

Congress Should Prohibit Biden Administration's Asylum Rule

Joseph Edlow

KEY TAKEAWAYS

The Biden Administration is using a new asylum rule to provide mass legalization for illegal aliens entering the U.S. along the Southwest border.

This rule bypasses Congress to dismantle integrity and efficiency procedures. It will exacerbate chaos at the border and increase asylum fraud.

Congress should invalidate the rule using the Congressional Review Act and take control of the border through a series of oversight and legislative measures.

In its move to “remove barriers” for those seeking immigration benefits, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) are misusing their new sweeping Interim Final Rule (IFR)—“Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers”¹—for recent land arrivals at U.S. borders. This major regulatory action is one of the Administration’s new tools to begin mass legalization of the staggering numbers of individuals pouring into the country illegally along the southern border each month, with 239,416 encounters in May.

This unilateral action unapologetically usurps congressional authority, removes integrity measures designed to prevent fraud, and provides a less-than-thinly veiled cover to make the asylum process

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susceptible to frivolous claims. The efficiency of the current process is also undermined by the needless duplicity of the IFR.

While this regulation alone will bring further chaos into the current crisis at the southern border, it is being implemented just as DHS announced its intention to dismiss many, if not most, cases from the immigration court dockets, and as the Administration prepared to terminate Title 42 authority that allowed DHS to quickly expel illegal aliens as a public health measure during the COVID-19 pandemic. Only a court order prevented Title 42 authority from being terminated.

Aliens Claiming Fear at the Border

Generally, under current law, when aliens at the border who have no documents or permission to enter the U.S. claim fear of returning to their country of origin, the statutorily proscribed “expedited removal” process provides aliens the chance to present those claims, in which both DHS and the DOJ play a role. The process begins with a “credible fear” interview in which a DHS asylum officer determines whether an alien’s claim is valid and can proceed before a DOJ immigration judge. In the case of a positive determination, the alien has the burden of filing an asylum application with an immigration court for its consideration. A negative credible fear determination may also be reviewed and reversed by an immigration judge if requested by the alien; otherwise, the alien will be ordered removed.

The two departments have seemingly reimaged this process through the IFR and misinterpreted the governing statutes. Under the new process, a positive credible fear determination by a DHS asylum officer will lead to a non-adversarial asylum interview with another DHS asylum officer. Asylum officers who find an alien eligible for a form of protection lesser than full-fledged asylum, such as statutory withholding of removal² or protection under the Convention Against Torture (CAT),³ must still refer the matter to a DOJ immigration judge who may consider the entire case. That is hardly streamlining the process.

As the written summary of the original credible fear interview doubles as an alien’s asylum application, the requirement that an alien file an asylum application is, in essence, negated, along with the burden of preparing and presenting a meritorious claim for protection. Aliens may rely on first-made claims of their story, changing or including relevant details in advance of the asylum interview or court proceeding, but without having to affirmatively file an application. While this, in and of itself, does not ensure an asylum grant, it certainly provides a path for fraud. It also renders a key anti-asylum fraud measure moot.

In 1996, Congress created the one-year asylum application requirement as part of the Illegal Immigration Reform and Immigrant Responsibility Act. If an alien is truly fleeing for fear of his or her life, he or she would request protection within one year of arriving in the U.S. Barring changed circumstances in the home country, which the one-year filing rule excepts, requesting asylum protection years after arriving here is a strong fraud indicator. The Biden Administration's new rule is a work-around of the one-year filing requirement. By making the credible fear interview the de facto asylum application, not only do aliens not have to worry about the one-year deadline, but they also receive work authorization faster than the statutory credible fear asylum process. These benefits are a magnet for illegal immigration and asylum fraud.

