⁷⁹ to dissuade would-be illegal migrants from coming to the United States and to encourage those unlawfully here to leave "now or face deportation with the inability to return to the United States".

Whether the Trump administration is aware or not, its PR campaign takes a page out of President Obama's playbook when he was faced with a surge of Central American families and children entering illegally in 2014.²⁸⁰

²⁷⁵ ICE, *federal partners arrest 133 alien offenders during enhanced operation in New York*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Apr. 4, 2025). Source: <https://www.ice.gov/news/releases/ice-federal-partners-arrest-133-alien-offenders-during-enhanced-operation-new-york>.

²⁷⁶ *100 days of record-breaking immigration enforcement in the US interior*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Apr. 29, 2025). Source: <https://www.ice.gov/news/releases/100-days-record-breaking-immigration-enforcement-us-interior>.

²⁷⁷ *Id.*

²⁷⁸ Camarota, Steven A. and Zeigler, Karen. *Foreign-Born Number and Share of U.S. Population at All-Time Highs in January 2025*. CENTER FOR IMMIGRATION STUDIES (Mar. 12, 2025). Source: <https://cis.org/Report/ForeignBorn-Number-and-Share-US-Population-AllTime-Highs-January-2025>.

²⁷⁹ *DHS Announces Nationwide and International Ad Campaign Warning Illegal Aliens to Self-Deport and Stay Out*. U.S. DEP'T OF HOMELAND SECURITY (undated). Source: <https://www.dhs.gov/news/2025/02/17/dhs-announces-ad-campaign-warning-illegal-alien-self-deport-and-stay-out>.

²⁸⁰ See *The Obama Administration's Government-Wide Response to Influx of Central American Migrants at the Southwest Border*. THE WHITE HOUSE (Aug. 1, 2014) ("On June 20, the Honduran government began a nationwide media campaign using CBP-provided materials highlighting the dangers of land-based migration, which is being shown on gas station screens and broadcast on 80 TV outlets and 120 radio stations. . . . Guatemala's First Lady launched the "Quédate!" campaign discouraging illegal immigration to the United States. Through public statements she is noting the dangers of the journey and urged parents not to send their children illegally to the United States. On June 26, Guatemala media Prensa Libre.El Quetzalteco, and Guatevisión launched an independent campaign on June 26 to raise awareness of the unaccompanied minors issue . . . On July 14, the Government of El Salvador announced the launch of a six-month, \$1.2 million media campaign on the dangers of migration by children and families. Phase one will focus on the dangers of the trip, while phase two will highlight government efforts to reduce migration push factors. On July 10, the Mayor's Office of San Salvador, the Municipal Institute for Youth and the NGO Vision Democrática launched an unaccompanied minor campaign called "Sueño vs. Pesadilla" (Dream vs. Nightmare). The campaign, conducted in partnership with ten universities and 2,000 youth volunteers, includes earned media, social media and direct volunteer outreach to key communities in San Salvador.""). Source: <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american>.

In addition, Secretary Noem has announced²⁸¹ DHS would begin requiring aliens unlawfully present to register with the federal government and be fingerprinted in accordance with section 262 of the INA.²⁸²

As the department noted in a March 21 announcement on that requirement²⁸³, aliens who don't register or who fail to carry evidence of registration face prosecution and "a fine, imprisonment, or both" -- penalties provided for in section 266 of the INA.²⁸⁴

The Center has noted²⁸⁵ that when DHS operated a more narrowly tailored registration program for nationals of certain designated countries in the early 2000s, "80,000 people complied with the registration law and 13,000 were placed in deportation proceedings, and an estimated 15,000 aliens from Pakistan, one of the designated countries, left on their own – i.e., self-deported".

Perhaps the most exceptional Trump administration self-deportation plan, however, involves paying aliens unlawfully present to leave.

On May 5, DHS announced²⁸⁶ "a historic opportunity for illegal aliens to receive both financial and travel assistance to facilitate travel back to their home country through the CBP Home App"²⁸⁷—a reconfigured version of the prior CBP One app.

Under that plan: "Any illegal alien who uses the CBP Home App to self-deport will also receive a stipend of \$1,000 dollars, paid after their return to their home country has been confirmed through the app."

