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Bill Summary of the Bipartisan Border Solutions Act

December 2, 2022

Introduced in the 117th Congress in April 2021, the Bipartisan Border Solutions Act of 2021 (the “bill”), co-sponsored by Senators John Cornyn (R-TX), Krysten Sinema (D-AZ), Margaret Hassan (D-NH), and Thomas Tillis (R-NC) aimed to address migration flows at the Southern border. The following summarizes each section of the bill and contextualizes it within our existing immigration system.

Section 2: Creates Two New Terms

This section includes definitions of terms used throughout the bill. Notably, it creates and defines two new terms: “irregular migration influx event” and “legally determinative aspect of the asylum process.”

- **“Irregular migration influx event”** is defined as “a period during which there is a significant increase in, or a sustained large number of, Department of Homeland Security encounters with aliens who— (A) do not use the formal immigration system of the United States or the countries they are traveling through; and (B) intend to enter the United States.” The definition does not include any baseline level of migration nor does it define “large” or “sustained.” As a result, this definition potentially could be applied to any migration level at the border.
- **“Legally determinative aspect of the asylum process”** is defined as “any stage of the asylum process in which the alien is present and evidence of an alien’s credible fear of persecution or eligibility for asylum is gathered or considered, or a determination of an alien’s credible fear of persecution or eligibility for asylum is made.” The bill specifically states that credibility determinations, asylum interviews and credible fear interviews (CFI), immigration judge review of CFIs, and removal proceedings are legally determinative aspects of the asylum process. It is worth noting that Reasonable Fear Interview (RFI) is not explicitly listed in this definition, and that, currently, credibility determinations are made by adjudicators during certain stages of the asylum process. For example, asylum officers will make a credibility determination during a credible fear interview or immigration judges will make a credibility determination during removal proceedings. It is not clear what effect - if any - defining credibility determinations as a “legally determinative aspect of the asylum process” would have given that it is not a separate and distinct stage of the process.

Section 3: Creates Regional Processing Centers at the Southern Border

Creates at least four Regional Processing Centers (RPCs) located in “high traffic sectors” along the southern land border. The Department of Homeland Security (DHS) Secretary is charged with defining “high traffic.” Under this bill, RPCs would be short-term detention facilities that would hold individuals for no more than 72 hours and would coordinate processing migrants. RPCs can also be used to respond to a “major disaster or emergency” under certain circumstances.

- **RPC Responsibilities:** RPCs would carry out criminal history checks, identity verification, biometrics collection and analysis, medical screenings, asylum interviews, and CFIs. They will facilitate coordination and communication between agencies and with nonprofits, as well as provide legal orientation programming and issuance of legal documents. The DHS Secretary can add additional RPC responsibilities, and RPCs can be used to respond to major disasters or emergencies. DHS may accept donations for the support of migrants in RPCs.

- **RPC Staffing:** RPCs will be staffed with personnel from Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), the Federal Emergency Management Agency (FEMA), U.S. Citizenship and Immigration Services (USCIS), and the Office of Refugee Resettlement (ORR), as well as medical staff, social workers, mental health professionals, and child advocates. The CBP Commissioner manages the operation of the RPCs, in consultation with an “interagency coordinating committee” composed of the agencies staffing the RPCs.
- **NGO Access:** The bill mandates that private entities and nongovernmental (NGO) organizations that are “directly involved” in providing humanitarian or legal assistance to the migrants in RPCs have access for the purposes of legal orientation programming (LOPs); coordinating care of families and individuals; attorney communication; and humanitarian assistance. The bill does not define what it means for organizations to be “directly involved.”
- **Access to Counsel:** The bill mandates that migrants detained in an RPC have access to legal counsel “in accordance with section 292” of the INA, including “the opportunity to consult with counsel *before* any legally determinative aspect of the asylum process occurs” (emphasis added). Currently, INA § 292 is specific to “removal proceedings before an *immigration judge*,” as well as any appeals (emphasis added) and does not reference other aspects of the asylum process, for examples, CFIs.
- **Access to LOP:** The bill states that migrants “shall be provided the opportunity to receive a complete legal orientation,” and directs the DHS Secretary to “prioritize” holding LOP within 12 hours of apprehension. It also requires that LOPs be received not later than 24 hours after apprehension, and not less than 24 hours before initial appearance before an asylum officer or immigration judge for an asylum claim. Currently, within 12 hours of apprehension, most migrants are still in Border Patrol custody. The bill does not specify how access to LOP will be guaranteed within such a short turnaround time.

