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ABSTRACT

Asylum is under attack. After almost four years of the Trump Administration exercising political control over case law, signing executive orders, drafting presidential proclamations, issuing internal agency guidance and sweeping regulatory changes, and taking other measures, the United States system to protect asylum seekers is being dismantled. The system largely ground to a halt after the Trump Administration co-opted the coronavirus public health crisis to effectively close the southern border to asylum seekers with its March 2020 Center for Disease Control order. This catastrophic order is not even the last in a long line of the Trump Administration’s efforts since assuming power to obliterate asylum protection. Building on the actions from 2017 forward, the Trump Administration has proposed further regulations this year to undermine and eviscerate asylum protection.

A combination of public outcry and litigation through the courts have halted or limited some of the Trump Administration’s attempts to undermine asylum protection. Other new policies have gone into effect and some remain in effect, with dramatic results. By tracing the sustained series of policies, regulations, and other actions taken by the Trump Administration against asylum seekers, this article offers a roadmap of policies to be undone by a future Administration. Taking into account the public commitments made by the Biden campaign on asylum issues, this article outlines the actions a future democratic Administration will need to take to not only right the wrongs committed by the Trump Administration, but to provide truly meaningful asylum protection and to reassume the United States’ role as the global leader in refugee protection.

* Associate Professor of Law, Director, Immigration & Human Rights Clinic, University of the District of Columbia – David A. Clarke School of Law, J.D. Berkeley Law School, L.L.M, Georgetown University Law Center. My thanks to Saba Ahmed, Jillian Blake, Karen Musalo, Jaya Ramji-Nogales, Erica Schommer, and Shoba Sivaprasad Wadhia for sharing their insight, to UDC Law for supporting my work, and to Brian R. Israel for all the ways in which he made this possible for me to write this piece during a summer of pandemic-parenting in 2020. Thank you to Stephanie Brown for research assistance and to the editors of the Loyola Law Review for their diligence and thoughtfulness. All errors are my own.
Historically, the U.S. has been a global leader in refugee protection. The U.S. has resettled more refugees than any other refugee-receiving nation, but also generally provided asylum protection to those fleeing persecution who independently made it to our borders. The U.S. refugee resettlement program and the asylum program are children of the same parents: the U.S. international legal obligations under the Protocol to the UN Convention on the Status of Refugees and the domestic implementing legislation in the form of the 1980 Refugee Act. Refugee protection, for individuals fleeing persecution perpetrated by their own government or from which their government is unable to protect them, of course, remains enormously important. A new Administration, presumptively led by Joe Biden and Kamala Harris, has signaled a commitment to restoring and even expanding the U.S. commitment to refugees. The Bidens-Sanders Unity Task Force Recommendations promise that:

Democrats will end the Trump Administration’s shameful efforts to close the door to the world’s most vulnerable refugees. It’s not only the right thing to do – it’s the smart thing to do. Admitting refugees helps preserve the stability of America’s partners abroad, strengthens our hand in getting other countries to uphold their obligations, grows our economy, and enriches our society.

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3 I will refer simply to the Biden Administration throughout this article. This article assumes that American voters, will at least in significant enough numbers, will vote with kindness and compassion in mind and prevent Donald Trump furthering his white supremacist agenda during a second Presidential term.
6 Id. at 39. The Biden Immigration Platform makes clear that Biden plans to admit a
This article will not address all the ways in which the Trump Administration has undermined the refugee resettlement program† or indeed the broader immigration system, but will instead focus on the asylum system. Specifically, this article focuses on the treatment and protection of asylum seekers present or seeking admission to the United States. To be granted asylum, asylum seekers must meet the same definition as refugees. The U.S. has historically demonstrated global leadership in protection for asylees, those granted asylum, and refugees, notwithstanding the current administration’s efforts to dismantle those protections.

A new Administration will need to implement a long list of actions to restore asylum protection, but within the first 100 days in office the Administration can and should take clear actions to protect asylum seekers. Biden has already committed to taking some of these steps in his public immigration platform, referring to Trump’s misallocation of resources and focus on “bullying legitimate asylum seekers.” Using strong rhetoric, Biden refers to the “Trump-created humanitarian crisis at our border.” Biden speaks to reasserting “America’s commitment to asylum-seekers and refugees” and doing better to “uphold our laws humanely and preserve the dignity of immigrant families, refugees, and asylum-seekers.” Emphasizing the urgency of addressing this crisis, Biden has released not only his immigration platform, but also the Biden-Sanders Unity Task Force Recommendations on immigration, along with other public statements.

record 125,000 resettled refugees. See Biden Sanders Unity Task Force Recommendations, supra note 2, at 10.

† See, e.g., Priscilla Alvarez, America’s System for Resettling Refugees is Collapsing, The Atlantic, (Sept. 9, 2019).
‡ See, e.g, Sarah Pierce & Jessica Bolter, Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes Under the Trump Presidency, Migration Policy Institute (July 2020) (cataloguing the changes throughout the immigration system made under the Trump Administration).
§ 8 U.S.C. § 1101(a)(42)(A) (2018). (a refugee is defined as “any person who is outside any country of such person’s nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”).


11 Biden Immig. Platform, supra note 4, at 3.
12 Id. at 1.
13 Id. at 2.
14 Id.
15 Biden-Sanders Unity Task Forced Recommendations, supra note 4, at 38-41.
U.S. asylum policy affects international standing and credibility in the human rights arena more broadly. To restore the protections and reputation of the U.S. asylum system, the Biden Administration will have much work to do. Under the Trump Administration, the number of asylum applications have dropped, while the percentage of denials increased:

In the final year of the Obama administration (fiscal year 2017), 120,815 asylum applications were filed in immigration courts by individuals facing deportation. In the first year of the Trump administration, the number fell to 110,469—an immediate signal that fewer migrants were able to seek asylum. By the end of 2018, immigration courts were denying asylum to 75 percent of applicants under guidance of the attorney general, compared to about 55 percent denials during the Obama era.

Thus, chances of being granted asylum are now lower than ever. The Trump Administration has achieved this outcome in various ways. While Congress writes the laws governing immigration, executive agencies interpret, implement, and enforce those laws. Trump has used his deputies—the heads of executive agencies, including the Attorney General, but also has himself issued Executive Orders and “Presidential Proclamations,” along with changes to internal agency guidance, and new federal regulations to re-interpret existing laws. Advocates have challenged many of these actions...

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16 In July 2020, for example, the Canadian Constitutional Court found the 2004 safe-third country agreement between Canada and the United States invalid because the U.S. fails to provide meaningful protection to asylum seekers. The Canadian Council for Refugees et al., v. Minister of Immig. Refugees & Citizenship et al., 2020 FC 770 (July 22, 2020); see also Amanda Coletta, Canadian Courts Says Sending Asylum Seekers Back to the U.S. Violates Their Rights, Washington Post (July 22, 2020). Under the agreement, the U.S. and Canada shared mutual recognition of the other country as a safe place for asylum seekers to seek protection. It enabled Canada to send back potential asylum seekers who arrived at the Canada-U.S. border because they were obligated to pursue the claim in the country in which they first arrived.


through the federal courts and at times it has been heartening to see the effective operation of our system of checks and balances. Remedy anti-asylum executive actions through the courts is, however, limited. First, legal challenges move slowly, with some negative policies remaining in effect for months or longer before a judicial remedy can block their effects. Second, Trump has packed the federal courts with partisan judges, appointing more than 200 federal judges in the past four years who will serve with lifetime tenure. While at times even these judges have struck down egregious immigration policies, the sheer number of Trump appointees means that the courts provide a haphazard path to remedy.

It has never been a more difficult time to gain entry into the United States to pursue an asylum claim. Likewise, it has never been more difficult to actually access that system by filing an application once here, to survive while that application is pending adjudication, and ultimately to be granted asylum. This article explores what the Biden Administration must do to roll back the harm done by the Trump Administration and to meaningfully restore and improve asylum protection.

II. THE DISMANTLING OF OUR ASYLUM SYSTEM AND WHAT MUST BE DONE TO RESURRECT IT

The inauguration of Donald J. Trump heralded in an era of anti-immigrant sentiment and actions specifically focused on making seeking asylum more difficult. The sweeping changes to the asylum system, combined with regulatory changes at the granular level cannot be overstated. This part of the article attempts to outline the ways in which one piece of that process – asylum adjudication – has changed. Initially, the Trump Administration focused these changes on upending the process at our southern border but over time anti-asylum bureaucrats focused on sweeping changes to affect the asylum system as a whole.

This article describes these systematic attacks on the asylum system. In clearly delineating these actions, the article provides a roadmap for a new

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Administration to restore American leadership and reflect the American values of protecting the most vulnerable people. This part discusses more than a dozen ways in which the Trump Administration has attacked the asylum system under six broad categories:


**B. Asylum “Bans”** 1.0 (barring asylum seekers entering between ports of entry) and 2.0 (transit through a third country), and the “COVID-Ban;”

**C. Attorney General Decisions Changing Asylum Law** to curtail due process for asylum seekers, increasingly detain asylum seekers, and deny asylum protection to individuals fleeing gender and gang-related violence;

**D. Bureaucratic shifts** including charging a fee for asylum, restrictions on work authorization, and technical rejections of asylum applications;

**E. Co-opting the COVID-19 public health crisis** to ban migrants and asylum seekers at the Southern Border and beyond;

**F. Sweeping and comprehensive “Death to Asylum” proposed regulations** issued in June 2020 and five other sets of regulations proposed within a one-year period targeting due process and the immigration appellate system.

By discussing these changes, I examine the approach articulated by Joe Biden in his Immigration Platform, the Recommendations set forth by the

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22 See Biden Immig. Platform, supra note 2, at 3
Biden/Sanders Unity Task Force, and Biden’s June 2020 World Refugee Day statement. For each category of detrimental changes made or attempted under the Trump Administration, I highlight steps the Biden Administration must take, beyond their stated commitments, to meaningfully protect asylum seekers.

A. Border Policies Constricting Access to Asylum

Many of the Trump Administration’s anti-asylum policies have centered on either blocking access to asylum at the border or deterring asylum seekers from seeking protection in the United States. These changes are discussed in this section, beginning with “metering” of asylum seekers at the Southern Border, family separation and the zero tolerance policy, the Migrant Protection Protocols, the Prompt Asylum Claim Review and Humanitarian Asylum Review Process, and the Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador.

