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Southern Border Policies Impacting Asylum Seekers – An Overview
(last updated January 3, 2020)

The Trump Administration’s assault on asylum seekers seems to know no bounds. It has waged substantive attacks on the refugee definition in cases such as *Matter of A-B-* and *Matter of L-E-A-*, and sought to restrict asylum seekers’ due process. Coupled with these already extreme measures, the Administration has gone even further in its attempt to shut down asylum at the southern border through a combination of policies at odds with the Refugee Act and our international obligations under the Refugee Convention. Below is an overview of the current status of the most significant of these policies that impact asylum seekers and legal challenges thereto.

Asylum Ban 1.0 (Entry Ban) – In November 2018, the Administration sought [via proclamation](#) to ban individuals who did not enter the United States through an official port of entry (POE) from applying for asylum. While it would still permit them to pursue withholding of removal and protection under the Convention Against Torture (CAT), these forms of protection are much more difficult to obtain and confer far fewer benefits than asylum. In *East Bay Sanctuary Covenant v. Trump*, the U.S. District Court for the Northern District of California issued a temporary restraining order, the Ninth Circuit [denied](#) the government’s emergency motion for a stay pending appeal, and the Supreme Court similarly declined to grant a stay. [Thus this policy is not currently in effect.](#) It was also successfully challenged in [O.A. v. Trump](#).

Migrant Protection Protocols (MPP) – Beginning in January 2019, the Administration instituted the “Remain in Mexico” policy – officially titled the “Migrant Protection Protocols” – under which the U.S. government returns asylum seekers arriving at the southern border without documents to wait in Mexico for the duration of their immigration proceedings. While limited exceptions are supposed to exist for individuals who fear danger in Mexico, unaccompanied children, pregnant women, and people with serious medical issues, the administration has returned individuals falling within these categories to Mexico. In *Innovation Law Lab v. McAleenan*, a legal challenge brought by CGRS, the ACLU, and the Southern Poverty Law Center, the U.S. District Court for the Northern District of California preliminarily enjoined this policy in April 2019; however, the Ninth Circuit stayed the preliminary injunction pending the government’s appeal. [Thus, the MPP policy remains in effect.](#) The Ninth Circuit heard oral arguments in October 2019 and the case remains pending. More information on the legal challenge to the MPP can be found [here](#).

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

government's appeal of the preliminary injunction is pending in the Ninth Circuit. More information on the litigation is available [here](#) and [here](#). Other challenges have also been filed.

The Transit Ban has also been challenged with respect to asylum seekers turned back, or "metered," at POEs. In *Al Otro Lado v. Wolf*, the District Court for the Southern District of California preliminarily enjoined the application of the Transit Ban to asylum seekers who were unlawfully prevented from accessing the U.S. asylum process because they had been "metered" before the Transit Ban went into effect. The [preliminary injunction](#) prohibited the government from applying the Transit Ban to members of the provisional class of "all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process." On December 20, 2019, after the government appealed the decision, the Ninth Circuit granted an emergency temporary stay of the preliminary injunction. More information on the litigation is available [here and here](#).

Asylum Cooperative Agreements (ACAs) – The Administration has signed agreements with Guatemala, El Salvador, and Honduras to enable the U.S. Government to "transfer" asylum seekers to these countries rather than process their claims in the United States. U.S. law provides for such transfers if the asylum seeker will actually be safe and have access to a full and fair asylum procedure, but neither element exists in any of these three countries. On November 19, 2019, the Administration promulgated an [Interim Final Rule to provide for the implementation of the ACAs](#) and, on November 20, the Administration [published the Guatemala agreement in the Federal Register](#). The first transfer [reportedly](#) occurred on November 21. Leaked [Guidance to Asylum Officers on the Guatemala ACA](#) offers some insight into immediate plans for implementation. Among other things, it provides that:

- The Guatemala ACA "amenable population" (i.e., individuals subject to screening for application of the ACA) includes Hondurans and Salvadorans, but not unaccompanied children;
- Individuals must *affirmatively* express their fear of return to Guatemala (they will not be asked), and then meet the "more likely than not" standard for persecution or torture to avoid being transferred there; and
- Only "immediate family members" such as a spouse and "qualifying children" will be processed together – this restrictive definition will almost certainly result in separation of family members.

Prompt Asylum Claim Review (PACR) & Humanitarian Asylum Review Process (HARP) – [Media reports](#) indicate that secretive joint initiatives of the DOJ and DHS seek to condense the complex and sensitive asylum adjudication process from a matter of months to 10 days or less and to force asylum seekers to navigate the immigration court system while detained in deficient CBP facilities at the border, where they are denied meaningful access to counsel, or to country conditions information and other resources necessary to corroborate their claims.

The above policies are complex and interrelated, and much still remains to be learned about how the government will implement them. CGRS is actively developing and collecting resources to assist those facing these unlawful policies and will provide them through its [technical assistance program](#). If you have resources to share, please send them to CGRS at CGRS-TA@uchastings.edu. Please ensure that your materials are properly redacted to protect client confidentiality.