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Legal Sidebar

The Biden Administration's June 2024 Proclamation and Rule, *Securing the Border*

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On June 3, 2024, President Biden—pursuant to statutory authorities under 8 U.S.C. § 1182(f), 8 U.S.C. § 1185(a), and 3 U.S.C. § 301—signed a proclamation, "Securing the Border" (Proclamation), that temporarily suspends and limits the entry of aliens at the southern border, with exceptions for U.S. persons, aliens with lawful permission to enter (e.g., visa holders), and other aliens who meet certain criteria. The suspension and limitation on entry went into effect on June 5, 2024. In addition, the Departments of Homeland Security (DHS) and Justice (DOJ) promulgated an interim final rule (IFR) that also went into effect on June 5, 2024, restricting asylum eligibility at the southern border. This Legal Sidebar provides a background on the statutory authorities to limit entry into the United States and to place limitations and conditions on asylum eligibility. The Sidebar also provides a summary and analysis of the June 2024 Proclamation and IFR, comparing the Administration's latest efforts with similar executive actions taken by prior Administrations.

Background

Statutory Authorities Restricting Entry into the United States

Section 1182(f) of Title 8 of the *U.S. Code*—known colloquially as "212(f)" after the corresponding section in the Immigration and Nationality Act (INA)—vests the President with authority "to suspend the entry of all aliens or any class of aliens" whenever the President "finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States." Various presidential Administrations, including the Biden Administration, have invoked this authority in diverse contexts, including the 2017 suspension on the entry of nationals of "eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate" (commonly referred to as the "Travel Ban") and the suspension on entry of certain foreign nationals arriving to the United States by air from specific countries during the COVID-19 pandemic. The Supreme Court has determined that Section 1182(f)'s "plain language" conveys broad authority to the President to suspend the entry of aliens into the United States.

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Section 1185(a) permits restricting the entry of aliens according to "such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." Presidential Administrations regularly invoke authority under Section 1185(a) in conjunction with invoking authority under Section 1182(f). For example, the challenged proclamation in *Trump v. Hawaii* invoked Sections 1185(a) and 1182(f). The Supreme Court has also observed that there is "substantial overlap" between the two provisions.

Asylum and Other Humanitarian Protections

Section 1158(a)(1) governs who may apply for asylum and provides that "[a]ny alien who is physically present in the United States *or who arrives in the United States* (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum." A separate provision concerning eligibility for asylum, 8 U.S.C. § 1158(b)(1)(A), confers discretion to the Secretary of Homeland Security or the Attorney General to "grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by" DHS or DOJ if it is determined that such alien is a refugee. *Refugee* is defined as "any person who is outside any country of such person's nationality and who is unable or unwilling to return to his or her country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

Section 1158 restricts some individuals from applying for or receiving asylum (e.g., those who failed to timely file their applications or who committed certain crimes). Under 8 U.S.C. § 1158(b)(2)(C), the Attorney General or the Secretary of Homeland Security may promulgate regulations "establish[ing] additional limitations and conditions, *consistent with* [8 U.S.C. § 1158], under which an alien shall be ineligible for asylum" (emphasis added). Section 1158(d)(5)(B) also allows the Attorney General or Secretary of Homeland Security to promulgate regulations "for any other conditions or limitations on the consideration of an application for asylum not inconsistent with" the INA.

An applicant may also pursue alternative forms of protection from removal. These include withholding of removal, which has a higher burden of proof than asylum and requires the alien to prove that it is more likely than not he or she will be persecuted on account of one of the five statutorily enumerated grounds. An alien may also seek protection under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), which requires evidence that it is more likely than not that the alien will be tortured if removed to his or her home country by a public official or other person acting with the consent or acquiescence of public officials. Unlike asylum, withholding of removal and CAT protection are mandatory forms of protection and may not be denied as a matter of discretion. Additionally, a grant of withholding or CAT protection provides no path to legal permanent resident status and only prevents removal to the country where the alien fears either persecution or torture (but not necessarily to a third country).