An Impermissible Change of Jurisdiction

Preliminarily, DHS and the DOJ cannot, without express congressional action, simply swap roles and unilaterally designate which department and agency has original jurisdiction over which part of the process. When Congress created DHS, it relied on historical context in its assignment of jurisdiction. In doing so, there was tacit acknowledgment that the immigration courts and other immigration functions, while both previously housed in the DOJ, were viewed separately.⁴ Section 451 of the Homeland Security Act (HSA)⁵ established the Bureau of Citizenship and Immigration Services and transferred from the DOJ the “adjudications of [affirmative] asylum and refugee applications” to it.⁶

Separately, the HSA cemented the DOJ's Executive Office for Immigration Review (EOIR)⁷ jurisdiction. One such provision, codified in the Immigration and Nationality Act,⁸ states:

(1) In general. – The Attorney General shall have such authorities and functions under this Act and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.⁹

Congress was clear that the Attorney General should continue to retain the authority and jurisdiction exercised by EOIR prior to the HSA's enactment. The former Immigration and Naturalization Service (INS) did not have original jurisdiction over asylum applications stemming from positive credible fear determinations, nor did it have the option to retain jurisdiction

in its discretion. Sole jurisdiction was vested within the EOIR and exercised by duly authorized immigration judges.

As the INS did not exercise such authority, and no such functions were specifically transferred to U.S. Citizenship and Immigration Services (USCIS), the regulation cannot now amend those functions. The statute is clear that such quasi-judicial functions would remain with the EOIR. The statute is neither silent nor ambiguous and, accordingly, there is no latitude for agency interpretation.

A Recipe for Fraud

Apart from flawed statutory interpretations, the IFR signals a departure from the adversarial process associated with much of the asylum process that is intended to verify the validity of asylum claims. Beginning with the critical procedural step of filing of the asylum application, DHS's integrity measures to identify fraud are removed. One benefit of aliens filing asylum applications following a credible fear determination is to allow DHS to look for inconsistencies in the claim and, if necessary, use it in a fraud investigation.

As many aliens seeking a credible fear interview could be coached prior to the interview, subsequent inconsistencies are critical in distinguishing a valid claim from a frivolous one. Under the IFR's structure, the record of the initial interview serves as the underlying application, so an alien must no longer provide a written recollection of the claim. This places the trier of fact—the asylum officer—under the IFR, in a very weak position. Unless the alien decides to provide more information, the asylum officer must rely on essentially what was presented during the credible fear interview.

While asylum officers are expected to elicit all relevant information, the inclusion of language in the IFR mandating that it be done in a non-adversarial manner is confusing and may deter comprehensive examinations. Asylum interviews are always non-adversarial in the sense that there is no formal cross-examination and no opposing side, such as a government attorney. The language is superfluous if describing a typical asylum interview. While this "expectation" may just be lip service, without an immigration judge or government attorney present, there can be no confidence that the asylum officers, already facing undue time constraints for hearing many claims, will thoroughly probe the claims. DHS must issue relevant guidance for its adjudicators about interview management and conduct so that the efficacy of the interviews can be assessed later. Additionally, DHS must provide case completion statistics for the same reason.

Even for those asylum cases placed before immigration judges after asylum officers do not grant asylum, the IFR still anticipates much less than a full or standard adversarial process. Specifically, the IFR sets unrealistic deadlines for status conferences and individual hearings, especially when compared with current court docketing procedures and backlogs. These arbitrary deadlines will put undue pressure on immigration judges to conclude these matters quickly, freeing their dockets, and likely using the path of least resistance—a grant of protection without a full and complete hearing. Immigration judges may even be able to grant protection by simply looking at the documents alone.

Additionally, the rule anticipates that DHS prosecutors will either not oppose or will otherwise simply not participate (or even appear) at an individual merits hearing on the claim. While certain Administrations have, through prosecutorial discretion, attempted to limit DHS participation in immigration court, this is a dangerous concept for a regulation.

Essentially, DHS and the DOJ are suggesting that they interpret the immigration laws to limit government “interference” in the process so that more aliens can simply receive benefits faster without a thorough examination of their actual eligibility. Congress has provided for both benefits and protection for aliens, but it is incumbent on DHS to ensure that those benefits are properly obtained and only by aliens considered eligible for such benefits under applicable immigration law. This IFR may ensure that asylum is provided faster, but at the cost of the integrity measures that have been the cornerstone of the U.S. immigration system.

