

IMMIGRATION AND MIGRATION

President Biden Further Restricts Asylum Claims by Migrants at the U.S.-Mexico Border

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President Joseph R. Biden, Jr. has severely restricted access to asylum for migrants at the U.S. Mexico border. The president's proclamation¹ and the rules implementing it² come amid a significant increase in the number of encounters along the border, the failure of prior policies to reduce migration, Congress's inability to enact legislation that reforms and funds the immigration system, and the weaponization of immigration policy in presidential election-year politics.³ "[T]oday, I'm moving past Republican obstruction and using . . . executive authorities . . . to do what I can on my own to address the border," President Biden said upon the proclamation's issuance.⁴ He continued: "[W]e must face a simple truth: To protect America as a land that welcomes immigrants, we must first secure the border and secure it now."⁵ "We'll carry out this order," he insisted, "consistent with all our responsibilities under international law—every one of them."⁶

After taking office, President Biden quickly reversed or suspended many of President Donald J. Trump's efforts to restrict asylum, but when border crossings increased over the first two years of his presidency he instituted his own measures to discourage migration.⁷ In May 2023, the administration promulgated the final Circumvention of Lawful Pathways (CLP) rule, which established penalties for certain asylum seekers by creating a rebuttable presumption of ineligibility for migrants who were unable to or failed to schedule an appointment to seek asylum.⁸ Even under the CLP rule, migrants who crossed the border and

¹ See White House Press Release, A Proclamation on Securing the Border (June 4, 2024), at <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border> [<https://perma.cc/7B2Y-8UL7>] [hereinafter Border Proclamation]; see also White House Press Release, Fact Sheet: President Biden Announces New Actions to Secure the Border (June 4 2024), at <https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/04/fact-sheet-president-biden-announces-new-actions-to-secure-the-border> [<https://perma.cc/NDS6-A45U>].

² See Securing the Border, 89 Fed. Reg. 48,710 (June 7, 2024) [hereinafter IFR].

³ The number of encounters can be tracked on the U.S. Customs and Border Protection website. See U.S. Customs and Border Enforcement, Southwest Land Border Encounters, at <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>. There can be multiple encounters with the same migrant since the same person can attempt to cross the border more than once.

⁴ White House Press Release, Remarks by President Biden on Securing Our Border (June 4, 2024), at <https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/04/remarks-by-president-biden-on-securing-our-border> [<https://perma.cc/X9Y5-7SBK>].

⁵ *Id.*

⁶ *Id.*

⁷ On the Trump administration's asylum policy, see Jean Galbraith, Contemporary Practice of the United States, 114 AJIL 494, 504 (2020); Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 812, 833 (2019); and Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 376, 377 (2019). On the Biden administration, see Jacob Katz Cogan, Contemporary Practice of the United States, 117 AJIL 500, 528 (2023); Kristen E. Eichensehr, Contemporary Practice of the United States, 116 AJIL 164, 197 (2022); and Kristen E. Eichensehr, Contemporary Practice of the United States, 115 AJIL 309, 340 (2021).

⁸ See Cogan, *supra* note 7, at 528. The CLP rule is currently being applied. A district court vacated the rule, but the Ninth Circuit stayed that order pending appeal. See *East Bay Sanctuary Covenant v. Biden*, 2023 WL 11662094 (9th Cir. Aug. 3, 2023); *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023). The appeal is currently in abeyance pending settlement negotiations. See *East Bay Sanctuary Covenant v. Biden*, 93 F.4th 1130 (9th Cir. 2024).

claimed asylum were paroled into the United States pending immigration proceedings that could take years due to the backlog of cases.⁹ While border crossings initially declined following the CLP rule's issuance, they rapidly rebounded. Encounters at the southern border reached 10,000 a day in December 2023, a record.¹⁰ The skyrocketing numbers created great strains on the immigration system and significant political pressure on the administration.

