

FACT SHEET

An Analysis of the Senate Border Bill

The Emergency National Security Supplemental Appropriations Act (H. R. 815)

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Summary

If passed in its current form, the Emergency National Security Supplemental Appropriations Act would be the most sweeping immigration bill of the twenty-first century. It would overhaul the process for seeking asylum in the United States—and impose an “emergency authority” that would leave asylum fully out of reach for those crossing between ports of entry for much of the next three years. It would attempt to address issues like work permits and years-long waits for asylum seekers, and also raise the initial standard a person must pass in order to access our asylum system. It would expand additional visas and future green card availability and offer a pathway to citizenship to Afghans, while also significantly increasing detention capacity. It is a mixed bag.

Overall, the bill represents a serious attempt to acknowledge, and solve, some of the key problems with current border and asylum policy, and to address the federal government’s failure to manage migration in a way that supports American communities and respects humanitarian needs. In particular, it aims to reduce the frequency with which people wait years for a final outcome on their asylum case. However, its positive steps in this direction are smothered by a new “emergency authority” that repeats mistakes made by the Trump and Biden administrations: making protection much less available for those in need, while failing to send a clear message to future arrivals.

The Problem

The U.S. system of border management and humanitarian protection has been allowed to languish and decay for decades. Instead of investing in durable, efficient and responsive infrastructure that would allow the country to handle changes in how many people seek protection in the U.S., where they come from, and what their demographics are, successive administrations have relied on temporary crackdowns that have resulted in only short-term reductions in the number of people encountered by agents at the U.S./Mexico border.

We are currently in the midst of a global refugee crisis. In the Western Hemisphere, over 7.5 million Venezuelans have been displaced since 2014—with 6 million of them living in countries in Latin America and the Caribbean, rather than coming to the U.S. Continued humanitarian crises in Cuba and Haiti, natural disasters in Central America and the Caribbean, and threats to security and democracy in countries from Guatemala to Nicaragua to Ecuador have put millions of people at physical risk in their countries or left them facing an unstable future in an unstable country. Compounding this issue, a smuggling infrastructure has grown dramatically in the last decade, feeding demand for migration by word of mouth and social media and making it easier than ever for vulnerable and threatened people in countries around the world to come to the Western Hemisphere and travel northward to the U.S.

The number of people who are apprehended by Border Patrol agents on the U.S./Mexico border—most of whom turn themselves in—has hit levels never seen before. Existing infrastructure, laws, and policies are not sufficient to process people, assess any claims for protection efficiently and fairly, or allow them to support themselves in the United States while waiting for a decision on their cases. Instead, communities along the border and in the interior of the U.S. have been forced to accommodate large numbers of new arrivals, without coordination from the federal government—and, in some cases, with governors such as Greg Abbott and Ron DeSantis deliberately undermining efforts at coordination and support.

What This Bill Would Do

A “Border Emergency Authority” Adding a New, Restrictive, and Opaque Process until Border Crossings Reach Very Low Levels

The “trigger” authority—called the “Border Emergency Authority”—would enable the administration to summarily deport migrants who enter between ports of entry without permitting them to apply for asylum.

The new emergency authority could be activated if border “encounters” reach a daily average of 4,000 over a period of seven days and would become mandatory if border encounters reach over 5,000 over a period of seven days or 8,500 over a single calendar day. However, there are several other rules governing the use of the emergency authority, rendering it much less straightforward than the simple mathematics of crossings (for example, the so-called “discretionary” authority at the 4, level would in fact be mandatory for the first 90 days at that level after passage). In addition, the bill defines “encounters” to exclude apprehensions of unaccompanied migrant children.

The bill gives the federal government significant discretion over exactly when to implement this new emergency summary-deportation process and does not require it to be publicly announced. The upshot is this: on any given day, a would-be asylum seeker would have no idea whether they would be allowed to seek asylum in the U.S. The government would be allowed to opt people out of summary removal for a variety of reasons, including operational constraints such as overcrowding. Non-Me unaccompanied children would also be exempted. Those set for summary removal could receive a screening for non-asylum humanitarian protection by affirmative “manifesting” fear of persecution or torture to a border official—volunteering without prompting that they fear return or showing an obvious sign of fear.

People summarily deported under this authority could be sent to their home countries, or if the Mexican government is willing to accept them, sent to Mexico instead. A second deportation under emergency authority would trigger a one-year bar from obtaining a visa.