1. Metering of Asylum Seekers at the Border

Prior to the Trump Administration even taking office, advocates at the border reported issues around the “metering” of asylum seekers. These stories were a foreshadowing of the evil to come. Metering refers to the process where, in the run up to the 2016 elections, Customs and Border Protection officials began only processing a limited number of asylum seekers arriving at the border per day. CBP created a “list” of asylum seekers [who] obtain a number and then wait, often a period of 6-12 months, for their number to be called. CBP is the largest law enforcement agency in the country and yet on some days, CBP accepts no asylum seekers into the United States at the various ports of entry along the southern border.

As Jennifer Lee Koh explains:

23 See Biden Sanders Unity Task Force Recommendations, supra note 2.
25 As the 2021 Immigration Action Plan articulates, supra note 18, “But that rollback is not enough, [the Biden Administration] must also undo three decades of an enforcement-only approach to immigration policy with devastating consequences.” at 2.
27 For additional discussion on metering, see Fatma Marouf, Executive Overreaching in Immigration Adjudication, 93 Tulane L. Rev. 707, 763-68 (2019); see also Jennifer Lee Koh, Barricading the Immigration Courts, Duke L. R. Online, 34-47 (Feb. 2020).
The metering policy reflects a deeply substantive revision of the asylum laws through its novel reading of the asylum statute as empowering state officials to prevent people from requesting asylum so long as they have not yet entered a port of entry. But metering is also accompanied by stark procedural flimsiness, resulting in decreased accountability, a minimal record of agency deliberation, and perceptions of illegitimacy.\(^{28}\)

Initially, the Trump Administration denied that metering was even in effect.\(^{29}\) Over the last three years, the practice been challenged and its very existence debated in the July 2017 lawsuit, *Al Otro Lado, Inc. v. Kelly.*\(^{30}\) For asylum seekers and the attorneys attempting to represent them at the border, this means that months may pass while the asylum seeker waits for her number to be called in order to go through only the first threshold step of claiming asylum in the United States. These delays were further exacerbated on March 20, 2020, when the White House made an opportunistic move to close the border completely, ostensibly in response to the COVID-19 pandemic.\(^{31}\)

Biden has specifically committed to ending metering at the border.\(^{32}\) In addition to ending this abhorrent practice, the Biden Administration will need to provide accommodations within asylum law for those affected by more than four years of the practice. To start, expediting the process and ensuring that the asylum seekers subjected to metering will not be affected by the other panoply of potential asylum law changes, discussed in this essay, will be important.

\(^{28}\) Koh, *supra* note 24, at 37.

\(^{29}\) From the author’s own personal experience at the border in Tijuana, Mexico, in March 2020, the list most certainly is in effect although run by asylum seekers themselves with apparent cooperation with the Mexican authorities and U.S. authorities.


\(^{31}\) See Centers for Disease Control and Prevention, *Interim Final Rule: Control of Communicable Diseases: Foreign Quarantine; Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes* (Mar. 20, 2020, extended on April 20, and May 19, 2020); see also Nick Miroff, *Under Trump Border Rules, U.S. has Granted Refuge to Just Two People since Late March, Records Show,* Washington Post, (May 13, 2020).

\(^{32}\) Biden Immig. Platform at 3 (“End the mismanagement of the asylum system, which fuels violence and chaos at the border” and identifying “metering” as a “disastrous policy.”).
The official implementation of former Attorney General Jefferson B. Sessions’ zero tolerance and family separation policy in April 2018 catapulted asylum seekers into the national spotlight. Sessions announced that there would be “zero tolerance” for any migrants entering without inspection and was specifically aware that this would result in the separation of very young children, including infants, from their parents. Thus, adult asylum seekers who crossed the border between ports of entry were taken into criminal custody and separated from their children. This ignored international law concerns over the rights of asylum seekers to seek protection through irregular channels. Combined with the aforementioned metering policy, asylum seekers on the other side of the border were forced to wait for lengthy periods in increasingly precarious circumstances.

As a result of the “family separation” policy, images of children in cages flooded the media. National outrage led to protests and marches and eventually a June 2018 Presidential Executive Order ending the policy, swiftly followed by its court-ordered termination. In the months that followed, the public learned that the Trump Administration has separated more than 5000 children from their families since 2017. These separations

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33 President Donald J. Trump Is Acting to Enforce the Law, While Keeping Families Together, The White House, (June 20, 2018).
35 See, e.g., Marouf supra note 24 at 770-771 (outlining the international law concerns regarding prosecution of asylum seekers for unlawful entry); see also Jillian Blake, Trump Administration’s Family Separation Policy Violates International Law (June 10, 2018) https://ilg2.org/2018/06/10/trump-administrations-family-separation-policy-violates-international-law/
36 For a thoughtful exploration of the what Professor Laila L. Hlass terms the “adultification” of immigrant children, see generally Laila L. Hlass, Adultification of Immigrant Children, 34 Georgetown Imm. L. J. 200 (2020).
39 Beth Van Schaack, New Proof Surfaces That Family Separation Was About
continue today -- family separation existed on a smaller scale prior to April 2018\textsuperscript{40} and continues to occur at several points in the immigration system.\textsuperscript{41} More than two years later, in October 2020, the ACLU shared that the government still has not located the whereabouts of the parents of 545 children.\textsuperscript{42}

More recently, in 2020, ICE gave detained families a choice between remaining in detention with their children indefinitely, facing the risk of exposure to COVID-19, or allowing for release of the children without their parents, leading to indefinite family separation.\textsuperscript{43} ICE failed to comply with a summer 2020 order in the Flores case\textsuperscript{44} to release children from family detention centers within 21 days by releasing the children along with their accompanying parents. Instead, ICE has forced parents to choose between protecting their child from COVID-19, but being separated from their child,

\textsuperscript{40}See, e.g., Women’s Refugee Commission, Lutheran Immigration & Refugee Services, & KIND, Betraying Family Values: How Immigration Policy at the United States Border is Separating Families (Jan. 10, 2017), https://www.lirs.org/assets/2474/lirs_betrayingfamilyvalues_feb2017.pdf, (detailing the various ways in which families were being separated in 2016 and before); see also Jesuit Conference of Canada and the United States, Lutheran Immigration and Refugee Service (LIRS), National Immigrant Justice Center, and Women’s Refugee Commission, (WRC), Memo: Concerns Over the Separation of Immigrant Families in U.S. Immigration Custody (September 30, 2015);

\textsuperscript{41}The Young Center, Family Separation Is Not Over (June 25, 2020), https://www.theyoungcenter.org/report-family-separation-is-not-over; see also Katie Shepherd, The Government Said It Wouldn’t Separate Families at the Ports of Entry. It was Lying. Immigration Impact (June 10, 2020), https://immigrationimpact.com/2020/06/10/family-separation-port-of-entry/#.X5Wr3y9h2gR.


\textsuperscript{43}Katy Murdza, ICE TELLS PARENTS TO SEPARATE FROM THEIR CHILDREN OR RISK INDEFINITE DETENTION TOGETHER, Immigration Impact, May 20, 2020, https://immigrationimpact.com/2020/05/19/ice-binary-choice/#.X5WtFC9h2gR.

or remaining with the parent in detention. Also ostensibly due to the pandemic, the Administration has suspended processing of I-730 family reunification petitions for asylee and refugee relatives, exacerbating the prolonged separation of immediate family members.

Biden has committed to ending family separation. Indeed, during the final debate on October 23, 2020 Presidential Debate, Biden said that the policy “violates every notion of who we are as a nation.” The Biden-Sanders Unity Task Force recommendations explicitly prioritize family reunification for children still separated from their families. This proposal must go further. The Biden Administration must ensure no further de facto family separations through detention policies that separate parents from their children. This is in line with Biden’s immigration platform, which commits to “enforcing our [immigration] laws without targeting communities, violating due process, or tearing families apart.”

Specifically, Biden has signaled a commitment to exempt at least parent asylum seekers (entering with children) from prosecution for illegal entry and re-entry under 8 U.S.C. 1325 and 1326. This exemption for asylum seekers should be made more broadly and no asylum seeker should be penalized for irregular entry, pursuant to article 31 of the Protocol to the UN Convention on the Status of Refugees.

Further, Biden needs to ensure that the Flores Settlement is honored in letter and spirit. The Flores Settlement sets forth the minimum standards of treatment and care for immigrant and refugee children, accompanied and

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48 Biden Sanders Unity Task Force Recommendations, Supra note 2, at 39.
49 Biden Immig. Platform, supra note 2, at 3.
50 Id. at 3 (signaling an end to “prosecution of parents for minor immigration violations.”) AND
unaccompanied. The Biden-Sanders Unity Task Force Recommendations state that the detention of children should be “restricted to the shortest time possible, with their access to education and proper care ensured.” In Biden’s immigration platform, he speaks specifically to the Trump Administration’s attempts to “circumvent the Flores agreement.” The Biden Administration should end family detention. The detention of immigrant families was ended once under the Obama Administration in 2009 and yet resurrected by the same Administration in 2014. Families need not be detained while they await adjudication of their claims. In circumstances where detention of families is absolutely necessary, the Biden Administration should insist on a return to the original 3-5 day limit on the detention of immigrant children, originally permitted by the original Flores Settlement. The Biden Administration must move away from the approximately three weeks currently contemplated due to court orders in the litigation over the prolonged detention of immigrant families. The harm to children from detention, even for short periods, with their parents, is well-documented and must be avoided at all costs.

3. Migrant Protection Protocols

On January 29, 2019, the Trump Administration announced the “Migrant Protection Protocols,” which require asylum seekers from Spanish-speaking countries (with the addition of those from Brazil on the one-year anniversary of MPP on January 29, 2020) to remain in Mexico while they await asylum hearings in the United States. This program has forced at least 62,000 individuals to live in dangerous conditions on the Mexican side of the U.S.-Mexico border. The human consequences of this policy are devastating.
Human Rights First and other organizations documented more than 1000 cases of targeted violence against MPP asylum seekers waiting in Mexico during the program’s first year.\(^{59}\)

MPP has created extremely challenging barriers to basic protections that should be afforded to asylum seekers, including due process and access to counsel. Although MPP has been contested in federal court\(^ {60}\) and successfully enjoined by the Ninth Circuit in March 2020, later that month the Supreme Court stayed the injunction, meaning that MPP remains in effect.\(^ {61}\) The Supreme Court will hear the case sometime in early 2021.\(^ {62}\)

Currently, tens of thousands of asylum seekers languish in Mexico as they await their day in court (further delayed by the Trump Administration’s border controls in response to the COVID-19 pandemic).\(^ {63}\) Levels of representation for this population are extremely low – TRAC (a non-profit organization that compiles data on immigration courts and agencies) estimates 4% of MPP asylum seekers secure legal representation.\(^ {64}\) Those lawyers who are representing asylum seekers in Mexico face seemingly insurmountable obstacles to maintaining a functional attorney-client relationship.

