

Senate Border Deal Encourages Asylum Fraud, Leaves Catch-and-Release in Place

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On Sunday night, Senate negotiators unveiled their long-awaited border security deal for inclusion in President Biden’s foreign aid package and Senate Majority Leader Chuck Schumer is poised to act on the proposal Wednesday.

As advertised, the border security deal implements several changes in immigration processes. The changes however do not fundamentally address the core problems plaguing our system. The bill does not stop asylum abuse, it does not end the Biden administration’s illegal use of parole, and it does not end catch-and-release.

In reality, the bill: (1) leaves existing law in place, under which the Biden Administration has been (illegally) releasing illegal aliens encountered at the border; (2) does nothing to stop the President’s illegal use of parole; (3) creates a whole new, “claim-and-release” process for asylum-seekers that actually encourages asylum abuse; (4) provides limited expulsion authority for a temporary period of time and exempts huge swaths of illegal migrants; and (5) appropriates billions of dollars to NGOs and Homeland Security to continue the administration’s open-borders policies.

Among the many provisions in the 370-page bill, there are two core changes to current law. First, the bill creates a parallel processing path under Section 235B for anyone claiming asylum or other form of humanitarian protection. DHS has complete discretion to determine who is put into this path. However, aliens are not eligible to be processed under 235B unless they have been in the U.S. less than 14 days and are encountered within 100 miles of the border (generally, the same requirements for expedited removal). Unaccompanied alien minors (UACs) may not be processed under this authority.

Aliens referred to be processed under Section 235B will be immediately released and placed on alternatives to detention. They are guaranteed work authorization almost immediately.

After the alien is referred for the new asylum proceedings under Section 235B, an asylum officer must conduct a “protection determination” screening, which is roughly the same as a credible fear screening. In an attempt to speed up the current process, the bill provides that the screening must take place, at a USCIS-approved facility, within 90 days—**to the greatest extent practicable**. If USCIS does not do the protection determination screening within 90 days, the alien will automatically get work authorization.

Several outcomes are possible from the protection determination screening. If during the protection determination, an asylum officer determines that the alien, by a clear and convincing evidence standard, is eligible for asylum, the officer will approve the request for asylum right there and then, which becomes final if affirmed by a supervisor. However, the alien may also meet a lesser evidentiary standard and receive a positive determination, in which case the officer will refer the alien to a merits hearing, which will also be conducted by an asylum officer.

In either case, the asylum officer, not an immigration judge, will decide all asylum claims. The proceedings will be non-adversarial, which means there will be no opportunity for the government, typically ICE attorneys, to cross-examine the asylum-seeker to probe the veracity of his/her claims or whether s/he is indeed eligible for asylum. Removing all asylum decisions from judges to asylum officers will no doubt remove all sorts of constraints on issuing approvals.

However, if the asylum officer issues a negative finding during screening, another process ensues. The bill requires the asylum officer must order the alien removed, but then gives the alien multiple bites at the apple to reverse the decision. After a denial, the alien may request that USCIS “reconsider” the negative finding either through a newly created “Protection Appellate Board.” And if the Protection Appellate Board still denies, the alien may file motions to reopen or reconsider the Board’s decision. The Secretary of Homeland Security has final, ultimate authority over whether to approve or deny requests for asylum or other humanitarian protections.

Furthermore, at any time during this process the alien may opt for “voluntary departure” or “voluntary repatriation,” which allows them to leave the country with virtually no consequences. Similarly, before an asylum merits hearing, the alien may withdraw his application for admission and leave the

U.S. These options give the illegal alien a huge advantage, because if they realize during the process that they are likely to be denied and ordered removed, they can simply leave without penalties and avoid getting an official removal order, which can have serious consequences, including barring immigration benefits in the future. The aliens leave, come in again, and the process repeats.

The other major change the Senate border security deal makes to our immigration laws is the creation of a new expulsion authority at the southwest border. This expulsion authority, long-touted by the Senate negotiators, is actually significantly limited in time and scope and riddled with exceptions. First, **the expulsion authority sunsets after three years.** In addition, **during those three years, the authority may only be used for a limited number of days: 270 the first year, 225 the second year, and 180 the third year.**

This new expulsion authority is also limited in scope. **It does not apply to illegal aliens seeking asylum or parole at ports of entry. It does not apply to any alien whom the immigration officer determines should be excepted based on the “totality of the circumstances.”** It also does not apply to unaccompanied alien minors or victims of trafficking.

