

**U.S. Border Patrol Faces
Challenges Administering
Post-Apprehension
Outcomes Consistently
Across Sectors**





OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

September 13, 2022

MEMORANDUM FOR: The Honorable Chris Magnus
Commissioner
U.S. Customs and Border Protection

FROM: Joseph V. Cuffari, Ph.D. **JOSEPH V
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Date: 2022.09.13
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SUBJECT: *U.S. Border Patrol Faces Challenges Administering Post-
Apprehension Outcomes Consistently Across Sectors*

Attached for your action is our final report, *U.S. Border Patrol Faces Challenges Administering Outcomes Consistently Across Sectors*. We incorporated the formal comments provided by your office.

The report contains two recommendations aimed at improving guidance about planning for Border Patrol operations. Your office concurred with these recommendations. Based on information provided in your response to the draft report, we consider these two recommendations resolved and open. Once your office has fully implemented the recommendations, please submit a formal closeout letter to us within 30 days so that we may close the recommendations. The memorandum should be accompanied by evidence of completion of agreed-upon corrective actions. Please send your response or closure request to OIGInspectionsFollowup@oig.dhs.gov.

Consistent with our responsibility under the *Inspector General Act*, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Thomas Kait, Deputy Inspector General for Inspections and Evaluations, at 202-981-6000.

Attachment



DHS OIG HIGHLIGHTS

U.S. Border Patrol Faces Challenges Administering Post-Apprehension Outcomes Consistently Across Sectors

**September 13,
2022**

Why We Did This Inspection

Concurrent with our 2021 unannounced inspections of CBP holding facilities, we also looked at how four Border Patrol sectors on the Southwest border determine post-apprehension outcomes for noncitizens encountered between ports of entry.

What We Recommend

We made two recommendations to improve guidance and planning for Border Patrol operations.

For Further Information:

Contact our Office of Public Affairs at (202) 981-6000, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

U.S. Customs and Border Protection's (CBP) Border Patrol detects and apprehends individuals suspected of illegally entering the United States between ports of entry. Border Patrol must place apprehended migrants in administrative or criminal immigration proceedings or expel those covered by the Center for Disease Control and Prevention's (CDC) order pursuant to Title 42. Although all Border Patrol sectors on the Southwest border receive the same post-apprehension guidance from headquarters, applying the guidance consistently is a challenge. Sector capabilities, resources, and apprehension trends play a role in how Border Patrol implements the guidance, as does the availability of beds in U.S. Immigration and Customs Enforcement (ICE) facilities. In addition, the guidance changes frequently due to the fluid nature of irregular migration and the complexity of internal and external circumstances, which creates confusion among agents and results in operational variations. Application of the guidance is also inherently inconsistent due to external factors such as local prosecutorial guidelines and conditions for removals imposed by foreign governments. We also concluded that Border Patrol was not sufficiently prepared to meet an anticipated increase in processing and placement burdens when Title 42 expulsions can no longer be applied.

Each of the four Border Patrol sectors we reviewed had a different ability to manage high volumes of migrants. We found that migrants usually faced administrative and not criminal post-apprehension outcomes, mostly due to capacity limitations and constraints on how long Border Patrol should detain apprehended individuals in facilities. Within the administrative outcomes, in the sample we analyzed, the majority of migrants were not transferred to ICE detention facilities or expelled under Title 42, but rather were processed for outcomes allowing them to be released.

CBP Response

CBP concurred with both recommendations. We consider them resolved and open.



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Abbreviations

ATD	Alternatives to Detention
CBP	U.S. Customs and Border Protection
CDC	Centers for Disease Control and Prevention
COVID-19	coronavirus disease 2019
ER	Expedited Removal
ERO	Enforcement and Removal Operations
ICE	U.S. Immigration and Customs Enforcement
INA	<i>Immigration and Nationality Act</i>
NTA	Notice to Appear
NTR	Notice to Report
OFO	Office of Field Operations
PRR	<i>COVID-19 Pandemic Response Requirements</i>
UC	unaccompanied children
VR	Voluntary Departure
WA	Warrant of Arrest



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Introduction

Concurrent with our 2021 unannounced inspections of U.S. Customs and Border Protection (CBP) holding facilities in the Rio Grande Valley, San Diego, and Yuma areas, our team also looked at how Border Patrol agents in these Southwest border sectors determined post-apprehension outcomes for noncitizens encountered between ports of entry. We added analysis of Border Patrol’s Del Rio sector to determine which post-apprehension outcomes Border Patrol applied during the surge of Haitian migrants that unfolded in Del Rio in September 2021. In this report, we describe the post-apprehension outcomes available to Border Patrol agents in these four sectors and note the challenges agents face when deciding which outcomes to use. We also examine the differences in circumstances in the Rio Grande Valley, San Diego, Yuma, and Del Rio sectors and why consistency in outcomes can be elusive.

Background

CBP’s Border Patrol detects and apprehends individuals suspected of illegally entering the United States between ports of entry.¹ CBP refers to noncitizens as “migrants,” and we use this term where applicable in this report. Migrants encountered and apprehended by Border Patrol agents may face a variety of post-apprehension outcomes, described in Table 1. All the outcomes described in Table 1 also contain provisions for those migrants who fear persecution or return to their home countries and are seeking asylum. Border Patrol relies on several provisions of the *Immigration and Nationality Act* (INA)² and applicable policies to apply post-apprehension outcomes for migrants who enter the United States illegally. The outcomes can be administrative actions, referrals for criminal prosecution for illegal entry³ or illegal reentry,⁴ or a combination of administrative and criminal consequences.

¹ CBP’s Office of Field Operations (OFO) is responsible for inspecting travelers and cargo seeking to enter the country through ports of entry. We did not examine OFO post-apprehension actions at ports of entry because the OFO did not encounter a significant number of migrants who enter the United States without inspection pursuant to 8 U.S.C. § 1325 during our inspections.

² *Immigration and Nationality Act*, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (codified as amended at 8 U.S.C. § 1101).

³ “Illegal entry” refers to any migrant who is apprehended while entering or attempting to enter the United States at a time or place other than as designated by immigration officers. See 8 U.S.C. § 1325.

⁴ “Illegal reentry” refers to any migrant who has been denied admission, excluded, deported, or removed or has departed the United States and thereafter attempts to enter or is at any time found in the United States. See 8 U.S.C. § 1326.