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\(^{59}\) Human Rights First Fact Sheet, *Year of Horrors: The Trump Administration’s Illegal Returns of Asylum Seekers to Danger in Mexico* (January 2020); see also *Delivered to Danger,* recounting 1001 cases of murder, rape, kidnapping, torture, and other violent assaults of MPP asylum seekers as of Feb. 28, 2020; see also Am. Immigration Lawyers Ass’n., *AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum,* Doc. No. 18060102 3 (2018), https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border


\(^{61}\) *Wolf, Sec. of Homeland Sec., et al. v. Innovation Law Lab et al.*, (Order List 589 U.S.) (Mar. 11, 2020)


\(^{63}\) DHS Announcement to Stakeholders, June 16, 2020 (announcing that MPP hearings are postponed until July 22, 2020) (on file with author).

\(^{64}\) TRAC Immigration, *Contrasting Experiences: MPP v. Non-MPP Court Cases,* (Dec. 19 2019), https://trac.syr.edu/immigration/reports/587/ (“Immigrants who were allowed to wait in the U.S. were over seven times more likely to find an attorney to represent them than those diverted to the MPP program...[A]ccess to attorneys is extremely limited for those required to remain in Mexico. Representation rates do generally increase over time the longer individuals have to obtain attorneys. So far only 4 percent of immigrants in MPP cases have been able to find representation. In contrast, nearly a third (32%) of those who were allowed to remain in the U.S. have obtained counsel over the same time period.”)
relationship. The stronghold that cartels wield in many of the border cities creates intense security concerns for attorneys traveling back and forth across the border, and restrictions imposed by U.S. immigration authorities can make meeting with clients before court on the U.S. side of the border almost impossible. Individual (final) and master calendar (preliminary) immigration court hearings for individuals in MPP have been suspended during the COVID-19 pandemic. In July 2020, the Executive Office of Immigration Review (EOIR) announced a policy for resuming the hearings but the criteria have not been met and hearings remain suspended at the time of writing.

4. Changes to the Expedited Removal System, including Prompt Asylum Claim Review and Humanitarian Asylum Review Process

Congress created expedited removal in 1996 as a “streamlined” process whereby certain noncitizens can be removed from the United States without appearing before an immigration judge. At the same time, Congress created safeguards to ensure that asylum seekers would be protected and allowed to exercise their Refugee Convention rights to seek asylum protection. These safeguards require Customs and Border Protection officers to pose questions to all individuals apprehended in order to determine whether they may be an asylum seeker. If appropriate, the CBP officer is required to refer the potential asylum seeker to USCIS for a credible or reasonable fear interview, which are meant to determine if they can establish the basis for an asylum case or other humanitarian protection. USCIS provides guidance and lesson plans for asylum officer administering fear interviews, which the Trump

\[\text{Am. Immigration Lawyers Ass'n, Policy Brief: Questions Remain After AILA Joins Laredo Tent Court Tour, AILA Doc. No. 20013031 (Jan. 30, 2020) (lamenting a lack of transparency and due process concerns about the tent courts and port courts set up to adjudicate MPP cases).}\]

\[\text{Department of Homeland Security and Department of Justice Announce Plan to Restart MPP Hearings, Dep’t of Homeland Sec. (July 17, 2020),}\]


\[\text{Id. at 25-26.}\]


\[\text{Id.}\]

\[\text{See Lindsay M. Harris, Withholding Protection, 50.3 Columbia Human Rights L. Rev.,}\]

\[\text{1, 22-23, (May 17, 2019).}\]

\[\text{Id.}\]
administration quickly amended in February 2017\textsuperscript{72} and later in 2018.\textsuperscript{73} In addition, the Trump Administration has issued new guidance on the internal relocation of asylum seekers within the country of feared persecution,\textsuperscript{74} and at least temporarily allowed Customs and Border Protection officers to conduct those interviews until that policy was enjoined by yet another federal court.\textsuperscript{75}

While MPP was introduced at the beginning of 2019, at the end of 2019 DHS introduced two new programs to hyper-expedite the processing of asylum claims at the Southern border: Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP).\textsuperscript{76} While many of the details of these programs are murky, DHS has shared that PACR applies to individuals and families who are subject to the asylum transit ban, discussed below, which requires individuals to have sought asylum in other countries prior to coming to the U.S. for protection.\textsuperscript{77} It is unclear whether or how this program will be continued given that the Asylum Transit Ban

\begin{itemize}
\item \textsuperscript{72} See, e.g., See Fatma Marouf, \textit{Executive Overreaching in Immigration Adjudication}, 93 Tulane L. Rev. 707, 738-39 (2019) (discussing the February 2017 USCIS revised credible fear lesson plan, creating an arguably heightened standard for credible and reasonable fear interviews, leading to a lower grant rate).
\item \textsuperscript{76} Katie Shepherd, DHS Reveals new Details of Secretive Asylum Programs PACR and HARP, Immigration Impact (Mar. 10, 2020), https://immigrationimpact.com/2020/03/11/dhs-asylum-programs-pacr-harp/#X5W6is9h2gR
\item \textsuperscript{77} CBP Responds to Letter Regarding Concerns Over Truncated Asylum Programs Being Piloted In El Paso TX, AILA Doc. No. 20031130 | Dated February 28, 2020.
\end{itemize}
was recently struck down.\textsuperscript{78} HARP applies to Mexicans arriving at the border as families.\textsuperscript{79} Both policies have been challenged in federal court and are highly problematic in terms of undermining access to counsel.\textsuperscript{80} Despite the challenges, PACR and HARP were both expanded in February 2020.\textsuperscript{81}

A new Administration must establish oversight to ensure that CBP officers conduct credible fear screenings as instructed by law, regulation, and CBP’s own agency guidance, and refer individuals to the asylum office, where officers are properly trained to conduct credible fear interviews.\textsuperscript{82} Consistent with the August 2020 preliminary injunction from San Diego immigration Judge Richard Leon, fully trained asylum officers, rather than CBP agents, should conduct credible fear interviews.\textsuperscript{83} Biden commits to “surge asylum officers to efficiently review the cases of recent border crossers and keep cases with positive credible-fear findings with the Asylum division.”\textsuperscript{84} Allowing the asylum office the authority to fully adjudicate asylum applications for individuals with a positive credible fear determination would streamline the process and help to curtail the backlog in immigration court. Biden must also specifically commit to ending PACR and HARP. USCIS under Biden should issue guidance making clear that the credible fear interview is a threshold-screening test and that the threshold to establish potential asylum eligibility is low. The risks of wrongfully finding no credible fear are too high. In addition to ending PACR and HARP, the Biden Administration’s Department of Homeland Security must rescind the removal orders issued under the program and instruct officers that those orders should not be reinstated.\textsuperscript{85}

\textsuperscript{78} See \textit{E. Bay Sanctuary Covenant v. Barr,} No. 19-16487, 2020 WL 3637585, at *20 (9th Cir. July 6, 2020).
\textsuperscript{79} \textit{Supra} note 72.
\textsuperscript{81} Tanvi Misra & Camila DeChalus, \textit{DHS Expands Programs that Fast Track Asylum Processes,} Roll Call (Feb. 26, 2020), \url{https://www.rollcall.com/2020/02/26/dhs-expands-asylum-programs-that-fast-track-deportations/}
\textsuperscript{82} Biden’s Immigration Platform does reference a commitment to ensuring oversight, training, and transparency of ICE and CBP activities. (5).
\textsuperscript{84} Biden Immig. Platform, \textit{supra} note 2, at 9.

5. Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador

The U.S. Refugee Act permits an exception to asylum being granted for individuals who could be protected by a safe third country through which they passed en route to the United States. This requires an agreement between the U.S. and another country where the asylum seeker’s life or freedom would not be threatened and where she would have access to a full and fair procedure for determining asylum eligibility or its equivalent. Prior to the Trump Administration, only one such agreement existed, between the U.S. and Canada, which has a fully functioning refugee determination system. In recent years, through this “safe third country provision,” the Trump Administration has entered into attempts to outsource asylum seekers to countries in Central America’s Northern Triangle – Honduras, Guatemala, and El Salvador.

Between November 21, 2019, and March 16, 2020, the U.S. transferred 939 Hondurans and Salvadoran asylum seekers to Guatemalan custody, the majority of them women and children. The agreements with El Salvador and Honduras were just beginning the initial phases of implementation when the COVID pandemic hit the United States. Although at the time of writing the asylum cooperative agreement with Guatemala was suspended due to the pandemic, this agreement and others loom over would-be asylum seekers and make access to protection even more difficult. The policies have also been

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87 See supra note 16, explaining that the Canadian Constitutional Court recently found that agreement invalid because of U.S. failure to provide protection to asylum seekers.


89 Agreement Between the United States of America and Guatemala, signed July 26, 2019, entered into force November 15, 2019.

90 Dep’t of Homeland Sec., Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador, (Oct. 28, 2019) (reflecting that an ACA was signed with El Salvador on Sept. 20, 2019); Nick Miroff, Trump Administration Reaches Deal to Send Asylum Seekers to El Salvador in an Effort to Deter Migrants from Entering the United States, Wash. Post, (Sept. 20, 2019).


92 Id. at n.13.
Many asylum seekers are fleeing transnational criminal organizations, including MS-13 and M-18, which operate across the porous borders in Central America.\(^{94}\) Therefore, other Central American countries, where law enforcement systems are similarly ineffective, will not be able to protect asylum seekers. Likewise, individuals fleeing domestic and family violence are similarly at risk with deeply engrained machismo driving cross-border targeting and persecution of largely women and children.\(^{95}\) Similarly, LGBTQ+ asylum seekers face region-wide stigma and persecution.\(^{96}\) Even those asylum seekers who may not face a personalized risk based on their original reasons for fleeing their home countries are often targeted simply for being migrants in the region.\(^{97}\) None of the three countries have robust protection systems to process and provide meaningful protection to asylum seekers in the Northern Triangle countries of Guatemala, Honduras, and El

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\(^{96}\) Molly Hennessy-Fiske, *For Transgender Migrants Fleeing Death Threats, Asylum In the U.S. is a Crapshoot*, LA Times (Oct. 29, 2019); Human Rights Campaign, *The Crisis at the Border is an LGBTQ Issue: Here’s Why*, (Nov. 30, 2018) (discussing high levels of homophobia and violence against LGBTQ communities in Central America); see also Human Rights Watch, ‘Every Day I Live in Fear’: Violence and Discrimination against LGBTQ People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States (Oct. 7, 2020) (discussing the ways in which laws and policies fail to protect LGBT people from violence and discrimination).