A bipartisan immigration bill, negotiated by Senators James Lankford (R-Okla.), Chris Murphy (D-Conn.), and Kyrsten Sinema (I-Ariz.), and supported by President Biden, went before the Senate in early February 2024.¹¹ The bill, part of an omnibus emergency national security supplemental appropriations act that would have also provided military aid to Israel and Ukraine, focused mostly on immigration enforcement and represented substantial policy concessions by Democrats.¹² It would have provided appropriations to: hire additional asylum officers, border patrol agents, U.S. Immigration and Customs Enforcement (ICE) officers, and immigration judges; fund the expansion of ICE detention facilities; and support cities that are giving assistance to migrants. It would have assisted some migrants by requiring and funding legal representation in removal proceedings for unaccompanied children, aged thirteen and under, as well as adults with "mental or developmental disabilities," and by adding 50,000 green cards annually for five years. It would have expanded alternatives to detention at the southwest border and created a new "protection determination process" for undocumented migrants to live in the community. But it also would have created significant hurdles to claiming asylum by: raising the screening standard for showing "credible fear of persecution" to "reasonable possibility" (in place of "significant possibility"); barring a person from claiming asylum if there were reasonable grounds to believe that they could have internally relocated in their country of origin (instead of seeking protection in the United States);¹³ requiring asylum officers to determine whether the claimant is barred from entry (an inquiry previously made later by an immigration judge); and expediting the removal of those who did not satisfy initial asylum screening by restricting the review of those determinations to an administrative board within seventy-two hours (and eliminating judicial review). Most significantly, the bill would have provided the Secretary of Homeland Security "border emergency authority" when the number of encounters on the southern border averaged 5,000 per day over a seven-day period (or discretionarily when that number averaged 4,000). This authority would have prohibited the entry of, and quickly

⁹ See TRAC Immigration, Immigration Court Asylum Backlog, at <https://trac.syr.edu/phptools/immigration/asylumbl>.

¹⁰ See Zolan Kanno-Youngs & Hamed Aleaziz, *In Shift, Biden Issues Order Allowing Temporary Border Closure to Migrants*, N.Y. TIMES (June 4, 2024), at <https://www.nytimes.com/2024/06/04/us/politics/biden-executive-order-border-asylum.html>; Nick Miroff & Maria Sacchetti, *Biden Announces New Asylum Cap in Bid to Deter Illegal Crossings*, WASH. POST (June 4, 2024), at <https://www.washingtonpost.com/immigration/2024/06/04/biden-announce-new-asylum-cap-bid-deter-illegal-crossings>.

¹¹ See White House Press Release, Statement from President Joe Biden on Bipartisan Senate National Security Agreement (Feb. 4, 2024), at <https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/04/statement-from-president-joe-biden-on-bipartisan-senate-national-security-agreement> [<https://perma.cc/SL2A-TYKM>]. The following sentences summarize provisions in the bill, S. Amdt. 1386 to H.R. 815, 170 CONG. REC. S362-S400 (Feb. 5, 2024). See also Emergency National Security Supplemental Appropriations Act, 2024 – Summary, at https://www.appropriations.senate.gov/imo/media/doc/emergency_national_security_supplemental_section-by-section.pdf [<https://perma.cc/T3BX-A3CR>].

¹² See Carl Hulse, *On the Border, Republicans Set a Trap, Then Fell Into It*, N.Y. TIMES (Feb. 6, 2024), at <https://www.nytimes.com/2024/02/06/us/politics/border-republicans-ukraine-bill.html>.

¹³ This would codify an existing bar. See 8 C.F.R. § 208.13(b)(1)(i)(B).

expelled, non-citizens apprehended between ports of entry. Asylum claims of those so apprehended would have been prohibited,¹⁴ though migrants would have been able to seek withholding of removal or protection under the Convention Against Torture. The bill failed in the Senate after former President Trump, the Republican presidential candidate, called for its defeat.¹⁵ With the immigration provisions severed from the bill, the national security supplemental was enacted in April.¹⁶ In May, the Senate rejected a standalone immigration bill that included provisions identical to those that were included in the February bill.¹⁷

Several weeks later, with a legislative fix clearly unavailable and the crisis at the border unabated, the president decided to take unilateral action, a move that the administration had contemplated since the Senate bill was first defeated months earlier.¹⁸ President Biden could not himself authorize new appropriations to hire additional immigration officers and agents,¹⁹ expand detention facilities, and make other border security expenditures (constitutionally, funds can only be allocated by Congress), but he could issue rules to control the entry of non-citizens at the border pursuant to the Executive Branch's own authorities.²⁰

Instituted by the presidential proclamation and revisions to Department of Homeland Security (DHS) and Department of Justice regulations, the new rules apply specifically during "emergency border circumstances," a period triggered when a threshold number of encounters along the southern border—a seven-consecutive-calendar-day average of 2,500—is reached or exceeded.²¹ Once activated, the emergency continues until that average decreases to less than 1,500.²² With the number of encounters well above the threshold at the time of

¹⁴ The government, though, was required to ensure capacity for 1,400 asylum seekers per day, presumably those who scheduled appointments through the CBP One app, as opposed to those apprehended between ports of entry.

