Human Rights First

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Analysis of Asylum Provisions in Emergency National Security Supplemental Appropriations Act, 2024

The Emergency National Security Supplemental Appropriations Act, 2024 abandons the presumption that the United States will fairly hear the claims of those seeking safety from persecution and torture. As such, it is inconsistent with our nation's best traditions and breaks our international legal commitments.

The bill would prevent people seeking refuge from making asylum claims by creating a Title 42-like expulsion authority, imposing additional barriers to prevent people from accessing asylum adjudications, and new processes would deny asylum seekers immigration court hearings and federal court review. Beyond the new expulsion authority, the bill would eliminate crucial guardrails in the expedited removal process. The bill also would increase the likelihood that bona fide refugees will be returned to persecution or expelled to violent harm in Mexico.

While this bill will not address the actual problems at the border or in the asylum system – and in fact make it worse – there are effective and humane ways to address challenges at the southwest border and improve the adjudication of humanitarian claims. Human Rights First and other groups have repeatedly shared such recommendations with the Biden administration and Congress. Human Rights First outlines some concerns with provisions of this bill that would impact people seeking asylum.

Eliminates Crucial Safeguards on Expedited Removal

Section 3302 would eliminate crucial safeguards on expedited removal and, by erecting new screening barriers, return without asylum hearings people who have significant possibilities of being eligible for asylum to their country of persecution. Expedited Removal already increases the chances of returning individuals to persecution and torture. Indeed, it is already riddled with due process and refugee protection deficiencies that leave people at risk of *refoulement* to persecution, as Human Rights First documented in its report, *Pretense of Protection*.

Dangerously Heightens the Credible Fear Standard in Expedited Removal

Section 3202 would increase the screening standard, turning the Credible Fear Interview into a bar to asylum hearings for people who have a "significant possibility" of asylum eligibility. Current law requires that asylum seekers who have a "significant possibility" of establishing their asylum eligibility are provided with actual asylum hearings. Under Section 3202, asylum seekers would be required to meet a higher standard and demonstrate a "reasonable possibility" of establishing asylum to access an asylum hearing or other full assessment. They will need to prove this within days of being encountered, a difficult task after surviving a traumatizing journey. Asylum seekers are overwhelmingly not represented in these interviews, so they will need to prove their "reasonable possibility" without the benefit of counsel, time to recover or collect evidence, and often while detained.

As a result, asylum seekers who have a significant possibility of establishing asylum eligibility but do not meet the new unduly high standard will be returned to persecution and harm without full consideration of their asylum claim. A similar approach, under the Circumvention of Lawful Pathways Rule, resulted in people being three times as likely to not pass screenings and ordered deported, including political dissidents from China and Venezuela and LGBTQ asylum seekers. The United Nations High Commissioner for Refugees has confirmed that higher screening standards subject refugees to undue risk of return to persecution.

Raising the credible fear standard is not an appropriate way to "weed out" baseless claims. Instead, the change will affect people who have a significant possibility of establishing their asylum eligibility. Moreover, contrary to misleading assertions that most asylum seekers are not eligible for asylum, Immigration Courts grant relief to the majority of individuals who receive a positive credible fear determination (under the existing "significant possibility" standard).

Applies Complex Bars in Credible Fear Screenings

Section 3302 would also require credible fear screening interviews to include assessment as to whether a series of legally and factually complex exceptions, often referred to as bars, apply to asylum. Many of these bars are notoriously complicated and require the submission of detailed country-specific data, other factual information, and legal representation and analysis that are incompatible with and often impossible in the context of credible fear screening interviews. Section 3302 would also add an internal relocation bar (currently addressed in regulations) to the list of statutory bars.

These interviews typically take place within days of arrival, and long before asylum seekers have any realistic chance of obtaining legal representation. Asylum seekers in these impossible situations who cannot prove they would overcome these bars could face return to their country of persecution as an Asylum Officer would now have the discretion to deny access to asylum on these grounds.