In my analysis²⁸⁸ of this "historic opportunity", I noted that: "While it may be controversial, it could also be a cost- and resource-effective way to drive down the unauthorized population — assuming enough people take the department up on its offer."

²⁸¹ *Secretary Noem Announces Agency Will Enforce Laws That Penalize Aliens in the Country Illegally*. U.S. DEP'T OF HOMELAND SECURITY (undated). Source: <https://www.dhs.gov/news/2025/02/25/secretary-noem-announces-agency-will-enforce-laws-penalize-aliens-country-illegally>.

²⁸² Sec. 262 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1302&num=0&edition=prelim>.

²⁸³ *Secretary Noem Announces Agency Will Enforce Laws That Penalize Aliens in the Country Illegally*. U.S. DEP'T OF HOMELAND SECURITY (undated). Source: <https://www.dhs.gov/news/2025/02/25/secretary-noem-announces-agency-will-enforce-laws-penalize-aliens-country-illegally>.

²⁸⁴ Sec. 266 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title8-section1306&num=0&saved=%7CZ3JhbnVsZWlkOIVTQy1wcmVsaW0tdGl0bGU4LXNlY3Rpb24xMzAy%7C%7C0%7Cfalse%7Cprelim>.

²⁸⁵ *Immigration in Trump's First 100 Days*. CENTER FOR IMMIGRATION STUDIES (Apr. 23, 2025). Source: <https://cis.org/Report/Immigration-Trumps-First-100-Days>.

²⁸⁶ *DHS Announces Historic Travel Assistance and Stipend for Voluntary Self-Deportation*. U.S. DEP'T OF HOMELAND SECURITY (undated). Source: <https://www.dhs.gov/news/2025/05/05/dhs-announces-historic-travel-assistance-and-stipend-voluntary-self-deportation>.

²⁸⁷ *CBP Home Mobile Application*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 13, 2025). Source: <https://www.cbp.gov/about/mobile-apps-directory/cbphome>.

²⁸⁸ Arthur, Andrew. *DHS to Pay Illegal Aliens to Leave*. CENTER FOR IMMIGRATION STUDIES (May 8, 2025). Source: <https://cis.org/Arthur/DHS-Pay-Illegal-Aliens-Leave>.

That is because deportation is costly, exceeding on average \$17,000 per removal, whereas self-deportation under this program would only cost an estimated \$4,500 per person.

Those payments, coupled with registration requirements and a credible risk of prosecution and deportation, would likely encourage hundreds of thousands of aliens unlawfully present to leave each year, and possibly more, up to a million.

And in fact, by the Center's calculations²⁸⁹, up to 1 million unauthorized aliens have already left the United States since January, the majority voluntarily, as the total foreign-born population has dropped to 52.355 million from more than 53.312 million in January.

VII. "SANCTUARY POLICIES"

The Center uses the term "sanctuary jurisdictions"²⁹⁰ to refer to states and localities with laws, ordinances, regulations, resolutions, policies, or other practices that obstruct immigration enforcement and shield criminal aliens from ICE enforcement— either by refusing ICE detainers or prohibiting agencies from complying with those detainers, imposing unreasonable conditions on detainer acceptance, denying ICE access to interview incarcerated aliens, or otherwise impeding communication or information exchanges between their personnel and federal immigration officers.

A. History Of Sanctuary Policies

When I began my career as an INS trial attorney in San Francisco in the mid-1990s, it was virtually unheard of for states and localities to refuse to assist federal officers in their duties.

Immigration arrests took dangerous criminals off the street and spared localities the costs of reincarcerating recidivists.

Criminal recidivism is a serious issue for law enforcement. A May 2018 study from the Bureau of Justice Statistics²⁹¹ found that of 401,288 state prisoners released in 2005, 44 percent were rearrested during the first year after they were released, an estimated 68 percent within 3 years, 79 percent within 6 years, and 83 percent within 9 years.

That local cooperation with immigration enforcement changed, however, after the expansion²⁹² of the George W. Bush-era "Secure Communities"²⁹³ program under the Obama administration.

As ICE has explained:

²⁸⁹ Camarota, Steven and Ziegler, Karen. *Illegal Population Down Since January*. CENTER FOR IMMIGRATION STUDIES (Jun. 19, 2025). Source: <https://cis.org/Report/Illegal-Population-Down-January>.

