

The Intercept

Arizona Attorney General Manufactured An “Invasion” At The Southern Border

Mark Brnovich is pushing for a war that would, according to DHS data, impact families seeking refuge from Latin America’s most tumultuous places.

Ryan Devereaux

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MARK BRNOVICH, Arizona’s attorney general and one of several Republicans in the state running for U.S. Senate this year, delivered an urgent message to the governor this month. In a [legal opinion](#) issued February 7, Brnovich concluded that due to the “unprecedented” policies of President Joe Biden, the state is experiencing an “invasion” in the form of people and drugs across the U.S.-Mexico divide. Arizona is well within its rights to activate the “war powers” of the U.S. Constitution and respond with military force, Brnovich wrote, but it is up to Gov. Doug Ducey to give his troops the green light.

The following day, an [analysis of the government’s own data](#) by the organization Human Rights First painted a much different picture of the situation in Arizona, revealing that the people who would likely bear the brunt of a state offensive on the southern border are those fleeing violence and instability in some of Latin America’s most tumultuous places.

The group zeroed in on U.S. Customs and Border Protection data from areas surrounding Yuma, a border community on the western side of the state that has seen large periodic influxes of migrants and asylum-seekers under both the [Trump](#) and [Biden](#) administrations. The data showed that most of the people being taken into Border Patrol custody in and around the region are Cuban, Haitian, Nicaraguan, and Venezuelan families with small children, virtually all of whom are likely seeking asylum.

The organization argued that the fact that these individuals entered the U.S. immigration system between ports of entry, rather than at ports of entry, is key to understanding dynamics on the border right now. In 2017, according to CBP data, 99 percent of all Cubans and Haitians who encountered U.S. immigration officials on the border did so at a port of entry. In fiscal year 2022, those port encounters dropped to just 3 percent for Haitians and less than 1 percent for Cubans. The reason for the stark reversal, Human Rights First argued, is that successive policies enforced by former President Donald Trump and Biden make applying for asylum at ports next to impossible for most people and make hiring a smuggler the next best option.

In other words, it is not, as Brnovich and other Republicans on the campaign trail argue, the absence of Trump-era policies that is fueling a humanitarian crisis and lining the pockets of organized crime — it is their continuation. “Biden is definitely creating an economic opportunity for cartels, but it’s not because he has open borders,” Julia Neusner, an associate attorney for

refugee protection at Human Rights First, told The Intercept. “It’s because the government isn’t doing its job of processing people seeking asylum at ports of entry.”

With the onset of the coronavirus pandemic in March 2020, the Trump administration activated a public health order known as Title 42, which authorized Border Patrol agents to summarily expel undocumented migrants — including asylum-seekers — apprehended between ports of entry and all but ended asylum access at the ports. The order built upon other policies instituted under Trump, such as the Migrant Protection Protocols, better known as the “Remain in Mexico” program, which similarly forced asylum-seekers back across the border to await an immigration court hearing. Human Rights First and other organizations have documented how the offloading of U.S. asylum obligations onto Mexican soil has created an economic boom for smugglers and kidnapers south of the international divide. Despite demands from immigration advocates to lift the order, which Trump’s anti-immigration czar Stephen Miller pushed through over the objections of career public health professionals at the Centers for Disease Control and Prevention, the administration has kept Title 42 in place. Biden, meanwhile, canceled Remain in Mexico upon entering office, but a federal court ordered the administration to restart the program late last year.

Though crossing the border without authorization is a federal misdemeanor, seeking asylum between ports is a right enshrined under domestic and international law to protect people fleeing danger. Under Title 42, a migrant hoping to seek asylum can go to a port and attempt to make their claim, but they will likely be stopped at the door. (Implementation policies vary from place to place along the border, and exceptions to Title 42 have been made for certain groups of migrants, such as families with small children.) If they hire a smuggler, however, they can at least get onto U.S. soil, where they will have a better chance of beginning a case.

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While the lack of asylum access at ports creates an incentive for crossing the border without papers, it also comes with enormous risk. Thanks to a nearly two-decadelong, hypermilitarized war on drugs, northern Mexico’s main corridors for smuggling people and things into the U.S. are controlled by a patchwork of organized criminal networks and abusive government security forces. Robbery, extortion, kidnapping, rape, and murder of migrants navigating this underground economy is commonplace. “People would rather go to ports of entry and request asylum in a way that’s safe and orderly,” Neusner said. “Because that is not an option, the only way for them to access protection is between ports of entry, and that means that they have to rely on cartels and organized criminal groups who control crossings between ports of entry.”