Finally, the U.S. government has repeatedly warned its own citizens in recent years about a lack of safety and advised against travel within the region, demonstrating the known dangerous conditions to which migrants are continually subjected.99

The Biden-Sanders Unity Task Force recommends ending policies that “deny protected entry to asylum seekers, put them at great risk, and destabilize our neighbors and the broader region. And we will end prosecution of asylum seekers at the border and policies that forced them to apply from ‘safe third countries,’ which are far from safe.”100 Biden’s own platform explicitly commits to ending the Migration Protection Protocols,101 but this language should also signal an end to the Asylum Cooperative Agreements forcing asylum seekers to seek asylum in Guatemala, Honduras, and El Salvador, rather than the U.S.102 In ending the Migrant Protection Protocols, the Biden Administration should parole into the U.S. all asylum seekers with pending cases who are waiting in Mexico. They must create and fund community-based programs to provide support to these asylum seekers who will largely be released to live with family or friends in the United States.103

Biden has publicly committed to reaffirming the U.S. commitment to supporting the Northern Triangle countries as they struggle to control transnational criminal organization, increase access to opportunity,
education, and work to lift citizens out of poverty.\textsuperscript{104} These efforts are critically important, but must be paired with meaningful protections to those citizens that the Northern Triangle countries are not able to protect from harm themselves.

\section*{B. Asylum Bans}

Donald Trump is a big fan of “bans.”\textsuperscript{105} Through Presidential Proclamations, executive orders, federal regulations, or a combination of the three, Trump has attempted to curtail access to asylum for individuals seeking protection at our southern border and beyond. This section will discuss what are known as Asylum Bans 1.0 and 2.0 (or “the transit ban”) both of which have ultimately been struck down (at least at the time of writing) by federal courts.

1. Asylum Ban 1.0: Barring Asylum Seekers entering Between Ports of Entry

On November 9, 2018, the Trump Administration attempted to bar eligibility for asylum for individuals who entered the United States between ports of entry,\textsuperscript{106} directly defying statutory language stating that all noncitizens within the United States may apply for asylum.\textsuperscript{107} This also ignores the many obstacles to an asylum seeker actually presenting at ports of entry, including the above mentioned “metering” system, illegal turn backs

\textsuperscript{104} The Biden Sanders Task force commits to addressing the “root causes of migration – violence and insecurity, poverty, pervasive corruption, lack of educational and economic opportunity, and the impacts of climate change.” 2021 Immigration Action Plan supra note 2 at 41. Biden’s immigration platform commits to pursuing a “comprehensive strategy to strengthen the security and prosperity of Central America in partnership with the people of that regions.” (10).

\textsuperscript{105} See generally Shoba Sivaprasad Wadhia, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP (2019); see also Eunice Lee, Non-Discrimination in Refugee and Asylum Law (Against Travel Ban 1.0 and 2.0), 31 Georgetown Imm. L. J 459 (2017) (discussing the travel bans broadly).

\textsuperscript{106} Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,939 (Nov. 9, 2018) (barring asylum to anyone in violation of Presidential Proclamation); Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 15, 2018) (temporarily suspending entry to any non-U.S citizen or non-lawful permanent resident seeking to enter outside ports of entry).

\textsuperscript{107} 8 U.S. Code § 1158(1)(a)(2020) (“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 and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.”).
at the border\textsuperscript{108} and wait times that stretching into several-month-long stints of perilous life at the border. This ban was enjoined through nationwide litigation under \textit{East Bay Sanctuary v. Trump} and at the time of writing, and the preliminary injunction remains in effect.\textsuperscript{109}

While Asylum Ban 1.0 was blocked by the courts, the ban itself was yet another attempt by the Trump Administration to undermine protection for asylum seekers. Separately, regulations proposed in June 2020 created a discretionary bar to asylum for asylum seekers who entered without inspection, attempting to achieve through regulation what the Trump Administration failed to do through Presidential Proclamation.\textsuperscript{110}

2. Asylum Ban 2.0 - Transit Ban – Barring Asylum to Individuals who Transited Third Countries before Arriving at the Southern Border

In July 2019, the Trump Administration made yet another sweeping attempt, through new regulations, to ban certain categories of asylum seekers from accessing protection.\textsuperscript{111} This bar targeted individuals arriving at the U.S.-Mexico border after July 16, 2019, who transited at least one other country and who cannot show that they have applied for and been denied protection in at least one other country.\textsuperscript{112} This broad ban applied even to unaccompanied minors and children,\textsuperscript{113} who are sometimes exempt from other arcane provisions of asylum law.\textsuperscript{114} The only exceptions were for asylum seekers who demonstrate that they are a victim of a “severe form of trafficking in persons”\textsuperscript{115} or that they have applied for protection in at least one other country and received a final denial of that protection, or Mexican asylum seekers. The ban did not apply to asylum seekers arriving

\textsuperscript{108} Lindsay M. Harris, \textit{Withholding Protection}, 50.3 Columbia Human Rights L. Rev., 1, (May 17, 2019).


\textsuperscript{111} Id.

\textsuperscript{112} Id.

\textsuperscript{113} Id.


\textsuperscript{115} As defined under 8 C.F.R. § 214.11 (2020).
at airports or at the U.S. Northern border with Canada. Thanks to litigation efforts, the transit ban also did not apply to individuals who were “metered” when attempting to make an asylum claim at the U.S. Southern border prior to July 16, 2019.116

The transit ban was challenged in federal court117 and eventually overruled in July 2020.118 The ban was in place, however, for a year, and during that time dramatically undermined protection for asylum seekers at the border and within the U.S.119 The Administration now seeks to impose the same ban by introducing travel through other countries before seeking asylum in the U.S. as a “significantly adverse” negative discretionary factor that adjudicators would be required to consider if sweeping regulations proposed on June 15, 2020 are issued in final form.120

The Biden Administration should take steps to remedy the harms done by

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119 Along with applying the bar to the wide-ranging population of asylum seekers the ban was intended to target, individual immigration judges erroneously applied the ban to those who should not be covered by this provision – including Mexican nationals and individuals who entered the U.S. prior to July 16, 2019, but filed their I-589 application for asylum after that date. USCIS asylum officers were instructed to apply this bar at the credible and reasonable fear interview stage. This is not usually the case under 8 C.F.R. Sec. 208.30(e)(5) (explaining that bars to asylum will be adjudicated in Section 240 proceedings in immigration court, rather than by the asylum officer). See also USCIS, Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course: Credible Fear of Persecution and Torture Determinations (Apr. 30, 2016) at 36 (“the mandatory bars to asylum and withholding of removal do not apply to credible fear determinations.”); see also Human Rights First, Asylum Denied, Families Divided: Trump Administration’s Illegal Third-Country Transit Ban (July 2020), https://www.humanrightsfirst.org/sites/default/files/AsylumDeniedFamiliesDivided.pdf

120 See infra, 29-31.
the transit ban imposed from July 2019 to July 2020 by the Trump Administration. This will mean comprehensive training and clarity for asylum officers and immigration judges to adjudicate ongoing cases, but also to consider ways to remedy the removals that have been ordered and those already executed of asylum seekers pursuant to the transit ban. The Administration should also ensure that asylum seekers subject to the ban but granted withholding of removal or relief under the Convention Against Torture are allowed to expeditiously reopen their removal proceedings in order to permit an asylum grant.

C. Attorney General Decisions Changing the Shape of Asylum Law

The attacks on the asylum system have come on all fronts and from all agencies within the U.S. government at the behest of Trump and senior administration officials, including White House Senior Policy Adviser, Stephen Miller. The Attorney General (AG) as head of the Department of Justice, wields authority over the Executive Office of Immigration Review, which houses the immigration courts and the Board of Immigration Appeals (BIA) and may certify a case to himself for review. As Fatma Marouf explains, AG certification of a case from the BIA to himself is a “political tool used to advance the President’s immigration policies.”

AG Sessions and those who have followed him have used this tool with greater frequency than AGs under prior administrations. Sessions exercised this power 7 times in his 21 month tenure as AG. In doing so he:


122 See 8 CFR § 1003.1(h).


124 Id. at 744.

1) created a pathway to “pretermit” (summarily dismiss) asylum claims and undermine asylum seekers’ right to a full hearing;\textsuperscript{126} 2) curtailed the use of administrative closure as a docket management tool for immigration judges;\textsuperscript{127} 3) heightened the standard for the granting of continuances,\textsuperscript{128} which permit time for asylum seekers and others to find legal representation;\textsuperscript{129} 4) required asylum seekers to precisely delineate their membership in a particular social group(s) that drives their fear of persecution at a very early stage in the proceedings, \textsuperscript{130} and 5) undermined the ability of immigration judges and BIA members to terminate or dismiss cases.\textsuperscript{131}

AG William Barr has also not shied away from certifying decisions to himself on asylum issues. In April 2019, Barr ruled that asylum seekers entering without inspection, in between ports of entries, much like asylum seekers who seek admission at ports of entry, will be held in detention without the opportunity for an immigration judge bond for the duration of their asylum proceedings.\textsuperscript{132}

Three key AG decisions, one from Sessions and two from Barr, attempt to undermine asylum protection for individuals fleeing gender-based violence and targeting by transnational criminal organizations. In the summer of 2018, Sessions certified a case from the Board of Immigration Appeals to himself.\textsuperscript{133} In doing so, he overruled a precedential decision issued by the same Board, just four years earlier, in Matter of A-R-C-G-. Matter of A-R-C-G- had been the first precedential decision, coming after nearly two decades of litigation and advocacy, to recognize that a survivor of domestic violence could be granted asylum protection in the United States. Ms. A-B- was a woman from El Salvador fleeing domestic violence when AG Sessions used less than two years to undo precedent for asylum seekers claiming to have been victims of violence or coercion; to cast doubt on pre-hearing release for asylum seekers in detention; and to restrict immigration judges’ ability to postpone a final reckoning for migrants facing deportation. That’s a notable legacy.