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Table 1. Principal Post-Apprehension Outcomes Available to Border Patrol

Post-Apprehension Outcome	Category	Description
Parole plus Alternatives to Detention (INA § 212(d)(5))	Administrative	On a case-by-case basis, for urgent humanitarian reasons or significant public health benefit, Border Patrol may allow a migrant who might otherwise be inadmissible or have no means to enter legally to temporarily enter the United States. During this inspection, parolees were referred for INA § 240 removal proceedings before an immigration judge.
Expedited Removal (INA § 235(b))	Administrative	Border Patrol processes the migrant for removal from the United States without additional hearings or INA § 240 removal proceedings before an immigration judge. If a migrant subject to the Expedited Removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or fear of return to his or her country, the inspecting officer shall not proceed further with removal of the migrant until the migrant has been referred for an interview by an asylum officer.
Notice to Appear or Warrant of Arrest/ Notice to Appear (INA § 240)	Administrative	Issuing a Notice to Appear initiates formal removal proceedings before an immigration judge. While removal proceedings are pending, the migrant may remain in detention or may, in some instances, be released. Migrants released into the United States are provided conditions of release. Failure to comply with the conditions of release may result in arrest and detention.
Voluntary Departure (INA § 240B)	Administrative	Border Patrol may, as a matter of discretion, allow the migrant to voluntarily depart the United States rather than undergo formal removal proceedings, as long as the migrant is not deportable as an aggravated felon or terrorist. Voluntary Departure at the border applies to migrants from the contiguous countries of Mexico and Canada.



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Post-Apprehension Outcome	Category	Description
Notice to Report	Administrative	Border Patrol releases the migrant with a notice instructing him or her to report to a U.S. Immigration and Customs Enforcement (ICE) office within 60 days.
Reinstatement of Final Order of Removal (INA § 241)	Administrative	Reinstatement of removal applies to migrants who reenter the United States after being formally removed or depart under a removal order. The reinstatement does not require reopening or review of the original removal order.
Prosecution for Reentry of a Noncitizen Previously Removed	Criminal	Border Patrol may refer for prosecution to the Department of Justice migrants who without consent of the Attorney General reenter the United States following removal or deportation.
Prosecution	Criminal	Border Patrol may refer a migrant to the Department of Justice for felony or misdemeanor prosecution for violation of immigration laws or any other Federal laws that CBP has authority to enforce.

Source: DHS Office of Inspector General analysis of Border Patrol's post-apprehension outcomes

Application of Post-Apprehension Outcomes

After Border Patrol agents conduct an interview with an apprehended migrant, collect biographic and biometric data, and run record checks, they evaluate the circumstances of the migrant's case. Agents can refer migrants for prosecution to the Department of Justice⁵ if, for example, illegal reentry is evident, or, in contrast, agents can use prosecutorial discretion and process a migrant for parole for humanitarian reasons.⁶

⁵ Many Federal Government stakeholders play a role in the administration of immigration law. The Department of Justice, for example, prosecutes and detains migrants serving sentences for criminal immigration offenses and adjudicates immigration cases through the Executive Office for Immigration Review.

⁶ *Customs and Border Protection Parole Plus Alternative to Detention Memorandum*, dated Nov. 2, 2021.



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Border Patrol generally processes apprehended migrants and detains them short-term, typically not to exceed 72 hours,⁷ pending transfer of custody to another Department of Homeland Security component, specifically to ICE Enforcement and Removal Operations (ERO), which is responsible for long-term detention of migrants.⁸ If migrants are ultimately ordered removed, ICE ERO is also responsible for returning them to their home country. ICE ERO prioritizes detention for some post-apprehension outcomes that do not require proceedings before an immigration judge, such as Expedited Removal (ER) and Reinstatement of Final Order of Removal, but also has discretion to detain migrants who have a Notice to Appear (NTA) or Voluntary Departure (VR) and who have not been paroled.

Determining which post-apprehension outcomes Border Patrol should use to process migrants depends on a variety of factors, such as:

- the capacity of ICE ERO facilities to accept custody of the migrants;
- agreements with foreign governments guiding removals;
- changing policies of the U.S. Government; and
- migrant surges at the borders.

Border Patrol headquarters issues guidance for applying post-apprehension outcomes, but Border Patrol agents also maintain discretion in processing migrants. In addition, Border Patrol may take into consideration individual circumstances. Migrants being processed for an NTA are typically released without supervision. Migrants processed for Parole plus Alternatives to Detention (ATD) are given instructions to report to an ICE ERO office, where NTAs will be issued to them and their family members. For example, Border Patrol may give an NTA to migrants who are otherwise eligible for ER (removal without formal proceedings) but who are pregnant, elderly, or seriously ill and release them.

Title 42 Expulsions

Under Title 42 of the *Public Health Services Act*, the Surgeon General can prohibit the entry of people from foreign countries to avert the spread of

⁷ See CBP's *National Standards on Transport, Escort, Detention, and Search*, section 4.1, specifying that every effort must be made to promptly transfer, transport, process, release, or repatriate detainees, as appropriate and as operationally feasible, within 72 hours after being taken into custody.

⁸ Unaccompanied children apprehended by CBP are transferred to the Department of Health and Human Services, Office of Refugee Resettlement.



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communicable diseases.⁹ On March 20, 2020, under Title 42 authority and in response to the coronavirus disease 2019 (COVID-19) pandemic, the Centers for Disease Control and Prevention (CDC) issued an order temporarily prohibiting the introduction of certain persons from foreign countries traveling from Canada or Mexico, regardless of their countries of origin.¹⁰ On August 2, 2021, a subsequent CDC order extended the prohibition of entry under Title 42.¹¹ As a result, in addition to administering post-apprehension outcomes, Border Patrol also expelled migrants from a variety of countries to Mexico — or less often, to their countries of origin — within hours of apprehension. These are known as Title 42 expulsions.¹² Border Patrol applies “delayed” expulsions when they cannot immediately expel migrants who are covered by the CDC order. These migrants typically remain in Border Patrol holding facilities until removal flights coordinated with ICE ERO are available.

The CDC orders also specified that certain migrants may be exempt from Title 42 expulsion on a case-by-case basis, based on the totality of the circumstances, including considerations of significant law enforcement benefit, officer and public safety, and humanitarian and public health interests.

Results of Inspection

Although all Border Patrol sectors on the Southwest border receive the same post-apprehension guidance from headquarters, applying the guidance consistently is a challenge for Border Patrol agents. Sector capabilities, resources, and apprehension trends play a role in how the guidance is implemented, as does the availability of beds in ICE ERO facilities. In addition, the guidance changes frequently due to the fluid nature of irregular migration and the complexity of internal and external circumstances, which creates confusion among agents and leads to variations in operations. Application of the guidance is also inherently inconsistent due to external factors such as local prosecutorial guidelines and conditions guiding removals imposed by foreign governments. Finally, Border Patrol is not sufficiently prepared to meet

⁹ 42 U.S.C. § 265, *Suspension of Entries*. Expulsions under Title 42 are a public health measure and not immigration enforcement.

¹⁰ Department of Health and Human Services, CDC, order under § 362 and § 365 of the *Public Health Service Act* (42 U.S.C. §§ 265, 268), *Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*. The original CDC order was extended for 30 days on April 20, 2020, and indefinitely on May 19, 2020.

¹¹ See 42 U.S.C. §§ 265, 268, *Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*.

¹² See *Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries where Quarantinable Communicable Disease Exists*, 86 Fed. Reg. 42, 828 (Aug. 5, 2021).

