

**BORDER MYTHS: HOW U.S. POLICIES AND PRACTICES  
ARE CONTROLLING THE BORDER NARRATIVE AT THE  
EXPENSE OF ASYLUM SEEKERS**

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## INTRODUCTION

*“I would build a great wall, and nobody builds walls better than me, believe me, and I’ll build them very inexpensively, I will build a great, great wall on our southern border. And I will have Mexico pay for that wall.”*

*-Donald Trump, Presidential Announcement Speech<sup>1</sup>*

The pledge to build a wall along the southern United States (U.S.) land border was a central and fundamental promise in Donald Trump’s presidential campaign.<sup>2</sup> Whether or not this wall is built has become an important factor in evaluating the success of his presidency and his chances at re-election. After Trump’s proposition that Mexico pay for a southern border wall proved infeasible, the Trump Administration (Administration) turned to the U.S. Congress, seeking billions in funding for the wall.<sup>3</sup> This led to the longest government shutdown in history.<sup>4</sup> For thirty-five days, Congress and the President stood at an

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1. Washington Post Staff, *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/>.

2. Michael C. Bender, *How the Border Wall, Trump’s Signature Campaign Promise, Turned into a National Emergency*, WALL ST. J. (Feb. 15, 2019, 3:34 PM), <https://www.wsj.com/articles/trump-promised-to-build-that-wall-then-ran-out-of-time-and-options-11550262854>; *see, e.g., A History of Trump’s Border Wall*, COUNTABLE (Apr. 25, 2017), <https://www.countable.us/articles/418-history-trump-s-border-wall>.

3. *See* Marianne Levine & Quint Forgey, *White House Asks Congress for \$5.7 Billion for ‘Steel Barrier,’* POLITICO (Jan. 6, 2019, 7:49 PM), <https://www.politico.com/story/2019/01/06/trump-emergency-border-wall-government-shutdown-1082712>; Ayesha Rascoe & Domenico Montanaro, *Democrats Reject Trump Border Wall Proposal, Calling It a ‘Non-Starter,’* NPR (Jan. 19, 2019, 5:28 PM), <https://www.npr.org/2019/01/19/686876605/trump-offers-temporary-immigrant-protections-for-5-7-billion-in-wall-money>.

4. *See* Meg Wagner, Veronica Rocha & Amanda Wills, *The Government Shutdown Is Over*, CNN (Jan. 25, 2019, 10:01 PM), <https://www.cnn.com/politics/live-news/government-shutdown-month-2019/index.html>.

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impasse over funding for the proposed wall.<sup>5</sup> Throughout the entire wall saga, President Trump has relied on the same national security messaging to support his blind dedication to the border wall: a complete, contiguous physical barrier is necessary to keep out the scores of deadly, criminal migrants illegally flooding across the United States' unprotected borders.<sup>6</sup> This message has been utilized and amplified in order to support President Trump's political ends. As the 2020 Presidential election cycle ramps up, the Administration has doubled down on the "border crisis" and the need to stem migration to the United States by any means necessary to garner and solidify political support for re-election.<sup>7</sup>

Part I discusses President Trump's border wall imperative and his use of anti-immigrant rhetoric to support a border wall. It examines how President Trump utilizes a mischaracterization of who is immigrating to the United States through the southern border, how, and why, to serve his political ends. Part II outlines the United States' international law obligations to asylum seekers and how U.S. law contravenes these obligations. Specifically, it explains the non-refoulement principle and its corollary, non-rejection.

Part III discusses the recent developments in policy and practices that serve to reinforce Trump's rhetoric at the expense of asylum seekers. It analyzes the Attorney General's recent policy shifts, which seek to capitalize on these false narratives. Specifically, it examines the "zero-tolerance" policy regarding prosecuting all illegal entrants to the United States and the new guidance for asylum officers adjudicating expedited removal proceedings. This section also discusses how current U.S. Customs and Border Patrol (CBP) policies, either established or de facto, are dominating the narrative of border crossers,

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5. *See id.*

6. Trump's comments during his first primetime speech to the nation. *See, e.g., Full Transcripts: Trump's Speech on Immigration and the Democratic Response*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/us/politics/trump-speech-transcript.html>.

7. *See* Stephen Collinson, *Trump Launches Immigration Rant in Bid to Rekindle 2016 Campaign Rage*, CNN (June 18, 2019, 10:30 AM), <https://www.cnn.com/2019/06/18/politics/donald-trump-election-2020-orlando-florida/index.html>; Jeremy Diamond, *Trump Launches 2020 Bid with Familiar Refrains on Immigration and Trade*, CNN (June 18, 2019, 10:42 PM), <https://www.cnn.com/2019/06/18/politics/trump-orlando-rally-reelection/index.html>.

specifically in the following two ways: (1) by denying their access to U.S. ports of entry; or, (2) upon arrival, by providing falsified or incomplete information in their initial screening documents. Part III also briefly overviews the legal challenges undertaken to counter these practices.

Both Part II and Part III address how these changes are impacting asylum seekers, in contravention of the United States' international law obligations. Finally, this article concludes it is critical that the rights and protections of asylum seekers in the United States are defended and maintained through continued challenges to illegal policy changes and more wide-scale legislative changes to bring U.S. law more in line with international obligations toward refugees.

### I. TRUMP'S BORDER WALL IMPERATIVE

A foundational promise of Donald Trump's presidential campaign was to build a continuous wall along the United States' southern border with Mexico.<sup>8</sup> Trump's hard line stance on immigration and his characterization of illegal immigration as the source of many of America's problems in large part activated his Republican base.<sup>9</sup> Trump's campaign was fueled by the fear of undocumented migrants—characterizing them as “bad hombres” from Mexico and Central America, who were criminals, rapists, and drug addicts, stealing American jobs, taking American lives, and exacerbating the drug epidemic.<sup>10</sup>

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8. Bender, *supra* note 2; *see, e.g., A History of Trump's Border Wall, supra* note 2.

9. Harry Enten & Perry Bacon, Jr., *Trump's Hardline Immigration Stance Got Him to the White House*, FIVETHIRTYEIGHT (Sept. 12, 2017, 5:59 AM), <https://fivethirtyeight.com/features/why-polls-showing-daca-as-popular-even-among-republicans-dont-tell-the-whole-story/>; *see, e.g., Exit Polls*, CNN POLITICS (Nov. 23, 2016, 11:58 AM), <https://www.cnn.com/election/2016/results/exit-polls>.

10. *Donald Trump: We Need to Get Out 'Bad Hombres,'* YOUTUBE (Oct. 19, 2016), <https://www.youtube.com/watch?v=AneeacsvNwU>; *see, e.g., Ian Schwartz, Trump: Mexico Not Sending Us Their Best; Criminals, Drug Dealers and Rapists Are Crossing Border*, REAL CLEAR POL. (June 16, 2015), [https://www.realclearpolitics.com/video/2015/06/16/trump\\_mexico\\_not\\_sending\\_us\\_their\\_best\\_criminals\\_drug\\_dealers\\_and\\_rapists\\_are\\_crossing\\_border.html](https://www.realclearpolitics.com/video/2015/06/16/trump_mexico_not_sending_us_their_best_criminals_drug_dealers_and_rapists_are_crossing_border.html); *see also AP Fact Check: Trump Plays on Immigration Myths*, PBS (Feb. 8, 2019, 10:44 AM), <https://www.pbs.org/newshour/politics/ap-fact-check-trump-plays-on-immigration->

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Trump's hardline immigration stance largely contributed to his election. In exit polling, "Trump beat [Democratic nominee] Hilary Clinton by 31 percentage points among voters who said immigration was the most important issue facing the country."<sup>11</sup> Similarly, "[t]he 2016 Cooperative Congressional Election Study found that 73 percent of Trump voters said immigration was of 'very high importance' to them, [whereas only] 24 percent of Clinton voters [stated the same]."<sup>12</sup> To gain Republican votes in the 2018 midterm elections, the Administration once again turned to immigration. This time, the Administration capitalized on the large caravan of migrants from Central America, many of whom were asylum seekers making their way to the U.S. border.<sup>13</sup> Trump characterized caravan members as "stone cold criminals."<sup>14</sup> Just days before the midterm elections, Trump deployed 5,200 active duty military troops to the southern border, a move some viewed as political theater.<sup>15</sup>

In December 2018, Congress and the President reached an impasse regarding a \$5.7 billion allocation for the border wall in the 2019 fiscal

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myths (summarizing major Trump claims about immigrants and offering statistics or scholars' works to analyze those claims).

11. Enten & Bacon, *supra* note 9; *see, e.g., Exit Polls, supra* note 9.

12. Enten & Bacon, *supra* note 9 (citing Stephen Ansolabehere, Brian Schaffner & Sam Luks, *Guide to the 2016 Cooperative Congressional Election Survey*, HARVARD (August 2017), <https://cces.gov.harvard.edu/news/announcing-2016-cooperative-congressional-election-study>).

13. *See* Christopher Cadelago & Ted Hesson, *Why Trump Is Talking Nonstop About the Migrant Caravan*, POLITICO (Oct. 23, 2018, 5:05 AM), <https://www.politico.com/story/2018/10/23/trump-caravan-midterm-elections-875888>; Eugene Scott, *Before the Midterms, Trump Harped on the Migrant Caravan. Since Then, He Hasn't Brought It Up.*, WASH. POST (Nov. 8, 2018), <https://www.washingtonpost.com/politics/2018/11/08/before-midterms-trump-harped-migrant-caravan-since-then-he-has-barely-mentioned-it/>; John Fritze & Christopher Schnaars, *President Trump Latches onto Migrant Caravan as Top Issue in Midterms*, USA TODAY (Oct. 25, 2018, 4:36 PM), <https://www.usatoday.com/story/news/politics/elections/2018/10/25/donald-trump-migrant-caravan-could-help-gop-midterms/1742669002/>.

14. Donald Trump (@realDonaldTrump), TWITTER (Nov. 26, 2018, 3:19 AM), <https://twitter.com/realDonaldTrump/status/1067015026995879937>.

