

## THE STATE OF ASYLUM

Changes Made to the Asylum System During the Trump Administration

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### Key Takeaways

- ▶ The Trump administration has focused on deterring individuals from attempting to reach the U.S. southern border to claim asylum with severe effects on asylum seekers, but minimal to moderate effects on the flow of migrants seeking protection.
- ▶ Case quotas imposed on immigration judges have not reduced the immigration court backlog but have increased the rate of denials by nearly double.
- ▶ The use of Asylum Cooperation Agreements and increased repatriation have sent thousands of people back to dangerous places where they are likely to be the victims of violent crime.
- ▶ The Flores Settlement Agreement is not an ideal policy for handling children in immigration proceedings and detention, but it cannot be repealed without a replacement that adequately protects vulnerable populations and addresses the changing needs of migrants.
- ▶ The continued prevalence and use of the misnomer "catch and release" complicates the safe release of certain migrants into the interior, and abuses expensive detention for individuals that pose no risk to national security or public safety. Alternatives like Family Case Management should be used to save thousands of dollars and alleviate the stress on immigration detention centers.

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## Introduction

The ongoing humanitarian crisis in the Northern Triangle of Central America (NTC) — Honduras, El Salvador, and Guatemala — continues to drive families, unaccompanied children, and adults to seek safety in the U.S. At the same time, U.S. policies have attempted to deter asylum seekers, restrict their ability to make an asylum claim, and upend the longstanding legal process at the southern border (*see Event Timeline section*).

This report is meant to provide a factual, comprehensive overview of the changes that have occurred to the asylum system since the start of the Trump administration. The volume of changes and the increasingly obvious and devastating humanitarian impacts of these changes suggests these changes been the most impactful changes to our asylum system in its history. It also highlights the need for comprehensive reforms to our asylum system.

Even prior to the COVID-19 crisis, changes in asylum policy and law were fast-moving. This report aims to lay out the most -up-to-date information, with recognition that it may be outdated as soon as this report is published. Certainly, the changes in light of the coronavirus pandemic are expediting those changes. For purposes of clarity, we do not discuss COVID-19 impacts in this report.

President Trump's immigration policies were outlined in his initial executive orders. Executive Order 13767 ordered the construction of a border wall, increased deportations, and effectively prolonged detention for migrants.<sup>1</sup> Executive Order 13768, focused on interior enforcement and the expansion of the enforcement priorities of the Obama administration — criminals, national security threats, and recent arrivals — to all unauthorized persons, including long-term residents and Dreamers.<sup>2</sup> Order 13768 also outlined policies of detaining immigrants and asylum seekers, which later served as the legal basis for the Remain in Mexico (MPP) program and expedited deportations.

Despite a constant stream of legitimate legal challenges (*see Litigation section*), the administration has steadily implemented many of the policies outlined in the first orders and

<sup>1</sup> “Executive Order: Border Security and Immigration Enforcement Improvements.” January 25, 2017. <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/> (access date, January 27, 2019)

<sup>2</sup> “Executive Order: Enhancing Public Safety in the Interior of the United States.” January 25, 2017. <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/> (access date, January 27, 2019)

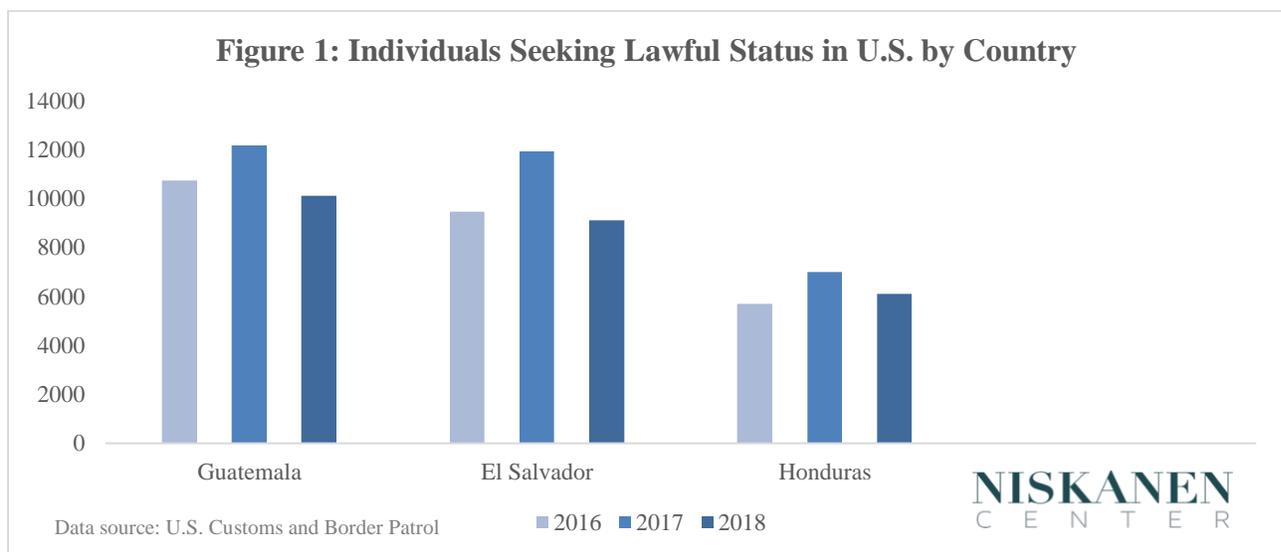
developed new impediments to individuals seeking asylum in the United States through policies impacting the southern border, detention centers, and the immigration courts.

## Narrowing Asylum in the U.S.

The current challenge of migration management at the U.S.-Mexico border is rooted in a sharp increase in emigration out of the Northern Triangle.

Transnational criminal organizations, ineffective public security institutions, and economic instability have forced displaced people to head north in search of safety and opportunity. In 2019 alone, over 53,000 new asylum applications were submitted worldwide by citizens of Northern Triangle countries, an 86 percent increase from 2018.<sup>3</sup> El Salvador, Guatemala, Venezuela, Honduras, and Mexico were the top five countries of origin of applications for asylum in the U.S. in 2018 and 2019.<sup>4</sup>

Figure 1: Individuals Seeking Lawful Status in the U.S. by Country



<sup>3</sup> “UNHCR Global Trends: Forced Displacement in 2018.” June 19, 2019. <https://www.unhcr.org/en-us/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> (access date, January 27, 2019).

<sup>4</sup> Congressional Research Service “Refugee Admission and Resettlement Policy.” <https://fas.org/spp/crs/misc/RL31269.pdf> (access date, January 27, 2019).

The economic and political crisis in Venezuela is also driving migrants north towards the U.S.-Mexico border. The number of migrants and refugees from Venezuela rose to over 4 million between 2015 and 2019, according to data from the United Nations High Commissioner for Refugees (UNHCR) and International Organization for Migration (IOM).

Venezuelan migrants and refugees have also fled to other countries, including Colombia, Peru, Chile, and Ecuador. Mexico and other Central American countries are hosting significant numbers of refugees and migrants from Venezuela, overwhelming the countries' limited immigration operations and reducing the resources available to other asylum claimants.<sup>5</sup>

Despite the growing need for humanitarian assistance on our southern border, the United States has slashed asylum and other flows of legal immigration. Asylum applications accepted by the government have fallen precipitously, even for these countries that have seen large numbers of people fleeing. To make matters worse, in fiscal year 2019, the administration allocated just 3,000 refugee visas — out of the paltry 30,000 allotted worldwide — to all Latin American and Caribbean countries.<sup>6</sup>

In addition to restricting access to the U.S.-Mexico border to make a legal asylum claim, several policies discussed below have created distinctly higher standards for accessing the U.S., and for making a successful asylum claim.

### **Rising thresholds for credible fear**

In February 2017, U.S. Citizenship and Immigration Services (USCIS) raised the threshold for demonstrating credible fear of persecution or torture in initial asylum interviews.<sup>7</sup> This new guideline ordered asylum officers to be stricter in assessing claims made during the threshold interview conducted by USCIS. An applicant is required to demonstrate credible fear in these interviews before they are allowed to present their claim to an immigration judge.

<sup>5</sup> UNHCR “*Venezuela Situation.*” <https://www.unhcr.org/en-us/venezuela-emergency.html> (access date, January 27, 2019).

<sup>6</sup> Matthew La Corte, “*What Role Can Refugee Resettlement Play in Addressing the Border Crisis?*” July 10, 2019. Niskanen Center. <https://www.niskanencenter.org/what-role-can-refugee-resettlement-play-in-addressing-the-border-crisis/>

<sup>7</sup> USCIS “*Lesson Plan Overview*” [https://www.uscis.gov/sites/default/files/files/nativedocuments/Reasonable\\_Fear\\_Asylum\\_Lesson\\_Plan.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Reasonable_Fear_Asylum_Lesson_Plan.pdf)

A 2014 lesson plan for teaching asylum officers to make credible fear determinations indicated that they need only determine that there was a "significant possibility" that an applicant would eventually succeed in obtaining asylum from a judge.<sup>8</sup> That guidance was altered in the 2017 update, which is more nuanced.

The new guidance directs officers to find *in favor of removal* — not in favor of allowing a judge to review the merits of the case — by removing Section 5(C)(3) of the 2014 lesson plan, which states: "When there is a reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a positive credible fear determination. The questions at issue can be addressed in a full hearing before an immigration judge."

Additionally, the 2017 lesson plan adds language that places heavy emphasis on the provision of providing copious substantiating evidence at the earliest stage of the asylum process — the credibility determination. Section 6(C)(4) allows officers to make an adverse finding based on even trivial inconsistencies identified during the screening interview:

On occasion such [trivial or minor] credibility concerns may be sufficient to support a negative credible fear determination considering the totality of the circumstances and all relevant factors. Such concerns should only be the basis of a negative determination if the officer attempted to elicit sufficient testimony, and the concerns are not adequately resolved by the applicant during the credible fear interview.

Advocates and attorneys have long noted that determining credibility from initial interviews and their transcripts is problematic for many reasons. Applicants arrive exhausted, sick, or recently traumatized after arduous journeys; interviews are offered only in a limited number of languages; male officers interview female applicants about sexual trauma, which often significantly reduces the likelihood of disclosure; applicants do not want to be separated from children, but are unwilling to speak about violence and fear in the presence of their children; and the interviews are inaccurately transcribed. It follows then that increasing the weight of these transcripts in the credibility determination is leading to increasingly adverse credible fear

<sup>8</sup> USCIS "*Lesson Plan Overview*"

[https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum\\_and\\_Female\\_Genital\\_Mutilation.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_and_Female_Genital_Mutilation.pdf)

determinations for individuals who should have a chance to see an immigration judge to determine the outcome of a complex legal question.

The U.S places tight restrictions on what gives applicants grounds to qualify for asylum. The asylum applicant must have evidence of past harm or credible evidence of likely future damage inflicted because of that person's race, religion, nationality, membership in a particular social group, or political opinion.

Generally, someone claiming asylum must also credibly demonstrate that the police cannot help them and that relocation within their home country is not a viable option. While the unprecedented levels of gang violence in the Northern Triangle have forced more people to seek asylum in the U.S., threats of violence alone are not enough to qualify an individual for asylum.