¹⁵ See CONG. REC. S437-S438 (Feb. 7, 2024) (vote to invoke cloture on H.R. 815); see also Annie Karni, *Senate Bogs Down on Ukraine and Israel Aid After G.O.P. Blocks Border Deal*, N.Y. TIMES (Feb. 7, 2024), at <https://www.nytimes.com/2024/02/07/us/politics/congress-ukraine-israel-aid.html>; Liz Goodwin & Leigh Ann Caldwell, *Border-for-Ukraine Deal on Life Support as GOP Opposition Mounts*, WASH. POST (Feb. 6, 2024), at <https://www.washingtonpost.com/politics/2024/02/05/republican-opposition-mounts-border-for-ukraine-deal>.

¹⁶ See Pub. L. 118-50 (Apr. 24, 2024).

¹⁷ See CONG. REC. S3878 (May 23, 2024) (vote to invoke cloture on S. 4261); see also Liz Goodwin, *Senate Rejects Border Security Deal for a Second Time*, WASH. POST (May 23, 2024), at <https://www.washingtonpost.com/politics/2024/05/23/senate-democrats-immigration-bill-vote-contraception-ivf>.

¹⁸ See Hamed Aleaziz, Charlie Savage, Maggie Haberman & Zolan Kanno-Youngs, *Biden Mulling Plan That Could Restrict Asylum Claims at the Border*, N.Y. TIMES (Feb. 21, 2024), at <https://www.nytimes.com/2024/02/21/us/politics/biden-executive-order-asylum-border.html>.

¹⁹ He can, though, redirect existing funding to hire immigration officers, for example.

²⁰ The president asserted both constitutional and statutory authority to issue the proclamation. The constitutional authority was unspecified. The cited statutes included Sections 212(f) and 215(a) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(f), 1185(a). The interim final rule cites to additional statutory authority. See IFR, *supra* note 2, at 48,716–18. The extent of the president's immigration authorities is contested and was extensively litigated during the Trump administration, though the specific parameters remain uncertain. Cases pertaining to the CLP rule are pending, as is litigation challenging the new regulations. See notes 7 *supra* & 41 *infra*.

²¹ See Border Proclamation, *supra* note 1, Sec. 2(b); IFR, *supra* note 2, at 48,769 (adding 8 C.F.R. § 208.13(g)). An "encounter" refers to non-citizens apprehended between ports of entry along the southwest land border or southern coastal borders, as well as those determined to be inadmissible at a southwest land border port of entry. See Border Proclamation, *supra* note 1, Sec. 4(a). The average does not include unaccompanied children. See *id.*, Sec. 2(c). The southern border means both the "southwest land border" and the "southern coastal borders," as those terms are defined in the proclamation. *Id.*, Sec. 4(d). The term "emergency border circumstances" appears in the IFR, not the president's proclamation. See IFR, *supra* note 2, at 48,769. In these notes, I refer only to DHS regulations. Corresponding changes were also made to DOJ regulations.

²² See Border Proclamation, *supra* note 1, Sec. 2(a); IFR, *supra* note 2, at 48,769. The emergency will end fourteen days after the 1,500-encounter mark is reached.

the proclamation, the president suspended entry immediately.²³ Since daily encounters have exceeded 2,500 since February 2021, and a daily average of below 1,500 encounters has not occurred since July 2020, it is likely that “emergency border circumstances” will continue for some time.²⁴

During the emergency, the entry of non-citizens along the southern border is “suspended and limited,” with certain exceptions.²⁵ Suspension of entry does not apply to the following groups: non-citizen nationals of the United States; lawful permanent residents; unaccompanied children; “victim[s] of a severe form of trafficking in persons”; those “noncitizen[s] who [have] a valid visa or other lawful permission to seek entry or admission into the United States, or present[] at a port of entry pursuant to a pre-scheduled time and place”; and those permitted to enter by a CBP immigration officer “based on the totality of the circumstances” or “due to operational considerations.”²⁶ Undocumented migrants who have made an appointment through the CBP One app are thus still eligible for asylum under the preexisting rules.

