An American Immigration Council Analysis of the President's 212(f) Proclamation and Interim Final Rule Restricting Asylum

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Summary

On June 4, the Biden administration issued a presidential proclamation and an Interim Final Rule restricting access to asylum for people crossing into the United States without legal status.

While the presidential proclamation nominally "suspended the entry" of asylum seekers—mirroring the language of Section 212(f) of the Immigration and Nationality Act—the Biden administration's actions did not close or seal the border. Nor did they automatically make asylum seekers ineligible to enter or stay in the United States, or allow the government to expel them without following existing immigration procedures (as the Trump and Biden administrations did under Title 42, a pandemic-era health restriction that was in effect until May 2023).

What the proclamation and regulation actually do, in practice, is: 1) prohibit most people seeking protection from being granted asylum by the United States if they cross the southern border without inspection, forcing them to seek other (more limited) forms of humanitarian protection; 2) make it harder for people to stay and seek those other forms of protection, by adding new restrictions and raising standards at the beginning of the process.

The Biden administration has said that the new prohibitions and enhanced ability to remove people within days of unlawful arrival seek to deter unlawful border crossings. But a hoped-for reduction in future crossings does not justify refusing protection here and now to people who would otherwise be entitled to it—especially when diplomatic and resource constraints limit the government's ability to execute its own plan.

The additional restrictions to the asylum process double down on other recent efforts to reduce border crossings by making asylum screenings more restrictive and reducing asylum eligibility, most notably through the May 2023 "Circumvention of Lawful Pathways" regulation. Recent history indicates that the U.S. will be unable to put everyone through the new, more restrictive processes, and that a significant number of people will still be released into the United States pending court hearings—even though they may be deemed ineligible for asylum at those hearings.

Some of the changes to the border asylum process—most notably, the fact that officials will no longer affirmatively ask people if they fear removal—may prove significant. But much will depend on real-world implementation, both by U.S. officials and governments of other countries. In the months before Biden took this action, border apprehension levels had already been declining significantly, largely due to increased interdiction of migrants by the government of Mexico rather than any U.S. policy.

At the time of this analysis, it is hard to say with confidence whether this regulation will work as the administration intends. What is clear is the fact that while it is in effect, people will be ordered removed who might otherwise have been able to successfully win asylum, and that some people may potentially be removed to face persecution in violation of international law.

When New Processes Are in Effect: "Emergency Border Circumstances"

The proclamation and regulation, along the lines of the border bill considered by the U.S. Senate earlier this year, set additional restrictions on asylum under "emergency" circumstances at the U.S. southern border. The emergency suspension and limitation of entry under President Biden's proclamation is triggered after seven days of average border apprehensions (between ports of entry) of 2,500 or more. It initially went into effect at 12:01 a.m. on June 5.

The presidential proclamation allows the government to lift the emergency limitation on entry 14 days after the conclusion of a seven-day period in which an average of 1,500 people or fewer are apprehended per day between ports of entry. In other words, once triggered, limitation of entry must remain in place for a minimum of 21 days. Furthermore, because the emergency asylum limits are automatically retriggered after the seven-day average exceeds 2,500, it is possible that it could be reinstated during the 14-day waiting period.

Recent history indicates that it is highly unlikely that the current emergency will be lifted in the near future, barring an unprecedented and sudden break in border trends. In five of the last six fiscal years, monthly average border crossings have exceeded 1,500 in every month but one (the exception was fiscal year 2020, which included the earliest months of the COVID-19 pandemic during which migration plummeted).

As long as the emergency is in place, the following changes to border processing will apply.

Continued Access at Ports of Entry—But Only with An Appointment

The restrictions on asylum and protection triggered by the "emergency border circumstances" being in effect do not apply to people who present themselves at ports of entry (official border crossings) with an appointment, like those provided through the CBP One app. These people also do not count toward determining when the emergency is put into place and when it can be lifted. This is consistent with the Biden administration's insistence that it is directing people to seek asylum at ports of entry rather than by crossing irregularly and presenting themselves to Border Patrol. At present, roughly 1,450 people a day can make appointments to present themselves for asylum using the CBP One app—which is an unprecedented level of asylum access at ports of entry. Nonetheless, the demand for CBP One appointments is so high that the average wait time for an appointment at a port of entry through the app is several months.

Moreover, the CBP One app is not accessible to everyone. It is only available in three languages, and technological glitches have rendered it impossible to use for many asylum seekers. While the Biden administration has made exceptions in the past for people who are unable to use CBP One, the new regulation does not carve out an exception based on problems with the app. People who walk up to ports of entry can theoretically be excepted for other reasons—see section below.

Who Can—And Can't—Be Banned from Asylum Under the Rule

When a border emergency is in effect, the new regulation states that people who enter the U.S. without legal status or prior permission (including via a parole program), and without an appointment at a port of entry, are

generally ineligible for asylum. This includes people who enter the U.S. without being caught by an official, and then apply for asylum on their own.

This restriction does *not* apply to unaccompanied children, or to people the U.S. government determines are victims of "a severe form of trafficking in persons."

