

What does Asylum in the U.S. look like right now?

Over the past two years, there has been a systematic effort by the current Administration to implement policies meant to deter individuals seeking protection from coming to the United States. Both domestic and international law dictates that the U.S. has a legal and moral responsibility to consider the claims of those seeking safety and to offer protection when the criteria for asylum is met. Current policies, meant to deter individuals who exercise their fundamental right to claim asylum, ignore these obligations. Outlined below are some of the ways in which the current Administration has altered the U.S. asylum system.

Immigration Court Backlog

According to Syracuse University's TRAC Immigration database, the backlog in U.S. immigration courts reached an all-time high in 2018, with 809,041 pending cases as of November.¹ This backlog is largely the result of an overburdened immigration court system with too few immigration judges. Last year, former Attorney General Jeff Sessions imposed quotas on immigration judges, requiring them to complete 700 cases a year in an effort to decrease the backlog.² A quota system undermines due process by putting pressure on immigration judges to expedite hearings and issue decisions without sufficient time to consider all of the complexities of a case, placing asylum seekers at a disadvantage as they move through the immigration court system.³

Increased use of Detention

Today the use of immigration detention is increasing, despite the availability of more cost-effective and humane alternatives. Detention has been proven to cause trauma and undermines due process by limiting access to counsel. Alternatives to detention not only allow asylum seekers to live in communities with support systems, but they cost significantly less than detention, allow for greater access to legal counsel, and have proven to be successful.⁴

The current Administration has ignored alternatives to detention by instead increasing the use of detention by ending "catch and release," the practice of allowing an individual to live in the community while they await their immigration court hearing. In many cases, even asylum seekers who meet the requirements for release, meaning they have established a credible fear of persecution, have confirmed their identity, and have been identified as not posing a security or flight risk, are held for prolonged amounts of time.⁵ Detaining asylum seekers impedes their ability to secure legal counsel, undermining their access to due process. Non-detained individuals are 52% more likely to have legal counsel than those who are detained and on average, only 14% of detained individuals are represented in immigration court.⁶

¹ TRAC Immigration, Syracuse University (2018). Immigration Court Backlog Surpasses One Million Cases. Syracuse, NY.

² American Bar Association (2018). EOIR Performance Plan, Adjudicative Employees. Washington, DC.

³ <https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas>

⁴ Women's Refugee Commission (2017). The Real Alternatives to Detention. Washington, DC.

⁵ https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf

⁶ Women's Refugee Commission (2017). The Real Alternatives to Detention. Washington, DC.

Changing Precedents

Unlike other judges, Immigration Judges and the Board of Immigration Appeals work as part of the Department of Justice, meaning that the Attorney General can overrule their decisions. Between January 2017 and October 2018, Former Attorney General Sessions overturned five decisions, all of which dealt with immigration courts.⁷

For example, in June 2018, Former Attorney General Jeff Sessions announced that fleeing **gang and domestic violence** would no longer be considered grounds for asylum in the U.S.⁸ This decision has a disproportionately high impact on asylum seekers from Central America where gang violence is rampant and women have no recourse against domestic abusers. Citing the increase in asylum claims of individuals who were victims of “private violence,” this decision was aimed at reversing the precedent set by the Obama Administration that allowed women to claim credible fear due to domestic violence. Under this guidance, an individual would have been able to argue that they feared return due to gang and domestic violence, but judges would have been less likely to grant asylum based on this type of claim. In December 2018, a Federal judge permanently blocked this policy.⁹

Metering at Ports-of-Entry

U.S. law makes it clear that an asylum seeker who arrives at ports of entry can apply for asylum, and that the government is required to provide them with a credible fear interview. Despite this rule, there have been reports of turn-backs and restrictions on the number of entrants allowed per day at U.S. ports of entry, a process also referred to as “metering”. U.S. Customs and Border Protection (CBP) is using these tactics to **reduce the number of asylum seekers that are processed**.¹⁰ The Department of Homeland Security (DHS) and CBP have said that this is in response to increased arrivals and a lack of detention beds, but it appears that processing has dropped far below their existing capacity.¹¹