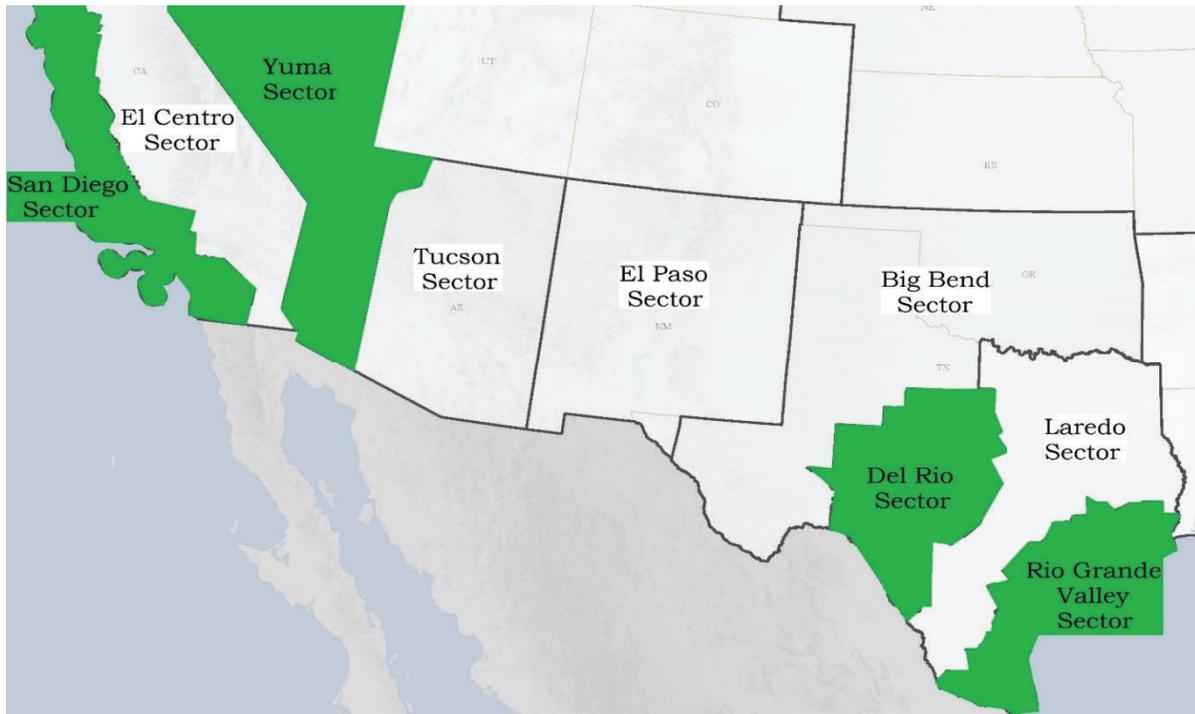


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an anticipated increase in processing and placement burdens when Title 42 can no longer be applied.

Figure 1 shows the four Border Patrol sectors we reviewed (three in person and one virtually), shaded in green.¹³ We found that each sector had a different ability to manage high volumes of apprehended migrants, and inconsistencies in post-apprehension outcomes across sectors appear to be mostly due to the demographic makeup of apprehended migrants, such as nationality, gender, and family unit status. We provide snapshot information from each sector to illustrate how sector differences can affect post-apprehension decisions. We also found that migrants who were not subject to Title 42 expulsions typically faced administrative and not criminal post-apprehension outcomes, mostly due to capacity limitations and constraints on how long Border Patrol should detain apprehended individuals. Within the administrative outcomes, the majority of migrants were not transferred to ICE ERO detention, but rather were processed for other outcomes allowing them to be released to await further immigration actions.

Figure 1. Four Border Patrol Sectors DHS OIG Reviewed



Source: DHS OIG

¹³ We visited the Rio Grande Valley, San Diego, and Yuma sectors in person and performed virtual analysis of the Del Rio sector.



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Border Patrol Sectors Face Challenges and Limitations When Administering Post-Apprehension Outcomes

Border Patrol sectors on the Southwest border receive the same post-apprehension outcome guidance from Border Patrol headquarters, but applying the guidance consistently is a challenge due to the particular circumstances and limitations in each sector. High migrant apprehension numbers along the Southwest border have strained capabilities and resources for both Border Patrol sectors and their partner ICE ERO, playing a role in how the guidance is implemented. In addition, the guidance changes often and does not fully account for Border Patrol sector differences or migration trends. Finally, factors external to DHS such as local prosecutorial guidelines and conditions guiding removals imposed by foreign governments also play a role, often limiting the options for what post-apprehension outcomes Border Patrol can choose.

Impact on Operations from Rise in Migrant Encounters

CBP has experienced irregular migration and high encounter numbers during the last 3 fiscal years, with the exception of FY 2020, when the COVID-19 pandemic started. As shown in Table 2, total encounters with migrant unaccompanied children (UC), family units, and single adults were high in FY 2021, when we started this review. The numbers have continued to trend upward in FY 2022.

Table 2. Border Patrol Total Encounters on the Southwest Border, FYs 2019 to 2022

Fiscal Year	UCs	Family Units	Single Adults	Totals
2019	76,020	473,682	301,806	851,508
2020	30,577	52,230	317,864	400,651
2021	144,834	451,087	1,063,285	1,659,206
2022 to date*	84,235	260,659	871,279	1,216,173

Source: CBP enforcement statistics

* FY 2022 statistics are for October 2021 to April 2022.

Total Southwest border encounters for FY 2022 through April 2022 are 1,216,173 and notably higher than in FY 2021. In the first 7 months of FY 2022, migrant encounters increased by 68 percent over the same period in FY 2021.



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Increased Southwest border encounters and apprehensions resulting from the migrant surges negatively affect Border Patrol operations, straining holding capacity and staffing resources in each sector. Border Patrol holding facilities have limits on the number of migrants they can safely hold. These capacity limits plus the 72-hour limit on time in custody are crucial factors in how Border Patrol administers post-apprehension outcomes; agents aim to transfer migrants out of Border Patrol custody as soon as processing is complete. During our analysis, facilities in all four sectors significantly exceeded their capacity, as detailed in Table 3.

Table 3. Border Patrol Sector Capacity During DHS OIG Visits

Sector/Date Capacity Assessed	Total in Custody	Capacity	Over Capacity
Rio Grande Valley, July 15, 2021	4,768	1,278	373%
San Diego, August 12, 2021	803	570	141%
Yuma, September 16, 2021	1,872	354	529%
Del Rio, September 16, 2021	2,282	465	491%

Source: CBP Lines of Effort Capacity Report

While Table 3 demonstrates Border Patrol facilities exceeded capacity, we also consistently heard Border Patrol officials describing low agent morale as a challenge. One Border Patrol official in the field explained that agents were stretched thin, being asked to do more with less support, and could not sustain this level of operations. In every Border Patrol sector we visited on the Southwest border, we observed that sector staffing could not keep up with demands of processing migrants. For example, as we reported after our July 2021 inspection of CBP facilities in the Rio Grande Valley, managing the high volume of detainees in those facilities required extensive external assistance.¹⁴ At the time of our site visit, there were more than 300 Border Patrol agents detailed from the northern border and coastal sectors to provide assistance. In addition, there were dozens of DHS volunteers, including detailees from the United States Coast Guard, U.S. Citizenship and Immigration Services, and the Transportation Security Administration, assisting with supplies and detainee care. We also observed DHS volunteers assisting Border Patrol in the San Diego and Yuma sectors.