Migrants who are not in one of these groups may also be eligible for asylum during “emergency border circumstances” under very narrow conditions. Non-citizens subject to expedited removal (because they lack documentation for entry) must now without prompting “manifest[] a fear of return, express[] an intention to apply for asylum or protection, or express[] a fear of persecution or torture or a fear of return”; Customs and Border Protection (CBP) officers will no longer themselves ask migrants about persecution or torture to determine whether they should be referred for a credible fear interview with an asylum officer.²⁷ (Studies indicate that migrants do not spontaneously communicate their persecution to officers (the “shout test”) and so this new “manifest fear” requirement will effectively prevent many migrants from claiming asylum.)²⁸ If they have manifested fear, migrants must then show at a credible fear interview that there is a significant possibility that they could demonstrate by a preponderance of the evidence that “exceptionally compelling circumstances” exist.²⁹ If they make this showing, their asylum eligibility screening will proceed under the usual rules that require a showing of a “significant possibility” of persecution or a well-founded fear of persecution on account of being in a protected group.³⁰ Those who cannot demonstrate “exceptionally compelling circumstances” (which will be nearly

²³ Border Proclamation, *supra* note 1, Sec. 1. Technically, entry was suspended the day after the president’s proclamation.

²⁴ See Washington Office on Latin America, Border Oversight (June 4, 2024), at <https://borderoversight.org/2024/06/04/june-4-2024> [<https://perma.cc/JBW6-XXKL>].

²⁵ Border Proclamation, *supra* note 1, Sec. 1.

²⁶ *Id.*, Sec. 3(b).

²⁷ See IFR, *supra* note 2, at 48,770–71 (adding 8 CFR § 235.15). Questions were previously required by 8 CFR § 235.3(b)(2)(i).

²⁸ Center for Gender & Refugee Studies, “*Manifesting Fear at the Border: Lessons from Title 42 Expulsions*” (Jan. 30, 2024), at <https://cgrs.uclawsf.edu/our-work/publications/%E2%80%9CManifesting%E2%80%9D-fear-border-lessons-title-42-expulsions> [<https://perma.cc/DM9W-KEKW>].

²⁹ See IFR, *supra* note 2, at 48,769 (adding 8 C.F.R. §§ 208.35(a)(2), (b)(1)(iii)). “[E]xceptionally compelling circumstances” can be demonstrated by a showing, by a preponderance of the evidence, that the non-citizen or a member of their family with whom they are traveling: “(1) faced an acute medical emergency; (2) [f]aced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or (3) [s]atisfied the definition of ‘victim of a severe form of trafficking in persons’ provided in [8 C.F.R. § 214.11].” *Id.* (adding 8 C.F.R. § 208.35(a)(2)(i)).

³⁰ See *id.* (adding 8 C.F.R. § 208.35 (b)(1)(iii)) (directing the asylum officer to follow the procedures at 8 C.F.R. § 208.30).

everyone) will be subject instead, during their asylum screening, to a heightened standard, requiring a demonstration of a “reasonable probability.”³¹ At the same time, under new DHS policy issued separately, the asylum officer will determine whether the migrant could have found refuge elsewhere in their home country.³² Individuals who are ineligible for asylum under these rules are still able to apply for withholding of removal and Convention Against Torture protection (though these processes require the applicant to meet higher standards and they provide lesser forms of relief).

While not a ban per se on asylum at the southern border, the requirements imposed by the president’s proclamation and related rules create a very significant bar.³³ Since their issuance, asylum claims are down fifty percent and border crossings are at their lowest numbers since President Biden took office (though that may in part be because the number of migrants coming north drops during the summer months and because the Mexican government is keeping migrants away from the border).³⁴ Because lawful pathways under the CLP rule are not able to meet demand (the CBP One app, for example, currently schedules only 1,450 appointments per day for all matters), it is likely that many who qualify for asylum are being turned away at the border or are deterred from coming.³⁵ Practical impediments, such as a shortage of asylum officers and the continued willingness of Mexico and other countries to accept the return of migrants, may yet act as limitations on the administration’s ability to implement the new policy.³⁶

The new rules were quickly condemned by international and domestic human rights organizations. The Office of the UN High Commissioner for Refugees (UNHCR) expressed its “profound[] concern[] about the new . . . measures . . . which impose harsh restrictions on the right to seek asylum”³⁷ While not specifically asserting that the administration’s actions

³¹ See *id.* (adding 8 C.F.R. § 208.35(b)(2)(i)). “Reasonable probability” is described as “substantially more than a ‘reasonable possibility’ but somewhat less than more likely than not.” *Id.* “Reasonable possibility” is the standard that would typically apply in asylum screenings under 8 C.F.R. § 208.33(b)(2). A lower standard than “reasonable possibility”—“significant possibility”—applies in screenings under 8 C.F.R. § 208.30(e).