²⁹⁰ Vaughan, Jessica and Griffin, Bryan. *Map: Sanctuary Cities, Counties, and States*. CENTER FOR IMMIGRATION STUDIES (May 7, 2025). Source: <https://cis.org/Map-Sanctuary-Cities-Counties-and-States>.

²⁹¹ *Special Report, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)*. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATS. (MAY 2018). Source: <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf>.

²⁹² *Activated Jurisdictions*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (May 3, 2011). Source: <https://web.archive.org/web/20110509095810/http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.

²⁹³ *Secure Communities*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (undated). Source: <https://www.ice.gov/secure-communities#:~:text=Secure%20Communities%20had%20a%20long,criminal%20aliens%20from%20the%20U.S..>

*For decades, local jurisdictions have shared the fingerprints of individuals arrested and/or booked into custody with the FBI to see if those individuals have a criminal record and outstanding warrants. Under Secure Communities, the FBI automatically sends the fingerprints to DHS to check against its immigration databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable, ICE takes enforcement action – prioritizing the removal of individuals who present the most significant threats to public safety as determined by the severity of their crime, their criminal history, and risk to public safety – as well as those who have violated the nation’s immigration laws.*²⁹⁴

Then-DHS Secretary Jeh Johnson ended Secure Communities in November 2014²⁹⁵, asserting that: “Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation.”

By that point, however, state and local officials came to believe sanctuary policies were a winning political issue with their constituents, and many of them only “doubled down”²⁹⁶ on those policies after Trump’s November 2016 election victory.

B. “Protecting the Rights of All Residents”

Most sanctuary jurisdictions contend they have adopted such policies for reasons roughly along the lines of Arlington County, Va.’s “Trust Policy”²⁹⁷, which states: “The County is committed to protecting the rights of all residents, regardless of their immigration or citizenship status, and to ensuring every person in Arlington has an equal opportunity to participate in our economy.”

As an aside, at a May 13 hearing, the Arlington County Board removed two sections of that policy “which previously allowed Arlington police to notify [ICE] when undocumented individuals **were arrested for serious crimes such as terrorism, gang activity, or human trafficking**”²⁹⁸—an unusual move for a jurisdiction that is home to the Pentagon.

²⁹⁴ *Id.*

²⁹⁵ Memorandum from Jeh Johnson, Secretary of Homeland Security. DEP’T OF HOMELAND SECURITY (Nov. 20, 2014). Source: https://web.archive.org/web/20160401195026/https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

²⁹⁶ See, e.g., Davis, Aaron. *D.C. will go ‘beyond sanctuary,’ create legal defense fund for illegal immigrants*. WASHINGTON POST (Jan. 9, 2017) (“In a statement, Bowser said the District is ‘doubling down’ on its status as a sanctuary city, where D.C. police have already been instructed to not cooperate with federal authorities working to deport residents.”). Source: https://www.washingtonpost.com/local/dc-politics/dc-will-go-beyond-sanctuary-create-legal-defense-fund-for-illegal-immigrants/2017/01/09/0d6c7adc-d68e-11e6-9f9f-5cdb4b7f8dd7_story.html.

²⁹⁷ *Arlington’s Commitment to Strengthening Trust with Our Immigrant Communities*. ARLINGTON COUNTY Bd. (updated May 13, 2025). Source: <https://www.arlingtonva.us/files/sharedassets/public/v/1/county-board/documents/trust-policy-updated-may-13-2025.pdf>; see also Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CENTER FOR IMMIGRATION STUDIES (Feb. 26, 2025) (review of sanctuary policies in the states of California and Illinois and the city of Chicago), Source: <https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional>.

²⁹⁸ Gonzalez, John. *Arlington board limits police collaboration with ICE, sparking debate over public safety*. ABC NEWS 7 (May 15, 2025) (emphasis added). Source: <https://wjla.com/newsletter-daily/arlington-limits-police-collaboration-ice-united-states-immigration-customs-enforcement-county-board-immigrants-arrests-charges-violent-crimes-concerns-virginia-dmv-sparking-debate-public-safety>.

“Protecting the rights of all residents” is an inapt rationalization for such policies given that alien criminals generally live in and prey upon immigrant communities—meaning such sanctuary policies only protect those criminals, not the community as a whole.

