



AILA Policy Brief: The “Asylum Ban” Flouts U.S. Law and Endangers the Lives of Asylum Seekers

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On November 9, 2018, partly in response to a migrant caravan traveling through Mexico, the Trump administration issued an “asylum ban” that bars anyone who enters the United States from Mexico between ports of entry from seeking asylum. The ban, which was issued in the form of a fast-track regulation¹ and presidential proclamation,² violates U.S. law guaranteeing an individual the right to apply for asylum. The administration justified this measure with inaccurate and misleading assertions about asylum seekers and border processing. On November 19, the U.S. District Court in San Francisco blocked implementation of the ban by issuing a temporary restraining order effective until December 19.³

If the ban subsequently goes into effect, it would effectively prevent many persecuted families and individuals from applying for asylum no matter whether they arrived at a port of entry or crossed between ports of entry. As a result, bona fide asylum seekers will be deported and could face further persecution and even death. Those who are given the opportunity to pursue asylum or other humanitarian protection in the United States will likely endure longer periods of detention in inhumane facilities.

Missing from the administration’s plan are solutions that would improve conditions in the region or enhance the U.S. government’s capacity to process asylum seekers who arrive at the southern border. Instead, the administration issued the ban as part of a comprehensive, continuing effort to limit access to asylum in the United States. This policy brief presents several solutions that would address the root causes of displacement in Central America and help ensure that the U.S. government processes asylum seekers in a fair, humane, and efficient manner consistent with the rule of law.

Not every person arriving at the southern border is eligible under U.S. law to receive asylum or other legal protection allowing them to remain. But U.S. asylum law does guarantee each individual the right to apply for such relief and to obtain a meaningful and thorough review of his or her case.⁴ The federal government has the resources to conduct such a review without resorting to measures intended to deter the arrival of vulnerable populations. For generations, through our history, traditions, and laws, America has remained steadfastly committed to the principle of welcoming and protecting those who flee persecution. Our government can ensure the integrity of its borders while still upholding this fundamental principle.

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Section I – Analysis of the Asylum Ban

1. Summary of the Asylum Ban

On November 9, 2018, the Departments of Homeland Security (DHS) and Justice (DOJ) published a fast-track rule⁵ that, in combination with a proclamation signed by President Trump the same day,⁶ prohibits from seeking asylum individuals who enter the United States from Mexico between ports of entry. Together, this rule and proclamation are commonly referred to as the “asylum ban.” The ban relies in significant part on the president’s limited authority to restrict immigration under Sections 212(f) and 215(a) of the Immigration and Nationality Act (INA)—the same legal authorities invoked for the “Muslim ban,” which restricts the entry into the United States of certain noncitizens from designated, mostly Muslim-majority, countries.⁷

The asylum ban does not affect individuals’ ability to apply for humanitarian relief in the form of withholding of removal or protection under the Convention Against Torture (CAT). As written, the asylum ban remains effective for 90 days—until January 8, 2019—or until the establishment of a so-called “safe third country” agreement with Mexico, whichever occurs earlier. By the 90th day, the Secretaries of Homeland Security and State, along with the Attorney General, must recommend to the president whether to extend the ban.

2. The Asylum Ban Contravenes U.S. Law

The asylum ban attempts an end run around U.S. laws that ensure the right of individuals arriving to the United States, whether at or between ports of entry, to seek asylum. Not everyone will qualify for this relief under asylum law; but everyone must receive a full and fair opportunity to pursue it.

On the day of the ban's issuance, several immigration advocacy organizations filed suit to halt the ban in the U.S. District Court in San Francisco in *East Bay Sanctuary Covenant v. Trump*.⁸ Their complaint asserts that the ban impermissibly seeks to override federal statute guaranteeing individuals' right to apply for asylum regardless of their manner of arrival. Specifically, INA Section 208(a)(1) provides that "any alien who is physically present in the United States or who arrives in the United States... **whether or not at a designated port of arrival**... may apply for asylum... (emphasis added)." The litigants argue that INA Sections 212(f) and 215(a) do not authorize the president to nullify this express command from Congress, and that the Attorney General likewise lacks authority to circumvent the statute.

