



SEARCHLIGHT INSTITUTE

MEMORANDUM

To: Interested Parties

From: Blas Nuñez-Neto, Senior Policy Fellow at the Searchlight Institute

Re: The ACLU's Asylum Plan is a Path to Back to Chaos

The American Civil Liberties Union (ACLU) recently published a report titled: [Improving Asylum at and Beyond the U.S. Border](#). The report claims to provide a “way forward” towards asylum reform for a future Administration. Despite the optimistic title, what the ACLU is actually offering is a path back to chaos at the border. Along the way, their report badly mischaracterizes the work of those—myself included—who are seeking to provide policymakers with workable solutions to fix our immigration system once and for all.

The ACLU is right to object to the Trump Administration’s lawless approach to enforcing our immigration laws, which essentially amounts to ignoring laws they find inconvenient in order to inflict as much cruelty on migrants as possible and deter others from deciding to migrate. Democrats should reject these harmful policies. But swinging the pendulum all the way back to the opposite end of the spectrum, as the ACLU recommends, is precisely how we ended up with Trump as president.

The ACLU report is a greatest-hits repository of the same failed arguments that it and other immigration advocates have been making for the last 20 years—arguments that were directly responsible for the border crisis that occurred during the first three years of the Biden administration. These circular arguments can be boiled down to three overarching themes:

1. Enforcement at the border does not work; it just creates pent-up demand for migration;
2. The factors pushing people to migrate are much stronger than the factors pulling them to come, so changes to U.S. immigration policies—apart from those that increase legal pathways—are ineffective as a deterrent;
3. Our legal and moral obligation to protect those in need means that we must err on the side of ensuring that nobody who needs protection is turned away, even if it means that a large number of people who are not eligible for asylum are released at the border.

The ACLU proposal amounts to a vociferous defense of the status quo in our asylum system that has badly failed the country, as well as migrants who are actually fleeing

persecution, for decades. It also demonstrates how some members of the immigration advocacy community completely ignore facts that are uncomfortable or that undercut their claims—for example, the fact that the vast majority of people who claim asylum at the border are ultimately found not to merit such protection years later. In doing so, they focus myopically on the factors that push migrants to leave their country and downplay—or just ignore—the immigration policies that pull migrants to come to the United States.

The only viable solutions the ACLU finds to prevent future surges in illegal immigration are to build more legal pathways, increase our capacity to process people who cross the border illegally, and to grant asylum more quickly to those who qualify. Many of these suggestions would be good policy; none of them would prevent future surges. The ACLU's approach would, instead, almost certainly lead to another surge of illegal immigration.

