



## Restoring Asylum at the Border

The United States has a proud history of providing safety to those fleeing persecution, rooted in commitments to providing protection after World War II and the horrors of the Holocaust. But the Trump administration systematically dismantled this system. As a result, tens of thousands of adults, families, and children have been returned to danger in their home countries or abandoned to fend for themselves in unsafe conditions in Mexico. The Trump administration unlawfully cut off asylum in a multi-pronged approach that included exploiting the COVID-19 pandemic as an excuse for xenophobic policies, eviscerating screening mechanisms established by Congress, and barring eligibility for core protections.

The Trump administration used the pandemic as cover to accomplish its long-time goal of ending asylum. In March 2020, the CDC issued an unprecedented and unlawful order relying on public health authorities in Title 42 of the U.S. Code, under which CBP agents now quickly “expel” all migrants at the border who don’t have visas — even if they can prove that they are entitled to asylum or other protection. CDC staff refused to issue the order due to the lack of actual public health justification for these expulsions, but the White House intervened and got the director to issue it notwithstanding his own experts’ objections.<sup>1</sup> As a result, people are now effectively barred from seeking asylum and instead quickly deported to danger without any process at all. So far, more than 200,000 people have been expelled under the CDC’s order, including more than 13,000 unaccompanied children.<sup>2</sup>

Even before the administration used the CDC to attack the asylum system, it had enacted a series of unlawful immigration policies that, in a belt-and-suspenders-and-more approach, cut off access to protection at the border in multiple overlapping ways.

Under the so-called “Migrant Protection Protocols” (MPP), the Department of Homeland Security (DHS) has returned more than 67,000 individuals and families to Mexico, while their immigration cases are decided in U.S. immigration courts.<sup>3</sup> And long before the pandemic, the Trump administration forced asylum seekers to wait for months outside the United States before even giving them an opportunity to seek asylum by artificially limiting the number of individuals processed per day at ports of entry — a practice known as “metering.” DHS’s displacement of thousands of people to northern Mexico through MPP and metering forced people into makeshift encampments or shelters where they are vulnerable to violence, including kidnapping and torture, and often lack sufficient access to food, water, and medical care.

Under the Asylum Cooperative Agreements (ACAs), DHS claims authority to remove asylum seekers to Guatemala, El Salvador, and Honduras, and force them to seek asylum in those countries under the fiction that they are “safe” and capable of providing protection. In reality, tens of thousands of people *flee* those countries each year, and none has a fair and effective

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<sup>1</sup> James Bandler et al., “Inside the Fall of the CDC,” *ProPublica*, October 15, 2020, <https://www.propublica.org/article/inside-the-fall-of-the-cdc>.

<sup>2</sup> See *P.J.E.S. v. Wolf*, No. 120CV2245EGSGMH, 2020 WL 5793305 (D.D.C. Sept. 25, 2020) (magistrate judge recommendation that this expulsion system be enjoined as to class of unaccompanied children); *J.B.B.C. v. Wolf*, No. 1:20-CV-01509-CJN, 2020 WL 6041870 (D.D.C. June 26, 2020) (concluding that individual “plaintiff is likely to succeed on the argument that the CDC director does not have this power under 42 U.S.C. 265”).

<sup>3</sup> See *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) (affirming preliminary injunction of MPP program), *cert. granted* No. 19-1212, 2020 WL 6121563 (U.S. Oct. 19, 2020).

asylum system capable of handling large numbers of asylum seekers. And under the PACR/HARP policies, asylum seekers receive an initial asylum interview while still jailed by U.S. Customs and Border Protection (CBP), blocking them from meaningful access to counsel and a meaningful asylum screening,<sup>4</sup> in violation of the law.

