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ISSUE BRIEF | Center for Homeland Security & Immigration

# THE BIDEN ADMINISTRATION'S NEW PLAN FAILS TO SOLVE THE BORDER CRISIS

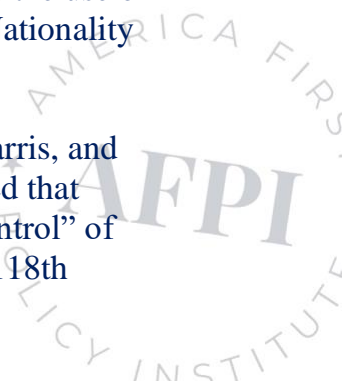
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## TOPLINE POINTS

- ★ The Biden Administration's expansion of Title 42 is a short-term response, and there is no border security plan once that public health authority ends.
- ★ The use of categorical parole is unlawful and only hides the optics of the border crisis rather than solving it.
- ★ The announced asylum reforms will take 18 months to finalize the regulations, which will do nothing to stop today's crisis at the border.

The Biden Administration's first two years in office corresponded with the two worst years at the southern border in our Nation's history. In Fiscal Years 2021 and 2022, over 5 million illegal aliens crossed the southern border unlawfully, including known "gotaways," over 25,000 pounds of fentanyl was seized at the border, and an untold number of illegal aliens and fentanyl successfully made it into American communities undetected by Customs and Border Protection (CBP) agents. The border crisis is not coincidental or unexpected but an inevitable crisis borne of the intentional decision by the Biden Administration to swiftly abandon every successful Trump Administration border policy, including Remain in Mexico, the Asylum Cooperative Agreements, and the use of expedited removal to the fullest extent authorized under the Immigration and Nationality Act (INA) (MPP) (ACA) (8 USC 1225).

Throughout the first two years, President Joe Biden, Vice President Kamala Harris, and Department of Homeland Security (DHS) Secretary Alejandro Mayorkas denied that there was a crisis at the border and even claimed that DHS had "operational control" of the southern border. (Mayorkas testimony) Then, just ahead of the start of the 118th



Congress, Secretary Mayorkas conceded that the number of illegal aliens DHS has been apprehending at the southern border was “straining our system.” (Washington Post Live) Then, on January 5, 2023, President Biden unveiled a new border security plan and visited the southern border for the first time in his political career before heading to Mexico City for the North American Leaders’ Summit. (Biden Remarks)

Unfortunately, the new plan fails to secure the border, offers no new deterrent strategies, abuses current law in an effort to hide the crisis from the American people, and could actually make the situation worse.

### **Expanding Title 42 is not a long-term border security strategy**

As part of the new plan, the Biden Administration announced that it would begin expelling aliens from Cuba, Haiti, and Nicaragua at the border under Title 42’s public health emergency authority. The administration has had the ability to apply Title 42 to these populations all along but made a policy choice during the first two years to exempt them. The Title 42 expansion is an acknowledgment that allowing aliens from these countries into American communities while they wait many years for a court hearing under Title 8 immigration authority incentivized more aliens of these nationalities to come to the border.

Expanding Title 42 is not a long-term border security strategy, and the Biden Administration is actively opposing the continuation of Title 42 before the U.S. Supreme Court. Title 42 is a temporary public health authority that the Trump Administration used on an emergency basis to stop the introduction of COVID-19 into the country at the onset of the pandemic. It was always intended to be short-term, not an immigration authority (even though it has an immigration effect through the turning away of aliens at the border). The Biden Administration’s temporary expansion of Title 42 is insincere and hypocritical, and the administration has not announced any new border security policies when this authority ends. In the interim, those aliens now subject to Title 42 will likely continue to try to cross the border unlawfully between ports of entry until they succeed. The U.S. Border Patrol agents are overwhelmed processing illegal aliens, that the chances of getting into the country undetected are high. The result will be a surge in the “gotaway” population.

### **Parole proposal is illegal but exposes the “asylum seeker” myth**

The Biden Administration’s plan to parole a combined 30,000 Cubans, Haitians, and Nicaraguans per month into the country is an abuse of the 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). A nationality-based program with pre-established eligibility criteria is an unlawful use of this narrow authority.

