



SHATTERED REFUGE

A U.S. Senate Investigation into the
Trump Administration's Gutting of Asylum



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EXECUTIVE SUMMARY

This report details the extensive efforts the Trump administration has undertaken since January 2017 to deter and prevent asylum seekers from legally claiming asylum within the United States. The report finds that many of these efforts have involved actions that are in violation of domestic and international law; have placed political pressure on asylum officers to deny refuge to worthy applicants; and have subjected people seeking asylum to dehumanizing, dangerous, and in some cases deadly conditions.

This report is divided into two parts:

PART I details and analyzes the publicly known efforts of the Trump administration to deter migrants and choke off access to the asylum system, including family separation, child detention, and egregious detention conditions.

PART II documents a systematic effort to undermine the functioning of the asylum system. This Part is the result of investigative work performed by this office, including new information reported by whistleblowers from within the immigration and asylum system. Part II includes previously unreported information about major changes to the asylum training process, and direct evidence of whistleblowers' concerns. It also includes alarming reports of how the Migrant Protection Protocols (MPP) policy, also known as the "Remain in Mexico" program, has been implemented on the ground, including higher-level supervisors directing asylum officers to return families that face violent threats in Mexico back into dangerous Mexican border towns.

PART I – KEEP THEM AWAY: TRUMP ADMINISTRATION EFFORTS TO BLOCK ACCESS TO ASYLUM

Part I contains background on U.S. and international asylum laws, and details many of the Trump administration's efforts to deter asylum seekers through policies that intentionally inflicted trauma on families arriving at the U.S.-Mexico border. Among those deterrence strategies, it details U.S. policies that endangered migrants' health and lives, ranging from inadequate medical care, to sending late-term pregnant women back into Mexico, to holding asylum seekers in highly overcrowded facilities.

KEY FINDINGS INCLUDE:

- **The Trump administration has massively expanded the detention of asylum seekers within the U.S.** Between FY2016 and FY2020, the administration has nearly doubled immigration-related detention, from 30,539 beds in 2016 to 54,000 beds in 2020.
- **The administration's "zero tolerance" policy—more commonly known as family separation—was intentionally formulated to deter asylum seekers.** In internal documents, administration officials theorized that reports of family members being arrested and separated from children would reach potential asylum seekers in Central America, deterring them from presenting themselves at the U.S.-Mexico border so that they could spare their families those circumstances.
- **The administration intentionally increased prosecutions and detentions without a plan for appropriate space to hold increased numbers of migrants in Customs and Border Protection (CBP) detention.** As a result, many facilities became dangerously overcrowded. As reported by the Department of Homeland Security's (DHS's) own Inspector General, some facilities were found to be more than 500% over capacity when inspected.
- **At least seven Central American children died in U.S. custody between September 2018 and May 2019, including three from the flu.** In the U.S. as a whole, the rate of pediatric death from the flu is only two per million, indicating that medical breakdowns within the detention system likely contributed to these deaths.

- **CBP officers sent late-term pregnant women back to Mexico under the MPP policy, despite the fact that individuals with known health issues are supposed to be exempted from the program.** In one case, doctors gave a woman who was already experiencing contractions medication to stop the contractions so that she could be sent back across the border to Mexico.
- **As of July 2019, more than 4,000 migrant children with no identified sponsor were being held in the Department of Health and Human Service's (HHS's) Office of Refugee Resettlement (ORR) child detention system.** Without a sponsor, these children could conceivably be held in detention for years on end while their asylum cases are adjudicated. The report finds that shortage of sponsors is likely directly linked to a new policy created by the Trump administration in 2018, which began sharing sponsors' and their family members' immigration status with immigration enforcement agencies.

PART II – THE ANSWER IS ALWAYS NO: GUTTING THE ASYLUM SYSTEM

Part II details the systemic efforts underway to effectively rewrite U.S. asylum laws, rules, and procedures without congressional approval or involvement. This section of the report was largely informed by whistleblowers within the administration, who enabled this office to unearth previously unreported information.

KEY FINDINGS INCLUDE:

- **Whistleblowers reported that former U.S. Citizenship and Immigration Services (USCIS) Asylum Division head John L. Lafferty was forced out of his job by Acting USCIS Director Ken Cuccinelli.** This forced reassignment resulted in the perception among rank-and-file officers that Lafferty was fired for applying asylum law as written rather than skewing it to meet the administration's political goals.
- **Under Trump administration leadership, USCIS has begun using CBP law enforcement officers to replace asylum officers in conducting credible fear interviews.** This is an apparent strategy to cut the number of asylum applicants who pass the credible fear screening by removing trained asylum officers from the equation as much as possible.
- **When asylum officers found that an applicant had a legitimate reason to fear staying in Mexico until their asylum court date, those decisions were reviewed by political supervisors.** Decisions to send migrants back to Mexico were not reviewed, while decisions that migrants should

remain in the U.S. for their safety were forwarded on to supervisors, and in some cases all the way up to headquarters. Whistleblowers reported that in nearly all cases where asylum officers found that asylum seekers should be allowed to await their hearing within the U.S. for safety reasons, they were overruled by their superiors, with one whistleblower reporting that it would take “Herculean efforts” to get final approval on any recommendation to allow an asylum seeker to wait in the U.S.