\textsuperscript{209} See Trice, supra note 201, at 1773-74.
\textsuperscript{129} Marouf, supra note 116, at 752.
\textsuperscript{133} Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018)
his power to reverse the grant of asylum she had received from the Board of Immigration Appeals. In doing so, he tried to create a blanket rule against granting asylum to individuals fleeing domestic violence or violence perpetrated by transnational criminal organizations.\textsuperscript{134} Within the decision he also attempted to elevate the standard for a government being “unwilling or unable” to protect its own citizens from persecution. Historically this standard required that a government be unwilling or unable to protect its citizens from persecution, but Sessions interpreted this as requiring the government to actually condone the persecutory acts of private non-state actors or to be “completely helpless” to prevent such acts.\textsuperscript{135} At the same time, Sessions tried to heighten credibility standards and encourage adjudicators to exercise their discretion not to grant asylum to individuals for a variety of reasons.\textsuperscript{136}

Following Matter of A-B-, USCIS and EOIR issued guidance implementing the decision, which was challenged in federal court. The district court overturned the guidance as arbitrary and capricious, at least as it applies to credible fear interviews.\textsuperscript{137} The D.C. Circuit upheld the district court’s finding that the new requirement that a government condone or be completely helpless to prevent persecutory acts was arbitrary and capricious. Similarly, the Circuit court found that the guidance requiring application of the law of the circuit, rather than the law most favorable to the asylum applicant, within the credible fear interview, was also an impermissible change.\textsuperscript{138} In the litigation on appeal, the government conceded that there was no general rule against domestic violence or gang cases, or that particular social groups containing the language “unable to leave” (a relationship) are always impermissible. Accordingly, the Circuit court vacated those portions of the district court’s injunction. Matter of A-B- remains in place generally, however, as a precedent decision for immigration judges throughout the

\textsuperscript{134} Matter of A-B-, 27 I&N Dec. 316, 320 (A.G. 2018) (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”).

\textsuperscript{135} Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018) (citing Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000) (The applicant must show that the government condoned the private actions “or at least demonstrated a complete helplessness to protect the victims.”)).


The Trump Administration did not, however, give up the idea of quashing gender-based asylum claims after *Matter of A-B*. Indeed, Attorney General Bill Barr doubled down on the attack on female identifying asylum seekers in September 2020, when he issued the *Matter of A-C-A-A* decision. In that case, an immigration judge had granted asylum to an applicant, finding that she was persecuted by her parents on account of her membership in a particular social group of “Salvadoran females.” AG Barr emphasized the Board of Immigration Appeals should revisit de novo all aspects of the asylum claim and not accept the parties’ stipulations on any particular element of the asylum claim. AG Barr stressed the importance to “scrutinize where the asserted particular social group encompasses millions of persons in a particular society.” The decision stresses again the distinction between “private violence” and persecution and attempts to pretend that the well-documented dynamics of machismo in El Salvador are unfounded stereotypes. The *A-C-A-A* decision represents another attempt to double down on gender-based asylum claims and yet another attack in the onslaught against women asylum seekers.

The *Matter of A-B* decision, like its kin, *Matter of L-E-A*-, issued by Attorney General Barr in the summer of 2019, has led to mass confusion and inconsistencies in adjudication nationwide. In *Matter of L-E-A*, AG Barr attempted to bypass Circuit Court precedent and severely restrict access to asylum for individuals seeking protection because of persecution on account of their membership in a family group. In *Matter of L-E-A*-, AG Barr overturned a decision issued just two years earlier. The original 2017 decision had not even granted asylum to the particular asylum seeker, a Mexican national who argued that a dangerous drug cartel threatened his life because of his relationship with his father.

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139 The case has been limited in certain jurisdictions, including the Ninth Circuit. See Diaz-Reynoso v. Barr, 968 F.3d 1070 (9th Cir. 2020) (limiting A-B in the 9th Circuit).


141 Id.

142 Id.

143 Id.

144 Id. at 94.


individual, based on a lack of nexus of the harm he feared to the protected ground, the Board of Immigration Appeals recognized, echoing all of the federal circuit courts who had spoken on the issue, that family constituted a particular social group – one of the five protected grounds under which an individual may seek asylum.\footnote{Matter of L-E-A-, 27 I&N Dec. 40 (BIA 2017).} The 2019 AG decision attempted to limit the application of family as a particular social group by explaining that most families will not be “inherently socially distinct.”\footnote{Matter of L-E-A- II, 27 I. & N.Dec. 581, 589 (A.G. 2019) (“[I]n the ordinary case, a nuclear family will not, without more, constitute a ‘particular social group’ because most nuclear families are not inherently socially distinct.”).} Instead, Barr tried to set a new standard where family must stand out in society in some special way, perhaps requiring families to be like the Clintons, Kardashians, or Trumps, in order to be recognized as “socially distinct.” Whether or not Barr met his goal of limiting access to asylum for individuals fleeing persecution based on family membership remains to be seen. Following Matter of L-E-A- II, some immigration judges have continued to grant asylum, while others have denied asylum. Nonetheless, the decision has certainly served to muddy the waters of asylum law.

In addition to Trump AGs exercising the power to certify a decision and to undo prior Board of Immigration Appeals precedent, the Trump Administration has engaged in highly politicized appointment, assignment, and removal of immigration judges and Board of Immigration Appeals members.\footnote{See Fatma Marouf, Executive Overreaching in Immigration Adjudication, 93 Tulane L. Rev. 707, 728-733 (2019) (discussing politicized hiring, reassignment, and removal of IJs); see also Tanvi Mizia, DOJ reassigned Career Members of Board of Immigration Appeals, Rollcall, June 9, 2020 (reassigning Board members who were appointed prior to Trump Administration), https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/.} In July 2020 the Trump Administration announced the appointment of 46 new immigration judges, almost all of whom either had an immigration enforcement or prosecution background, or no immigration experience whatsoever.\footnote{U.S. Dep’t of Justice, EOIR, Notice: EOIR Announces 46 New Immigration Judges (July 17, 2020), https://www.justice.gov/eoir/page/file/1295301/download.} One concerning appointment, for example, was Matthew O’Brien, the former research director of an anti-immigrant think tank with clear ties to white supremacy,\footnote{Law 360, Ex-FAIR Research Director Among 46 New Immigration Judges (June 20, 2020), https://www.law360.com/legalindustry/articles/1293543/ex-fair-research-director-among-46-new-immigration-judges.} who has been publicly and vocally anti-immigrant.\footnote{See e.g., Matt O’Brien, The Truth About Zero-Tolerance and Family Separation, What Americans Need to Know, FAIR (June 19, 2018), https://www.fairus.org/issue/border-
The Biden-Sanders Unity Task Force recommendations, along with Biden’s immigration platform commits to reversing “policies that prevent victims of gang and domestic violence, as well as LGBTQ+ people who are unsafe in their home countries from being eligible to apply for asylum.” This commitment should ensure that the AG decisions in Matter of A-B- and Matter of L-E-A- are reversed, along with rescinding the sweeping regulations proposed in June 2020. Guidance to asylum officers and immigration judges must make clear that individuals fleeing gender-based and gang-based violence and harm from non-state actors should be considered along with all other asylum seekers. The Biden-Harris Administration should consider adopting UNHCR Guidelines on gender and particular social group more broadly, to insulate against future attacks on these types of claims. Passing the Refugee Protection Act would also go a long way to provide statutory protections

155 Id. Biden Immig. Platform speaks to ending “Trump’s detrimental asylum policies” and specifically mentions members of the LGBT community as an “especially vulnerable group in many parts of the world.” (3) The Platform also centers restoring asylum eligibility for domestic violence, committing Biden’s DOJ to “reinstate explicit asylum protections … for domestic violence and sexual violence survivors whose home governments cannot or will not protect them.” (9).

156 The Biden Immigration Platform flags Trump’s attempts to “prevent victims of gang and domestic violence from receiving asylum” as a detrimental policy that will be discontinued. Id. at 3.


protection for these categories of asylum seekers.\textsuperscript{161}

Further, the Biden Administration needs to, as the 2021 Immigration Action Plan proposed “reimagine the role of the immigration courts.”\textsuperscript{162} The lack of independent immigration courts leaves the immigration system vulnerable to the political whims of the executive branch. Case completion goals implemented by the Trump Administration undermine meaningful due process for asylum seekers and immigrants more generally.\textsuperscript{163} The Biden Administration must support legislation to create an independent immigration court system to provide meaningful access to justice and due process for all.\textsuperscript{164} The Biden Administration will need to work with Congress to create an independent immigration court, not embedded within the executive branch (the Executive Office of Immigration Review is currently housed within the Department of Justice).\textsuperscript{165}

The Biden-Sanders Unity Task Force recommendations state that detention of immigrants in general should be a “last resort, not the default,” so presumably this would mean correction of \textit{Matter of M-S-} and the default detention of asylum seekers along with much needed comprehensive reform, and indeed abolition, of immigration detention.\textsuperscript{166} The Task Force emphasizes investments in “more effective and cost-efficient community-based alternatives to detention” as well as ending for-profit detention centers. Biden’s Immigration Platform specifically commits to ending for-profit detention centers and to focusing on cost-effective alternatives to detention, including case management programs.\textsuperscript{167} But, the Task Force also states that a commitment to ensuring that “any facility where migrants are being

\begin{thebibliography}{99}
\bibitem{161} Refugee Protection Act H.R. 5210, 116\textsuperscript{th} Cong., 1\textsuperscript{st} Spec. Sess.( Ca. 2019).
\bibitem{162} See 2020 Immigration Action plan, supra note 2 at 15.
\bibitem{164} Human Rights First, \textit{Walking the Talk: 2021 Blueprints} at 29, 46-47 (discussing the importance of creating an independent immigration court through legislation but in the meantime working to “remedy politicized hiring, conducting fair and increased hiring and reducing the backlog.”).
\bibitem{166} See generally César Cuauhtémoc García Hernández, \textit{MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS} (2019).
\bibitem{167} Biden Sanders Unity Task Force Recommendations, supra note 2 at 3, 10-11 (specifically referencing Lutheran Immigrant and Refugee Services).
\end{thebibliography}
detained is held to the highest standards of care and guarantees the safety and dignity of families.”168 The Biden Administration should make a more dramatic shift away from immigration detention, towards abolition, and should ensure that asylum seekers are not detained.169

D. Bureaucratic Shifts to Make Life more Challenging for Asylum Seekers in the United States

In addition to the well-publicized and sweeping actions that the Trump Administration has taken to curtail access to asylum, the Administration has also, through minute regulatory changes and minor tweaks to bureaucratic processes, actively worked to make life more difficult for asylum seekers navigating the process. These range from finding new ways to reject the initial asylum application, to proposed increases in fees, to eliminating or delaying access to work authorization.