The administration also repeatedly sought to render entire categories of individuals ineligible for asylum. In 2018, with “Asylum Ban I,” the administration sought to bar anyone who crossed the Southern border between ports of entry from asylum eligibility. This ban has been suspended by courts during ongoing litigation.<sup>5</sup> In 2019, with “Asylum Ban II,” the administration barred from asylum eligibility anyone who crossed the Southern border without having first applied for and been denied asylum in any country through which they transited, subject to extremely limited exceptions.<sup>6</sup> A court vacated the policy in June 2020, but litigation is ongoing, and regardless of that outcome, it undoubtedly resulted in thousands of case denials while in effect.<sup>7</sup>

The administration also issued new bars to asylum for people with minor criminal histories. And recently, it moved to enact yet another categorical asylum ban, this time using COVID-19 as the putative justification. A regulation proposed by DHS and DOJ in July 2020 would strip protections from removal for anyone who has traveled through a country where COVID-19 or another “contagious or infectious disease” is “prevalent or epidemic.”<sup>8</sup> Even though the United States has suffered more deaths from COVID-19 than any other country, under this rule, the U.S. government would be able to use the pandemic as an excuse to categorically deny asylum.

The Trump administration also changed the substantive standards used to adjudicate asylum claims. It issued orders from the attorney general limiting the ability of people with gang- and domestic-violence-based claims to win asylum, and similarly targeting people whose claims are based on their family membership. A proposed rule issued in June 2020 would further decimate “political opinion,” “particular social group,” and other core elements of the refugee definition, legal standards, and adjudication process that help ensure that the U.S. government does not deport people to danger or death.

The Trump administration also sought to make waiting for a decision in an immigration case extremely difficult. The attorney general issued an order to force asylum seekers who have passed their initial asylum screenings to remain in jail for the duration of their case.<sup>9</sup> For non-detained asylum seekers, two rules finalized by the Trump administration in June 2020 make it impossible for them to work legally for one year and would bar from employment eligibility people who entered between ports of entry or who applied for asylum more than a year after

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<sup>4</sup> The ACLU has challenged these policies, and a summary judgment motion is pending. *See Las Americas Immigrant Advocacy Center v. Wolf*, No. 19-cv-3640 (D.D.C.); *see also* Ruthie Epstein and Shaw Drake, “Ban on Attorney Access for Asylum Proceedings in Inhumane CBP Jails Key to Trump’s Attack on Asylum,” ACLU, Feb. 26, 2020, <https://www.aclu.org/news/immigrants-rights/ban-on-attorney-access-for-asylum-proceedings-in-inhumane-cbp-jails-key-to-trumps-attack-on-asylum/>.

<sup>5</sup> *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (affirming injunction), and the court of appeals and Supreme Court refused to stay the injunction, *see* 932 F.3d 742 (9th Cir. 2018); 139 S. Ct. 782 (2018). Four Justices would have granted the stay.

<sup>6</sup> *See East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020) (affirming injunction). However, the Supreme Court stayed that injunction. *See* 140 S. Ct. 3 (2019).

<sup>7</sup> *See Capital Area Immigrants’ Rights Coal. v. Trump*, No. CV 19-2117 (TJK), 2020 WL 3542481 (D.D.C. June 30, 2020), *appeal pending sub nom. I.A. v. Barr*, No. 20-5271 (D.C. Cir.).

<sup>8</sup> *See* Security Bars and Processing, 85 Fed. Reg. 41201 (July 9, 2020).

<sup>9</sup> *See, e.g., Mons v. McAleenan*, No. CV 19-1593 (JEB), 2019 WL 4225322 (D.D.C. Sept. 5, 2019), *appeal dismissed sub nom. Mons v. Wolf*, No. 19-5306, 2020 WL 3635095 (D.C. Cir. June 29, 2020).

entry, as well as creating complex new criminal bars to work authorization.<sup>10</sup> Moreover, the Trump administration expanded the use of expedited removal to noncitizens apprehended anywhere in the U.S. who have been present for less than two years.<sup>11</sup> The decision to expand expedited removal to the interior was a break from over two decades of bipartisan consensus to limit the use of expedited removal.

Despite the success of some legal challenges, through its relentless and multi-pronged assault the administration has succeeded in its goal of shutting down the asylum system. On World Refugee Day, June 20, 2020, now-President-elect Biden promised to “restore asylum laws” and “recommit to building a more inclusive and welcoming America” if elected President.<sup>12</sup> He has explicitly committed to ending Trump’s anti-asylum policies, including the Migrant Protection Protocols, metering, the transit ban and regulations implementing the Asylum Cooperative Agreements, and the other restrictions on asylum.<sup>13</sup>

It is incumbent upon the next administration to rescind all of these policies, ensure access to protection for asylum seekers previously subject to them, and rebuild an asylum system that reflects the principles of fairness and compassion.

