

BIDEN ADMINISTRATION PLAN TO RESURRECT ASYLUM BAN ADVANCES TRUMP AGENDA

Would Condemn Refugees to Return to Harm, Family Separation, and Permanent Limbo

On January 5, 2023, the Biden administration [announced](#) new policies relating to the border and asylum, including a plan to issue a Notice of Proposed Rulemaking (NPRM) that would ban asylum for many seeking safety — a policy that is straight from the Trump playbook and would advance the Trump administration agenda of turning away and banning refugees from asylum.

The Department of Homeland Security (DHS) and the Department of Justice (DOJ) have [indicated](#) that they intend to issue a proposed rule that would create a presumption of asylum ineligibility for individuals who did not apply for protection in a country they traveled through on their way to request safety in the United States and did not use or "circumvent[ed] available, established pathways to lawful migration," subject to certain exceptions. The purpose of the potential rule, as described by President Biden and DHS, is to impose "[consequences](#)" on people seeking asylum who do not use these pathways.

Such a rule would violate U.S. and international law. [U.S. law](#) provides that people seeking refugee protection may apply for asylum regardless of manner of entry. Under the [Refugee Convention and its Protocol](#), "States may not condition access to asylum procedures on regular entry," as the U.N. Refugee Agency (UNHCR) has [confirmed](#). Article 31 of the Refugee Convention prohibits states from imposing improper penalties for irregular entry. Following the Biden administration's Jan 5th announcement, the U.N. High Commissioner for Human Rights [warned](#) that the plans risk undermining international human rights and refugee law, reminding the U.S. that the right to seek asylum is a human right no matter a person's origin, immigration status or how they arrived at a border.

This potential rule would repackage the Trump administration's "[asylum entry ban](#)" and "[asylum transit ban](#)," which similarly made people ineligible for asylum if they entered between ports of entry or did not apply for protection in a country they transited through. While Biden administration officials have tried to [distinguish](#) their plans from Trump policy, the bottom line is that — regardless of tinkering or slight differences in description — the policy, if implemented, will ban and/or deny refugees asylum based on

similar factors. Labeling its own planned iteration of this restriction on asylum as a “rebuttable presumption” does not change the reality — and harmful impact — that, like the Trump bans, it will ban refugees from asylum by making them ineligible based on manner of entry and transit through third countries.

The Trump-era entry and transit bans were [repeatedly struck down](#) by federal courts as unlawful. Reinstating a similar policy would, like the Trump transit ban, [result](#) in the return of refugees to harm in the countries they fled, fuel prolonged detention in the United States, cause family separations and deprive refugees barred from asylum by the ban of a path to citizenship and stability when they are left only with the limited protection of withholding of removal. A resurrected asylum ban will also add to inefficiencies and delays in asylum determinations, as adjudications of this additional requirement will require additional evidentiary submissions, as well as additional factual and legal assessments.

The Biden administration should adjust course immediately, abandon its misguided plan to initiate rulemaking to ban and deny asylum to refugees, and end its deeply damaging attempts to misuse safe pathways to refuse refugees access to asylum. Proceeding with plans to issue a proposed rule to create an asylum ban would violate President Biden’s [campaign promise](#) to end policies that impose restrictions on asylum for individuals who transit through other countries to reach safety in the United States — and play into the hands of politicians and perpetrators of anti-immigrant fearmongering who are working to force the continuation or enactment into law of Trump administration policies. It would also advance the [agenda](#) of anti-immigrant groups, including the Federation for American Immigration Reform, which was [designated](#) a hate group by the Southern Poverty Law Center and has [praised](#) the Biden administration’s plans to impose an asylum ban as a “good first step.” If the Biden administration were to issue a proposed asylum ban, the step would deepen the stain already inflicted on the administration’s record by its decisions to expand use of Trump policy – including its [October 2022](#) and [January 2023](#) expansions of the use of the Title 42 policy to additional nationalities.