Moreover, an October 2021 Center study²⁹⁹ found no evidence that ICE cooperation reduces the rate at which immigrants report crimes locally, suggesting that the very rationale for sanctuary policies is based on an erroneous (or fallacious) premise.

C. Detainers

Detainers are the primary tool ICE uses to take criminal aliens into custody. They are notices to other law enforcement agencies that ICE intends to assume custody of an alien, and include information on aliens’ previous criminal history, immigration violations, and potential threats to public safety or security.

As ICE explains³⁰⁰, it issues those requests because:

When jails, prisons or other confinement facilities agree to honor immigration detainers, ICE officers can take custody of removable aliens in a safe, controlled environment instead of at-large in the community.

At-large arrests are unpredictable and can be dangerous to the public, aliens and federal law enforcement officers. It’s safer to assume custody of removable aliens in a secure, private environment.

Detainers also conserve scarce government resources and taxpayer dollars. When a confinement facility allows ICE to take custody of removable aliens when they’re released, the agency doesn’t need to expend resources to locate and arrest an alien in the community.

Simply put, when sanctuary jurisdictions refuse to honor ICE detainers, “officers pursue the alien in the community. These at-large arrests are more dangerous for the public, aliens and officers.”³⁰¹

In April, my colleague Jessica Vaughan reported³⁰² that from the beginning of FY 2022 to February 6, 2025, “more than 25,000 detainers were declined by” jails in sanctuary jurisdictions, and “in more than 1,400 instances the jails failed to give adequate notification to ICE to take custody of the aliens”.

²⁹⁹ Camarota, Steven and Zeigler, Karen. *No Evidence that Cooperation with ICE Reduces Immigrant Crime Reporting*. CENTER FOR IMMIGRATION STUDIES (Oct. 19, 2021). Source: <https://cis.org/Camarota/No-Evidence-Cooperation-ICE-Reduces-Immigrant-Crime-Reporting>.

³⁰⁰ *Immigration Detainers*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (undated). Source: <https://www.ice.gov/immigration-detainers>.

³⁰¹ *Id.*

³⁰² Vaughan, Jessica. *Which Sanctuary Jurisdictions Have Released the Most Criminals?* CENTER FOR IMMIGRATION STUDIES (Apr. 9, 2025). Source: <https://cis.org/Vaughan/Which-Sanctuary-Jurisdictions-Have-Released-Most-Criminals>.

That included 72 releases notwithstanding ICE detainers for aliens with homicide charges and convictions.³⁰³

D. Communications Under 8 U.S.C. §§ 1373(a) and 1644

As a legal matter, many of those sanctuary policies appear to violate federal law. Specifically, 8 U.S.C. § 1373(a)³⁰⁴ states:

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [DHS] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

Similarly, 8 U.S.C. § 1644³⁰⁵ provides:

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [DHS] information regarding the immigration status, lawful or unlawful, of an alien in the United States.

Attorney General Pam Bondi specifically referenced section 1373(a) in a February 5 memo³⁰⁶ in which she announced that: “Sanctuary jurisdictions should not receive access to federal grants administered by the Department of Justice.”

The next day, DOJ filed a federal complaint³⁰⁷ against Illinois and the city of Chicago³⁰⁸, alleging sanctuary policies in those jurisdictions: “undermine federal immigration law’s protections for information sharing and are thus preempted” by and violate the Supremacy Clause³⁰⁹; discriminate against the federal government by “singl[ing] out federal immigration officials, expressly and implicitly, for unfavorable and uncooperative treatment when other law enforcement officials are not so treated”; and unlawfully regulate the federal government in that, “By refusing to honor civil detainers and warrants expressly authorized by Congress, Defendants

³⁰³ *Id.*

³⁰⁴ 8 U.S.C. § 1373(a) (2025). Source: <https://www.law.cornell.edu/uscode/text/8/1373>; see also Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CENTER FOR IMMIGRATION STUDIES (Feb. 26, 2025) (legislative history of section 1373(a)). Source: <https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional>.

³⁰⁵ 8 U.S.C. § 1644 (2025). Source: <https://www.law.cornell.edu/uscode/text/8/1644>; see also Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CENTER FOR IMMIGRATION STUDIES (Feb. 26, 2025) (legislative history of section 1644). Source: <https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional>.

