



ACLU Explainer on the New Executive Actions Eviscerating Asylum During “Emergency Border Circumstances”

SUMMARY

- On June 5, 2024, President Biden issued a proclamation followed by a Department of Homeland Security (DHS) Interim Final Rule (IFR) to bar access to asylum to noncitizens arriving between ports of entry at the southern U.S. border, with limited exceptions. These rules went into effect on June 5, 2024, only hours after they were made public. Under the IFR (or rule), individuals arriving between ports and in search of protection **cannot apply for asylum, unless they meet one of the extremely limited exceptions; otherwise, migrants can seek asylum only** if they manage to get one of the 1,450 CBP One daily appointments that require technology and often take months to secure, even when a spot is available at all. The rule remains in effect for at least 21 days — it is only lifted 14 days after DHS reports an average of less than 1,500 encounters over seven consecutive calendar days. Even then, the restrictions would go back into effect when DHS encounters an average of 2,500 or more people between ports during seven consecutive days.
- **This ban, based on an arbitrary limit that already triggered an immediate shutdown, cuts off access to asylum for people arriving between ports.** The rule seeks to justify this rewrite of our asylum and protection system by citing operational constraints, but the measure will create significant new operational complexities on its own and is not a lawful use of executive authority. This freeze on asylum for most who seek it, like the asylum bans that courts have invalidated in previous challenges brought by ACLU and partners, violates the Immigration and Nationality Act, which does not permit the government to limit access to asylum based on where an individual applies. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 658 (9th Cir. 2021).
- The new rule also adds additional procedural hurdles (not present in the analogous Trump administration asylum ban) for people seeking asylum. To get screened for any form of protection, **migrants will not be asked if they fear danger if removed** but will be now required to satisfy the defective “shout test” by affirmatively manifesting a fear or removal. Additionally, even for the more limited forms of protection that remain available for those fleeing danger (like “withholding of removal” or Convention Against Torture relief), migrants must not only pass the shout test, but will also now have to meet a newly-invented, significantly higher legal standard at the screening stage.
- **The overall impact of this new set of rules will be to close off asylum to people in need of protection and rapidly deport many deserving and vulnerable people back to danger without an opportunity to present a case for asylum.** In sum, this new rule goes further than prior asylum bans by limiting access to asylum based on an arbitrary and artificially low number of arrivals at the border and by subjecting people to a gauntlet of new procedural obstacles. These obstacles do not filter out frivolous cases; to the contrary, they will result in the rushed deportation of many deserving individuals without even the most basic screening.

Eliminating Asylum Between Ports of Entry:

- Section 208.35 of the new rule denies asylum to anyone who crosses into the U.S. between ports of entry, with limited exceptions. This elimination of asylum for those subject to the rule is triggered by a new, low average of encounters between ports of entry, creating our country's first asylum quota or cap system and leaving many deserving people without critical protection.
- The rule has only limited exceptions for “exceptionally compelling circumstances” which include: an acute medical emergency; imminent and extreme threat to life or safety (such as rape, kidnapping, torture, or murder); and victims of a severe form of human trafficking. Unaccompanied minors, but not families, are exempted.
- It is on the individual to show that these circumstances exist, and that they should not be subject to the rule. Customs and Border Protection (CBP) officers will assess whether an individual has met that exception; this determination itself may be made very quickly and without review. In practice, it is likely very few people will be able to satisfy these narrow exceptions.

Vanishing Access Even for Other Forms of Protection:

Under the rule, other forms of protection remain available (“withholding of removal” and torture protection). These other forms of relief are not as protective as asylum. In any event, although these forms of protection are theoretically available, the new rule puts in place two daunting obstacles that likely will mean few people will be able access them: the **shout test and higher screening standard**.

The “Shout Test”

- Under the rule, officials will **no longer ask** people who arrive between ports if they fear being expelled — a core protection under our legal system that ensures our compliance with international human rights law and, specifically, that we do not deport people to places where they face persecution or torture. Instead, when this rule is in effect, people who enter the U.S. between ports in search of protection must “manifest” their fear to even be screened for a protection claim.
- Often referred to as the “shout test,” the manifestation of fear test was developed for use by the Coast Guard for interceptions at sea and previously used under Title 42. It requires a person seeking safety to affirmatively raise their fear of removal to get any type of screening for protection. Yet, even if migrants know they must affirmatively “manifest” fear, previous experience shows that when this test is used, statements by migrants are routinely ignored, such that very few people are screened for protection. As a result, people with strong claims are deported back to the dangers they fled without even being *screened* at this initial stage.
- Moreover, even the few people who can still seek asylum because they fall into one of the limited exceptions to the rule will not be screened unless they pass the shout test, thereby making the exceptions to the ban on asylum that much more illusory.
- To be clear, adding this excessive hurdle doesn't target or eliminate non-meritorious claims. By making it harder for *anyone* to be screened, this policy will inevitably result in the removal of people with strong claims for protection. This does not improve the integrity of the asylum system, it dismantles it.

Higher Screening Standard.

- Individuals ineligible for asylum — but who manage to pass the shout test and get screened for some other form of protection — will now also have to meet a much more restrictive, newly-invented legal test, the “reasonable probability” of persecution or torture standard.
- What this new standard looks like in application remains to be seen, but according to the rule, a “reasonable probability” is supposed to be a significantly higher standard than currently applies and “means substantially more than a reasonable possibility, but somewhat less than more likely than not.” Those who meet this high legal standard will *still* be ineligible for asylum — the most they can get is the more limited forms of protection via withholding of removal or Convention Against Torture.
- The people subjected to this new and harsher test will likely be in detention, with virtually no legal assistance. DHS is also reportedly limiting the time a person subject to the rule has to attempt to consult with a lawyer for these life and death interviews to [four hours](#). These are not rules that provide [solutions](#) at the border or improve processing; they are instead severe limitations on due process that will result in the wrongful deportation of people with genuine claims for protection.