- **In April 2019, USCIS quietly changed their policies for credible fear screenings to make it much more difficult for asylum seekers to pass their initial screening at the border.** The new policy would require applicants to present a factual record demonstrating “a significant possibility of future persecution” at their initial screening interview, despite the fact that most asylum seekers are freshly arrived from difficult circumstances and would need time to gather evidence in support of their claim. This policy is currently being challenged in federal court, but has been allowed to go into effect in the interim; if allowed to stand, it will ultimately deny thousands of applicants the chance for a fair hearing in a full immigration court.
- **In mid-August 2019, USCIS ended standardized training for new asylum officers.** This training was previously mandatory for all asylum officers, to ensure consistency across the nation and to reduce the risk of bias and inconsistency among USCIS field offices. Without standardized trainings, new asylum officers are likely to be trained by politically-installed leaders and more vulnerable to pressure from supervisors to deny as many asylum claims as possible.
- **Trained asylum officers strenuously objected to being forced to implement the administration’s programs, such as MPP, that appear to be in clear violation of domestic and international asylum law.** One whistleblower, who refused to participate in MPP on both legal and moral grounds, wrote in a letter that “[i]mplementation of a program for which there is no legal authority violates my oath to office.” The asylum officer noted that the U.S. is bound by law not to discriminate against refugees on the basis of their race, religion, or nationality, and not to penalize refugees for how they enter the country to claim asylum. “However, the MPP both discriminates and penalizes,” the officer continued. “Implementation of the MPP is clearly designed to further this administration’s racist agenda of keeping Hispanic and Latino populations from entering the United States.”

CONCLUSIONS

The report concludes with recommendations of policy changes and areas for further investigation. Specifically, the report recommends further congressional investigation of the following six areas:

1. The White House's purge of DHS immigration leadership in 2019.
2. The White House's underlying ideological and political motivations for changes to the asylum system.
3. Attempts to rig the asylum system by replacing asylum officers with law enforcement agents.
4. Attempts to eliminate established grounds for asylum and illegally raise the credible fear standards.
5. The administration's creation of an enormous affirmative asylum backlog by transferring officers off of affirmative asylum cases.
6. Asylum officers objecting to or refusing to participate in the MPP program.

Based on its findings, the report also recommends the following key policy changes:

1. Establish a \$10,000 civil claim against the U.S. government for delaying or preventing asylum seekers from crossing the U.S. border.
2. Prohibit CBP officers from acting as USCIS officers.
3. Establish stringent hiring qualifications for immigration judges to ensure a competent and independent judicial process.
4. Right to counsel for all unaccompanied children (UACs).
5. Prioritize family-based and small group care for all unaccompanied children, unless a trained child welfare expert makes an affirmative, individualized determination that congregate care would be in the best interest of the child.
6. Require daily monitoring of all immigration detention facilities (including contracted facilities) by independent and specialized legal counsel and child welfare experts. Mandate weekly reports to Congress listing critical health and safety actions for Immigration and Customs Enforcement (ICE), CBP, and ORR to address within 7 days. Any facility failing to remedy a listed action within 3 weeks must be immediately shut down.
7. Ban for-profit detention centers.
8. Rescind the current information sharing Memorandum of Agreement (MOA) between DHS and ORR.

PART I

KEEP THEM AWAY: TRUMP ADMINISTRATION EFFORTS TO BLOCK ACCESS TO ASYLUM

This President came into office determined, both literally and figuratively, to “build that wall.” His administration aims to stop anyone, particularly non-white and low income individuals, from seeking a home or refuge in the U.S. While this has resulted in highly publicized efforts to build a literal wall at the U.S.-Mexico border and to deport undocumented individuals living within the U.S., it has also taken the form of a systemic and widespread attack on asylum laws.

Part I focuses on two separate but intertwined strategies the Trump administration undertook to try to dramatically shrink the number of asylum seekers and refugees in America:

- **FIRST**, to deter asylum seekers from making the journey to the U.S. by inflicting cruelty and chaos at the border, with the expectation that news reports about these horrific conditions would make their way back to Central America;
- **SECOND**, to try to ensure that the U.S. would no longer provide assistance to refugee populations—both by cutting off U.S. aid and by closing our doors to asylum seekers and refugees.

