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Policy Brief: Analysis of Final Rule on “Securing the Border”

Updated: October 3, 2024

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On June 4, 2024, President Biden signed “[A Proclamation on Securing the Border](#),” (Proclamation) and the Administration issued an Interim Final Rule, “[Securing the Border](#)” (IFR). On September 30, 2024, the Biden Administration expanded on the June measures by publishing the joint [DHS-DOJ Final Rule](#) (“Final Rule”). The Final Rule codifies into law and maintains the strict border measures in place since June, with two major changes:

- When the restrictions are in place, the period in which border encounters must fall below 1,500 has been extended from 7 to 28 days. This dramatically increases the likelihood the restrictions will remain in place indefinitely given the existing arrival levels.
- Unaccompanied children will now be included in the calculation. Previously, only unaccompanied children from contiguous countries were included.

This regulation bars access to asylum for nearly all people seeking protection at our border outside of the CBP One application, something that has been [extensively documented](#) since the IFR’s implementation. These updates in the Final Rule make the asylum restrictions effectively permanent. Moreover, with limited access to time and legal counsel, exceptions to the rule meant to protect vulnerable populations are almost completely inaccessible. With this Final Rule, the federal government prioritizes rapid processing over ensuring fair and dependable processes for those needing protection, which in turn severely restricts due process and the asylum protections guaranteed by law. Based on [recent federal court rulings](#) that clearly prohibiting making asylum dependent on manner of entry, it is likely this rule faces the same risk of being enjoined by a court. the same risk of being enjoined by a court.

The border can be managed in an orderly, efficient, and fair manner. Effective migration management requires solutions that address not only the border but the entire immigration system. The Biden Administration should continue developing legal pathways and coordinating with country governments to give people alternatives to journeying to the U.S. southern border. However, those that find themselves at the southern border fleeing for their lives should be given a fair chance. Moreover, Congress should provide more visas for families and businesses to meet the country’s needs and [alleviate the strain](#) on our southern border. Finally, in absence of congressional action, the President should protect people who have been living in and contributing to the country for years but have no way to apply for legal status. They are integral to American communities and help the country thrive.

What the Final Rule Does:

Predicates access to asylum on border numbers. This policy has a trigger, which goes into effect when there is a seven-consecutive calendar-day average of 2,500 encounters or more between ports of entry. The restrictions remain in effect until 14 calendar days after there is a twenty-eight consecutive calendar day average of less than 1,500 encounters between ports of entry. The Final Rule now includes unaccompanied children encounters in this calculation.

- **Categorically excludes people apprehended between ports of entry from being eligible for asylum unless they qualify for narrow exceptions.**¹ They can only apply for the more limited humanitarian protections described below.
- **Sets a new, higher legal standard known as reasonable probability** for people to qualify for the more limited legal protection: withholding of removal and Convention Against Torture (CAT).
 - Under this new standard, people need to show almost the same level of proof at the preliminary screening stage as they do for a full hearing before an immigration judge. Congress intended the preliminary screening stage to be a lower [legal standard](#). Now they need to meet a high standard with far less time to prepare and without legal counsel.
- **People must affirmatively ask for protection by “manifesting” fear.** The Department of Homeland Security (DHS) will not affirmatively ask questions to screen people for persecution, torture or other vulnerabilities.
 - Since the IFR was implemented, there have been [numerous](#) reports documenting that even when an asylum seeker affirmatively asks for asylum, they are not given a credible fear interview. Statements [told](#) to asylum seekers by immigration officers include that “[t]here is no asylum anymore; we don’t care” and “we are no longer giving asylum to anyone.”
 - This rule ignores the research that has [demonstrated](#) that people do not get referred for credible fear screenings when DHS officers do not affirmatively ask about fear. [The Center for Gender Refugee Studies](#) interviewed 97 families deported during Title 42. Among those interviewed, not a single family was given a fear screening by DHS even though about three quarters expressed fear. Those families were erroneously returned to Mexico.
- **The rule provides a mere [four hours](#) for an asylum seeker to consult an attorney before the initial fear screening, effectively eliminating access to legal representation.**
 - To expect a person to be able to find and consult with an attorney within four hours is completely out of touch with the reality people face when they cross the border as well as the glaring gap in legal representation.