15. Nancy A. Youssef & Alicia A. Caldwell, *Trump to Deploy 5,200 Troops to Southern Border*, WALL ST. J. (Oct. 30, 2018, 1:44 AM), <https://www.wsj.com/articles/military-to-deploy-5-000-troops-to-southern-border-u-s-officials-say-1540820650>.

year budget, leading to the longest government shutdown in history.<sup>16</sup> On January 8, 2019, in his first primetime speech to the nation, President Trump characterized illegal immigrants as brutal killers responsible for thousands of American deaths.<sup>17</sup> He then went on to describe in detail a number of heinous acts allegedly committed by undocumented migrants.<sup>18</sup> After Trump's speech, many feared he would declare a national emergency to justify allocating funds for a border wall. Indeed, on February 15, 2018, less than twenty-four hours after Congress passed a funding measure without the requested border wall funds, Trump declared a national emergency at the southern U.S. border, citing "an invasion of drugs and criminals coming into our country."<sup>19</sup>

Many political pundits believe President Trump's ability to deliver on his much touted border wall promises will decide his presidential legacy and his chances of re-election.<sup>20</sup> President Trump's attack on Central American migrants in the name of border security continues unabated, regardless of whether or not southern border crossers are fleeing persecution or harm.<sup>21</sup> President Trump's need to justify the

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16. Bender, *supra* note 2; see Wagner, Rocha & Wills, *supra* note 4.

17. See, e.g., *Full Transcripts: Trump's Speech on Immigration and the Democratic Response*, *supra* note 6.

18. *Id.*

19. Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html>; see also Olivia Paschal, *Read President Trump's Speech Declaring a National Emergency*, ATLANTIC (Feb. 15, 2019), <https://www.theatlantic.com/politics/archive/2019/02/trumps-declaration-national-emergency-full-text/582928/>.

20. See, e.g., Paul Waldman, *Trump's Reelection Campaign Just Got a Lot Tougher*, WASH. POST (Feb. 15, 2019), <https://www.washingtonpost.com/opinions/2019/02/15/trumps-reelection-campaign-just-got-lot-tougher/>; see also Jim Malone, *Trump Sees Border Wall Promise as Key to Re-Election*, VOICE OF AM. (Jan. 9, 2019, 8:55 PM), <https://www.voanews.com/a/donald-trump-sees-border-wall-promise-as-key-to-re-election/4736039.html> (explaining Trump's view of his border wall promise and the reactions or views of opposing Democrats and conservative supporters).

21. See, e.g., Hamed Aleaziz, *Trump's Claim That Migrants 'Infest' Country Seen as Whipping Up Fear*, S.F. CHRON. (June 19, 2018, 9:18 PM), <https://www.sfchronicle.com/bayarea/article/Trump-s-claim-that-migrants-infest-13008615.php?psid=7eyDQ>; Bart Jansen & Alan Gomez, *President Trump Calls Caravan Immigrants 'Stone Cold Criminals.' Here's What We Know.*, USA TODAY

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construction of a southern border wall, in order to fulfill campaign promises and secure re-election, has led to the implementation or continuation of official policies and de facto practices that serve to bolster Trump's self-serving rhetoric. As the idea of a border wall continues to prove politically infeasible, Trump has doubled-down on the migrant "border crisis" and sought to enact other hardline immigration reforms to solidify political support in the run-up to the 2020 presidential elections.<sup>22</sup> However, many of these policies and practices have also resulted in the wide scale violation of the rights of asylum seekers.

## II. INTERNATIONAL LAW OBLIGATIONS AND THE UNITED STATES' APPROACH TO ASYLUM SEEKERS

The right to seek asylum is a fundamental human right.<sup>23</sup> According to the Universal Declaration of Human Rights, "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."<sup>24</sup> Under international law, a refugee or asylum seeker<sup>25</sup> is anyone who holds a well-founded fear of persecution based on their

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(Dec. 6, 2018, 2:00 PM), <https://www.usatoday.com/story/news/2018/11/26/president-trump-migrant-caravan-criminals/2112846002/>; David Nakamura, *Trump Says the Border Crisis Is About Criminals and Gangs. His Administration Says It Is About Families and Children.*, WASH. POST (May 1, 2019), [https://www.washingtonpost.com/politics/trump-says-the-border-crisis-is-about-criminals-and-gangs-his-administration-says-it-is-about-families-and-children/2019/05/01/0f94d78c-6c37-11e9-8f44-e8d8bb1df986\\_story.html?utm\\_term=.bd04e398af8b](https://www.washingtonpost.com/politics/trump-says-the-border-crisis-is-about-criminals-and-gangs-his-administration-says-it-is-about-families-and-children/2019/05/01/0f94d78c-6c37-11e9-8f44-e8d8bb1df986_story.html?utm_term=.bd04e398af8b).

22. Abigail Abrams, *Trump Is Again Considering Dramatic Action on Immigration. Here's Why*, TIME (Apr. 9, 2019), <https://time.com/5566328/donald-trump-immigration-policies/>.

23. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948).

24. *Id.*

25. The terms "refugee" and "asylum seeker" or "asylee" are often used interchangeably. A refugee is someone who has fled persecution in his or her home country and has been recognized as a refugee in the process; "[a]n asylum seeker is someone who is also seeking international protection from dangers in his or her home country, but whose claim for refugee status hasn't been determined legally." For more information, see Int'l Rescue Comm., *Migrants, Asylum Seekers, Refugees and Immigrants: What's the Difference?*, RESCUE (Dec. 11, 2018), <https://www.rescue.org/article/migrants-asylum-seekers-refugees-and-immigrants-whats-difference>.

race, religion, nationality, membership in a particular social group, or political opinion in their home country, and who is unable or unwilling to return to that country because of this fear.<sup>26</sup> Refugee status is declaratory in nature, meaning any individual who meets the requirements is a refugee, regardless of whether this status has been formally recognized or not.<sup>27</sup> A State or international organization does not have to formally recognize an individual as a refugee before special protections apply.<sup>28</sup> Although no State has a duty to grant asylum,<sup>29</sup> once an asylum seeker enters the territory, several international law protections arise under various treaties and in customary international law. The 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) and the 1967 Protocol Relating to the Status of Refugees (1967 Refugee Protocol) lay out the majority of these obligations.<sup>30</sup> The following section briefly outlines the United States' international law obligations to asylum seekers and how the U.S. government has interpreted these obligations domestically.

#### A. *International Law Obligations to Asylum Seekers*

##### 1. *The Non-Refoulement Principle*

Although international law does not obligate States to grant asylum to refugees within their borders, it expressly prohibits States from returning refugees to the country in which they fear persecution on a protected ground.<sup>31</sup> This principle, known as non-refoulement, is well

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26. U.N. High Comm'r for Refugees (UNHCR), *Convention and Protocol Relating to the Status of Refugees*, art. 1 (Dec. 2010) [hereinafter *Convention and Protocol*] (referencing G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees, U.N. Doc. A/RES/2198 (Dec. 16, 1966)).

27. UNHCR, *Note on Determination of Refugee Status Under International Instruments*, paras. 2-3, U.N. Doc. EC/SCP/5 (Aug. 24, 1977), <https://www.unhcr.org/en-us/excom/scip/3ae68cc04/note-determination-refugee-status-under-international-instruments.html>.

28. UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, para. 6 (Jan. 26, 2007) [hereinafter UNHCR, *Advisory Opinion*], <https://www.unhcr.org/4d9486929.pdf>.

29. *See id.* para. 8.

30. *See Convention and Protocol*, *supra* note 26.

31. *Id.* art. 33(1).



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defined and established in international law.<sup>32</sup> Specifically, the 1951 Refugee Convention states that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>33</sup> This section of the 1951 Refugee Convention was also incorporated into the 1967 Refugee Protocol.<sup>34</sup> Various other legal instruments have also codified non-refoulement obligations at the international and regional levels, and the obligations are widely accepted as part of customary international law.<sup>35</sup> Consequently, non-refoulement obligations bind all States, not just those signatory to treaties that require compliance with non-refoulement.<sup>36</sup> Article 33 of the 1951 Refugee Convention envisions limited exceptions to this principle; specifically, a State may return a refugee if there are “reasonable grounds” that the refugee is a security threat to the country in which he or she seeks refuge.<sup>37</sup> However, under customary international law, State obligations do not allow any derogation from the non-refoulement principle, which therefore, bars all signatories from applying Article 33 exceptions.<sup>38</sup>

*a. Non-Rejection*

It is also widely accepted that the non-refoulement principle includes the obligation of “non-rejection” at the border.<sup>39</sup> In practice, non-rejection means that asylum seekers who intend to enter a state seeking protection may not be turned away before entering that state’s territory.<sup>40</sup> Non-rejection was first included as part of non-refoulement

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32. See *Convention and Protocol*, *supra* note 26; UNHCR, *Advisory Opinion*, *supra* note 28.

33. *Convention and Protocol*, *supra* note 26, art. 33(1).

34. *Id.* art. 1.

35. See generally UNHCR, *Advisory Opinion*, *supra* note 28 (e.g., the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa and the 1969 American Convention on Human Rights).

36. *Id.* para. 15 n.30.

37. *Convention and Protocol*, *supra* note 26, art. 33(2).

38. See UNHCR, *Advisory Opinion*, *supra* note 28, paras. 12, 16 n.35.

39. See *id.* paras. 13 n.27, 16 n.36.

40. See *id.* para. 13 n.27.

in the 1967 Declaration on Territorial Asylum.<sup>41</sup> Later, the obligation was also included in non-refoulement provisions codified at the regional level in the 1969 Cartagena Declaration on Refugees and in the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.<sup>42</sup> Most recently, the Office of the United Nations High Commissioner for Human Rights (High Commissioner) stated that non-rejection is implicit in the ordinary meaning of “refouler” and that a territorial limitation on *non-refoulement*, meaning the protection only applied to individuals within a country’s borders, and not at the frontiers of its borders, would run counter to the “overriding humanitarian object and purpose of the [1951 Refugee] Convention.”<sup>43</sup>

*b. Access to Fair and Efficient Asylum Procedures*

Once a refugee is present in another country seeking asylum, additional protections under international law attach. In order to comply with their non-refoulement obligations, all States, regardless of their treaty obligations, must ensure that they do not return or expel individuals who self-identify as refugees before they have made a final determination of the individuals’ status.<sup>44</sup> The Refugee Convention provides greater guidance to signatory States. “As a general rule, . . . [contracting] States [must] grant individuals seeking international

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41. See G.A. Res. 2312 (XXII), Declaration on Territorial Asylum, U.N. Doc. A/RES/2312(XII), art. 3 (Dec. 14, 1967).

42. Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, OAS (Nov. 22, 1984), [https://www.oas.org/dil/1984\\_cartagena\\_declaration\\_on\\_refugees.pdf](https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf); Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, art. II (3), June 20, 1974, 1001 U.N.T.S. 45 [hereinafter OAU Convention].

43. See UNHCR, *Advisory Opinion*, *supra* note 28, para. 30; see also Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents at 5-6, *McNary v. Haitian Centers Council, Inc.*, 506 U.S. 814 (1992) (No. 92-344) (“urg[ing] the Court to affirm the decision of the United States Court of Appeals for the Second Circuit striking down the Executive Branch’s policy of blocking the flight of Haitian refugees and returning them against their will to the country from which they fled” because the plain meaning of Article 33 and the 1951 Refugee’s Convention clearly supports that non-refoulement protections apply to State conduct, regardless of whether the conduct occurs inside or outside of the State’s borders).

44. UNHCR, *Advisory Opinion*, *supra* note 28, paras. 2, 6, 15.

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protection access to the territory and to fair and efficient asylum procedures” to effectuate their international law obligations.<sup>45</sup> Additionally, contracting States cannot impose penalties on asylum seekers who illegally enter their country, “provided [the asylum seekers] present themselves without delay to the authorities and show good cause for their illegal entry or presence.”<sup>46</sup> Essentially, under international law, if a self-identified asylum seeker enters a State, with or without permission, that individual is entitled to remain in that country, pending a fair and efficient process to establish his or her refugee status.

### *B. U.S. Interpretations of International Obligations*

The United States is a party to the 1967 Refugee Protocol, which incorporates the substantive articles of the 1951 Refugee Convention, including the provisions relating to non-refoulement and non-penalties for unlawful entrants.<sup>47</sup> Additionally, under customary international law, the United States, like all States regardless of their treaty obligations, is bound by the principle of non-refoulement.<sup>48</sup> In 1980, following its accession to the 1967 Refugee Protocol, the United States overhauled its refugee system by passing the Refugee Act, which amended the earlier Immigration and Nationality Act and the Migration and Refugee Assistance Act.<sup>49</sup> The 1980 Refugee Act incorporated the 1951 Refugee Convention definition of refugee and the principle of non-refoulement into U.S. law.<sup>50</sup> However, the United States has interpreted its international law obligations to refugees in a manner counter to or violative of prevailing interpretations of international law, particularly by repudiating the non-rejection principle, inflicting

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45. *Id.* para. 8.

46. *Convention and Protocol*, *supra* note 26, art. 31(1).

47. *Id.*; UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, <https://www.unhcr.org/en-us/3b73b0d63.pdf> (providing data as of July 2019).

48. UNHCR, *Advisory Opinion*, *supra* note 28, paras. 14-16 (on non-refoulement being customary international law).

49. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)).

50. *Id.* §§ 201(a), 203(h)(1).

punitive measures upon illegal entrants, and employing expedited removal procedures.

### 1. *Exclusion of the Non-Rejection Principle*

Regarding its non-refoulement obligations, the United States does not recognize the non-rejection principle (the prohibition on turning away potential asylum seekers before they reach U.S. territory).<sup>51</sup> Instead, the United States follows the absolute State sovereignty approach, meaning that only once a refugee is present on U.S. territory, is the United States required to ensure he or she is not returned to a country of origin in which he or she fears persecution or torture.<sup>52</sup> The United States first adopted a policy of interdicting potential asylum seekers in the 1990s, following the large influx of Haitian individuals attempting to reach the United States by boat.<sup>53</sup> President George H.W. Bush's Executive Order 12807 allowed U.S. Coast Guard officials to intercept and return boats of potential Haitian refugees without first assessing the refugees' fear of torture or persecution if returned to Haiti.<sup>54</sup> In *Sale v. Haitian Centers Council, Inc.*, the U.S. Supreme Court upheld the constitutionality of this interdiction and gave constitutional validity to the United States' minority position against non-rejection.<sup>55</sup> The United States' position of rejecting potential

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51. See Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1, 15-16 (2008); see generally UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner)*, U.N. Doc. EC/SCP/2 (Aug. 23, 1977) [hereinafter UNHCR, *Note on Non-Refoulement*], <https://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> (discussing the principle of non-rejection).

52. See *Interdiction of Illegal Aliens*, Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992); see also *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 159 (1993) (holding that "neither § 243(h)(1) [of the Immigration and Nationality Act of 1952] nor Article 33 of the United Nations Protocol Relating to the Status of Refugees applies to action taken by the Coast Guard on the high seas," where Executive Order 12807 language allowed the United States to turn away Haitian passengers before determining their refugee status).

53. Christina C. De Matteis, *Forced Return of Haitian Migrants Under Executive Order 12,807: A Violation of Domestic and International Law*, 18 N.C. J. INT'L & COM. REG. 431, 434-35 (Winter 1993).

54. *Id.* at 440. See Exec. Order No. 12,807, *supra* note 52.

55. See generally *Sale*, 509 U.S. 155.

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asylum seekers before they have reached U.S. territory runs counter to the United Nations High Commissioner for Human Rights' understanding of non-refoulement and customary international law.<sup>56</sup>

## 2. *Punitive Measures for Illegal Entrants*

The United States' immigration policy also derogates from international law standards by criminalizing asylum seekers who cross the U.S. border without inspection. This policy contravenes the 1951 Refugee Convention Article 31 protections against penalization.<sup>57</sup> Under U.S. law, individuals may be charged with a misdemeanor punishable by a fine, up to six months imprisonment, or both, for the following reasons: (1) entering the United States between ports of entry, (2) avoiding examination or inspection by CBP, or (3) making false statements to CBP while entering or attempting to enter the United States.<sup>58</sup> Additionally, individuals may be charged with a felony punishable by up to two years imprisonment if they are found to have illegally re-entered, either by attempting to unlawfully re-enter or by being found in the United States after having been deported, ordered removed, or denied admission.<sup>59</sup> Finally, migrants with criminal records who re-enter illegally may be punished with up to twenty years imprisonment.<sup>60</sup> The criminal code makes no exception for asylum seekers who may have good cause for entering the United States without inspection.<sup>61</sup>

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56. See UNHCR, *Note on Non-Refoulement*, *supra* note 51; see also Farmer, *supra* note 51, at 15-16 ("In the U.S., an individual may be barred from asylum or refugee status under several different provisions, which are cumulatively broader than those articulated in the 1951 Convention. The United States is, in effect, considering refugee status determination and protection from refoulement (referred to as 'withholding of removal') at the same time, in a manner that improperly conflates two parts of the 1951 Convention.").

57. See *Convention and Protocol*, *supra* note 26.

58. 8 U.S.C. § 1325(a) (1996).

59. *Id.* § 1325(a); 8 U.S.C. § 1326(a) (1996).

60. 8 U.S.C. § 1326(a)(2) (1996).

61. See 8 U.S.C. §§ 1325, 1326 (1996).

### 3. Expedited Removal and the Credible Fear Process

The expedited removal process is another policy that abrogates the United States' international law obligation of non-refoulement. Expedited removal was established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) in response to the mass migration of Cubans and Haitians to the United States in the early 1980s.<sup>62</sup> The expedited removal procedure empowers low-level immigration officers, usually CBP agents, to order the deportation of certain non-citizens following a brief screening of eligibility.<sup>63</sup> Originally, expedited removal only applied to individuals arriving at ports of entry without proper documentation; however, in the early 2000s the procedure was expanded to include anyone "who [is] present in the U.S. without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, who [is] encountered by an immigration officer within 100 air miles of the U.S. international land border" within fourteen days of entry into the United States.<sup>64</sup> Consequently, this policy applies to most southern border crossers who are either detained at a port of entry or who are found after having entered without inspection.

In the expedited removal process, an immigration officer can summarily order an individual be deported from the United States, without giving that individual the opportunity to speak with an immigration judge.<sup>65</sup> The expedited removal procedure mandates that upon arrival or detention, a CBP agent screen an individual for admissibility.<sup>66</sup> The examining immigration officer must inform the individual of his or her rights and take a written record of the proceedings.<sup>67</sup> If the CBP officer determines the individual is

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62. *A Primer on Expedited Removal*, AM. IMMIGR. COUNCIL (Feb. 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/a\\_primer\\_on\\_expedited\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/a_primer_on_expedited_removal.pdf). See H.R. REP. NO. 104-828 (1996) (Conf. Rep.); see generally Aliens and Nationality, 8 C.F.R. § 235.3 (2017); Ruth Ellen Wasem, *U.S. Immigration Policy on Haitian Migrants*, FED'N OF AM. SCIENTISTS (May 17, 2011), <https://fas.org/sgp/crs/row/RS21349.pdf>.

63. See 8 C.F.R. § 235.3 (2017).

64. See Notices, 69 Fed. Reg. 48,877-81 (Aug. 11, 2004).

65. 8 C.F.R. § 235.3(b)(2)(i)-(ii) (2017); see 8 U.S.C. § 1225(b)(1)(A)(i) (2008).

66. 8 C.F.R. § 235.3(b)(2) (2017).

67. *Id.* § 235.3(b)(2).

inadmissible, meaning there are no legal grounds for the person to enter the United States, then the officer will issue a deportation order.<sup>68</sup> However, if during this brief interview, an individual indicates intent to apply for asylum or expresses a fear of return to his or her country of origin, then the individual cannot be summarily deported.<sup>69</sup> The individual must be referred to the U.S. Citizenship and Immigration Services (USCIS), where he or she enters the “credible fear” process.<sup>70</sup> For many individuals, this extremely brief screening with a CBP officer may be the only opportunity to speak with a U.S. government official regarding his or her fear of returning to his or her home country. That reality leads to deep concerns about asylum seekers being wrongfully deported.