Entry and Transit Asylum Bans are Unlawful

Under 8 U.S.C. §1158(a)(1), “any [noncitizen] **who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including a[]** [noncitizen] who is brought to the United States after having been interdicted in international or United States waters)...**may apply for asylum** in according with this section.” 8 U.S.C. §1158(a)(2) and 8 U.S.C. §1158(b)(2) delineate specific exceptions where an individual would not be eligible for asylum, including where a person was “firmly resettled” in another country or if the United States has a formal “Safe Third Country” return agreement with a country where refugees are both safe from persecution and have access to fair asylum procedures. 8 U.S.C. §1158(d)(5)(B) provides that the administration *may not* issue regulations that are inconsistent with these provisions.

In 2018, the Trump administration created an asylum entry ban to bar asylum for refugees who enter the United States between ports of entry, which was [blocked by](#) a federal court shortly after the

administration published an [interim final rule](#) and [proclamation](#) implementing the policy. The court [concluded](#) that the policy "flout[s] the explicit language" of U.S. asylum law, which provides that people may apply for asylum regardless of manner of entry into the United States. The decision to enjoin the rule was later [upheld](#) by the U.S. Court of Appeals for the Ninth Circuit. In a separate decision in a lawsuit brought by Human Rights First and other organizations, another federal court [vacated](#) the policy, also holding that it is inconsistent with asylum law.

The asylum entry ban also violated U.S. treaty obligations, including Article 31 of the [Refugee Convention](#), which generally prohibits states from imposing penalties on asylum seekers based on manner of entry into the country of refuge. In [amicus briefs](#) submitted in litigation challenging the asylum entry ban, UNHCR emphasized that the ban violates the Refugee Convention and its Protocol because it subverts the right to seek asylum, creates a penalty on unlawful entry that is prohibited by Article 31, and is inconsistent with the principle of non-refoulement as it would risk returning refugees to persecution.

In 2019 and 2020, the Trump administration repeatedly imposed asylum transit bans to bar from asylum protection refugees at the U.S.-Mexico border who had traveled through another country on their way to seek safety and had not applied for asylum in transit countries, subject to limited exceptions. The administration's first iteration of the policy, issued as a 2019 [interim final rule](#), was [vacated](#) and [enjoined](#) by federal courts including in a lawsuit brought by Human Rights First and other organizations. The Trump administration then attempted to revive the asylum transit ban by issuing a [final rule](#) in 2020, which was similarly [enjoined](#) in a holding that the ban likely violated U.S. asylum law. During the year that the policy was in effect, it inflicted horrific harms on refugees, as documented in a June 2020 Human Rights First [report](#) and described below.

As [federal courts](#) that blocked the policy held, the asylum transit ban violated U.S. [law](#), which ensures that asylum seekers can apply for asylum protection regardless of their nationality, travel route, or place of entry or arrival to the United States and delineates specific and limited exceptions to this general rule. Refugees are [barred](#) from asylum based on their travel only if they have "firmly resettled" in another country or if the United States has a formal "Safe Third Country" agreement with another country, as noted above. The asylum transit ban was entirely inconsistent with those statutory provisions.

The Biden administration has explicitly [stated](#) that its potential rule is intended to impose "consequences" on individuals who "circumvent" or do not use other pathways, to "reduce irregular migration," by "disincentivizing" — *i.e.* attempting to deter — people from "attempting to cross without authorization," making clear that the policy is an attempt to inflict improper and illegal penalties on asylum seekers for manner of entry. [Numerous media reports](#) about the administration's recent announcements describe its new policies as a "carrot and stick" approach — dehumanizing and dangerous language to describe punishment inflicted on human beings seeking safety — suggesting that the administration is using this punitive language to frame its policy changes to the press and the public.

DHS's embrace of policies that officials tout as imposing "consequences" and the use of a "stick" on asylum seekers who enter between ports of entry to request protection is further confirmation that these policies violate Article 31's prohibition on penalizing asylum seekers for their manner of entry.

While the Biden administration is trying to [paint](#) its iteration of an asylum ban as “not an asylum ban” and distinct from the Trump administration’s transit ban, it is clear that the Biden administration plan would make many refugees ineligible for asylum due to their transit through other countries, as did the Trump administration transit ban. The Trump administration [banned](#) asylum seekers who did not apply for protection in a country of transit and also asserted that its transit ban included exceptions.