- Previously, DHS provided 24 hours to consult with counsel, which was completely insufficient given the extraordinary barriers this population faces. These barriers include detention in remote areas, restrictions on in person consultations in [CBP custody](#), and the [impractically fast timeline](#).
 - [Only one percent](#) of people are represented by an attorney during their CFI process.²
- **The rule expands upon the May 2023 Circumvention of Lawful Pathways rule, which severely compromises access to asylum.**
 - In the first five months after CLP was implemented, only 13 percent of people were screened in and found eligible for asylum.³ In other words, CLP eliminated the vast majority of people from consideration for asylum at the preliminary screening stage. By comparison, the CLP figure is far lower than the grant rate for asylum in full court before immigration judges. In fiscal year 2023, 55 percent of people who received a positive CFI and had their case adjudicated by the immigration court were granted asylum.⁴ A preliminary screening should not impose a more stringent standard than the full merits standard applied in court.
 - The Final Rule requests comment on certain expansions of the CLP, including whether or not Mexican nationals should be subject to the rule.
 - **The rule incorporates some exceptions established in the CLP rule for people with vulnerabilities, virtually no one can access them.**
 - These exceptions include lawful permanent residents, unaccompanied children, victims of a severe form of trafficking, and noncitizens with a valid visa or other lawful permission to enter the United States. Notably, there is not an exception for individuals who could not access the CBP One application due to language barriers or technical issues. Those who are facing acute medical emergencies or threats to their lives face nearly insurmountable obstacles in securing a CBP immigration personnel’s approval, even if they meet an exception under the rule.

Background on the CLP rule

In May 2023, the Administration issued the Circumvention of Lawful Pathways regulation (CLP), also known as the asylum transit ban. The CLP was enjoined by a federal court and is still being litigated before the 9th Circuit—during the appeal it remains in effect. The CLP created a rebuttable presumption of ineligibility for asylum based on how the noncitizen entered the United States and whether they applied for protection in transit. If the CLP is found to apply, they **are no longer eligible for asylum** and are only eligible for withholding of removal or CAT, which has a higher legal standard and does not allow for derivatives or a path to citizenship.

Related Resources

- [Policy Brief: Presidential Authority to Block or Expel Migrants](#)
- [Policy Brief: Solutions for the Border and America’s Immigration System](#)

¹ The new rule does not apply to these individuals: 1) Lawful permanent residents or other noncitizens with a valid visa; 2) Unaccompanied children; 3) People demonstrating exceptionally compelling circumstances, such as an acute medical emergency; imminent and extreme threat to life or safety (rape, kidnapping, torture, or murder); or a victim of a severe form of trafficking; 4) people who use the CBP One application at a port of entry. There is no exception for Mexican nationals or those who cannot access or use CBP One due to language or accessibility concerns.

² This number refers to data available to asylum merits interviews, which is the only data available on legal representations at the CFI stage.

³ [M. A. v. MAYORKAS](#), 1:23-cv-01843, (D.D.C. Oct 27, 2023) ECF No. 53, at 8-9. Total CFIs for this time period are 57,000. Of this number, 7,600 either rebutted the presumption or established an exception to the rule and established credible fear.

⁴ Government numbers often factor in cases where no asylum application was ever filed (for example, if government notices were sent to an [erroneous address](#) and the noncitizen never received important information), the application was abandoned, not adjudicated, withdrawn, or administratively closed, or “other.” Factoring in grants versus denials, the number is 55 percent. Executive Office for Immigration Review, “Adjudication Statistics: Asylum Decisions in Cases Originating with a Credible Fear Claim,” Jan. 18, 2024, <https://www.justice.gov/eoir/media/1344831/dl?inline>.