Asylum applicants often do not know what information is useful in the credible fear hearings and have limited time to convey on often extensive history in the initial interview.<sup>9</sup> Even before the 2017 changes, less than 30 percent (on average) of initial interviews meet the legal requirements for credible fear.<sup>10</sup>

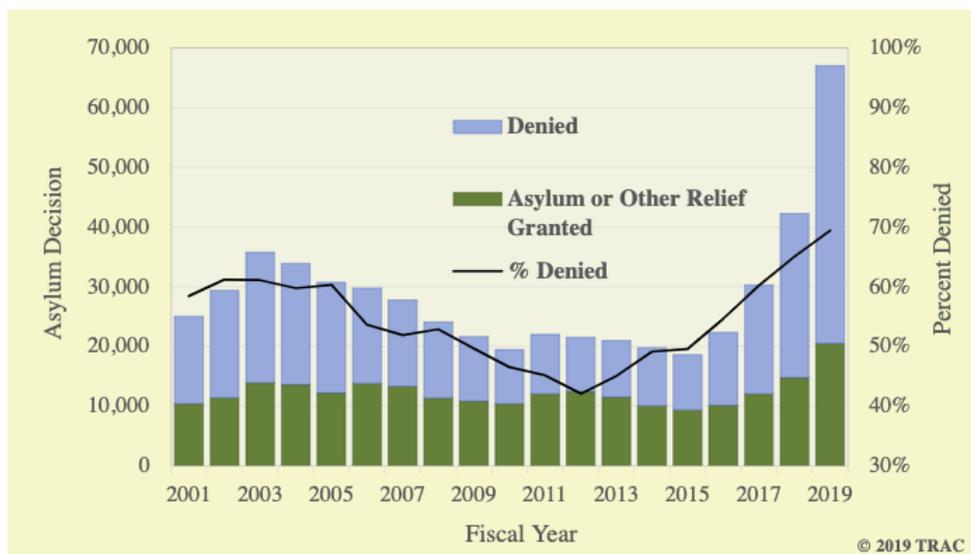
Yet, these expedited denials have not reduced the backlog in the asylum system, or the number of claimants. Between FY 2010 and FY 2017, the USCIS Asylum Division credible-fear interview requests rose from 9,000 to 79,000.<sup>11</sup>

<sup>9</sup> Kristie De Peña “*Asylum Fraud Isn’t What You Think It is*” August 14, 2018.  
<https://www.niskanencenter.org/asylum-fraud-isnt-what-you-think-it-is/>

<sup>10</sup> TRAC “*Findings of Credible Fear Plummet Amid Widely Disparate Outcomes by Location and Judge*”  
<https://trac.syr.edu/immigration/reports/523/>

<sup>11</sup> Doris Meissner, Faye Hipsman, T. Alexander Aleinikoff. “*The US Asylum System in Crisis: Charting a Way Forward*” September 2018.  
[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=13&cad=rja&uact=8&ved=2ahUKEwj6x5GYvIXnAhUBzlkKHAsIAL8QFjAMEgQIAXAB&url=https%3A%2F%2Fwww.migrationpolicy.org%2Fsites%2Fdefault%2Ffiles%2Fpublications%2FMPI-AsylumSystemInCrisis-Final.pdf&usq=AOvVaw3\\_6x5sJTtUy-S3HI60h\\_Ls](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=13&cad=rja&uact=8&ved=2ahUKEwj6x5GYvIXnAhUBzlkKHAsIAL8QFjAMEgQIAXAB&url=https%3A%2F%2Fwww.migrationpolicy.org%2Fsites%2Fdefault%2Ffiles%2Fpublications%2FMPI-AsylumSystemInCrisis-Final.pdf&usq=AOvVaw3_6x5sJTtUy-S3HI60h_Ls)

Figure 2: Immigration Court Asylum Decisions by Outcome (FY 2001-FY 2019)



Despite a 55 percent increase in its budget between FY 2013 and FY 2018, the USCIS Asylum Division cannot effectively address the increasing number of credible-fear interviews and the case backlogs it continues to face.

In July 2019, Mark Morgan, acting chief of U.S. Customs and Border Protection (CBP), testified before Congress that there would be a new pilot program training CBP officers to conduct credible fear interviews, instead of trained asylum officers working under USCIS supervision.<sup>12</sup> National Immigration Justice Center (NIJC) reports that as early as September 2019, “CBP agents were beginning to screen families for credible fear, with CBP agents at the Dilley Family Residential Center identifying themselves to children and families as ‘asylum officers.’”<sup>13</sup> Requiring asylum seekers to articulate their fear of return to uniformed CBP officers will certainly intimidate even those with substantial claims and result in many more asylum seekers returned to danger.

<sup>12</sup> “Press Briefing by Acting CBP Commissioner Mark Morgan” October 8, 2019. <https://www.whitehouse.gov/briefings-statements/press-briefing-acting-cbp-commissioner-mark-morgan/>

<sup>13</sup> NIJC “A Timeline of the Trump Administration’s Efforts to End Asylum” <https://www.immigrantjustice.org/issues/asylum-seekers-refugees>

### **Expedited initial fear screenings**

In July 2019, USCIS acting director Ken Cuccinelli reduced the waiting time from 48 hours before an initial credible fear interview to one calendar day,<sup>14</sup> even though longer waiting times assured applicants necessary time to consult with an attorney and to seek medical care.

This policy dramatically hinders the ability of individuals to utilize available nonprofit assistance, and also severely limits the ability to reschedule interviews in cases that present extraordinary circumstances. Continuances are also no longer granted when additional time is needed to prepare for the interview or overcome language barriers.<sup>15</sup> Together, the policies have had a devastating effect on applicants' ability to share their cases with counsel or secure necessary supporting documents or affidavits.

In September 2019, asylum seekers and advocacy groups filed a lawsuit in the U.S District Court for the District of Columbia challenging the directive as a violation of the statutory rights of asylum seekers and on procedural grounds.<sup>16</sup>

### **Vacating the right to testify**

In March 2018, then-Attorney General Jeff Sessions used his power of certification to overturn a 2014 precedent-setting decision of the Board of Immigration Appeals (BIA), the appellate court with universal jurisdiction over immigration cases. Attorneys general have the power to select immigration cases to certify — meaning they can choose cases from the BIA docket, review them, and modify or overturn rulings.

The case known as *Matter of E-F-H-L*<sup>17</sup> allowed asylum seekers to testify on their own behalf before they could be denied asylum and deported. The 2014 BIA decision in *Matter of E-F-H-L* held that applicants for asylum or withholding of removal are entitled to full hearings on their applications that included a chance to testify and present evidence before an immigration

<sup>14</sup> Hamed Aleaziz “*Immigrant Asylum-Seekers May Get Less Time To Prepare Their Cases Under A New Trump Administration Rule*” July 9, 2019.

<https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-asylum-seekers-less-time-to-prepare>

<sup>15</sup> Hamed Aleaziz “*Immigrant Asylum-Seekers May Get Less Time To Prepare Their Cases Under A New Trump Administration Rule*” July 9, 2019.

<https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-asylum-seekers-less-time-to-prepare>

<sup>16</sup> The full text of the complaint is available at: <https://democracyforward.org/wp-content/uploads/2019/09/Dilley-Complaint-FINAL-TO-FILE.pdf>

<sup>17</sup> The full text of the decision is available at: <https://www.justice.gov/eoir/page/file/1040936/download>

judge. The respondent was not required to show a “prima facie case” for an asylum grant to get a full hearing.

Sessions’ ruling — which was cryptic in that the case was apparently chosen without any explanation or a stated goal — reversed that precedent, limiting hearings to individuals who successfully challenged their case in federal appellate courts. For nearly all asylum applicants, this ruling ended the ability to present their case to an immigration judge.

### **Metering or turnback**

At the start of the Trump administration, the Department of Homeland Security instituted strict metering at many ports of entry used by asylum seekers to limit the number of asylum seekers able to claim asylum per day. According to a 2018 DHS Office of Inspector General (OIG) report that summarizes the policy, CBP has been “regulating the flow of asylum seekers at ports of entry” since at least 2016 through its metering policy (otherwise known as the “turnback policy”).

The OIG report states that under the metering policy, CBP officers may direct asylum seekers who have not yet crossed the international boundary line into the U.S. to remain in Mexico — sometimes not allowing any asylum seekers to enter the busiest ports of entry at all. The metering process is disordered and chaotic; there is no federal statute or regulation that governs the circumstances under which CBP may limit the number of asylum seekers who are processed at designated ports of entry. Each day, the U.S. government provides a number to Mexican authorities — based on little-known factors — indicating how many people they can process. Then, Mexican government authorities, civil society organizations, and asylum seekers themselves must notify those individuals on the waitlist for that port that it is their turn.

CBP justified the change in policy by a lack of resources and space that force them to limit the number of asylum seekers who can enter each day, citing a limited number of holding cells and staff available to process asylum claims and conduct regular border-crossing screenings.

In July 2019, the list in Juarez had approximately 5,500 names on it.<sup>18</sup> Because the U.S. government does not officially recognize the waitlists, there is no official record, no formal notice, no history of the individuals on waitlists, and the individuals on the lists do not receive

<sup>18</sup> Dara Lind “*Asylum-Seekers Who Followed Trump Rule Now Don’t Qualify Because of New Trump Rule*” July 22, 2019. [Propublica.org/article/asylum-seekers-that-followed-trump-rule-now-dont-qualify-because-of-new-trump-rule](https://propublica.org/article/asylum-seekers-that-followed-trump-rule-now-dont-qualify-because-of-new-trump-rule)

any legal protections or resources while they remain in Mexico.<sup>19</sup> Even individuals who waited on the lists are now subject to additional regulations and laws, like safe third country agreements.

The Immigration and Nationality Act (INA) established the rules for asylum eligibility and the inspection of aliens seeking admission into the United States. Critics of the policy assert that the policy violates Sections 208 and 235 of the INA by not allowing aliens who are physically present or arriving in the U.S. to pursue an asylum claim.

INA 235 (a)(3) provides that all aliens “who are applicants for admission or otherwise seeking admission ... shall be inspected by immigration officers.” INA 208(a)(1) states that “any 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 under this section or, where applicable, section [235(b) of the INA].”<sup>20</sup> Preventing individuals from crossing the international boundary into the U.S. has provided an ostensible — though controversial — legal basis to create the metering program.

The Southern Poverty Law Center (SPLC), Center for Constitutional Rights, and the American Immigration Council have filed a class-action lawsuit (*Al Otro Lado v. McAleenan*)<sup>21</sup> representing six asylum seekers (amended in 2018 to include eight additional asylum seekers) challenging the administration’s metering policy.

The plaintiffs claimed that asylum seekers are subject to dangerous conditions on the Mexican side of the border and argued that CBP’s metering system “creates unreasonable and life-threatening delays in processing asylum seekers.” They also alleged that CBP officials had discouraged aliens from pursuing asylum by forcibly removing them from ports of entry, threatening them with prolonged detention or separation from their children, and falsely telling them that they can no longer pursue asylum due to changes in U.S. law.<sup>22</sup>

<sup>19</sup> “El Numero De La Lista” <http://elnumerodelalista.com>

<sup>20</sup> “Immigration and Nationality Act” <https://www.uscis.gov/legal-resources/immigration-and-nationality-act>

<sup>21</sup> “Challenging Customs and Border Protection’s Unlawful Practice of Turning Away Asylum Seekers” <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers>

<sup>22</sup> The full text of the complaint can be found at [https://www.americanimmigrationcouncil.org/sites/default/files/litigation\\_documents/challenging\\_custom\\_and\\_border\\_protections\\_unlawful\\_practice\\_of\\_turning\\_away\\_asylum\\_seekers\\_complaint.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/challenging_custom_and_border_protections_unlawful_practice_of_turning_away_asylum_seekers_complaint.pdf)

In September 2019, the plaintiffs filed a motion asking the California district court to keep the administration from applying “Asylum Ban 2.0” (*see discussion below*) to provisional class members to maintain their eligibility for asylum until the court rules on the legality of the metering policy. Attorneys at the SPLC and the Center for Constitutional Rights state that their clients would not be able to seek asylum relief in Mexico under the new policy because Mexico requires those who seek asylum to do so within 30 days of arriving in the country. Since some of the class members have been waiting in Tijuana for months based on metering restrictions or were returned to the country under Migrant Protection Protocols (*see discussion below*), they are ineligible to now seek asylum there.

On November 19, 2019, the court provisionally certified a class consisting of “all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. port of entry 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 court also blocked the administration from applying the so-called Asylum Ban 2.0 to members of the provisional class and ordered that the government apply pre-asylum-ban practices for processing the asylum applications of members of the class.<sup>23</sup>

### **Zero tolerance**

On April 6, 2018, Attorney General Jeff Sessions announced a new “zero-tolerance” policy to prosecute people caught entering the U.S. illegally criminally. While the policy became widely known for leading to widespread separation of families, the primary goal was to detain and criminally prosecute every migrant (including asylum seekers) who attempted to cross the U.S. border anywhere other than at an official port of entry.<sup>24</sup> The policy directed federal prosecutors’ offices along the southwest border to accept for criminal prosecution all cases involving illegal entry referred to them by CBP “to the extent practicable.” Sessions declared

<sup>23</sup> The full text of the decision can be found at:

[https://ccrjustice.org/sites/default/files/attach/2019/07/Order%20granting%20in%20part%20and%20denying%20in%20part%20MTD%207.29.19%20\\_1.pdf](https://ccrjustice.org/sites/default/files/attach/2019/07/Order%20granting%20in%20part%20and%20denying%20in%20part%20MTD%207.29.19%20_1.pdf)

<sup>24</sup> Department of Justice “*Zero-Tolerance Memorandum*” April 6, 2018.