This abusive use of parole does not secure the border at all. It is designed to hide the optics of the border crisis by having visa-less aliens fly into the country instead of appearing at the border. Parole is temporary and provides no path to permanent immigration status, so the 120,000 aliens allowed in each year under this program will be unlawfully present in the country when a future administration ends the parole.

An overlooked implication of the parole programs is that the Biden Administration is conceding the “asylum seeker” myth. The illegal aliens apprehended at the border who claim “credible fear” to be let into the country are placed into removal proceedings before an immigration judge where they can raise an asylum claim as a defense against their deportation. By contrast, as a parolee, the alien has no obligation to file an asylum claim once in the U.S. and is immediately eligible to obtain a work permit. While fleeing poverty, gang violence, or domestic violence are not grounds for asylum, they are similarly not legitimate grounds for parole, even if examined on a case-by-case basis.

### **“Expansion” of Expedited Removal is deceptive**

The Biden Administration’s claim that it has “expanded” the use of expedited removal is deceptive. Under section 235(b)(1)(A)(iii) of the INA, Congress provided a streamlined process to remove aliens who are apprehended anywhere in the country within two years of their unlawful entry. The Trump Administration utilized this authority to the fullest extent possible, but the Biden Administration reduced the application of expedited removal to just those aliens apprehended within 100 miles of the border who are detained within the first 14 days after the unlawful entry. (Rescission Notice)

The Biden Administration’s claim of applying enhanced penalties to aliens who attempt to re-enter the country unlawfully after being removed is disingenuous. The announced five-year bar to re-enter the U.S. for these aliens is already established in current law, found in section 212(a)(9)(A)(i) of the INA. Instead of imposing new, enhanced penalties to deter illegal immigration, this announcement seems to indicate that for the last two years, the Biden Administration has failed to apply the law as intended by Congress.

### **Asylum Regulation will stop future border crises but will take too long to implement to secure the border now**

The Biden Administration announced that DHS and the Department of Justice would soon publish a notice of proposed rulemaking (NPRM) that will establish a “rebuttable presumption of asylum ineligibility” if the alien failed to seek asylum protections in other countries he or she traveled through to get to the U.S. The NPRM has yet to publish in



the *Federal Register*, but it is similar to the Trump Administration’s “third country transit” or “asylum shopping ban” regulation. The Biden Administration could already have had this authority in place, but it refused to defend the Trump Administration regulation in court, allowing a judge to nullify it. As a result, the Biden Administration has to start at the beginning of the rulemaking process, which will easily take 18 months to finalize and go into effect. While the transit bar will effectively deter illegal immigration and asylum abuse once implemented, this rulemaking is not a solution to the current border crisis. Our country needs immediate changes in policies, not fixes that will happen years down the road.

## Conclusion

The Biden Administration’s new border plan is a combination of more of the same failed policies from the past two years paired with unlawful actions that are intended to hide the border crisis rather than solve it. As laid out, the Biden Administration is continuing to use Title 42 for border and immigration purposes instead of for public health reasons. This is an inappropriate use of Title 42 and underscores that the administration has no new solutions to secure the border. While DHS claims that categorical parole is a “safe, humane, and lawful” pathway, it is actually an abuse of that authority and will create a border surge of aliens from other nationalities hoping to benefit from their own parole program. And after refusing to enforce the law for two years, the Biden Administration’s latest plan is to finally start applying the law and deceive the American people into believing that new, enhanced penalties have been introduced.

The border crisis is the intentional outcome of a strategy that was designed to fail. Requesting more resources in the form of additional Border Patrol agents, asylum officers, and immigration judges does nothing to solve this crisis—it simply allows the administration to process more illegal aliens into the country. The American people want a secure border, human trafficking stopped, and the cartels to be defeated. There are enough current laws and proven policies from the Trump Administration and previous administrations to accomplish these goals. It is past time for Congress to hold the Biden Administration accountable and compel them to offer new policy solutions and no more excuses.



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8 United States Code 1225(b)(1)(A)(iii)

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