In addition to the precipitous drop in Cubans and Haitians seeking asylum at ports, the CBP data analyzed by Human Rights First also showed steep declines among Nicaraguans and Venezuelans — dropping from 32 and 56 percent, respectively, in fiscal year 2020 to a mere 0.5 and 0.8 percent in fiscal year 2022. As the organization noted, all four countries are currently experiencing major breakdowns in the arenas of human rights, political freedom, and economic stability. In Yuma specifically, CBP data showed that more than half of the people who crossed into the region in December were families with minor children. Service providers on the ground have confirmed that nearly all the migrants crossing the border in the area immediately seek out a Border Patrol agent, Neusner said, a sign that that they are likely planning to apply for asylum.

THE FORMAL CATALYST for Brnovich’s decision to outline a legal pathway to an Arizona border war was a request for a legal opinion that Republican state Rep. Jake Hoffman sent in October. Drawing on the 2001 Authorization for the Use of Military Force that began the war on terror and a definition of invasion that he pulled from the Merriam-Webster dictionary, Hoffman described his “firm belief” that the Biden administration, with the “assistance of the Mexican drug cartels,” is overseeing a “coordinated crisis” on the U.S.-Mexico border.

Hoffman’s request stemmed from a behind-the-scenes effort spearheaded by Ken Cuccinelli, a former acting deputy secretary at the Department of Homeland Security under Trump. Cuccinelli is now a fellow at the Center for Renewing America, one of several right-wing think tanks in Washington, D.C., devoted to continuing the Trump legacy whether or not Trump is in office. As investigative journalist Melissa del Bosque documented last week, Cuccinelli has for more than a decade been pushing the idea that conditions on the border qualify as an invasion and that border states have the authority to respond to that invasion with military force. Cuccinelli told former White House adviser Steve Bannon in an interview last month that he has spent the past two years working to convince Ducey, as well as Texas Gov. Greg Abbott, of his idea.

Declaring a state of emergency last year, Abbott, who is also running for reelection, has embraced Cuccinelli’s argument through “Operation Lone Star,” a massive, combined effort of 10,000 state troopers and Texas National Guard soldiers that circumvents the federal immigration system by arresting undocumented migrants on state-level criminal trespassing charges. Last month, in a case involving an Ecuadorian asylum-seeker, a Texas judge ruled that the operation was unconstitutional. Hundreds of similar claims have been filed in the state since, with defense attorneys documenting cases of migrants lingering in Texas jails for weeks or months at a time without access to a lawyer. Journalists at the state and national levels have meanwhile documented repeated evidence of major problems surrounding the troops deployed for the mission — from drug and alcohol use to run-ins with local enforcement agents to missing pay and a rash of soldier suicides.

In his analysis, Brnovich wrote that Arizona’s right to protect against an invasion applies to criminal groups in Mexico, which he blames for importing drugs and violence into the U.S., and that Ducey has the constitutional authority to call up the Arizona National Guard to fend off their purported invasion. “The State Self-Defense Clause of the Constitution establishes that States in our federal system retain the sovereign power to ‘engage in War’ when ‘actually invaded,’ and States do not require the ‘Consent of Congress’ to do so,” he wrote. “Arizona therefore has the power to defend itself from this invasion under the Governor’s authority as Commander-in-Chief. An actual invasion permits the State to engage in defensive actions within its own territory at or near its border.”

While Ducey has deployed National Guard troops to the border in limited numbers, the governor has yet to mobilize a force on par with his counterpart in Texas. When asked about Brnovich’s legal opinion earlier this month, the governor dodged the question. David Bier, an immigration policy expert at the libertarian Cato Institute, told an NBC affiliate in Phoenix that the legal opinion would be “laughed out of any court” if Arizona officials actually attempted to follow through with the plan. Robert Robb, a conservative columnist at the Arizona Republic, meanwhile, described Brnovich’s legal opinion as “stunningly sloppy” and argued that the attorney general was blurring the lines between his duties as a public official and his electoral ambitions.

In an interview with CNN last month, Miller made clear that he and his cohort of loyal Trumpists are set on projecting a narrative of border chaos heading into this year's midterm elections. That narrative and the policy moves that follow with it have real consequences for people on the ground, Neusner argued. "We've seen so many campaign ads of candidates running for election or reelection that use this really fearmongering rhetoric about invasions to advance their own political agenda," she said. "It's definitely worse because this is an election year." Brnovich's claim that Arizona is being invaded, she added, is "ridiculous."

"DHS's own data shows it's very likely that the vast majority of people arriving at that border are people seeking protection," Neusner said. "It's a dangerous decision because we've already seen in Texas how problematic it can be when states authorize local law enforcement to enforce federal immigration laws."