The lawsuit further contends that DOJ and DHS violated the Administrative Procedure Act by failing to offer the public the opportunity to comment on the rule prior to promulgating it and by not publishing the rule at least 30 days before it became effective. Although the Administrative Procedure Act contains a "good cause" exception to these requirements, the lawsuit alleges that DOJ and DHS failed to establish good cause.

On November 19, 2018, presiding Judge Jon S. Tigar found that the plaintiffs were likely to succeed on the merits of the case, and issued a nationwide temporary restraining order blocking the ban from going into effect until a December 19 hearing.⁹ The district court order states that "[w]hatever the scope of the President's authority, he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden." He also reasoned that the "failure to comply with entry requirements such as arriving at a designated port of entry should bear little, if any, weight in the asylum process."¹⁰ The administration has announced it will appeal the ruling.

3. To Justify the Asylum Ban the Administration Relied on Gross Misrepresentations

In the text of the regulation and proclamation, as well as in official statements, the administration has sought to justify the asylum ban through a series of factually unsupported claims. Four of those claims are debunked below.

Claim #1: "Our system is currently overwhelmed by unchecked mass immigration, particularly at our Southwest border."¹¹

Reality: *The number of southwest border apprehensions is near historic lows.*

Though the administration has characterized the migrant caravan as evidence of "unchecked mass immigration" at the U.S. southern border, in reality, overall Customs and Border Protection (CBP) apprehensions—the closest proxy for border crossings—are markedly low by historical standards. From the 1980s through mid-2000s, southwest border apprehensions regularly exceeded 1 million annually.¹² By contrast, in FY 2018, the total was under 400,000, "the fifth lowest total since 1973."¹³ Meanwhile, even as apprehensions have plunged, the number of CBP border agents has skyrocketed, from 4,287 in 1994 to 19,828 in 2016.¹⁴ In 2018, the average Border Patrol agent apprehended just 23 noncitizens—less than 2 per month.¹⁵ In September 2017, DHS concluded that "[a]vailable data indicate that the southwest land border is more difficult to illegally cross today than ever before."¹⁶

Claim #2: “[T]hese migrants are not legitimate asylum-seekers. They’re not looking for protection.”¹⁷

Reality: Many caravan members and other individuals arriving at the U.S. southern border are legitimate asylum seekers fleeing life-threatening persecution in Central America.

There is an ongoing humanitarian crisis in El Salvador, Honduras, and Guatemala, marked by transnational gang violence, domestic abuse, and other existential dangers. This situation has fueled an increase in bona fide asylum seekers fleeing not only to the United States, but to countries throughout the Western hemisphere. Indeed, U.S. Citizenship and Immigration Services reported that of the members of the much-publicized caravan of Central Americans that arrived in May 2018, over 90 percent of those screened possessed a “credible fear” of persecution¹⁸—meaning the government found a “significant possibility” that, in a full asylum hearing in immigration court, an Immigration Judge would determine that they qualify for asylum. Similarly, on November 9th, 2018, following the issuance of the asylum ban, the United Nations emphasized that many of the individuals traveling through Central America and Mexico are escaping persecution and “in need of international protection.”¹⁹

Claim #3: Mexico is a “safe third country.”²⁰

Reality: For many asylum seekers, it is life-threatening to remain in Mexico.

When it was issued, the asylum ban was to remain effective for 90 days—subject to extension—or until the establishment of a so-called “safe third country” agreement with Mexico. The Trump administration has persistently sought such an agreement, which could preclude virtually all individuals who travel through Mexico from applying for asylum in the United States.²¹ Conditions in Mexico do not merit a “safe third country” designation. U.S. asylum law requires that asylum seekers’ “life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion” in the safe third country and that individuals would have access to a full and fair procedure for seeking asylum.²² It has been well documented that asylum seekers in Mexico face significant obstacles to protection, ongoing threats of sexual assault, kidnapping, and other harm, and too often, forcible return to the nations—and persecutors—they fled.²³ Thus, Mexico is not a “safe third country.” As such, an agreement of this kind between the United States and Mexico would not only bar asylum seekers from the United States, but also leave them without any reliable protection from the dangers they escaped.

