

Trump Administration's Third-Country Transit Bar is An Asylum Ban that Will Return Refugees to Danger

The Trump Administration's third-country transit asylum bar, issued as an interim final rule on July 16, 2019, effectively bans asylum for the vast majority of refugees seeking protection at the U.S. southern border. This radical attempt to bypass the laws Congress adopted to protect refugees from return to persecution violates U.S. law and treaty obligations and will cause the United States to return refugees with well-founded fears back to their countries of persecution.

This new regulatory asylum bar attempts to evade the law established by Congress that merely passing through a third country en route to the United States is not a basis to deny asylum. U.S. immigration law bars refugees who transit through other countries from asylum *only if* they "firmly resettled" in the transit country, or if the United States has a formal return agreement with a country where refugees are both safe from persecution and would have access to a full and fair procedure to seek asylum.

As of September 11, 2019, the asylum ban is in full effect after the U.S. Supreme Court stayed a ruling by a federal district court in northern California that had preliminarily enjoined the asylum ban during litigation brought on behalf of legal service providers by the ACLU, the Center for Constitutional Rights, and the Southern Poverty Law Center. A challenge to the asylum bar by Human Rights First, the Capital Area Immigrants' Rights Coalition, RAICES, and nine asylum seekers subject to the ban is also pending in the D.C. district court.

Another Attempt to Dismantle the U.S. Asylum System and Deport Refugees

The administration's third-country transit asylum bar bans refugees at the southern border, as of July 16, 2019, from receiving asylum if they transited through a third country en route to the United States even if they have well-founded fears of persecution. The exceptions are so limited that the ban is insurmountable for most refugees, who are overwhelmingly unrepresented in a process that has been rigged against them. The ban applies to **all** non-Mexican asylum seekers, including Central Americans, but also refugees from other countries such as Cameroon, Cuba, Eritrea, Nicaragua, Russia, Venezuela, and elsewhere.

The Department of Homeland Security (DHS) now applies the asylum bar during expedited removal proceedings to deport refugees with valid asylum claims at the initial screening stage if they do not meet the ban's nearly insurmountable requirements. The bar turns credible fear interviews—the process Congress created to determine if an asylum seeker will be immediately deported or allowed to have their asylum request assessed by an immigration judge—into a farce. During credible fear interviews, which are conducted at times by Border Patrol officers rather than asylum officers, the Administration now uses the ban to determine that essentially all refugees at the southern border do not meet the credible fear standard and to deny them the chance to apply for asylum. Refugees are then ordered returned to their countries of feared persecution under expedited removal, unless they meet the ban's higher reasonable fear standard. This higher standard is also used for individuals who seek protection after a prior deportation and is much more difficult to meet. In the first four months of FY 2019, less than 32 percent of reasonable fear screenings resulted in positive determinations.

The third-country transit asylum bar also denies asylum to refugees with well-founded fears of persecution applying for protection before the Asylum Office and in immigration court and subjects them to possible

deportation. In immigration court, those asylum seekers who have managed to pass the reasonable fear standard are not allowed to seek asylum but may apply only for withholding of removal under the Immigration and Nationality Act (INA) and protection under the Convention against Torture (CAT). These highly deficient forms of protection from deportation are not adequate substitutes for asylum.

Thus, even if an immigration judge finds that a refugee subject to the transit ban has a well-founded fear of persecution (the standard for asylum), that individual will be ordered deported unless they meet the much more stringent requirements for withholding of removal or CAT. In FY **2017**, only about seven percent of withholding and five percent of CAT applications were granted. Refugees granted withholding or CAT protection face barriers to a stable life in the United States, have no pathway to citizenship, and are often left separated from their families, as these limited deportation protections do not allow the refugee's children or spouse to be brought to, or remain in, safety in the United States.

Extremely Limited Exceptions to the Ban

The only, and essentially insurmountable, exceptions to the asylum bar are for refugees who (a) applied for but were denied asylum in a country of transit; (b) are victims of severe forms of trafficking; or (c) did not pass through any country that is a signatory to the Refugee Convention, Refugee Protocol, or CAT. Because Mexico is a party to the Refugee Convention and CAT, in effect, only those refugees who meet the first or second exceptions would be eligible for asylum in the United States. But many refugees do not apply for asylum in transit countries because their lives or safety would be at risk there, and/or they are not protected in that transit country from forced return to their countries of persecution. Further, **no exception is provided for unaccompanied children**, who Congress exempted from other asylum restrictions including safe-third country agreements and the one-year-filing deadline.