BACKGROUND: THE U.S. ASYLUM SYSTEM

LAW: Asylum is among the most consequential avenues of relief the United States offers to people being persecuted. When granted, it provides a permanent U.S. foothold to applicants who have successfully proven their past persecution or their well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹ Relatedly, and in addition to claims of asylum, under the Convention Against Torture, individuals

¹ Congressional Research Service (CRS), LSB10207, *Asylum and Related Protections for Aliens Who Fear Gang and Domestic Violence*, 2 (Oct. 25, 2018), <https://fas.org/sgp/crs/homesecc/LSB10207.pdf>.

cannot be removed from the U.S. if they can prove that it is more likely than not that they will be tortured in their home country.²

The asylum process is governed by U.S. law and the Congress's ratification of long-established international treaties.³ This body of law is intended to protect individuals claiming asylum from being sent back to their home countries where they risk further persecution or torture.

PROCESS: Any individual can apply for asylum.⁴ In broad strokes, applications are submitted: (i) affirmatively by individuals who lawfully entered the U.S.;⁵ (ii) defensively in removal proceedings in Immigration Court;⁶ or (iii) during expedited removal involving only immigration officers.⁷ Most arriving or apprehended at the southern border go through expedited removal.⁸

IMMIGRATION JUDGES AND ASYLUM OFFICERS: Federal immigration judges hear immigration cases. They are civilian executive branch employees within the Executive Office for Immigration Review (EOIR) of the Department of Justice (DOJ). They have the authority to grant asylum to applicants who show during court proceedings that they have a well-founded fear of persecution or torture. As of June 30, 2019, 430 immigration judges were on board to oversee more than 1.3 million active and backlogged cases.⁹

Asylum officers are civilian executive branch employees within the Asylum Division of USCIS (USCIS is part of DHS). They can grant asylum, but only in affirmative asylum cases. In defensive

² The Senate ratified the Convention Against Torture on April 18, 1988 (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988)).

³ The Refugee Act of 1980, Pub. L. No. 96-212 § 101(a), 94 Stat. 102, codified the United States' obligations under the United Nations Convention relating to the Status of Refugees of 1951, 189 U.N.T.S. 137 (1951), and the 1967 Refugee Protocol, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1967). Additionally, Congress enacted the Foreign Affairs Report and Restructuring Act of 1998 (an act to consolidate international affairs agencies that in chapter three sets out specific policies on refugees and migration), Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822. The Immigration and Naturalization Act (INA) of 1952 (as amended) sets out the specific legal processes for asylum. The INA is codified at 8 U.S.C. §§1101 et seq, and is current as cited as of Nov., 2019.

⁴ INA § 208(a) (8 U.S.C. § 1158(a) (current as of Nov. 2019)), see Appendix: Exhibit A.

⁵ 6 U.S.C. § 271 (current as of Nov. 2019), see Appendix Exhibit B; Code of Federal Regulations (C.F.R.) 8 C.F.R. § 208.2(a) (current as of Nov. 2019), see Appendix Exhibit C.

⁶ 8 U.S.C. § 1229a(d)(1) (current as of Nov. 2019), see Appendix Exhibit D; 8 CFR § 208.2(b) (current as of Nov. 2019), see Appendix Exhibit B.

⁷ 8 U.S.C. § 1225(b)(1)(A)(i), (iii), see Appendix Exhibit E

⁸ American Immigration Council, *A Primer on Expedited Removal* (July 22, 2019), <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.

⁹ Exec. Office for Immigration Review (EOIR), *Immigration Judge Hiring* (July 2019), <https://www.justice.gov/eoir/page/file/1104846/download>; Syracuse University Transactional Records Access Clearinghouse (TRAC), *Immigration Court's Active Backlog Surpasses One Million* (Sept. 18, 2019), <https://trac.syr.edu/immigration/reports/574/> (1.3 million as of August 31, 2019).

cases, asylum officers conduct credible fear or “reasonable fear” screening interviews,¹⁰ usually when individuals are in expedited removal.¹¹

As of May 6, 2019, the Asylum Division had 763 asylum officer positions in its field offices. More than 200 were assigned to conduct credible fear interviews and another 200-plus positions were unfilled.¹² As of March 31, 2019, there were 327,984 affirmative asylum cases pending, with 7,805 additional cases filed, and 7,071 completed that same month.¹³ USCIS is aiming to hire new asylum officers to fill the 200 vacancies by the end of 2019.

CREDIBLE FEAR INTERVIEWS: Credible fear interviews are supposed to take place in non-adversarial settings and are intended to be an initial screening to determine whether an individual's asylum claim is sufficiently credible to forward the case to immigration court for a full hearing.¹⁴ An individual who passes a credible fear interview is placed in immigration court proceedings.

¹⁰ 8 C.F.R. §§ 208.31, 1208.31, see Appendix Exhibit F.

