
Biden Administration’s Proposed Asylum Ban: Illegal, Inhumane, and No Solution

On February 23, 2023, the Biden administration published a [proposed rule](#) that would illegally ban many refugees from seeking asylum in the United States and deprive refugees of the ability to reunite with their families and pursue a path to citizenship. [Members of Congress](#), [human rights advocates](#), [faith-based organizations](#), and many others had previously voiced strong opposition to this plan and urged the administration to **not** issue the proposed rule. The proposed asylum ban, which is a new iteration of prior Trump administration asylum bans that were [repeatedly struck down](#) by federal courts, would unlawfully make refugees ineligible for asylum based on manner of entry into the United States and transit through a third country, subject to certain exceptions.

In his February 2021 [Executive Order](#), President Biden promised to “restore and strengthen our asylum system, which has been badly damaged by policies enacted over the last four years that contravened our values and caused needless human suffering.” As a candidate, he pledged that his administration would not “[deny\[\] asylum to people fleeing persecution and violence](#)” and would [end restrictions](#) on asylum for those who transit through other countries to reach safety. The proposed rule flies in the face of these promises. It is a blatant attempt to circumvent existing refugee law and treaty obligations and will lead the United States to deport refugees to life-threatening dangers. The administration [plans](#) to impose this asylum ban on May 11, 2023 when the [illegal](#) Title 42 policy is slated to end. The last thing the Biden administration should be doing is advancing the agenda of the former Trump administration and its anti-immigrant and hate group allies — [who have welcomed](#) the asylum ban — by replacing one inhumane Trump-initiated policy with another policy straight from the Trump playbook. That would be a tremendous humanitarian, legal and political mistake.

The Biden administration has provided only 30 days for the public to comment on the proposed rule, effectively denying the public the right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act. This timeframe is insufficient for a sweeping proposed rule that would make asylum seekers ineligible for asylum in violation of U.S. law and deny many access to asylum.

The Biden administration should withdraw this proposed rule and take steps — as Human Rights First and others have [recommended](#) — to uphold refugee law, restore and maximize access to asylum at ports of entry, strengthen capacities to receive and protect refugees in other countries, expand legal pathways to the United States, upgrade asylum processing, and stand up to racist, anti-immigrant fearmongering rather than adopting xenophobic rhetoric and versions of policies that its proponents have pushed.

Overview of Proposed Asylum Ban

The Biden proposed asylum ban would be a combination of a third-country transit ban and an entry ban, a new iteration of [similar bans](#) implemented by the Trump administration. It also attempts to impose new restrictions on the ability of people to seek asylum at ports of entry, codify a nationality-based approach to access to asylum via parole initiatives, and push people to seek asylum in countries that do not meet the U.S. law requirements for safe third countries. While the proposed ban is framed as “temporary,” any period of implementation would result in the illegal return of refugees to harm, and the trajectory of the Title 42 policy confirms that it will likely continue to be used and abused by future administrations as well.

Under the proposed rule, asylum seekers who enter the United States between ports of entry or present themselves at a port of entry without a previously scheduled appointment will be presumed to be ineligible for asylum unless they applied for and were denied protection in a country they traveled through on their way to the United States, subject to certain exceptions. Like the Trump administration's transit ban, this rule would be used to deny refugees asylum as well as to block and rapidly deport refugees without access to asylum hearings through expedited removal.

The proposed rule attempts to make access to asylum for refugees at the southwest border (and only at the southwest border) contingent on CBP One, a [notoriously flawed](#), often inaccessible, routinely oversubscribed, and glitchy smartphone application used to schedule appointments at ports of entry. Many technology and surveillance experts, as well as [Members Of Congress](#), have raised significant privacy concerns with this app as well as bias in the [facial recognition software](#) that misidentifies people of color, particularly Black asylum seekers. The conditioning of access to asylum largely on access to a smartphone app is neither legal nor equitable. The attempt to generally limit access to asylum at ports of entry to those who are able to secure appointments also raises concerns that the system will be used for [illegal metering](#) (based not on wait time but on luck, technology skills, or resources to secure an appointment — turning asylum access in effect into a lottery).

Trump Asylum Bans Repeatedly Struck Down as Unlawful, Inflicted Massive Harms

The Trump administration promulgated entry and third-country transit bans to block and deny refugees asylum in the United States. Federal courts repeatedly vacated and enjoined these bans for violating U.S. law. The Trump entry ban, which barred asylum for refugees who entered the United States between ports of entry, was [enjoined](#) because it "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 — and later [vacated](#) by another court that also found the ban is inconsistent with U.S. law.

The transit ban, which barred asylum for refugees at the border who had traveled through another country on their way to seek safety and had not applied for asylum in a transit country, was similarly [vacated and enjoined](#) by federal courts for violating U.S. law. Human Rights First issued a [report](#) in July 2020 documenting the harms inflicted by the transit ban during the year that it was in effect. These harms included unlawful returns of refugees to danger, prolonged U.S. detention, family separation, and deprivation of a pathway to citizenship for refugees.