Importantly, there are two other carveouts that allow U.S. officials to decide not to apply the asylum ban to someone who has entered the U.S. The first allows a Customs and Border Protection official to exempt someone from the asylum ban due to a consideration of the "totality of the circumstances"—including considerations such as public safety, medical emergency, or humanitarian concerns. The second allows a CBP official to exempt them based on "operational constraints."

The second of these is especially important. Anyone who is subjected to the asylum ban will need to be held in government custody under CBP or Immigration and Customs Enforcement (ICE) authority. If they manifest or express fear of return (see below), they will need to be screened by an asylum officer and, potentially, have that assessment reviewed by an immigration judge. And if they fail the screening or do not express fear at all, they will need to be put on a deportation flight.

Current border infrastructure lacks the capacity to do all this for even a fraction of the people crossing into the U.S. (see below). In the absence of significant changes to either the number of people coming in or the resources deployed to respond to them, these practical constraints will become a very real consideration, and the government may have to release significant numbers of people into the U.S. with notices to appear in immigration court. What remains to be seen is whether the government will consider them exempted from the ban because of "operational constraints," or whether such individuals will still be deemed ineligible for asylum months or years later in front of an immigration judge.

The regulation also allows people who aren't exempted from the ban when they are first booked into custody to establish that they should be given an exception. In that case, they must establish by a preponderance of the evidence (i.e., a "more likely than not" standard) that they are suffering an acute medical emergency, an "imminent and extreme threat to life or safety," or that they are victims of severe trafficking.

How the Process Works: Protection Available in Lesser Forms

Individuals covered by the asylum ban included in the new regulation are *not* prohibited from staying in the United States. Instead, they are barred from receiving asylum as a specific form of legal status. They will still be eligible to apply to stay in the U.S. under a status called "withholding of removal" due to persecution, or by receiving protection under the Convention Against Torture (which can come in the form of withholding of removal or deferral of removal).

These are lesser forms of protection than asylum because they do not put the individual on a path to permanent resident status (and potentially citizenship) in the United States. They also do not allow someone to apply for their family members to join them in the U.S. (although the regulation does say that in cases in which a family would be separated because one of them qualifies for withholding but others do not, the head of the family can receive asylum so that the whole family can be covered). And they may be revoked at the discretion of a U.S. official if circumstances change in their home country. However, they do protect individuals from deportation and usually allow them to work in the United States legally while they remain here.

The standard to qualify for withholding of removal is already higher than the standard to qualify for asylum. This means some people will likely find themselves denied relief by an immigration judge, whenever they are ultimately given a hearing, who *otherwise would have received asylum* but for the new rule.

Additionally, the new regulation makes it harder for people to make it to a final hearing before an immigration judge, with the two additional changes below.

How the Process Works: The "Shout Test"

Under long-standing government policy, before a person can be subject to "expedited removal" and rapidly ordered deported, a U.S. immigration official is required to ask the person whether they fear persecution or torture in the country to which they would be deported. If they answer yes, the immigration official is obligated to refer the person for a screening with an asylum official and can only deport them if they fail that screening or rescind their claim.

Under the new regulation implementing the emergency suspension, that requirement no longer exists. Instead, people seeking protection will be required to affirmatively "manifest or express" a fear of return, or proactively ask for asylum or relief from persecution, a process which has become known as a "shout test." If they fail to do so, they could be deported without ever being screened for asylum or any humanitarian protection.

The regulation, in addition to guidance provided by federal agencies to the officials responsible for enforcing the new rule, takes a fairly broad approach to what would qualify someone for a screening interview—including expressing "an intention to apply for asylum," as well as nonverbal signals that may indicate that someone is afraid of being deported.

However, there is reason for concern that federal agents will fail to fulfill their duties to acknowledge fear when it is expressed to them. During previous uses of a shout test under Title 42, many people reported expressing fear and nevertheless being denied a screening. One study in 2022 interviewed 97 families who had been expelled under Title 42. Even though 51 families reported verbally expressing a fear to Border Patrol agents, none were provided fear screenings as required.

Replacing the required questions about fear of persecution with a shout test is likely the most significant procedural change of the new regulations, and may significantly reduce the number of people who are given fear screenings. It is likely that at least some people who manifest a fear of persecution or request a screening will not be provided one as required under the regulation.

How the Process Works: A New Standard in Screening Interviews

The new regulation raises the standard for screening interviews for people seeking protection for the second time in two years.

Before 2023, the standard for passing a screening interview for asylum was demonstrating "credible fear" of persecution—defined as a "significant possibility" (at least a 10 percent chance) that their asylum claim would prevail. Under the Circumvention of Lawful Pathways rule enacted in May 2023, most people who cross between ports of entry and are screened by an asylum officer are subjected to a higher standard known as "reasonable possibility."

Under the new regulation, whenever the emergency suspension of entry is in effect, this standard is replaced with a completely new standard called "reasonable probability"—which the regulation defines as "substantially higher" than reasonable possibility, and "somewhat lower" than a "more likely than not" standard.