¹⁴ [*Rio Grande Valley Area Border Patrol Struggles with High Volumes of Detainees and Cases of Prolonged Detention but Has Taken Consistent Measures to Improve Conditions in Facilities*](#), OIG-22-22, Jan. 27, 2022.



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Limits of ICE ERO Infrastructure

The availability of beds in ICE ERO facilities plays a role in deciding which post-apprehension outcomes Border Patrol can assign when processing migrants. According to Border Patrol officials, ICE ERO sometimes does not have sufficient bed space to accept migrants from Border Patrol who are eligible for ER, and Border Patrol must choose an outcome — such as NTA or parole — that does not rely on ICE ERO detention facilities. We previously reported that the key obstacle preventing Border Patrol from transferring more migrants out of its facilities within 72 hours was insufficient ICE ERO bed space.¹⁵

The COVID-19 pandemic further limited ICE ERO bed capacity. Specifically, ICE's *COVID-19 Pandemic Response Requirements* (PRR) reduced ICE ERO bed space to 75 percent of the total capacity.¹⁶ Before the COVID-19 pandemic started, in February 2020, ICE ERO used 187 detention facilities with approximately 60,000 beds. In July 2021, when we started our fieldwork, ICE ERO used 163 facilities, and with the PRR's 25 percent reduction, only 44,572 beds were available. In September 2021, at the time of our last fieldwork visit to the Southwest border, ICE ERO's capacity was further reduced to 149 facilities. Moreover, according to ICE ERO, it lost access to 24,808 beds due to ongoing litigation, canceled contracts, and quarantining, cohorting, and social distancing requirements for COVID-19. To make a pointed comparison, in September 2021, when Border Patrol encountered 185,515 migrants at the Southwest border, ICE ERO had only 25,192 beds available. Figure 2 shows the general decrease in ICE capacity compared with the increase in Border Patrol encounters prior to the onset of the COVID-19 pandemic (February 2020) and at the beginning and end of our fieldwork (July and September 2021, respectively). Even as ICE ERO capacity started increasing again by April 2022, so did CBP encounters, resulting in a continuing deficit in bed space.

¹⁵ [*DHS' Fragmented Approach to Immigration Enforcement and Poor Planning Resulted in Extended Migrant Detention during the 2019 Surge*](#), OIG-21-29, Mar. 2021; [*Capping Report: CBP Struggled to Provide Adequate Detention Conditions During 2019 Migrant Surge*](#), OIG-20-38, June 2020.

¹⁶ ICE's *COVID-19 Pandemic Response Requirements* sets forth expectations to sustain detention facility operations while mitigating risk to the safety and well-being of detainees, staff, contractors, visitors, and stakeholders due to COVID-19.



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Figure 2. ICE Capacity Decreased while Border Patrol Encounters Increased

Although not all outcomes led to use of ICE ERO bed space, the available bed space generally decreased as Border Patrol encounters increased.



Source: DHS OIG Analysis of ICE and CBP data

Finally, ICE ERO stopped housing family units at all three of its Family Residential Centers, closing the first to family units on February 26, 2021, the second on November 5, 2021, and the last on December 10, 2021. Although ICE ERO converted some of these detention beds to house single adults, the move limited Border Patrol’s options to transfer family units to ICE ERO detention facilities.

Changes in Post-Apprehension Guidance

Border Patrol sector leadership periodically receives updated post-apprehension outcome guidance from Border Patrol headquarters. Station leadership in each sector then conveys the guidance to agents. We found that this guidance from headquarters changes depending on considerations ranging from national immigration enforcement policy to local circumstances such as availability of ICE ERO bed space. Following are examples of policy changes that resulted in different applications:

- In March 2021, Border Patrol’s headquarters issued guidance giving agents prosecutorial discretion when using the Notice to Report (NTR) outcome to process certain migrants. We observed NTR processing in the Rio Grande Valley sector in July 2021, where Border Patrol was using this outcome mostly for family units with younger children. The Rio Grande Valley was the only Southwest border sector with significant use of NTR at that time. Agents told us they used NTR for these family units



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because Mexican authorities did not accept children younger than age 7 for Title 42 expulsions from the Rio Grande Valley sector.

- In November 2021, Border Patrol headquarters issued guidance stating it would no longer use NTR. Agents in the Rio Grande Valley sector told us that using NTR had significantly decreased the time needed to process migrants amenable to this outcome, but they also said NTR had a negative effect on agent morale because they viewed it as a “no consequence” outcome for crossing the border.
- In November 2021, Border Patrol headquarters issued guidance that it was implementing the Parole plus ATD outcome in the Del Rio and Rio Grande Valley sectors to address “urgent crowding and excessive time in custody in Border Patrol facilities.” Although applying this outcome might have assisted Border Patrol with excessive time in custody, migrants were still required to report to ICE for an NTA to continue through the formal immigration process. The guidance also stated that Border Patrol sectors outside of Del Rio and Rio Grande Valley seeking to use the Parole plus ATD outcome could do so but needed to obtain approval from the Border Patrol Chief and CBP Commissioner prior to implementation.

The fact that Border Patrol guidance on post-apprehension outcomes changes monthly, weekly, or even daily can be challenging. In one example, on July 15, 2021, the sectors received guidance that all Haitian, Cuban, and Venezuelan single adults should be processed under NTA.¹⁷ On July 23, 2021, the guidance was updated, and the sectors were instructed to process Haitian and Venezuelan single adults under ER instead (although Cubans were still being processed under NTA). Less than 2 weeks later, on August 4, 2021, the guidance was updated again, and the sectors were instructed to process all Haitians, Cubans, and Venezuelans under Warrant of Arrest (WA)/NTA. We heard from Border Patrol officials that such frequent changes create confusion among agents and lead to inconsistent application of the guidance.

Frequent changes also result in confusion when agents seek to place migrants in ICE ERO detention. In one example, we found that an ICE ERO facility denied bed space for 34 Haitian and Venezuelan nationals processed for ER because ICE ERO did not receive the new guidance from ICE management that ICE ERO should start accepting nationals of these countries.¹⁸

¹⁷ Border Patrol also refers to this outcome in its data as NTA-Release (NTA-R).

¹⁸ These migrants were initially processed as WA/NTAs to be taken into custody. However, because they were denied bed space, ICE ERO advised it would be better to process them as NTAs so they could be released.



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External Factors Impacting Border Patrol Decisions

External factors such as local prosecutorial guidance and conditions imposed by foreign governments impact Border Patrol's ability to apply certain outcomes when processing migrants, adding to inconsistencies across sectors.