Applies to Refugees Returned to Mexico under the Migrant Protection Protocols

Asylum seekers returned to Mexico under the Migrant Protection Protocols, or Remain in Mexico policy, are subject to the asylum bar. The asylum ban applies to the approximately 25,000 individuals placed in the returns program and forced back into Mexico on or after July 16, as well as the approximately **26,000** asylum seekers who have been stuck for months in Mexico on wait "lists" as a result of DHS's illegal practice of restricting or "metering" asylum applicants at U.S. ports of entry.

Refugees with well-founded fears of persecution who are stranded in Mexico by the Remain in Mexico policy without legal counsel to assist them, are even more likely to be deported to countries where they fear persecution. Returned asylum seekers in Mexico have extremely limited access to immigration attorneys as a consequence of being forced to remain there. Analysis by **TRAC** of immigration court data reveals that attorneys have entered official notices of representation for only about one percent of the Remain in Mexico cases. Asylum seekers with attorneys were four times more likely to win their cases in FY 2018 than those without.

Will Refugees Be Returned to Transit Countries?

The interim final rule itself does not specify whether the administration will attempt to return refugees subject to the bar to one or more countries of transit. Returns to transit countries would require agreements with those countries to accept returned asylum seekers and provide a process to request protection. To date no country has publicly agreed to accept asylum seekers prohibited from requesting asylum in the United States under the third-country transit bar. The United States and Guatemala have, however, entered into a sweeping agreement that purports to allow the United States to send asylum seekers there, though the scope and details of its implementation may not have been agreed to and are not publicly known.

Transit Countries Are Not Safe for All Refugees

The countries through which asylum seekers pass to reach the southern border are not safe for all refugees and are not equipped to fully and fairly process their protection claims. Refugees fleeing persecution cannot be expected to apply for protection in countries where their lives are in danger and they risk *refoulement*. Indeed, large numbers of asylum seekers have fled transit countries south of the U.S.-Mexico border. For instance, as Human Rights First has previously reported, refugees are at risk of kidnapping, rape, assault, and extortion in [Mexico](#) and [Guatemala](#). These countries also lack fully functional asylum systems and cannot guarantee that refugees will not be subject to deportation to their countries of persecution.

Adds to the Immigration Court Backlog

The new asylum bar will not reduce “strain on the nation’s immigration system,” as the administration [claims](#), but will instead create additional and unnecessary work for immigration courts. Asylum officers and immigration judges will have to assess whether the asylum transit bar applies and whether the applicant qualifies for an exception, including the assessment of whether an asylum seeker is a victim of trafficking, a decision not ordinarily made by such officials. There are serious concerns that the Trump administration is trying to subvert these assessments by replacing asylum officers with Border Patrol agents and taking steps to rush or otherwise undermine fair adjudications. Immigration judge review of negative credible and reasonable fear determinations are also likely to skyrocket—placing more strain on their dockets. Because withholding of removal and CAT claims are made by individual applicants, asylum-seeking families must submit, and immigration judges must decide, protection claims for each individual family member instead of a single asylum application. These additional duties are likely to add to an already substantial immigration court backlog that the administration is exacerbating through its policies limiting judges’ docket management tools.

Violates U.S. Law and U.S. Obligations Under International Law

The INA protects refugees with well-founded fears of persecution from return to their country of persecution and ensures that asylum seekers can apply for such protection regardless of their nationality, travel route, or place of entry or arrival to the United States ([8 U.S.C. § 1158\(a\)\(1\)](#)). Congress delineated specific and limited exceptions to this general rule in situations where an asylum seeker was “firmly resettled” ([8 U.S.C. § 1158\(b\)\(2\)\(A\)\(vi\)](#)) in a third country on the way to the United States, or where a “safe third country” ([8 U.S.C. § 1158\(a\)\(2\)\(A\)](#)) agreement is in place to allow for the person’s return. Under federal law, safe third country agreements can only be entered into where refugees in the third country would be safe from persecution and have access to a full and fair procedure for adjudication of their protection claims. The third-country transit asylum bar is entirely inconsistent with those statutory provisions and beyond what Congress has authorized the administration to do.

Promulgating the asylum bar as an interim final rule also violates the Administrative Procedure Act. The administration claims that issuing the asylum bar without the standard notice and comment period was necessary to avoid a surge of migrants who might learn of changes in immigration policy prior to implementation. However, on July 18, 2019, the [acting head](#) of Customs and Border Protection (CBP) publicly stated that the asylum ban was being implemented as a pilot project at only two Border Patrol stations—severely undermining the administration’s stated rationale for issuing the bar as an interim rule.

Further, the third-country transit asylum bar violates international refugee law by “significantly rais[ing] the burden of proof on asylum seekers beyond the international legal standard,” as the [UN Refugee Agency](#) noted, subjecting refugees with well-founded fears of persecution to *refoulement* at both the screening stage and after the full adjudication of their protection claims.