³⁰⁶ *Sanctuary Jurisdiction Directives, Memorandum from Pam Bondi, Attorney General*. U.S. DEP’T OF JUSTICE (Feb. 5, 2025). Source: <https://www.justice.gov/ag/media/1388531/dl?inline>.

³⁰⁷ *U.S. v. Illinois*, No. 1:25-cv-1285, Complaint (N.D. Ill. 2025). Source: https://storage.courtlistener.com/recap/gov.uscourts.ilnd.473062/gov.uscourts.ilnd.473062.1.0_2.pdf.

³⁰⁸ See Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CENTER FOR IMMIGRATION STUDIES (Feb. 26, 2025) (review of sanctuary policies in the state of Illinois and the city of Chicago), Source: <https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional>.

³⁰⁹ See U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”). Source: https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/.

have unlawfully eliminated these means for federal immigration officials to carry out their statutory functions”.

E. Policies Barring ICE Detention

Several sanctuary states and localities have also attempted to bar ICE from detaining aliens within their jurisdictions.

For example, in August 2021, New Jersey enacted Assembly Bill (AB) 5207³¹⁰, which prohibited the state, its political subdivisions, and (most importantly) private entities from contracting prospectively with ICE to own or operate detention facilities.

“Three New Jersey counties previously housed ICE detainees in their jails, but they stopped in 2021, just about the time the law in question took effect.”³¹¹ That left CoreCivic, a private entity, operating the only remaining ICE detention facility in the state (the Elizabeth Detention Center³¹²), under a contract set to expire on August 31, 2023.

Consequently, in February 2023, CoreCivic filed a complaint³¹³ in federal district court in New Jersey, seeking declaratory and injunctive relief and alleging AB 5207 was unconstitutional because it was:

in conflict with federal immigration law, interferes with the purpose behind the federal immigration law, presents a substantial obstacle to the purposes of Congress in enacting the federal immigration law and, in intruding into federal immigration law, improperly imposes into an area where Congress has manifested its intent to occupy the entire field.

On August 23, 2023, Judge Robert Kirsch of the U.S. District Court for the District of New Jersey struck down³¹⁴ that bill in part as unconstitutional, ruling:

*Enforcing AB 5207 against [CoreCivic] would close the last remaining facility in New Jersey to which ICE has access. The result of any one of New Jersey's neighboring states passing a comparable law — let alone an ensuing domino effect to other states — would result in nothing short of chaos. **Although reference to the federal government was conveniently omitted from AB 5207, the statute is a dagger aimed at the heart of the federal government's immigration enforcement mission and operations.** Congress's assignment to the federal government the responsibilities to enforce the civil immigration laws,*

³¹⁰ A.B. 5207 (2021), N.J. (enacted). Source: <https://www.njleg.state.nj.us/bill-search/2020/A5207>.

³¹¹ DeFilippo, Dana. *N.J. law barring prison operator from contracting with ICE is unconstitutional, judge says*. NEW JERSEY MONITOR (Aug. 29, 2023). Source: <https://newjerseymonitor.com/2023/08/29/law-banning-immigrant-detention-in-new-jersey-is-unconstitutional-judge-rules/>.

³¹² *Elizabeth Detention Center*. CORECIVIC (undated). Source: <https://www.corecivic.com/facilities/elizabeth-detention-center>.

³¹³ *CoreCivic v. Murphy*, No. 23-967, Complaint (D. N.J. Feb. 17, 2023), at 1, 14. Source: https://www.documentcloud.org/documents/23686412-complaint_230220_074306/.

³¹⁴ *CoreCivic v. Murphy*, No. 23-967, Opinion (D. N.J. Aug. 28, 2023). Source: <https://newjerseymonitor.com/wp-content/uploads/2023/08/8-29-23-Corecivic.pdf>.

including, when necessary, through detention, renders AB 5207 unconstitutional under the Supremacy Clause. [Emphasis added.]

The state has appealed that order.³¹⁵

The constitutionality of such laws aside, however, it's not clear sanctuary jurisdictions have considered the consequences of barring ICE detention in their localities.

If ICE cannot detain aliens in New Jersey or another sanctuary state, the agency is not going to release those aliens — it will send them to another jurisdiction, likely one far away from their lawyers and families and more amenable to immigration enforcement.