As Table 1 specifies, Border Patrol may refer migrants to the Department of Justice for misdemeanor or felony prosecution for violation of immigration laws or any other Federal laws that CBP has the authority to enforce. Border Patrol has to follow relevant guidance when it decides to refer a migrant for prosecution and has to abide by the rules that local courts impose. For example, in September 2021:

- The Chief Judge for the District of Arizona, where the Yuma sector is located, issued an order canceling prosecution of immigration misdemeanor cases to mitigate COVID-19 virus spread in Federal courts in Arizona.
- The U.S. Attorney's Office for the Western District of Texas, where the Del Rio sector is located, did not accept misdemeanor cases for illegal entry and accepted felony cases for prosecution only if they met certain criteria, for example having been previously deported at least three times or having prior convictions of either misdemeanor sex crimes, domestic violence, or multiple DUIs.

These examples show how local prosecutorial guidance limited the Yuma and Del Rio sectors' ability to refer certain cases for prosecution, resulting in Border Patrol's inability to assign a criminal post-apprehension outcome. Instead, these noncitizens would be subjected to other applicable post-apprehension outcomes.

Further, foreign governments impose policies that create challenges for Border Patrol to repatriate migrants to their countries. Border Patrol officials explained that the rules and conditions for removals or expulsions in sectors along the Southwest border are affected by guidance from the Mexican government. As described earlier, when we visited the Rio Grande Valley sector, Mexican authorities bordering this sector did not accept family units with children younger than age 7 for Title 42 expulsions. In contrast, when we visited the Yuma sector, expulsions for this demographic did occur. In another example, although Brazilian migrants were technically amenable to Title 42 expulsions, the Mexican government was not accepting Brazilians for direct Title 42 expulsions into Mexico, and Brazil was mandating COVID-19 testing



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and passports or other travel documents for all returns, which in practice prevented Title 42 expulsion flights back to Brazil.

The combination of multiple factors creates challenges as agents attempt to consistently assign post-apprehension outcomes. These factors include, but are not limited to, rising numbers of migrant encounters, persistent resource limitations in both Border Patrol and ICE ERO facilities, frequent changes in Border Patrol guidance, and the policies of external stakeholders. These factors are neither new nor easily addressed, and they restrict Border Patrol's options for consistent application of outcomes.

Border Patrol Did Not Have Plans or Guidance for Operations When the CDC Order Is No Longer in Effect

The CDC order has helped Border Patrol sectors keep the number of migrants in Border Patrol facilities and time in custody lower than they otherwise would be. During FY 2021, Border Patrol's Southwest border encounters totaled 1,659,206, and 1,040,220 migrants (or 63 percent) were expelled under Title 42. Expelling migrants under Title 42 significantly diminishes the processing burden for Border Patrol agents because these migrants do not receive a formal order of deportation or consideration for any post-apprehension outcomes. Instead, before expulsion, Border Patrol agents only collect their biometric and biographic data and record the information in CBP's system of record, e3.¹⁹ For example, our fieldwork indicated that both the Rio Grande Valley and Del Rio sectors applied Title 42 to expel thousands of migrants from Mexico, Honduras, El Salvador, and Guatemala within hours of apprehension.

During FY 2021, 63 percent of migrants encountered on the Southwest border were expelled under Title 42.

During our site visits, observations, and interviews, Border Patrol appeared unprepared to meet increased processing burdens when the CDC order is terminated. Without the CDC order, Border Patrol will have to fully process and take into custody, at least for the short-term, every migrant it encounters instead of being able to immediately expel those who are covered by the CDC order. The number of migrants that Border Patrol will have to process and manage for post-apprehension outcomes will likely be double or greater, straining Border Patrol operations. During our fieldwork, we did not see viable plans to prepare Border Patrol for this eventuality.

¹⁹ e3 is the primary system used by Border Patrol to collect and transmit biographic, encounter, and biometric data for identification and verification of individuals encountered at the border and checkpoints for CBP's law enforcement and immigration mission.



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Several Border Patrol agents told us the CDC order allowed them to keep migration levels manageable. We heard from one Border Patrol official in the field that “guidance to agents on when Title 42 goes away is scarce” and that there are no plans for what processing alternatives could be available when the CDC order can no longer be used to expel migrants. We heard that, on the one hand, Border Patrol could go back to “normal operations” and do what it has always done, but, on the other hand, its resources and infrastructure might not be able to sustain the anticipated increase in detainee numbers, resulting in overcrowding and longer detention times.

Select Border Patrol Sector Snapshots for Post-Apprehension Outcomes

To illustrate how the differences among the Rio Grande Valley, San Diego, Yuma, and Del Rio²⁰ sectors can affect post-apprehension decisions, in this section we describe sector capacity at the time of our fieldwork, different post-apprehension outcomes sectors used, most common countries of origin for apprehended migrants, and other factors that could influence how sectors make decisions on post-apprehension outcomes. We have separately reported findings regarding conditions of detention from our unannounced inspections of the facilities in the Rio Grande Valley,²¹ San Diego,²² and Yuma²³ areas. Table 4 provides a summary snapshot of data across the four sectors. Generally, we found that migrants who were not amenable to Title 42 expulsions usually faced administrative and not criminal post-apprehension outcomes, mostly due to capacity limitations and standards for how long Border Patrol should hold apprehended migrants in its facilities. The majority of migrants were not transferred to ICE ERO detention facilities but were processed for other outcomes, allowing them to be released to await further immigration actions.

²⁰ Although we did not visit the Del Rio sector in person, we included it in our analysis because of the Haitian migrant surge that unfolded in September 2021 in Del Rio.

²¹ [*Rio Grande Valley Area Border Patrol Struggles with High Volumes of Detainees and Cases of Prolonged Detention but Has Taken Consistent Measures to Improve Conditions in Facilities*](#), OIG-22-22, Jan. 27, 2022.

²² [*CBP Border Patrol Stations and Ports of Entry in Southern California Generally Met TEDS Standards*](#), OIG-22-26, Feb. 7, 2022.

²³ [*Yuma Sector Border Patrol Struggled to meet TEDS Standards for Single Adult Men but Generally Met TEDS Standards for Other Populations*](#), OIG-22-38, Apr. 14, 2022.