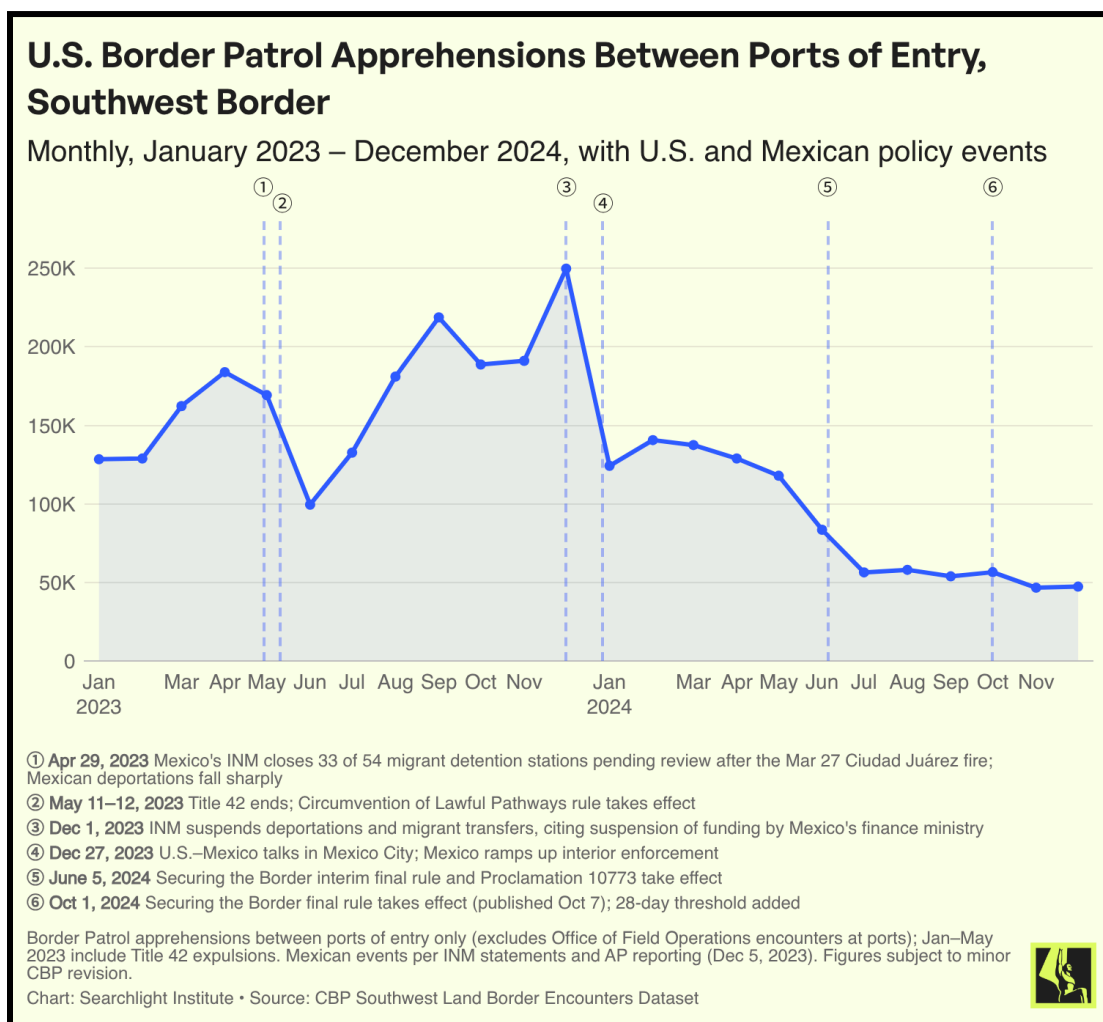
1. Enforcement at the Border Does, In Fact, Work

Since President Trump's return to the White House, an array of enforcement efforts—many of them, as the ACLU notes, deliberately cruel and unlawful—have driven encounters at the border to record lows. To buttress its argument that enforcement doesn't reduce migration in the face of this reality, the ACLU notes that encounters had been declining before President Trump took office again, and attributes the sharp reduction in encounters at the border in 2024 “in part to actions of the Panamanian Government in closing the Darién Gap route as well as actions of the Mexican government.” In fact, the ACLU is simultaneously arguing that U.S. enforcement is ineffective at impacting illegal immigration, but that other countries' enforcement efforts work. If U.S. enforcement is ineffective and merely reroutes migration, why would Mexican or Panamanian enforcement be any different? The answer, obviously, is that they are all effective—enforcement is enforcement, whether it happens on the U.S. side of the border or along migratory routes. However, each country's capacity to enforce and thereby limit illegal immigration varies significantly.