In the credible fear process, potential asylum seekers are given the opportunity to establish prima facie eligibility for asylum through an interview with an asylum officer.<sup>71</sup> During this interview, the asylum officer assesses whether the individual has a “credible fear” of persecution or torture.<sup>72</sup> An individual has a credible fear if “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, [that] the alien can establish eligibility for asylum . . . or [a basis for] withholding of removal.”<sup>73</sup> If an asylum officer determines an individual has a credible fear, then the individual is taken out of the expedited removal process and is referred to the immigration court for a standard removal hearing.<sup>74</sup> At this hearing, an individual may apply for asylum and can develop a full record of the merits of his or her asylum claim with the help of a legal representative.<sup>75</sup> If an asylum claim is denied, an individual may appeal the immigration judge’s (IJ) decision to the Board of Immigration Appeals (BIA).<sup>76</sup> This standard removal hearing should be provided to

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68. *Id.*

69. *Id.* § 235.3(b)(4).

70. *See id.* § 235.3(b)(4)(i).

71. *See* 8 C.F.R. § 208.30(e)(1)-(2) (2019); 8 U.S.C. § 1225(b)(1)(B) (2008).

72. 8 C.F.R. § 208.30(e)(1) (2019).

73. *Id.* § 208.30(e)(2).

74. *See id.* § 208.30(e)(7)(f).

75. *Id.* *See* 8 U.S.C. § 1229(a) (2006); 8 C.F.R. § 1240.10(a)(1)-(2) (2015).

76. 8 C.F.R. § 1240.53 (2003).

any potential asylum seeker under international law; however, individuals placed in expedited removal must first prevail in a credible fear interview before accessing a full removal hearing.<sup>77</sup> The expedited removal process risks sending bona fide asylum seekers back to a country in which they fear persecution, torture, or death, without a chance at a full and fair hearing before an immigration judge.

### III. THE TRUMP ADMINISTRATION'S ATTEMPTS TO CONTROL THE BORDER NARRATIVE

As described in Part II, various aspects of U.S. immigration law do not align with the United States' international law obligations toward asylum seekers. Although these aberrations predate the current administration, the Administration's recent policy changes have sought to capitalize upon existing legal structures to propagate a politically motivated mischaracterization of southern border crossers—further undermining the rights of asylum seekers. These official policies and condoned unofficial practices include: (1) denials at ports of entry, (2) CBP intimidation and/or corruption during admissibility screenings, (3) increased prosecution of illegal border crossers, and (4) attempted policy changes to the credible fear process.

#### A. Port of Entry Denials

Adhering to its restricted interpretation of non-refoulement obligations, the United States maintains that it may intercept potential asylum seekers before they reach the U.S. border and that it may refuse entry even if the individuals' purpose is to seek asylum.<sup>78</sup> This rejection has traditionally been applied to individuals attempting to access the United States by boat.<sup>79</sup> In recent years, reports and first-

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77. UNHCR, *Advisory Opinion*, *supra* note 28, para. 8 (“As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to *fair and efficient asylum procedures*.”) (emphasis added); 8 U.S.C. § 1225(b)(1)(B)(i)-(iii)(I) (2008).

78. *See, e.g., Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

79. *See id.* at 164; *see generally* De Matteis, *supra* note 53 (discussing the Haitian political upheaval, the resulting mass Haitian migration, the United States' response, the resulting legal battle in *Haitian Centers Council*, and the impact of that case decision).



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hand accounts have illustrated CBP officials are increasingly intercepting asylum seekers at legal ports of entry before they reach the U.S. border and turning them away, or forcing them to wait days or weeks before allowing them to approach the port of entry.<sup>80</sup> The uptick of this practice has been notable since Trump's election in November 2016 and appears to be a de facto policy of the current administration.<sup>81</sup>

Significantly, a May 2017 Human Rights First report documented 125 instances of CBP officials unlawfully refusing access to U.S. ports of entry to individuals seeking asylum in the border regions of California, Texas, and Arizona.<sup>82</sup> In Texas specifically, these "turnbacks" have also been documented all across the southern border in the border cities of Brownsville, El Paso, Laredo, McAllen, Nogales, and Reynosa.<sup>83</sup> U.S. border officials have employed various tactics to turn back asylum seekers. Some individuals have been lied to by some CBP officials with a vast array of falsehoods, including that the United States is no longer accepting asylum seekers, that the United States is no longer accepting individuals from their country, or that the U.S. border is altogether closed.<sup>84</sup> Others have been told they are not allowed to seek asylum at certain smaller ports of entry, and they are redirected to larger U.S. ports of entry sometimes "as far as 50 miles away."<sup>85</sup> Additionally, some immigration attorneys working near the

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80. See, e.g., B. SHAW DRAKE ET AL., HUMAN RIGHTS FIRST, CROSSING THE LINE: U.S. BORDER AGENTS ILLEGALLY REJECT ASYLUM SEEKERS 1, 20 (May 2017); see generally AMNESTY INT'L, USA: 'YOU DON'T HAVE ANY RIGHTS HERE': ILLEGAL PUSHBACKS, ARBITRARY DETENTION, AND ILL-TREATMENT OF ASYLUM-SEEKERS IN THE UNITED STATES 4 (2018) (discussing, among other policy effects, the "mass illegal pushbacks of asylum-seekers at the US-Mexico border . . . [and arguing that it is a practice] indisputably intended to deter asylum-seekers from requesting protection in the United States, as well as to punish and compel those who did seek protection to give up their asylum claims").

81. See DRAKE ET AL., *supra* note 80, at 5; see also AMNESTY INT'L, *supra* note 80, at 5, 17-22.

82. DRAKE ET AL., *supra* note 80, at 1, 7.

83. AM. IMMIGRATION LAWYERS ASS'N., AILA POLICY BRIEF: NEW BARRIERS AT THE BORDER IMPEDE DUE PROCESS AND ACCESS TO ASYLUM 3 (June 1, 2018) [hereinafter AILA POLICY BRIEF].

84. See DRAKE ET AL., *supra* note 80, at 5-6.

85. ADAM ISACSON ET AL., WASH. OFFICE ON LATIN AM., "COME BACK LATER": CHALLENGES FOR ASYLUM SEEKERS WAITING AT PORTS OF ENTRY 5 (August 2018).

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border at Hidalgo, Texas, reported CBP officials were telling asylum seekers, “Trump says we don’t have to let you in.”<sup>86</sup>

Even if individuals are not turned back, they still face additional barriers to entry. Some individuals have been forced to wait days or even weeks to access a legal port of entry, under the guise of “a lack of processing capacity.”<sup>87</sup> For example, in April and May of 2018, CBP officials denied entry to migrant caravan members at the San Ysidro port of entry near San Diego, California, forcing them to sleep outside in dangerous conditions for up to six days.<sup>88</sup> Asylum seekers in Arizona and Texas have been told that certain ports of entry are “full,” which local advocates contend are fabricated capacity issues.<sup>89</sup> Since 2017, the Dilley Pro Bono Project recorded more than 130 instances in which family units attempting to seek asylum in the United States were denied at ports of entry; some mothers and their children waited up to eighteen days outside of a port, with no access to food, water, or toilets, before being allowed entry.<sup>90</sup>

For many vulnerable asylum seekers, waiting outside of a port of entry for CBP to allow access is a dire proposition. Those waiting at the border face extreme heat and a lack of food, water, and protection from the elements.<sup>91</sup> Individuals waiting outside of ports of entry or in migrant shelters in border towns are also easy targets for organized criminal groups that engage in kidnapping, exploitation, and trafficking.<sup>92</sup> As a result of these illegal border rejections, many asylum seekers have chosen to attempt dangerous unauthorized border crossings outside of an official port of entry.<sup>93</sup> Mexican drug cartels control the majority of irregular border crossings across the Rio Grande River, and they require that individuals pay large fees to cartel members

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86. DRAKE ET AL., *supra* note 80, at 5.

87. AILA POLICY BRIEF, *supra* note 83, at 3; *see* AMNESTY INT’L, *supra* note 80, at 14-20.

88. *See* AILA POLICY BRIEF, *supra* note 83, at 3.

89. ISACSON ET AL., *supra* note 85, at 4-5.

90. Interview with Katy Murzda, Advocacy Coordinator, Dilley Pro Bono Project (on file with author).

91. *See* ISACSON ET AL., *supra* note 85, at 4.

92. DRAKE ET AL., *supra* note 80, at 5, 16-17.

93. Interview with Katy Murzda, *supra* note 90.

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for passage.<sup>94</sup> Asylum seekers have reported that while attempting to cross the border, cartel members extorted, trafficked, and raped them.<sup>95</sup> Many of these illegal crossings involve traversing extremely dangerous portions of the Rio Grande River. Immigration advocates in the Rio Grande Valley have reported “an increase in the number of drownings” since CBP officials at the Hidalgo port of entry began refusing asylum seekers entry.<sup>96</sup>

The increased number of border rejections under the Trump Administration has led to more asylum seekers entering the United States without passing through a legal port of entry.<sup>97</sup> The Administration has attempted to capitalize on this new trend, referring

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94. See generally Jay Root, *How One Migrant Family Got Caught Between Smugglers, the Cartel and Trump’s Zero-Tolerance Policy*, TEX. TRIB. (Mar. 7, 2019, 6:00 AM), <https://www.texastribune.org/2019/03/07/migration-us-border-generating-billions-smugglers/> (explaining that the global smuggling trade is “a system that runs on people . . . who are willing to carve up their meager assets to pay off a sophisticated network of smugglers, cartels, stash houses, drivers, and lookouts [and that] [i]t’s like a cake . . . [because] [e]veryone gets their little piece”). Root provides an example of a smuggler who provides three different package deals to be smuggled, at prices similar to other smugglers. The VIP plan involves driving one individual to Houston and costs \$10,000. The second deal costs \$7,500 and is a two-part process. First, “single adults are delivered to the border, . . . “[then] they make their own way by foot around a checkpoint 80 miles north of it before getting picked back up.” The last deal is “the popular bargain-basement deal: for \$6,000, [the smuggler] will arrange to deposit a parent and child on the U.S. side of a South Texas riverbank, at which point they are left to turn themselves in to U.S. border officials and claim asylum.” *Id.*; Nicholas Kulish, *What It Costs to Be Smuggled Across the U.S. Border*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/interactive/2018/06/30/world/smuggling-illegal-immigration-costs.html> (describing how cartels kill migrants who attempt to cross legally or without paying them to cross).

