



RESEARCH REPORT | Center for Homeland Security & Immigration

# PLAYBOOK FOR SECURING THE BORDER, ENDING HUMAN TRAFFICKING, AND DEFEATING THE CARTELS: EXISTING LAWS THE EXECUTIVE BRANCH SHOULD USE

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## TOPLINE POINTS

- ★ Even without Congress acting, there are enough current laws to secure the border, end human trafficking, and defeat the cartels.
- ★ Previous policies like Remain in Mexico, Asylum Cooperative Agreements, and Title 42, when fully leveraged, deterred illegal immigration by denying them entry into the U.S.
- ★ Expanding expedited removal and imposing visa sanctions are additional tools to disrupt the smuggling and trafficking networks.

An overused trope by many politicians and the media is that our immigration system is “broken.” Those who make this assertion rarely identify with specificity what precisely is broken or offer solutions to fix the immigration system. Instead, “broken immigration system” is largely understood to be a catchphrase that necessitates

providing amnesty to millions of illegal aliens in the country and sometimes also increasing legal immigration beyond the current 1 million lawful permanent residents our country welcomes every year under current law. In the midst of an ongoing historic border crisis that dates to President Biden’s inauguration, his



administration similarly lays blame on our current laws rather than his administration's policies as the source of the problem. For example, in September 2021, Department of Homeland Security Secretary (DHS) Alejandro Mayorkas said, “we are dealing with a broken immigration system, and we need legislative reform.”

While there are various immigration laws that need revising and new laws that need passing to modernize the immigration system, **there are laws currently on the books that provide any administration with the authority and ability to secure the border, end human trafficking, and defeat the cartels.** The following playbook details the laws available for the Executive Branch to utilize to protect the homeland in the absence of congressional action.

### **Migrant Protection Protocols or “Remain in Mexico”**

During the Obama Administration's second term, smugglers and traffickers began exploiting loopholes in our asylum laws to get economic migrants into the country even though very few actually qualify for asylum. The problem is the judicial interpretation for establishing a credible fear of persecution—the first step in the asylum process for illegal aliens apprehended at the border—is far laxer than the

standard to qualify for asylum. The ease with which aliens could satisfy the credible fear threshold—nearly 70% of aliens passed—exposed inefficiencies in the immigration courts and pushed court dates many years into the future. The Obama Administration's decision to release these aliens gave them a multi-year head start to disappear into the interior of the country, likely with illegal alien family members who arrived before them. Of the aliens who satisfied the credible fear threshold, more than 33% never filed an asylum application, many never showed up for their court hearings, and less than 15% actually qualified for asylum as determined by an immigration judge.

The Trump Administration curtailed this abuse of the asylum system by utilizing an overlooked provision of the immigration laws that allows DHS to require most illegal aliens apprehended at the Southwest border to wait in Mexico until their immigration court hearing. According to section 235(b)(2)(C) of the Immigration and Nationality Act (INA), the DHS Secretary “may return the alien to that [contiguous] territory pending a proceeding under section 1229a of this title.” Proceedings under section 1229a of Title 8 United States Code are also referred to as section 240 of the INA removal proceedings.



Migrant Protection Protocols, the official Trump Administration policy, became best known as “Remain in Mexico” or, for shorthand, MPP because the aliens were sent back to Mexico to await trial dates. As DHS [explained](#) in January 2019, when then-Secretary Kirstjen Nielsen announced the Remain in Mexico policy, “MPP will help restore a safe and orderly immigration process, decrease the number of those taking advantage of the immigration system, and the ability of smugglers and traffickers to prey on vulnerable populations, and reduce threats to life, national security, and public safety, while ensuring that vulnerable populations receive the protections they need.”

There were several distinct populations exempt from MPP as required by separate immigration laws. This included aliens placed in expedited removal proceedings under INA section 235 (meaning an alien who entered unlawfully and has not been continuously present for 2 years before being found inadmissible), unaccompanied alien children, and any alien who claimed a fear of persecution if returned to Mexico. The U.S. either detained aliens exempt from MPP or released them under “alternatives to detention” while they waited for their immigration court dates.

During the Trump Administration, more than 71,000 illegal aliens were

sent back to Mexico under MPP. Of this total, less than 1% (641 aliens) were granted asylum by the end of the Trump Administration. By denying economic migrants their underlying goal of being released into the interior of the U.S., the Remain in Mexico policy was highly successful in securing the border, discouraging the next wave of illegal immigration, and disrupting the cartels and human trafficking networks.

