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**EXPERT INSIGHT** | Center for Homeland Security & Immigration

# THE SENATE IMMIGRATION BILL WOULD NOT HAVE “SHUT DOWN THE BORDER”

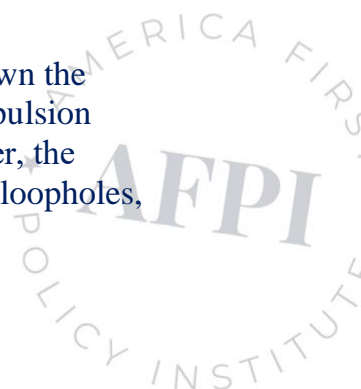
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## TOPLINE POINTS

- ★ Supporters of the recent Senate immigration bill claimed it contained a new border expulsion authority that would have “shut down the border” once in effect.
- ★ A thorough review of the bill text reveals that the legislation would have authorized an unprecedented level of illegal immigration before the new authority kicked in.
- ★ While the bill appears to have died after an unsuccessful floor vote, it is still necessary to analyze the new expulsion authority because it contained numerous loopholes that further weakened its claimed effect on border security.

On February 4, 2024, the U.S. Senate released legislation as an amendment in the nature of a substitute for H.R. 815 that reportedly paired border security reforms with more funding for Ukraine, Israel, and Taiwan after Conservatives in Congress refused to consider the White House’s stand-alone foreign aid request. Section 3301 of the bill would have created a new authority, as Section 244B of the Immigration and Nationality Act, for the Department of Homeland Security (DHS) to “respond to extraordinary migration circumstances.”

Some have claimed that the border emergency authority would have “shut down the border” once it was activated and that it functioned the same as the border expulsion authority derived under Title 42’s public health emergency authority. However, the reality is that this so-called border expulsion authority is flawed, riddled with loopholes, and would have expired after three years.



**The bill would have authorized *at least 5,000* unlawful border crossings per day (1.8 million per year).**

First, the new border emergency authority would have been activated only on a discretionary basis by the DHS secretary after an average of 4,000 illegal aliens per day were “encountered” at the southern border over a seven-day period. This is the equivalent of 120,000 illegal aliens crossing the border in a month or 1.46 million in a year. February 2021 is the only month during the Biden Administration in which southern border “encounters” of illegal aliens were fewer than 120,000.

The border emergency authority would have become mandatory if an average of 5,000 illegal aliens per day were “encountered” at the southern border over a seven-day period or if 8,500 illegal aliens were “encountered” in a single day. Considering that the current DHS secretary has refused to use existing discretionary authority, such as the Migrant Protection Protocols, there is little reason to believe this new authority would be used before the mandatory trigger applies. This is the equivalent of 150,000 illegal aliens per month or 1.8 million illegal aliens crossing the southern border per year before this new authority supposedly intended to “respond to extraordinary migration circumstances” would kick in. That is an unprecedented level of illegal immigration that our country never experienced before the Biden Administration.

Second, the total illegal immigration level implicitly authorized by the Senate before the border emergency authority applied would have been even higher. The 5,000 trigger excluded all non-Mexican unaccompanied alien children (UAC) “encountered” as well as known “gotaways”—illegal aliens who were observed evading Border Patrol while disappearing into American communities. Thus far, during the Biden Administration, there have been at least 1.8 million known gotaways and almost 371,000 non-Mexican UAC encounters. Assuming that those levels remain constant, and there is reason to believe they would both have increased under this bill, that’s a monthly average of 51,429 gotaways and 10,593 UACs allowed into the country on top of the 150,000 illegal aliens who would be processed into the U.S. before the new “expulsion” authority was triggered.