¹¹ 8 U.S.C. § 1225(b)(1)(B)(i) (current as of Nov. 2019), see Appendix Exhibit E; Code of Federal Regulations (C.F.R.), 8 C.F.R. § 208.9(a) (current through Nov. 2019), see Appendix Exhibit G.

¹² U.S. Citizenship and Immigration Services (USCIS), *Questions and Answers*, Asylum Division Quarterly Meeting (May 20, 2019), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AsylumStakeholderMeetingQA_05202019.pdf.

¹³ U.S. Citizenship and Immigration Services (USCIS), *Asylum Office Workload* (Mar. 2019), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsMar2019.pdf.

¹⁴ 8 C.F.R. § 208.30(d), (f) (current as of Nov. 2019) (possible amendment to this section pending litigation: *Barr v. East Bay Sanctuary Covenant*, No. 19A230, 588 U.S. ____ (2019)), see Appendix Exhibit H.

TRUMP STRATEGY #1: "CRUELTY AS DETERRENCE"

The cornerstone of the "cruelty as deterrence" policies is the fervent belief that asylum seekers and migrants will stop coming to the U.S. once word gets out about the horrendous treatment they will receive at the border. This is no secret; as Trump tweeted in July, "[i]f Illegal Immigrants are unhappy with the conditions in the quickly built or refitted detentions centers, just tell them not to come. All problems solved!"¹⁵ Stephen Miller, the President's senior policy advisor, and his colleagues have been turning the President's tweets into reality.

But "cruelty as deterrence" was always destined to be a failed strategy. As two senior White House officials from the prior administration wrote:

"[t]he suggestion that subjecting migrants to appalling conditions might serve as a deterrent is not just cruel; it conveys a grave misunderstanding of the forces that drive people to undertake this dangerous journey and of what it will take to manage the number of people arriving at the border."¹⁶

Migrants coming from the Northern Triangle countries of Honduras, El Salvador, and Guatemala are fleeing existential threats in their homelands: gang violence; endemic extortion and corruption; extreme poverty and malnutrition; and gender-based violence that is treated with impunity. When migrants believe that their very lives depend on fleeing, they will endure virtually any conditions in order to pursue a chance at finding safety in a country that operates under the rule of law.

In investigating the "cruelty as deterrence" strategy, this office found that not only were these policies ineffective in deterring migration; they frequently put asylum seekers' human rights, health, and safety at risk.

In at least seven cases, they contributed to the deaths of refugee children.

¹⁵ Donald Trump (@realDonaldTrump), Twitter (July 3, 2019, 4:22 PM ET), <https://twitter.com/realDonaldTrump/status/1146514575048790019>.

¹⁶ New York Times, Dennis McDonough and Celia Muñoz, *Opinion, Cruelty Won't Stop the Crisis at the Border* (July 11, 2019), <https://www.nytimes.com/2019/07/11/opinion/immigration-trump-border.html>; see also Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current U.S. Immigration Policy Crisis*, 6 *Journal on Migration and Human Security* 192, 202 (2018), <https://doi.org/10.1177/2331502418786718>, ("As constituted, the current system does not fully honor the rule of law, too often serves as an instrument of exclusion and marginalization, and has become a symbol to the world of U.S. cruelty and injustice.")

FINDING #1

The Trump administration embraced mismanagement and operational chaos as a strategy to produce horrific conditions for asylum seekers at the border.

The Trump administration has gone far beyond policy pronouncements; personnel practices are having profoundly damaging effects throughout the asylum and immigration system.

Current and former officials have said that DHS is buffeted by “irrational” demands and “silly ideas” emanating from the White House and political leadership, that the department “has been gutted at all levels” and that “this is their way of managing.”¹⁷

Mismanagement, either intentional or resulting from incompetence and negligence, produces the same result: intolerably cruel conditions imposed on vulnerable children, families, and adults.

FINDING #2:

The Trump administration massively expanded the detention of asylum seekers within the U.S.

The attack on the immigration system began within days of Trump’s inauguration. Executive Order (EO) 13767, issued on January 25, 2017,¹⁸ directed DHS to “immediately construct, operate, [and] control ... facilities to detain aliens at or near the land border with Mexico.” It further directed DHS to detain all “aliens apprehended for violations of immigration law” and to issue new, stricter policies requiring detention of vastly greater numbers of apprehended children, families, and adults.

¹⁷ New York Times Magazine, Jason Zengerle, *How America Got to ‘Zero Tolerance’ on Immigration: The Inside Story* (July 16, 2019), <https://www.nytimes.com/2019/07/16/magazine/immigration-department-of-homeland-security.html>.