Despite this policy being immensely popular with Border Patrol agents and the American people, the Biden Administration chose to terminate the policy. Several states, led by Texas, sued the administration to block the termination, and the issue went all the way up to the U.S. Supreme Court. At the conclusion of the 2022 term in the case *Biden v. Texas*, Chief Justice John Roberts and Justice Brett Kavanaugh joined the three liberal justices to rule 5-4 in favor of allowing the Biden Administration to terminate the Remain in Mexico policy. However, the chief justice’s majority opinion also expressly adopted the legality of Remain in Mexico, writing, “MPP was implemented pursuant to *express congressional authorization* in the [INA].”

On August 8, 2022, about 5 weeks after the Supreme Court ruling, DHS [officially terminated](#) MPP. While it was legally permissible for the Biden Administration to



terminate MPP, they have an obligation to the American people to replace it with a new strategy to secure the border. By failing to do so, the cartels are effectively controlling U.S. immigration policy.

MPP is a lawful, highly effective policy that the administration would be wise to resume to fulfill its mandate to secure the border, end human trafficking, and defeat the cartels.

### **Asylum Cooperative Agreements (ACAs)**

In the decade preceding the Biden Administration, hundreds of thousands of illegal aliens reached the U.S. southern border, either trying to cross unlawfully or appearing at a port of entry with documents and claimed a fear of persecution or torture. As mentioned above, the overwhelming majority of these aliens do not ultimately qualify for asylum, but the volume of claims overwhelmed the immigration court system. By fiscal year (FY) 2019, there was a backlog of almost 1 million cases before immigration judges within the Department of Justice's Executive Office for Immigration Review, with the average case taking 816 days, more than 2 years, to complete.

In FY 2019, during the Trump Administration, more than 71% of illegal aliens apprehended at the southern border were nationals of

the Northern Triangle countries of El Salvador, Guatemala, and Honduras. This meant that the biggest driver of the border crisis at the time was caused by migrants who traversed one or more additional countries before they reached the U.S. southern border.

As part of a multi-pronged approach to secure the border, curb illegal immigration, and disrupt the human trafficking networks, the Trump Administration relied on another rarely used provision of immigration law that allows DHS to redirect these aliens to another safe country to seek humanitarian protections there instead of in the U.S. Through section 208(a)(2)(A) of the INA, Congress authorized the Executive Branch to enter into agreements with a "safe third country" to ease the burden on the U.S. immigration system by redirecting claims for asylum or similar humanitarian relief to these other countries for adjudication under their laws.

Specifically, section 208(a)(2)(A) authorizes DHS to bar an alien from applying for asylum in the United States where "pursuant to a bilateral or multilateral agreement," the alien may be removed to a third country (*i.e.*, a country other than the alien's country of nationality or last habitual residence) "where the alien would have access to a full and fair procedure for determining



claims for asylum or equivalent temporary protection.”

Pursuant to this authority, the Trump Administration made separate agreements, known as Asylum Cooperative Agreements (ACAs), with each of the Northern Triangle countries where they would consider humanitarian relief claims from nationals of the other Central American countries. For example, a Salvadoran who claimed fear of persecution at the U.S. southern border could be sent to Guatemala to have his claim considered and adjudicated under the Guatemalan equivalent of asylum law.

Similar to MPP, ACAs were designed to discourage economic migrants from attempting to exploit the asylum system for their personal gain because it denied them entry into the U.S. The overall effectiveness of ACAs was limited because only the agreement with Guatemala was implemented before the country shut down international travel due to COVID-19. Confronted with the prospect of being sent to a regional country to have their asylum claims heard, some aliens rescinded them and requested to be returned to their home country, confirming the dubious basis of their persecution claim to begin with. The inability to enter the U.S. disrupted the trafficking networks, as their business model depends on the

ability to get aliens across the border.”

Despite the effectiveness of this policy in securing the border by rooting out fraudulent asylum claims, the Biden Administration chose to terminate all ACAs. While it is the prerogative of a new administration to change policies from its predecessor, the past 18 months have demonstrated that the Biden Administration lacks solutions that will stop illegal immigration or combat the smuggling and trafficking networks. Even big city mayors are now calling the border security problem a humanitarian crisis. Resuming ACAs would be an effective, lawful option to help secure the border, end human trafficking, and defeat the cartels.