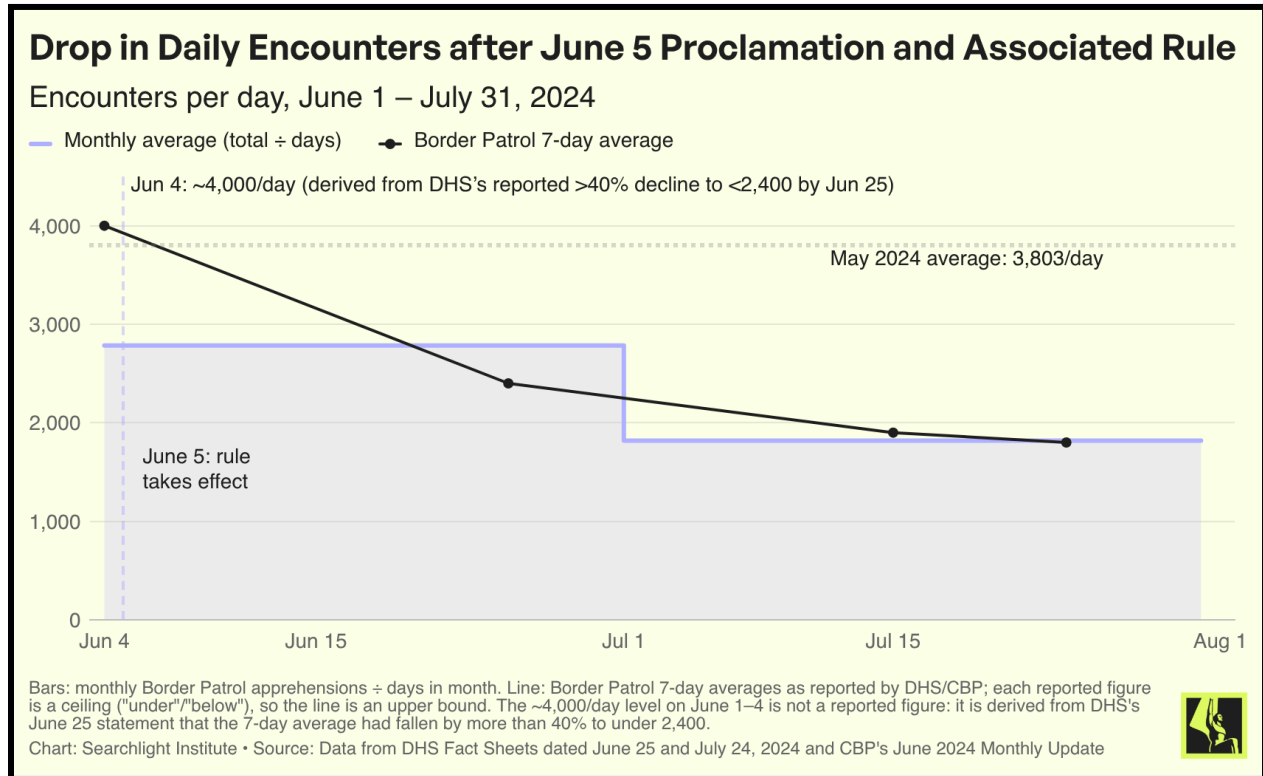
I served as one of the lead U.S. government negotiators with Mexico and Panama during the Biden Administration; the assertion that Panama closed the Darién Gap—one of the world's most dangerous migratory routes—is a fantasy. The Panamanian government took modest actions, starting in July 2024, that included repatriating some Colombian nationals back to Colombia (with U.S. funding that I helped coordinate), but did nothing to prevent migrants from entering the Darién. In fact, Panama continued its longstanding program of bussing migrants who exited the Darién north to its border with Costa Rica. The U.S.'s inability to get Panama and Colombia to prevent migrants from transiting through the Darién Gap was, simply put, one of the biggest foreign policy failures of the Biden Administration.

The ACLU correctly notes that Mexico took strong actions in January 2024 and meaningfully curtailed illegal immigration. But they leave out some important facts. In [early December 2023](#), due to budget constraints, Mexico completely ceased their enforcement along migratory routes, which resulted in record encounters at our border that month. After [significant U.S. pressure](#), Mexico restarted and significantly expanded their [efforts to keep migrants from transiting north](#) in January 2024.

These efforts, which included setting up checkpoints throughout Mexico and busing migrants back south, were effective up to a point—they were able to sharply reduce encounters at our shared border from their record of almost 250,000 in December 2023 to around 130,000 in January of 2024. Encounters then plateaued around that level for the next four months, largely because Mexico had reached the limits of their enforcement capacity.



On June 5, 2024, the U.S. implemented significant new enforcement measures at our border through the promulgation of the [Presidential Proclamation](#) and its associated [Secure the Border](#) interim final rule which, among other things, placed common-sense restrictions on access to asylum at the border. Within 3 weeks, average daily encounters at the southwest border dropped by more than 40%, to [less than 2,400](#).



The layering of enhanced enforcement at our border on top of Mexico's ongoing enforcement efforts helped cut encounters between ports of entry from almost 120,000 in May to roughly 56,000 in July. They remained at or below that level for the rest of the year—levels which were significantly lower than average encounters during the last five months of the first Trump Administration. The figure below shows how the combined enforcement efforts by Mexico and the U.S. worked together to significantly reduce illegal immigration throughout 2024.

The ACLU also notes that encounters continued to increase after the first effort the Biden Administration made to restrict asylum at the border in May 2023 via the [Circumvention of Lawful Pathways Rule](#) (CLP). But again, the facts actually cut against their argument. Encounters decreased initially, showing that migrants were concerned about the regulation's new consequences for those who illegally crossed the border. However, over the next few months, [migrants and smugglers figured out](#) that DHS simply did not have enough asylum officers, CBP holding capacity, or ICE detention beds to provide screening interviews to everybody who needed one. This unfortunate reality forced DHS to start

releasing more people into the country without putting them through the rule's processes. This, in turn, incentivized more people to cross illegally.