### **Recommendations to the President**

#### *First 100 Days*

1. Rescind key Trump administration orders, rules, directives, memos, decisions, and guidance relating to the asylum system, and end key practices that restrict access to asylum, including:
  - CDC “Title 42” border orders, which permitted the immediate removal of all migrants at the border who do not have prior permission to enter the U.S. without the opportunity to seek protection from persecution that the law guarantees.
  - Migrant Protection Protocols (MPP), which forced non-Mexican asylum seekers at the Southern border to wait in dangerous conditions in Mexico for their court hearings in the U.S.
  - “Metering,” the policy of illegally turning away asylum seekers at ports of entry at the U.S.-Mexico border.
  - Asylum Cooperative Agreements, under which asylum seekers could be summarily removed to third countries that lack fair and effective asylum systems, as well as the regulations and guidance regarding the ACAs and any memoranda designating Guatemala, Honduras, or El Salvador as “safe third countries” for removal.
  - Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP), expedited deportation programs under which asylum seekers received the high-stakes credible fear interview within 48 hours of arrival, while in CBP custody.
  - Asylum Ban I/Entry ban, which made ineligible for asylum anyone who entered the U.S. at the Southern border anywhere other than a port of entry.

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<sup>10</sup> See *Casa de Maryland, Inc. v. Wolf*, No. 8:20-CV-02118-PX, 2020 WL 5500165 (D. Md. Sept. 11, 2020); see also “Update on Two New Attacks on Asylum Seekers,” National Immigrant Justice Center, Sept. 30, 2020, <https://immigrantjustice.org/for-attorneys/legal-resources/copy/update-two-new-attacks-asylum-seekers>.

<sup>11</sup> See Notice Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019)

<sup>12</sup> Joe Biden, “My Statement on World Refugee Day,” *Medium*, June 20, 2020, <https://medium.com/@JoeBiden/my-statement-on-world-refugee-day-fddb4abddfd5>.

<sup>13</sup> “The Biden Plan for Securing Our Values as a Nation of Immigrants,” <https://joebiden.com/immigration/>.

- Asylum Ban II/Transit asylum ban, which made ineligible for asylum anyone who travelled to the Southern border through another country before arriving in the U.S., with only extremely limited exceptions.
  - Indefinite detention of asylum seekers through non-compliance with the 2009 parole directive and through *Matter of M-S-*.
  - *Matter of A-B-*, *Matter of L-E-A-*, and *Matter of A-C-A-A-*, which limited the ability of people with domestic violence- or gang-related claims to win asylum, as well as people whose claims are based on their family membership.
  - Expanded use of expedited removal under the July 23, 2019 designation pursuant to 8 U.S.C. § 1225(b)(1)(A)(iii). The authority to designate classes of non-citizens for expedited removal need not go through notice and comment procedures and may be done with immediate effect.
2. Provide meaningful access to protection for those subjected to MPP and other anti-asylum policies enacted during the Trump administration through measures including:
- The administration should restore eligibility for relief for all individuals ordered removed through MPP, PACR/HARP, the transit asylum ban, or the ACA policies through the following measures:<sup>14</sup>
    - i. ICE OPLA should file motions to reopen and terminate all cases of individuals ordered removed through MPP and under the transit asylum ban.
    - ii. CBP should rescind the expedited removal orders of all individuals ordered removed through PACR/HARP, the transit asylum ban, or the ACA policies.
    - iii. CBP should begin the process of returning to the U.S. all asylum seekers who remain in Mexico pursuant to MPP and whose removal cases are pending and allow them to proceed with their cases from within the U.S. DHS should release these individuals on recognizance, bond, parole, or alternatives to detention while their cases proceed in immigration court. Any indigent person who is unrepresented and wants an attorney should receive one at government expense. Any person, including any child, who requires mental health services as a result of trauma experienced while waiting in Mexico should receive mental health services at government expense. DOJ should request appropriations from Congress to ensure these commitments are fully funded. This process will likely take beyond 100 days to complete.<sup>15</sup>
    - iv. During the COVID-19 pandemic, DHS should adopt public health measures including social distancing, wearing masks, using hand sanitizer, demarcations and barriers, and sheltering in place, to safely process asylum seekers, children, families, and other migrants at the border.<sup>16</sup>

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<sup>14</sup> Vacating prior removal orders will restore full asylum eligibility only if the other anti-asylum policies implemented during the Trump administration are reversed.

