

Congress Should Prohibit Biden Administration Asylum Rule

THE ISSUE

The Biden Administration has published a sweeping interim final rule (IFR), “[Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers](#),” for recent land arrivals at our borders. This rule is the tool the Administration will use to process and rapidly provide asylum status without proper review for the historic numbers of illegal encounters at our southern border that have been ushered in by the Biden Administration’s open-border policies. Congress should prohibit the rule and significantly reform the credible fear and asylum statutes to prevent and punish fraud, provide efficient benefit adjudication, and end process abuse.

BACKGROUND

This rule usurps congressional authority, removes asylum integrity measures, and adds inefficiency between the Departments of Justice (DOJ) and Homeland Security (DHS).

Under current law, when aliens encountered at a port of entry claim that they fear returning to their home country, that claim begins a statutorily prescribed “credible fear” process between both DHS and DOJ. A DHS asylum officer first conducts a credible fear interview to determine whether an alien’s claim is valid and should proceed before a DOJ immigration judge. In the case of a positive determination, the alien has the burden to file an asylum application for an immigration court to consider. A negative determination may also be reviewed and reversed by an immigration judge

if requested by the alien; otherwise, the alien will be ordered removed.

Rule Usurps Congress’s Authority. It is unclear how DHS and DOJ, without express congressional action, can simply swap roles and unilaterally determine which department should have original jurisdiction over which part of the process. When Congress created DHS, it ensured that certain functions were either fully transferred to DHS or retained in the existing DOJ framework. Congress [transferred](#) (affirmative) asylum adjudications to DHS. Congress also made clear that the [Attorney General](#) shall have such authorities and functions as were exercised by DOJ prior to DHS’s creation. The former Immigration and Naturalization Service did not have original jurisdiction over asylum applications stemming from positive credible fear determinations, nor did it have the choice to retain jurisdiction at its discretion. That jurisdiction was vested with the DOJ immigration judge corps and, accordingly, cannot now be amended by regulation. The statute is neither silent nor ambiguous.

Rule Removes Asylum Integrity Measures. The IFR also removes key anti-fraud and judicial norms by eliminating the adversarial process from the asylum application process. Under the IFR, a positive credible fear determination will lead to a non-adversarial asylum interview before an asylum officer. Asylum officers who find aliens eligible for a form of protection less than full-fledged asylum will still have to refer the matter to immigration judges who may relitigate the entire case. The burden to file a complete application in a timely

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manner would shift to the government. The alien can simply rely on the first-made claims, changing or including relevant details in the court proceeding but without having to file an application. While this, in and of itself, does not ensure a positive result, it certainly provides a path for fraud. It also renders the one-year filing requirement, an anti-fraud measure, moot and accelerates the alien's receipt of a work authorization.

One of the many benefits of having aliens file asylum applications following a credible fear determination is that it allows DHS to look for inconsistencies in the claim and, if necessary, use it in a fraud investigation. It is well documented that many aliens seeking a credible fear interview have been coached, and later inconsistencies are critical in distinguishing a valid claim from a frivolous one. Under the IFR's structure, the record of the interview serves as the underlying application, so the alien no longer has to provide a written recollection of the claim. This places the trier of fact, the asylum officer, in a very weak position.

The true premise of this IFR—that almost all aliens seeking asylum are eligible—becomes clear in the DOJ language. Specifically, it anticipates that DHS either will not oppose or otherwise will simply not participate (or even appear) at a merits hearing on the claim. DHS and DOJ interpret the immigration laws to limit ICE's participation in the process so that more aliens can simply derive asylum benefits faster—but at the cost of integrity measures that have been a cornerstone of our immigration system.

Rule Makes Asylum Process Less Efficient. Finally, the IFR's duplicity will reduce efficiency in both DHS and DOJ. DOJ's most recent statistics show a pending caseload of 1,503,931 cases. Of that pending caseload, only 238,042 cases originated from credible fear referrals. This is less than 16 percent of the total immigration court docket, so removing this portion of the caseload will not make a significant difference in eliminating the backlog.

Additionally, any efficiency argument is belied by the increased strain placed on immigration judges who must hear the referred cases and be able to compile a record without the normal application in which all information is contained. Instead, the immigration judge must hope that the credible fear packet and the affirmative asylum referral are sufficiently thorough. That a transcript of the credible fear interview is available is certainly helpful substantively but will do nothing for efficiency.

DHS will see significant increases in its already staggering backlog from this rule. USCIS reports that it has 8,407,773 cases pending before the agency. This includes 432,341 applications for asylum and well over 1.5 million applications for employment authorization. The number of these applications should be expected to increase exponentially if this proposed rule is implemented. While the IFR estimates only a marginal increase of cases annually, the departments fail to address the increasing numbers of apprehensions along the border and further fail to estimate the additional number of aliens who may be enticed by this rule to come here illegally. This IFR will continue to slow USCIS adjudications and cause aliens awaiting adjudication of all benefit types to wait even longer for resolution.

CONCLUSION

Congress, pursuant to the Congressional Review Act, should enact a joint resolution of disapproval, thereby prohibiting DHS and DOJ from implementing this IFR. In addition, Congress should withhold all appropriations deemed necessary to implement this IFR.