Claim #4: Customs and Border Protection “processes asylum seekers at ports of entry in a lawful, orderly, and controlled manner.”

Reality: CBP violates U.S. law by denying protection seekers at ports of entry the opportunity to apply for asylum.

CBP routinely violates U.S. law by turning away many asylum seekers who present themselves at ports of entry.²⁴ Thus, far from processing “asylum seekers at ports of entry in a lawful, orderly, and controlled manner,” frequently our government does not process them at ports of entry at all. Such CBP turnbacks have led many persecuted individuals to believe that they have no choice but to enter the United States between ports of entry in order to obtain life-saving protection.²⁵ CBP’s “turnback” practice is examined in greater detail below.

4. The Asylum Ban Would Impose an Unfair Higher Standard on Asylum Seekers

Asylum seekers subject to the ban will no longer be eligible for asylum and can only apply for protection that imposes a considerably higher legal standard. To qualify for asylum, an individual must demonstrate a “well-founded fear of persecution” in her home country based on protected grounds. The Supreme Court has noted that even a 10 percent chance of persecution translates into a “well-founded fear.”²⁶ Individuals subject to the asylum ban, however, will only be able to seek humanitarian relief in the form of withholding of removal or protection under CAT, which are substantially more difficult to qualify for than asylum. Withholding of removal requires an applicant to demonstrate a “clear probability” of persecution in her home country on account of a protected ground, and Convention Against Torture protection requires a showing that it is “more likely than not” she will be tortured if returned.²⁷ Both standards have been interpreted as requiring a higher than 50 percent chance of the harm feared, a substantially higher threshold than what is required to qualify for asylum.

Furthermore, individuals subject to the ban must pass an initial “reasonable fear” screening with a USCIS asylum officer in order to *even* receive a hearing before an immigration judge for withholding of removal or CAT. To pass the screening an individual must show a “reasonable possibility” of persecution or torture in his or her home country. This legal standard is substantially higher than what is required for an initial asylum “credible fear” screening which requires the asylum officer to find only a “significant possibility” that an immigration judge would deem the individual eligible for asylum.²⁸ Individuals who fail the “reasonable fear” screening will never have the opportunity to seek protection before an immigration judge.

Finally, someone who qualifies for withholding of removal or CAT protection will remain in indefinite legal limbo in the United States. People granted these forms of protection cannot obtain green cards and cannot petition for their family members to join them in the United States, leaving their families separated on a potentially permanent basis.²⁹ Under both forms of relief, DHS retains the authority to deport the individuals to third countries.³⁰

5. CBP’s “Turnback” Practice Is Denying Meaningful Access to Asylum at Ports of Entry

In recent years, CBP has repeatedly violated the right to seek asylum codified under INA Section 208(a)(1) by turning away asylum seekers who lawfully present themselves at ports of entry along the U.S. southern border.³¹ Such turnbacks often occur as a result of CBP’s use of “metering,” whereby the agency informs arriving asylum seekers that it cannot process them at that time and instructs them to return to the port later.³² Upon returning, they frequently receive the same instructions, creating a cycle of deferrals that in many cases functionally prevents them from applying for asylum at designated checkpoints.

The turnback practice forces asylum seekers to wait for lengthy periods in dangerous conditions in Mexico. For example, individuals seeking processing at ports in Calexico, Nogales, and San Luis may face wait times of three to six weeks.³³ Those on the Mexican side of the border face acute risks of rape, abduction, and other harm, as well as forcible repatriation by the Mexican government to the countries where they previously suffered persecution. Many of the families and children affected may also have limited access to vital shelter, food, and medical treatment.³⁴

CBP's principal justification for this practice is that it lacks sufficient processing capacity at ports of entry.³⁵ Yet the U.S. government has committed extraordinary resources to border security, including the deployment of approximately 5,900 active duty soldiers and 2,100 National Guard members to the southern border,³⁶ in addition to a total force of about 20,000 CBP agents. Strikingly, no comparable commitment has been made to enhancing the processing of asylum seekers at ports of entry despite the longstanding recognition that more asylum seekers have been fleeing Central America for several years. Moreover, DHS has not expanded the spatial capacity at ports of entry to accommodate more asylum seekers or increased more substantially the ranks of processing personnel at ports of entry.