1. Death By a Thousand Paper Cuts: Technical Rejections of the Asylum Application Form

The Trump Administration has made it more difficult to even get an asylum application actually “filed” and received. Around October 2019, attorneys began to experience high levels of persnickety rejections of the application form to apply for asylum.170 A 12-page form, available only in English, must be mailed to one of USCIS’ service centers. The rejections have been Kafkaesque – rejecting a form solely because the asylum seeker only listed three siblings, rather than four in the space provided and failed to write “None” or “N/A” on the fourth line.172 These rejections have continued

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168 Id., at 40.
169 See, e.g., Erica B. Schommer, Commentary: Five Reforms to Restore and Improve Asylum System, San Antonio Express (Oct. 4, 2020) (advocating for alternatives to detention for a fraction of the cost of detaining asylum seekers); see also 2021 Immigration Action Plan at 13 (advocating for phasing out immigration detention and funding community-based case management programs instead); see also Human Rights First, Walking the Talk: 2021 Blueprints at 39-41.
171 The Trump Administration seeks to make this form 16 pages long, with the regulatory changes proposed in June 2020.
unabated in the midst of the COVID-19 pandemic – in late May 2020, for example, one attorney received a rejected asylum application solely because he wrote his client’s name in pen, rather than pencil, on the back of the two passport photographs submitted with the applications. In June 2020, reports surfaced of rejected I-589s because the form stated N-A instead of N/A. These rejections are disheartening and demoralizing and given that USCIS takes around 6-8 weeks to issue a Notice of Deficiency, this also leads to substantive delays for the asylum applicant in obtaining work authorization and an even longer wait for the interview.

2. Asylum Fee Increases

On April 29, 2019, President Trump issued a memo calling for regulations to further change the asylum-seeking process. The memo called for regulations that require asylum seekers to pay a fee to apply for asylum and also for their first work permit, and to deny work permits to immigrants who entered the United States without inspection.

As a result, for the first time ever, USCIS proposed creating a fee to apply for asylum. Though a fairly modest sum of $50, some asylum seekers will doubtless be unable to pay. The Executive Office of Immigration Review aims to impose the same fee in immigration court where the applicant is applying for asylum as a defense to removal. On August 25, 2020, new regulations went into effect requiring asylum seekers, for the first time, to pay an $85 biometrics fee for the processing of their work permit.

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173 Email correspondence with John Leschak, June 1, 2020 (on file with author).
176 Id. at Sec. 3.
178 Lindsay M. Harris & Joan Hodges-Wu, Asylum seekers leave everything behind. There’s no way they can pay Trump’s Fee, Washington Post, (May 1, 2019).
These regulations have been enjoined by a District Court in Maryland, but only for members of two plaintiff organizations in the class action lawsuit challenging the new regulations. Proposed regulations from USCIS in January 2020 also contemplate a fee for asylum seekers for the first work permit, which has historically been free. The fee for an employment authorization document is currently $410 and requiring an asylum seeker unable to work and ineligible for any federal (and usually no state) financial assistance to pay is illogical, unless specifically intended to make life more difficult for the asylum seeker. The fee changes that would have gone into effect on October 2, 2020, would have increased the work permit application fee to $550 and eliminated fee waivers for asylum seekers for work permits and adjustment of status applications. At the time of writing, two federal district courts have issued nationwide injunctions to enjoin the fee changes from going into effect pending adjudication of the legal challenges to the final rules.

3. Barriers to Work Authorization

The ability to lawfully work is critically important for asylum seekers. Asylum seekers usually flee their home countries with limited resources, often using whatever financial resources they may have to secure their passage to the U.S. and frequently going into debt to do so. They arrive in the U.S. unable to work and generally ineligible for any state financial assistance, and not for any federal assistance whatsoever. Delaying work authorization makes asylum seekers more vulnerable to exploitative employment practices within the United States.

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181 CASA de Maryland v. Wolf, No. 8:20-cv-02118-PX, 2020 WL 5500165 (D. Md., Sep. 11, 2020) (enjoining the rule only with regard to members of the Asylum Seeker Advocacy Project and Casa de Maryland. Both organizations have circulated information regarding how asylum seekers can become members).


184 Kevin Miller, Gov Mills Takes Emergency Steps to Allow Asylum Seekers to Qualify for State Assistance, Portland Press Herald (July 18, 2019).
Since 1996, asylum seekers have been eligible to apply for a work permit 150 days after filing their asylum applications. Those applications were then adjudicated within 30 days.\textsuperscript{185} The Trump Administration has issued regulations to change this.

First, after August 21, 2020, unless litigation to challenge these new rules is successful,\textsuperscript{186} USCIS will no longer have to process asylum seeker EADs according to any specific timeline.\textsuperscript{187} Second, a separate set of regulations that went into effect on August 25, 2020, increased the time period during which an asylum seeker must wait to file for a work permit after submitting the asylum application from 150 to 365 days.\textsuperscript{188} This second set of more comprehensive regulations also created categories of asylum seekers who are now ineligible to obtain a work permit at all, including certain bars based on criminal convictions,\textsuperscript{189} as well as asylum seekers who enter without inspection (with limited exceptions), and those who file after the one-year filing deadline (with an exception for unaccompanied minors).\textsuperscript{190} These regulations, combined, mean that an asylum seeker must wait a full year after entry to apply for a work permit that will be issued whenever the agency feels like it, and almost all asylum seekers who enter the United States without inspection will be ineligible to apply at all. Advocates challenged both sets of regulations affecting employment authorization for asylum seekers in federal court.\textsuperscript{191} As mentioned above, the district court in Maryland enjoined the implementation of the new work permit regulations that would have gone into effect on August 21 and 25, but only as applied to members of two plaintiff organizations, Casa de Maryland and the Asylum Seeker Advocacy Project.\textsuperscript{192}

4. Biden on Bureaucratic Changes to the Asylum Application Process and Work Authorization


\textsuperscript{186} \textit{Casa de Maryland et al., v. Wolf}, Case No. 8:20-cv-2118 Complaint (S. Dist MD July 21 2022).

\textsuperscript{187} 8 Fed. Reg. 37,502-37,546 (June 22, 2020) (eliminating 30 day deadline in 8 C.F.R. § 208.7(a)(1)).

\textsuperscript{188} See 8 C.F.R. §§ 208.3, 208.4.

\textsuperscript{189} National Immigration Project of the National Lawyers Guild, \textit{Practice Alert, Proposed Criminal Bars to Asylum: Intersection with New and Proposed Asylum Regulations}, (July 9, 2020).

\textsuperscript{190} See 8 C.F.R. § 208.4.


Biden has made clear through broad language on the asylum program that he wants to support and welcome asylum seekers. A major part of that effort must be effectively engaging in re-orienting the United States Citizenship and Immigration Services back to its original welcoming mandate and humanitarian mission.

Under increasingly hostile and anti-immigrant leadership, USCIS has from the top down engaged in practices, as discussed above, to undermine asylum applications. The USCIS under Biden must issue clear agency guidance to officers at service centers reviewing I-589 applications for asylum. The guidance must put an end to the highly technical rejections of asylum applications at USCIS. That standard should be generous – understanding that there is ample opportunity to correct any errors or omissions at the asylum interview. Congress should also play a role here, with appropriations and funding for USCIS conditioned on performance in resolving the extensive backlogs that have grown exponentially under the Trump Administration and ensuring timely issuance of work permits and green cards.\(^{193}\) The Biden Administration should also consider having USCIS asylum officers adjudicate asylum claims for individuals arriving and seeking asylum in the first instance.\(^{194}\)

The Biden Administration must also work to undo the regulatory changes that are either proposed or in the works, including eliminating any established fee for an asylum application and removing the new barriers to work authorization created through regulation.

In rolling back the August 25, 2020 final regulation instituting a 365-day waiting period for a work permit after an asylum seeker has submitted the asylum application, the Biden Administration should revisit the utility of any waiting period. Even with the 150-day waiting period to apply, this realistically means that by the time an asylum seeker has secured an attorney, completed and submitted the asylum application, they are often not able to work until a year or more after the asylum application is filed. This leaves asylum applicants in limbo, at the mercy of good Samaritans and overstretched non-profit organizations within our communities and

\(^{193}\) Alecs Cook, USCIS Wants $1.2 Billion in Taxpayer Dollars. The Agency Should Do These 3 Things Before Getting a Bailout, Immigration Impact (June 17, 2020), https://immigrationimpact.com/2020/06/17/uscis-funding-bailout/#.X5XkIC9h2gR.

\(^{194}\) See, e.g., Erica B. Schommer, Commentary: Five Reforms to Restore and Improve Asylum System, San Antonio Express (Oct. 4, 2020) (advocating for USCIS asylum officers to adjudicate claims in the first instance with referral to an immigration court as needed); see also Human Rights First, Walking the Talk: 2021 Blueprints at 29, 45 (also advocating to increase USCIS asylum officer ability to resolve cases at the border).
vulnerable to exploitation by employers and others. The 150-day waiting period was instituted in 1996. It is true that asylum applications have risen exponentially in recent years.\textsuperscript{195} No data, however, actually suggests those higher numbers are because individuals are filing fraudulent asylum applications simply to receive a work permit months down the road. The Biden administration should either revisit the overly punitive waiting period to allow asylum seekers to work to provide for themselves, or put in place federal assistance for asylum seekers while they await adjudication of their claims.

\textbf{E. Co-Opting the COVID-19 Public Health Crisis to Shut Down the Asylum System}

During the COVID-19 pandemic, Trump Administration officials have used the pandemic as an excuse to completely close the Southern Border to asylum seekers, despite a lack of any evidence indicating a heightened risk from the asylum seeking population.\textsuperscript{196} Under Title 42 of the Public Health Act,\textsuperscript{197} federal officials may exercise unique powers during a pandemic to respond to a public health crisis. Sarah Sherman-Stokes has explored the Department of Homeland Security’s use of this provision of law in 2020.\textsuperscript{198}

In conjunction with the Centers for Disease Control and prevention, and,

\textsuperscript{195} Manuela Tobias, \textit{Has there been a 1,700 percent increase in asylum claims over the last 10 years?}, \textit{Politico}, (June 21, 2018), \url{https://www.politifact.com/factchecks/2018/jun/21/donald-trump/1700-percent-increase-asylum-claims/} (affirming that a close to 1700% increase in asylum applications over the period a decade is accurate, but explaining that this rise is due to a number of factors including humanitarian crises in Central America).

