

## **FAIR Responds to the Wall Street Journal**

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By: FAIR Staff

Barely 24 hours after Senate negotiators released their “border security deal,” the editorial board of the Wall Street Journal published an editorial extolling its virtues. The piece, entitled “A Border Security Bill Worth Passing,” not only argues that the Senate should pass the legislation negotiated in secret by a handful of Senators, but that Republicans who vote against it will do so only because they want to preserve an effective election year issue.

Three days later, most Republicans did vote against the Senate border security deal. While it is impossible to know what was in the minds of each Republican who voted against it, we do know from the whirlwind of media coverage that many did so because they thought it was bad policy.

FAIR agrees: it is bad policy. Having spent 45 years focusing on nothing but immigration, we know President Biden could end the border crisis simply by enforcing existing immigration laws. But, because the President refuses to do so, we have urged Congress to act. Sadly, the package proposed by the Senate negotiators – and supported by the Wall Street Journal – is not only ineffective, it makes the situation worse.

To illustrate our point, we took the time to review and rebut the Wall Street Journal’s editorial. For those who appreciate a robust public dialogue, here is our response, presented as annotations to the original text.

WSJ: Do Republicans want to better secure the U.S. border, or do they want to keep what has become an open sore festering for another year as an election issue? That’s the choice presented to Congress this week with the rollout of the Senate’s bipartisan border security bill, and we’ll soon learn what the GOP really wants.

By any honest reckoning, this is the most restrictive migrant legislation in decades. Previous immigration talks have involved trading security measures for legalizing more immigration. There is little of the latter in this bill— nothing for nearly all of the Dreamers who were brought here illegally as children, no general pathway to citizenship or green cards for most illegal immigrants already in the U.S.

**FAIR:** The toughest legislation in decades is H.R. 2, which the House passed in May. That did not have any legalization provisions either. Senator Schumer refuses to take up that legislation, but Senate Republicans have already voted in favor of that bill as an amendment to the debt ceiling agreement. Senate Democrats, of course, voted it down.

- The argument that we should pass a bill because it does not have amnesty in it, regardless of whether the provisions on the bill are good for the future of our country, is short-sighted. The ultimate factor in whether Congress passes immigration legislation should be whether it serves the national interest. If it does not, Congress should reject it. That is not to say no compromises can ever be made. But once something is codified into law, it is harder to repeal it than it was to actually pass it. The time to ensure legislation is sound is before it becomes law.
- The Senate bill should be rejected because it will not fix the border crisis. Not only does it fail to stop asylum abuse, it encourages it. It does not end catch-and-release, but instead condones it and does nothing to stop the abuse of humanitarian parole.
- Just to note, there is one amnesty provision in here. The Senate deal does include a pathway to citizenship for tens of thousands of Afghan nationals who were illegally paroled into the United States. We strongly oppose this: (1) because they were illegally paroled into the U.S. and that action should not be ratified by subsequent legalization; (2) multiple government reports detail how these parolees were not adequately vetted; (3) the legislation allows the Secretary to waive crimes committed by these parolees when applying for legalization.

WSJ: This is almost entirely a border security bill, and its provisions include long-time GOP priorities that the party's restrictionists could never have passed only a few months ago. Republicans demanded border measures last year as the price for passing military aid for Ukraine, Israel and Pacific allies. Democrats resisted at first but later agreed to negotiate and have made concessions that are infuriating the open-borders left. Will Republicans now abandon what they claimed to want?

**FAIR:** Republicans (and FAIR) demanded meaningful policy changes, not money. The Senate bill offers billions in appropriations, but it already did that when it was first introduced last year. Throwing money at the problem will not solve it, and this has been our argument all along.

- This bill does NOT contain meaningful policy changes, and in fact, does more damage. Meanwhile, billions of dollars are still given to CBP and ICE to process and release illegal aliens. For example, over \$1.4 billion goes to FEMA’s Shelter and Services programs which funnels that money through nonprofits to provide illegal aliens social services.

WSJ: The bill’s details are worth describing because they’re crucial to reducing the current incentives for migrants to come to the U.S. border. Most important, the bill rewrites the standard and process for granting asylum in the U.S.