The Rule Increases Inefficiency

Finally, the IFR will increase inefficiency in both DHS and the DOJ immigration court system. The EOIR’s most recent statistics show a pending caseload of more than 1,636,000 cases.¹⁰ Of that caseload, only 236,907 cases originated from credible fear referrals.¹¹ At less than 15 percent of the total immigration court docket, removing a portion of these cases (those that are granted by the asylum officer under the IFR) will not make a significant difference in reducing the pending DOJ caseload.

On the other hand, the IFR will place increased strain on immigration judges who will be forced to hear the referred cases and compile a record without the normal application. Instead of relying on the application, where all information is contained, the immigration judge must hope that the credible fear packet and the affirmative asylum referral prepared by the USCIS asylum officer is sufficiently thorough to make an informed decision. It helps that a transcript of the credible fear interview is available, but it will do nothing for efficiency.

Lastly, the time constraints placed on the court may decrease the DOJ backlog by moving this stream of work to DHS, but other aliens will be adversely affected with long continuances for their cases as immigration judges struggle to meet the new demands this IFR imposes on them.

DHS will likewise experience increased inefficiencies from this IFR. While the EOIR has a large pending caseload, it pales in comparison to the total number of pending cases at the USCIS. Currently, the USCIS reports that it has 8,407,773 cases pending before the agency.¹² This includes 432,341 applications for asylum and well over 1.5 million applications for employment authorization.¹³ These numbers will increase exponentially under this new rule. The IFR estimates only a marginal increase of cases annually, but the departments fail to address the rapidly increasing apprehension numbers along the border and further fail to estimate the number of new aliens who will be enticed by this rule to illegally enter the United States.

The IFR will continue to slow down USCIS adjudications and will place aliens who have been waiting for adjudication for all manner of benefits at the back of the proverbial line while resources are surged to bolster this effort and process this population.

Duplicative vetting by asylum officers for all forms of protection claims, while acknowledging that the asylum officer has no authority to provide the alien with two lesser forms of protection, is the epitome of inefficiency. Assuming for the sake of argument that asylum officers should exercise original jurisdiction over the asylum claim, ineligibility for that form of relief should end the inquiry and immediately lead to a referral to a DOJ immigration judge. Inexplicably, an asylum officer is instead required to conduct further inquiries and then make the referral. The USCIS does not have the resources or the time to spend precious adjudication hours on matters where it has no authority to grant anything.

Ultimately, while the DOJ and DHS tout the benefits and savings that this IFR will bring, the IFR is teeming with inefficiencies and comes with a very high cost to both agencies tasked with implementing it. If fully implemented (implementation has begun), it will bring the bulk of the immigration system, including the USCIS's separate affirmative asylum adjudications caseload, to a halt and increase fraud in the immigration system.

Recommendations for Congress

This IFR is yet another shortsighted move in a series of actions that have aggravated the current crisis at our southern border. Regulatory actions providing ease of process while simultaneously dismantling integrity and

efficiency measures act as additional magnets for illegal immigration. To achieve operational control of the border, the Administration must enforce the existing immigration laws and Congress must use its oversight authority to ensure that the Administration is operating in accordance with those laws.

Specifically, Congress should:

- **Enact a joint resolution of disapproval** pursuant to the Congressional Review Act, thereby prohibiting DHS and the DOJ from implementing this IFR.
- **Conduct oversight of the credible fear process, the U.S. immigration courts, and USCIS** to determine the effects of implementation of the IFR on each and withhold all appropriations deemed necessary to implement it.
- **Conduct oversight on present Administration compliance** with immigration enforcement more generally.
- **Mandate a report on asylum fraud** focusing on fraud trends originating from credible fear claims.
- **Raise the credible fear standard to align it with the standard for asylum eligibility** and add language to instruct asylum officers that credibility is a critical aspect of the initial inquiry.
- **Codify former Attorney General Jeff Sessions’s now-rescinded precedent decision in the *Matter of A-B*-ruling,¹⁴ limiting asylum protection for those who experience harm by non-state actors specifically in the context of gang or domestic violence. Or, in the alternative, amend asylum eligibility grounds to eliminate the ambiguous and amorphous category known as “particular social group.”**
- **Delay issuance of work authorization** until asylum is granted in a case, rather than tying issuance to the mere filing of an application.