<https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>

the goal was to prosecute 100 percent of people caught crossing the border illegally.<sup>25</sup> As of June 2018, 46 percent of adults arrested by Border Patrol were prosecuted.<sup>26</sup>

When an individual is criminally charged with illegally crossing the border, any accompanying children are placed in the custody of the Office of Refugee Resettlement (ORR). This policy was initially put in place to make sure that human traffickers would not maintain custody of children they might be smuggling. However, the U.S. had a longstanding policy of family separation when the parents face a criminal charge, such as illegal entry. But zero-tolerance required all parents who crossed illegally be put in criminal proceedings, rather than the more expedient civil removal proceedings.<sup>27</sup> It removed the choice of law enforcement — otherwise known as prosecutorial discretion, which was used by both Presidents Bush and Obama — and *required* law enforcement to charge parents with illegal entry even if they claimed a legal right to asylum.

Soon after the change, news outlets began to report that unauthorized immigrant parents traveling with their children were being criminally prosecuted and separated from their children. Altogether, nearly 3,000 children were separated from their parents before Trump signed an executive order “Affording Congress an Opportunity to Address Family Separation,” on June 20, 2018, ostensibly halting family separation.<sup>28</sup> The order stated that the “zero-tolerance” policy would continue by detaining families together instead of separating them.

After the executive order, a federal judge mandated that all separated children are promptly reunited with their families. Another federal judge rejected the Department of Justice’s request to extend the 20-day limit on holding children in immigration detention established by the Flores Settlement Agreement, which sets the parameters for such confinement (*discussed in a later section*). DHS has since reverted to some prior immigration enforcement policies, and

<sup>25</sup> Richard Gonzalez, “Sessions Says ‘Zero Tolerance’ For Illegal Border Crossers, Vows to Divide Families” May 7, 2018. [Npr.org/sections/the-two-way-2018-05-07-609225537/sessions-says-zero-tolerance-for-illegal-border-crossers-vows-to-divide-families](http://npr.org/sections/the-two-way-2018-05-07-609225537/sessions-says-zero-tolerance-for-illegal-border-crossers-vows-to-divide-families)

<sup>26</sup> TRAC “*Stepped Up Illegal-Entry Prosecutions Reduce Those for Other Crimes,*” [trac.syr.edu/immigration/reports/524](http://trac.syr.edu/immigration/reports/524)

<sup>27</sup> Kristie De Pena “*What Everyone Has Gotten Wrong About Family Separation*” May 31, 2018. <http://niskanencenter.org/what-everyone-has-gotten-wrong-about-family-separation/>

<sup>28</sup> “*Affording Congress an Opportunity to Address Family Separation*” June 20, 2018. <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>

family separations continue to occur based upon DHS enforcement protocols in place before the 2018 zero-tolerance policy.

According to a report by the Government Accountability Office, DOJ U.S. Attorneys' Offices in all five districts along the southwest border — Arizona, Southern California, New Mexico, Southern Texas, and Western Texas — have adopted prosecution priorities aligned with the attorney general's prioritization of criminal immigration enforcement.<sup>29</sup> These districts have seen a continued significant increase in prosecution of immigration-related referrals by CBP.<sup>30</sup> Among the five judicial districts, in June 2018, there were 20 percent more immigration prosecutions than in May 2018 and 74 percent more prosecutions than in March 2018.<sup>31</sup>

A Time article shows that approximately 1,000 children were separated from their parents the year after the Trump administration “ended” the practice.<sup>32</sup> In a legal challenge brought by the ACLU, the plaintiffs state that “the Executive Order halting family separations did not provide guidance for reunifying families or guidance on future family separations, other than stating that parents and children would not be detained together if Defendants [ICE] had ‘concerns’ that the parent posed ‘a risk to the child’s welfare.’”

Criminal history has been the most widely stated reason for the continued separations (750 known family separations between June 28, 2018, and June 29, 2019). The bar for “criminal history” that warrants separation includes all crimes — like unlawful reentry — not just crimes that impact a parent’s fitness to raise their child. While zero-tolerance is officially terminated, children and parents continue to face unwarranted separation at the southern border.

<sup>29</sup> U.S. Government Accountability Office “*Report to the Chairwoman, Subcommittee on Immigration and Citizenship, Committee on the Judiciary, House of Representatives*” December 2019. <https://www.gao.gov/assets/710/702965.pdf>

<sup>30</sup> Congressional Research Service “*The Trump Administration’s ‘Zero Tolerance’ Immigration Enforcement Policy*.” February 26, 2019. <https://fas.org/sgp/crs/homesec/R45266.pdf>

<sup>31</sup> TRAC Immigration “*Stepped Up Illegal-Entry Prosecutions Reduce Those for Other Crimes*” <https://trac.syr.edu/immigration/reports/524/#f1>

<sup>32</sup> Jasmine Aguilera “*Here’s What to Know About the Status of Family Separation at the U.S. Border, Which Isn’t Nearly Over*” September 20, 2019. <http://time.com/5678313/trump-administration-family-separation-lawsuits/>

## **Removal of protections for unaccompanied minors**

In May 2019, USCIS issued a memo, “Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children,” that undercut protections provided to unaccompanied children during the asylum process.<sup>33</sup> This guidance allowed USCIS to deny standard accommodations for children, and requires immigration adjudicators to continually re-adjudicate a child’s designation as unaccompanied. These new procedures — effective July 30, 2019 — remove protections specifically designed to accommodate the specific vulnerability of children who arrive at the border alone.

In August 2019, Judge George J. Hazel of the U.S. District Court of Maryland issued a temporary restraining order prohibiting USCIS from implementing the memo.<sup>34</sup> Although enjoined, the policy is an example of a broader effort by the executive branch to align the U.S. Department of Justice immigration judges’ decisions with the president’s policy goals.

## **Excluding Asylum Seekers Who Are Victims of Domestic Abuse and Gang Violence**

In June 2018, Attorney General Jeff Sessions referred the case of a Salvadoran woman — *Matter of A-B35* — who was a victim of domestic abuse to himself in order to overrule a 2014 BIA decision in, *Matter of A-R-C-G*.<sup>36</sup>

In *Matter of A-R-C-G*, the BIA had held that women fleeing domestic violence may qualify for asylum as members of a particular social group: married women in Guatemala who are unable to leave their relationship. This ruling reflected the deeply entrenched patriarchal norms in Guatemala that perpetuate widespread, gender-based violence that is inflicted on Guatemalan wives with impunity,<sup>37</sup> and allowed victims of domestic violence and gang violence — which

<sup>33</sup> USCIS “*Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children*” May 31, 2019.  
[https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%271%20Ops/Asylum/Memo\\_-\\_Updated\\_Procedures\\_for\\_I-589s\\_Filed\\_by\\_UACs\\_5-31-2019.pdf](https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%271%20Ops/Asylum/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf)

<sup>34</sup> The full text of the decision is available at:  
[https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/I.O.P.\\_v.\\_U.S.\\_Dept.\\_of\\_Homeland\\_Security\\_et.\\_al.\\_Civil\\_Action\\_819-cv-01944.pdf](https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/I.O.P._v._U.S._Dept._of_Homeland_Security_et._al._Civil_Action_819-cv-01944.pdf)

<sup>35</sup> The full text of the decision can be found at: <https://www.justice.gov/eoir/page/file/1070866/download>

<sup>36</sup> The full text of the decision can be found at: <https://www.justice.gov/eoir/page/file/1070866/download>

<sup>37</sup> The full text of the decision can be found at:  
<https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/26/3811.pdf>

is the basis of many claims for asylum from Central America, where there is a high rate of femicide and gang violence — to seek safety in the U.S.

Asylum jurisprudence based on gender — particularly domestic violence — has been well-established in the U.S. immigration system. In 1996, the BIA ruled in *Matter of Kasinga*, 21 *I&N Dec.* 357 that victims of female genital cutting qualified as a particular social group.<sup>38</sup> In 1999, an immigration judge established in *Matter of R-A* that victims of domestic violence qualified as a particular social group.

The BIA ultimately overturned this decision, but DHS attorneys eventually agreed with the premise that domestic violence can be a basis for asylum under the so-called Acosta test (*Matter of Acosta*, 19 *I&N Dec.* 211).<sup>39</sup> The BIA remanded *In re R-A* back to the judge, and the plaintiff was granted asylum in 2009.<sup>40</sup> Finally, in 2009, in *Matter of L-R-*, DHS once again recognized the validity of asylum based on domestic violence.<sup>41</sup>

In 2014, the BIA issued two particular social group cases that dealt with victims of gang violence, *Matter of W-G-R*, 26 *I&N Dec.* 208<sup>42</sup> and *Matter of M-E-V-G*, 26 *I&N Dec.* 227.<sup>43</sup> These cases established a three-pronged test to qualify as a particular social group. To qualify, a group must demonstrate immutability, social distinction, and particularity. Each social group formation is considered on a case-by-case basis. That established the legal precedent on which *Matter of A-R-G-C* was decided and granted protection to victims of domestic violence and gang violence.

<sup>38</sup> The full text of the decision can be found at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3278.pdf>

<sup>39</sup> The full text of the decision can be found at: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2986.pdf>

<sup>40</sup> The full text of the decision can be found at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3403.pdf>

<sup>41</sup> The full text of the decision can be found at: <https://cgrs.uchastings.edu/our-work/matter-l-r>

<sup>42</sup> The full text of the decision can be found at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3794.pdf>

<sup>43</sup> The full text of the decision can be found at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3795.pdf>

In overruling that precedent, Sessions stated that:

[A]n applicant seeking to establish persecution on account of membership in a ‘particular social group’ must demonstrate (1) membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question; and (2) that membership in the group is a central reason for her persecution. When the alleged persecutor is someone unaffiliated with the government, the applicant must also show that her home government is unwilling or unable to protect her. To be cognizable, a particular social group must exist independently of the harm asserted in the application for asylum.

Additionally, he limited the ability of any migrants being persecuted by nonstate actors to qualify for asylum. His opinion states that “[a]n applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government’s difficulty controlling individual behavior.<sup>44</sup> The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims. The mere fact that a country may have a problem policing certain crimes or that certain populations are more likely to be victims of a crime, cannot itself establish an asylum claim.”

On July 11, 2018, USCIS issued a memorandum of guidance in light of the decision in *Matter of A-B*.<sup>45</sup> In the policy memorandum, USCIS reiterated that claims based on membership in a social group defined by the members’ vulnerability to domestic violence or gang violence committed by non-government actors would *not* establish a credible or reasonable fear of persecution.

The American Civil Liberties Union, the Center for Gender and Refugee Studies, the ACLU of Texas, and the ACLU of D.C. filed a federal lawsuit in August 2018 challenging Sessions’ ruling in *Grace v. Whitaker*. In December 2018, Judge Emmet Sullivan of the federal district

<sup>44</sup> The full text of the decision can be found at: <https://www.justice.gov/eoir/page/file/1070866/download>

<sup>45</sup> See USCIS “Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B*.” July 11, 2018. <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf>

court in D.C. issued an injunction permanently blocking the government’s general rule against credible fear claims relating to domestic violence or gang violence, as well as multiple other challenged policies. The court found that the policy was contrary to the INA, the Refugee Act of 1980, and the Administrative Procedure Act.

The ruling states, “The general rule is arbitrary and capricious because there is no legal basis for an effective categorical ban on domestic violence and gang-related claims.” Such a general rule runs contrary to the individualized analysis required by the INA. Under the current immigration laws, the credible fear interviewer must prepare a case-specific factually intensive analysis for each alien.<sup>46</sup>

Credible fear determinations, like requests for asylum in general, must be resolved based on the particular facts and circumstances of each case. According to the court, the new general rule is thus contrary to the Refugee Act and the INA in interpreting ‘particular social group’ in a way that results in a general rule....” Additionally, the court found that “[u]nder the government’s formulation of the persecution standard, no asylum applicant who received assistance from the government, regardless of how ineffective that assistance was, could meet the persecution requirement when the persecutor is a nongovernment actor. That is simply not the law.”

As a result of this ruling, the administration is now permanently blocked from applying the policies articulated in Sessions’ ruling and the USCIS guidelines to credible fear proceedings.