The Proclamation and Interim Final Rule, *Securing the Border*

President Biden's Proclamation

Proclamation 10773, effective on June 5, 2024, suspends and limits the entry of "any noncitizen into the United States across the southern border," with specified exemptions. The Proclamation broadly exempts U.S. nationals, lawful permanent residents, and aliens with lawful permission to enter (i.e., aliens with valid visas or "other lawful permission" to enter). The Proclamation also includes exemptions for certain

aliens who lack advance permission to enter: unaccompanied alien children, victims of a severe form of trafficking in persons, aliens who present at ports of entry (POEs) pursuant to pre-scheduled times and places, aliens who are permitted to enter by Customs and Border Protection (CBP) immigration officers "based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, urgent humanitarian, and public health interests," and aliens permitted to enter "due to operational considerations at the time of entry or encounter." The Proclamation authorizes the Secretary of Homeland Security and the Attorney General to issue instructions, orders, and regulations to implement the Proclamation.

The restrictions on entry will remain in effect until the Secretary of Homeland Security determines that there has been a seven-consecutive-calendar-day average of less than 1,500 encounters. The suspension and limitation on entry may resume if "the Secretary has made a factual determination that there has been a [seven]-consecutive-calendar-day average of 2,500 encounters or more." The Proclamation uses the term *encounter* to refer to aliens who lack legal authorization to enter the United States who come into contact with immigration authorities at or in the vicinity of the U.S.-Mexico border. Specifically, the term covers (1) an alien either physically apprehended by CBP officers within 100 miles of the U.S. southwest land border within 14 days after his or her entry between POEs, (2) an alien physically apprehended at the southern coastal waters by DHS personnel within 14 days of entry between POEs, or (3) an alien determined to be inadmissible at a southwest land POE. Of note, encounters with aliens found to be inadmissible at POEs are not included in determining the average number of encounters for purposes of the Proclamation.

The Interim Final Rule

DHS and DOJ jointly promulgated an IFR "to respond to the emergency border circumstances discussed in the Proclamation," including addressing any limitations and conditions on asylum eligibility. The IFR, which went into effect on June 5, 2024, describes "emergency border circumstances" as the period lasting from the starting date of the Proclamation's entry limitations (June 5, 2024) until either the discontinuation date (i.e., the date that is 14 calendar days after the Secretary of Homeland Security determines that there has been a seven-day average of less than 1,500 encounters) *or* the date the President revokes the Proclamation (whichever comes first). The emergency border circumstances also include any subsequent period during which the Proclamation's entry restrictions are reinstated following the Secretary of Homeland Security's determination that there has been a seven-day average of 2,500 encounters or more, and that period would last until the entry limitations are discontinued.

Under the IFR, aliens arriving in the United States at the southern border during emergency border circumstances who do not fall within the exceptions to the Proclamation's entry restrictions are ineligible for asylum unless they show by a preponderance of the evidence (i.e., that it is more likely than not) that "exceptionally compelling circumstances exist." These circumstances include cases where an alien or a family member traveling with the alien faced an acute medical emergency; faced an imminent and extreme threat to life or safety (e.g., an imminent threat of rape, kidnapping, torture, or murder); or met the definition of "victim of a severe form of trafficking in persons" as defined in federal regulations.

In a departure from standard procedures, a person encountered at the southern border during emergency border circumstances and who is subject to expedited removal proceedings, will not be asked by a CBP officer whether he or she fears returning to the proposed country of removal. Instead, that person will be referred for a credible fear interview only if he or she affirmatively "manifests a fear of return, expresses an intention to apply for asylum or protection, or expresses a fear of persecution or torture or a fear of return" to the proposed country of removal. The rule specifies that "manifestation can occur at any time in the process and can be expressed verbally, non-verbally, or physically." The IFR then requires asylum officers to apply the asylum restriction during the credible fear interview. If the alien is subject to the IFR's asylum limitation, the asylum officer will make a negative credible fear determination with respect

to the asylum claim unless there is a significant possibility that the alien can show by a preponderance of the evidence that exceptionally compelling circumstances exist. If a negative credible fear determination is made, the asylum officer will then consider whether the alien can show a "reasonable probability" of persecution or torture in order to assess potential eligibility for withholding of removal and CAT protection. The IFR explains that a *reasonable probability* in this context means substantially more than a *reasonable possibility* (which is the standard used to assess whether certain aliens, such as those with reinstated removal orders, may pursue withholding of removal or CAT protection) but that this standard is "somewhat less than more likely than not" (which is the standard used to qualify for withholding of removal or CAT protection).