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Table 4. Two-Week Data Snapshot, by Sector

	Rio Grande Valley	San Diego	Yuma	Del Rio
Encounter Dates	7/11/21 to 7/24/21	8/8/21 to 8/21/21	9/12/21 to 9/25/21	9/15/21 to 9/28/21
Migrants Encountered	37,026	6,336	11,397	25,391
Title 42 Expulsions	9,178	4,080	1,086	11,496
Exceeded Capacity	373% on 7/15/21	141% on 8/12/21	529% on 9/16/21	491% on 9/16/21
Main Countries of Origin	“Northern Triangle”	Brazil and Mexico	Brazil, Venezuela, and Cuba	Haiti, Mexico, and Venezuela

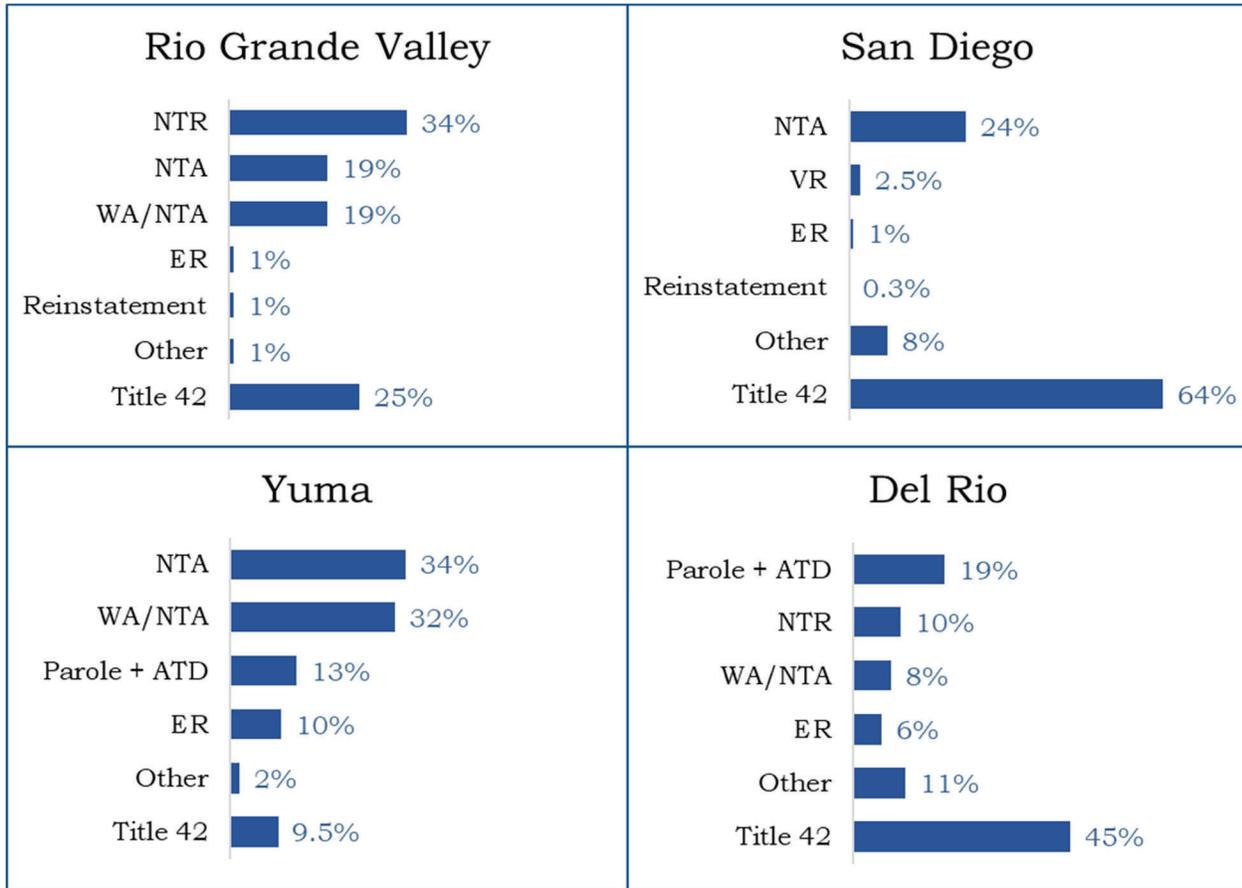
Source: DHS OIG analysis

See Figure 3 for a snapshot of the outcomes applied in each sector. In addition to other internal and external factors we describe in this report, we found that inconsistencies in post-apprehension outcomes across sectors appear to be also due to the demographic makeup of apprehended migrants, such as nationality, gender, and family unit status. As mentioned earlier, ICE ERO capacity to accept migrants from Border Patrol and other factors also play a part in what outcomes are available. What was common is that a very small percentage of migrants received an ER outcome resulting in removal from the United States, which, according to Border Patrol officials, is more effective for border security operations than outcomes that result in release into the United States.



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Figure 3. Application of Outcomes Applied in Each Sector



Source: DHS OIG analysis of Border Patrol's data

Rio Grande Valley Sector

Border Patrol agents in the Rio Grande Valley sector process the largest volume of migrants of any Southwest border sector. The sector apprehended approximately one-third more migrants than the next highest volume sector examined. Below we provide specific data snapshots for the Rio Grande Valley sector:

- In the 2 weeks from July 11 to July 24, 2021, the Rio Grande Valley sector processed 37,026 migrants, of whom 57 percent (21,142) were family units, 11 percent (4,075) were UCs, and 7 percent (2,631) were single adults.



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- On July 15, 2021, the sector reported operating at 373 percent capacity. The sector had capacity to hold 1,278 migrants but instead had to hold 4,768.
- Migrants from the “Northern Triangle” of Guatemala, Honduras, and El Salvador made up the most encounters in this sector. The most common countries of origin were Honduras (43 percent) and Guatemala (27 percent).

From July 11 to July 24, 2021, the Rio Grande Valley sector expelled 9,178 migrants to Mexico under Title 42, mostly consisting of Honduran, Mexican, Guatemalan, and Salvadoran migrants. However, during the time of our visit, families with children younger than age 7 could not be expelled under Title 42.

Border Patrol agents also reported that some migrants of other nationalities were flown to the El Paso sector, where the adjacent Mexican city of Juarez was accepting more foreign nationals under Title 42 expulsions than Tamaulipas, the Mexican state bordering the Rio Grande Valley sector. As shown in Table 5, apart from Title 42 expulsions, which Border Patrol tracks separately, the most used processing outcomes in the Rio Grande Valley sector were NTR (34 percent), NTA (19 percent), and WA/NTA (19 percent).

Table 5. Rio Grande Valley Sector Outcomes

Outcome	Overall Percentage	Total Processed
NTR	34%	12,500
NTA	19%	7,173
WA/NTA	19%	6,971
ER	1%	430
Reinstatement of Final Order of Removal	1%	375
Other*	1%	399
Title 42 expulsions	25%	9,178
Total		37,026

Source: DHS OIG analysis of the Rio Grande Valley sector’s post-apprehension outcomes and Title 42 expulsions for July 11 to July 24, 2021

* This number represents other, less used post-apprehension outcomes for migrant processing.



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In interviews, Border Patrol agents reported that the sector's reliance on the NTR outcome in the spring and summer of 2021 was mostly due to the high apprehensions of family units. As of November 2, 2021, Border Patrol sectors ceased using NTR as a processing outcome.²⁴ On the other hand, one of the less used outcomes was ER, which means that in the 2 weeks for which we performed this analysis, only 430 migrants (or 1 percent) were transferred to ICE ERO detention, out of 27,848 migrants who were apprehended and not expelled under Title 42.