TRUMP'S ASYLUM BAN	vs.	BIDEN'S "NOT AN ASYLUM BAN"
<p><i>An alien who enters or attempts to enter . . . across the southern border after failing to apply for protection in a <u>third country</u> . . . through which the alien transited en route to the United States is ineligible for asylum."</i></p>		<p><i>Individuals who circumvent available, established pathways to lawful migration, and also fail to seek protection in a country through which they traveled . . . will be subject to a rebuttable presumption of asylum ineligibility in the United States."</i></p>

Source: <https://bit.ly/3X8a8rM>

Source: <https://bit.ly/3keELx5>

Harms Inflicted by Asylum Bans

For nearly a year, the Trump administration wielded the third country [transit ban](#), which fueled unlawful returns of refugees to harm and prolonged U.S. detention, as documented in a Human Rights First [report](#). It also resulted in family separations and deprived refugees of a path to citizenship, in cases where they were denied asylum and left only with the inadequate protection of withholding of removal.

During the period that the transit ban was implemented, immigration court asylum denial rates [skyrocketed](#) for many Black, Brown, and Indigenous asylum seekers requesting safety at the southern border. For instance, asylum grant rates declined by 45 percent for Cameroonian asylum applicants, 32.4 percent for Cubans, 29.9 percent for Venezuelans, 17 percent for Eritreans, 12.9 percent for Hondurans, 12 percent for Congolese (DRC), and 7.7 percent for Guatemalans from December 2019 to March 2020,

compared to the year before the third-country transit asylum ban began to affect refugee claims, according to data analyzed by Syracuse University's Transactional Records Access Clearinghouse.¹

In addition to barring refugees from being granted asylum in immigration court proceedings, the Trump administration used the transit ban in tandem with expedited removal to unlawfully rig the credible fear process, blocking asylum seekers from accessing the U.S. asylum system and leading to rapid return to harm without a hearing. Congress has [provided](#) that asylum seekers in expedited removal must have an opportunity to apply for asylum if they establish a credible fear of persecution (*i.e.* a "significant possibility" that they could establish eligibility for asylum in a full hearing). When used in expedited removal, the transit ban resulted in a negative credible fear finding for any asylum seeker barred by the transit ban and forced them to meet a higher screening threshold to be permitted to apply for withholding of removal.

Many expedited removal screenings for asylum seekers impacted by the transit ban were conducted under the Prompt Asylum Claim Review (PACR) [program](#), a fast-track deportation process where Central American asylum seekers underwent fear screenings in [abysmal](#) CBP facilities with severely limited access to attorneys. In a February 2021 [Executive Order](#), the Biden administration ended the PACR program and a similar fast-track deportation program for Mexican asylum seekers (the Humanitarian Asylum Review Program, or HARP).

While the transit ban was in effect, DHS applied the ban in at least [43,000](#) expedited removal screenings. As a result of the administration's use of the transit ban in expedited removal, positive credible fear determination rates [plummeted](#) during Fiscal Year 2020 (through June²) — nearly 50% lower than in the prior year.

Under the asylum transit ban, the U.S. government denied asylum to refugees including persecuted pro-democracy advocates, torture survivors, and people targeted due to their sexual or gender identities. Some were denied all relief and ordered deported to the countries from which they had fled persecution and torture, while others were determined by immigration judges to be refugees under U.S. law but denied asylum and left only with withholding of removal due to the asylum ban. Refugees left only with withholding of removal live under a permanent deportation order, cannot reunite with their families by bringing their spouse or children to safety in the United States, and are deprived of a path to permanent status and citizenship in the United States. Harms inflicted on refugees under the transit ban [include](#):

- **Asylum seekers were denied all relief and ordered deported due to the transit ban**, including a Venezuelan opposition journalist and her one-year-old child; a Cuban asylum seeker who was beaten and subjected to forced labor due to his political activity; a Nicaraguan student activist who had been shot at during a protest against the government, had his home vandalized, and was pursued by the police; a gay Honduran asylum seeker who was threatened and assaulted for his sexual orientation; and a gay Nicaraguan asylum seeker living with HIV who experienced severe abuse and death threats on account of his sexual orientation, HIV status, and political opinion.