If an alien shows a reasonable probability of persecution or torture if returned to the proposed country, DHS may place the alien in formal removal proceedings or retain jurisdiction of the case for further consideration of the alien's claims. If an alien fails to show a reasonable probability of persecution or torture, the alien may request an immigration judge's review of the asylum officer's negative credible fear finding, including whether the alien is ineligible for asylum under the IFR or has shown a reasonable probability of persecution or torture.

Analysis

The Proclamation and the accompanying IFR on asylum raise questions about the extent to which the executive branch, in general, can utilize its statutory authorities under Sections 1182(f) and 1158 to restrict the entry of aliens at the southern border and to limit an individual's eligibility for asylum through regulations. If a legal challenge is raised against the Proclamation and IFR, a reviewing court may likely consider existing precedent as to whether the executive branch's actions are lawful.

The Proclamation relies primarily on Section 1182(f). As previously noted, the Supreme Court has interpreted this delegation of authority broadly. In the 2018 decision *Trump v. Hawaii*, the Court held that the breadth of the restrictions on nationals of the countries identified by a presidential proclamation as posing a security or safety threat did not exceed the President's authority under Section 1182(f). The majority held that, "[b]y its terms," Section 1182(f) "exudes deference to the President" and grants the President broad authority to impose entry restrictions. Such authority is likely sufficient for the President to restrict the entry of certain aliens across the southern border. However, since the Court's ruling in *Trump v. Hawaii*, lower courts have determined that the President's authority under Section 1182(f) to suspend the entry of aliens is not unbounded and may not be used to supersede or conflict with other provisions of the INA.

Reviewing courts have construed Section 1158(a)(1) as prohibiting asylum denials based on manner of entry into the United States. By rendering certain aliens who arrive at the U.S. southern border during "emergency border circumstances" ineligible for asylum, the IFR may raise questions as to whether its limitations violate the provisions dictated in Section 1158. As discussed above, Section 1158(a)(1) permits, with some exceptions, any alien physically present or arriving to the United States—not just through a POE—to apply for asylum. In previous years, executive branch officials have taken actions that restricted the eligibility of asylum for certain aliens arriving at the southern border. These executive actions have faced legal challenges, and in some cases, courts have enjoined their implementation.

In 2018, the Trump Administration issued a Presidential Proclamation and IFR in which aliens who entered the United States anywhere other than at a POE were ineligible for asylum. A district court enjoined the rule's enforcement, finding that the rule conflicted with the INA and Congress's intent. In 2021, the Ninth Circuit affirmed the district court's preliminary injunction and held that the Proclamation and IFR effectively posed a categorical ban on asylum eligibility for aliens using a manner of entry permitted under Section 1158(a), which allows any alien arriving to the United States—not just through a POE—to apply for asylum. The court further held that the rule was in violation of international treaty

obligations, including the principle of non-refoulement. Finally, the court held that the rule was subject to the notice and comment process of the Administrative Procedure Act and rejected the government's claimed exceptions. The Supreme Court denied an application to stay the injunction. The Biden Administration rescinded the rule in 2023.

Both the Trump and Biden Administrations have issued restrictions on asylum eligibility based on transit through a third country. In 2019, DHS and DOJ promulgated a rule that generally made an alien ineligible for asylum if he or she traveled through at least one third country (other than country of citizenship, nationality, or last habitual residence) to reach the southern border without seeking protection in that third country. In 2020, the Ninth Circuit affirmed a district court's injunction blocking implementation of the rule. The court held that the rule conflicted with Section 1158 because the statute limits asylum eligibility based on third-country considerations only if there is a formal safe third-country agreement or the applicant was firmly resettled in a third country. The Biden Administration rescinded the rule in 2023.