95. DRAKE ET AL., *supra* note 80, at 1, 16-18. See generally WASH. OFFICE ON LATIN AM., LATIN AM. WORKING GRP. EDUC. FUND & KINO BORDER INITIATIVE, *SITUATION OF IMPUNITY AND VIOLENCE IN MEXICO’S NORTHERN BORDER REGION 1* (2017), <https://www.wola.org/wp-content/uploads/2017/04/Situation-of-Impunity-and-Violence-in-Mexicos-northern-border-LAWG-WOLA-KBI.pdf> (arguing that the situation of crimes against migrants “is compounded by ineffective responses by Mexican authorities to investigate and prosecute [those] crimes and other human rights violations”).

96. DRAKE ET AL., *supra* note 80, at 15.

97. *Id.* at 14.

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to illegal border crossers as criminals and false asylum seekers.<sup>98</sup> In November 2018, President Trump issued an order seeking to block any individual from applying for asylum who entered the United States illegally.<sup>99</sup> This attempted asylum ban was immediately challenged in court by immigrant advocacy groups and struck down by the U.S. District Court of Northern California.<sup>100</sup>

Asylum seekers and immigration advocates are also challenging the Administration's turn back policy. In July 2017, in *Al Otro Lado v. Kelly*, Al Otro Lado brought a class action lawsuit on behalf of six asylum seekers and all others similarly situated against John F. Kelly, in Kelly's official capacity as Secretary of the Department of Homeland Security, alleging that the CBP's practice of turning back ("metering") the number of asylum seekers allowed to enter via ports of entry violates domestic law.<sup>101</sup> The lawsuit claims "high level CBP officials, under the direction or with the knowledge or authorization of [U.S. government officials], adopted a formal policy to restrict access to the asylum process at [ports of entry] by mandating that lower-level officials directly or constructively turn back asylum seekers at the border."<sup>102</sup> The court decided this case on August 20, 2018.<sup>103</sup>

Most recently, reports indicate that many asylum seekers are no longer attempting to cross at legal ports of entry given their fears of

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98. See Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 15, 2018).

99. Dara Lind, *Trump Signs a 90-Day Asylum Ban for Border Crossers*, VOX (Nov. 9, 2018, 10:03 AM), <https://www.vox.com/2018/11/8/18076510/asylum-trump-border-caravan>.

100. Complaint for Declaratory and Injunctive Relief Immigration Action at 1, *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018) (No. 3:18-cv-06810); Order Granting Temporary Restraining Order; Order to Show Cause Re Preliminary Injunction, *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018) (No. 3:18-cv-06810-JST); Maria Sacchetti & Sarah Kinosian, *Trump Lashes Out at Judge After Order to Allow Illegal Border Crossers to Seek Asylum*, WASH. POST (Nov. 20, 2018), [https://www.washingtonpost.com/local/immigration/judges-ruling-means-trump-administration-must-allow-illegal-border-crossers-to-seek-asylum/2018/11/20/1aebd608-ecc1-11e8-96d4-0d23f2aaad09\\_story.html](https://www.washingtonpost.com/local/immigration/judges-ruling-means-trump-administration-must-allow-illegal-border-crossers-to-seek-asylum/2018/11/20/1aebd608-ecc1-11e8-96d4-0d23f2aaad09_story.html).

101. Complaint for Declaratory and Injunctive Relief at 1-3, 16-17, *Al Otro Lado, Inc. v. Kelly*, No. 2:17-cv-05111 (C.D. Cal. filed July 12, 2017).

102. First Amended Complaint for Declaratory and Injunctive Relief at 2, *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284 (S.D. Cal. 2018) (No. 3:17-cv-02366-BAS-KSC).

103. *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284 (S.D. Cal. 2018).

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rejection or long wait times, which are likely exacerbated following the Administration's announcement of its "Migrant Protection Protocols" (MPP), colloquially referred to as the "Remain in Mexico" policy."<sup>104</sup> The MPP forces asylum seekers who have been admitted at legal ports of entry to return to Mexico to wait potentially months or years for their asylum claims to be adjudicated in the United States.<sup>105</sup>

This policy is being challenged by the American Civil Liberties Union (ACLU) "on behalf of eleven asylum seekers . . . and [six] organizations that seek to assist them."<sup>106</sup> Despite clear evidence that current policies directly caused an increase in irregular border crossings by refusing entry to asylum seekers at legal ports of entry, the Administration continues to characterize individuals who cross outside of legal ports of entry as illegitimate asylum seekers.<sup>107</sup> CBP data shows illegal border crossings rose ten percent between October 2017 and January 2018, whereas entries at legal ports of entry dropped by ten

104. Press Release, U.S. Dep't of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019) [hereinafter MPP], <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>; Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship and Immigration Services, Kevin K. McAleenan, Comm'r, U.S. Customs and Border Patrol, & Ronald D. Vitiello, Deputy Dir. and Senior Official Performing the Duties of Dir., U.S. Immigration and Customs Enforcement (Jan. 25, 2019) [hereinafter January Memo], [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf); Camilo Montoya-Galvez & Angel Canales, *More than 10,000 Asylum Seekers Returned Under "Remain in Mexico" as U.S. Set to Expand Policy*, CBS NEWS (June 8, 2019, 9:17 AM), <https://www.cbsnews.com/news/remain-in-mexico-asylum-seekers-returned-as-us-seeks-to-expand-policy-2019-06-08/>. See DRAKE ET AL., *supra* note 80, at 1-2, 15-16.

105. Aaron Reichlin-Melnick, *Risky 'Remain in Mexico' Policy Faces Legal Challenges*, IMMIGRATION IMPACT (Feb. 21, 2019), <http://immigrationimpact.com/2019/02/21/remain-in-mexico-policy-legal-challenges/>; MPP, *supra* note 104, at 4; January Memo, *supra* note 104, at 1.

106. Reichlin-Melnick, *supra* note 105 (summarizing the ACLU's main arguments); Complaint for Declaratory and Injunctive Relief at 1-2, *Innovation Law Lab v. Nielsen* 366 F. Supp. 3d 1110 (N.D. Cal. 2019) (No. 3:19-cv-00807).

107. Julia Ainsley, *Since Trump Restricted Flow at Border, More Migrants Trying to Sneak Through Undetected*, NBC NEWS (Mar. 1, 2019, 1:33 AM), <https://www.nbcnews.com/politics/immigration/trump-restricted-flow-border-more-migrants-trying-sneak-through-undetected-n976356>. See Alyssa Isidoridy, *FAQ: Why Do Asylum Seekers Cross the U.S. Border Between Ports of Entry?*, HUMAN RIGHTS FIRST (Nov. 27, 2018), <https://www.humanrightsfirst.org/blog/faq-why-do-asylum-seekers-cross-us-border-between-ports-entry>.

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percent.<sup>108</sup> The Department of Homeland Security's response was that "[t]he fact that illegitimate asylum seekers may be abandoning efforts at our [ports of entry] (sic) means that legitimate asylum seekers at the [ports of entry] (sic) can receive protections far more quickly — which has been our goal from the start."<sup>109</sup> This characterization of who is choosing to cross outside of legal ports of entry is oversimplified.

*B. CBP Abuse at the Border*

Once potential asylum seekers present themselves at a port of entry or are detained by U.S. officials along the border, CBP officials screen them for admissibility to enter the United States. Under U.S. law, this screening must include assessing whether an individual fears returning to his or her home country.<sup>110</sup> Only after an asylum seeker is able to convey a fear of return will he or she be granted the right to speak with an asylum officer or immigration judge regarding his or her desire to seek asylum in the United States. However, recent reports and firsthand accounts highlight various corrupt practices that CBP officials have undertaken to deny asylum seekers the right to apply for protection in the United States.<sup>111</sup> These practices include intimidation, misinformation, and falsification of records.

At the outset, it must be stated that independent of reported CBP abuse of power, the practice of preliminarily screening for fear of return at a border holding facility implicates various due process concerns. For example, often, individuals in CBP custody have just completed an extremely treacherous and arduous journey. They may be disoriented, malnourished, ill, or confused. Trauma-related barriers to discussing fear of return and/or distrust of CBP officials may inhibit these individuals' ability to give testimony. To make matters worse, these preliminary screening interviews are sometimes conducted in settings where a lack of privacy may also discourage an individual from

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108. Ainsley, *supra* note 107.

109. *Id.*

110. Inadmissible Aliens and Expedited Removal, 8 C.F.R. §§ 235.3(b)(2)(i), (b)(4) (2017).

111. DRAKE ET AL., *supra* note 80, at 1-2, 5-8. *See, e.g.*, Complaint, Jose Crespo Cagnant v. United States, No. 1:18-cv-22267 (S.D. Fla. filed June 7, 2018) [hereinafter Cagnant Complaint].

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discussing past persecution and his or her intent to apply for asylum.<sup>112</sup> Additionally, asylum seekers at the border are not allowed to speak with a lawyer or a legal representative before their CBP screening interview.<sup>113</sup> Finally, mistreatment by CBP officials can create distrust and confusion, which can lead individuals to withhold information that may prove critical to their opportunity to seek asylum in the United States.<sup>114</sup>

Even if asylum seekers did not face these basic barriers and could narrate their claims for asylum completely, various reports and studies show how CBP corruption has obstructed the claims of legitimate asylum seekers.<sup>115</sup> U.S. officials deprive many immigrants of their legal rights in the following ways: (1) failing to provide them with legally required information in a language of their understanding, to inquire about their fear of return, or to acknowledge their expressed fear; (2) falsifying records; and (3) intimidating and coercing asylum

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112. AILA POLICY BRIEF, *supra* note 83, at 4.

113. *See, e.g.*, SARA CAMPOS & GUILLERMO CANTOR, AM. IMMIGRATION COUNCIL, DEPORTATIONS IN THE DARK: LACK OF PROCESS AND INFORMATION IN THE REMOVAL OF MEXICAN MIGRANTS 8, 11 (Sept. 2017) [hereinafter CAMPOS & CANTOR].

114. *See id.* at 12-13.

