Analysis of the Immigration and Asylum Policy Changes in S. 4361, the Border Act of 2024

Summary:

This legislation is a carbon-copy of its predecessor but is no longer bipartisan and is no longer in order to advance any foreign policy or other goals**.** More than three months have passed since HR. 815, the Lankford-Murphy-Sinema Border Bill, was hastily drafted and introduced, and in the interim, this legislation has lost its bipartisan support but has not incorporated policies that would improve the functioning of the immigration system– for example, expanding port processing and investing in USCIS and immigration courts to expedite case processing. At its core, this bill remains a monumental and devastating rewrite of the asylum system that will leave many people without a chance to request protection and will take away the critical protection of court review, while re-investing in a border wall, massive immigration detention and surveillance, and other disastrous and failed deterrence measures.

Key Takeaways:

- This bill would double-down, and in some ways codify, Trump-era policies including a border shutdown, border wall, nearly impossible asylum standard, and expansive immigration detention—-all on the theory of deterrence, which is a proven failure. This is **not** legislation that invests in solutions to improve border management, like expanded port processing or a meaningful Shelter and Services Program (SSP). Rather, a vote for this bill–no longer bipartisan–is a vote for extreme Trump-era policies that will push the conversation on immigration far to the right for years to come and only reduce the negotiation space for real, meaningful immigration reform.
- This bill creates an operationally complex and counterproductive expulsion requirement that will eliminate asylum protections for many deserving people, in violation of international law and contravention of decades of US law. This trigger-based system–*including the first such cap for asylum in the world* – will drive many desperate people to seek entry between ports of authority - *increasing* unauthorized entries at the southern border, just like Title 42 did.
- Regardless of whether or when the "emergency border authority" is in effect, this legislation eviscerates our asylum system by creating a gauntlet of new, punishing obstacles for people arriving in search of safety. This includes new mandatory bars and a rushed, unfair and harsher screening process for people who are arriving traumatized, with no legal assistance, and limited to no understanding of the existing or novel asylum process. The result will be that many people with strong claims for protection will be deported back to danger—including violence and death—in violation of our obligations under international human rights law.

- This bill undercuts a critical rule of law protection by eliminating judicial review for asylum cases while also dramatically expediting the processing of people seeking protection. This will result in more erroneous, unfair determinations in a system where the stakes are incredibly high—life and death.
- This legislation is a boon to the private prison industry, as it massively increases spending on immigration detention and surveillance (even after the 2024 DHS appropriations) to nearly **three times** the number of people detained when President Biden took office. Expansive, suspicionless surveillance of immigrant and mixed status families is also a dangerous precedent to legislate.

Bill Analysis

1. The "Border Emergency Authority"

Taken from the earlier Emergency National Security Supplemental Funding Bill (H.R. 815), this bill would mandate an expulsion system when there is an average of 5,000 people arriving at the southern border per day over a seven-day period, including at ports of entry, or if there are 8,500 arrivals on a single day. The Department of Homeland Security would also have discretion to invoke this expulsion power at an average of 4,000 arrivals over a seven-day period. When the expulsion regime is in effect, asylum is ***not an available protection*** for people who arrive between ports of entry, in violation of the Refugee Convention. They will instead be barred from asylum and will have to meet the "manifestation of fear" test (also known as the "shout test"); the very few individuals who are identified through the "shout test" and are screened for protection can only get the much more limited protections of withholding of removal and under the Convention against Torture.

The "shout test", developed for use by the Coast Guard for interceptions at sea and previously used under Title 42, requires a person seeking safety to affirmatively raise their fear of return to get any type of screening for protection. Previous experience has demonstrated that this test makes it extremely difficult for people with strong protection claims who would otherwise qualify for asylum to even be *screened* for a claim. But when the shutdown is in effect, many individuals will feel they have no choice but to cross in between ports given the extremely few port appointments that exist. As a May 2024 Human Rights First report shows, over the last year under the current Asylum Ban, people seeking safety have been waiting for months for a port appointment, subject to severe violence including rape and kidnapping. When the border is shut down, as the Title 42 experience showed, people desperate for protection for themselves and their families will not wait in limbo, in extreme danger, for the unpredictable date when the border may reopen; they are more likely to attempt to cross between ports and find what safety they can.