Concurrently, Mexico pulled back on much of its internal immigration enforcement efforts and closed many immigrant detention centers after [a March 27, 2023 fire](#) in a Mexican immigration detention center that killed 40 migrants. The combination of decreased Mexican enforcement and lack of resources to fully implement the CLP resulted in a historic surge in encounters. This wave crested in December 2023, when Mexico's complete cessation of immigration enforcement led to an all-time record for illegal immigration in a single month.

The ACLU conveniently overlooks these facts in its report, but facts are stubborn things.

2. U.S. Immigration Policy is the Biggest Factor that Drives Migration

The ACLU report also ignores the role that U.S. immigration policy plays in “pulling” people to come to the country illegally. It fails to address the main criticism of our asylum system that Searchlight and others have made: releasing individuals at the border who will not ultimately be granted protection incentivizes more people to come illegally. This is because the asylum court process takes four or more years, during which time they can apply to work legally in the United States.

The ACLU takes umbrage that some equate this fact to a loophole, noting that: “Some people come to the border, not to “game the system” but because they know of no other way to come to the United States to try to reunite with family and find work.” This is a strange assertion given that this behavior—claiming asylum at the border not because you are fleeing persecution, but because you want to work here—is basically the definition of gaming the asylum system.

Instead, the ACLU advances the venerable straw man that terrible economic and social conditions in sending countries (push factors) and the demand for labor in the United States (a pull factor outside of DHS control) mean that we will always have large-scale illegal immigration.

As a result, the only policy option available to address this reality is to modify the avenue through which this immigration happens. That is, if you close the border, you get pent-up demand; if you shut down asylum, people take more dangerous routes; and if you provide more legal pathways, fewer people will come to the border. The ACLU seems to believe the U.S. can somehow supply enough legal pathways to meet the global demand for migration—something that is needed because, in their telling, there are no other domestic policy levers that affect illegal immigration.

However, the report completely ignores the fact that the Biden Administration oversaw the largest expansion of lawful processes for people to come to the United States in modern history—namely, the Cuba, Haiti, Nicaragua, and Venezuela (CHNV) parole

processes—with the explicit goal of reducing illegal immigration from those countries. The CHNV processes allowed nationals of those countries with U.S.-based sponsors to enter the country lawfully for a period of two years; while they were here, they could work legally. CHNV nationals who crossed the border illegally despite having this lawful option could be returned to Mexico—the first time that Mexico had ever agreed to accept the return of third country nationals under our immigration statutes.

Unfortunately, despite an initial dip in encounters immediately following their launch, the CHNV processes were simply not as effective as we had hoped in terms of reducing encounters from those countries at the border, especially for nationals of Venezuela (as shown in the figure below.) Instead, illegal immigration from Venezuela during this time period was far more sensitive to our ability to impose consequences at the border—mainly the government of Mexico’s willingness to accept significant returns of Venezuelan nationals given our inconsistent ability to return people to Venezuela.

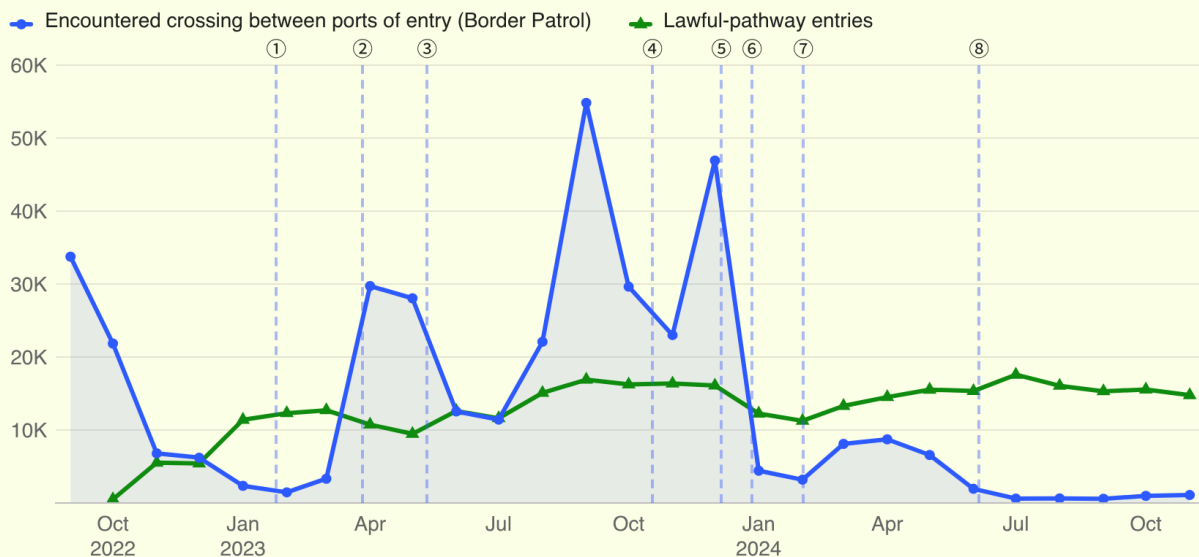
When Mexico was taking back large numbers of Venezuelans at the border, encounters dropped. But from April to December 2023, the government of Mexico put strict limits on Venezuelan removals at the border as a result of the Juarez fire—and illegal immigration of Venezuelans spiked once again.