115. *Id.* at 13. *See* Letter from Keren Zwick, from the Nat'l Immigrant Justice Ctr., Stephanie Taylor, from Am. Gateways, Kate Voigt, from Am. Immigration Lawyers Ass'n, Karen Musalo & Lisa Frydman, from the Ctr. for Gender & Refugee Studies at U.C., Hastings Coll. of the Law, Eleni Wolfe Roubatis, from Centro de la Raza Legal, Eleanor Acer, from Human Rights First, Robin Goldfaden, from Lawyers' Comm. for Civil Rights of the S.F. Bay Area, Amelia Fischer, from Tex. Civil Rights Project, Denise L. Gilman, from Immigration Clinic, Univ. of Tex. Law Sch., & Katharina Obser, from Women's Refugee Comm'n, to Megan H. Mack, Officer of Civil Rights & Civil Liberties, Dep't of Homeland Sec. & John Roth, Inspector Gen., Dep't of Homeland Sec., *Inadequate U.S. Customs and Border Protection (CBP) Screening Practices Block Individuals Fleeing Persecution from Access to the Asylum Process* (Nov. 13, 2014) [hereinafter Letter to Dep't of Homeland Sec.]; *see, e.g.*, Cagnant Complaint, *supra* note 111; *see generally* ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL (2016) (providing a follow up report to USCIRF's 2005 *Report on Asylum Seekers in Expedited Removal* that reviews public information and examines field research between 2012 and 2015 to examine the recent expedited removal process, notably revealing DHS' failure to effectuate a majority of the 2005 recommendations).

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seekers to recant their stated fear or accept deportation.<sup>116</sup> These abuses are not new; however, they continue unabated in the Trump era.<sup>117</sup>

CBP agents are legally required to screen for asylum seekers at the border<sup>118</sup> and must ask the following questions verbatim to each individual screened for admissibility:

- (1) Why did you leave your home country or country of last residence?
- (2) Do you have any fear or concern about being returned to your home country or being removed from the United States?
- (3) Would you be harmed if you are returned to your home country or country of residence?
- (4) Do you have any questions or is there anything else you would like to add?<sup>119</sup>

The responses to these admissibility questions must be recorded on Form I-867B.<sup>120</sup> However, it appears that some CBP officials have made it a practice to falsify these documents in an attempt to keep asylum seekers from accessing protection in the United States.

Many immigrants report they were never asked about their fear of return.<sup>121</sup> In a survey of 600 Mexican nationals who were repatriated

116. CASSIDY & LYNCH, *supra* note 115, at 19-20, 27. See AMNESTY INT'L, *supra* note 80, at 30, 50; Letter to Dep't of Homeland Sec., *supra* note 115, at 21; see, e.g., CAMPOS & CANTOR, *supra* note 113, at 2, 4, 9; Cagnant Complaint, *supra* note 111.

117. See DRAKE ET AL., *supra* note 80, at 1. Compare OFFICE OF IMMIGRATION STATISTICS & U.S. DEP'T OF HOMELAND SEC., STATISTICAL REPORT ON EXPEDITED REMOVAL, CREDIBLE FEAR, AND WITHDRAWAL, FY 2000-2003 (Feb. 2005) (seeking to determine whether CBP officers were improperly processing, removing, and detaining aliens who might be eligible for asylum admission), with Letter to Dep't of Homeland Sec., *supra* note 115 (providing examples of individuals attesting to not being asked about their fear, not having their fear acknowledged, and being coerced).

118. CBP officials' duty to screen asylum seekers starts with having to use Form I-867A, which requires the officer to state that U.S. law offers asylum to people facing persecution, harm, or torture if returned to their home country. Form I-867A is reproduced in Letter to Dep't of Homeland Sec., *supra* note 115, at 7; see 8 C.F.R. § 235.3(b)(2)(i) (2017) (stating that Form I-867A and I-867B must be used in determining admissibility).

119. CBP officials must use Form I-867B, reproduced in Letter to Dep't of Homeland Sec., *supra* note 115, at 7-8.

120. 8 C.F.R. § 235.3(b)(2)(i) (2017).

121. See CAMPOS & CANTOR, *supra* note 113, at 5.



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to Mexico between August 2016 and April 2017, 55.7% of the respondents reported that they were not asked if they feared returning to their home country.<sup>122</sup> For these more than 300 individuals who were deported allegedly without having been screened for fear, CBP officials must create a transcript of the admissibility interview on Form I-867B.<sup>123</sup> Meaning, records must exist to demonstrate whether these individuals stated to a CBP official that they had no fear of return. This raises legitimate concerns that transcripts are being falsified.

Ongoing litigation in the case of *Crespo Cagnant v. United States* also helps to illustrate the types of corrupt actions allegedly being undertaken by CBP officials. In June 2018, plaintiff Jose Crespo, an asylum seeker from Mexico, sued the U.S. government, claiming he had been wrongfully deported without the opportunity to express a fear of return.<sup>124</sup> The case alleges that the CBP official who interviewed Crespo unlawfully prevented him from seeking asylum by falsifying information in the Form I-867B, including falsely stating, among other things, that Crespo was interviewed in Spanish, did not express a fear of return to Mexico, had never been to the United States, and had come to the United States “to live and work in McAllen, Texas.”<sup>125</sup> However, Crespo alleges he was not interviewed in Spanish, but in English, and he never stated that he was not afraid to return to Mexico or that he had come to the United States to work in Texas.<sup>126</sup> On the contrary, Crespo had previously lived and studied in Miami, Florida, and was returning to the United States for fear of persecution and to live with his partner in Miami while seeking asylum.<sup>127</sup> This case is currently pending as of June 2019 in the U.S. District Court for the Southern District of Florida.<sup>128</sup>

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122. *Id.* at 1-2.

123. *See* 8 C.F.R. § 235.3(b)(2)(i) (2017). Transcripts of an asylum seeker’s admissibility interview, recorded by CBP officers in Form I-867A & B, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, are included in an individual’s Alien File (“A” file) and are therefore available to asylum officers conducting credible fear interviews.

124. Cagnant Complaint, *supra* note 111, at 1, 7.

125. *Id.* at 7-10.

126. *Id.*

127. *Id.* at 5, 9.

128. Notice of Appeal at 1, Jose Crespo Cagnant v. United States, No. 1:18-cv-22267 (S.D. Fla. filed Mar. 13, 2019).

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Furthermore, many asylum seekers who *are* asked about their fear of return are coerced or intimidated into recanting their fear. A 2017 Human Rights First report provides various examples of these tactics.<sup>129</sup> In one instance, a Mexican family retracted its claim after CBP officials threatened to call Mexican police to jail the family members if they continued to claim fear of persecution by their government.<sup>130</sup> Other asylum seekers report being forced to sign deportation documents or unknown papers instead of being allowed to proceed with their asylum claim, even after claiming fear of return.<sup>131</sup> In the American Immigration Lawyers Association/Programa de Defensa e Incidencia Binacional (AILA/PDIB) survey, 50.7% of respondents stated that “they were not allowed to read [their deportation] documents” before being forced to sign, and 58.1% stated that these forms were presented to them only in English.<sup>132</sup> Many of these individuals did not understand they were accepting deportation despite continually expressing fear and/or intent to apply for asylum.<sup>133</sup>

In instances where asylum seekers have successfully triggered the credible fear process during an admissibility screening, CBP officials are also reported to have falsified or mischaracterized border interview records to undermine legitimate asylum claims. For example, “a CBP officer reportedly asked an asylum seeker, ‘What will you do if you are granted asylum in the United States? Work? Okay, so you are here to work.’”<sup>134</sup> The CBP agent then recorded that the asylum seeker came to the United States for work, creating a false impression that the individual had not come to the United States out of fear.<sup>135</sup> In another well-known case, *Matter of M-R-R-*, CBP officials signed a sworn interview transcript with a three-year-old child that stated the child had supposedly left his home country “to look for work.”<sup>136</sup> Given the

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129. See, e.g., DRAKE ET AL., *supra* note 80, at 11-12.

130. *Id.* at 12.

131. CAMPOS & CANTOR, *supra* note 113, at 7-11.

132. *Id.* at 9.

133. *Id.*

134. DRAKE ET AL., *supra* note 80, at 12.

135. *Id.* at 12.

136. Elise Foley, *Infants and Toddlers Are Coming to the U.S. to Work, According to Border Patrol*, HUFFPOST (June 16, 2015), [https://www.huffpost.com/entry/border-patrol-babies\\_n\\_7594618](https://www.huffpost.com/entry/border-patrol-babies_n_7594618).

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child's tender age, it is highly unlikely that these records reflected the true conversation conducted by the CBP official.

While not all falsified information in admissibility transcripts can be said to have been made with malicious intent, *Crespo Cagnant v. United States* and *Matter of M-R-R-* both help to demonstrate CBP's proclivity to falsify information regarding critical screening for asylum claims. Although legal challenges such as these help to identify the types of material misrepresentations that are included in admissibility screening documents, the pervasiveness of falsified information remains unclear.<sup>137</sup> Deep concerns about CBP officials' corrupt and abusive behavior during asylum screenings have continued unabated, although not unchallenged, for over a decade.<sup>138</sup> Moreover, steps toward reform are unlikely during this administration. On the contrary, the Trump Administration has attempted to enact policies in an apparent attempt to capitalize off of these common misstatements. These policies are further discussed in subsection D, *Policy Changes to the Credible Fear Process*.

### C. Increased Prosecution of Illegal Border Crossers

The Department of Justice (DOJ) has a long tradition of prosecuting asylum seekers for illegal entry or reentry into the United States. In 2005, the DOJ and the Department of Homeland Security (DHS) launched a joint initiative named Operation Streamline. The initiative aimed to improve the efficiency of the process of referring individuals from the DHS to the DOJ for prosecution, following a DHS determination that the individual has entered the United States without inspection.<sup>139</sup> As a result, a few years ago, "[i]llegal entry (under 8 U.S.C. § 1235) and illegal re-entry (under 8 U.S.C. § 1326) [were] the most prosecuted federal crimes in the United States."<sup>140</sup> Historically, prosecution efforts focused on individuals who had illegally *re-entered*

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137. In my own immigration practice, it is quite common for an individual in credible fear proceedings to have false statements recorded in their CBP admissibility screening transcript.