¹⁸ Exec. Order No. 13767, *Border Security and Immigration Enforcement Improvement*, 82 Fed. Reg. 8793 (Jan. 25, 2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements>; see also Exec. Order No. 13768, *Enhancing Public Safety in the Interior of the U.S.*, 82 Fed. Reg. 8799 (Jan. 25, 2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states-states>.

The result was a significant expansion of immigrant detentions. One measure can be seen in the ICE annual budget request. For the Fiscal Year (FY) ending September 31, 2016, DHS expected to detain 30,539; for FY2020, the number targeted is 54,000.¹⁹

FINDING #3:

The administration's "zero tolerance" policy—more commonly known as family separation—was intentionally formulated to deter asylum seekers.

In April 2018, then-Attorney General Jeff Sessions announced the "zero tolerance policy," requiring federal prosecutors to file criminal charges against everyone 18 or older apprehended by CBP while crossing the border.²⁰ The policy was challenged as unlawful and on June 28, 2018 a federal district court enjoined further implementation.²¹

But, before the injunction took effect, thousands of children had been separated from their families – in some cases literally ripped from their parents' arms. Parents were placed in DOJ custody and their children were handed over to ORR, a separate government agency. At least 2,737 children were in ORR custody as of June 28, 2018, and separations continued even after the court ordered an end to them.²²

"Zero tolerance" was intentionally formulated as part of the Trump theory of deterrence. An important piece of evidence is an internal planning document called *Policy Options to Respond to Border Surge of Illegal Immigration*, circulated among DHS and DOJ officials in December 2017, months before the Sessions announcement. In January 2019, a whistleblower provided a draft to Congress.²³ As a short-term measure that could be implemented within 30 days, the document recommended increased criminal prosecutions of parents apprehended with their children while

¹⁹ Immigration & Customs Enforcement (ICE), *Congressional Justification*, Fiscal Year 2020,

https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf.

²⁰ Dep't of Justice (DOJ), Press Release, *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry* (April 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

²¹ *Ms. L v. CBP*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

²² U.S. Dep't of Health & Human Services (HHS) Office of Inspector General (OIG, HHS-OIG), OEI-BL-18-00511, *Separated Children Placed in Office of Refugee Resettlement Care* (Jan. 17, 2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>; CNN, Catherine E. Shoichet, 'Zero Tolerance' a Year Later: How the U.S. Family Separations Crisis Erupted (Apr. 5, 2019, updated Apr. 8, 2019), <https://www.cnn.com/interactive/2019/04/us/immigrant-family-separations-timeline/>.

²³ NBC News, Julia Ainsley, *Trump Admin Weighed Targeting Migrant Families, Speeding up Deportation of Children* (Jan. 17, 2019, updated Jan. 17, 2019 8:40 PM ET), <https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811>;

crossing the border and noted that “the increase in prosecutions would be reported by the media and it would have a substantial deterrent effect.”²⁴

FINDING #4:

The administration intentionally increased prosecutions and detentions without a plan for appropriate space to hold increased numbers of migrants in CBP detention.

The natural consequences of policies that mandate detention and 100% criminal prosecutions are overcrowded detention facilities and Border Patrol Stations, where detainees are warehoused in horrific conditions.

The experience of detainees in one facility – the Del Norte Processing Center in El Paso (PDT) – is eye-opening. In March 2019, news media published photographs showing hundreds of families and children caged inside a hastily-erected PDT holding pen under the Paso Del Norte International Bridge, which spans the Rio Grande.²⁵

²⁴ The document is available at <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html>.

²⁵ El Paso Times, Mark Lambie, *Migrants Being Housed Under the Paso Del Norte International Bridge in El Paso* (Mar. 27, 2019), <https://www.elpasotimes.com/picture-gallery/news/2019/03/27/migrants-being-housed-under-paso-del-norte-international-bridge-el-paso/3290370002/>; BuzzFeed News, Adolfo Flores, “It’s Hell There”: *This Is What It’s Like For Immigrants Being Held In A Pen Underneath An El Paso Bridge* (Mar. 30, 2019), <https://www.buzzfeednews.com/article/adolfoflores/border-bridge-migrants-detained-camp-el-paso-texas>.



PHOTO: Hundreds of children and families are held in standing-room-only conditions in a holding pen under the Paso Del Norte International Bridge. (Mark Lambie/El Paso Times)

Five weeks later, the DHS Office of Inspector General (DHS OIG) carried out a surprise inspection at the same facility.²⁶ The inspectors, too, found shocking conditions, only now detainees were warehoused indoors. PDT was **500% over capacity**. While the facility was supposed to house no more than 125 people, a sampling of records over two days revealed, respectively, 750 and 900 individuals detained.

²⁶ DHS-OIG Management Alert, OIG-19-46, *DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing Center* (May 30, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-05/OIG-19-46-May19.pdf>.

In their report, the inspectors published photos. A cell with a maximum capacity of 12 people held 76 women.