\textsuperscript{196} Nick Miroff, \textit{Under Trump Border Rules, U.S. has Granted Refuge to Just Two People since Late March, Records Show}, \textit{Washington Post}, (May 13, 2020) The Administration’s response to COVID-19 within the immigration system was lacking overall – it took several weeks for the Executive Office of Immigration Review to shut down immigration courts, and even then they remained open for detained hearings and closed only a couple of weeks at a time. The asylum office closed on March 13 and re-opened with restrictions on June 4. Individuals remained detained by ICE and private prison contractors at the behest of ICE and advocates filed multiple lawsuits across the United States arguing for the release of those most vulnerable to the virus held in civil confinement. \textit{See, e.g., UCLA’s COVID-19 Behind Bars Data Project} and César Cuauhtémoc García Hernández’s \textit{blog} tracking COVID detention litigation. \textit{See also} Seton Hall University School of Law, Immigrants Rights/Human Rights Clinic, \textit{A Long Time Coming: How the Immigration Bond and Detention System Created Today’s COVID-19 Tinderbox}, April 20, 2020.

\textsuperscript{197} 42 U.S.C. §§ 265, 268.

\textsuperscript{198} Sarah Sherman Stokes, \textit{When Racist Immigration Policies Masquerade as Public Health: Continued Attacks on Central American Asylum Seekers} (draft on file with author).
as we later learned, under express order from Vice President Mike Pence,\(^{199}\) DHS announced on March 20, 2020, that it would bar entry to all migrants at the Southern Border ostensibly to limit the spread of coronavirus.\(^{200}\) At the same time, the Department of Health and Human Services announced that unaccompanied minor children would be returned to their home countries, rather than being considered for asylum status in the United States.\(^{201}\) As a result of this policy, at the time of writing close to 200,000 people,\(^{202}\) including unaccompanied immigrant children,\(^{203}\) have been returned to their country of origin without the typical due process afforded to asylum seekers.\(^{204}\) Lawsuits have been brought to challenge these Title 42 expulsions and the undermining of due process for asylum seekers during the pandemic.\(^{205}\)

Hearings for the 62,000 plus individuals living in Mexico pursuant to the Migrant Protection Protocols have been postponed and although the Department of Justice has outlined criteria for reopening, those criteria have not yet been met.\(^{206}\) These measures make little to no practical sense given


\(^{202}\) John Oliver, Asylum: Last Week Tonight (Oct. 25. 2020) (explaining that nearly the U.S. government has overseen close to 200,000 Title 42 expulsions to date), https://twitter.com/lastweektonight/status/1320727085502111746?s=21


\(^{206}\) Department of Justice, Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings (July 17, 2020),
that thousands of other individuals are still permitted to come back and forth across the border.

The border closure may violate the 2005 World Health Organization International Regulations, to which all 196 member states signed on. The United Nations High Commission for Refugees has critiqued the decision to shut down the U.S. asylum seeker at the border as contrary to international law. Indeed, UNHCR made clear in response to the COVID-19 pandemic that:

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\text{[I]mposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards, in particular as linked to the principle of non-refoulement.}
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Some have sounded alarm bells that this dramatic move could mean the end of asylum in the United States. Others have explained that travel restrictions, unless handled very carefully, cause a rush for travelers to move from one place to another quickly and lead to chaos creating chaos and, arguably, helped spread the virus into communities not previously affected. Martin and Bergman point out that travel restrictions, while they may have some effect in controlling a pandemic, are only effective if also

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207 See International Health Regulations, World Health Organization, (2005), https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf?sequence=1 aiming to “prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”).


209 UNHCR, Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response, (Mar. 16, 2020)


211 Greg Miller, Josh Dawsey and Aaron C. Davis, One final viral infusion: Trump’s move to block travel from Europe triggered chaos and a surge of passengers from the outbreak’s center Washington Post, (May 23, 2020).
accompanied by “by other public health measures—such as social distancing, hygiene practices, testing, tracing and quarantine for those found positive...”212 Without this, some of the strictest measures may be taken against migrants, and such travel restrictions, like this ban “risked undercutting individual rights, and some resulted in scapegoating and discrimination, especially against already deprived and marginalized social groups.”213 Martin and Bergman conclude that, “travel bans can have devastating consequences for people seeking asylum or other protection from life-threatening situations.”214 Most importantly, these bans pose little to no benefit to public health.215

In July 2020, the Administration released a set of proposed regulations targeting asylum with COVID-19 as a pretext.216 As Human Rights First has explained, the health-related proposed rules could bar individuals from asylum and withholding relief including those working in essential jobs in the United States in the health or other industries, who have come into contact with COVID-19.217 Similarly, individuals who have contracted COVID-19 while awaiting adjudication of their asylum claims, within or outside an ICE detention center could be barred, along with those arriving from or traveling through countries outside the U.S. where COVID-19 is prevalent. Finally, asylum seekers would be forced to show they meet the standard for relief under the Convention Against Torture in the earliest stages of seeking protection and may be transferred to third countries without ever seeing an immigration judge. The Administration would also potentially be able to extend the ban to asylum beyond COVID-19 and to other conditions

212 Susan Martin & Jonas Bergman, Shifting Forms of Mobility Related to COVID-19, 8 (under review) (On file with author).
213 Id. at 8.
214 Id. at 13.
216 See Docket No: USCIS 2020-0013; A.G. Order No. 4747-2020; Scott Roehm, “Trump’s Latest Assault on Asylum has Nothing to Do with National Security or Public Health,” Just Security, (July 15, 2020) (“Depending on the issue and its perceived electoral implications, COVID-19 is either a benign nuisance over which the country must stop fretting, or a catastrophic national emergency that presents an imminent and severe risk to everyone.”).
including gonorrhea, syphilis and tuberculosis. The Administration’s
dramatic approach to COVID-19 in the migration context is in sharp contrast
to its rather lackadaisical approach in general for the U.S. population.

While Biden has commented on other ways in which the Trump Administration has used the COVID-19 pandemic to curtail immigration, he has not specifically spoken on the ways in which the Administration is using the pandemic to undermine asylum protection. Biden has made public statements lambasting the Trump Administration’s pause on legal immigration back in April 2020, and the June 2020 attempt to send international students back to their home countries, but has not made similar statements on the ban at the border or the July 2020 regulations aimed at excluding asylum seekers on public health grounds. Biden must immediately act to re-open the border to asylum seekers and to halt or reverse the regulations, wherever they are in the process when he assumes the office of President. Human Rights First has explored recommendations that take into account both the safety of asylum seekers along with protecting public health.

F. Sweeping Changes to Asylum Law through a Complex Web of Proposed Regulations Aimed at Undermining Asylum Protection

The executive branch issues regulations (or “rules”) through a procedure under the Administrative Procedure Act known as “notice and comment” allowing members of the public to submit their thoughts on proposed regulations within a certain period of time. The Trump Administration has issued proposed regulations on the asylum system at least six times in the course of a year, including the regulations on employment authorization and fees for asylum, as discussed above, but also on the process more generally. Rules proposed in December 2019 and issued in final form in

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218 Id.
219 Scott Roehm, “Trump’s Latest Assault on Asylum has Nothing to Do with National Security or Public Health,” Just Security, (July 15, 2020) (“Depending on the issue and its perceived electoral implications, COVID-19 is either a benign nuisance over which the country must stop fretting, or a catastrophic national emergency that presents an imminent and severe risk to everyone.”).
221 Human Rights First, 2021 Blueprints Report (Oct. 2020) (advocating for 14-day self-quarantine for asylum seekers along with other travelers to the U.S., providing adequate masks and hand sanitizer, screens, and space for social distancing in the asylum seeking process).
222 Insert infra cite.
223 See, e.g. Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640 (December 19, 2019).
October 2020, for example, will penalize asylum seekers for criminal convictions that are often a byproduct of fleeing from persecution, including using false documents, “illegal” entry or reentry, and harboring. These regulations, which will go into effect, absent a successful legal challenges, before the end of 2020, will also create broad criminal bars to asylum, allowing for no adjudicator discretion and relegating many asylum seekers to eligibility for lesser forms of protection with higher burdens of proof such as withholding of removal and protection under the Convention Against Torture.

On June 15, 2020, the Trump Administration entered sweeping and dramatic proposed regulations which would eviscerate asylum protection into the Federal Register, with comments due just 30 days later on July 15, 2020. In response, around 88,000 organizational and individual public comments were submitted critiquing various aspects of the behemoth 161 page notice of proposed rulemaking, including the asylum officer’s union, members of Congress, and a wide variety of civil society organizations. Advocates penned powerful Op Eds critiquing the proposed regulations and asylum seekers and those granted asylum joined the chorus.

The proposed regulations seek to codify the previously discussed unsuccessful attempts by the Trump Administration to bar asylum seekers


225 See also American Immigration Lawyers Association, AILA Comment on Proposed Rules on Bar to Asylum Eligibility, AILA Doc. 20012231 (Jan. 17 2020) https://www.aila.org/infonet/aila-submits-comments-on-proposed-rule-on-bars

226 Id. 227 An organizational sign on effort led by the Tahirih Justice Center requested a 60-day comment period and garnered 502 signatures, without a response from the Administration.


229 See Comment from 70 members of Congress.

230 See e.g. https://www.interfaithimmigration.org/2020/06/26/resources-to-act-push-back-on-proposed-rule-to-gut-asylum-today/


who entered between ports of entry or who transited another country (Asylum Ban 1.0 and 2.0 discussed infra). They also seek to put into regulatory form the Attorney General decisions curtailing asylum for those fleeing gender-based harm and harm perpetrated by private actors, including Matter of A-B and Matter of L-E-A-. The regulations further gut due process protections for asylum seekers in immigration court, including allowing for the pretermission of claims before a meaningful day in court. The standards for credible and reasonable fear interviews at the border are further heightened. Confidentiality protections for information shared in asylum interviews are undermined. The ways in which the proposed regulations seek to undermine asylum protection, along with the racially motivated animus behind them, could be discussed in a book, rather than an essay. Advocates hope that the voluminous and substantive comments on the regulations, despite the shortened time period for public comment, will slow down the rulemaking process to allow for a new Administration to scrap the proposed regulations entirely. Only time will tell.