**FAIR:** The Senate bill doesn’t re-write the asylum process, it just creates a new one. It dramatically increases the incentive for asylum fraud, encouraging aliens to claim fear in order to be released and obtain a work permit faster. Further, more are likely to claim asylum if they know they may obtain it within days by an asylum officer rather than going before an immigration judge.

WSJ: Under current law and practice, migrants cross the border, turn themselves in to border patrol agents, and claim asylum. If they pass the deliberately low bar for claiming “credible fear” of persecution, they are given a date for a future asylum hearing and released into the U.S. The wait can take years, and many never show up. This is the policy that has become known as “catch and release.”

**FAIR:** The Senate bill actually codifies this practice—except that under the new process, the aliens must be released *before* they are ever interviewed by an officer.

- Section 3141 of the Senate bill creates a new asylum process called “Provisional Noncustodial Removal Proceedings.” This asylum procedure can apply to virtually anyone who crosses the southern border and claims asylum. The only real limitation is that aliens must be encountered within 14 days of crossing the border and within 100 miles of the border. These are the same requirements for applying expedited removal and generally covers most illegal border crossers.
- Aside from this time and distance requirement, the Secretary of Homeland Security has complete discretion to divert any alien – and every alien – who claims asylum into this new asylum process.
- Once placed into this process, the aliens “*shall be released from custody.*” DHS has no discretion. Thus, the new asylum


process *codifies a new catch-and-release process*, or what I would call a “claim-and-release” policy.

- Regarding the years-long wait to conduct proceedings, the Senate bill does say that under this new process DHS must conduct initial protection screenings within 90 days after the alien is determined inadmissible. However, that language has a huge caveat: “*to the maximum extent practicable.*”
  - In government-speak, that means there is no deadline. Given the volume of illegal aliens, the lack of facilities to undergo a screening (as required in the bill), the insufficient number of asylum officers, and the time and money it will take to hire and train enough asylum officers, this deadline will never be met. [It generally takes a full year for USCIS to hire and train an asylum officer and the fail rate is roughly 25%. USCIS will need hundreds of new asylum officers to pull this off.]
  - The authors of the bill know this full-well, which is why they also provide that if DHS does not conduct the initial asylum screening within 90 days, the alien “shall be granted” work authorization. Mandatory release plus work permits equals a massive incentive for asylum abuse.
  - So in reality, this provision codifies mandatory release, but the backlogs continue. It just moves the backlog from the immigration judges, who currently conduct asylum hearings for border crossers, to asylum officers. It turns asylum officers into judges, but the government attorneys are not allowed in to make their case.

WSJ: The new bill raises the bar for that initial border screening for credible fear to a “reasonable possibility” of persecution. Toughening the asylum standard was a priority of the Trump Administration, but a statutory change is needed to make it permanent. Migrants will have to show they couldn’t have moved elsewhere in their own country to avoid persecution before seeking refuge in the U.S.

**FAIR:** The Senate deal does increase the evidentiary standard for credible fear. However, the change in this bill is one grade up and still constitutes less than 50 percent likelihood of success of establishing a valid case on the merits. In

contrast, H.R. 2 would have implemented a higher, “more likely than not” standard, which is equal to “preponderance of the evidence.” (See chart below published by USCIS). The change is an improvement, but it’s still a low bar.



Standard of Proof		Refugee	Asylum	Int'l Ops
Beyond any reasonable doubt	<i>Very high</i>			I-130 Adam Walsh Act- no risk to beneficiary
Clearly and beyond doubt	<i>Highly probably true</i>	Admissibility		Admissibility
AND			Filed within one year	<ul style="list-style-type: none"> <li>• Rebut prior fraudulent marriage</li> <li>• Citizenship of children born out of wedlock</li> </ul>
Clear and convincing	<i>Firm belief or conviction</i>			
Preponderance of the evidence	<i>More than 50% chance</i>	<ul style="list-style-type: none"> <li>• Meets refugee definition</li> <li>• Special humanitarian concern</li> <li>• Not firmly resettled</li> <li>• Facts supporting eligibility</li> </ul>	<ul style="list-style-type: none"> <li>• Meets refugee definition</li> <li>• Not subject to any bars</li> <li>• Facts supporting eligibility</li> </ul>	Eligibility for benefit sought
AND			Exceptions to 1-year rule	
To the Satisfaction of the adjudicator	<i>Probably true</i>			
AND				
More Likely Than Not				
Reasonable possibility	<i>One in ten chance</i>	Well-founded fear	Well-founded fear Reasonable fear	Well-founded fear
Significant possibility	<i>Substantial and realistic possibility</i>	Interdictions at sea	Credible fear	