As I have noted³¹⁶:

One issue in the case of Mahmoud Khalil — a Columbia University graduate and Palestinian activist currently facing removal on foreign policy grounds — is that after his arrest at his Manhattan apartment on March 8, DHS sent him briefly to New Jersey before then transporting him to ICE detention in Jena, La.

As I reported on April 15, Khalil filed a habeas petition in federal district court in New York on March 9, the day after he was arrested, prompting the government to file a motion to dismiss or instead transfer that case to the U.S. District Court for the Western District of Louisiana, with jurisdiction over Jena.

On March 19, however, the New York judge transferred the case instead to federal district court in New Jersey, because that's where Khalil was (briefly) being detained when he filed that petition.

I am unsure why Khalil was transferred from New Jersey to Louisiana, but it is possible—if not likely— it had something to do with a lack of ICE detention space in the former.

CONCLUSION

It would be an understatement to say that the rhetoric surrounding ICE enforcement is currently heated and becoming more so by the day.

That heat, however, is rising to the point that immigration officers and members of our communities are imperiled.

³¹⁵ See Nieto-Munoz, Sophie. *Federal appeals court to hear New Jersey immigrant detention case*. NEW JERSEY MONITOR (Apr. 28, 2025) (“In March, the state Attorney General’s Office asked the 3rd Circuit to finally hear the state’s appeal, stressing that while the appeal is active, the state cannot enforce the 2021 law as it pertains to private companies. The hearing is scheduled for May 1 at 9:30 a.m.”). Source: <https://newjerseymonitor.com/2025/04/28/federal-appeals-court-to-hear-new-jersey-immigration-detention-case/>.

³¹⁶ Arthur, Andrew. *Why All the Hullabaloo Over ICE Detention in New Jersey?* CENTER FOR IMMIGRATION STUDIES (May 14, 2025). Source: <https://cis.org/Arthur/Why-All-Hullabaloo-Over-ICE-Detention-New-Jersey>.

On May 14, the U.S. Attorney’s Office for the Central District of California issued a press release³¹⁷ captioned “South Los Angeles Man and Woman Arrested on Federal Charge for Impeding Federal Agents Engaged in Immigration Enforcement”, which states:

According to an affidavit filed with the complaint, on the morning of February 28, Homeland Security Investigations (HSI) and United States Border Patrol agents executed four search warrants at separate residences in Los Angeles, one of them occurring at an address in South Los Angeles. A small crowd began to concentrate outside the residence and some bystanders in the crowd directed hostile remarks at the agents, who later got in their government vehicles and left the area.

At the intersection of 61st Street and Broadway in South Los Angeles, Torres and Flores – driving a Honda Fit – allegedly pulled in front of one of the government vehicles and blocked its pathway at the intersection. The defendants also drove westbound on 61st Street in an opposing lane, passing another two government vehicles. The defendants allegedly pulled in front of one of the vehicles and slammed on the brakes, which the agents believed was an attempt to cause a collision.

Torres and Flores aggressively followed one of the government vehicles for two miles, attempting to cross multiple lanes of traffic as it followed it and the other cars.

On March 19, a federal grand jury in Kansas indicted³¹⁸ a Mexican national, Diego Barron-Esquivel, for “forcibly assaulting and causing bodily harm to an [ICE] deportation officer while the officer was performing his official duties” in February.

On May 10, the New York Post reported³¹⁹: “A Massachusetts police union is calling for charges against a City Councilmember who allegedly assaulted local and federal officers — and incited a caught-on-video chaotic protest of an [ICE] arrest of an accused violent criminal.”

The violence has only increased since then.

On the morning of July 7, 27-year-old Ryan Luis Mosqueda³²⁰ appeared at a Border Patrol facility in McAllen, Tex., allegedly sporting tactical gear and carrying a rifle.

³¹⁷ *South Los Angeles Man and Woman Arrested on Federal Charge for Impeding Federal Agents Engaged in Immigration Enforcement*. U.S. ATTY’S OFF., C.D. CAL. (May 14, 2025). Source: <https://www.justice.gov/usao-cdca/pr/south-los-angeles-man-and-woman-arrested-federal-charge-impeding-federal-agents>.

³¹⁸ *Mexican national indicted for assaulting federal agent*. U.S. ATTY’S OFF., D. KANS. (Mar. 19, 2025). Source: <https://www.justice.gov/usao-ks/pr/mexican-national-indicted-assaulting-federal-agent>.