³² See U.S. Dep’t of Homeland Security Press Release, DHS Announces Proposed Rule and Other Measures to Enhance Security, Streamline Asylum Processing (May 9, 2024), at <https://www.dhs.gov/news/2024/05/09/dhs-announces-proposed-rule-and-other-measures-enhance-security-streamline-asylum> [<https://perma.cc/2FMS-9CPU>]. U.S. Citizenship and Immigration Services proposed a rule in May that would allow, but not require, asylum officers to consider statutory bars to asylum. See Application of Certain Mandatory Bars in Fear Screenings, 89 Fed. Reg. 41,347 (May 13, 2024).

³³ That is the conclusion of the American Immigration Lawyers Association. See American Immigration Lawyers Association, Policy Brief: Analysis of Proclamation and Interim Final Rule on “Securing the Border” (June 5, 2024), at <https://www.aila.org/aila-files/D16AD362-535E-4CED-93B3-4009633E75A1/24060510.pdf?1717629643> [<https://perma.cc/ZZF4-MGG8>].

³⁴ See Hamed Aleaziz, *Biden’s Asylum Restrictions Are Working as Predicted, and as Warned*, N.Y. TIMES (Aug. 24, 2024), at <https://www.nytimes.com/2024/08/24/us/politics/biden-asylum-restrictions.html>; see also Maria Sacchetti & Nick Miroff, *Illegal Border Crossings Fell in July to Lowest Level in Four Years*, WASH. POST (Aug. 16, 2024), at <https://www.washingtonpost.com/immigration/2024/08/16/united-states-mexico-border-apprehensions-july/>; Nick Miroff, *A Quieter Border Eases Pressure on Biden, with a Hand from Mexico*, WASH. POST (Apr. 30, 2024), at <https://www.washingtonpost.com/immigration/2024/04/30/united-states-mexico-border-surge-biden/>.

³⁵ U.S. Customs and Border Protection, CBP One™ Mobile Application, at <https://www.cbp.gov/about/mobile-apps-directory/cbpone> [<https://perma.cc/G4Z3-LKRP>].

³⁶ See Miroff, *supra* note 34.

³⁷ Office of the UN High Commissioner for Refugees Press Release, UNHCR Expresses Concern Over New Asylum Restrictions in the United States (June 4, 2024), at <https://www.unhcr.org/us/news/press-releases/news-comment-unhcr-expresses-concern-over-new-asylum-restrictions-united-states> [<https://perma.cc/L2HV-D6AG>].

violate the United States' international obligations, UNHCR said that the rules "will deny access to asylum for many individuals who are in need of international protection, and who may now find themselves without a viable option for seeking safety and even at risk of refoulement," and it "call[ed] on the United States to uphold its international obligations and . . . reconsider restrictions that undermine the fundamental right to seek asylum."³⁸

U.S. immigrant advocacy groups denounced the administration's actions, calling them illegal. "The administration lacks unilateral authority to override Congress and bar asylum based on how one enters the country," declared Lee Gelernt, deputy director of the American Civil Liberties Union's (ACLU) Immigrants' Rights Project.³⁹ National Immigrant Justice Center's litigation director, Keren Zwick, said that: "Around the world, people are fleeing persecution and torture at higher rates than ever before. It's shameful that the U.S. government has chosen to respond by shutting out access to asylum to those who come to our border in need."⁴⁰

The ACLU and other organizations immediately challenged the new rules in federal court.⁴¹ Reportedly, the Biden administration is considering ways of locking in the restrictions even if the number of migrants decreases below the current thresholds.⁴²

³⁸ *Id.*

³⁹ American Civil Liberties Union Press Release, Immigrants' Rights Groups Sue Biden Administration Over New Anti-asylum Rule (June 12, 2024), at <https://www.aclu.org/press-releases/immigrants-rights-groups-sue-biden-administration-over-new-anti-asylum-rule> [<https://perma.cc/7KSA-D5MJ>].

⁴⁰ *Id.*

⁴¹ See Complaint, *Las Americas Immigrant Advocacy Center v. U.S. Dep't of Homeland Security*, Case 1:24-cv-01702 (D.D.C. June 12, 2024), at <https://www.aclu.org/cases/las-americas-immigrant-advocacy-center-v-u-s-department-of-homeland-security?document=Complaint> [<https://perma.cc/T6VQ-TDET>].

⁴² See Camilo Montoya-Galvez, *Biden Administration Weighs Making It Harder to End Asylum Crackdown at Border*, CBS NEWS (Sept. 4, 2024), at <https://www.cbsnews.com/news/biden-asylum-rules-us-mexico-border>.