¹ Human Rights First assessed the impact of the transit ban from December 2019 due to a [lag](#) in adjudication of affected cases.

² The transit ban was [vacated](#) on June 30, 2020.

Many asylum seekers were summarily ordered deported through expedited removal without an asylum hearing due to the transit ban, including Indigenous asylum seekers fleeing gender-based and other persecution in Guatemala and a Congolese woman who had been beaten by police in her country when she sought information about her husband, who had been jailed and tortured due to his political activity.

- **Many others were recognized as refugees but denied asylum and left only with the limited and deficient protection of withholding of removal**, including a Cameroonian man tortured by the military; an LGBTQ woman from Honduras who was beaten, repeatedly raped, and kidnapped by gangs because of her sexual orientation; a Cuban political activist detained, beaten, and threatened with death for supporting a Cuban opposition movement founded by female relatives of jailed dissidents; and a Venezuelan opposition supporter kidnapped and tortured by pro-government forces.

- **Under the transit ban, refugees were separated from their families who sought protection with them in the United States.** While people who are granted asylum may automatically extend derivative asylum status to their spouses and children who are included in their application, those who are granted withholding of removal or protection under the Convention against Torture (CAT) cannot extend protection to their family. As a result, while the transit ban was in effect, families seeking asylum were at risk of separation unless each family member, including children, met the heightened requirements for withholding or CAT. For instance, four- and eight-year-old Venezuelan [children](#) were denied all relief and ordered removed even though their mother was recognized as a refugee and granted withholding of removal; and an 18-year-old Venezuelan [asylum seeker](#) was denied all relief and separated from her father who had been granted withholding of removal due to kidnappings and beatings for his refusal to work for the Maduro regime.

- **The transit ban also separated other families by barring refugees from petitioning to bring their spouse and children who were outside the country to the United States as derivative asylees, leaving family members stranded in danger with no path to reunification.** Unlike those granted asylum, people granted withholding of removal or protection under CAT cannot petition to bring their immediate relatives to the United States. Refugees denied asylum due to the transit ban and granted withholding of removal faced potentially permanent separation from their spouses and children, including: an Anglophone Cameroonian refugee who was brutally tortured by the Cameroonian military and could not reunify with his wife and child, who were in hiding in Cameroon because of the threats they faced; a Cuban musician and critic of the government who was jailed and beaten and could not petition for his wife and two children who remained in Cuba; and a Venezuelan refugee who fled after being detained and tortured and could not reunify with his three children who lived in Venezuela.

- **In addition to fueling family separation, the transit ban created other inhumane barriers to integration in the United States for refugees barred from asylum and left only with withholding of removal or protection under CAT.** Refugees who received withholding or protection under CAT due to the ban faced long delays in obtaining work authorization, barriers to accessing health care and other support, difficulty obtaining an identification card, threats of deportation by ICE officers, and the uncertainty of remaining in limbo without a path to permanent legal status.
- **The transit ban led to the prolonged jailing of many asylum seekers whom the government perversely claimed posed a flight risk because the ban would potentially render them ineligible for asylum.** For instance, a Cameroonian woman whose father, nephew, uncle, and eight-year-old son were murdered in Cameroon was denied parole due to the transit ban and needlessly detained for more than five months before being recognized as a refugee and granted withholding of removal. Other asylum seekers denied parole due to the transit ban include: a Venezuelan LGBTQ asylum seeker who was detained for four months, a Cuban asylum seeker who was beaten and imprisoned for her political opinion in Cuba and detained by DHS for more than six months, and a Cameroonian woman subject to the transit ban who was beaten, arrested, and tortured by the authorities and jailed by DHS for seven months before being granted withholding of removal.

Planned Asylum Ban Cannot be Justified by Migration Pathways

The administration perversely [claims](#) that the planned asylum ban rule will inflict “consequences” on individuals who “circumvent available, established pathways to lawful migration” or “fail to use pathways made available to them.” But this rhetoric perpetuates a false and dangerous narrative. **Seeking asylum is, and has been for decades, a lawful pathway to protection for people seeking refuge at a U.S. port of entry or inside the United States.** Individuals have a [legal right](#) to request asylum regardless of the existence of other migration pathways or how they enter the country, as discussed above.