Conclusion

As the border crisis continues to worsen, this IFR represents a flagrant disregard for congressional action and statutory construction, and it is a clear departure from the existing law. It is also bad public policy with dire

consequences for the DHS's and the DOJ's ability to administer the U.S. immigration system. Congress must take charge to restore integrity and order and use its authority under the Congressional Review Act to invalidate this dangerous and disastrous regulation.

Joseph Edlow is Visiting Fellow in the Border Security and Immigration Center at The Heritage Foundation.

Endnotes

1. Department of Homeland Security and Department of Justice, "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," Interim Final Rule, *Federal Register*, Vol. 87, No. 60 (March 29, 2022), p. 18078, <https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat> (accessed July 7, 2022). (To be codified at 8 C.F.R. parts 208, 212, 235, 1003, 1208, 1235, and 1240.) CAT stands for Convention Against Torture.
2. Statutory withholding of removal specifies that an alien may not be removed "to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).
3. Following the U.S. ratifying its signing of the Convention Against Torture in 1994, Congress implemented CAT protections in Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 aimed at not effecting the removal of a person who would be subjected to torture upon such removal. See Foreign Affairs Reform and Restructuring Act (FARRA) of 1998, Public Law 105-277, Div. G, Tit. XII, chap. 3, subchap. B, section 2242(a) (1998).
4. The existence of the immigration courts stems from a 1983 rulemaking to "improve the management, direction, and control of the immigration judicial review programs." Department of Justice, "Board of Immigration Appeals; Immigration Review Functions; Editorial Amendments," Final Rule, *Federal Register*, Vol. 48, No. 39 (February 25, 1983), p. 8038. (Codified at 8 C.F.R. parts 1, 3, and 100). In doing so, the quasi-judicial functions previously managed by the U.S. Immigration and Naturalization Service (INS) were reorganized into the newly formed Executive Office for Immigration Review (EOIR) at the DOJ. (See p. 8039.) Specifically, the INS Commissioner was divested of any authority to direct any function transferred to the EOIR. Relevantly, the *Federal Register* noted: "(a) The Attorney General has delegated to the Commissioner, the principal officer of the Immigration and Naturalization Service, authority to direct the administration of the Service and enforce the Act and all other laws relating to immigration and naturalization except the authority delegated to the Executive Officer for Immigration Review, the Board of Immigration Appeals, the Office of the Special Inquiry Officer, or Special Inquiry Officers."
5. Homeland Security Act of 2002, Public Law No. 107-296, 116 Stat. 2135 (2002) at §451(b).
6. *Ibid.*
7. *Ibid.*, § 1101.
8. 8 U.S.C. 1103(g).
9. The Immigration Reform, Accountability and Security Enhancement Act of 2002 (S. 2444, 107th Cong.) was introduced in May 2002 but was never passed. This language was retained for the Homeland Security Act of 2002, Public Law No. 107-296, § 1102, 116 Stat. 2135, 2273-2274 (2002).
10. U.S. Department of Justice, "Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions," April 18, 2022, <https://www.justice.gov/eoir/page/file/1242166/download> (accessed July 7, 2022).
11. U.S. Department of Justice, "Executive Office for Immigration Review Adjudication Statistics: Pending I-862 Proceedings Originating with a Credible Fear Claim and All Pending I-862s," April 18, 2022, <https://www.justice.gov/eoir/page/file/1112996/download> (accessed July 7, 2022).
12. U.S. Citizenship and Immigration Services, "Number of Service-wide Forms by Quarter, Form Status, and Processing Time, October 1, 2021-December 31 2021," February 2022, https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2022_Q1.pdf (accessed July 7, 2022).
13. *Ibid.*
14. U.S. Department of Justice Office of the Attorney General, "Matter of A-B-, Respondent, Decided by Attorney General June 11, 2018," Interim Decision No. 3929, <https://www.justice.gov/eoir/page/file/1070866/download> (accessed July 7, 2022).