Because this is an entirely new standard, it is impossible to say with confidence how much more restrictive it will actually be in practice. Raising the standard in 2023 through the Circumvention of Lawful Pathways rule did reduce passage rates somewhat, but not as much as the Biden administration appeared to expect. The interpretation of "reasonable probability" will be left up to trainers and supervisors of asylum officers, as well as to immigration judges, who determine whether to reverse negative screening assessments as part of the process of appealing a credible fear determination.

Crucially, the regulation provides that this change will remain in place even if the other portions of the regulation which restrict asylum eligibility are struck down in court.

The Rule Goes into Effect Immediately

In 2018, a similar Trump administration asylum ban regulation implementing a presidential suspension of entry under Section 212(f) was blocked in court shortly after it began. The American Civil Liberties Union and partners have already announced an intent to sue over the legality of the new proclamation and regulation. The prospect of a future lawsuit has led many to assume that the new policy will be put on hold quickly and indefinitely.

However, it is worth emphasizing that the new asylum ban is already in effect and will remain so unless it is halted by a federal judge—which may be a multi-step court process. Additionally, many policies that are ultimately found to be illegal are often allowed to remain in effect until a final judgment is made (and vice versa).

People who are subjected to the asylum ban but allowed to stay in the country to seek withholding of removal may have their asylum eligibility restored if the ban is reversed in court. However, people who are deported because they failed to express fear or failed a screening interview will be affected regardless of what happens in any future lawsuit.

The Impact of These Changes Will Turn on Operational Limitations

At present, the United States has fewer than 1,000 asylum officers. Over the first six months of fiscal year 2024, those officers issued decisions in 115,900 screening interviews (107,001 decisions in credible fear interviews, and 8,899 in reasonable fear interviews). Over that same time period, 671,389 people were released from Border Patrol custody with notices to appear in immigration court—which is what happens either after someone passes a screening interview in Border Patrol custody, or when the government does not put them through the credible fear process at all (often due to resource limitations).

While statistics are unavailable for recent months, it is likely that the share of people who are screened for fear has increased as overall apprehension levels have declined. However, it is still likely that only a fraction of people who came to the U.S./Mexico border were screened for fear at all, instead of simply being referred to an immigration judge.

The new regulation presumes that the government will have the capacity to subject everyone to expedited removal. This would require the government to not only have enough asylum officers to screen everyone who

requests an interview through a "shout test" and conduct fear interviews that (because they require more from the respondent) may take longer than existing interviews do, but also have the detention beds to hold them during this process and then enough deportation flights to return them to their home countries.

In addition, as the number of countries from which migrants are coming rises, the number of countries to which the U.S. will have to arrange deportation flights becomes ever-longer—making it harder to run full flights frequently. In May 2024, ICE flew 151 removal flights in total, an average of 4.9 per day, which was the third highest total since January 2020, nearly all of which were to destinations in the Western Hemisphere. Some countries, like China and Venezuela, do not permit direct removal flights at all. Without a massive increase in resources, ICE is unlikely to be able to significantly increase these numbers in the near future.

If the government cannot solve all these operational issues overnight, it will likely have to continue releasing large numbers of people into the country. Importantly, the new regulation does *not* come with an agreement to allow the U.S. to send more non-Mexican nationals back to Mexico. (Under existing agreements, Mexico accepts 30,000 people a month from Cuba, Haiti, Nicaragua, and Venezuela.) For the last several years, agreements with Mexico have been the U.S.'s primary way to ensure quick removal or expulsion of large numbers of people.

Without a new agreement, it is all the more likely that this ban will only be applied to some of the people who enter the United States—and who it applies to will vary by time and place, due to resources, rather than due to the merits of their case or their humanitarian needs. In other words, like crackdowns of the past, the new policy creates yet more variation in what happens to someone after they cross the border seeking asylum—which also makes it impossible for the U.S. to send a consistent message to future would-be asylum seekers.

Conclusion: What Happens Now—And What Should Happen

It is quite possible that the United States will see lower levels of border apprehensions in the coming weeks, consistent with the "wait and see" period that has followed past border crackdowns. (It is also worth noting that apprehensions have generally fallen in the summer months.) It is also possible that the impact of these policy changes—most importantly the "shout test," the biggest change to previous U.S. border policy—will be significant, allowing the U.S. to remove more people and release fewer into the United States.

But success on the Biden administration's own terms—reducing border crossing levels for the next six months or longer—would require far more than that. It would require the United States to do what it has tried, and failed, to do for a decade: stop people from fleeing their homes, in the midst of a global displacement crisis, by making life harder for some of those who have already arrived in the United States.

Rather than doubling down on deterrence and focusing only on bringing down border encounters, the United States should focus on strengthening the asylum system itself and providing new pathways for people to come without feeling forced to cross the border. Undoubtedly this will require an infusion of resources from Congress to support the humanitarian protection system, including hiring more asylum officers, port of entry staff, immigration judges, and support staff throughout the system. Committing to a deterrence strategy would also require meaningful investment, but for highly uncertain benefit; committing to a solutions strategy would ensure today's investments will make the system work better tomorrow.

At present, the government is offering neither investment nor solutions. It is essentially crossing its fingers that the asylum system will fix itself.