### **Build the Wall/Obtain Operational Control of the Southern Border**

One of the Trump Administration’s primary immigration policies was building a physical structure along the southern border to deter illegal immigration. When Congress failed to appropriate the funds needed to build the wall, the Trump Administration issued Proclamation 9844 (February 15, 2019; extended February 13, 2020; extended January 15, 2021), which declared a national emergency at the southern border and permitted the reprogramming of unspent money from the Department of Defense toward the



building of the border wall. Construction of the border wall was not complete when President Biden was inaugurated on January 20, 2021, and he issued [Proclamation 10142](#), which fully rescinded the Trump border emergency proclamation. President Biden's proclamation stated that "no more American taxpayer dollars be diverted to construct a border wall" and that "authorities invoked in [the Trump] proclamation will no longer be used to construct a wall at the southern border." As a result of terminating these contracts, Senate Homeland Security and Government Affairs Ranking Member James Lankford of Oklahoma [found](#) the Biden Administration wasted \$2 billion in the first 6 months not to build the wall. Senator Lankford has not updated his findings, but the interim report estimates the continued waste of taxpayer dollars at [\\$3 million](#) per day paying contractors (with a legally enforceable contract) not to build the wall.

Beyond wasting taxpayer dollars, the Biden Administration's refusal to finish the wall is in direct conflict with the [2006 Secure Fence Act](#), which mandates the construction of "physical infrastructure to prevent unlawful border entry." This law identified five different areas at the southern border where Congress required DHS to construct at "least 2 layers of

reinforced fencing, the installation of additional physical barriers, roads, lighting, cameras, and sensors," including two "priority areas" for immediate action.

Additionally, the Secure Fence Act mandated DHS to obtain "operational control" of the southern border within 18 months of enactment. Secretary Alejandro Mayorkas testified under oath that DHS has [operational control](#) of the southern border. This is more DHS disinformation. Section 2(b) defines operational control as "the prevention of *all unlawful entries into the United States*, including entries by terrorists, other *unlawful aliens*, instruments of terrorism, narcotics, and other contraband." (Emphasis added.) Rather than operational control, Biden Administration policies are responsible for the two highest years of border apprehensions, 6 of the 7 highest individual months of border apprehensions, and record amounts of drugs and other contraband coming across the border.

The Secure Fence Act became law in October 2006 and passed the Senate with [broad bipartisan support](#), 80 to 19, including then-Senator Biden, then-Senator Obama, and current Majority Leader Schumer all voting in favor. It is still current law, and achieving operational control would literally secure the border, end human trafficking, and defeat the cartels.



### **Title 42 Expulsion Authority**

In March 2020, the Centers for Disease Control and Prevention (CDC) issued a public health emergency declaration under Title 42 of the United States Code to slow the spread of COVID-19. The declaration authorized the immediate expulsion of aliens at the border and ports of entry. Although not specifically an immigration law, the application of Title 42 had a border security effect. The Trump Administration first utilized Title 42's expulsion authority in March 2020 and, as a result of its broad application, border apprehensions in April 2020 totaled just 17,108 compared to 109,415 in April 2019.

While the Biden Administration has continued Title 42, it is applying the expulsion authority far more narrowly than the Trump Administration. For example, the Biden Administration has completely exempted unaccompanied alien children (UACs) from Title 42 as well as exempting family units (FMUs) with children under the age of 7. This means that only 13% of FMUs are being turned away while the remainder is allowed into the U.S. As of July 2022, only 37% of the nearly 200,000 illegal aliens apprehended at the southern border were subject to Title 42, compared to over 70% during the Trump Administration.

The Biden Administration's decision to fully exempt UACs from immediate expulsion under Title 42 emboldens cartels and smugglers to convince parents to hand over their children to make the perilous journey across the border. In short, by guaranteeing their children will be released into the U.S., this policy is encouraging family separation. Through July, almost 130,000 UACs have been smuggled or trafficked to the border, putting FY 2022 on pace to surpass FY 2021's record of nearly 147,000 UAC border apprehensions. The cartels are financially flourishing due to these open border policies, reportedly netting \$13 billion a year to smuggle and traffic aliens into the country. By comparison, in 2018, the cartels brought in \$500 million that year when the Trump Administration focused on border security.

The ability to immediately turn away aliens at the border is an effective tool to disrupt the smuggling and trafficking networks. A broader application of Title 42 will secure the border and keep families together in their home country instead of separating to take the dangerous journey to the southern border.

### **Expedited Removal**

Congress also gave the Executive Branch an effective tool to quickly remove aliens who do not claim a fear of persecution, known as



expedited removal. Section 235(b)(1) of the INA allows DHS to remove aliens (1) caught at the border entering the United States illegally or (2) who apply for admission at a port of entry with fraudulent documents or no documents at all, without placing those aliens into formal removal proceedings before an immigration judge (IJ). This streamlined process prevents the strain on the immigration courts, and the quick removal sends a clear deterrent message to migrants thinking of taking the journey north.