PHOTO: 76 women are crowded into a cell meant to hold a maximum of 12 detainees. (Courtesy of DHS OIG)

Hundreds of people were held in an outdoor parking lot.



PHOTO: Families being held in an outdoor parking lot at a detention facility in El Paso. (Courtesy of DHS OIG)

Staff on the scene told DHS OIG that “single adults had been held in standing-room-only conditions for days or weeks”²⁷ – far longer than what the law or DHS’s own policies allow. That reasonably led the inspectors to write that “overcrowding and prolonged detention represent an immediate risk of health and safety not just of the detainees, but also DHS agents and officers.”²⁸

The DHS response to the inspection report was that the problem would be solved in 18 months, by November 30, 2020.²⁹ The DHS OIG replied that this was an unacceptable timeframe; the office answered by writing that the overcrowding remained “unresolved and open,” and would so remain “until DHS offers an immediate corrective action plan to address the dangerous overcrowding.”³⁰

DHS did not take immediate action. Three days after the inspection report was issued, photos were published showing hundreds still warehoused at PDT, but in a different outdoor location. Detainees were living under makeshift Mylar covers.³¹



PHOTO: Migrants who had been moved to a new makeshift shelter in PDT detention. (Dr. Neal Rosendorf/Twitter)

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Texas Monthly, Robert Moore, *In El Paso, Border Patrol Is Detaining Migrants in ‘a Human Dog Pound’* (June 11, 2012), <https://www.texasmonthly.com/news/border-patrol-outdoor-detention-migrants-el-paso/>.

The photographer was able to get close enough to talk to the detainees for 15 minutes before being ordered to leave.³² According to the photographer's contemporaneous notes, they said they had been out in the open for a month, had not bathed once, had not changed clothes since crossing the border, and were hungry. DHS claimed this was a "rare instance" where there was a "breakdown in communications."³³

FINDING #5:

Dysfunction within the system resulted in neglectful and dangerous conditions for detainees in CBP custody, including young children left without supervision, inadequate food and water, and flu outbreaks within overcrowded facilities. Further evidence revealing dysfunctionality throughout the system can be seen in horrific conditions at facilities lacking necessary resources and properly trained staff.

Take the scene discovered at the Clint Border Patrol Station near El Paso, which garnered significant attention during the summer of 2019. Lawyers permitted to inspect the facility in mid-June – at which time it housed hundreds of detained children – discovered appalling conditions: 250 infants, children, and teens were detained; children were taking care of other children; and there was inadequate food, water and sanitation.³⁴ An experienced lawyer said, "In my 22 years of doing visits with children in detention, I have never heard of this level of inhumanity."³⁵

The attorneys provided additional horrifying details.

No Staff Care for Tender Age Children Under Five. According to the *Associated Press*, three detained girls said they were trying to take care of a "two-year-old boy, who had wet his pants [with] no diaper and was wearing a mucus-smear shirt when the legal team encountered him.

"A Border Patrol agent came in our room with a two-year-old boy and asked us, 'Who wants to take care of this little boy?' Another girl said she would take care of him, but she

³² Id.

³³ Id.

³⁴ Associated Press (AP), Cedar Attanasio, Garance Burke & Martha Mendoza, *Attorneys: Texas Border Facility Is Neglecting Migrant Kids* (June 21, 2019), <https://apnews.com/46da2dbe04f54adbb875cfbc06bbc615>.

³⁵ Id.

lost interest after a few hours and so I started taking care of him yesterday,' one of the girls said."³⁶

Inadequate Care. Children told lawyers about a lack of nutritious food and unsanitary conditions. The children were frequently fed instant noodles, and there were no fruits or vegetables available. Children conveyed that they'd gone weeks without bathing or a clean change of clothes.³⁷

Significant Health Risks. As of mid-June 2019, 15 detained children had the flu and ten more were quarantined.³⁸

FINDING #6:

At least seven Central American children died in U.S. custody between September 2018 and May 2019, including three from the flu. Further evidence of dysfunction can be seen in likely medical mistreatments throughout the system.

Between September 2018 and May 2019, seven Central American children died in government custody or shortly after release due to infections.³⁹ Jakelin Caal Maquin, 7, died of a bacterial infection known as sepsis; Juan de León Gutiérrez, 16, died of a skull infection; Mariee Juárez, 19 months, died of a viral lung infection contracted in CBP custody; and Darlyn Cristabel Cordova-Valle, 10, died of heart failure after 7 months in ORR custody. Three had the flu: Felipe Gómez Alonzo, 8;⁴⁰ Wilmer Josué Ramírez Vásquez, 30 months; and Carlos Gregorio Hernandez Vasquez, 16 (discussed further in the accompanying cutout).⁴¹

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ NBC News, Nicole Acevedo, *Why are Migrant Children Dying in U.S. Custody?* (May 29, 2019), [nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316](https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316).