Nonetheless, in July 2019, Attorney General William Barr certified to himself the *Matter of L-E-A*, where an asylum seeker based his application on the fear of his father’s store being targeted by gangs. Barr ruled that a “nuclear family” is not considered a “particular social group” for asylum applicants.<sup>47</sup>

Barr stated in his ruling: “What qualifies certain clans or kinship groups as particular social groups is not merely the genetic ties among the members. Rather, it is that those ties or other salient factors establish the kinship group, on its terms, as a ‘recognized component of the society in question.’ An alien’s family-based group will not constitute a particular social group

<sup>46</sup> The full text of the opinion is available at: <https://www.aclu.org/legal-document/grace-v-whitaker-opinion>

<sup>47</sup> The full text of the decision is available at: <https://www.justice.gov/file/1187856/download>

unless it has been shown to be socially distinct in the eyes of its society, not just those of its alleged persecutor.”

Barr justified his ruling by highlighting that the INA does not specify family ties alone as an independent basis for qualifying for asylum. He noted, “as almost every alien is a member of a family of some kind, categorically recognizing families as particular social groups would render virtually every alien a member of a particular social group.”

Further, Barr asserted, there is no evidence that Congress intended the term “particular social group” to cast so wide a net. If Congress intended for refugee status to turn on one’s suffering of persecution ‘on account of’ family membership, Congress would have included family identity as one of the expressly enumerated covered grounds for persecution.”

### **Asylum Ban 1.0**

In November 2018, in response to a caravan of asylum seekers arriving at the U.S.-Mexico border, Trump signed a presidential order barring asylum claims from individuals who do not cross at official ports of entry.<sup>48</sup>

The proclamation was implemented through an Interim Final Rule, allowing for immediate implementation of the regulation without the standard notice or comment periods. The individuals affected by the ban could only seek humanitarian protection, like withholding of removal and protection under the United Nations Convention Against Torture, if they are banned from making an asylum claim.

Additionally, CBP would subject individuals to an initial higher screening standard. Instead of being held to a ‘credible fear’ standard that 75 percent of people currently pass, CBP planned to hold individuals to the ‘reasonable fear’ standard, which only approximately 25 percent of applicants are able to meet.

The rule was challenged by the National Immigrant Justice Center, Human Rights First, and Williams & Connolly LLP in the U.S. District Court in Washington in *O.A. v. Trump*.<sup>49</sup> The plaintiffs argued that the asylum statute makes it clear that any individual can seek asylum

<sup>48</sup> “*Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*” November 9, 2018. <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/>

<sup>49</sup> National Immigrant Justice Center “*O.A. v. Trump*” [https://immigrantjustice.org/court\\_cases/oa-v-trump](https://immigrantjustice.org/court_cases/oa-v-trump)

regardless of their location in the U.S. or manner of entry, and that the executive branch lacks the authority to implement a policy that directly conflicts with the statute.

On August 2, 2019, a federal judge struck down the initial asylum ban. In his ruling, U.S. District Judge Randolph Moss said he does not doubt Trump's intention that a surge of migrants crossing the southern U.S. border is a problem of national interest, however, "that assessment is neither sufficient to override a statutory mandate permitting all aliens present in the United States to apply for asylum, regardless of whether they arrived in the United States 'at a designated port of arrival,' nor does it suffice to shift the congressional assignment of authority to adopt additional limitations on asylum 'by regulation' from the attorney general and the secretary of homeland security to the president."<sup>50</sup>

### **Asylum Ban 2.0**

In July 2019, the DOJ and DHS announced a new policy — known as Asylum Ban 2.0 — making any asylum seekers that transit through another country — excluding the person's country of citizenship, nationality, or lawful permanent residence — ineligible for asylum in the U.S.<sup>51</sup> Individuals who fail to apply for protection in a third country of transit may only seek withholding of removal and deferral of removal under the Convention against Torture. The rule required asylum officers and immigration judges to apply the new bar on asylum eligibility during credible fear processes for stowaways and aliens subject to expedited removal under section 235(b)(1) of the INA.

The second asylum ban is facing litigation in *East Bay Sanctuary Covenant et al. v. Trump*.<sup>52</sup> A federal district court judge in California issued a temporary restraining order on July 16, 2019, finding the ban likely violated the asylum statute and raised concerns regarding the administration's failure to allow for notice-and-comment rulemaking.<sup>53</sup>

<sup>50</sup> Nate Robson "Trump Loses Another Asylum Ruling, as DC Judge Vacates 'Port of Entry' Rule." August 2, 2019. <https://www.law.com/nationallawjournal/2019/08/02/trump-loses-another-asylum-ruling-as-dc-judge-vacates-port-of-entry-rule/?slreturn=20191109103433>

<sup>51</sup> Daniel M. Kowalski "New DOJ/DHS Asylum Rule (*Federal Register*, July 16, 2019)" July 15, 2019. <https://www.lexisnexis.com/legalnewsroom/immigration/b/insideneews/posts/advance-copy-of-doj-dhs-asylum-rule>

<sup>52</sup> ACLU "*East Bay Sanctuary Covenant v. Trump*" <https://www.aclu.org/cases/east-bay-sanctuary-covenant-v-trump>

<sup>53</sup> "*East Bay Sanctuary Covenant v. Trump - TRO Granted*" <https://www.aclu.org/legal-document/east-bay-sanctuary-covenant-v-trump-tro-granted>

The government appealed to the U.S. Circuit Court of Appeals for the 9th Circuit, which kept the injunction in place only for the geographic region covered by the 9th Circuit (California and Arizona) and allowed the government to implement the rule across the rest of the southern border. On September 11, 2019, the Supreme Court allowed full implementation of Asylum Ban 2.0. The rule is now entirely in effect, allowing the ban to be fully implemented during the pendency of litigation.<sup>54</sup>

### **HARP AND PARC Pilot Programs**

The Humanitarian Asylum Review Process (HARP) is a pilot project launched in October 2019 aimed at expediting deportation processes for Mexican asylum seekers who present themselves at the border in El Paso, Texas.

Under the program, Mexican asylum seekers detained by CBP agents are given an initial credible fear interview by USCIS asylum officers within 24 hours, and a decision is provided within ten days. If the asylum officer determines that an asylum seeker does not have a credible fear of persecution, immigrants can have an appeal heard over the phone by an immigration judge, according to government documents and those with knowledge of the policy.<sup>55</sup>

Historically, asylum seekers have not been held in CBP custody during the credible fear process and are usually transferred to Immigration and Customs Enforcement (ICE) detention facilities within 24 hours. CBP facilities are intended as short-term detention facilities, and are unequipped to handle populations for up to 10 days.

In CBP facilities, there is no way for individuals to access their attorneys, family, or the public. Detainees cannot access reliable medical care, and cannot access nonprofit assistance. The CBP cells are frequently referred to as “hieleras” (“iceboxes,” aptly named for their freezing temperatures) and lack both real beds and adequate nutrition, particularly for children.

A similar pilot project called the “Prompt Asylum Case Review” (PACR) also began in October 2019 in El Paso to provide a decision on an asylum claim by an immigration judge within ten days.

<sup>54</sup> The full text of the Supreme Court decision can be found at:  
[https://www.supremecourt.gov/opinions/18pdf/19a230\\_k53l.pdf](https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf)

<sup>55</sup> Hamed Aleaziz “*The Trump Administration Launched a Secretive Program to More Quickly Deport Mexican Asylum-Seekers*” November 6, 2019.  
<https://www.buzzfeednews.com/article/hamedaleaziz/asylum-pilot-program-border-mexico-deport-trump>

The Department of Homeland Security confirmed the existence of the pilot program, but provided few details. It called the program a joint effort with the Justice Department to expedite proceedings at a single location while ensuring protections and due process for all. The statement said it would be enforced on single men and people traveling in families who are subject to the asylum ban.

Under PACR, individuals apprehended in the El Paso area are kept in holding cells or taken to a local 1,500-bed, tent facility operated by CBP. The pilot is designed to give asylum seekers 24 hours of access to a phone in a private room before an initial asylum screening. Still, attorneys said the rules are unclear, and they aren't receiving notice or instructions. If asylum seekers fail the screening, they can appeal to judges in Otero County, New Mexico, by phone.<sup>56</sup>

On December 6, 2019, the ACLU filed a lawsuit in the U.S District Court in Washington D.C. challenging the PARC and HARP programs on behalf of their clients who were put in the programs and removed to their countries of origin. The lawsuit was also brought on behalf of Las Americas Immigrant Advocacy Center, a nonprofit organization that provides legal services to immigrants detained by the federal government in the El Paso area.

The plaintiffs claim that the programs require the detention of asylum seekers in dangerous facilities with no meaningful way to obtain or consult with an attorney before their hearings. The lawsuit seeks an order declaring PARC and HARP illegal and blocking the removal of asylum seekers until they are granted the opportunity to access counsel.<sup>57</sup>

### **Application Fees**

In November 2019, USCIS proposed a rule that charged \$50 for asylum applications to “alleviate the pressure” that the growing asylum backlog places on the system, as well as an

<sup>56</sup> Robert Moore “*Trump administration testing rapid asylum review, deportation process in Texas*” October 19, 2019. [https://www.washingtonpost.com/immigration/trump-administration-testing-rapid-asylum-review-deportation-process-in-texas/2019/10/24/caa91a62-f5d8-11e9-a285-882a8e386a96\\_story.html](https://www.washingtonpost.com/immigration/trump-administration-testing-rapid-asylum-review-deportation-process-in-texas/2019/10/24/caa91a62-f5d8-11e9-a285-882a8e386a96_story.html)

<sup>57</sup> The full text of the complaint can be found at: [https://www.aclutx.org/sites/default/files/aclu\\_complaint\\_expedited\\_removal\\_program\\_pacr\\_harp.pdf](https://www.aclutx.org/sites/default/files/aclu_complaint_expedited_removal_program_pacr_harp.pdf)

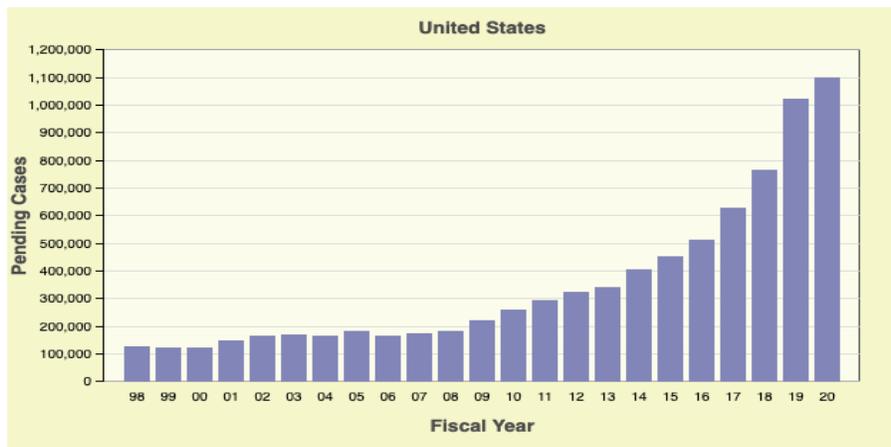
83 percent fee increase —\$640 to \$1,170—for the form to naturalize to become a U.S. citizen. There is no waiver of the fee for those who cannot afford to pay the \$50.<sup>58</sup>

The agency increased fees for most applications, including citizenship applications and certifications, in 2016. The agency does not charge for specific humanitarian applications, such as visas for crime victims and those working with police or visas for those who have been victims of human trafficking. There are currently only three other countries that charge fees for asylum: Iran, Fiji, and Australia.<sup>59</sup>

### Case Quotas

In April 2018, Sessions established a case completion quota (effective October 2018) for immigration judges, encouraging them to order immigrants deported and to deny their asylum claims quickly.<sup>60</sup> The quota requires immigration judges to make rulings on 700 cases per year. Judges who do not meet the quote face disciplinary action, including transfer or termination.

Figure 3: Pending Immigration Cases (FY1998-FY 2020) (Source: TRAC 2020)



<sup>58</sup> The full text of the proposed bill is available at: <https://www.federalregister.gov/documents/2019/11/14/2019-24366/us-citizenship-and-immigration-services-fee-schedule-and-changes-to-certain-other-immigration>

<sup>59</sup> Priscilla Alvarez “Trump administration proposes charging for asylum applications, joining only 3 other countries,” November 8, 2019. <https://www.cnn.com/2019/11/08/politics/asylum-fee-uscis/index.html>

<sup>60</sup> The full text of the policy can be found at: <https://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf>

In December 2019, Las Americas Immigrant Advocacy Center, the Asylum Seekers Advocacy Project, Catholic Legal Immigration Network, Inc., Innovation Law Lab, Santa Fe Dreamers Project, and the Southern Poverty Law Center filed a lawsuit in federal court in Oregon challenging the quota. The plaintiffs charge the administration with violating the INA, the Administrative Procedure Act, and the U.S. Constitution’s Take Care Clause.<sup>61</sup> That decision is pending, and case quotas are currently in place.