Additionally, section 235(b)(1)(A)(iii) authorizes DHS to apply expedited removal to aliens who entered illegally and have been unlawfully present in the country for 2 years or less. Prior to the Trump Administration, the Executive Branch limited the application of expedited removal to aliens apprehended by U.S. Immigration and Customs Enforcement (ICE) agents within 100 miles of the border and within 2 weeks of the unlawful entry. In July 2019, the Trump Administration expanded expedited removal to its full statutory application to any alien who entered unlawfully and was apprehended anywhere in the country within 2 years of the unlawful entry. Full application of expedited removal was consistent with congressional intent and efficient use of ICE resources as agents only needed to determine when the illegal alien entered the

country unlawfully and whether he or she asserted a fear of persecution if returned.

In March 2022, the Biden Administration limited the use of expedited removal to the pre-Trump Administration standard. This policy reverted the application of expedited removal to illegal aliens apprehended within 100 miles of the border within the first two weeks of their unlawful entry. In the Federal Register Notice reducing expedited removal, the Biden Administration justified the change claiming that DHS believes that expedited removal is best focused as a border enforcement tool on recent entrants encountered in close proximity to the border or its functional equivalent (e.g., air and land ports of entry), rather than on individuals apprehended throughout the United States without geographical limitation, who may have developed significant ties to the community.”

This justification is inconsistent with congressional intent and establishes a radical view that illegal aliens can establish “significant ties” in our country after 14 days. There is not a “significant ties to the community” exception to our immigration laws, and this restriction encourages more illegal aliens to come to the country. While ICE is not currently enforcing the law in the interior, this reduced application of expedited removal





will create an inefficient process for ICE to remove aliens apprehended inside the country. Congress gave the Executive Branch a tool to make it easier for DHS to remove illegal aliens once they are detained in the country. The failure to fully apply this authority is contrary to that mandate and frustrates the broader effort of immigration enforcement.

### INA 243(d) Visa Sanctions

In addition to expedited removal, another powerful enforcement tool Congress provided the Executive Branch is visa sanctions under section 243(d) of the INA. This section reads:

*On being notified by the [DHS Secretary] that the government of a foreign country denies or unreasonably delays accepting an alien who is a citizen, subject, national, or resident of that country after the Attorney General asks whether the government will accept the alien under this section, the Secretary of State **shall order consular officers in that foreign country to discontinue granting immigrant visas or nonimmigrant visas**, or both, to citizens, subjects, nationals, and residents of that country until the Attorney General notifies the Secretary that the country has accepted the alien. (Emphasis added.)*

In practice, this authority is intended to hold foreign governments accountable for their failure to take back their nationals by denying the issuance of any new visas until the sanctions are lifted. However, past administrations have rarely utilized this authority as an immigration enforcement tool. Section 243(d) sanctions were imposed on Guyana in 2001 and not used again until 2016, when the Obama Administration applied it to The Gambia. The Trump Administration better utilized its section 243(d) authority by applying it to Cambodia, Eritrea, Guinea, and Sierra Leone in 2017; Burma and Laos in 2018; Cuba, Ghana, and Pakistan in 2019; and Burundi, China, and Ethiopia in 2020.

Rather than subjecting more countries to section 243(d) authority, the Biden Administration has taken steps to lift or reduce the visa sanctions for a number of these countries without detailed explanation. For example, the Department of State's announcement that most of the visa sanctions were lifted for citizens of Laos only says, "*The Secretary of State has authorized the lifting of most sanctions on U.S. visa issuance to Lao citizens. The sanctions were imposed under U.S. Immigration and Nationality Act (INA) Section 243(d).*" And while the decision to ease visa sanctions on Cubans included a detailed



justification, it fails to state that the Cuban government is cooperating in the return of their nationals which is the triggering event for imposing visa sanctions in the first place. This is another example of the Biden Administration ignoring U.S. immigration law to allow as many aliens into the country as possible.

### Conclusion

The Executive Branch, through DHS, has an obligation to the American people to secure the border, enforce our immigration laws, and protect the homeland. The Biden Administration's attempt to blame our current immigration laws for the historic border crisis instead of accepting that it is their policies that have failed is a convenient scapegoat. While there are many immigration laws that could be revised or added to improve the immigration system, enough legislative authority exists today that gives DHS the authority, ability, and mandate to secure the border. As this report detailed, these options

range from making "asylum seekers" wait outside the country (MPP) or seeking protection in another country (ACAs) to removing illegal aliens apprehended inside the country quickly (Expedited Removal) and denying visas to nationals of countries who refuse to take back their citizens (INA 243(d) sanctions). The law unambiguously mandates DHS to build a wall along the southern border and to obtain operational control by preventing all unlawful entries. Lastly, the administration can turn away all aliens at the border for as long as the public health emergency continues (Title 42), an authority that should be broadly applied to be effective. The legal authority is there for the Biden Administration to end the border crisis, end human trafficking and defeat the cartels. The only question remaining is whether they will implement new policies and strategies consistent with the law.



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