<sup>15</sup> As of September 2020, there were approximately 26,000 pending MPP cases. See “Details on MPP (Remain in Mexico) Deportation Proceedings,” TRAC Immigration, October 2020, <https://trac.syr.edu/phptools/immigration/mpp/>.

<sup>16</sup> Public health, humanitarian, legal, and human rights experts have developed detailed recommendations to DHS that would safeguard public health during the COVID-19 pandemic and preserve the ability of asylum seekers, children, families, and other migrants to seek protection in the United States. See “Public Health Measures to Safely Manage Asylum Seekers and Children at the Border,” Columbia Mailman School of Public Health Program on Forced Migration & Health, et al., May 15, 2020, <https://www.humanrightsfirst.org/resource/public-health-measures-safely-manage-asylum-seekers-and-children-border>.

### *Beyond the First 100 Days*

1. Rescind all other Trump administration orders, rules, directives, memos, and guidance relating to the asylum system, and end all practices that restrict access to asylum, in the first six months, including:
  - DHS/DOJ regulatory attack on asylum, which made destructive new changes to nearly every aspect of asylum adjudication, effectively ending access to asylum in the U.S.
  - DHS/DOJ opportunistic misuse of the COVID-19 pandemic to strip eligibility for asylum or withholding of removal from anyone who has traveled through a country where COVID-19 or another “contagious or infectious disease” is “prevalent or epidemic” and to remove people eligible for CAT to third countries.
  - Expansion of the criminal bars to eligibility for asylum and change to the process by which adjudicators consider whether a conviction or sentence triggers these bars.
  - Regulations restricting access to Employment Authorization Documents (EADs) by extending the length of time that an asylum seeker must wait to apply for an EAD from 180 days to 365 days, eliminating the rule that requires EAD applications for asylum seekers to be processed within 30 days, creating complex new criminal bars to eligibility for EADs, and ending EAD eligibility altogether for asylum seekers who entered between ports of entry or who applied for asylum more than a year after entry.
  - New application fees for asylum seekers.
2. Provide meaningful access to protection for all individuals subjected to MPP and other anti-asylum policies during the Trump administration through measures including:
  - CBP should return to the U.S. all asylum seekers with pending cases who are waiting in Mexico and release them on recognizance, bond, parole, or alternatives to detention while their cases proceed in immigration court, as described above. Any indigent person who is unrepresented and wants an attorney should receive one at government expense, any person who requires mental health services as a result of trauma experienced in Mexico should receive such services at government expense, and DOJ should request appropriations from Congress to ensure these commitments are fully funded.
  - DHS should inform all individuals who received withholding after implementation of the transit ban (July 16, 2019) that they may reopen their case and request asylum.
3. Strengthen the U.S. asylum system through measures including:
  - DHS should end the use of expedited removal.
  - DHS should impose a new 12-hour maximum limit on the length of time that any migrant can be held in CBP custody and fully comply with *Flores* limits on the length of time and conditions under which families and children can be detained.
  - DHS should issue a comprehensive directive to ensure the fairness of the processing of asylum seekers at the border including provisions that:
    - i. Prohibit CBP officers from the practices of metering, turn backs, and all other tactics that effectively prevent asylum seekers from requesting protection or expressing fear at ports of entry;
    - ii. Clarify that CBP officers are not authorized to conduct credible fear interviews of asylum seekers;
    - iii. Prohibit CBP from making referrals to DOJ for prosecution under 8 U.S.C. 1325 or 8 U.S.C 1326; and
    - iv. Require that all asylum seekers must have meaningful access to counsel, at government expense if needed, at all stages of their case.
    - v. DHS should also issue a comprehensive directive requiring that all asylum seekers have meaningful access to counsel, at government expense if needed, at all stages of their case.