CBP's common practice of turning away asylum seekers at ports of entry has driven many people to cross between ports of entry—the practice that the asylum ban penalizes. Repeatedly rebuffed at designated checkpoints, individuals often conclude that lawful presentation at ports of entry no longer represents a viable option for accessing life-saving protection. In fact, DHS's own [Inspector General](#) concluded that turnbacks have caused asylum seekers “who would otherwise seek legal entry into the United States” to enter between ports.³⁷

Taken together, CBP's turnback practice and the asylum ban would widely bar individuals from obtaining asylum along the southern border. The turnbacks leave them unable to apply for asylum *at* ports of entry, and the ban precludes them from seeking asylum upon entry *between* ports.

6. The Trump Administration is Systematically Closing Off Access to Asylum

The asylum ban represents only one part of the current administration's ongoing, systematic effort to shut out asylum seekers from the country. Since taking office, this administration has increased CBP's practice of turnbacks, increased the detention of asylum seekers, and initiated a policy that separates asylum-seeking families in connection with the administration's “zero-tolerance” policy.³⁸ In addition, former Attorney General Sessions issued a precedent decision in *Matter of A-B*- which restricts the ability of domestic and gang violence survivors to obtain asylum.³⁹ These measures undermine our country's longstanding commitment to protect those fleeing violence and persecution.

Recently, the media has reported that the U.S. government and incoming Mexican administration are negotiating a policy that would radically restrict access to asylum in the United States. Known as “Remain in Mexico,” the policy, if agreed upon, would require individuals who receive a positive credible fear finding in the United States to return and remain in Mexico pending a full asylum hearing before an immigration judge.⁴⁰ Not only would this plan violate domestic and international law, it would also severely jeopardize asylum seekers' safety, access to counsel, and ability to obtain and furnish documentation in support of their cases. Though the *Washington Post* initially reported that a “Remain in Mexico” deal had already been reached,⁴¹ representatives of the incoming Mexican administration have since stated that no agreement has been formed.⁴²

7. The Asylum Ban Could Substantially Prolong the Detention of Asylum Seekers

The asylum ban could significantly extend the detention of many asylum seekers, lengthening their exposure to inhumane treatment and conditions in ICE facilities. By law, detained

noncitizens who pass a credible fear screening after entering the United States between ports of entry are entitled to an individualized custody hearing before an immigration judge. The judge may permit those individuals to post bond, which triggers release from detention pending an asylum hearing in immigration court.⁴³ By contrast, detained individuals who pass credible fear screenings after presenting themselves at a port of entry do not receive custody hearings; they may gain release from detention only if ICE grants them “parole.”⁴⁴

In the past, ICE generally granted such individuals parole unless the agency made an individualized determination that a person posed a flight risk or danger to the community. But under the Trump administration, ICE has been denying parole to and indefinitely detaining the overwhelming majority of asylum seekers processed at ports of entry.⁴⁵ This practice has almost certainly contributed to the record-high number of immigrants ICE now holds in detention: 44,631 as of as October 20, 2018.⁴⁶ These detained families and individuals frequently face harsh treatment and conditions, including verbal abuse by ICE agents, spoiled food, and lack of access to essential medical care and hygiene products.