³¹⁹ Galvin, Shane. *Mass. pol Etel Haxhij assaulted officers, incited chaotic melee over ICE arrest of violent illegal migrant: police union*. NEW YORK POST (May 10, 2025). Source: <https://nypost.com/2025/05/10/us-news/chaotic-video-shows-massachusetts-ice-arrest-being-disrupted-by-unruly-crowd-leading-to-2-arrests/>.

³²⁰ Lybrand, Holmes. *Officer shot and man with rifle killed after exchange of fire at Border Patrol facility in Texas*. CNN (Jul. 7, 2025). Source: <https://www.cnn.com/2025/07/07/us/border-patrol-mcallen-shooting>.

He fired “dozens of rounds”, according to reports³²¹, and agents responded in kind. One local McAllen officer, Officer Ismael Garcia, was shot in the knee after he responded to the scene, and a second officer and a Border Patrol agent were injured.

Mosqueda was killed, but the law enforcement officers while injured are otherwise fine.

Mosqueda’s car had “*Cordis Die*” (“Heart Day” in Latin) spraypainted on it.³²² As CNN noted³²³, the phrase “appears in a ‘Call of Duty’ video game, according to a local law enforcement official and a source familiar with the matter”.

McAllen Police Chief Victor Rodriguez was unable “to explain a connection between the phrase and the shooting”³²⁴, but he did note that Mosqueda “was loaded for bear” after officers found “another rifle and other assaultive weapons” in his car³²⁵.

I’ve been to the Border Patrol McAllen sector annex in question, and while Mosqueda’s motive may be “unclear”, if he hadn’t gone there intending to kill agents, it’s a big coincidence that he picked that spot.

That attack followed a July 4 incident³²⁶ outside of ICE’s Prairieland Detention Facility³²⁷ in Johnson County, Tex., during which a local Alvarado police officer was shot in the neck.

The NBC affiliate in Dallas reports³²⁸ that the acting U.S. Attorney for the Northern District of Texas, Nancy Larson, “described the encounter as an ‘organized ambush’ carried out by armed individuals dressed in black military-like clothing who reportedly first detonated fireworks outside the federal facility”.

Why an “organized ambush?” According to the local U.S. Attorney’s Office³²⁹:

After approximately 10 minutes of convening, one or two individuals broke off from the main group and began to spray graffiti on vehicles and a guard structure in the parking lot at the facility. An Alvarado police officer responded to the

³²¹ See *id.*

³²² *Id.*

³²³ *Id.*

³²⁴ Oler, Bobby. *Photos: Border Patrol kills man after he shot officer, police say*. NEWSNATION (Jul. 7, 2025). Source: <https://www.newsnationnow.com/us-news/immigration/border-coverage/border-patrol-shooting-mcallen-texas/>.

³²⁵ Lybrand, Holmes. *Officer shot and man with rifle killed after exchange of fire at Border Patrol facility in Texas*. CNN (Jul. 7, 2025). Source: <https://www.cnn.com/2025/07/07/us/border-patrol-mcallen-shooting>.

³²⁶ Casiano, Louis. *Planned ambush at Texas ICE facility leaves officer shot, as 10 charged with attempted murder, authorities say*. FOX NEWS (Jul. 7, 2025). Source: <https://www.foxnews.com/us/texas-police-officer-shot-near-ice-detention-center-trump-officials-promise-zero-tolerance>.

³²⁷ *Prairieland Detention Facility*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (updated Jun. 2, 2025). Source: <https://www.ice.gov/detain/detention-facilities/prairieland-detention-facility>.

³²⁸ Guerrero, Maria and Yeomans, Meredith. *Officer injured in ‘organized ambush’ at Alvarado ICE detention facility; 10 in custody*. 5 NBC DFW (updated Jul. 8, 2025). Source: <https://www.nbcdfw.com/news/local/officer-injured-ice-detention-center-alvarado-prairie-land/3880134/>.