San Diego Sector

The San Diego sector experienced the lowest volume of apprehensions of the four sectors we examined. Below we provide specific data snapshots for the San Diego sector:

- In the 2 weeks from August 8 to August 21, 2021, the San Diego sector processed 6,336 migrants, of whom 69 percent (4,373) were single adults, 28 percent (1,767) were family units, and 3 percent (196) were UCs.
- On August 12, 2021, the sector reported operating at 141 percent capacity. The sector had capacity to hold 570 migrants but instead had to hold 803.
- The most common country of origin for apprehended migrants was Brazil (62 percent), followed by Mexico (12 percent).
- The San Diego sector also processed as many as 1,000 cases weekly on behalf of the Yuma sector, due to relatively low volume of apprehensions in San Diego and very high volume in Yuma.

From August 8 to August 21, 2021, this sector expelled only 4,080 migrants to Mexico under Title 42. Because Mexico did not accept non-Spanish speaking migrants for Title 42 expulsions, nearly all Brazilians were processed through the NTA outcome. As shown in Table 6, apart from Title 42 expulsions, the most used processing outcome in the San Diego sector was NTA (24 percent).

²⁴ November 2, 2021 Memorandum from Chief Raul Ortiz, *Parole Plus Alternative to Detention*.



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Table 6. San Diego Sector Outcomes

Outcome	Overall Percentage	Total Processed
NTA	24%	1,522
VR	2.5%	159
ER	1%	62
Reinstatement of Final Order of Removal	0.3%	21
Other*	8%	492
Title 42 expulsions	64%	4,080
Total		6,336

Source: DHS OIG analysis of the San Diego sector’s post-apprehension outcomes and Title 42 expulsions for August 8 to 21, 2021

Note: Due to rounding, the total percentages of the post-apprehension outcomes may not equal 100 percent.

* This number represents other, less used post-apprehension outcomes for migrant processing.

In the San Diego sector, in the 2 weeks for which we performed this analysis, only 62 migrants (or 1 percent) were processed as ER and transferred to ICE ERO detention, out of 6,336 migrants who were apprehended and not expelled under Title 42.

Yuma Sector

The Yuma sector was also very busy when we visited, especially considering that it has a relatively short segment of the Southwest border to protect. As mentioned in our San Diego sector snapshot, the Yuma sector sent 7–8 buses daily with migrants to the San Diego, El Centro, and Tucson sectors during this timeframe. Below we provide specific data snapshots for the Yuma sector:

- In the 2 weeks from September 12 to September 25, 2021, the Yuma sector processed 11,397 migrants, of whom 58 percent (6,653) were family units, 39 percent (4,468) were single adults, and 2 percent (268) were UCs.



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- On September 16, 2021, the sector reported operating at 529 percent capacity. The sector had capacity to hold 354 migrants but instead had to hold 1,872.
- This sector had the greatest overall number of Brazilians (40 percent), followed by Venezuelans (21 percent) and Cubans (11 percent).

From September 12 to September 25, 2021, the Yuma sector processed 1,086 migrants for Title 42 expulsions. As shown in Table 7, apart from Title 42 expulsions, the most used processing outcomes in the Yuma sector were NTA (34 percent) and WA/NTA (33 percent). Brazilians and Venezuelans were most likely to be processed through either outcome. As discussed earlier, Brazilians were not amenable to Title 42 expulsions.

Table 7. Yuma Sector Outcomes

Outcome	Overall Percentage	Total Processed
NTA	34%	3,856
WA/NTA	32%	3,697
Parole plus ATD	13%	1,462
ER	10%	1,107
Other*	2%	189
Title 42 expulsions	9.5%	1,086
Total		11,397

Source: DHS OIG analysis of the Yuma sector’s post-apprehension outcomes and Title 42 expulsions for September 12 to 25, 2021

Note: Due to rounding, the total percentages of the post-apprehension outcomes may not equal 100 percent.

* This number represents other, least used post-apprehension outcomes for migrant processing.

As we saw with other sectors, ER was one of the less used outcomes; in the 2 weeks for which we performed this analysis, 1,107 migrants (or 10 percent) were processed as ER and transferred to ICE ERO detention, out of 10,311 migrants who were apprehended and not expelled under Title 42.



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Del Rio Sector

The Del Rio sector encountered the second greatest number of migrants of the sectors we examined. Following are specific data snapshots for the Del Rio sector:

- In the 2 weeks from September 15 to September 28, 2021, the Del Rio sector apprehended and processed 25,391 migrants, of whom 52 percent (13,088) were single adults, 47 percent (11,997) were family units, and 1 percent (306) were UCs.
- On September 16, 2021, the sector reported operating at 491 percent capacity. The sector had capacity to hold 465 migrants but instead had to hold 2,282.
- This sector had the greatest overall numbers of Haitians (37 percent), followed by Mexicans (16 percent) and Venezuelans (13 percent).

From September 15 to September 28, 2021, the Del Rio sector processed 11,496 migrants for Title 42 expulsions. In September 2021, Border Patrol expelled more than 7,000 Haitians back to Haiti under Title 42, via ICE repatriation flights. The sector reported that during the surge of Haitian migrants, Border Patrol headquarters provided direct guidance on how to process migrants for release or expulsion. As shown in Table 8, apart from Title 42 expulsions, the most used processing outcomes in the Del Rio sector were Parole plus ATD (19 percent) and NTR (11 percent).



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Table 8. Del Rio Sector Outcomes

Outcome	Overall Percentage	Total Processed
Parole plus ATD	19%	4,764
NTR	10%	2,614
WA/NTA	8%	2,119
ER	6%	1,577
Other*	11%	2,821
Title 42 expulsions	45%	11,496
Total		25,391

Source: DHS OIG analysis of the Del Rio sector’s post-apprehension outcomes and Title 42 expulsions for September 15 to 28, 2021

Note: Due to rounding, the total percentages of the post-apprehension outcomes may not equal 100 percent.

* This number represents other, less used post-apprehension outcomes for migrant processing.

As we saw with other sectors, ER was one of the less used outcomes; in the 2 weeks for which we performed this analysis, 1,577 migrants (or 6 percent) were processed as ER and transferred to ICE ERO detention, out of 13,895 migrants who were apprehended and not expelled under Title 42.

Conclusion

We found that post-apprehension outcomes may be administered inconsistently across Border Patrol sectors due to the particular challenges and limitations faced by each sector. Across the four sectors we reviewed, many factors hindered Border Patrol agents’ ability to assign post-apprehension outcomes to migrants. These factors included, but were not limited to, rising numbers of migrant encounters, persistent resource limitations in both Border Patrol and ICE ERO facilities, frequently changing Border Patrol guidance, and the policies of external stakeholders. These factors are not new or easily addressed, and they restrict Border Patrol’s ability to consistently assign outcomes across sectors. Moreover, we found that Border Patrol was not sufficiently prepared to meet the anticipated increase in processing and placement burdens when Title 42 can no longer be applied.