When the U.S. restarted repatriation flights to Venezuela for illegal immigrants who had exhausted their legal avenues to remain in the United States on October 5, encounters declined for a couple of months. They sharply increased again in December as word got out that the flights to Venezuela were sporadic and Mexico announced its pullback on enforcement. Once Mexico began accepting the return of Venezuelan migrants again in January 2024, encounters between ports of entry decreased dramatically from their December peak, despite Venezuela announcing they would no longer accept repatriations at the end of that month. Venezuelan encounters then fell further after the Secure the Border proclamation and rule in June.

During this period, the Venezuela process and CBP One App allowed more than 15,000 Venezuelan nationals to enter the country lawfully at our ports of entry each month, but were ineffective in slowing illegal immigration. Instead, when Venezuelans knew there was a consequence at the border, they stopped crossing illegally.

Venezuelan Nationals: Illegal Crossings vs. Lawful-Pathway Entries

Monthly, September 2022 to December 2024



- ① Oct 12, 2022 Venezuela parole process launches; Venezuelans crossing between ports returned to Mexico under Title 42
 - ② Mar 27, 2023 Fire at Ciudad Juárez INM detention facility kills 40 migrants; returns to Mexico disrupted
 - ③ May 11–12, 2023 Title 42 ends; Circumvention of Lawful Pathways rule takes effect; Mexico continues accepting some CHNV returns
 - ④ Oct 18, 2023 U.S. resumes direct removal flights to Venezuela (announced Oct 5) following Barbados agreement and sanctions relief
 - ⑤ Dec 5, 2023 Mexico's INM announces it has run out of funds and suspends deportations and transfers of migrants
 - ⑥ Dec 27, 2023 Mexico removes restrictions on Venezuela returns
 - ⑦ Feb 2024 Venezuela suspends U.S. removal flights after U.S. reimposes sanctions (Jan 29–30); Mexico's removals to Venezuela halted
 - ⑧ June 5, 2024 Securing the Border interim final rule and Proclamation 10773 take effect
- Chart: Searchlight Institute • Source: DHS Office of Homeland Security Statistics



The U.S. experience with Venezuelan migration in 2023 and 2024 demonstrates that providing legal pathways is not sufficient to curb illegal immigration without imposing consequences at the border on those who fail to use them. In fact, we will never be able to provide sufficient legal pathways to satisfy global demand for migration to the U.S.—which is why we will always need firm enforcement at our border.

3. Our Asylum System Has To Work for All Americans, not Just Migrants

The ACLU concedes that “It is true that not everyone who seeks entry at the U.S. border is an asylum seeker or meets the legal standard to claim protection, which is why we have a screening system.” And it acknowledges that the initial screening allows many people who will ultimately be found ineligible to be released at the border, calling it “a predictable and necessary consequence of a system where the individual doesn’t receive a full hearing upon arrival”.

However, it fails to put those numbers into perspective: the border screening system has historically been so permissive that [83% of illegal immigrants who claimed fear](#) between FY2014 and FY2019 were ultimately released to pursue their claim in court. And after their

multi-year immigration court process—DHS data shows that immigration court cases completed in 2023, on average, [were initiated in 2020](#), but most cases initiated in this timeframe were actually still unresolved—[just 18 percent](#) were granted protection or relief. This is the fundamental issue with our asylum system that leads many critics to conclude it has effectively become a backdoor for people to come to work in the United States.