⁴⁰ Washington Post, Maria Sacchetti, *Official: Guatemalan Boy Who Died in U.S. Custody Tested Positive for Influenza B, Final Cause of Death Remains Under Investigation* (Dec. 27, 2018), https://www.washingtonpost.com/local/immigration/father-whose-son-died-in-custody-knew-bringing-him-would-ease-entry-into-us/2018/12/27/4c210bfc-0a1d-11e9-85b6-41c0fe0c5b8f_story.html.

⁴¹ Washington Post, Maria Sacchetti & Robert Moore, *Toddler Apprehended at the U.S.-Mexico Border Dies After Weeks in Hospital* (May 15, 2019), https://www.washingtonpost.com/immigration/toddler-apprehended-at-the-us-mexico-border-dies-after-weeks-in-hospital/2019/05/15/f69f8522-7755-11e9-bd25-c989555e7766_story.html?utm_term=.9f84e7a5b578.

AN AVOIDABLE DEATH

Carlos Gregorio Hernandez Vasquez, 16, died alone in a cell at the CBP Border Patrol station in Weslaco, Texas on May 20, 2019. Cause of death: the flu.

Carlos was from Guatemala. After crossing the Rio Grande, he was apprehended near Hidalgo, Texas on May 13, 2019. He was taken to the CBP Rio Grande Valley Central Processing Center (RGVCPC) in McAllen, Texas. The RGVCPC is a large warehouse, with wire fences segregating detainees.



PHOTO: Carlos Gregorio Hernandez Vasquez (CBS)

On May 19, he reported he did not feel well. A nurse in the facility examined him and diagnosed him with influenza. He was given anti-flu medicine. But by then, flu contagion was bad and growing worse – so much so that by May 22, at least 32 flu cases had been discovered and further intake of detainees to RGVCPC was halted.⁴²

Meanwhile, it was decided that Carlos needed to be isolated from other detainees. He was transferred to the Weslaco Station, where he was held in his own cell. Carlos was given something to eat 20 minutes after midnight on May 20; his lifeless body was discovered the next morning at 6:00 am. The autopsy report concluded that Carlos died from Influenza A 2009 H1N1 respiratory infection, complicated by bacterial coinfections.

Pediatric deaths from the flu are exceedingly rare in the U.S. According to U.S. Centers for Disease Control and Prevention (CDC) data, for the 2018-19 flu season, the nationwide average rate of pediatric death was in the range of approximately two per million.⁴³ In other words, three flu deaths would be expected in a population of 1.5 million. In that period of time, the average number of

⁴² CBS News, Angel Canales & Graham Kates, *He Survived the 1,000-Mile Journey to the U.S. He Died Days Later in Custody* (July 21, 2019), <https://www.cbsnews.com/news/migrant-boy-dies-in-u-s-custody-he-survived-the-1000-mile-journey-to-the-u-s-he-died-days-later-in-custody/>.

⁴³ Center for Disease Control & Prevention (CDC), FluView, Influenza-Associated Pediatric Deaths by HHS Region: 2018-19 Season, <https://gis.cdc.gov/GRASP/Fluview/PedFluDeath.html> (last visited Oct. 9, 2019).

children held in ORR custody varied between 11,151 and 14,226,⁴⁴ while CBP detained around 2,000 children.⁴⁵

FINDING #7:

In at least one case, DHS separated a child from her aunt and made no attempt to reunify her with her family, despite being told that she had a parent within the U.S.

According to the *Associated Press*, one migrant father said “authorities separated his daughter from her aunt when they entered the country.”⁴⁶ The girl would be a second grader in a U.S. school. He had no idea where she was until... one of the [attorneys] visiting Clint found his phone number written in permanent marker on a bracelet she was wearing. It said ‘U.S. parent.’ ‘She’s suffering very much because she’s never been alone. She doesn’t know these other children,’ said her father.”⁴⁷

FINDING #8:

CBP officers sent late-term pregnant women back to Mexico under the MPP policy, despite the fact that individuals with known health issues are supposed to be exempted from the program.

Whistleblowers identified six migrant women in CBP custody who were in late-term pregnancies, including one that was nine months pregnant. On May 23, 2019, CBP sent them back to Mexico. Some of the women were separated from their families; the family members were permitted to remain in the U.S.⁴⁸

More shocking is the case of an eight-and-a-half-months pregnant El Salvadoran woman apprehended by CBP and in custody in Brownsville, Texas. She began experiencing early

⁴⁴ U.S. Department of Health and Human Services, *Latest UAC Data FY2019* (content last reviewed on October 11, 2019), <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2019/index.html>.