In its January 5th announcement, the administration established limited programs for migrants from [Cuba](#), [Haiti](#), and [Nicaragua](#) to apply for parole in the United States as well as migrants from [Venezuela](#) who had access to a prior parole initiative created in October 2022. The Biden administration has linked these parole programs to the administration’s expansion of the illegal Title 42 policy to expel nationals from these countries to danger in Mexico if they enter the United States to seek asylum. In October 2022, the administration first expanded use of Title 42 to expel Venezuelans to Mexico — a decision that fueled attacks, kidnappings, and other violence against Venezuelan asylum seekers and migrants, as well as family separation and onward refoolment to persecution in the country they fled, as Human Rights First [documented](#) in a December 2022 report. In November 2022, a federal court [vacated](#) Title 42 for violating U.S. law, but the Supreme Court [paused](#) the decision after a last-minute attempt to intervene in the case by Trump-aligned state attorneys general.

The new parole programs are numerically restricted, require migrants to identify a sponsor in the United States with sufficient income to support them, and include other criteria that make the programs inaccessible to many of the most vulnerable refugees. The Hope Border Institute [concluded](#) that the Venezuelan parole [program](#) implemented in October 2022 that was linked to the expansion of Title 42 “left no path for relief for the people in the most vulnerable situations.” Refugees fleeing [Cuba](#), [Haiti](#), [Nicaragua](#), [Venezuela](#), and other countries face [escalating repression](#), [human rights abuses](#), and [violence](#) including at the hands of authoritarian governments, which the United States has repeatedly [acknowledged](#) and [condemned](#). Many refugees from these countries will be unable to access the limited parole process, nor does any similar process exist for refugees fleeing other countries who also continue to be blocked or expelled under Title 42.³

Migration pathways are not asylum, are not a substitute for asylum, and will in many cases not be realistic or meaningful paths to protection to people urgently fleeing persecution.

At the same time that it announced these new parole programs, the administration stated that it would issue the potential rule as “a complement to these efforts” to impose “consequences” on asylum seekers who do not follow such “pathways to lawful migration.” **The creation of new pathways for migrants to travel to safety in the United States is a welcome step but does not and cannot justify the imposition of asylum bans or other denials of access to asylum.**

New pathways to safety “should never be wielded to deny other people seeking protection access to asylum,” as a group of non-governmental organizations [warned](#) the Department of Homeland Security (DHS) in October 2022 after the Venezuelan parole program and Title 42 expansion were announced.

The U.N. Refugee Agency (UNHCR), the International Organization for Migration, and UNICEF welcomed efforts to provide safe pathways but [warned](#) in the context of the Venezuela program that such pathways “cannot come at the expense of the fundamental human right to seek asylum.” In their statement, these U.N. authorities specifically reminded the United States that: **“Access to safe territory for asylum seekers is a cornerstone of the 1951 Refugee Convention and of international refugee law.** We remain concerned by asylum restrictions that are inconsistent with international law standards...and reiterate the call for their urgent termination.” In response to the January 5th announcement, UNHCR [reiterated](#) that “[s]eeking asylum is a fundamental human right” and welcomed new pathways to safety while condemning the “curtailment” of the “right to seek asylum.”

Following the Biden administration’s announcement, the U.N. High Commissioner for Human Rights warned that the administration’s plans to restrict asylum risk undermining international human rights and refugee law. The High Commissioner specifically [confirmed](#) that “[t]he right to seek asylum is a human right, no matter a person’s origin, immigration status, nor how they arrived at an international border,” and confirmed that “[t]hese measures appear to be at variance with the prohibition of collective expulsion and the principle of non-refoulement.” The High Commissioner for Human Rights also [stated](#): **“While I welcome measures to create and expand safe and regular pathways, such initiatives should not come**

³ The only other country for which the administration has created a similar parole program is [Ukraine](#).

at the expense of fundamental human rights, including the right to seek asylum and the right to an individual assessment of protection needs. Limited access to humanitarian parole for some cannot be a replacement for upholding the rights of all to seek protection of their human rights.”