Crucially, the emergency authority does not “close” or “shut down” the border. It does not prevent unauthorized migration entirely: legislation cannot physically prevent people from crossing between ports of entry at all (it can only assess consequences for what happens after). Furthermore, the bill requires the government to allow people to seek asylum at ports of entry even during a border emergency and requires the government to maintain capacity for 1,400 daily entries in this manner—ensuring that asylum will not be wholly unavailable.

By creating two different sets of border policy depending on whether the emergency authority was in effect or not—without declaring whether it was in effect at any time—the bill would increase confusion at the U.S./Mexico border. Border Patrol agents, U.S. Citizenship and Immigration Services (USCIS) asylum officers and migrants themselves would be left uncertain on a day-to-day basis about which set of rules was in effect. Confusion about border policies is easily exploited by human smugglers who encourage people to come to the U.S. quickly if there are threats that the border is about to be “shut down.”

A Quicker, More Restrictive Non-Custodial Asylum Process for Border Entrants

The bill includes several provisions that would overhaul asylum in the U.S. independently of the “trigger” —in other words, changes that will happen regardless of how many people are trying to come to the United States.

The bill raises the standard for being able to claim asylum as decided at the initial screening interview stage when an asylum officer determines whether an individual progresses to making an asylum claim. Instead of being required to establish a “significant possibility” that their asylum claim would prevail, asylum seekers would now need to establish a “reasonable possibility,” which is a higher bar to meet. This standard is already used for other forms of humanitarian relief, in what’s known as a “reasonable possibility” interview.” In 2023, 65 percent of people passed their “credible fear interviews” for asylum, while 44 percent passed “reasonable fear interviews” subject to the “reasonable possibility” standard.

The bill would add a new bar to asylum if there are “reasonable grounds for concluding” that a person could avoid persecution by moving to another location in the country of nationality, or if they have no nationality, by moving to another location in their country of “last habitual residence.” While a version of this bar is currently in place under federal regulation and case law, this would enshrine a single version of it in statute.

The bill requires asylum officers to consider certain potential bars to asylum at the screening interview stage, giving the asylum seeker less time to prepare evidence to counter them. Currently, these bars are assessed as part of the asylum claim itself. However, the bill does not require the asylum officer to conclude that the person is ineligible for asylum as a result at this stage.

The bill creates a new process into which people can be placed who come to the U.S./Mexico border without papers, as an alternative to expedited removal. This “protection determination” process is designed to take six months, during which time the asylum seeker would be allowed to live in the community in the U.S., while monitored under government Alternatives to Detention programs. Under this process, the government would have 90 days to conduct a fear screening, at which an officer can deny or grant asylum or other protections on the spot—or can pass people through to a full “merits interview.” Those granted protection, referred to as a “protection determination,” or who couldn’t be interviewed within 90 days, would become eligible for work permits.

All steps in the “protection determination” process would be conducted by asylum officers, with no role for immigration courts and very little judicial review of final decisions. At the same time, it would be almost entirely non-adversarial. The bill ultimately requires virtually all asylum seekers encountered at the border to be placed in either expedited removal or in this process.

Changes to Detention and Alternatives to Detention

The bill requires Immigration and Customs Enforcement (ICE) to ensure consistent policies for alternatives to detention across all sectors. They would need to put those policies into place within 90 days and make them public.

However, it also provides funds for ICE to keep at least 50,000 detention beds available—an increase of 47 percent from the 34,000 beds allocated in 2023, 2022, and 2021.

A Path to Citizenship for Afghan Evacuees and Allies

The bill includes language similar to the Afghan Adjustment Act introduced during the last two sessions of Congress. It would establish a streamlined but rigorous path to citizenship for Afghan evacuees who have not obtained asylum to have their legal status adjusted to Conditional Permanent Resident Status (CPRS). CPRS status would be retroactively granted when applicants were initially paroled into the U.S.—giving beneficiaries a shorter wait to become eligible for citizenship.

Additionally, the bill would mandate the Department of State to designate an office in lieu of an embassy to provide consular services for Afghan applicants still residing in Afghanistan, recognizing that many Afghans who are eligible for certain protection programs cannot travel to a third country to receive consular services as is currently required. The bill would also establish an “Afghan-Ally” referral program to expand eligibility and streamline applications of at-risk Afghan allies to the U.S. Refugee Admissions Program.