- In reality, however, the change won’t have a real impact, because under the new process, the *aliens must be released before their initial protection* screenings. The large majority of them will never show. This is why current law requires that the aliens be held throughout their asylum proceedings. Under a mandatory release process, Congress could set the bar at the highest level possible and it still will not stop asylum abuse because the aliens already have what they want—to be released into the U.S. The only aliens who will show up for asylum screenings are the ones who are likely to be approved, so the slightly increased standard isn’t really meaningful.

WSJ: The bill also includes an expedited review process for asylum with a stay-or-deport decision within 90–180 days. There is money for 50,000 detention beds while migrants are awaiting review. If there are more migrants arriving than can be detained, the overflow will be enrolled in mandatory alternatives–

to-detention programs that use tools such as ankle bracelets or reporting curfews. No more catch and release without consequences.

**FAIR:** The expedited process is a sham, addressed above.

- The money for added detention beds is welcome, but still below the levels that President Trump used. More importantly, the bill does not force the administration to use them. Currently, the government funds 34,000 detention beds, yet the number of beds used daily is somewhere around 25,000 because the Biden Administration releases everyone. We made the same argument in December when the foreign supplemental bill was introduced with money for more detention beds.
- Any overflow from a lack of detention space should be diverted to Mexico through the Remain in Mexico program, not released into the U.S. However, the Senate border deal does not reinstate the program. H.R. 2 does.
- Alternatives to Detention, which is not codified in law, is not effective at monitoring aliens who do not want to be monitored. Today, only around 250,000 aliens (of the more than 6 million on the non-detained docket) are enrolled in ATD. A majority of those enrolled simply check-in periodically through an app. Those monitored by GPS regularly cut off the GPS bracelets and dump them in trash at bus stations – without any consequence. And, because the program is not statutory, it can be modified at-will by the executive branch. Under this Administration, alternatives to detention has been converted to a program that provides social services to illegal aliens.

WSJ: The bill also reforms humanitarian parole. Migrants will no longer be able to register using the Biden CBP One App to gain free entry at a border crossing and an immediate work permit.

**FAIR:** This is false. The bill does not change one sentence of the humanitarian parole statute, and even states in several places that nothing in the legislative language should be construed to expand or narrow the parole powers already in statute.

WSJ: The bill doesn't include a cap on the number of parolees in a year, as some Republicans sought. But the tightened rules for claiming parole should reduce the incentives to come, and parole is vital in some cases such as Ukrainians or Afghan allies. One disappointment is that the bill lets the



Administration continue its parole programs for Haitian, Cuban, Nicaraguan and Venezuelan migrants who apply in their home capitals.

**FAIR:** There are no “tightened rules for claiming parole” in the Senate deal.

- In addition, we disagree that parole is “vital” for the Afghans and Ukrainians. When Kabul fell to the Taliban, the U.S. government should have employed existing law to organize an orderly refugee process whereby multiple countries could have (and should have) taken aliens who qualified for refugee status and were thoroughly vetted.
- More importantly, Section 212(d)(5)(B) of the INA expressly prohibits the government from paroling in refugees as a group (i.e. there must be an individualized exception based on a compelling public interest). Thus, the parole of Afghans and Ukrainians was illegal. Not only was it illegal, it was a disservice to those who enrolled because the Biden Administration could not provide a long-term or durable status to them. The proposed bill does nothing to stop a Secretary from doing that again to others.

WSJ: The bill also includes an emergency provision mandating that the border be closed if the average showing up each day for a week is 5,000. This is to stop the current mess in which border crossings are overwhelmed. If a shutdown is triggered, all migrants will be deported until the number of arrivees falls 25% and the border patrol has regained control. The provision does not mean that migration is unchecked up to 5,000 a day.