³²⁹ *Press Release: Ten Individuals Charged with Attempted Murder of Federal Officers and Firearms Offenses in Alvarado Police Officer Shooting*. U.S. ATTY’S OFF., N.D. TEX. (Jul. 8, 2025). Source: <https://www.justice.gov/usao-ndtx/pr/ten-individuals-charged-attempted-murder-federal-officers-and-firearms-offenses>.

scene after correctional officers called 911 to report suspicious activity. When the Alvarado police officer arrived, one alleged defendant positioned in nearby woods shot the officer in the neck area. Another alleged assailant across the street fired 20 to 30 rounds at unarmed correctional officers who had stepped outside the facility.

As alleged in the complaint, AR-style rifles were found at the scene. The assailants fled from the detention center but were stopped by additional law enforcement officers. Some defendants were wearing body armor, some were armed, and some had two-way radios. A total of twelve sets of body armor were found during searches of vehicles associated with the defendants, on their persons, and in the area around the Prairieland Detention Center.

Additionally, officers found spray paint, flyers stating, “FIGHT ICE TERROR WITH CLASS WAR!” and “FREE ALL POLITICAL PRISONERS,” and a flag stating, “RESIST FACISM – FIGHT OLIGARCHY.” One of the alleged attackers had cell phones inside a “Faraday bag,” used to block phone signals and commonly used by criminal actors to try to prevent law enforcement from tracking their location.

Ten individuals have been charged with attempted murder and firearms violations in connection with that attack, identified as Cameron Arnold, Savanna Batten, Nathan Baumann, Zachary Evetts, Joy Gibson, Bradford Morris, Maricela Rueda, Seth Sikes, Elizabeth Soto, and Ines Soto³³⁰. If convicted, each of them faces 10 years to life in federal prison.

These are just allegations, and the accused are entitled to a presumption of innocence. If those allegations are true, however, it underscores the dangers posed by those seeking to impede ICE operations.

Respectfully, I take such attacks personally, having been subject to threats in my capacity as an immigration prosecutor and an immigration judge³³¹, and with the same respect, I ask you to take them seriously as well.

The purpose of the Laken Riley Act—the first bill passed this Congress—was to force ICE to take criminal aliens into custody and detain them. And yet just 174 days after that bill was enacted, some argue ICE should not enforce the law at all.

In her November 29, 2023, Memorandum Opinion and Order in *Texas v. U.S. DHS*³³², U.S. District Court Judge Alia Moses explained:

³³⁰ *Id.*

³³¹ See Arthur, Andrew. *Unmasking ICE — or Throwing Agents to the Wolves?* CENTER FOR IMMIGRATION STUDIES (Jul. 11, 2025). Source: <https://cis.org/Arthur/Unmasking-ICE-or-Throwing-Agents-Wolves>.

³³² *Texas v. U.S. DHS*, Case No. DR-23-CV-00055-AM, Memorandum Opinion and Order, at 6 (W.D. Tex. Nov. 29, 2023) (Moses, J.). Source:

The immigration system . . . dysfunctional and flawed as it is, would work if properly implemented. Instead, the status quo is a harmful mixture of political rancor, ego, and economic and geopolitical realities that serves no one. So destructive is its nature that the nation cannot help but be transfixed by, but simultaneously unable to correct, the present condition. [Emphasis added.]

Note that Judge Moses was ruling in favor of the Biden administration when she made those finding, allowing it to continue to cut concertina wire barriers Texas had erected along the Rio Grande to prevent the unlawful entry of migrants. But that didn't mean the court agreed with the administration's actions.

Many Americans who have watched the gyrations of sundry immigration policies over the past decade may agree with Judge Moses's conclusions about "the status quo".

As explained *supra*, under our constitution, Congress has plenary authority to make rules concerning the admission of aliens, their presence in the United States, and their removal from this country. It is the role of the executive branch to faithfully carry out those rules, consistent with due process.

I concur with Judge Moses's conclusion that our immigration system would work if it were properly implemented and allowed to work.

If the immigration laws are harsh and unfair, I have faith in the American people to realize it and prompt their representatives to amend the laws; in the interim, the constitution mandates that those laws be enforced³³³.

Thank you, and I look forward to your questions.

<https://www.texasattorneygeneral.gov/sites/default/files/images/press/Concertina%20Wire%20PI%20Denial%20File%20Stamped.pdf>.

³³³ See U.S. CONST. art. II § 3 (the president "shall take Care that the Laws be faithfully executed"). Source: https://constitution.congress.gov/browse/essay/artII-S3-3-1/ALDE_00001160/.