The Biden asylum ban, which has been [proposed](#) to replace the Trump entry and transit bans and described by U.S. agencies as a "tailored" approach, similarly violates U.S. law. Legal organizations, including those that successfully challenged the Trump asylum bans in federal court, have [already indicated](#) that they will file legal challenges to the Biden asylum ban if the administration moves forward with the policy.

Biden Proposed Asylum Ban Violates U.S. Law and Treaty Obligations

The proposed asylum ban contravenes the U.S. asylum statute, which has clear provisions regarding access to asylum that prohibit imposition of entry and third-country transit asylum bans.

8 U.S.C. 1158(a)(1) provides that people seeking refugee protection may apply for asylum regardless of manner of entry. The proposed asylum ban would unlawfully bar people from asylum based on their entry into the United States by generally making ineligible for asylum people who enter between ports of entry or arrive at ports of entry without a previously scheduled appointment.

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. Barring asylum seekers based on transit through a third country is inconsistent with these provisions and violates U.S. law, as federal courts [have held](#) when enjoining the Trump asylum transit ban.

The proposed rule also runs afoul of U.S. treaty obligations. It will lead to refoulement of refugees to persecution and torture in violation of the [Refugee Convention and Protocol](#) and the Convention against Torture. It also violates the Refugee Convention’s prohibition against imposing improper penalties on people seeking refugee protection based on manner of entry. By blocking access to asylum at the border and conditioning access on manner of entry or transit, the proposed rule contravenes longstanding U.S. commitments to refugees. The right to seek asylum is enshrined in the [Universal Declaration of Human Rights](#). The U.N. Refugee Agency (UNHCR) has [confirmed](#) that States may not “condition access to asylum procedures on regular entry” under the Refugee Convention and Protocol. The proposed rule’s goal of imposing penalties on asylum seekers — described as “[consequences](#)” or a “stick” in dehumanizing “[carrot and stick](#)” framing — and its improper use of safe pathways to attempt to justify denials of access to asylum, threaten to subvert refugee law, the [Los Angeles Declaration](#), and the refugee protection system globally.

The Asylum Ban Will Fuel Race- and Nationality-Based Discrimination

The proposed asylum ban, which applies only to people who seek protection at the border, will have a disparate impact, favoring wealthy and white immigrants who can procure visas and arrive by plane. It is inequitable and inhumane to implement one set of rules for people at the southwest border and a different set of rules for people who are able to reach the United States on planes.

The United States and other countries employ [visa regimes](#) to prevent people from reaching their countries’ territories to seek asylum while often allowing access to people from wealthier and predominantly white nations. Imposing a ban on refugees seeking safety at the southwest border will, like the Trump third-country transit ban, disproportionately harm people of color and those who do not have the resources or ability to arrive in the United States by plane. This proposed asylum ban will significantly undermine the Biden administration’s stated [commitment](#) to racial justice and equity.

The ban also builds in nationality-based discrimination in access to asylum, as it largely bans asylum for people who do not enter the United States via limited parole initiatives or previously scheduled appointments at ports of entry while simultaneously only affording limited access to parole initiatives for certain nationalities. For instance, while there are currently limited parole initiatives for some nationalities, there are no similar parole initiatives for people from Guatemala, Honduras, and El Salvador — and recent [reporting](#) has indicated the Biden administration plans to wield the asylum ban against these nationalities.

If implemented, the proposed asylum ban will inflict [grave harms](#) on Black, Brown and Indigenous asylum seekers, as well as LGBTQ+ asylum seekers. While the Trump asylum transit ban was in effect, immigration court asylum denial rates [skyrocketed](#) for many Black, Brown, and Indigenous asylum seekers requesting safety at the southwest border. Those barred from asylum due to the Trump transit ban and ordered deported to danger [include](#) Indigenous asylum seekers fleeing gender-based and other persecution in Guatemala, a Congolese woman

who had been beaten by police in her country, a gay Honduran asylum seeker who was threatened and assaulted for his sexual orientation, and a Venezuelan opposition journalist and her one-year-old child.

Exceptions Won't Mitigate Illegality of the Rule or Prevent Return of Refugees to Harm

The asylum ban provides limited exceptions, including where an asylum seeker can show that at the time they entered the United States, they or a family member faced an acute medical emergency, an imminent or extreme threat to life or safety, or were a “victim of a severe form of trafficking in persons.”

Barring asylum based on manner of entry or transit is unlawful and cannot be made lawful by providing exceptions. Moreover, while the rule includes exceptions on paper, in practice such exceptions will prove difficult to satisfy and will not prevent immigration officers from using the rule to deny asylum and return to danger refugees who qualify for asylum under U.S. law. Exceptions to the rule are limited to “exceptionally compelling circumstances” and impose restrictive language such as requiring a medical emergency to be “acute” and a threat to life or safety to be “imminent and extreme,” which will result in asylum seekers barred from protection even where they can establish that they fled serious dangers.