Processing reductions have led some asylum seekers to cross the U.S.-Mexico border between ports-of-entry - after trying to cross at checkpoints and being turned away by CBP. A report from the DHS Office of the Inspector General acknowledged that limiting the number of asylum seekers allowed to enter the country at ports would lead some to cross the border between ports. Many asylum seekers face danger while waiting in Mexico, where they are at risk of kidnapping, trafficking, and other violence that lead some asylum to cross between ports of entry.

Asylum Ban

In November 2018, President Trump issued an executive proclamation announcing an “asylum ban,” making ineligible for asylum any individual who crosses the U.S.-Mexico border between official

⁷ <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/how-jeff-sessions-attacking-immigration-judges>

⁸ <https://www.justice.gov/eoir/page/file/1070866/download>

⁹ <https://www.aclu.org/blog/federal-judge-blocks-trumps-policy-gutting-asylum-people-fleeing-domestic-and-gang-violence>

¹⁰ Human Rights First (2018). Refugee Blockade: The Trump Administration’s Obstruction of Asylum Claims at the Border. New York.

¹¹ Ibid.

crossing checkpoints.¹² While the ban would not entirely preclude people from seeking humanitarian protection, the options available to them include significantly stricter requirements.¹³ Under the asylum ban, it is very likely that asylum seekers who have well-founded fears of persecution would be sent back to their home countries.

Under U.S. and international laws, seeking asylum is legal, whether at a port-of-entry or not. Congressional directive dictates that individuals have up to one year to file an asylum claim from their time of arrival in the U.S.¹⁴ Additionally, as a signatory to the 1967 Protocol Relation to the Status of Refugees, the U.S. is obligated to comply with international rules related to asylum, including prohibiting the penalization of refugees for illegal entry.¹⁵ In December 2018 a U.S. District Judge issued a preliminary injunction to block the ban, which was upheld by the U.S. Supreme Court.¹⁶ The ban is not currently in effect.

Remain in Mexico

In December 2018, the Administration announced their 'Remain in Mexico' plan to keep individuals in Mexico who have claimed asylum at the U.S.-Mexico border while their asylum cases are processed.¹⁷ Under the announced plan, asylum seekers who made a claim at the U.S. border and who passed a credible fear hearing would wait, for what could be years, before being allowed to enter the U.S. This plan directly contradicts the Immigration and Nationality Act (INA), which expressly dictates that asylum seekers are to remain in the U.S. while their cases are pending.¹⁸

Mexico agreed to the policy, indicating that it would grant humanitarian visas to asylum seekers to work, and would not deport those waiting.¹⁹ However, there has not been a clear message from the Mexican government of how they plan to implement these changes or assist asylum seekers waiting in their cities.²⁰ Additionally, the 'Remain in Mexico' plan has raised questions about due process for asylum seekers who cannot enter the country to access legal counsel and has also added to concerns about the safety risks faced by individuals in Mexico.

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¹² <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/>

¹³ Human Rights First (2018). Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk. New York.

¹⁴ <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-1687.html>

¹⁵ UNHCR (1967). Convention and Protocol Relating to the Status of Refugees.

¹⁶ <https://www.lawfareblog.com/asylum-ban-litigation-supreme-court-declines-stay-injunction>

¹⁷ <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>

¹⁸ <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/act.html>

¹⁹ <https://www.gob.mx/sre/en/articulos/position-of-mexico-on-the-decision-of-the-u-s-government-to-invoke-section-235-b-2-c-of-its-immigration-and-nationality-act-185795?idiom=en>

²⁰ <https://www.newyorker.com/news/news-desk/the-radical-gambit-of-trumps-remain-in-mexico-deal>