### **Changes to Work Permits**

Previously, people seeking asylum in the U.S. became eligible for work permits 150 days after filing their asylum applications, and USCIS was given 30 days to process those permits.

On November 13, 2019, USCIS proposed a rule that would bar asylum seekers who illegally crossed the border from obtaining work authorization, and delay the issuance of permits to those who crossed legally by at least one year.<sup>62</sup>

Under the proposed rule, USCIS would deny work authorization to most individuals seeking asylum who crossed the U.S.-Mexico border without documentation. It would also require all those seeking asylum and undergoing deportation proceedings to wait one year from when they filed their asylum application to request a work permit. Two months earlier, DHS had proposed a rule in the federal register that would end the 30-day deadline for processing work permits.<sup>63</sup>

These changes would prevent most asylum seekers from working while they wait for review of an asylum claim, which can often take years. For asylum seekers who cannot afford to be unemployed and are not eligible for most public benefits, that means they would need to either give up their asylum claims in the U.S. altogether or work illegally (and in unsafe conditions).<sup>64</sup>

<sup>61</sup> The full text of the complaint is available at:

[https://www.splcenter.org/sites/default/files/documents/ecf\\_1\\_las\\_americas\\_v.\\_trump\\_no.\\_19-cv-02051-sb\\_d.\\_or.pdf](https://www.splcenter.org/sites/default/files/documents/ecf_1_las_americas_v._trump_no._19-cv-02051-sb_d._or.pdf)

<sup>62</sup> The full text of the proposed rule is available at:

<https://www.federalregister.gov/documents/2019/11/14/2019-24293/asylum-application-interview-and-employment-authorization-for-applicants>

<sup>63</sup> The full text of the proposed rule is available at:

<https://www.federalregister.gov/documents/2019/09/09/2019-19125/removal-of-30-day-processing-provision-for-asylum-applicant-related-form-i-765-employment>

<sup>64</sup> Jeremy Neufeld “A stiff-arm to immigrant investors – and the jobs they create,” September 10, 2019 [niskanencenter.org/a-stiff-arm-to-immigrant-investors-and-the-jobs-they-create/](https://niskanencenter.org/a-stiff-arm-to-immigrant-investors-and-the-jobs-they-create/)

With the new guidelines, officials would have more leeway in terminating the work authorization of individuals who receive unfavorable decisions from asylum officers or immigration judges. Felony convictions and arrests for certain crimes would also disqualify asylum seekers from obtaining work authorization. The proposed changes also appear to be retroactive, potentially allowing the government to reject work permit renewal requests for asylum seekers already in the U.S. as they would be ineligible under the new guidelines.

## “Safe” Third Country Agreements and Remain in Mexico

To complement the asylum ban, the administration has been working to implement “safe third country agreements” with each Northern Triangle country to force asylum seekers who transit through a “safe” country to be returned to seek asylum there. These policies — in conjunction with the metering of border access and the Migrant Protection Protocols, discussed below — effectively close the U.S.-Mexico border to non-Mexicans, regardless of the validity of their lawful claims of asylum, and “outsources” asylum to countries that are often unsafe for asylum seekers.

Safe third country agreements were initially created as a way for countries to share the responsibility of aiding asylum-seekers. In 1991, UNHCR invited such contracts where they would result in “clearer identification of those in need of protection” and “international cooperation in the provision of this protection and the realization of lasting solutions.”<sup>65</sup> The INA lays out two conditions for the agreements. First, they must be with countries where an immigrant’s “life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.” Second, the countries must be where they would have “access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.”

### Guatemala

On November 19, 2019, USCIS issued a rule that would allow the administration to return individuals who had crossed Guatemala seeking asylum in the U.S. *back* to Guatemala.<sup>66</sup> While

<sup>65</sup> UNHCR “*Background Note on the Safe Country Concept and Refugee Status Background Note on the Safe Country Concept and Refugee Status.*” July 26, 1991. <https://www.unhcr.org/en-us/excom/scip/3ae68ccec/background-note-safe-country-concept-refugee-status.html>

<sup>66</sup> The full text of the rule is available at: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2019->

details of the agreement are shrouded in secrecy, it is said that as part of the agreement, the U.S. offered to expand and streamline the H-2A temporary agricultural visa program for Guatemalan citizens, promising to spur what Trump described as a “new era of investment and growth.” According to a New York Times article, the United States agreed to invest \$40 million in aid to help build the country’s asylum system.<sup>67</sup>

Gang warfare and violence within Guatemala have forced thousands of Guatemalan citizens from their homes to seek asylum in the U.S. In 2018, Guatemalans submitted 34,800 asylum applications worldwide. The country was the second-largest contributor to asylum applications in the U.S. State Department notes that “gang activity, such as extortion, violent street crime including armed robbery and murder, and narcotics trafficking, is widespread.”<sup>68</sup>

Opposition to the “safe third country” agreement was so strong within Guatemala that in July 2019, the Guatemalan government issued a statement canceling a meeting between Jimmy Morales, then president of Guatemala, and President Trump to discuss the agreement. After the meeting was canceled, Guatemala’s Constitutional Court blocked Morales from immediately declaring Guatemala a safe third country for asylum seekers.

When the agreement fell through, Trump threatened to impose tariffs, ban travelers, and hit remittances with fees, which would have devastating social and economic consequences. By the end of the month, acting Homeland Security Secretary Kevin McAleenan signed a confidential agreement with Guatemala’s minister of interior and home affairs, Enrique Antonio Degenhart Asturias.

According to Reuters, the first phase of the agreement will roll out in El Paso with a small number of adult asylum seekers from El Salvador and Honduras. Unaccompanied children will not be eligible to be deported to Guatemala, and families with children under 18 are not part of the first phase. Immigrants can avoid deportation if it is in the “public interest” — an

25137.pdf?utm\_medium=email&utm\_campaign=pi+subscription+mailing+list&utm\_source=federalregister.gov

<sup>67</sup> Zolan Kanno-Youngs and Elisabeth Malkin. “U.S. Agreement with El Salvador Seeks to Divert Asylum Seekers.” September 20, 2019. <https://www.nytimes.com/2019/09/20/us/politics/us-asylum-el-salvador.html>

<sup>68</sup> U.S. Department of State – Bureau of Consular Affairs “Guatemala Travel Advisory” [travel.state.gov/content/travel/en/traveladvisories/traveladvisories/Guatemala-travel-advisory.html](https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/Guatemala-travel-advisory.html)

exception that must be cleared by senior USCIS officials.<sup>69</sup> In December 2019, Interior Minister Enrique Degenhart said that a total of 24 people were sent to Guatemala under the program. Of those, “only two have requested asylum (in Guatemala).”<sup>70</sup>

### **El Salvador**

El Salvador is the most common country of origin for applications for asylum in the U.S. Rampant violent crime has driven thousands of asylum seekers to seek safety in the U.S. in recent years. Although its homicide rate has been falling since 2017, it is still one of the highest in the world.

On September 20, 2019, the Trump administration signed a “safe third country” agreement with the government of El Salvador. Acting DHS Secretary Kevin McAleenan said the agreement focuses on helping El Salvador develop its asylum system, but remained vague on the agreement's exact provisions.<sup>71</sup> It has also not been announced whether Salvadoran citizens will be allowed to seek asylum in the U.S. under the agreement.

It also remains unclear what El Salvador will receive from the U.S. President Nayib Bukele has previously lobbied the U.S. to extend “temporary protected status” for Salvadorans who have lived in the U.S. for an extended period of time. Potential protection would impact about 200,000 Salvadorans who have lived in the U.S. for nearly two decades, and whose current protections expired in January 2020.<sup>72</sup>

This agreement may allow the U.S. to target Cubans and Nicaraguans in particular, who usually pass through El Salvador on their way to the U.S. southern border. The U.S. must be able to cooperate with immigrants’ home countries to deport them, but Cuba and Nicaragua have not

<sup>69</sup> Ted Hesson, Mica Rosenberg, Kristina Cooke “*Trump administration prepares to send asylum seekers to Guatemala.*” November 20, 2019. <https://www.reuters.com/article/us-usa-immigration-guatemala-asylum/trump-administration-prepares-to-send-asylum-seekers-to-guatemala-idUSKBN1XU2SI>

<sup>70</sup> Sofia Menchu “*U.S. Asylum Seekers Sent to Guatemala Preferring to Return to Home Countries*” December 12, 2019. <https://www.usnews.com/news/world/articles/2019-12-12/us-asylum-seekers-sent-to-guatemala-preferring-to-return-to-home-countries>

<sup>71</sup> Nick Miroff “*Trump administration reaches deal to send asylum seekers to El Salvador in an effort to deter migrants from entering the United States*” September 20, 2019. [https://www.washingtonpost.com/immigration/trump-administration-reaches-deal-to-send-asylum-seekers-to-el-salvador-in-an-effort-to-deter-migrants-from-entering-the-united-states/2019/09/20/17350a16-dbbd-11e9-ac63-3016711543fe\\_story.html](https://www.washingtonpost.com/immigration/trump-administration-reaches-deal-to-send-asylum-seekers-to-el-salvador-in-an-effort-to-deter-migrants-from-entering-the-united-states/2019/09/20/17350a16-dbbd-11e9-ac63-3016711543fe_story.html)

<sup>72</sup> Catherine E. Shoichet “*Federal judge temporarily blocks Trump administration from ending TPS,*” October 4, 2018. [Cnn.com/2018/10/03/politics/tps-preliminary-injunction/index.html](http://Cnn.com/2018/10/03/politics/tps-preliminary-injunction/index.html)

been willing to do so recently. This agreement would potentially allow the administration to send them to El Salvador instead.

## Honduras

The White House directed DHS officials to secure a “safe third country” style agreement with Honduras by October 1, 2019, although no details of the agreement have been made public.

According to a report by the Los Angeles Times, the agreement was signed in New York on September 25, 2019, by Acting Secretary McAleenan and Honduras’ foreign minister, María Dolores Agüero. This agreement is the first to explicitly state that if Honduras or another country rejects the individuals’ asylum claims, they will not get another chance to apply in the U.S.<sup>73</sup>

Again, violent crime, extreme poverty, and corruption at all levels of government have made Hondurans the eighth-largest group to apply for asylum in the world in 2018. Since April 2019, Hondurans have protested conditions in the country in rising numbers. Nearly two-thirds of Hondurans live in poverty, while a third live in extreme poverty, according to the Honduras National Institute of Statistics.<sup>74</sup> Since the election of President Juan Orlando Hernández in 2014, there has been a dramatic cut in spending on education and health care (which likely led to the worst dengue fever outbreak Honduras has seen in 50 years) and an increase in military spending to target government opponents. The U.S State Department’s travel advisory for Honduras instructs potential visitors to “reconsider travel to Honduras due to crime.”

In January 2019, the American Civil Liberties Union, National Immigration Justice Center, Center for Gender & Refugee Studies, and Human Rights First filed a federal lawsuit (*U.T. v. Barr*) challenging the Trump administration’s policies regarding the “safe third country” agreements with Guatemala, El Salvador, and Honduras. The plaintiffs are asylum seekers who fled to the U.S. and were removed to Guatemala and Las Americas Immigrant Advocacy Center and the Tahirih Justice Center, which serve asylum seekers. It cites violations of the Refugee Act, INA, and Administrative Procedure Act.<sup>75</sup>

<sup>73</sup> Molly Hennessy-Fiske and Molly O’Toole “U.S. to send asylum seekers to Honduras, bypassing American asylum.” December 16, 2019. <https://www.latimes.com/world-nation/story/2019-12-16/us-poised-to-send-asylum-seekers-to-honduras>

<sup>74</sup> Redaccion Web “INE: 30.9% de los hogares hondureños se encuentran en pobreza crónica” December 10, 2018. <https://tiempo.hn/ine-hogares-pobreza-cronica/>

<sup>75</sup> The full text of the complaint can be found at: <https://www.aclu.org/legal-document/complaint-ut-v-barr>

## Remain in Mexico

The Migrant Protection Protocols (MPP) of 2019, in conjunction with metering, have created a “remain in Mexico” policy whereby the U.S. government forces asylum seekers to wait in northern Mexican cities to make asylum claims, and often, for the duration of their hearings.

The MPP policy was first announced<sup>76</sup> in December 2018, and implemented<sup>77</sup> on January 25, 2019. This policy orders asylum seekers arriving at ports of entry on the U.S.-Mexico border to be returned to Mexico.