Additionally, requiring adjudicators to impose the rule will be counterproductive and inefficient. Like round after round of barriers to asylum imposed over the years, it will add to the complexity and length of asylum adjudications, exacerbating delays and backlogs.

Use of Asylum Ban in Flawed Expedited Removal Will be a Due Process Fiasco

The proposed rule provides that the asylum ban would be imposed in expedited removal, which would lead to the rapid deportation of asylum seekers who are unable, in this fraught, due process deficient process, to prove to asylum officers during their credible fear interview that they meet requirements that have no basis in U.S. law and are irrelevant to their fears of return. Like the Trump transit ban, the proposed rule attempts to unlawfully heighten the credible fear [standard](#) established by Congress, which was [intended](#) to be a low screening threshold.

The use of expedited removal, particularly in detention, is already a [due process nightmare](#) and leads to many erroneous negative credible fear determinations, preventing asylum seekers from applying for asylum. Due process violations in expedited removal that prevent asylum seekers from fairly presenting their claims include failures by officers to interview asylum seekers in the correct language, cursory or hostile interviews, lack of access to legal representation, and [horrendous conditions](#) of confinement.

[Reports](#) have also indicated that the Biden administration will conduct credible fear interviews in Customs and Border Protection (CBP) custody, in essence a resurrection of the flawed Trump-era Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) programs that the Biden administration rightly [ended](#) and should not revive. Asylum seekers jailed in CBP custody have [severely limited access](#) to attorneys and face [abysmal conditions including](#) insufficient or inedible food and water; lack of access to showers and other basic hygiene; and inability to sleep because of overcrowding, lack of adequate bedding, and cold conditions. As a result, positive credible fear determinations [plummeted](#) under the Trump administration’s PACR and HARP programs as many asylum seekers were deported without a hearing. Imposing the Biden proposed asylum ban and carrying out credible fear interviews in CBP custody would be a similar due process fiasco.

It would be nearly impossible for many asylum seekers to establish during their credible fear interviews that they should not be barred under the asylum ban. For instance, asylum seekers who arrive at a U.S. port of entry without a previously scheduled appointment are covered by the ban unless they can show they could not access

or use CBP One due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. Given that CBP confiscates asylum seekers' phones while they are jailed — and some asylum seekers do not have smart phones and may have borrowed another phone to try to make the appointment — it would not be feasible to prove that they encountered technological or other problems with CBP One.

Similarly, asylum seekers who are jailed and whose property has been confiscated would likely be unable to provide evidence that they faced an imminent threat to their life or qualify for another exception. In the past, asylum officer assessments regarding fear of persecution in Mexico in the context of the Remain in Mexico policy had [disastrous results](#), leading to returns to Mexico for many individuals who had suffered horrific harms and faced persecution or torture upon their return. Conducting these assessments in credible fear interviews will result in the deportation of many refugees to harm including those who should have qualified for an exception.

Family Separation and Deprivation of a Pathway to Citizenship

While the rule includes exceptions to promote family unity for asylum-seeking families who have traveled to the United States together, it would result in separation of other families including for refugees whose spouses and children remain in danger in their country of persecution or in a transit country. Many refugees who flee are unable to travel with their families due to lack of resources, immediate danger, or other circumstances, and would be barred from petitioning for their spouses and children once they have received protection in the United States.

By denying asylum to eligible refugees based on manner of entry or transit, the proposed rule would leave many refugees with the inadequate protection of withholding of removal, which does not allow them to petition for family members or provide for a pathway to citizenship. As a result, the asylum ban would, like the [Trump transit ban](#), leave many refugee families separated and deprive refugees of a path to citizenship. The rule may also, as have other [policies](#) that ban and block people from seeking asylum, spur family separations as families who fear their children will suffer harm in transit countries are faced with the impossible choice of whether to send their children alone to the United States to reach safety.

Circumventing Legal Requirements for Safe Third Country Agreements

The premise of a third-country transit ban is that asylum seekers should apply for asylum in countries they travel through on the way to the United States. In the case of asylum seekers who seek protection at the U.S. southwest border, transit countries would potentially include Mexico, Guatemala, and other countries. U.S. law sets forth clear requirements where a country may be designated through a formal agreement as a safe third country such that asylum seekers in the United States may be denied asylum if they transited through that country and did not seek protection. To qualify as a safe third country, the country must enter into a formal agreement with the United States, guarantee asylum seekers protection from persecution, and provide full and fair procedures for protection claims.

Human Rights First and other groups have extensively documented the [harms](#) inflicted on refugees and migrants in Mexico including by government agents as well as the fact that Mexico [does not meet](#) the U.S. law requirements for a safe third country. Moreover, Mexico has not agreed to a safe third country agreement and has publicly [opposed](#) such an agreement. Similarly, Guatemala is [not a safe place](#) for many refugees and [does not provide access](#) to full and fair procedures for protection claims, nor does it have a formal safe third country agreement with the United States. The proposed rule is an illegal attempt to [circumvent](#) safe third country legal requirements — including by evading law requiring official agreement of impacted countries — and would force people to seek asylum in countries where many would not actually be safe and protected.