By making asylum available exclusively to those who present themselves at ports of entry, and thereby driving individuals to those ports—leaving no subsequent opportunity for bond—the asylum ban could substantially raise the likelihood that asylum seekers would face long-term detention without release. Indeed, in October 2018 President Trump stated that the administration would “hold [caravan members] “until such time as their trial takes place.” He added: “We’re going to build tent cities. We’re going to put tents up all over the place ... and they’re going to wait.”⁴⁷

8. The Administration Has Militarized the Border

The Trump administration issued the asylum ban amid a series of measures that substantially militarize the U.S. southern border. By November 21, 2018, in response to the migrant caravan traveling through Mexico, the Department of Defense had deployed to the border roughly 5,900 active duty troops.⁴⁸ On that same day, White House Chief of Staff John Kelly signed an order authorizing those troops to “perform those military protective activities” deemed necessary to protect CBP border agents, including crowd control, detention, and even the “use of lethal force.”⁴⁹ Such activities may violate the 1878 Posse Comitatus Act, which limits the federal government’s power to employ military personnel to enforce domestic law. In response to migrants attempting to cross into the United States, CBP temporarily closed the San Ysidro port of entry and fired tear gas on the approaching individuals.⁵⁰ The military deployment and authorization of force against migrants threatens to turn border security into a military operation rather than a measured response to a migration flow that poses no danger to national security.

Section II – Solutions

The asylum ban and other anti-asylum measures pursued by the administration represent a profoundly misguided response to the humanitarian crisis in Central America and the resulting outflows of asylum seekers to the U.S. southern border. If the ban is implemented, numerous bona fide asylum seekers who would have otherwise obtained permanent, life-saving protection may not obtain any protection at all. Instead, they could face removal to the same countries—and persecutors—they fled, only to encounter further persecution, torture, and even death.

AILA recommends that the U.S. government consider other initiatives, both foreign and domestic, that would address the root causes of the increased migration from Central America and improve the capacity of the U.S. and foreign governments to process migrants and asylum seekers in a fair, humane and efficient manner. Below are five solutions that would serve as a starting point in this effort.

1. Address the root causes of violence and instability in Central America.

The Trump Administration and Congress can step up efforts to address the root causes of Central America's humanitarian crisis. The U.S. government should provide El Salvador, Honduras, and Guatemala with substantial foreign assistance to combat gang and gender-based violence, strengthen rule-of-law observance, and support anti-corruption initiatives, among other vital objectives. These approaches would provide a long-term solution that ameliorates the systemic problems compelling flight from the region.

Unfortunately, in its FY 2018 budget request, the administration proposed slashing foreign assistance to Latin America and the Caribbean by 36 percent over the prior year. The Congressional Research Service noted that "[t]he proposal would have cut funding for nearly every type of assistance and would have reduced aid for every Latin American and Caribbean nation."⁵¹ The administration's budget request for FY 2019, meanwhile, would cut aid to Central America by 29 percent over FY 2018 budget estimates.⁵² President Trump threatened to eliminate foreign assistance to the region outright as the migrant caravan traveled north.⁵³ A reduction in foreign assistance to Central America would prove profoundly counterproductive, worsening the very in-country conditions that force people to leave their homes in the first place.

2. Enhance processing capacity for asylum seekers at the U.S. border.

In September 2017, DHS concluded that the U.S. southern border is more secure than ever.⁵⁴ Rather than increase the deployment of border enforcement and military resources, DHS should ensure that sufficient resources are in place to process arriving asylum seekers in a manner that ensures a timely and thorough review of each case. To accomplish this DHS should expand the spatial capacity at ports of entry to accommodate more asylum seekers and increase processing personnel at ports of entry.

3. Strengthen refugee resettlement programs in the region.

The United States should commit to the robust processing of refugees from Central America. In the absence of such processing, many persecuted persons may feel they have no option but to make dangerous treks north in pursuit of asylum. To begin with, the U.S. government should substantially elevate the annual refugee admissions ceiling, which designates the number of refugees that the United States may resettle in a year. For FY 2019, the administration set an historically and unacceptably low worldwide refugee admissions ceiling of 30,000.⁵⁵ In FY 2018, the administration admitted only 826 refugees from El Salvador, Honduras, and Guatemala.⁵⁶ In the first month of FY 2019, only 28 refugees from those three countries were admitted—an embarrassingly low figure.⁵⁷

The administration should reestablish the Central American Minors Refugee and Parole (CAM) program, which it terminated in 2017.⁵⁸ CAM allowed vulnerable children and families to

relocate to safety without undergoing the perilous journey across the region. The administration should expand other refugee programs in the region, including the Protection Transfer Agreement (PTA) established in July 2016.⁵⁹ Under the PTA, certain persecuted Central Americans may undergo refugee processing in Costa Rica, then be relocated to safety in countries such as the United States, Canada, Australia, and Uruguay. As of January 2018, the United States had taken in only 90 individuals through the program.⁶⁰ Our government should commit to augmenting this multi-lateral PTA and accepting more refugees under the agreement.