The Biden Administration addressed this challenge by, among other things, raising the bar migrants must clear in that initial screening interview and implementing a manifestation of fear standard (which required migrants to affirmatively claim fear rather than respond to leading questions). The ACLU objects to both of these things on the grounds that it would miss some people who would otherwise qualify.

The ACLU believes the system must err on the side of screening in more people—that is, using a lower standard and referring the vast majority for screenings—even if it means releasing (large numbers of) people who do not qualify. But using a higher standard at the front end and requiring migrants to proactively claim fear allows the government to focus its limited resources on the people who are most likely to qualify for protection, and reduces or eliminates the need to release large numbers of people who are unlikely to qualify. This improves the overall outcomes for the immigration system and weakens the pull factor at the border—ensuring that our immigration system works for all Americans, not just migrants.

We Need Common sense Solutions to the Asylum Crisis

The main issue with the ACLU proposal is that it fails the basic test we lay out in our [No More Back Doors](#) proposal: until Democrats understand the main reason why we keep seeing these surges in migration, we will be doomed to repeat the same failures. This reason is not the economic and social conditions in other countries that the ACLU identifies, though they certainly play a role, or even demand for labor in the United States, which will always be higher than in sending countries.

Instead, it is whether migrants who do not have valid claims of asylum believe that they will be released at the border, allowed to stay here for years, and work while their cases are slowly making their way through immigration court. We need to build a system that focuses screenings on migrants who are most likely to have valid protection claims and provides a final adjudication in days, not months or years. Only this will allow us to quickly provide protection to those who merit it, and to impose consequences on people who cross the border illegally and do not qualify for asylum—consequences that the past three years have proven, once and for all, actually deter illegal immigration.

The ACLU's proposed solutions tinker with the margins of our asylum system, but do nothing to close the asylum loophole. Many of them are designed to grant asylum more quickly to those who deserve it—a laudable goal—but not to allow us to remove people who don't qualify more quickly. For example, the ACLU proposes to "triage and process

claims so that some prima facie protection claims can be expedited and approved without a full, multi-month process.” Providing protection more quickly to those who merit it is something that we should always strive to do, but the “multi-month process” for others is the actual problem that we should be trying to solve. It also proposes giving asylum officers the authority to “grant clearcut asylum cases without necessitating an immigration court referral,” but not the authority to quickly order removed individuals who clearly do not qualify.

Searchlight’s recommendations are a common sense path forward that respects our laws and aligns with our values as a nation of immigrants. We need to ensure that the initial screening does a much better job of identifying individuals who will succeed, and fail, in their claims. Those who will succeed should be quickly granted asylum; those who fail should be quickly removed.

There will always be people who do not qualify for protection and cannot be deported to their home countries, like the Venezuelans for most of 2022-2024. Those individuals should be removed to what we call “safer third countries”—not to places where they will be subjected to persecution or torture, but to countries that are safer for them than their home country. The ACLU appears to conflate this approach with the Trump Administration’s current practice of third country removals, which is railroading migrants—many of whom were actually granted protection in the United States—to war-torn countries where they are almost certainly subjected to abuse. Conveniently, the ACLU also fails to mention that we explicitly rejected the Trump Administration’s lawless approach to third country removals.

Beyond these differences, there are important areas of agreement. For example, we believe that our current legal pathways are inadequate, and that the country needs to modernize these pathways to better match demand for labor in the United States with the skilled and unskilled immigrants who can fill those jobs.

But the goal of these pathways cannot be to rechannel illegal immigration into legal channels, as the ACLU suggests. Instead, their goal should be to supercharge our economy and build prosperity for all Americans by creating flexible and scalable options that can ramp up and down as demand for labor ebbs and flows. We also believe that the non-CBP and ICE parts of our immigration system need far more resources, and that asylum officers should be empowered to resolve cases quickly—although we believe that this power should extend to ordering removed individuals who do not qualify for protection.

If the ACLU actually wants to save territorial asylum from the Trump Administration's full-scale assault, they should partner with institutions like Searchlight to identify common-sense solutions to the very real challenges we are facing as a result of global migration, rather than engaging in tired straw man arguments designed to protect the status quo ante in our system that has failed the country.

It was this kind of knee-jerk opposition to change that led the ACLU to oppose [the bipartisan Senate bill](#) in 2024 that would have [added 4,300 asylum officers](#) (an increase of more than 400%) and 100 immigration judges—the very resources it is calling for now.

The country needs a more pragmatic and heterodox approach if we are actually going to save asylum.