The bill would authorize some additional Special Immigrant Visas for certain family members of Afghans who served in the armed forces or are veterans who supported a U.S. mission. However, it would authorize 2,500 per year—and no more than 10,000 in total—which is far fewer than previous versions of the Afghan Adjustment Act attempted to provide for.

The First Increases to Legal Immigration Since 1990

Notably, for the first time since 1990, the bill would allocate additional immigrant visas—green cards—to expand legal immigration to the U.S. The increases would amount to a 13 percent increase for employment-based visas and a 7 percent increase for family-based visas for the next five years.

The bill would also ensure that spouses and children of highly skilled workers, as well as people who come to the U.S. on fiancé visas, are eligible to work legally in the U.S. And it would fix immigration law so that children who are waiting for green cards along with their parents would not lose their path to citizenship when they turn 21, providing a solution for “documented Dreamers.”

Congressional Funding for Asylum Officers and Lawyers for Kids

Appropriations in the bill include funding to USCIS to hire up to 4,300 new asylum officers to take on the additional workload of the bill's new asylum processes. When the new system would go into effect upon enactment—at least, unless superseded by the emergency authority—hiring of those asylum officers would likely take years, the risk that short-staffing will continue to slow down processing of asylum seekers and other immigrants and would-be immigrants. Furthermore, the bill prevents USCIS from funding its asylum operations through the application fees that it uses to fund most of its work—taking the burden off immigrants to fund humanitarian processing but instead relying on future Congresses to pick up the slack.

Additionally, the bill includes funds for a program that would guarantee access to counsel for children who arrive in the U.S. without parents and are 13 or younger, an innovation which could open the door in the future to universal representation for all immigrants at risk of deportation.

What This Bill Would Not Do

Just as important as what the bill does require is what it leaves out. Most importantly—with the very welcome exception of Afghan evacuees—it does not resolve the status of millions of immigrants in the U.S. without legal status or with only discretionary, temporary protections. While the bill preserves the president's authority to grant humanitarian parole as needed to preserve U.S. and humanitarian interests, it does not offer any permanent path forward for those parolees.

The bill also expects the US to deter future migration without any significant attention to the root causes of migration, ignoring the issues that have led people in the Western Hemisphere to ever-higher levels of displacement. It also does nothing to support people who are waiting in Mexico for their chance at a CBP One appointment—to “the right way” for asylum—or who have been deported there from the U.S. The conditions facing migrants in northern Mexico continue to pose humanitarian and security dangers.

Finally, the bill does not do enough to support American communities who are trying to support and welcome new arrivals. It offers some grants through the Supplemental Shelter Program, but the total amount available under the bill could be under \$1 billion. And it does nothing to improve information-sharing and coordination between border and interior communities. As a result, asylum seekers who are released into the U.S. under this bill could be as unsupported as those arriving now.

What We Really Need at the Border

The changes proposed to border and asylum policy in this bill can be over-simplified into two principles:

- Making it harder for people to be allowed to start the asylum process upon entering the U.S.; and
- Making that process itself faster.

Notably, this bill would not stop anyone from being allowed to set foot on U.S. soil. It would not, therefore, do anything to bring down “the numbers” on its own. The proponents hope instead that it will reduce the number of people who are allowed to stay in the U.S. outside of immigration custody, and therefore, through word of mouth, reduce the number of people trying to come to begin with.

What we have seen, time and time again, is that adding additional penalties or complications to the process for asylum seekers once they arrive in the U.S. immiserates those asylum seekers without having a lasting impact on overall border arrivals. This is especially true when the process is made longer and less certain, contributing to bottlenecks throughout the system including dangerous border overcrowding.

What is instead needed is a way to resolve these cases quickly and certainly—taking months, not years—without railroading claimants. This bill takes steps in that direction but overwhelms them with the imposition of an opaque emergency authority, which would undermine any deterrent effect by providing inconsistent outcomes to people attempting to enter the U.S. without warning or rationale.

Efficiency also can't go so far as to fully sacrifice any meaningful, independent review of decisions. Making a process quicker does not require cutting corners on due process.

The U.S. can't solve a global displacement crisis just by deporting people to other parts of the world. Cooperation with other countries on migration management to people in their home countries and in countries they settle in is not a nice-to-have or a long-term goal, it is an essential part of any plan—especially one that expects and other countries to shoulder the responsibility for taking deportees from other countries.

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