The New "Shut Down" Expulsion Authority

Section 3301 would create an expulsion authority similar to the Trump-initiated Title 42 expulsion policy. The authority would allow the Secretary of Homeland Security to summarily expel people without asylum screening when encounter numbers, which include individuals entering through a pre-approved process at ports of entry, meet certain specified levels. A seven-day average of 5,000 encounters, or a single day of 8,500 encounters, triggers mandatory expulsions. An administration could also choose to exercise the authority when encounters reach a seven-day average of 4,000. Once triggered, the expulsion authority would lift only after seven days of 75% or less of the number of encounters that triggered the authority, but during the first year, the authority must be in effect for at least 90 days after being triggered. The expulsion authority is dubbed an "emergency" authority and appears to be labeled as "summary removal," though it lacks the minimal safeguards of expedited removal or its "consequences."

Human Rights First's concerns about the new expulsion authority include:

- **The new expulsion process, like the Title 42 expulsion authority, would be a human rights and migration management failure** that would spur irregular and repeat entries, family separations, and massive human rights abuses – impacts Human Rights First has documented in a series of reports. We tracked over 13,000 reports of torture, kidnapping, and brutal attacks against asylum seekers and migrants impacted by the Title 42 policy, as well as reports of attacks on 1,308 individuals stranded in Mexico since the asylum ban took effect in mid-May 2023.

- **The expulsion process fails to provide an asylum exception and would potentially expel people eligible for asylum** who have a significant possibility of establishing their eligibility. The exception relating to fear of persecution or torture included in the bill is deficient, as it would fail to adequately protect people with well-founded fears of persecution from expulsion to persecution or torture. That exception is limited to a person "who manifests a fear of persecution or torture" with respect to the country to which they will be expelled *and* who must demonstrate during a screening interview with an asylum officer that they have a "reasonable possibility" of persecution or torture. The new higher "reasonable possibility" screening barrier risks *refoulement* of refugees as outlined above. The bill fails to provide for prompt review by an immigration judge of a negative fear decision – a critical safeguard included in expedited removal screenings – and instead limits review to a supervisory asylum officer.

- **The confusing language referring to a person who "manifests" fear raises alarms** given the importance of using the critical safeguard, long required in expedited removal, of asking people if they have a fear of return to properly identify who should be referred to required fear screening interviews. Research conducted by the U.S. Commission on International Religious Freedom and by the Center for Gender and Refugee Studies confirms that failure to use this safeguard leads to the failure to refer people who express a fear of return to required fear screening interviews. Asking this question in a language the person understands is necessary because many people who fear persecution or torture do not speak English and may not know they can raise their need for protection in these settings. They should not be required to spontaneously "manifest" their fear. Facetiously known as the "shout test," this sham approach leads to massive failure in properly identifying at-risk people in need of protection screening.

- **A punitive approach inflicts suffering, not deterrence**. Section 3301 indicates that a one-year "admissibility" bar will be imposed on people who are expelled two or more times. Such punitive consequences, like the Biden administration's asylum ban and other attempts to ban and bar people seeking protection, will inflict human suffering but will not deter people from seeking life-saving refuge. Indeed, extensive research on the asylum ban confirms that people seeking asylum are largely unaware of or do not understand such bans and bars.

- **The bill paves the way for the creation of a new normal and the continuation of expulsion authority**. Numerical limits allow the "emergency" expulsion authority to be in place for major portions of the next three years. Indeed, the trajectory of the Title 42 policy makes clear that once such an expulsion authority is initiated, there will be repeated attempts – including via legislation or court action -- to keep it in place.

Due Process Deficiencies Plague New Asylum Process

Sections 3141 and 3132 create a new USCIS-only processing pathway that mirrors elements of the Asylum Processing Interim Final Rule and the Family Expedited Removal Management process. The proposed process involves: 1) protection determination interviews, similar to Credible Fear Interviews, 2) protection merits interviews, similar to Asylum Merits Interviews, 3) requests for reconsideration to the Director of USCIS, and 4) requests for review by a newly created Protection Appellate Board, comprising a panel of Asylum Officers. Sections 3141 and 3142 eliminate any review of the newly established protection determinations and protection merits decisions by Immigration Judges, the Board of Immigration Appeals, or the federal circuit courts of appeals (with the extremely limited exception of federal court review over constitutional claims).