4. Improve Congressional and DHS Inspector General oversight.

Despite widespread evidence that CBP has violated U.S. and international law by turning away asylum seekers at the border, Congress has failed to conduct meaningful oversight of the practice or of the administration's numerous other efforts to limit access to asylum. Congress should begin vigorously exercising its oversight powers on these issues, including through hearings and requests for pertinent agency documentation.

Furthermore, the DHS Inspector General should perform and publish the results of a comprehensive investigation into the nature, scope, impacts, and reasons for CBP's turnback practices. The investigation should expand upon the Inspector General's previous observations on turnbacks and should include an examination of any potential policies, official or unofficial, aimed at deliberately slowing the processing of asylum seekers at ports of entry.⁶¹

5. Reduce the reliance on jail-like detention for asylum seekers and increase the use of alternatives to detention.

The Trump administration has substantially curbed the use of alternatives to detention—including parole, release on recognizance, and community support programs—that facilitate the release of asylum-seeking families and individuals from inhumane detention conditions. As noted above, the administration has been denying parole to asylum seekers contrary to ICE's past policy. In addition, in June 2017, the administration terminated the "Family Case Management Program," a highly successful alternative to detention for family units that received positive credible fear determinations.⁶² Among other benefits, the program helped these families navigate the U.S. immigration system and obtain counsel, while ensuring their appearance at court and adherence to other immigration obligations. The program yielded a 99 percent appearance rate at check-in meetings with ICE and at immigration court hearings.⁶³ It also saved taxpayer dollars: keeping a single family member in a family detention facility costs \$319,37 a day, while the Family Case Management Program cost only \$36 per day for an entire family.⁶⁴ For these reasons, the administration should revive the Family Case Management program and expand the use of other successful alternatives to detention for asylum seekers.

¹ 83 Fed. Reg. 55934 (Nov. 9, 2018).

² See Whitehouse.gov, "Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States, (Nov. 9, 2018); <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/>.