In 2023, the Biden Administration issued a rule providing that an alien entering without valid entry documents at "the southwest land border or adjacent coastal borders" between May 11, 2023, and May 11, 2025, after traveling through another country en route to the United States (other than country of citizenship, nationality, or last habitual residence) is presumed ineligible for asylum unless he or she meets certain exceptions (e.g., was authorized to travel to the United States under a DHS-approved process or had unsuccessfully applied for asylum in the third country). The rule allows a person to rebut the presumption based on a showing of exceptionally compelling circumstances as defined in the rule (e.g., an acute medical emergency). Following legal challenge, a district court vacated the rule, concluding that it "conflicts with the unambiguous intent of Congress," as specified in Section 1158, that aliens may apply for asylum regardless of their manner of entry and that third-country considerations are relevant to asylum only when there is a safe third-country agreement or firm resettlement. The Ninth Circuit has stayed that decision pending the outcome of the government's appeal, allowing the rule to remain in effect.

Like these prior actions, the 2024 IFR places additional limitations on asylum eligibility pursuant to the Attorney General's and DHS Secretary's authority to implement restrictions under Section 1158(b)(2)(C). Accordingly, the IFR may face similar legal challenges.

DHS and DOJ argue in the IFR that the new measure is distinguishable from previous rules that have been challenged and ultimately enjoined by federal courts. The agencies assert that the IFR is "substantially different" from the 2018 rule issued during the Trump Administration because it does not categorically bar asylum based on manner of entry and instead turns on whether a person (whether encountered at or between POEs) has failed to pursue "lawful, safe, and orderly pathways" to enter the United States during "emergency border circumstances." The agencies also mention that, under the IFR, immigration officials retain authority to exempt individuals from the asylum limitations upon a finding of exceptionally compelling circumstances. This exception language largely resembles the rebuttable presumption language in the 2023 rule that was challenged but remains in effect. The agencies also maintain that the IFR is consistent with Section 1158(a)(1) because the statute requires only that an alien be permitted to "apply" for asylum but does not require that a person is entitled to *receive* asylum regardless of that person's manner of entry. The agencies remark that the United States' non-refoulement international treaty obligation applies only to withholding of removal and that the IFR preserves this form of protection.

The agencies also contend that they have "broad discretion" under Section 1158(b)(2)(C) to impose additional limitations and conditions on asylum. This position is in disagreement with the Ninth Circuit's analysis in *East Bay Sanctuary Covenant v. Garland*, in which the court held that additional limitations and conditions that are "consistent with" the asylum provisions must further the purpose of other provisions in Section 1158 (i.e., Sections 1158(a)(2)(A) and (b)(2)(A)(vi)). The agencies assert that the Ninth Circuit's logic conflicts with the statute's history and meaning. According to the agencies,

Congress's adoption of a one-year filing deadline (8 U.S.C. § 1158(a)(2)(B)) and a bar to filing successive asylum applications (8 U.S.C. § 1158(a)(2)(C)) are examples of limitations on asylum that do not further the purpose of a provision in Section 1158. Therefore, the agencies claim, the executive branch has discretion to add additional limitations and bars to asylum. Like the one-year filing deadline and bar on successive applications, according to the agencies, this IFR "furthers systemic efficiency by limiting asylum in certain situations where the strains on the immigration system are at their peak."

Following the announcement of the IFR, some have expressed their opposition to the measure, arguing, among other things, that the rule violates Section 1158 because, while the IFR is in effect, some people will be ordered removed and prevented from applying for asylum when they would have otherwise been eligible to do so. Opponents of the measure have also stated that the covered individuals present in the United States will not be eligible to apply for asylum, in contravention to Section 1158, and will be eligible only for withholding of removal and CAT protection.

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