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Recommendations

We recommend the Chief, Border Patrol, U.S. Customs and Border Protection:

Recommendation 1: Develop and implement guidance for Border Patrol sectors to address the expiration of the CDC order pursuant to Title 42.

Recommendation 2: Develop and implement contingency plans for increased apprehensions and processing.

Management Comments and OIG Analysis

CBP officials concurred with our recommendations. Appendix B contains CBP's management response in its entirety. We also received technical comments on the draft report and made revisions as appropriate. We consider both recommendations resolved and open. A summary of CBP's response and our analysis follows.

CBP Response to Recommendation 1: Concur. CBP noted it has given guidance to the field with instructions for processing migrants, both currently as well as when CDC's order prohibiting entry under Title 42 is rescinded. Once Title 42 is rescinded, Border Patrol will resume processing high levels of migrants using established pathways under Title 8 of the Code of Federal Regulations. CBP asked that the recommendation be closed.

OIG Analysis: We consider these actions responsive to the recommendation, which we consider resolved and open. We will close this recommendation when CBP submits documentation confirming the efforts described in its management response, such as all the guidance and instructions disseminated to the field in anticipation of the expiration of the CDC order pursuant to Title 42, are complete.

CBP Response to Recommendation 2: Concur. CBP noted it initiated numerous actions to address this recommendation, including finalizing a specific Concept of Operations (CONOPS) Report that allows Border Patrol to continue to plan for increased apprehensions and processing of migrants. The report was designed to increase Border Patrol's enforcement posture, prioritize threats to border security, and ensure humane treatment of undocumented non-citizens. The report also captures appropriate and expeditious application of processing pathways and dispositions. Border Patrol sectors submitted operational orders under this CONOPS to be implemented as activity and traffic dictates. CBP asked that the recommendation be closed.



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OIG Analysis: We consider these actions responsive to the recommendation, which we consider resolved and open. We will close this recommendation when CBP submits documentation confirming the efforts described in its management response, such as the CONOPS report described in the response as well as sector-specific operational orders under this CONOPS, are complete.



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Appendix A

Objective, Scope, and Methodology

Department of Homeland Security Office of Inspector General was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*.

Our objective was to determine how four Border Patrol sectors on the Southwest border determine post-apprehension outcomes for noncitizens encountered between ports of entry. We conducted this review in conjunction with our annual congressionally mandated unannounced inspections of CBP holding facilities.

Prior to our inspection, we reviewed relevant background information, including reports and articles from nongovernmental organizations and media.

Between July 13 and September 16, 2021, we visited CBP holding facilities in the Rio Grande Valley, San Diego, and Yuma sectors. We also included the Del Rio sector as part of our review to determine how CBP managed post-apprehension outcomes during the Haitian migrant surge, which took place in Del Rio, Texas, in September 2021.

Our inspections were unannounced; we did not inform CBP we were in the sector or field offices until we arrived at the first facility. At each facility, we observed Border Patrol agents processing migrants and reviewed electronic records and paper logs as necessary. We also interviewed a limited number of CBP personnel and requested additional information.

We also conducted additional interviews with ICE ERO personnel and requested additional documentation after our inspections to supplement our overall evaluation.

We conducted this review between July 2021 and March 2022 pursuant to the *Inspector General Act of 1978*, as amended, and according to the *Quality Standards for Inspection and Evaluation* issued by the Council of the Inspectors General on Integrity and Efficiency.



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Appendix B
CBP Comments to the Draft Report

1300 Pennsylvania Avenue, NW
Washington, DC 20229



**U.S. Customs and
Border Protection**

August 15, 2022

MEMORANDUM FOR: Joseph V. Cuffari, Ph.D.
Inspector General

FROM: Henry A. Moak, Jr.
Senior Component Accountable Official
U.S. Customs and Border Protection

8/15/2022
X 
Signed by: HENRY A. MOAK, JR.

SUBJECT: Management Response to Draft Report: “U.S. Border Patrol
Faces Challenges Administering Post-Apprehension Outcomes
Consistently Across Sectors”
(Project No. 21-047-ISP-CBP(c))

Thank you for the opportunity to comment on this draft report. U.S. Customs and Border Protection (CBP) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

CBP’s U.S. Border Patrol (USBP) remains committed to the detection and apprehension of individuals suspected of illegally entering the United States between ports of entry and adhering to pertinent guidance when placing apprehended migrants in administrative or criminal proceedings, or expelling them across the border.

The draft report contained two recommendations with which CBP concurs. Enclosed find our detailed response to each recommendation. CBP previously submitted technical comments addressing several accuracy, contextual and other issues under a separate cover for OIG’s consideration.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Enclosure



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Enclosure: Management Response to Recommendations Contained in 21-047-ISP-CBP(c)

OIG recommended that Chief of USBP:

Recommendation 1: Develop and implement guidance for Border Patrol sectors to address the expiration of the CDC [Centers for Disease Control and Prevention] order pursuant to Title 42.

Response: Concur. On September 27, 2021, the USBP Law Enforcement Operations Directorate, Immigration, Prosecution and Custody Division implemented field guidance and instructions via an email distribution identifying pathways for processing prioritization both currently, as well as when CDC's order prohibiting entry under Title 42 of the Public Health Services Act is rescinded. Once the Title 42 order is rescinded, USBP will resume processing high levels of migrants by utilizing the established processing pathways under the Code of Federal Regulations, Title 8 that provides the most efficient processing efforts. These pathways include Warrant of Arrest/Notice to Appear, Notice to Appear, Expedited Removal, Reinstatement of prior order of Removal, and Voluntary Return.

In addition, USBP maintains an internal SharePoint site that provides a centralized repository for its personnel to immediately access current guidance and instructions for processing or otherwise handling migrants encountered in the field. For example, the site includes current processing pathways, processing documents, current policies and visual aids which provides instructions concerning removals from the United States.

CBP requests that the OIG consider this recommendation resolved and closed, as implemented.

Recommendation 2: Develop and implement contingency plans for increased apprehensions and processing.

Response: Concur. On May 12, 2022, USBP finalized the "U.S. Department of Homeland Security U.S. Customs and Border Protection Concept of Operations Report for Palisade" that allows USBP to continue to plan for an illegal migrant influx, as this report was designed to: (1) increase USBP's enforcement posture; (2) prioritize threats to border security; (3) ensure humane treatment of undocumented non-citizens; (4) apply appropriate processing pathways; (5) expedite processing dispositions; and (6) manage in-custody population. According to the CONOPS Report for Palisade, USBP in-custody numbers are used to determine appropriate response and resource allocation. Accordingly, CBP's Headquarters Incident Command Structure requires monitoring, planning, coordination efforts and preparedness. USBP Sectors submitted operational



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orders to be nested under and support the overarching CONOP Palisades. Individual USBP Sectors operational orders will be implemented as activity and traffic dictates.

CBP requests that the OIG consider this recommendation resolved and closed, as implemented.



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Appendix of C
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Appendix D
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