The new emergency authority is only triggered after a staggering amount of illegal immigration has already taken place. The authority may be triggered two ways. First, DHS may elect to use the authority if encounters at the southwest border reach an average of 4,000 per day for seven days—a staggering number. Second, DHS is required to use the authority if encounters at the southwest border reach an average of 5,000 days over seven days, or there are 8,500 encounters in a single day.

The bill also provides multiple ways to end the expulsion authority. First, DHS **must** suspend use of the authority if encounters reach 75% of the triggering event. For the discretionary trigger, this means an average of 3,000 aliens per day for seven days. For the mandatory trigger, this means an average of 3,750 per day for seven days or 6,375 for a single day. **In addition, the bill allows the President to order the Secretary of Homeland Security to suspend use of the authority up to 45 days.**

Moreover, even if this expulsion authority is in place, no matter how high the number of people pouring over the border, the bill requires that DHS continue to process aliens arriving at ports of entry for asylum and parole under current legal authorities—at least 1,400 each and every day!

Finally, the Senate border security deal includes billions in funding, largely designed to: (1) give agencies more money to process and release illegal aliens; (2) speed up the process of delivering immigration benefits, such as work authorization and naturalization; and (3) use taxpayer dollars to support policies that encourage illegal immigration.

The bill appropriates billions to the Biden Administration's catch-and-release policies. It provides more than \$6 billion to Customs and Border Protection (CBP) to process and transport illegal aliens. Of that amount, \$1.4 billion is directed to the Shelter and Services Program (SSP), which awards grants to nongovernmental organizations that facilitate illegal immigration. In addition, the bill appropriates \$7.6 billion to Immigration and Customs Enforcement (ICE), of which \$1.2 billion is directed to expand the Alternatives to Detention (ATD) program, which under the Biden Administration, has been used to provide social services for aliens instead of effectively monitoring aliens.

In addition, the bill appropriates nearly \$4 billion to U.S. Citizenship and Immigration Services (USCIS) to process immigration benefits more quickly. The money will be used to hire additional asylum officers—which typically takes at least a year before they are on-boarded, trained and adjudicating cases. The funding would also go to building new USCIS facilities and processing work permits for the millions of illegal aliens who have crossed into the U.S.

Other government departments would likewise receive additional funding to continue open-borders policies. The Department of Health and Human Services (HHS) would receive \$2.3 billion, the large majority of which will go to pay for benefits for illegal Cuban and Haitians paroled into the U.S. Another \$350 million would be provided to HHS to provide legal counsel for unaccompanied alien children (UACs). And \$415 million would be provided to the Department of State to address “irregular migration” in the Western Hemisphere, on top of \$850 million for humanitarian needs in Central and South America.

Additionally, the Senate proposal:

- Relaxes work permits for those claiming asylum and extends their validity to two years.
- Prohibits protection determinations of illegal aliens in ICE and CBP facilities, forcing USCIS to construct new facilities to carry out its new duties, thus delaying the effective date of the new policies.

- Provides a path to citizenship for those illegally paroled in from Afghanistan while not ending the ability of the Secretary to repeat the abuse in the future.
- Requires USCIS officers that deny a protection claim to also provide the alien with options on departing the United States.
- Requires the Secretary to issue reports on parole – rather than reining in his abuse – requirements which he has clearly ignored the last three years.
- Contains provisions that have nothing to do with securing our border, such as adding 50,000 new green cards per year for five years and granting work authorization to the spouses and children of H-1B workers.

With the border security text now released, Majority Leader Chuck Schumer has announced that he will attempt to proceed to debate on the entire foreign aid package Wednesday. That motion to proceed will require 60 votes to pass, but some Senate Republicans are already objecting to the immigration provisions. House Speaker Mike Johnson, has already voiced his opinion and lawmakers in both houses are scrambling to figure out what the weeks of secret negotiations have actually accomplished.

All-in-all, the bill fails at every level. There is virtually nothing from H.R. 2 in it. There is nothing that curtails the President's illegal use of parole. There is nothing that stops the current catch-and-release policies. Meanwhile, the new asylum process, which immediately releases illegal aliens and quickly gives them work authorization, encourages more asylum fraud and more illegal immigration. Unfortunately, this result was completely predictable given that the Senate negotiators hatched this deal with Homeland Security Secretary Alejandro Mayorkas, who willfully and knowingly created this border crisis. FAIR urges all lawmakers and Americans to reject the Senate proposal.