138. See, e.g., Cagnant Complaint, *supra* note 111; Foley, *supra* note 136.

139. *Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing*, AM. CIVIL LIBERTIES UNION (Dec. 14, 2015), <https://www.aclu.org/other/operation-streamline-issue-brief>.

140. *Id.*

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the United States.<sup>141</sup> Between 1992 and 2012, the number of individuals convicted for illegal re-entry increased by twenty-eight times, accounting for forty-eight percent of the total growth of overall federal convictions during this period.<sup>142</sup> Prosecution of first time offenders was less prolific.<sup>143</sup> As a policy, Operation Streamline makes no exception for border crossers who express a fear of persecution or torture if returned to their home country.<sup>144</sup> In fact, the DHS Inspector General admitted that prosecution of asylum seekers under Operation Streamline was “inconsistent with and [possibly] violate[d] U.S. treaty obligations.”<sup>145</sup> Indeed, some boilerplate plea agreements presented to illegal entrants and re-entrants required that they waive their right to apply for asylum or protection against persecution in their home country.<sup>146</sup>

Recently, in April 2018, then-Attorney General Jeff Sessions announced a “zero-tolerance” policy for illegal entrants that called on U.S. Attorney’s Offices along the southern border to prosecute all referred cases for violations of 8 U.S.C. section 1325(a) “to the extent practicable.”<sup>147</sup> This policy move was consistent with the Administration’s mischaracterization of southern border crossers as criminals. The “zero-tolerance” policy meant federal prosecutors were encouraged to prosecute each and every asylum seeker who did not present themselves at a port of entry, regardless of whether these individuals had turned themselves over to CBP or had legitimate reasons for entering without inspection. In announcing the new policy, Sessions stated that zero tolerance was necessary to address a crisis at

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141. See Michael T. Light, *The Rise of Federal Immigration Crimes: Unlawful Reentry Drives Growth*, PEW RES. CTR. (Mar. 18, 2014), <https://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/>.

142. *Id.*

143. NATASHA ARNPRIESTER & OLGA BYRNE, HUMAN RIGHTS FIRST, PUNISHING REFUGEES AND MIGRANTS: THE TRUMP ADMINISTRATION’S MISUSE OF CRIMINAL PROSECUTION 4 (Jan. 2018).

144. AM. IMMIGRATION COUNCIL, PROSECUTING MIGRANTS FOR COMING TO THE UNITED STATES 5 (May 2018), [https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting\\_migrants\\_for\\_coming\\_to\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_migrants_for_coming_to_the_united_states.pdf).

145. *Id.*

146. ARNPRIESTER & BYRNE, *supra* note 143, at 19-20.

147. Press Release, Dep’t. of Justice Office of Pub. Affairs, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018).

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the southern border that was caused by Congress' failure to "pass effective legislation that serves the national interest[,] . . . closes dangerous loopholes[,] and fully funds a wall along our southern border."<sup>148</sup> However, Sessions failed to mention how the Administration's implicitly sanctioned CBP policies of rejection and metering were greatly contributing to the increase in irregular border crossings.

During the Trump Administration and the month before the new "zero-tolerance" policy was implemented, prosecutions of first time illegal entrants skyrocketed—increasing by 448.1%.<sup>149</sup> The majority of the controversy surrounding this new policy focused on the humanitarian crisis created by the illegal separation of parents from their children.<sup>150</sup> Under the policy, parents were detained and forced to await prosecution while their children were classified as unaccompanied minors and transferred to Health and Human Services' Office of Refugee Resettlement.<sup>151</sup> However, the negative impact that this dramatic increase in prosecutions of illegal entry had on asylum seekers' ability to seek protection in the United States must also be recognized. It is unknown exactly how many asylum seekers may have been coerced into pleading guilty and may have forgone their right to seek asylum in the United States in exchange for little to no prison time. Furthermore, even for asylum seekers who are given the opportunity to continue to pursue their asylum claims after conviction of an entry-related defense, additional barriers still exist; the DHS often prioritizes the future criminal prosecution or deportation of individuals with prior federal convictions.<sup>152</sup>

Increasing prosecutions of illegal border crossers, including asylum seekers, buttressed Trump's hateful immigrant rhetoric. In addition to branding asylum seekers who felt increasingly obligated to enter the

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148. *Id.*

149. *Immigration Prosecutions for February 2018*, TRAC IMMIGRATION (Mar. 26, 2018), <https://trac.syr.edu/tracreports/bulletins/immigration/monthlyfeb18/fil/>.

150. *See, e.g.*, Press Release, Am. Civil Liberties Union, *Ms. L v. ICE* (June 6, 2019), <https://www.aclu.org/cases/ms-l-v-ice>.

151. Press Release, U.S. Dep't of Homeland Sec., Fact Sheet: Zero-Tolerance Prosecution and Family Reunification (June 23, 2018), <https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification>.

152. AM. IMMIGRATION COUNCIL, *supra* note 144, at 4.

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United States outside of a port of entry as “illegitimate,” the Administration was able to use the “zero-tolerance” policy to classify them as federally convicted criminals as well.

*D. Policy Changes to the Credible Fear Process*

The Trump Administration has heightened the legal standard for credible fear and increased the scrutiny of asylum claims during the credible fear screening process, in another attempt to undermine the refugee exception to the expedited removal process.<sup>153</sup> Once an individual in the expedited removal process expresses a fear of return to his or her home country or intent to apply for asylum, CBP officials must refer the individual to USCIS for a credible fear screening.<sup>154</sup> If an individual establishes a credible fear of persecution or torture if repatriated, the asylum officer must refer that person to an immigration judge to adjudicate his or her asylum claim in removal proceedings under INA section 240.<sup>155</sup> According to the Administration, thousands of illegal, criminal immigrants are abusing and defrauding this system simply by stating “the magic words needed to trigger the credible fear process”—they fear returning home.<sup>156</sup>

In his 2017 remarks to the Executive Office of Immigration Review, Sessions made it clear that the Administration believes “[t]he [credible fear] system is being gamed . . . [and] has become an easy ticket to illegal entry into the United States.”<sup>157</sup> According to Sessions, “[s]aying a few simple words is now transforming a straightforward arrest and immediate return into a probable release and a hearing.”<sup>158</sup>

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153. See, e.g., U.S. CITIZENSHIP & IMMIGRATION SERVICES – RAIO, ASYLUM DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS (effective Feb. 27, 2017) [hereinafter USCIS CREDIBLE FEAR LESSON PLAN] (on file with American Immigration Lawyers Association), <https://www.aila.org/infonet/raio-and-asylum-division-officer-training-course>; Matter of A-B-, 27 I. & N. Dec. 316 (Att’y Gen. 2018).

154. See 8 U.S.C. § 1225(b)(1)(A)(ii) (2008).

155. 8 C.F.R. § 208.30(f) (2019).

156. Jeff Sessions, Att’y Gen., U.S. Dep’t of Justice, Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

157. *Id.*

158. *Id.*

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Furthermore, Sessions claimed the adjudication process is also broken because “DHS found a credible fear in 88 percent of claims adjudicated[, which] means an alien entering the United States illegally has an 88 percent chance to avoid expedited removal simply by claiming a fear of return.”<sup>159</sup> To reduce the amount of asylum seekers entering the United States, Sessions announced the Administration’s plans to make it more difficult for asylum seekers in expedited removal proceedings to receive a positive finding of credible fear.<sup>160</sup> In other words, because U.S. government officials too frequently found southern border crossers to be legitimate asylum seekers, undermining Trump’s self-serving imagery of criminal immigrant masses endangering the security of the United States, the Administration made it more difficult for asylum seekers to access legal protections.

One way in which the Administration sought to achieve this was to amend the guidance given to the Asylum Office regarding credible fear determinations. In February 2017, the USCIS amended its “Credible Fear Lesson Plan,” elevating the threshold of the “credibility” requirements for asylum seekers.<sup>161</sup> Previously, to find the applicant credible, an asylum officer only needed to find that an individual had “‘a significant possibility’ that, in a full hearing, an immigration judge could deem the applicant credible.”<sup>162</sup> Under the new guidance, USCIS clarified that a “significant possibility” was more than a “mere possibility.”<sup>163</sup> The new guidance also introduced more stringent requirements that the asylum officer find the claim not only credible, but also persuasive and specific.<sup>164</sup> These new requirements raised

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159. *Id.*

160. *Id.*

161. USCIS CREDIBLE FEAR LESSON PLAN, *supra* note 153; see *USCIS Amends Credible Fear Lesson Plans*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., <https://cliniclegal.org/resources/uscis-amends-credible-fear-lesson-plans> (last visited July 21, 2019) (identifying the revised Credible Fear Lesson Plan’s three major changes and explaining the seemingly increased threshold poses greater difficulty for bona fide asylum seekers).

162. AILA POLICY BRIEF, *supra* note 83.

163. USCIS CREDIBLE FEAR LESSON PLAN, *supra* note 153, at 15.

164. *Id.* at 14. See *USCIS Amends Credible Fear Lesson Plans*, *supra* note 161. Since the writing of this article, USCIS has issued newer guidance in an April 30, 2019, Credible Fear Lesson Plan. U.S. CITIZENSHIP & IMMIGRATION SERVICES – RAIQ, ASYLUM DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS (Apr. 30, 2019),

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asylum seekers' burden, heightening the level of specific, sensitive, and traumatic details that they must provide to establish a credible fear. Positive credible fear determinations dropped four percent in the first eleven months following the application of this new guidance.<sup>165</sup>

Next, Sessions issued a broad-scale attack on credible fear determinations and asylum protections more generally in his *Matter of A-B-* decision.<sup>166</sup> In *Matter of A-B-*, the respondent was a Salvadoran woman fleeing physical, emotional, and sexual abuse from her ex-husband.<sup>167</sup> The Board of Immigration Appeals found that she was eligible for asylum based on persecution because of her membership in the "particular social group of 'El Salvadoran women who are unable to leave their domestic relationships where they have children in common' with their partners"; that classification was sufficiently similar to the social group of "'married women in Guatemala who are unable to leave their relationship,' which the Board [of Immigration Appeals previously] had recognized in *Matter of A-R-C-G-*."<sup>168</sup> In referring the case, Sessions sought to review under what circumstances "being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."<sup>169</sup> Many immigration advocates saw Session's resulting decision as a full-scale attack on asylum seekers fleeing domestic abuse and gang-related crimes in Central America.

