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Southern Border Policies Harming Asylum Seekers – An Overview

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The Trump Administration’s assault on asylum seekers seems to know no bounds. It has waged substantive attacks on the refugee definition in cases such as [Matter of A-B-](#) and [Matter of L-E-A-](#), and sought to restrict asylum seekers’ due process. The Administration has also attempted to shut down access to asylum at the southern border through a combination of policies all of which are at odds with the Refugee Act and our international obligations under the Refugee Protocol and the Convention Against Torture. Below is an overview of the current status of some of the most significant of these policies that harm asylum seekers.

Asylum Ban 1.0 (Entry Ban) – In November 2018, the Administration sought [via proclamation](#) and an [interim final rule](#) to ban individuals who did not enter the United States through an official port of entry (POE) from receiving asylum. In [East Bay Sanctuary Covenant v. Trump](#), the U.S. District Court for the Northern District of California issued a temporary restraining order and, later, a preliminary injunction. On February 28, 2020 the Ninth Circuit [affirmed](#) the district court’s orders. While the government moved for stays of the temporary restraining order and preliminary injunction, the district court, Ninth Circuit, and Supreme Court have thus far denied these requests. Thus, Asylum Ban 1.0 is not currently in effect. It was also successfully challenged in [O.A. v. Trump](#).

Migrant Protection Protocols (MPP) – Beginning in January 2019, the Administration instituted the “Remain in Mexico” policy – officially titled the “Migrant Protection Protocols” – whereby the U.S. government returns asylum seekers arriving at the southern border without documents to wait in Mexico for the duration of their U.S. immigration proceedings. The government stated that it would not return asylum seekers to Mexico who would be in danger there, but the screening process to assess their risk is completely inadequate, and there are countless reports of [human rights abuses](#) against migrants under MPP in Mexico. Additionally, while limited exceptions exist for individuals considered to be in vulnerable groups, the Administration has returned individuals falling within these categories (e.g., unaccompanied children, pregnant women, and people with serious medical issues) to Mexico. In [Wolf v. Innovation Law Lab](#), a legal challenge brought by CGRS, the ACLU, and the Southern Poverty Law Center, the U.S. District Court for the Northern District of California preliminarily enjoined the MPP in April 2019. The Ninth Circuit stayed the preliminary injunction pending appeal. On February 28, 2020, the Ninth Circuit affirmed the district court’s order granting a preliminary injunction. The court stayed the preliminary injunction to the extent that it applied outside the Ninth Circuit on March 2, 2020. On March 11, 2020, the Supreme Court stayed the injunction pending the filing and disposition of a petition for a writ of certiorari, which was filed by the government on April 10, 2020. More information on the legal challenge to the MPP can be found [here](#). Although the MPP policy remains in effect, immigration court hearings have been suspended until at least May 1, 2020 due to the COVID-19 pandemic.

Asylum Ban 2.0 (Transit Ban) – Known also as the “Third Country Transit Rule,” or “Transit Ban,” this policy seeks to all but categorically deny asylum to all non-Mexican nationals entering the United States at the southern border, leaving them with only the opportunity to pursue withholding and CAT protection. [The interim final rule](#), effective July 16, 2019, bars asylum to anyone who transited a third country *en route* to the southern border unless they (a) applied for protection from persecution or torture in a third country and received a final judgment denying such protection; or (b) satisfy the definition of “victim of a severe form of trafficking in persons” in 8 C.F.R. § 214.11. This rule is currently in effect nationwide after the Supreme Court granted a stay of the preliminary injunction issued in [East Bay Sanctuary Covenant v. Barr](#). The government’s appeal of the preliminary injunction is pending in the Ninth Circuit.

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CGRS filed an [amicus brief](#) joined by over 50 organizations in this challenge. More information on the litigation is available [here](#) and [here](#).

The Transit Ban has also been challenged with respect to asylum seekers turned back, or “metered,” at POEs. In [Al Otro Lado v. Wolf](#), the District Court for the Southern District of California preliminarily enjoined the application of the Transit Ban to asylum seekers who were unlawfully prevented from accessing the U.S. asylum process because they had been “metered” before the Transit Ban went into effect. The [preliminary injunction](#) prohibits the government from applying the Transit Ban to members of the provisional class of “all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the U.S. Government’s metering policy, and who continue to seek access to the U.S. asylum process.” The district court’s order was stayed between December 20, 2019 and March 5, 2020, when the Ninth Circuit Court of Appeals denied the government’s motion for a stay pending its appeal and lifted its previously-imposed emergency stay of the district court’s order. Thus, the policy cannot currently be applied to class members. More information on the litigation is available [here](#) and [here](#). See also CGRS Practice Advisory, *The Third Country Transit Bar* (Mar. 2020), available upon request through CGRS’s [Technical Assistance](#) program.

Asylum Cooperative Agreements (ACAs) – The Administration has signed agreements with [Guatemala](#), El Salvador, and Honduras to enable the U.S. Government to remove asylum seekers to these countries rather than process their claims in the United States. In *U.T. v. Barr*, CGRS, ACLU, the National Immigrant Justice Center, and Human Rights First have challenged the November 19, 2019 joint [interim final rule providing a procedural framework for current and future ACAs](#), U.S. Citizenship and Immigration Services [guidance to Asylum Officers on the Guatemala ACA](#), and the U.S. Government’s categorical designation of Guatemala as a safe third country. More information on the litigation is available [here](#). Currently, the “amenable population” of individuals subject to the Guatemala ACA includes Salvadorans and Honduras, with over 900 nationals of these countries, including women and children, removed to Guatemala to date. While the Guatemala ACA remains in effect, Guatemala has recently [refused](#) to accept transfers due to the COVID-19 pandemic.

Prompt Asylum Claim Review (PACR) & Humanitarian Asylum Review Process (HARP) – [Media reports](#) indicate that secretive joint initiatives of the Department of Justice (DOJ) and Department of Homeland Security (DHS) seek to condense the complex and sensitive asylum adjudication process from a matter of months to 10 days or less and to force asylum seekers to navigate the immigration court system while detained in deficient CBP facilities at the border, where they are denied meaningful access to counsel, or to country conditions information and other resources necessary to corroborate their claims. According to [information revealed by DHS](#), PACR applies to adults and family units from Guatemala, El Salvador and Honduras who are subject to the Transit Ban, and HARP applies to Mexican family units. Under both policies, individuals are only provided 24 hours to contact an attorney or another person of their choosing before moving forward with their credible fear interviews. These policies were challenged by the ACLU in *Las Americas Immigrant Advocacy Center v. Wolf*. More information on the case can be found [here](#).

CDC Order Suspending Introduction of Persons from a Country Where a Communicable Disease Exists – Citing the COVID-19 pandemic, on March 20, 2020 the Centers for Disease Control (CDC) issued an [order](#) and [interim final rule](#) limiting the entry of certain persons into the United States for public health reasons. Accompanying the CDC order, DHS has determined that asylum seekers lacking proper documentation are not engaged in essential travel. According to leaked [U.S. Customs and Border Protection \(CBP\) guidance](#), border officials are authorized to return asylum seekers apprehended along the southern border back to Mexico or other countries, without asking if they fear persecution or torture or providing any other due process protections. This policy violates our domestic law and international obligations under the 1967 Protocol Relating to the Status of Refugees and the 1984 Convention Against Torture, and has effectively shut down asylum along the southern border. Congressional leaders and a number of advocacy organizations have [condemned](#) this policy. UNHCR and WHO have advised that governments can manage border restrictions in a manner which protects public health while respecting international human rights and refugee protection standards, including *non-refoulement*.