Section 4: Directions the Creation of Credible Fear Determination and Asylum Process Improvement Pilot Programs

Creates pilot programs to develop strategies to improve and expedite the credible fear and asylum processes at the southwest border, aiming for improved access to legal counsel and improved case management of migrants. Unaccompanied children (UCs), pregnant individuals, or individuals with a disability or acute medical condition cannot participate in these programs. Among other provisions, this section:

- Requires live LOP before any “legally determinative aspect” of the asylum process occurs.
- Suggests, but does not require, creating case management programs, which could include the provision of information around legal rights and facilitating the attendance of migrants at their immigration court hearings.
- States that access to counsel shall comply with INA §292, which guarantees access to counsel at no expense to the Government in removal proceedings before IJs and subsequent appeals. This section of the bill also states that those enrolled in a pilot program must be allowed to consult with “1 or more individuals of their choosing... prior to a credible fear interview.” This mandate is not specific to attorneys or legal representatives.
- Contains provisions related to language access, communicating with counsel, and program reporting and evaluation.

Section 5: Directs the Attorney General to Prioritize the Docketing and Processing of Migrants that are Part of an “Irregular Migration Influx Event”

Directs the Attorney General (AG) to prioritize migrants apprehended during an irregular migration influx event when docketing cases in immigration courts. The AG and the DHS Secretary are tasked with

defining the parameters of when the event begins and ends, which the bill does not set. This section also requires the AG to provide “a fair and reasonable opportunity” for migrants to obtain counsel.

Section 6: Office for Civil Rights and Civil Liberties Impact Assessment

Requires the Officer for Civil Rights and Civil Liberties (OCRCL) of DHS to 1) assess the asylum and credible fear processing occurring at both the RPCs and other DHS facilities where a “legally determinative” aspect of the asylum process occurs within 90 days, and 2) submit these findings to the DHS Secretary and Congress.

Section 7: Expanding to Expand the Legal Orientation Program

Directs the DHS Secretary to submit a plan to Congress on expanding LOP in each RPC and wherever a legally determinative aspect of the asylum process occurs, including requiring consultation with NGOs and the Director of the Executive Office for Immigration Review (EOIR). It includes a list of elements the LOP should include and language access requirements. Under the current system, given that DHS is the prosecuting agency, EOIR manages LOP through a contract to provide program services and DHS only ensures access to LOP in detention facilities.

Section 8: Modifications to CBP Standards to Conform with LOP Requirements

Requires CBP to develop procedures for the transport, escort, detention, and search standards to comply with LOP requirements elsewhere in the bill.

Section 9: Standard Operating Procedures

Directs the CBP Commissioner to create standard operating procedures for the “detection, interdiction, inspection, processing, or transferring of alien children.” This would apply to all migrant children as it does not specify that it applies only to unaccompanied children. It also directs the DHS Secretary to review and update regulations around preventing, detecting, and responding to sexual abuse and assault in immigration detention facilities, and to review such regulations at least every 4 years.