**The new border expulsion authority would have expired after three years, while other provisions are permanent.**

Third, even beyond the unacceptable levels of illegal immigration allowed under this bill, the border expulsion authority would have been severely limited in its application. The border emergency authority was time-limited in its application. In the first year, the border emergency authority could have been used only for 270 days. In the second year, it would be further reduced to just 225 days of application. In the third year, DHS would have been allowed to use it only for 180 days, or less than half the year. Confusingly,



after this point, the border emergency authority would sunset, meaning it would be removed from the statute, while all of the other changes would have been permanent. This does not make sense operationally and appears to indicate that any level of illegal immigration is acceptable during those remaining days of each year. The authority also would have terminated if the seven-day average dropped to 75 percent of the trigger level, meaning 3,750 illegal aliens per day. This is still an extraordinarily high level of illegal immigration, the equivalent of 112,500 illegal aliens, excluding gotaways and non-Mexican UACs, that would overwhelm the system. For reference, President Obama's second DHS secretary said that 1,000 illegal aliens per day crossing the border was a crisis level that would cripple the system. Yet, the Senate bill indicated that 3.7 times that level would be acceptable. Additionally, the president would be authorized to suspend this authority for 45 days each year, regardless of the levels of illegal immigration that occur during that period.

Fourth, even more carve-outs undermine the claims that this would have been a border expulsion authority that “closes” the border. For example, once the authority was activated, all UACs would be exempt from immediate expulsion, which means these trafficked and smuggled minors would be allowed into American communities. Another exemption that could function as a major loophole is that DHS could have exempted any alien from expulsion for “humanitarian” reasons, “public health interests,” or “operational considerations.” The current administration would be expected to broadly exploit this loophole to allow more illegal aliens into American communities.

**Instead of shutting down the border, the bill would have redirected illegal aliens to the ports of entry for processing into American communities.**

Fifth, the bill would have required that a *minimum* of 1,400 illegal aliens per day be processed into the country through the ports of entry during the time that the so-called expulsion authority was in effect. This provision assumes a continued daily level of illegal immigration that the Obama Administration's DHS secretary considered a crisis level. Similar to other carve-outs, non-Mexican UACs would not have counted toward this minimum level of “authorized” illegal immigration through the ports of entry. This emphasis on processing illegal aliens instead of deterring them would be a continuation of the same ineffective Biden Administration policies that have spurred the ongoing border crisis.

Sixth, a glaring issue throughout this bill is that it did not adequately account for the fact that an illegal alien could delay or block immediate expulsion by making a claim for different forms of humanitarian relief. While illegal aliens would have been barred from making asylum claims under the border emergency authority, they are still allowed to raise claims under the Convention Against Torture or seek separate relief, known as withholding from removal. This is yet another loophole that illegal aliens will exploit to



overwhelm the system to achieve their goal of being released into American communities.

Finally, the new so-called border expulsion authority could have significantly undermined a powerful existing authority that Congress has delegated to the president. While proponents of the bill claim this would be an improvement over the current daily average of 10,000 unlawful border crossings, it still would have deemed as acceptable an unprecedented amount of illegal immigration. The establishment of a trigger at 5,000 illegal aliens could also be interpreted as a congressional limit on the president's existing broad authority under section 212(f) of the Immigration and Nationality Act to deny the entry of aliens. Currently, section 212(f) states:

*Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation... suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.*

Arguably, a court could interpret the new provision as narrowing section 212(f) by establishing that illegal immigration below 5,000 unlawful border crossings per day is not considered “detrimental.”

Beyond the policy issues, the 5,000 unlawful crossings trigger contained notable operational difficulties. First, it would have placed a substantial burden on U.S. Customs and Border Protection personnel to have a real-time count of daily encounters across all border sectors. Second, the bill failed to account for a plausible scenario in which a large group is apprehended that would cross the 5,000 illegal alien trigger. The legislation did not indicate how the decision would be made about which illegal aliens are immediately expelled and which are processed into American communities. Third, there is a legitimate concern that the border crossings could be manipulated by the cartels to prevent this new authority from being triggered. Fourth, based on the lawfare that occurred during the Trump Administration, it is highly probable that progressive organizations would have challenged the legislation in court as discriminatory, arbitrary, and capricious, find a liberal district court judge to issue a nationwide injunction, and tie up the issue in litigation for years. This would mean that one of the bill's touted enforcement mechanisms was delayed while the humanitarian and security crisis at the southern border continued uninterrupted.