Protection Determination Interviews **(Section 3141).** If subject to the new processing authority, an individual would receive a notice of removal proceedings and a protection determination interview within 90 days of being referred for noncustodial provisional removal proceedings. If the individual establishes a "reasonable possibility" of establishing a claim for protection, they would move forward to a protection merits removal proceeding before an Asylum Officer. If an individual receives a negative protection determination, they could request review within 5 days by the Director of USCIS. If the Director denies the request, the individual could also request review by the Protection Appellate Board. If the Protection Appellate Board affirms a negative protection determination, the individual would be ordered removed. In addition, the bill would allow the Asylum Officer to actually grant asylum or other protection if the evidence of eligibility is "clear and convincing" (a high standard), subject to a Supervisor's review.

Protection Merits Removal Proceedings **(Section 3412).** If an individual receives a positive protection determination or is not provided a protection determination interview within 90 days of being referred for noncustodial provisional removal proceedings, they will receive a protection merits interview where an Asylum Officer will make a protection merits decision on their claims. If positive, the Asylum Office will grant the individual's application for protection. If negative, the individual can submit a request for reconsideration to the Director of USCIS within 5 days. If the Director denies the request, the individual can request review by the Protection Appellate Board. If the PAB affirms the negative protection merits decision, the individual would be ordered removed.

Human Rights First has documented a range of problems in the asylum system, and in the AMI and FERM processes, that appear to have inspired this proposed new system.

Specific elements of this proposed system raise a number of concerns:

- **Eliminates access to Immigration Court hearings and the Board of Immigration Appeals (BIA) appeals.** Immigration Court hearings have saved many lives by granting asylum in cases that USCIS asylum officers initially did not recognize, as USCIS frequently fails to grant eligible asylum cases. In the new process, USCIS would have sole responsibility for conducting screenings, "removal hearings," and "appeals."

- **Deprives asylum seekers of access to federal court review,** which is critical to oversight of flawed agency decision-making and has saved the lives of political dissidents, victims of religious persecution, women targeted for gender-based persecution, and LGBTQ refugees. Human Rights First has documented

examples of the vital role judicial review plays in saving from return to persecution refugees who qualify for protection under our laws, including:

- a Russian dissident associated with Alexei Navalny's Anti-Corruption Foundation who was clearly persecuted for political opinion,
- a gay man who suffered brutal persecution in Serbia and was then denied protection by an Immigration Judge who, stereotyping, said he did "not appear to be overtly gay," and
- a man who converted to Christianity in Iran, where apostasy is punishable by death.

Federal court review also ensures that refugees are protected despite patterns of faulty legal and factual analysis in agency decision-making and appeals. Absent judicial review, the PAB will develop its own set of precedents regarding the application of immigration laws that may diverge from the law of the relevant federal courts of appeals. An entirely in-house USCIS adjudication process, from Asylum Officer, to Director, and then the Protection Appellate Board, will create decisions insulated from judicial review and perhaps significantly diverge from the otherwise controlling law of the federal courts of appeals. Asylum seekers with identical claims could receive starkly different outcomes depending on which processing authority DHS chooses to use.

- **Draconian timelines would thwart access to legal counsel, evidence, and appeals.** The bill aims for the entire process, from notice to removal, to take place within 90 days – and sets unrealistic deadlines of 5 days for requesting reconsideration and 7 days for filing for appeal by the Protection Appellate Board. Fewer than three percent of asylum seekers in a similar program were able to secure legal representation, including on account of these timelines. The lack of independent oversight and unworkable timelines would essentially rig the system against asylum applicants.

Drastic Escalation of Detention

The bill dramatically increases funding for Immigration and Customs Enforcement and Customs and Border Patrol detention. Human Rights First documented the harms individuals are subject to in detention, including the significant obstacles that detention poses to access to counsel which is crucial to gathering evidence and making legal arguments necessary to prove asylum eligibility. Detention is cruel, inhumane, and unnecessary because the vast majority of people seeking asylum not in detention appear for their hearings. In FY 2023, 99.5 percent of all people whose asylum cases were decided by immigration judges appeared for their hearings.