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Circumvention of Lawful Pathways

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On February 21, 2023, the Biden administration issued a notice of proposed rulemaking regarding the “Circumvention of Lawful Pathways” for people seeking asylum at the southern border.¹ This notice of proposed rulemaking would create a presumption that individuals who cross the US Mexico border and who have not availed themselves of existing lawful processes, applied at a port of entry in compliance with the asylum rule’s requirements, or were denied asylum in a third country through which they traveled are ineligible for asylum.² Asylum seekers are able to negate this presumption if they can demonstrate “exceptionally compelling circumstances” supporting that they should be allowed to apply for asylum.³ However, the proposed rule would not apply to unaccompanied minors and provides three additional exceptions.⁴ The first exception is for individuals who were provided with authorization to travel to the US through an approved parole process.⁵ The next exception is for individuals who scheduled an appointment in advance to appear at a port of entry in advance on the “CBP One” app or can demonstrate that they were unable to make an appointment via the app on arrival at the port of entry.⁶ The final exception is for individuals who applied for and were denied asylum in a third country they passed through to get to the United States.⁷

Title 42

Biden’s proposed rule comes as Trump-era procedures for asylum seekers at the borders under 42 U.S.C. § 265 (“Title 42”) are set to expire. Title 42 allows for migrants to be removed from the United States when the Surgeon General determines that there is a danger that their

¹ *Fact Sheet: Notice of Proposed Rulemaking “Circumvention of Lawful Pathways,”* DEP’T. OF HOMELAND SEC. (Feb. 21, 2023), <https://www.dhs.gov/news/2023/02/21/fact-sheet-notice-proposed-rulemaking-circumvention-lawful-pathways>

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

entering the country would create an increased risk for transmission of a communicable disease, in this case COVID-19.⁸ Individuals who are removed under Title 42 do not have the opportunity to make an asylum claim before that removal occurs, even if they were able to demonstrate a credible fear of persecution.

This article focuses on of the impact of Title 42 on asylum and the hypocrisy the Biden administration has demonstrated through both its use of Title 42 and notice of proposed rulemaking.

Title 42 is Harmful to Asylum Seekers

Asylum is one of the central pillars of immigration law in the United States. The factors establishing a person's eligibility for asylum are laid out in 8 CFR § 1208.13. An applicant must show that he was subject to either past persecution or has a well-founded fear of future persecution and that the persecution was on account of his nationality, race, religion, political opinion, or membership in a particular social group.⁹ Asylum is a discretionary form of relief that many people who come to the United States in search of a better life seek because it provides work authorization, a path to citizenship, and can be claimed at the border.

Typically, asylum seekers are also able to apply for asylum defensively, meaning they apply for asylum after being placed in formal removal proceedings with the immigration court system.¹⁰ However, those denied admission into the United States are not placed into removal proceedings but are simply "expelled" to Mexico.¹¹ Between Title 42's implementation in 2020 and April 2022 over 1.8 million asylum seekers were expelled from the United States.¹² As many

⁸ 42 U.S.C. § 265.

⁹ 8 CFR § 1208.13.

¹⁰ See *Obtaining Asylum in the United States*, U.S. CUSTOMS AND IMMIGR. SERV., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>.

¹¹ *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (May 25, 2022), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

¹² *Id.*

as half of those expulsions are estimated to be people attempting to cross the border multiple times.¹³ Reports indicate that in the time since President Biden took office there have been over 13,000 violent attacks on asylum seekers who were expelled to Mexico.¹⁴ The Biden administration's continued use of Title 42 has been met with significant criticism, including claims that the mass expulsion of asylum seekers is a violation of international law.¹⁵ This criticism has come from a wide variety of sources, including from within President Biden's own administration; in October 2021 a top State Department official resigned, calling the use of Title 42 "illegal, inhumane, and not worthy of this Administration that I so strongly support."¹⁶

Biden's Empty Promises

"As president, Biden will finish the work of building a fair and humane immigration system — restoring the progress Trump has cruelly undone and taking it further. He will secure our border, while ensuring the dignity of migrants and upholding their legal right to seek asylum."¹⁷ Biden campaigned extensively on immigration issues, claiming that he would undo all the harm had been done by the Trump administration. Instead of upholding those promises, he has further reinforced the "cruel" Trump-era policies. He continued to use Title 42 to expel asylum seekers, putting their lives at risk in Mexico. And now when those policies are set to expire with the lifting of the COVID-19 public health emergency, he is attempting to continue to