2. The Harsher, Unfair Screening Process for Arriving Asylum Seekers

In addition to closing the door to asylum for the majority of people when the expulsion rule is in effect, this bill dramatically changes the asylum screening test applied in expedited removal proceedings to a "reasonable possibility" standard. In practice, this new and more demanding "reasonable possibility" standard will mean that far fewer people will have the chance to *even apply* for asylum–including

individuals who would actually qualify for asylum. The bill, adding to recent guidance and proposed regulations from the administration, also creates a new statutory bar to asylum for people for whom the government claims there are "reasonable grounds" to believe could relocate to other parts of their home countries–despite evidence that people are often unable to safely do so and through no fault of their own. The Biden Administration has already tried subjecting some people to a higher screening standard through the Circumvention of Lawful Pathways Rule, which has resulted in a drop in the number of people passing their screening interviews but has not disincentivized people from attempting to find protection in the United States. And as described below, a more rushed and punishing timeline for asylum cases will only increase the errors in these decisions–with deadly consequences for some.

3. Elimination of Judicial Review and Significant Harmful Changes to the Asylum Process

A massive departure from current immigration law, this bill would permit DHS to place asylum seekers who arrive at the border into a new process that completely cuts off any review of asylum denials from a judge or court. Under the new rushed asylum process ("protection determination"), the entire asylum process is conducted by asylum officers and allows only a rushed agency appeal: the review must be requested within **just 5 days** for a merits decision and then a final appeal within 7 days of that reconsideration decision. Individuals who lose at the initial screening have 5 days to seek a reconsideration.

These short timeframes make it nearly impossible to actually give a complex issue implicating life or death due consideration, and are particularly punishing in the absence of legal assistance, time to prepare evidence, and time to rest for people arriving after an often traumatic and dangerous journey. And critically, this fast-tracked and error-prone process does **not permit any court review** of the denial of protection claims. Judicial review is an essential due process protection, ensuring that vulnerable people making protection claims often with no legal assistance and in a complex legal framework, and after often very cursory asylum hearings, have some independent review of their case. Courts have repeatedly and routinely found that USCIS officers wrongly denied people protection, so removing court review will send people with strong claims back to the dangers they fled. This bill also explicitly *removes* due process protections for access to counsel, virtually guaranteeing that the vast majority of asylum seekers will have to proceed without legal support.

4. Expanded Detention and Surveillance

This supplemental package also includes an additional $1.67 billion for immigrant detention and an additional $210 million for U.S. Marshals detention costs. Together with the more than $1.2 billion in detention funding already allocated for the FY2024 appropriations in March, this will go to an estimated 50,000 total detention beds – nearly three times the number of people detained when Biden took office. Congress has passed annual detention funding at a higher level only twice in history, for fiscal years 2019 and 2020, at the height of the Trump administration. Adding to this is a historic high–more than President Trump's detention budget at any point during that administration– and expanding detention at this scale will lead to more abuses in custody–including sexual assault, solitary

confinement, and medical neglect, as the government's own experts have documented. This expansion is particularly nonsensical at a time when ICE is detaining an unprecedented 39,000 people. Notably, $188 million of the federal funding available for the Shelter and Services Program is conditioned on DHS certifying that ICE has the ability to detain 46,500 people in addition to other concerning metrics.

This bill massively expands suspicionless surveillance through mandatory monitoring of those going through the asylum process. The bill authorizes an additional $1.29 billion dollars –three times the current budget–for these programs, which include intensive and continuous GPS surveillance tools like ankle-monitors and other applications that already subject individuals and families to 24-hour surveillance without individualized assessment. Normalizing and expanding these tools is dangerous and completely unnecessary. Studies show that notifying individuals of upcoming court appearances through various means, including phone calls, recorded messages, mail, text messages, and emails is highly effective at ensuring people appear in legal proceedings. The main beneficiary of this expansion will be for-profit prison companies that provide both detention beds and monitoring technology.

5. President Trump's Border Wall

Section 205 of the bill requires the remaining funds allocated by President Trump for a border wall to be used for the same purpose–the construction of a southern border wall. President Trump's border wall was previously held illegal by federal courts and catastrophically harmed natural resources and communities in the U.S.-Mexico border region. The wall proved to be an expensive but ineffective tool for border management but caused significant harm to the border region, destroying ecosystems and cutting through a federal wildlife preserve and Tribal lands.

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