If a person states that she has a fear of returning to Mexico, she is referred to USCIS for an “MPP fear-assessment interview.” This interview determines whether an individual is likely to be subjected to persecution on account of a protected ground in Mexico.

During the first year of MPP, screening interviews have become increasingly cursory.<sup>78</sup> Some MPP fear interviews last just minutes, consist of yes-or-no questions, and focus on issues irrelevant to establishing fear of return to Mexico. A former asylum officer resigned in protest over MPP and said it was violating international law.<sup>79</sup>

As of October 15, 2019, USCIS completed over 7,400 screenings to assess fear of returning to Mexico. Of those, only about 13 percent ended with affirmative determinations that allowed applicants to stay in the U.S. to pursue their asylum claims.

The policy was first implemented in San Diego, Calexico, Calif., and El Paso. In June 2019, however, DHS erected temporary MPP hearing locations at ports of entry in Laredo, Texas,

<sup>76</sup> “Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration” December 20, 2018. <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>

<sup>77</sup> “Secretary Nielsen Implementation Memo” January 25, 2019. <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>

<sup>78</sup> Human Rights First “A Sordid Scheme: The Trump Administration’s Illegal Return of Asylum Seekers to Mexico” March 2019. [https://www.humanrightsfirst.org/sites/default/files/A\\_Sordid\\_Scheme.pdf](https://www.humanrightsfirst.org/sites/default/files/A_Sordid_Scheme.pdf)

<sup>79</sup> Doug Stephens “Why I quit My Job Carrying Out Trump’s Immigration Policies.” November 2019. <https://www.nytimes.com/2019/11/20/opinion/trump-asylum-remain-mexico-policy.html>  
<https://www.washingtonpost.com/context/read-the-email-former-asylum-officer-blasts-trump-s-remain-in-mexico-policy/bd0e07ea-2b91-4d5b-9bc1-4fb01500359a/>

and Brownsville, Texas (a total six-month construction and operation cost of approximately \$70 million).<sup>80</sup>

According to an assessment by DHS of MPP in October of 2019, the program has led to a decrease of total “enforcement actions” — apprehensions plus inadmissible — by 64 percent through September 2019.

More than 47,000 migrants have been sent back to Mexico under MPP between January and November 2019. Through September, 9,974 cases were completed; 11 migrants, or 0.1 percent, had received asylum, according to the Transactional Records Access Clearinghouse (TRAC).

The assessment also states:

According to CBP estimates, approximately 20,000 people are sheltered in northern Mexico, near the U.S. border, awaiting entry to the United States. This number—along with the growing participation in an Assisted Voluntary Return (AVR) program operated by the International Organization for Migration (IOM), suggests that a significant proportion of the 55,000+ MPP returnees have chosen to abandon their claims.

On September 10, 2019, Vice President Pence and the Mexican Secretary of Foreign Affairs, Marcelo Ebrard, “agreed to implement the Migrant Protection Protocols to the fullest extent possible.”<sup>81</sup> In September 2019, the U.S. Department of State’s Bureau of Population, Refugees, and Migration (PRM) funded a \$5.5 million project by IOM to provide shelter to approximately 8,000 asylum seekers in cities along Mexico’s northern border. In late

<sup>80</sup> DHS “*Assessment of the Migrant Protection Protocols (MPP)*” October 28, 2019. [https://www.dhs.gov/sites/default/files/publications/assessment\\_of\\_the\\_migrant\\_protection\\_protocols\\_mpp.pdf](https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf)

<sup>81</sup> “*Readout of Vice President Mike Pence’s Meeting with Mexican Foreign Secretary Marcelo Ebrard*” September 10, 2019. <https://www.whitehouse.gov/briefings-statements/readout-vice-president-mike-pences-meeting-mexican-foreign-secretary-marcelo-ebard/>

September 2019, PRM provided \$11.9 million to IOM to give case-based assistance to potential asylees seeking to move out of shelters and into more sustainable living.<sup>82</sup>

In practice, the policy has resulted in the formation of a refugee camp on the southern border. An estimated 26,000 men, women, and children are camped in tents around ports of entry in violent, unhygienic, and unmonitored areas as they wait for humanitarian relief.

Some choose to cross between ports of entry to present themselves to border officials, a risky decision. In June 2019, Óscar Alberto Martínez Ramírez and his 23-month-old daughter, Angie Valeria, drowned in the Rio Grande near Matamoros trying to cross into the U.S. to make an asylum claim.

Together, these policies subject asylum seekers to dangerous conditions in Mexican border towns, including kidnapping, rape, and homicide.<sup>83</sup> The U.S government has advised citizens to reconsider travel to border states in Mexico like Sonora, Chihuahua, Coahuila, Nuevo Leon, Tamaulipas. Tamaulipas is under a “do not travel” advisory citing violent crime by gangs, including gun battles and blockades by criminal organizations.<sup>84</sup>

As of January 2019, Human Rights First tracked over 800 public reports of murder, torture, rape, kidnapping, and other violent attacks against asylum seekers and migrants who were returned to Mexico under MPP. This number only includes returned individuals who have reported being victims of crimes to human rights investigators or journalists. DHS returned approximately 16,000 children and 500 infants to Mexico as of September 2019. There have been over 200 reported cases of kidnapping or attempted kidnapping of children returned.<sup>85</sup>

<sup>82</sup> DHS “*Assessment of the Migrant Protection Protocols (MPP)*” October 28, 2019.  
[https://www.dhs.gov/sites/default/files/publications/assessment\\_of\\_the\\_migrant\\_protection\\_protocols\\_mpp.pdf](https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf)

<sup>83</sup> “*Q&A: Trump Administration’s ‘Remain in Mexico’ Program*” January 29, 2020.  
<https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program#>

<sup>84</sup> Crimen en México “*Map of Homicides in Mexico from January 2019 to December 2019*”  
<https://elcri.men/en/violence-map/>

<sup>85</sup> Human Rights First “*A Year of Horrors: The Trump Administration’s Illegal Returns of Asylum Seekers to Danger in Mexico*” January 2020.  
<https://www.humanrightsfirst.org/sites/default/files/AYearofHorrors-MPP.pdf>

Acting Customs and Border Protection Commissioner Mark Morgan said that safety was “ok” in Mexico, and reports of violence were only “anecdotal information.”<sup>86</sup>

Asylum seekers do not have a right to a court-appointed lawyer in immigration court or MPP hearings. The administration says it provides individuals in the program with a list of legal service providers in the area that offer help at little or no expense. More than 6,000 potential asylees who came to the U.S. to ask for asylum have been sent back to Ciudad Juárez, Mexico, to wait for their day in U.S. immigration court under the “Remain in Mexico” program. But only about 20 of them have lawyers, according to human rights groups and attorneys who work with asylum seekers.<sup>87</sup>

A lawsuit challenging the policy is ongoing (*Innovation Law Lab v. Nielsen*). The plaintiffs include Innovation Law Lab, Central American Resource Center of Northern California, Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Al Otro Lado, Tahiri Justice Center, and 11 asylum seekers affected by MPP. The lawsuit cites violations of the INA, the Administrative Procedure Act, and the United States’ duty under international human rights law. Although the district court issued a preliminary injunction halting MPP in April 2019, the program continues to be operational because of a stay of that injunction issued by the 9th Circuit Court of Appeals in May 2019.<sup>88</sup>

### **Repatriation to Central Mexico**

In January 2020, the Trump administration announced it had reintroduced a program to deport Mexican nationals to cities in central Mexico. An earlier version of this program took place between 2004 and 2012, involving Mexican nationals who had crossed into Arizona. This program cost the U.S. government approximately \$100 million and resulted in the relocation of 125,000 individuals in its eight years of existence.

The Trump administration plans to deport about 250 Mexican nationals a week on flights from Arizona to Guadalajara. DHS said there would be two flights a week, starting in late January

<sup>86</sup> “Press Briefing by Acting CBP Commissioner Mark Morgan” November 14, 2019. <https://www.whitehouse.gov/briefings-statements/press-briefing-acting-cbp-commissioner-mark-morgan-2/>

<sup>87</sup> Joel Rose and Laura Smitherman “Fear, Confusion and Separation As Trump Administration Sends Migrants Back to Mexico” July 1, 2019. <https://www.npr.org/2019/07/01/736908483/fear-confusion-and-separation-as-trump-administration-sends-migrants-back-to-mex>

<sup>88</sup> ACLU “*Innovation Law Lab v. McAleenan*” Updated July 10, 2019. <https://www.aclu.org/cases/innovation-law-lab-v-mcaleenan>

2020. Heather Swift, a department spokeswoman, said the flights satisfy “a longstanding request of the Mexican government and will take people who are deported closer to their hometowns.”<sup>89</sup>

## Detention and Case Management

The Department of Homeland Security (DHS) manages the most extensive immigration detention system in the world and spends more on immigration enforcement than all other federal enforcement agencies combined.

Individuals apprehended by U.S. Immigration and Customs Enforcement (ICE), the DHS agency charged with immigration enforcement in the nation’s interior, may be detained in one of more than 200 jails and detention centers in the ICE detention system.<sup>90</sup> That system includes dedicated immigration detention facilities run by ICE and others contracted to private prison corporations, including family detention centers. ICE’s detention system is built and operated on a correctional model, in direct conflict with the civil nature of immigration detention.

A series of lawsuits alleges that a number of private prisons that contract with ICE have violated the Victims of Trafficking and Violence Protection Act of 2000. Four such suits were filed against GEO Group and five against CoreCivic — the two largest private prison corporations contracted with ICE. The plaintiffs in these suits allege that the corporations purposefully deprive immigrant detainees of food, water, and hygiene supplies so that they must work to purchase them at the detention centers’ commissaries.

Individuals who refuse to participate in the work program are allegedly threatened with solitary confinement, use of force, and legal repercussions. They also allege that they are pressured to work for free to earn one of the limited paid positions or to be housed in better conditions. A USA Today investigation found more than 400 allegations of sexual assault or abuse; inadequate medical care; regular hunger strikes; frequent use of solitary confinement; more than 800 instances of physical force against detainees; nearly 20,000 grievances filed by

<sup>89</sup> “US Sending Mexican Migrants 1,000 Miles From Border”  
<https://www.nytimes.com/aponline/2020/01/14/us/ap-us-immigration-deported-mexicans.html>

<sup>90</sup> Detention Watch Network “*Detention by the numbers,*” [freedomforimmigrants.org/detention-statistics](http://freedomforimmigrants.org/detention-statistics)

detainees; and at least 29 fatalities, including seven suicides, in the ICE system since Trump took office in January 2017.<sup>91</sup>

The Trump administration has rolled out multiple initiatives to increase capacity and prolong the detention of asylum seekers, including the detention of families and unaccompanied minors. The policies aim to limit the flow of asylum seekers into the interior of the United States and end what critics call “catch and release,” the practice of issuing apprehended immigrants summons to appear in court rather than detaining them. The Trump administration has argued that keeping immigrants in detention while they undergo court proceedings is the only way to ensure that they show up for their court hearings.

But the evidence demonstrates that most immigrants show up for their court dates. Government figures show a 98.5 percent appearance rate for asylum seekers released from immigration detention.<sup>92</sup> Out of 10,427 decisions in FY 2018 for released asylum seekers, only 160 received a removal order because they missed a court hearing. A 2018 study published by the American Immigration Council found that between 2001 and 2016, 96 percent of families with pending asylum cases who were released from immigration detention attended their hearings.<sup>93</sup>

Increased detention of migrants has enormous social, human, and economic costs. In FY 2018, the government allocated \$3.076 billion to DHS Custody Operations (\$8.4 million per day). That amounts to an average daily cost of \$208 per immigrant detainee. Studies were conducted on the harmful impacts on children held in detention,<sup>94</sup> and the rapidly increasing number of asylum seekers who have died in U.S. detention centers shows the tremendous stress prolonged detention places on people.<sup>95</sup>

<sup>91</sup> Arlene Martinez “ICE detention centers rife with abuse, investigation finds” [usatoday.com/story/news/nation/2019/12/23/ice-detention-centers-rife-abuse-investigation-finds-2736084001/](https://www.usatoday.com/story/news/nation/2019/12/23/ice-detention-centers-rife-abuse-investigation-finds-2736084001/)

<sup>92</sup> TRAC “Record Number of Asylum Cases in FY 2019,” [trac.syr.edu/immigration/reports/588/](https://trac.syr.edu/immigration/reports/588/)

<sup>93</sup> Ingrid Eagly, Esq., Steven Shafer, Esq. and Jeana Whalley, Esq. “Detaining Families: A Study of Asylum Adjudication in Family Detention,” [americanimmigrationcouncil.org/research/detaining-families-a-study-of-asylum-adjudication-in-family-detention](https://americanimmigrationcouncil.org/research/detaining-families-a-study-of-asylum-adjudication-in-family-detention)

<sup>94</sup> Human Rights Watch “The Effect of Family Detention on Children” August 20, 2018. <https://www.humanrightsfirst.org/resource/effect-family-detention-children>

<sup>95</sup> Renuka Rayasam “Migrant mental health crisis spirals in ICE detention facilities” July 21, 2019. <https://www.politico.com/story/2019/07/21/migrant-health-detention-border-camps-1424114>

## Family Case Management

In July 2017, ICE ended the Family Case Management Program (FCMP). FCMP allowed some asylum seekers to remain in the community during their asylum proceedings while receiving case-management services, including referrals to legal and social services. FCMP offered community-based resources and services tailored to family needs, including transportation and logistics assistance, education about rights and responsibilities, planning for safe repatriation when required, and more.