¹³ *Id.*

¹⁴ Julia Neusner et. al, *Human Rights Stain, Public Health Farce*, HUMAN RIGHTS FIRST (Dec. 15, 2022), <https://humanrightsfirst.org/library/human-rights-stain-public-health-farce/>

¹⁵ *See Statement attributable to UN High Commissioner for Refugees Filippo Grandi on the need to end US COVID-19 asylum restrictions*, UN REFUGEE AGENCY (May 20, 2021), <https://www.unhcr.org/news/news-releases/statement-attributable-un-high-commissioner-refugees-filippo-grandi-need-end-us>; *See Alex Thompson and Alexander Ward, Top State adviser leaves post, rips Biden's use of Trump-era Title 42*, POLITICO (Oct. 4, 2021), <https://www.politico.com/news/2021/10/04/top-state-adviser-leaves-post-title-42-515029>.

¹⁶ Thompson, *supra* note 15.

¹⁷ *The Biden Plan for Securing Our Values as a Nation of Immigrants*, <https://joebiden.com/immigration/#> (last accessed Apr. 24, 2023)

restrict access to asylum protections despite his campaign promises to uphold that access.¹⁸ The Biden administration claims that the new rule is necessary to prepare what it anticipates will be a “surge in migration” as Title 42 expires and that it wants to encourage asylum seekers to use “safe, lawful, and orderly processes” to enter the United States.¹⁹ But this proposed rule is essentially just a continuation of restrictive Trump-era policies. Immigration advocates have noted that the proposed rule is almost identical to a Trump-era asylum ban that was blocked by the Ninth Circuit in 2020.²⁰ When discussing that Trump-era ban in an interview, Biden said “This is the first time ever you’ve had to seek asylum in a third country. It’s outrageous. It’s outrageous. It’s wrong.”²¹

The Proposed Rule

Biden has stated that he has a “carrot and stick” approach to immigration policies, that he wants to encourage people to enter the US legally, while discouraging them from entering illegally.²² Here, with the new proposed rule, he is threatening people who are fleeing from persecution with a giant stick. And the carrots, the exceptions, he is balancing that stick with have significant issues. The CBP One app, which asylum seekers are required to use to make an appointment at a port of entry, has been “plagued by errors.”²³ There are too few appointments to meet the demand and the app frequently crashes due the sheer number of asylum seekers trying to use it once. Perhaps most concerning, the app requires asylum seekers to take a photo of

¹⁸ *See id.*

¹⁹ *Fact Sheet: Notice of Proposed Rulemaking “Circumvention of Lawful Pathways*, *supra* note 1.

²⁰ Joel Rose, *Biden rolled out tougher asylum rules. Advocates say it’s a betrayal of his promises*, NPR (Feb. 24, 2023), <https://www.npr.org/2023/02/23/1158935188/advocates-criticize-biden-administrations-proposed-broad-asylum-restrictions>; *See Al Otro Lado, Inc. v. Wolf*, 336 F.R.D. 494 (S.D. Cal. 2020).

²¹ Rose, *supra* note 19.

²² *Id.*

²³ Ali Rogin and Claire Mufson, *Glitches plague CBP one app for asylum seekers as Title 42 comes to an end*, PBS (Apr. 22, 2023), <https://www.pbs.org/newshour/show/glitches-plague-cbp-one-app-for-asylum-seekers-as-title-42-comes-to-an-end>.

themselves so their identities can be verified at their appointments but is unable to recognize the faces of people with darker skin.²⁴

This proposed rule is designed to be limited, only applying to people who enter the US within two years of its effective date.²⁵ However, the author is concerned that the same logic that the Biden administration is using to support this rule, that it is to prevent an influx in people seeking asylum at the southern border, will be used by the next administration to continue to implement restrictive asylum rules. The rule allows for so few people to apply for asylum that when it expires, there will very likely again be concerns about a “surge in migration” and further restrictive policies instituted to address that. This may be the beginning of a perpetual cycle of restrictive asylum policies intended to solve for issues created by the previous restrictive asylum policy.

Biden campaigned on building a fair and humane immigration system. Of ensuring the dignity of asylum seekers. Of upholding the legal right to asylum. He claimed he would move the immigration system away from the cruel policies instituted by the Trump administration. He has done none of this. He continued to use Trump-era policies to expel asylum seekers from the country. And now that those policies are set to expire, he is instituting new policies that will continue to fundamentally undermine the legal right to asylum.

²⁴ *Id.*

²⁵ *Fact Sheet: Notice of Proposed Rulemaking “Circumvention of Lawful Pathways, supra note 1.*