**FAIR:** The President already has the power to shut down the border under Section 212(f) of the INA—without first surpassing the insanely high threshold of 5,000 illegal border crossings per day for seven days. Providing, as the Senate bill does, that expulsion is only required after 5,000 per day essentially admits that this amount of illegal immigration is acceptable. It is the stamp of approval on lawlessness.

- ***The expulsion authority expires in three years***, and the Secretary of Homeland Security may only invoke it for ***a limited number of days each of the three years***. Moreover, it is NOT true that all migrants will be deported. The expulsion authority does not apply to:
  - Aliens seeking asylum or parole at ports of entry;
  - Unaccompanied minors;
  - Trafficking victims; and

- *Any aliens the government feels should be exempted for operational reasons.* Under this Administration, most will be exempted, just like we witnessed under Title 42.
- There are more limits to this expulsion authority. It must be suspended when encounters hit 75% of the 5,000 threshold, but the flow of 3,750 aliens per day is still extraordinarily high and hardly means the border is under control.
- To add insult to injury, the bill expressly states that even when the expulsion authority is in place, DHS *must continue to process 1,400 illegal aliens each and every day* under the current authorities in law.

WSJ: GOP critics of the bill are pointing to the bill's modest expansion of legal visas—about 50,000 a year for employment and family visas. But these immigrants aren't pouring over the border willy-nilly. They are following legal rules. Republicans claim to oppose illegal immigration, but this complaint shows that some really oppose all immigration.

**FAIR:** The bill does expand legal immigration by 50,000 green cards per year for five years. While FAIR opposes this because we believe legal immigration should be curtailed, the Senate authors should be honest about why they want these additional green cards. Those green cards are needed to start legalizing all of the illegal migrants who have come into the U.S. over the past three years. Many illegal aliens with citizen-relatives in the U.S. will be able to get a green card under INA Section 245. Similarly, parolees, who are authorized to work, can be sponsored by an employer for a green card.

WSJ: The Senate bill is a major improvement over the status quo, as the Border Patrol union said Monday in endorsing it. The bill would go far to reduce the incentives for illegal migration and provide new tools to the executive branch to control it. Oklahoma Sen. James Lankford, who negotiated for the GOP, deserves thanks for digging into the policy nuances and writing a bill that Mr. Trump never came close to getting when he was President.

**FAIR:** We disagree with the Border Patrol Union. It is not a major improvement over current law. The Union endorsed it based on the expulsion authority, which many do not know will disappear in three years. The president of the Union, Brandon Judd, said he thought the new authority would allow them to quickly remove aliens and deter new crossings. This can be done under existing law such as the expedited removal and mandatory detention authorities in INA Section 235. But the Biden Administration refuses to use them. If the Senate



passes the border deal, however, the main enforcement provision will be temporary, while the claim-and-release asylum policies will be permanent.

WSJ: Yet the signs are that many Republicans in Congress may heed Mr. Trump's current orders and reject this policy victory. They will point to this or that detail to justify opposition, all of which are minor in the context of these consequential reforms. House Republicans could also work to improve the bill, but it appears they may not even allow a vote.

**FAIR:** At this point, it should be clear why these changes can hardly be described as consequential reforms. Regardless of the politics, the bill should be rejected because it is not in the national interest. The asylum provisions will encourage a huge rush on the border and the enforcement provisions, particularly the expulsion authority, are both temporary and illusory.

If Republicans reject this bill, they will hand Democrats an argument that the GOP wants border chaos that they can exploit as a campaign issue. The chaos will continue for at least another year. Republicans may think they can write a better law if Mr. Trump wins in November, but don't count on it. Democrats will again demand much more in return. If Republicans pass up this rare chance at border reform, they may not get a better one.

**FAIR:** If Republicans reject this bill, FAIR hopes it will be for policy reasons. After 45 years of fighting for sane immigration policy, we believe this bill is not in the national interest. It represents a step backward, not a step forward.

- If the chaos continues, it will be because of President Biden and Secretary Mayorkas, not the Republicans who rejected this bill. President Biden has all the authority he needs to enforce the law. He can use expedited removal to quickly remove illegal border crossers without a hearing before a judge, and he has thousands of empty detention beds to detain those who are quickly removed. And, as mentioned above, he has the authority under INA 212(f) to immediately shut down the border – without allowing massive amounts of illegal immigration first.