Around the same time as the “death to asylum” regulations were proposed, in July 2020, the Administration proposed another set of proposed rules on Security Bars and Processing, using the COVID-19 pandemic as another way in which to undermine asylum protection. These regulations are discussed in the previous section above.

The Administration’s attacks on the asylum definition did not stop over the summer, but proceeded into the Fall. On August 26, 2020, the EOIR issued proposed regulations to institute dramatic changes to the appellate immigration system. These proposed rules are broad in their application to the immigration system, and prevent the use of administrative closure by judges and board of immigration appeals members, prevent the BIA from remanding cases for further fact finding, and remanding in general except in very limited circumstances, expediting adjudication timelines to the

233 Indeed, some of the comments against the proposed asylum regulations, including the author’s own, were quite lengthy. The Catholic Legal Immigration Network, Inc’s Comment was 101 pages long.

234 See infra note 193.


236 Proposed 8 CFR § 1003.1(d)(ii) and 8 CFR § 1003.10. Proposed 8 CFR § 1003.1(d)(7)(v) (creating a double-standard for remand based on evidence the government presents but
detriment of fair consideration of cases, enabling individual immigration
driving by the parties and eliminating the opportunity to address arguments
raised by the other side. Many of these provisions would pose special
challenges for pro se immigrants and asylum seekers and also for attorneys
who provide pro bono services, those at non-profit organizations and small
firms, along with law school clinics, who often serve asylum seekers.

On September 11, 2020, the Department of Homeland Security
proposed rules around the collection of biometrics from immigrants more
broadly, but which also affect asylum seekers specifically. In their
comment submitted in response to this set of proposed rules, the Center for
Gender and Refugee Studies explains that the proposed rule’s “onerous and
unjustified biometrics collection requirements will lead to refugees who are
fleeing a range of abhorrent persecution that has long been recognized as
meriting protection being needlessly returned to countries where they could
be abused, sexually assaulted, or otherwise harmed, tortured, or killed.”
CGRS, among other advocates, raise concerns regarding the privacy of
asylum seekers. Concerns exist regarding changes proposed to the family
reunification process for asylees and refugees that will delay the process of
bringing spouses and children of an approved asylee or refugee to the United
States and perhaps force permanent separation.

On September 23, 2020, the Executive Office of Immigration proposed
yet another set of regulations on “procedures for asylum and withholding of
removal.” These rules would significantly shorten the period in which an
individual can apply for asylum, creating a 15-day deadline to submit an

preventing remand for evidence presented by immigrants themselves); and Proposed 8 CFR
§ 1003.2(c)(3)(vii) (removing time and number bars on motion to reopen for the government
but retaining strict limits for noncitizens in immigration court).

See Proposed 8 CFR § 1003.1 (e)(1), (8) + cite to CLINIC comment prioritizing
efficiency over fairness.

Proposed 8 CFR § 1003.3(c).

DHS Docket No. USCIS-2019-0007, Request for Comments: Collection and Use of
Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56338 (September
11, 2020)

Center for Gender and Refugee Studies, Comment in response to Request Collection
and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56338

See Comment from Lindsay M. Harris, Director of UDC Law Immigration & Human

RIN 1125-AA93; EOIR Docket No. 19-0010; A.G. Order No. 4843–2020, Public
Comment Opposing Proposed Rules on Procedures for Asylum and Withholding of
asylum application\textsuperscript{247} along with a receipt for the currently enjoined $50 payment\textsuperscript{248} associated with that application. This undermines the congressionally mandated one-year period in which an asylum seeker may file for asylum after entry without penalty. The proposed rule also requires immigration judges to adjudicate most asylum applications within 180 days of the applications’ filing, making it more difficult for asylum seekers to secure counsel or fully prepare their claims.\textsuperscript{249} The rule also requires judges to reject asylum applications for minor errors, including blanks or failure to write N/A or “none,” in completing the I-589 application form.\textsuperscript{250} Finally, the proposed rule would fundamentally change the role of the immigration judge by allowing judges to submit their own evidence in asylum proceedings, while also giving less weight to evidence coming from independent non-governmental organizations on human rights and country conditions.\textsuperscript{251} The turnaround time again for this public comment was the curtailed 30 days only and organizations submitted an extension request, without response.\textsuperscript{252}

Many of the commitments made by Biden throughout his immigration platform, along with the Biden-Sanders Unity Task Force recommendations signal that a Biden Administration would pull back these regulations, whether still in the works or issued. Jill Biden and Julissa Reynoso published an Op Ed critiquing the proposed regulations as an effort to “strip away protections from those fleeing violence and oppression.”\textsuperscript{253} Recognizing the ways in which the rule would also act as another “transit ban,” Biden and Reynoso expressed concern that the rules “would reduce the number of asylum seekers admitted into the United States and force judges to deny the claims — no matter how righteous — of those arriving at our border from countries beyond Mexico.”\textsuperscript{254} They noted that the proposed regulations would “make it nearly impossible for victims of domestic violence, gender-based violence or gang persecution to claim asylum.”\textsuperscript{255} Given this, we can expect the Biden Administration to halt the regulations,

\textsuperscript{247} See proposed 8 CFR § 1208.4.
\textsuperscript{249} See proposed 8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6.
\textsuperscript{250} See proposed 8 CFR § 1208.3(c)(3).
\textsuperscript{251} See proposed 8 CFR § 1208.12.
\textsuperscript{252} Catholic Legal Immigration Network, Inc., \textit{Nearly 90 Organizations Join to Urge the Justice Department to Provide a 60-Day Comment Period to Respond to EOIR's Proposed Changes to Asylum and Withholding of Removal Procedures}, (Oct. 8, 2020) \url{https://cliniclegal.org/resources/federal-administrative-advocacy/nearly-90-organizations-join-urge-justice-department}
\textsuperscript{253} Jill Biden & Julissa Reynoso, \textit{E Pluribus Unum is On the Ballot This November}, Washington Post (July 7, 2020).
\textsuperscript{254} \textit{Id.}
\textsuperscript{255} \textit{Id.}
if they are not already issued by inauguration in January 2021, and to quickly act to issue new regulations, restoring asylum protection, if the Trump Administration succeeds in issuing final regulations and surviving any legal challenges to those regulations.

III. CONCLUSION

Since inauguration day, the Trump Administration has done everything in its power, legal and otherwise, to undermine the system of protection for asylum seekers. It is clear that Donald Trump himself believes asylum seekers to be dangerous and criminal.256 This vilification of asylum seekers combined with xenophobic rhetoric has led to policy after policy targeting the U.S. asylum system. During the 2020 COVID-19 pandemic, the Administration has not only succeeded in bringing the system to a grinding halt but has used this time to propose sweeping regulations to permanently undermine asylum protection. Also during this time period, the Department of Justice has focused on trying to undo a 2006 asylum grant257 and attorneys are hearing troubling stories of notices of intent to terminate asylum status sometimes granted decades ago. It is the responsibility of citizens and attorneys to push for this Administration and a future Administration to fully realize our international and domestic legal and moral obligations to protect asylum seekers.

As discussed above, the largely broad strokes with which the Biden campaign have articulated a vision for restoring and improving our system are positive. In many instances, Biden has explicitly committed to reversing harmful Trump era policies. In others, he has hinted at a commitment to go beyond simply repairing some of the harm done and restoring the status quo. Biden himself has stated that it is “not enough to simply reverse or dismantle the heartless policies of the Trump Administration. We need to look for ways to do better.”258 He has also alluded to shortcomings of the Obama Administration on asylum and immigration policy more broadly and explained during the final Presidential Debate, “We made a mistake...I’ll be President, not Vice President.”259

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In addition to the commitments Biden has already made within his immigration platform and the specified actions he will take within the first 100 days of his Administration, Biden must also work with Congress to finally pass the Refugee Protection Act. The RPA would insulate the asylum system from further attacks by providing clear guidance from Congress to protect asylum. This article has delineated other key areas in which Biden must act to protect asylum seekers beyond his stated campaign goals. This includes not only abolishing metering and providing remedies for those asylum seekers affected by the practice. To prevent further family separation, Biden must act to ensure no further de facto family separations through operation of agency policies. His Administration must end family detention and where it is completely unavoidable must closely adhere to the spirit and the letter of the 1997 Flores Settlement, setting forth the minimum standards of care and treatment for immigrant children in detention. Biden must create meaningful oversight of Customs and Border Protection and ICE officers throughout the country, and consider abolishing these agencies along with immigration detention as a whole. Biden must similarly create guidance and oversight for USCIS officers to restore the humanitarian side of immigration, reverse any fee increases, and the regulations making it more difficult for asylum seekers to obtain work authorization.

Finally, the Biden Administration must make efforts to work with and not against asylum advocates. The Trump Administration presented an era in which asylum attorneys specifically have been called out and vilified. In an October 2017 speech, former Attorney General Sessions referred to “dirty immigration lawyers” who prepared clients with “magic words” to seek asylum. Trump himself has critiqued immigration lawyers and former DHS Secretary Kirstjen Nielsen threatened to prosecute those who “coach” asylum seekers on “false claims.” These attacks must come to an end and Biden should commit to working with advocates to ensure a robust asylum system. This should also include expanding access to counsel for asylum

260 Refugee Protection Act HR 5210; S. 2936.
The Biden Administration should also complement and support state and local government efforts to increase access to counsel for immigrants and asylum seekers.\textsuperscript{265}

Trump campaigned for and won the presidency using inflammatory anti-immigrant rhetoric and scapegoating immigrants for perceived ills plaguing the United States. With that power the Trump Administration has wrought incredible damage on our immigration and asylum system. Although the task of undoing that damage may seem overwhelming, this article has outlined the specific harms perpetrated and maps out concrete steps for the next Administration to take to restore our protection system for asylum seekers. As citizens, neighbors, advocates, scholars, allies, and congressional representatives, we must work together to hold a Biden Administration accountable for progressive promises made on the campaign trail, and more.


\textsuperscript{265} Lindsay M. Harris, \textit{Withholding Protection} at n. 211 (discussing efforts in New York and New Jersey to provide universal representation for immigrants within those locales).}