The program was active in five metro areas: Baltimore/Washington, Los Angeles, New York City/Newark, Miami, and Chicago. In total, the program achieved nearly 99 percent compliance for check-ins and 100 percent compliance for court hearings. Just 23 out of 954 participants — 2 percent — absconded.<sup>96</sup>

The Trump administration terminated the policy in April 2017 and subsequently unrolled a de facto policy of the prolonged and indefinite detention of nearly all asylum seekers, in violation of ICE’s policy directive requiring that the agency release asylum seekers on humanitarian parole if they have a sponsor and pose no community safety risk. By the summer of 2019, ICE’s data revealed it to be jailing approximately 9,000 immigrants who were already found to have a credible or reasonable fear of persecution or torture.<sup>97</sup> In addition to avoiding the hardship placed on individuals held in prolonged detention, FCMP is also more cost-effective. In 2016, the average per-day, the per-person cost of FCMP was \$36 (\$13,140 annually), compared to \$133 per day (\$48,545 annually) for an adult in solo detention and \$319 per day (\$116,435 annually) for an individual in family detention.<sup>98</sup>

ICE is facing multiple federal lawsuits for the systemic violation of its parole guidance. A preliminary injunction was issued in *Damus v. McAleenan*, ordering ICE to resume individualized release considerations in five field offices that almost entirely stopped granting

<sup>96</sup> Matthew La Corte, “Restore the Family Case Management System for Asylum Seekers” April 17, 2019. <https://www.niskanencenter.org/restore-the-family-case-management-program-for-asylum-seekers/>

<sup>97</sup> DHS “Detention Statistics” <https://www.ice.gov/detention-management>

<sup>98</sup> Matthew La Corte “Restore the Family Case Management Program for Asylum Seekers” April 17, 2019. <https://www.niskanencenter.org/restore-the-family-case-management-program-for-asylum-seekers/>

parole as early as 2017.<sup>99</sup> The New Orleans ICE Field Office faces similar litigation in *Heredia Mons v. McAleenan*.<sup>100</sup> Both cases are ongoing.

### **Information Sharing**

In April 2018, ICE, CBP, and the Office of Refugee Resettlement (ORR) entered into an agreement, titled the Law Enforcement Information Sharing Initiative (LEISI). It allows for information obtained from unaccompanied minors to be shared between the agencies. This allows ICE to use the information to target and arrest potential sponsors of the UAC already residing in the U.S.<sup>101</sup> The agreement was temporarily limited by the fiscal 2019 DHS appropriations bill. The bill included language that prohibited the use of information obtained by the Memorandum of Agreement (MOA) for enforcement against most sponsors of unaccompanied minors.<sup>102</sup>

### **Indefinite Detention**

In September 2018, DHS and U.S. Department of Health and Human Services (HHS) issued notices in the Federal Register of a proposed rule that would effectively dismantle the Flores Settlement Agreement. The rule would allow for the indefinite detention of families, enable DHS to self-license family detention facilities (as opposed to state-licensing requirements), and limit unaccompanied children's rights to a bond hearing.<sup>103</sup> DHS and HHS published the rule in final form in August 2019, and it took effect on October 22, 2019.<sup>104</sup>

<sup>99</sup> The full text of the decision is available at: <https://www.aclu.org/legal-document/order-granting-preliminary-injunction-and-class-cert-damus-et-al-v-nielsen>

<sup>100</sup> The full text of the decision is available at: [https://www.laaclu.org/sites/default/files/field\\_documents/0033\\_09-05-2019\\_order\\_granting\\_22\\_motion\\_for\\_preliminary\\_injunction\\_granting\\_15\\_motion\\_for\\_class\\_certification.pdf](https://www.laaclu.org/sites/default/files/field_documents/0033_09-05-2019_order_granting_22_motion_for_preliminary_injunction_granting_15_motion_for_class_certification.pdf)

<sup>101</sup> ICE “Law Enforcement Information Sharing Initiative” <https://www.ice.gov/le-information-sharing>

<sup>102</sup> The full text of the law is available at: <https://www.congress.gov/116/bills/hr2740/BILLS-116hr2740pcs.pdf>

<sup>103</sup> The full text of the proposed rule is available at: <https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children>

<sup>104</sup> “DHS and HHS Announce New Rule to Implement the Flores Settlement Agreement; Final Rule Published to Fulfill Obligations under Flores Settlement Agreement” August 21, 2019. <https://www.dhs.gov/news/2019/08/21/dhs-and-hhs-announce-new-rule-implement-flores-settlement-agreement>

Dismantling the Flores Settlement Agreement in this way is seriously detrimental to migrant children. Studies show prolonged detention has damaging psychological effects on children.<sup>105</sup> According to an Associated Press and PBS Frontline report on U.S. government data, there were an unprecedented 69,550 migrant children held in U.S. government custody in FY 2019. For reference, 155 children were detained in Canada in 2018, and 42 migrant children were put in shelters in the U.K. in 2017.<sup>106</sup>

On September 27, 2019, Judge Dolly Gee of Federal District Court for the Central District of California blocked the policy from going into effect. The judge stated that it was up to Congress, not the Trump administration, to replace the Flores Agreement.<sup>107</sup>

In April 2019, Barr ruled in *Matter of M-S* that many asylum seekers who entered the country illegally between ports of entry would be ineligible for a bond hearing.<sup>108</sup> Migrants requesting asylum at a legal point of entry were exempted, since they are not eligible for bond hearings, but rather for humanitarian parole. A separate legal challenge claims the Trump administration is systematically denying parole to some of those asylum seekers.

In July 2019, U.S. District Judge Marsha Pechman in Seattle issued an injunction blocking the policy from taking effect. The decision states that immigration courts must continue to provide bond hearings to asylum seekers and that those bond hearings must occur within seven days of request.<sup>109</sup> This case is ongoing.

### **Ban on Internal Release**

In September 2019, Acting Secretary McAleenan announced during a speech at the Council on Foreign Relations that DHS will no longer allow any arriving Central American families into the community after being arrested and detained by CBP. Family units will be returned to

<sup>105</sup> Sarah Mares “*Fifteen years of detaining children who seek asylum in Australia - evidence and consequences*” December 8, 2015. <https://journals.sagepub.com/doi/abs/10.1177/1039856215620029>

<sup>106</sup> Christopher Sherman, Martha Mendoza and Garance Burke “*US held record number of migrant children in custody in 2019*” November 12, 2019. <https://apnews.com/015702afdb4d44fbf85cf5070cd2c6824>

<sup>107</sup> The full text of the decision can be found at: <https://www.aila.org/File/Related/14111359ag.pdf>

<sup>108</sup> The full text of the decision is available at: <https://www.justice.gov/eoir/file/1154747/download>

<sup>109</sup> See “Federal Court Requires Immigration Courts to Continue to Provide Bond Hearings Despite Matter of M-S-” July 3, 2019. [https://www.americanimmigrationcouncil.org/practice\\_advisory/federal-court-requires-immigration-courts-continue-provide-bond-hearings-despite](https://www.americanimmigrationcouncil.org/practice_advisory/federal-court-requires-immigration-courts-continue-provide-bond-hearings-despite)

their home countries or Mexico under the MPP policy, with the exception for some humanitarian and medical cases.<sup>110</sup>

The timing of the new policy is unclear. McAleenan said that if the rule overturning the 21-day limit on holding minors in detention is upheld in court, the administration will no longer release families after the 21-day detention limit, but will hold them in detention instead. “After the Flores regulations are finally adjudicated and put in place, that time limit will be alleviated, and it will be [another] option for managing cases,” he said. “We will hold them together in an appropriate setting through their immigration proceedings.” In the meantime, requiring families to wait in Mexico serves as a way to “keep families together and not in custody,” he said.

### **Expedited Deportations**

In July 2019, DHS issued an Interim Final Rule (Designating Aliens for Expedited Removal) that expanded procedures for arresting and deporting undocumented immigrants in the U.S.<sup>111</sup> Under this rule, an undocumented immigrant who cannot prove they have remained in the U.S. for at least two years is at risk of expedited deportation proceedings. Individuals subject to this rule would not have the opportunity to consult an attorney or present their case to an immigration judge. The rule immediately took effect and was challenged in August 2019 in *Make the Road New York v. McAleenan*.<sup>112</sup>

In September 2019, a federal judge issued a preliminary injunction blocking the implementation of the policy. DHS has appealed the decision, but they cannot enforce the policy as the lawsuit moves forward.<sup>113</sup> The case is ongoing.

<sup>110</sup> DHS “*Acting Secretary McAleenan Announces End to Widespread Catch and Release*” September 23, 2019. <https://www.dhs.gov/news/2019/09/23/acting-secretary-mcaleenan-announces-end-widespread-catch-and-release>

<sup>111</sup> The full text of the proposed rule is available at: <https://www.federalregister.gov/documents/2019/07/23/2019-15710/designating-aliens-for-expedited-removal>

<sup>112</sup> “*Challenging the Expansion of Expedited Removal*” <https://www.americanimmigrationcouncil.org/litigation/expedited-removal-litigation>

<sup>113</sup> The full text of the decision is available at: [https://www.americanimmigrationcouncil.org/sites/default/files/litigation\\_documents/challenging\\_the\\_expansion\\_of\\_expedited\\_removal\\_preliminary\\_injunction\\_opinion.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/challenging_the_expansion_of_expedited_removal_preliminary_injunction_opinion.pdf)

## Central American and Mexican Response

El Salvador, Mexico, Belize, Costa Rica, Guatemala, Honduras, and Panama have formed a regional initiative, the Comprehensive Regional Protection and Solutions Framework (MIRPS) — a regional version of the Global Refugee Compact — to better address forced displacement in and from Central America.<sup>114</sup> The beginning steps for countries participating in the initiative are to develop and implement a national action plan in consultation with people who have been forcibly displaced, federal and local institutions, civil society, and international organizations.

At the 2017 MIRPS meeting, members agreed to adopt laws that enable refugees and asylum seekers to integrate into local communities, including access to the labor market. During the annual MIRPS meeting in 2019, member states agreed to address forced displacement. This commitment includes managing the consequences of internal displacement and implementing policies for internal relocation and resettlement.

In January 2020, El Salvador’s National Assembly passed legislation<sup>115</sup> to aid internally displaced Salvadorans. UNHCR responded to the new law:

The text of the legislation on internal displacement, drafted with technical support from UNHCR, aligns with the UN Guiding Principles on Internal Displacement and with other international standards that describe the rights of internally displaced persons, including the right to request and receive humanitarian assistance, protection of family unit, an adequate standard of living and durable solutions. It also establishes mechanisms to allow those affected by internal displacement to protect and reclaim property they may have been forced to abandon in their flight.

<sup>114</sup> UNHCR “*Digital Platform for the Global Refugee Compact*” <https://www.globalcompactrefugees.org>

<sup>115</sup> UNHCR “*UNHCR welcomes new law in El Salvador to help people internally displaced by violence*” January 10, 2020. <https://www.unhcr.org/news/briefing/2020/1/5e183d4b4/unhcr-welcomes-new-law-el-salvador-help-people-internally-displaced-violence.html>

Honduras and Mexico are also considering similar legislation to protect internally displaced people in their countries.

While Mexico and Northern Triangle countries work to strengthen laws and protect their displaced citizens, they have also increased the use of force against migrants and caravans traversing to avoid the wrath of the U.S.

