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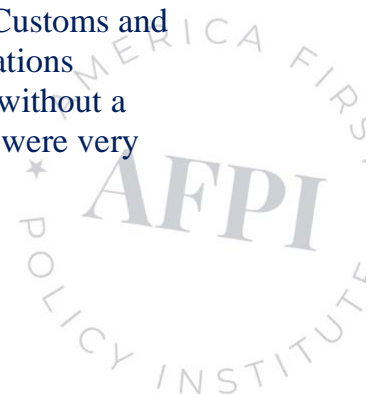
ISSUE BRIEF | Center for Homeland Security & Immigration

POST-TITLE 42: HOW THE BIDEN ADMINISTRATION'S NEW BORDER POLICIES HIDE THE BORDER CRISIS

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- ★ The Biden Administration's new border policies following the expiration of Title 42 divert illegal aliens from areas between the ports of entry to the actual ports of entry to hide the optics of the border crisis.
- ★ Additionally, the Department of Homeland Security is unlawfully using the narrow immigration parole authority to allow illegal aliens to fly directly into the U.S. interior and not show up on the southern border apprehensions data page.
- ★ Monthly border apprehension numbers are no longer a reliable metric for how many illegal aliens are being allowed into the country because these policies cause the official numbers to be undercounted.

Historically, the number of [apprehensions](#) of illegal aliens by U.S. Border Patrol (BP) agents between ports of entry at the southern border has been a reliable metric to assess the effectiveness of an administration's border security policies because that is where attempted unlawful entry largely occurred. BP is one subcomponent of U.S. Customs and Border Protection (CBP), while the other, known as the Office of Field Operations (OFO), operates at the ports of entry. When aliens show up at a port of entry without a visa, OFO agents will find them inadmissible, but those numbers historically were very low when compared to apprehensions by BP agents.



The Biden Administration has created the term “encounters” to replace both apprehensions of illegal aliens by BP agents and those found inadmissible by OFO officers. Under the Immigration and Nationality Act (INA), it is irrelevant whether illegal aliens are apprehended between ports of entry or found inadmissible at ports of entry—both are forms of attempted unlawful entry, and the aliens are violating section 212(a)(6) of the INA.

Using the rebranded “encounters” metric, the first 29 months of the Biden Administration reflect a failed border security strategy. For example, since the creation of the Department of Homeland Security (DHS) in 2004 through the end of the Trump Administration, CBP never apprehended 200,000 or more illegal aliens in a single month. That streak ended under the Biden Administration in July 2021 when CBP apprehended 213,593 illegal aliens. Unfortunately for the American people, July 2021 was not an anomaly, and there have already been 14 individual months where CBP apprehended 200,000 or more illegal aliens, including an all-time high of 252,280 apprehensions in December 2022.

While the Biden Administration has blamed “root causes” in the Northern Triangle or a global migrant movement, those arguments are unpersuasive. Instead, the ongoing humanitarian and security crisis at the southern border is caused by the Biden Administration’s decision to end every enforcement policy of the Trump Administration and allow the mass release of illegal aliens into American communities instead of detaining them before their court dates.

Unsurprisingly, the first two fiscal years of the Biden Administration are the two worst years for southern border “encounters” ever recorded. In Fiscal Year (FY) 2021, DHS shattered the previous record when 1.73 million illegal aliens were encountered—a period that included lower levels of apprehensions during the final months of the Trump Administration. The situation worsened in FY 2022 as DHS encountered about 2.38 million illegal aliens—[exceeding](#) the total southern border apprehensions during the four years of the Trump Administration. Through May 2023, DHS has already encountered 1.64 million illegal aliens—putting FY 2023 on pace to potentially surpass 3 million total “encounters” by September 30, 2023.

Due to this historically poor record, the Biden Administration has now implemented a new border security [strategy](#) designed to hide the extent of the border crisis from the American people instead of solving it. On January 5, 2023, the DHS announced through a White House Fact Sheet that the administration was introducing new policies in anticipation of the expiration of Title 42’s public health authority and was fully reverting to Title 8 immigration law. The Trump Administration first applied Title 42 in March 2020 to stop the spread of COVID-19, allowing for the immediate expulsion of aliens at the border. Title 42 officially ended at 11:59 p.m. Eastern on May 11, 2023.



What follows is an analysis of several key aspects of the Biden Administration’s new border strategy and how the administration is not being transparent with the American people about the reality of the crisis.

Increasing the Use of Expedited Removal Does Not Mean Expeditiously Removing Illegal Aliens

Beginning on January 5, 2023, DHS announced that illegal aliens “who attempt to enter the United States without permission, do not have a legal basis to remain, and cannot be expelled pursuant to Title 42” will be subject to expedited removal and a five-year ban on re-entry.

The Biden Administration wants the American people to believe these are “new consequences” to “increase security at the border.” The reality, which DHS leadership fully understands, paints a different picture.