In *Matter of A-B-*, Sessions prescribed that individuals fleeing persecution by private actors, such as domestic abusers or gang members, would have difficulty establishing a nexus to a protected ground. He stated that "[w]hen private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group may well not be 'one central reason' for the abuse[. . . especially] [w]hen 'the alleged persecutor is not even aware of the

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<https://fingfx.thomsonreuters.com/gfx/mkt/11/10239/10146/2019%20training%20document%20for%20asylum%20screenings.pdf>.

165. AILA POLICY BRIEF, *supra* note 83, at 5 n.44.

166. *See generally* *Matter of A-B-*, 27 I. & N. Dec. 316 (Att'y Gen. 2018). Under 8 C.F.R. § 1003.1(h)(1)(i), the Attorney General may review any decision of the Board of Immigration Appeals that he or she directs the BIA to refer.

167. *A-B-*, 27 I. & N. Dec. 316, 321 (Att'y Gen. 2018).

168. *Id.* at 321 (quoting *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014)).

169. *Id.* at 317 (quoting 8 U.S.C.A. § 1101(a)(42)(A)).



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group's existence.”<sup>170</sup> Sessions also raised the burden regarding the government protection element of an asylum claim, declaring that asylum seekers fleeing private actors “must show more than [mere] ‘difficulty . . . controlling’ private behavior”;<sup>171</sup> additionally, asylum seekers “must show that the government condoned the private actions ‘or at least demonstrated a complete helplessness to protect victims.’”<sup>172</sup> Sessions also highlighted that asylum seekers should face increased scrutiny regarding their ability to safely relocate within their home country to avoid persecution by a private actor because “[w]hen the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable.”<sup>173</sup> Ultimately, Sessions went as far as to declare that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”<sup>174</sup>

Sessions also lambasted the credible fear process:

Finally, there are alternative proper and legal channels for seeking admission to the United States other than entering the country illegally and applying for asylum in a removal proceeding . . . . Aliens seeking a better life in America are welcome to take advantage of existing channels to obtain legal status before entering the country. In this case, A-B- entered the country illegally, and when initially apprehended by Border Patrol agents, she stated that her reason for entering the country was “to find work and reside” in the United States. Aliens seeking an improved quality of life should seek legal work authorization and residency status, instead of illegally entering the United States and claiming asylum.<sup>175</sup>

In a final footnote, Sessions reminded all asylum adjudicators that asylum is a discretionary form of relief that is not automatically granted when an applicant meets the statutory eligibility requirements.<sup>176</sup> He

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170. *Id.* at 338-39 (quoting 8 U.S.C. § 1158(b)(1)(B)(i)).

171. *Id.* at 337 (quoting *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005)).

172. *Id.* at 337 (quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)).

173. *Id.* at 345.

174. *Id.* at 320.

175. *Id.* at 345.

176. *Id.* at 345 n.12.

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provided a list of relevant discretionary factors, the first of which was “the circumvention of orderly refugee procedures.”<sup>177</sup> USCIS guidance to asylum officers adjudicating credible fear claims built on this closing salvo:

USCIS personnel may find an applicant’s illegal entry, including any intentional evasion of U.S. authorities, and including any convictions for illegal entry where the alien does not demonstrate good cause for the illegal entry, to weigh against a favorable exercise of discretion. In particular, “the circumvention of orderly refugee procedures” factor may take into account whether the alien entered the United States without inspection and, if not, whether the applicant had other ways to lawfully enter this country . . . . An officer should consider whether the applicant demonstrated ulterior motives for the illegal entry that are inconsistent with a valid asylum claim that the applicant wished to present to U.S. authorities.<sup>178</sup>

The Attorney General’s decision in *Matter of A-B-* was immediately binding precedent on all DHS officers and employees, including USCIS officers and immigration judges.<sup>179</sup>

Session’s holding in *Matter of A-B-* sought to wipe out a large swath of potential asylum claims. The holding conveniently pulled together the negative repercussions of various Trump era policies to serve in rejecting the legitimate claims of asylum seekers and to bolster the Administration’s imagery of illegal border crossers as criminals and threats to national security. For example, increased port of entry denials and CBP abuse at the border led to a significant increase in the number of individuals entering the United States illegally, which should now “weigh against a favorable exercise of discretion.”<sup>180</sup> Similarly, “ulterior motives for illegal entry,” such as the statements included in falsified CBP admissibility screenings and convictions for illegal entry, which increased markedly with Trump’s “zero-tolerance” policy, should now also be considered adverse factors for discretionary asylum

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177. *Id.*

178. Memorandum from the U.S. Citizenship & Immigration Services on Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-* (July 11, 2017) [hereinafter USCIS Guidance for Processing] (on file with American Immigration Lawyers Association).

179. 8 C.F.R. § 103.10(b) (2011); 8 C.F.R. § 1003.1(g) (2018).

180. USCIS Guidance for Processing, *supra* note 178.

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relief.<sup>181</sup> In August 2018, the ACLU challenged these new policies on behalf of numerous asylum seekers who were processed according to the *Matter of A-B-* guidelines and denied at the credible fear review level.<sup>182</sup> The ACLU asserted that the policy changes were inconsistent with the Refugee Act, the Immigration and Nationality Act, the Administrative Procedure Act, and the Fifth Amendment of the U.S. Constitution.<sup>183</sup> In December 2018, the District Court for the District of Columbia found that the majority of the higher legal standards contained in *Matter of A-B-* were arbitrary, capricious, and violative of U.S. immigration law.<sup>184</sup> Accordingly, the court enjoined the DHS from applying those parts in future credible fear proceedings.<sup>185</sup>

### CONCLUSION

In 2016, Donald Trump ran a successful presidential campaign predicated on fear and racism. Since his election, he has continued to build on his anti-immigrant rhetoric to maintain public support as he zealously attempts to fulfill a key campaign promise to build a border wall. In a last-ditch effort to secure funding for this wall, Trump has declared a national emergency grounded in the idea that the influx of illegal border crossers is an attack on U.S. security and safety. The possibility that a substantial percentage of these individuals might be legitimate asylum seekers serves to undermine this political position. As a result, steps have been taken to delegitimize asylum seekers.

Since 2017, the Trump Administration has tacitly or explicitly approved the implementation of policies that sought to achieve the following objectives: (1) drive potential asylum seekers away from legal ports of entry, (2) penalize them with criminal prosecution or divest them of the right to seek asylum if they crossed the border illegally, (3) raise the legal burden of proof in establishing a credible fear of persecution for individuals in expedited removal proceedings; and (4) deny discretionary asylum in cases of illegal border crossings

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181. *Id.*

182. *See, e.g.*, Complaint for Declaratory and Injunctive Relief, Grace v. Sessions, No. 1:18-cv-01853 (D.D.C. Aug. 7, 2018).

183. *Id.*

184. Order, Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018) (No. 1:18-cv-01853).

185. *Id.*

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and convictions for illegal entry. U.S. immigration law diverges from international law in various ways regarding the rights of asylum seekers and the obligations of receiving States, namely by failing to observe the non-rejection principle of non-refoulement, penalizing illegal border crossers, and implementing the credible fear process. The Administration has been able to build upon these inconsistencies in an attempt to impugn asylum seekers and substantiate false claims for political gain.

However, asylum seekers and immigration advocates have resisted each of the Administration's politically-motivated attempts to implement policies geared toward negatively shaping the public imagery of immigration into the United States. Following fast actions by the immigration legal community, the courts have struck down or temporarily enjoined a number of policies aimed specifically at stripping asylum seekers of their rights.<sup>186</sup> But the fight has only just begun. As the United States gears up for the 2020 elections, Trump continues to lean on his anti-immigration, fear-based rhetoric in an attempt to solidify his base and garner additional political support.<sup>187</sup> Further, new policies seeking to restrict the flow of legitimate asylum seekers to the United States, in contravention of non-refoulement obligations, are continuously being devised.<sup>188</sup>

The current administration has utilized, and weaponized, the existing immigration legal framework to support its political ends.

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186. See, e.g., *id.*; Cagnant Complaint, *supra* note 111; Matter of A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018).

187. During a March 2019 campaign rally, President Trump openly mocked an asylum seeker who appeared to be too strong-looking to be fleeing persecution, before blanketly calling asylum claims a "big fat con job." Kate Riga, *WATCH: Trump Mocks Asylum Seekers at Rally, Calls Process a 'Big Fat Con Job'*, TALKING POINTS MEMO (Mar. 29, 2019, 10:52 AM), <https://talkingpointsmemo.com/news/trump-mocks-asylum-seekers-rally-big-fat-con-job>.

188. See, e.g., Makini Brice, *Trump Threatens More Tariffs on Mexico over Part of Immigration Deal*, REUTERS (June 10, 2019, 3:51 AM), <https://www.reuters.com/article/us-usa-trade-mexico/trump-threatens-more-tariffs-on-mexico-over-part-of-immigration-deal-idUSKCN1TB182>; Press Release, Human Rights First, *Safe Third Country Agreement with Guatemala Would Endanger, Not Protect Refugees* (June 14, 2019), <https://www.humanrightsfirst.org/press-release/safe-third-country-agreement-guatemala-would-endanger-not-protect-refugees>; Louise Radnofsky, *Trump Says Guatemala Is Set to Help Stem Migrant Flow*, WALL ST. J. (June 18, 2019, 12:44 AM), <https://www.wsj.com/articles/trump-says-guatemala-is-set-to-help-stem-migrant-flow-11560833062>.

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While civil society and the legal community must continue to valiantly challenge these new, restrictive policies head-on, more systemic reforms are also required to strengthen the statutory and regulatory framework of U.S. immigration law to bring it more in line with international obligations toward asylum seekers. Recognition of the non-rejection principle of non-refoulement should be codified in U.S. law, as should exceptions from criminal prosecution for illegal entrants seeking asylum. The process of expedited removal should also be thoroughly examined and overhauled to ensure compliance with non-refoulement obligations. The first step in building the political support and movement necessary for such reforms must be to counter the false rhetoric that surrounds U.S. immigration policy and discourse.