President Andrés Manuel López Obrador of Mexico started his tenure in office promising work opportunities in Mexico, distributing humanitarian visas to Central Americans, and generally rejecting the hardline enforcement policies of his predecessors. In 2019, Mexico received financial support and staff from UNHCR to open new offices in Tijuana, Monterrey, Palenque, and Chiapas. The new offices will double Mexican Commission for Refugee Assistance's (COMAR) current numbers.

Once Trump threatened tariffs if Mexico did not start cracking down on migrants, Mexico began policing its southern border and increasingly detaining Central American migrants. In January 2020, approximately 4,000 migrants formed a caravan in Honduras and began making their way towards the U.S.<sup>116</sup>

As the caravan reached Mexico's southern border, they were promised employment in Mexico's southern border cities — but only if they crossed legally at a port of entry. This created a bottleneck between the Guatemalan city of Tecún Umán and the Mexican city of Ciudad Hidalgo and forced countless people to cross the river, where they were met by the Mexican National Guard wielding riot shields and pepper spray. ABC News reported: “Hundreds of migrants were pushed back into Guatemala, shipped to detention centers, or returned to Honduras.”<sup>117</sup>

Mexico has attempted to crack down on immigration before. In 2010, the government revised its immigration law, making it a civil offense rather than a criminal offense to be in the country without authorization. They also established procedures for migrants to get temporary visas so they wouldn't need to travel at the mercy of smugglers. In 2014, in response to the massive

<sup>116</sup> Maria Verza and Sonia Perez D. “*Mexico begins flying, busing migrants back to Honduras.*” January 21, 2020. <https://apnews.com/4d685100193f6a2c521267fe614356df>

<sup>117</sup> Brent McDonald “*A Surge of Migrants Rushes a Mexican Border Crossing*” January 18, 2020. <https://www.nytimes.com/2020/01/18/world/americas/a-surge-of-migrants-rushes-a-mexican-border-crossing.html>

influx of unaccompanied minors from Central America transiting the country, then-President Enrique Peña Nieto launched the Southern Border Program.

This increased deportations, opened five new border control stations along popular migrant routes, and implemented a new guest worker program and a three-day transit visa. This program increased surveillance by Mexican authorities and pushed migrants to take more dangerous roads when moving north. Migrants began traveling in large caravans that allowed them to avoid the use of human smugglers.<sup>118</sup>

Guatemala is not likely to reduce its hardline approach towards immigration in the near future. In June of 2019, Acting Secretary McAleenan offered assistance from Border Patrol agents, and homeland security investigators to Guatemala to help them reduce the number of migrants. Homeland security investigators have worked to break up human trafficking rings that smuggle migrants across the border, and dozens of Border Patrol agents have helped Guatemalan authorities build checkpoints to certify paperwork from migrants.<sup>119</sup>

In his election campaign, Guatemala's new president Alejandro Giammattei pointed to his experience directing prisons to bolster his tough-on-crime image. Giammattei also promised to modify the asylum cooperation agreement that his predecessor Jimmy Morales signed under pressure from President Trump. In response to the January 2020 caravan, Giammattei said that the migrants could pass through Guatemala with correct documentation, but predicted they would run into a "wall" before reaching the U.S. When a group of approximately 300 migrants reached the town of Corinto, they were asked for documentation challenged by Guatemalan police. They were then put on grey buses (possibly paid for by the U.S.) back to Honduras if they were unable to provide entry documents.

Honduras has increased policing of migrants leaving the country. In response to the January 2020 caravan, the Honduran government vowed vigilance at its northern border and said it had detained 60 minors who did not have proper documentation.

<sup>118</sup> Randal C. Archibold "On Southern Border, Mexico Faces Crisis of Its Own" July 19, 2014. <https://www.nytimes.com/2014/07/20/world/americas/on-southern-border-mexico-faces-crisis-of-its-own.html>

<sup>119</sup> Zolan Kanno-Youngs "U.S. Promises Security Aid, but No Funds, to Guatemala to Curb Migration." June 1, 2019. <https://www.nytimes.com/2019/06/01/world/americas/immigration-guatemala-homeland-security.html>

“The border and the illegal crossings are reinforced,” Julián Pacheco, the Honduran security minister, told reporters. “If people are going to leave, they have to leave through legal, authorized points.”<sup>120</sup>

It is unclear what will happen with El Salvador’s immigration policing. President Nayib Bukele has nothing but praise for President Trump and the asylum cooperation agreement. He said in a press conference: “For us, the United States is not only a partner and an ally, but also a friend. And we’re going to show that friendship. That’s one of the reasons we signed this agreement — because we want to show the friendship to our most important ally, which is the United States.”

An NPR report states that more resources have been given to immigration authorities to increase security. El Salvador has also given more power to immigration agents. Before new policies took place under the asylum cooperation agreement, immigration agents were only able to ask for documents if the police intervened. Under new policies, immigration officials have the authority to stop people themselves.<sup>121</sup>

## Conclusion

In the now infamous clip of *Last Week Tonight with John Oliver*, John Oliver highlighted cases of pro se clients as young as two years of age, including one where a child asked to be returned to the country of “Pizza.”<sup>122</sup>

Correcting asylum issues is more than reversing the policies imposed by the Trump administration — it requires a broader assessment of the asylum system, and should force lawmakers and Americans to grapple with how we want to treat those seeking refuge.

<sup>120</sup> Associated Press “*Honduran migrants crossing Guatemala face more obstacles but still no hope to get to U.S.*” January 16, 2020. <https://www.nbcnews.com/news/latino/honduran-migrants-crossing-guatemala-face-more-obstacles-still-hope-get-n1117356>

<sup>121</sup> Emily Green “*El Salvador Ramps Up Security to Stop Migrants*” September 29, 2019. <https://www.npr.org/2019/09/29/765480416/el-salvador-ramps-up-security-to-stop-migrants>

<sup>122</sup> Lena Wilson, *John Oliver (and Some Adorable Toddlers) Teach You About Immigration Courts*, April 2, 2018. <https://slate.com/culture/2018/04/john-oliver-breaks-down-american-immigration-courts-on-last-week-tonight-video.html>

But urgent reversals and systematic reforms are going to be further complicated by the COVID-19 pandemic. On March 20, 2020, the Center for Disease Control (CDC) issued an order, based on Sections 362 and 365 of the Public Health Service Act, which prohibits for public health reasons the entry of certain individuals, regardless of their countries of origin, who require processing at the Mexican and Canadian borders. According to the order, this would prevent overcrowding at points-of-entry and border patrol stations, thus limiting the spread of COVID-19.

That order has been extended through June, and will be subject to renewal every 30 days, despite ongoing testimony from health experts and immigration advocates that the shutdown is ineffective and tremendously dangerous conditions for asylum seekers waiting at the border. The ban applies to individuals without valid documents, including asylum-seekers and other vulnerable groups. Unaccompanied alien children, who are not subject to immediate deportation under the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, are also reportedly being detained and sent back under the CDC directive. The TVPRA of 2008 exempts unaccompanied alien children from noncontiguous countries from detention at the border longer than 72 hours and expedited removal.

Taken together, these changes may coalesce to create the one of the most historically significant humanitarian impacts in U.S. history—one that will likely haunt America for years to come.

## Event Timeline

Jan 2016	Metering
Jan 2017	Interior and Exterior Executive Orders
Feb 2017	Raised Credible Fear Threshold
Jul 2017	End of Family Case Management Program
Aug 2017	Stay of Parole Guidelines in Five ICE offices
Mar 2018	Session Vacates Matter of E-F-H-L
Apr 2018	ICE, CBP, and ORR Information Sharing Agreement
Apr 2018	Zero Tolerance
Jun 2018	Executive Order Halting Family Separation
Jun 2018	Sessions Ruling on Matter of A-B
Sep 2018	Preliminary Injunction to Restore Parole Procedures in New Orleans
Oct 2018	Sessions Implements Case Quota
Nov 2018	Asylum Ban 1.0
Dec 2018	Sessions Ruling on Matter of A-B- is Blocked
Jan 2019	MPP Begins
Feb 2019	Appropriations Bill Limits Information Sharing Agreement
Apr 2019	Barr Ruling on Matter of M-S-
May 2019	USCIS Memo on Removal of Protections for UACs
Jun 2019	Expansion of MPP
Jul 2019	Injunction on Barr's Ruling in Matter of M-S-
Jul 2019	Asylum Ban 2.0 Begins
Jul 2019	Temporary Restraining Order on Asylum Ban 2.0
Jul 2019	Barr Ruling on Matter of L-E-A-
Jul 2019	USCIS Expedited Initial Fear Screenings
Jul 2019	Expedited Deportations is Implemented
Aug 2019	Asylum Ban 1.0 Vacated
Aug 2019	Temporary Restraining Order on USCIS's Memo on UACs
Sep 2019	SCOTUS Allows Full Implementation of Asylum Ban 2.0
Sep 2019	CBP Conducts Credible Fear Interviews
Sep 2019	Proposed Rule: Removal of 30-day Processing Period for Work Visas
Sep 2019	Injunction on Family Indefinite Detention
Sep 2019	Internal Release Ban
Sep 2019	Preliminary Injunction on Expedited Deportations
Oct 2019	Public Charge Rule Implemented
Oct 2019	Injunction on Public Charge Rule
Oct 2019	Family Indefinite Detention Implemented
Oct 2019	Prompt Asylum Case Review
Oct 2019	DNA-Sample Collection Implemented
Nov 2019	Humanitarian Asylum Review Process
Nov 2019	Proposed rule: Denial of Work Permits
Nov 2019	Proposed Rule: Increase Asylum Fees
Nov 2019	Guatemala Agreement Enacted
Unknown	El Salvador Agreement
Unknown	Honduras Agreement

## Litigation

Case	Policy Impacted	Status
<a href="#">Al Otro Lado v. McAleenan</a>	Metering	Ongoing
<a href="#">East Bay Sanctuary Covenant et al. v. Trump</a>	Asylum Ban 2.0	Ongoing  July 2019 - <a href="#">Temporary Restraining Order</a>  September 11, 2019, the <a href="#">Supreme Court</a> allowed full implementation of Asylum Ban 2.0 pending litigation
<a href="#">Kiakombua v. McAleenan</a>	Expedited Initial Fear Screenings	Ongoing
<a href="#">Las Americas v. Wolf</a>	PARC and HARP	Ongoing
<a href="#">Las Americas v. Trump</a>	Sessions Case Quotas	Ongoing
<a href="#">U.T. v. Barr</a>	Safe Third Country Agreements (El Salvador, Guatemala, and Honduras)	Ongoing
<a href="#">Menocal et al. v. The Geo Group, Inc.</a>	ICE private detention conditions	Ongoing
<a href="#">State of Washington v. The Geo Group, Inc.</a>	ICE private detention conditions	Ongoing
<a href="#">Novoa v. The Geo Group, Inc.</a>	ICE private detention conditions	Ongoing

<a href="#">Raul Novoa, et al. v. The Geo Group, Inc.</a>	ICE private detention conditions	Ongoing
<a href="#">Chao Chen v. The Geo Group, Inc.</a>	ICE private detention conditions	Ongoing
<a href="#">Owino and Gomez v. CORECIVIC, Inc.</a>	ICE private detention conditions	Ongoing
<a href="#">Barrientos, et al. V. CORECIVIC, Inc.</a>	ICE private detention conditions	Ongoing
<a href="#">Gonzalez v. CORECIVIC, Inc.</a>	ICE private detention conditions	Ongoing
<a href="#">Grae v. Corrections Corporation of America et al</a>	ICE private detention conditions	Ongoing
<a href="#">Make the Road New York v. McAleenan</a>	Expedited Deportations	Ongoing
<a href="#">Damus v. McAleenan</a>	Ice Parole	July 2018 - preliminary injunction
<a href="#">Heredia-Mons v. McAleenan</a>	Ice Parole in New Orleans	September 5, 2019 - preliminary injunction
<a href="#">Innovation Law Lab v. Nielsen</a>	Migrant Protection Protocols	April 2019: preliminary injunction May 2019: 9th Circuit Court of Appeals stay of injunction

<a href="#">O.A. v. Trump</a>	Asylum Ban 1.0	November 2018: Temporary restraining order August 2019: Vacated rule
<a href="#">El Paso County and Border Network for Human Rights v. Trump</a>	Emergency declaration for border wall funds	December 2019: permanent injunction (any funds beyond what Congress appropriated)
<a href="#">Grace v. Whitaker</a>	Particular Social Group Limitations (Domestic Violence and Gang Violence)	December 2018 - permanent injunction