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- ³ Order Granting Temporary Restraining Order, *East Bay Sanctuary Covenant v. Trump*, Case 3:18-cv-06810-JST (Nov. 19, 2018).
- ⁴ See, e.g., INA Section 208(a)(1).
- ⁵ 83 Fed. Reg. 55934 (Nov. 9, 2018).
- ⁶ See Whitehouse.gov, “Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States, (November 9, 2018); <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/>.
- ⁷ See Whitehouse.gov, “Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats” (Sep. 24, 2018); <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.
- ⁸ Complaint for Declaratory and Adjudicative Relief, *East Bay Sanctuary Covenant v. Trump*, Case 3:18-cv-06810-JST (Nov. 9, 2018); <https://www.aclu.org/legal-document/east-bay-sanctuary-covenant-v-trump-complaint>.
- ⁹ Order Granting Temporary Restraining Order, *East Bay Sanctuary Covenant v. Trump*, Case 3:18-cv-06810-JST (Nov. 19, 2018).
- ¹⁰ *Id.*
- ¹¹ DHS Website, “DHS Myth vs. Fact: Asylum Proclamation and Rule;” <https://www.dhs.gov/news/2018/11/09/dhs-myth-vs-fact-asylum-proclamation-and-rule> (Nov. 9, 2018).
- ¹² Bipartisan Policy Center, “CBP 2017 Apprehensions May Be Historic, But They Are Not Dramatic” (Dec. 18, 2017); <https://bipartisanpolicy.org/blog/cbp-2017-apprehensions/>.
- ¹³ Washington Office on Latin America, “The U.S. Government’s 2018 Border Data Clearly Shows Why the Trump Administration is on the Wrong Track” (Nov. 9, 2018); <https://www.wola.org/analysis/us-government-2018-border-data-trump-immigration-asylum-policy/>.
- ¹⁴ American Immigration Council, “Why Caution is Needed Before Hiring Additional Border Patrol Agents and ICE Officers” (Apr. 24, 2017); <https://www.americanimmigrationcouncil.org/research/why-caution-needed-hiring-additional-border-patrol-agents-and-ice-officers>.
- ¹⁵ Washington Office on Latin America, “The U.S. Government’s 2018 Border Data Clearly Shows Why the Trump Administration is on the Wrong Track” (Nov. 9, 2018); <https://www.wola.org/analysis/us-government-2018-border-data-trump-immigration-asylum-policy/>.
- ¹⁶ DHS, “Efforts by DHS to Estimate Southwest Border Security between Ports of Entry” (Sep. 2017); https://www.dhs.gov/sites/default/files/publications/17_0914_estimates-of-border-security.pdf.
- ¹⁷ President Trump, “Remarks by President Trump on the Illegal Immigration Crisis and Border Security” (Nov. 1, 2018); <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>.
- ¹⁸ Catherine E. Schoichet, “How one month reshaped the US immigration landscape” *CNN* (Jun. 3, 2018); <https://www.cnn.com/2018/06/03/us/immigration-landscape-may/index.html>.
- ¹⁹ UNHCR, “UNHCR statement on new US regulation on asylum” (Nov. 9, 2018); <https://www.unhcr.org/news/press/2018/11/5be5bfac4/unhcr-statement-new-regulation-asylum.html>.
- ²⁰ The proclamation rests on this assumption, as it states that it would expire prior to the 90-day mark upon the establishment of a safe-third country agreement with Mexico.
- ²¹ Ted Hesson, “U.S., Mexican officials to discuss asylum pact,” *Politico* (May 16, 2018); <https://www.politico.com/story/2018/05/16/trump-mexico-asylum-immigration-547919>; INA §208 (a)(2)(A). UACs are exempt from safe third country laws. INA §208 (a)(2)(E)
- ²² INA §208 (a)(2)(A).
- ²³ See AILA, “AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum” (Jun. 1, 2018); <https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border>.
- ²⁴ *Id.*
- ²⁵ *Id.*
- ²⁶ See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).
- ²⁷ *INS v. Stevic*, 467 U.S. 407 (1984); *In re M-B-A* (BIA 2002).
- ²⁸ INA Section 235(b)(1)(B)(v).
- ²⁹ See Human Rights First, “Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk” (Nov. 2018); https://www.humanrightsfirst.org/sites/default/files/CAT_Withholding.pdf.
- ³⁰ *Id.*

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- ³¹ See AILA, “AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum” (Jun. 1, 2018); <https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border>.
- ³² See Project on Government Oversight, “Asylum Seekers Being Turned Away No Matter Where They Cross the Border” (Nov. 20, 2018); <https://www.pogo.org/investigation/2018/11/asylum-seekers-being-turned-away-no-matter-where-they-cross-the-border/>.
- ³³ See Human Rights First, “FAQ: Why do Asylum Seekers Cross the U.S. Border Between Ports of Entry?” (Nov. 27, 2018); <https://www.humanrightsfirst.org/blog/faq-why-do-asylum-seekers-cross-us-border-between-ports-of-entry>.
- ³⁴ *Id.*
- ³⁵ See Project on Government Oversight, “Asylum Seekers Being Turned Away No Matter Where They Cross the Border” (Nov. 20, 2018); <https://www.pogo.org/investigation/2018/11/asylum-seekers-being-turned-away-no-matter-where-they-cross-the-border/>.
- ³⁶ Tara Copp, “White House approves use of force, some law enforcement roles for border troops” *Military Times* (Nov. 21, 2018); <https://www.militarytimes.com/news/your-military/2018/11/21/white-house-approves-use-of-force-some-law-enforcement-roles-for-border-troops/>.
- ³⁷ DHS Office of Inspector General, “Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy” (Sep. 27, 2018); <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.
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