Section 10: Criminal Background Checks for Sponsors of Unaccompanied Alien Children

Amends the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 to:

- Require a criminal history background check on the individual and each adult member of the individual’s household prior to the Department of Health and Human Services (HHS) placing a UC with an individual.
- Allow HHS to collect biometrics samples and authorize the use of DNA analysis. However, the text prohibits HHS disclosure of fingerprints and DNA samples to DHS for immigration enforcement.
- Prevents the placement of UCs with individuals convicted of a sex offense, crime involving severe forms of trafficking, crime of domestic violence, crime of child abuse and neglect, murder, manslaughter, or an attempt to commit murder or manslaughter, or pornography.
- Requires well-being follow up calls after 30 days and then every 60 days until a final decision in the removal proceedings is made.

Section 11: Adds Specific Criminal Penalties For Fraud Relating to the Transfer of Custody of UCs

Makes it unlawful to obtain custody of a UC through making materially false, fictitious, or fraudulent statement or representation, including in writing. Violators face fines and imprisonment for not less than one year. If the primary purpose of the violation was to subject the child to exploitation, including sexually explicit activity, the imprisonment is not less than 15 years.

Section 12: Inspection of Facilities Housing Unaccompanied Children and Reporting Costs

Amends the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 to require inspection of HHS facilities and DHS facilities to ensure the safety of UC, to ensure that UC and family units have access to information relevant to their cases, and to ensure that legal representatives can communicate with UC and family unit clients. It also requires HHS and DHS to report to Congress the costs of operating HHS and DHS facilities that house UC.

Section 13: Mandates Hiring of Additional Staff in Certain Departments

Requires hiring additional staff, including:

- At least 600 new CBP Office of Field Operation Officers (OFO) and at least 250 Border Patrol processing coordinators, as well as additional support staff without a designated minimum. If CBP does not hire the 600 additional OFOs by the end of the fiscal year of the enactment of this bill, the GAO must conduct a review of and report on CBP hiring practices
- At least 300 ICE Enforcement and Removal Operations (ERO) support personal and no fewer than 128 Office of the Principal Legal Advisor (OPLA) attorneys.
- At least 41 support staff within OPLA “to assist immigration judges within the EOIR with removal, asylum, and custody determination proceedings.” It is unclear what the bill means by adding OPLA support staff to assist EOIR, since OPLA is a party to the proceedings and EOIR is the adjudicator. Support staff for EOIR would generally be hired by EOIR and support staff for OPLA activities would generally be hired by OPLA to ensure accountability and avoid conflicts of interest.
- No fewer than 150 new EOIR immigration judge teams, including staff attorneys and all applicable staff support.
- At least 300 USCIS asylum officers.

The bill also directs CBP on how to forecast migrant flows and requires GAO to report on ICE staffing needs related to irregular migration influx events (specifically noting fiscal years 2014, 2019, and 2021).

Section 14: Reports to Congress

Requires several reports to Congress, including:

- HHS report on the care of UC children, including summary on contracts, costs, number released to sponsors, and if more than one UC was released to the same sponsor.
- DHS report on UC returns to country of nationality.
- DHS & EOIR reports on UCs in immigration proceedings, including the number of removals effectuated and the number of UCs who fail to appear for removal proceedings.
- Department of State (DOS) report on binational efforts to combat irregular migration with a focus on migrant children.
- DHS report on data that could indicate trafficking of migrant children and recommendations on legislative fixes.

Section 15: Improving the Ability to Transport Migrants

Requires DHS to update transportation policies related to the ground transportation of migrants at the southwest border. It includes a provision of authority to transport migrants to facilities operated by State, local or Tribal governments, or relevant NGOs, as well as developing a system to notify State, local, or Tribal governments and relevant NGOs when migrants are being transferred to their area as least four hours in advance. The new DHS authority to transport directly to facilities run by State, local, or Tribal governments, or relevant NGOs, would be explicitly limited only to transfers occurring within the States

of California, Arizona, New Mexico, and Texas unless the Secretary certifies on a case-by-case basis that a different state is necessary for the public good.

Sections 16 & 17: Formalities

States that nothing in the bill impacts requirements placed on agencies under the terms of a settlement agreement or consent decree and authorizes the appropriations necessary to carry out this bill.

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