Reality #1:

Congress created expedited removal in section 235 of the INA in 1996 to allow for a streamlined removal process without an alien appearing before an immigration judge. The originating statute applied expedited removal to aliens apprehended anywhere in the U.S. within two years of their unlawful entry. The George W. Bush Administration defied the will of Congress and weakened the effect of expedited removal by limiting its application to aliens apprehended within 100 miles of the border who are detained within the first 14 days after unlawful entry. The Trump Administration restored expedited removal to the fullest extent authorized under the law, but the Biden Administration reverted to the reduced standard. Because of this limitation, any illegal alien who makes it more than 100 miles into the interior or who has been unlawfully present in the U.S. for at least 15 days before being apprehended by U.S. Immigration and Customs Enforcement is exempt from this “new consequence” and goes through a separate removal process before an immigration judge that will take years to resolve.

Reality #2:

Beyond the limited application of expedited removal under DHS Secretary Alejandro Mayorkas, a glaring loophole in the law can be exploited by illegal aliens and cartels to prevent quick deportation back to their home countries. Under section 235(b)(1)(A)(iii) of the INA, an illegal alien can effectively block expedited removal by simply indicating “an intention to apply for asylum” or “a fear of persecution.” Aliens who make these claims are referred to an asylum officer with U.S. Citizenship and Immigration Services for a “credible fear” screening—the initial step in the asylum process for illegal aliens



apprehended at the border. The credible fear standard is extremely low, meaning that more than 80% of illegal aliens pass it and are not expeditiously returned. Instead, they receive court dates more than five years into the future, and only 10%–15% qualify for asylum.

Diverting Illegal Aliens to the Ports of Entry

As previously explained, CBP includes subcomponents BP and OFO. Before the Biden Administration, data at the border was reported as *apprehensions* of illegal aliens by BP agents between the ports of entry and finding aliens *inadmissible* at the ports of entry by OFO officers. The Biden Administration has created the term “encounter” to replace both apprehensions and inadmissibles, thereby requiring additional layers of analysis to figure out where the attempted unlawful entry was recorded. For example, the rebranded “Southwest Land Border Encounters” data page captures the OFO and BP numbers but requires filtering to get the precise number attributable to BP apprehensions between ports of entry. Importantly, whether “encountered” by BP or by OFO, the alien is in violation of section 212(a)(6) of the INA, and some are also in violation of section 212(a)(7) of the INA and do not have a right to be admitted to the U.S.

Reality #3:

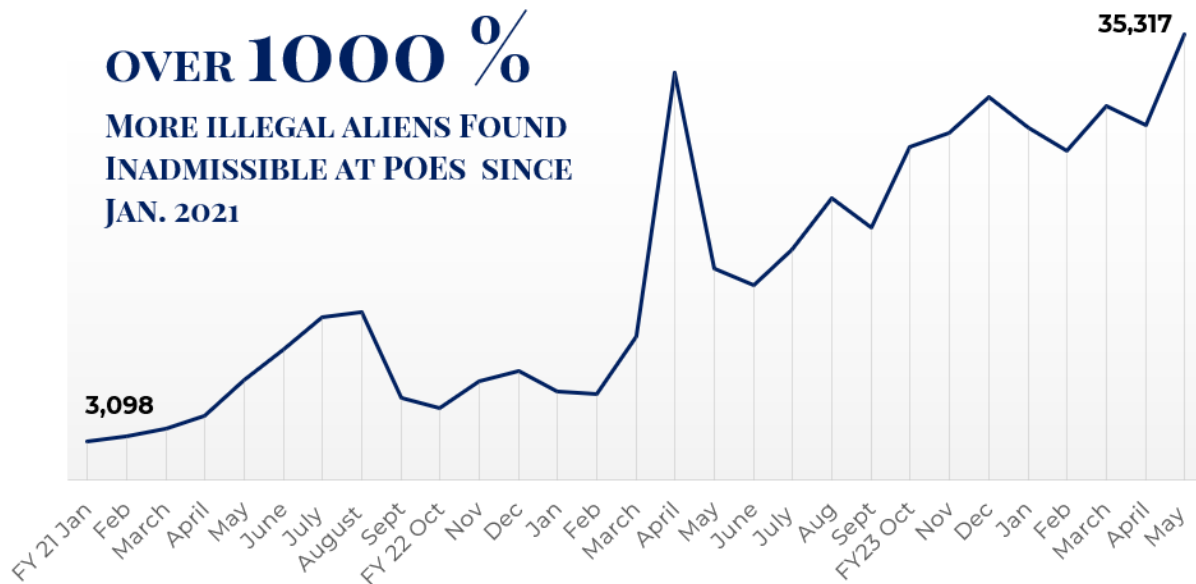
The Biden Administration’s new policy is to divert illegal aliens to the ports of entry because it does not consider an alien being found inadmissible by OFO to be an unlawful act. Consistent with this philosophy, which is inconsistent with the law, the administration is now publicly discussing only the number of “encounters” of illegal aliens by BP agents between the ports of entry. The January [Fact Sheet](#) previewed this strategy by announcing that the new policies are designed to “reduce the number of individuals crossing unlawfully *between* ports of entry.” (emphasis added) Notably absent is an effort to reduce the number of illegal aliens arriving *at* ports of entry. This omission is intentional because the Biden Administration wants illegal aliens to show up at ports of entry where they will not be viewed as violating the law—which they are.

This deception of the American people has gone into overdrive since Title 42 expired. In a June 6 [press release](#), DHS bragged that “unlawful entries *between* ports of entry along the Southwest border have decreased by more than 70 percent since May 11.” (emphasis added) Excluded are two crucial points: DHS ignores the illegal aliens *at* ports of entry and fails to contextualize that the baseline for the claimed decline is the record-setting 10,000 illegal aliens per day who were pouring over the border before Title 42 ended. DHS wants the American people to believe that an average of 3,400 illegal alien apprehensions per day by BP agents between May 12 and June 5 indicates successful border enforcement policies. The reality is that this pace converts to 102,000 illegal aliens apprehended by Border Patrol agents in a month—higher than total CBP



“encounters” in any single month during the Trump Administration—and excludes the “encounters” by OFO at the ports of entry.

The diversion of illegal aliens to the ports of entry is precisely why BP “encounters” are no longer an accurate metric for assessing the situation at the border. This shift to the ports of entry produces the same outcome—the mass release of illegal aliens into American communities—but it hides the optics of thousands of illegal aliens pouring over the southern border. To effectuate this plan, DHS repurposed the CBP One phone app to allow illegal aliens to schedule appointments to be systematically waived into the U.S. at a port of entry. According to the CBP [press release](#), when May’s border data was finally published on June 20, it showed 28,696 illegal aliens who showed up at a port of entry with a CBP One appointment and another 6,621 illegal aliens whom OFO encountered without an appointment. The 35,317 aliens OFO found inadmissible in May is the highest number for any month ever recorded at ports of entry, and there has been a more than [1000% increase](#) in illegal aliens found inadmissible at ports of entry since January 2021.



Unlawful Categorical Parole of Cubans, Haitians, Nicaraguans, and Venezuelans

Also, in the January new policy announcement, under the header “Expand Legal Pathways for Safe, Orderly, and Humane Migration,” DHS indicates that it began allowing up to 30,000 illegal aliens per month (or 360,000 per year) from Cuba, Haiti, Nicaragua, and Venezuela (CHNV) into the U.S. through immigration parole. As previously [discussed](#), the CHNV program is not a new “lawful pathway” but is instead an abuse of the DHS Secretary’s parole authority. Under section 212(d)(5) of the



Immigration and Nationality Act, the Secretary may parole an alien into the country only on a case-by-case basis for urgent humanitarian reasons or significant public benefit (8 USC 1182(d)(5)). A nationality-based program with pre-established eligibility criteria is an unlawful use of this narrow authority because it is not “case by case,” and the eligibility criteria fail to meet a rational definition of “urgent humanitarian reason” or “significant public benefit.”

Reality #4:

This categorical parole program is designed to reduce the number of illegal aliens apprehended along the southern border. As implemented, DHS allows these inadmissible aliens to fly into the U.S. after the parole has been granted, even though they lack a visa. Because they are arriving by air, these illegal aliens do not appear on the “Southwest Land Border Encounters” data page widely cited by the press when describing the border crisis. Finding them in DHS data takes multiple steps.

First, it is necessary to go to a separate data page, [“Nationwide Encounters,”](#) and second, to filter the “Citizenship” drop-down by selecting the four covered countries. Third, the “Title of Authority” drop-down must be filtered to select Title 8. These steps reveal that CBP “encountered” 65,499 illegal aliens from Cuba, Haiti, Nicaragua, and Venezuela in May. Fourth, filtering the “Choose Region” drop-down to select “Southwest Land Border” produces a value of 35,592. Fifth, filtering the “Choose Region” drop-down to select “Northern Land Border” produces a value of 212. Sixth, subtracting the “Southwest Land Border” and “Northern Land Border” numbers from the “Nationwide” total of 65,499 results in a final value of 29,695 illegal aliens from those countries found inadmissible at *interior* ports of entry, most likely international airports, who took advantage of CHNV categorical parole.

Considering the hoops DHS makes you go through to figure this out, it is unsurprising that the media fail to report on it and that the administration remains silent on the numbers.

Conclusion

The Biden Administration’s new border plan is a combination of misinformation and unlawful policies designed to hide the border crisis rather than solve it. The southern border monthly apprehensions are no longer a reliable metric for assessing the success—or failure—of policies because the Biden Administration is abusing the parole authority to continue allowing record numbers of illegal aliens into American communities under the guise of legality. Only those aliens who lack a visa or have no lawful right to enter the U.S. appear in the “encounters” data. The Biden Administration is deceiving the



American people by focusing only on the burden imposed on BP agents and pretending that an alien showing up at a port of entry is “legal.”



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