⁴⁵ Vox, Dara Lind, *The Horrifying Conditions Facing Kids in Border Detention, Explained* (June 25, 2019), <https://www.vox.com/policy-and-politics/2019/6/25/18715725/children-border-detention-kids-cages-immigration>.

⁴⁶ AP News, Cedar Attanasio, Garance Burke & Martha Mendoza, *Attorneys: Texas Border Facility is Neglecting Migrant Kids* (June 21, 2019), <https://apnews.com/46da2dbe04f54adbb875cfbc06bbc615>.

⁴⁷ Id.

⁴⁸ Confidential conversation with CBP source, August 5, 2019. See Appendix Exhibit I.

contractions and was taken to Valley Regional Medical Center, a local hospital. There, doctors gave her medicine to stop the contractions. CBP then almost immediately sent her back across the Rio Grande. According to a September 6, 2019 *Associated Press* news story, the woman's lawyer said she was waiting "with her 3-year-old daughter in a makeshift tent camp in Matamoros, Mexico, next to the international bridge, due to give birth any day..."⁴⁹

The American Civil Liberties Union (ACLU) followed up on this case – and 17 additional instances where CBP returned pregnant women to Mexico. In the case of the mother whose contractions were stopped, ACLU attorneys met with her; they learned she had given birth in Matamoros on September 6.⁵⁰ She was twice in CBP custody prior to that. CBP first returned her to Mexico on August 25. She then returned to the Brownsville CBP border crossing seeking medical treatment as she had had preeclampsia in a prior pregnancy.⁵¹ CBP held her in custody for two days and then returned her to Mexico. She returned to the border crossing again and CBP denied her entry altogether.

On the evening of September 5, she went into labor in a tent at a makeshift migrant encampment at the foot of the Gateway International Bridge in Matamoros. Women present assisted during her labor until Mexican officials finally took her to a hospital the next morning to deliver her baby.⁵²

Halting premature labor in a hospital setting and then releasing a pregnant woman with a known risk for preeclampsia so that she can give birth in a tent in a makeshift encampment next to a bridge on the Mexican side of the border clearly put the lives of both the mother and baby at risk. CBP's failure to provide appropriate medical treatment in this case is egregious, especially considering the specific conditions under which medicine halting preterm labor is supposed to be administered.

Terbutaline is a common medication used to halt preterm labor. It is used when doctors need to delay birth for several hours or days. However, its use must be closely monitored, in medical

⁴⁹ AP News, Nomaan Merchant & Verónica G. Cárdenas, *U.S. Tells Migrant Woman 8 Months Pregnant to Wait in Mexico* (Sept. 6, 2019), <https://apnews.com/965719d5bf5a4d5790820f719ae2a3da>.

⁵⁰ Letter from the ACLU to DHS-OIG Office of Civil Rights and Office of Professional Responsibility, *Re: Pregnant women returned to Mexico under the "Migration Protection Protocols" (MPP)* (Sept. 26, 2019), https://www.aclutx.org/sites/default/files/aclu_oig_complaint_preg_mpp.pdf.

⁵¹ Preeclampsia is a potentially high-risk condition for mother and child. If a mother is close to her due date the health care provider will probably want to deliver the baby as soon as possible. See American Pregnancy Association, *Preeclampsia: Symptoms, Risks, Treatment, and Prevention*, <https://americanpregnancy.org/pregnancy-complications/preeclampsia> (last visited Oct. 9, 2019).

⁵² Letter from the ACLU to DHS-OIG Office of Civil Rights and Office of Professional Responsibility, *Re: Pregnant women returned to Mexico under the "Migration Protection Protocols" (MPP)* (Sept. 26, 2019), https://www.aclutx.org/sites/default/files/aclu_oig_complaint_preg_mpp.pdf.

settings. The U.S. Food and Drug Administration specifically warns that it should only be used “in urgent and individual obstetrical situations in a hospital setting.”⁵³ The Terbutaline webpage on the MedlinePlus website maintained by the U.S. National Library of Medicine contains an “Important Warning” message in a separate box. It states that Terbutaline is not approved by the FDA to stop or prevent premature labor and “should only be given to women who are in a hospital.”⁵⁴

FINDING #9:

The Trump administration has institutionalized the mass detention of children through the ORR detention system, and has intentionally created a backlog of sponsors that threatens to keep some children locked up for years. As of July 2019, more than 4,000 migrant children with no identified sponsor were being held in ORR’s child detention system.

Another form of Trump administration cruelty for the sake of deterrence has been its willingness to house thousands of unaccompanied migrant children in institutional settings overseen by ORR for many months – or years.

ORR’s Responsibility for Unaccompanied Children. Unaccompanied migrant children apprehended by DHS are transferred to and become the responsibility of ORR. By law and regulation, ORR is supposed to promptly place these children in least-restrictive settings.⁵⁵

⁵³ U.S. Food and Drug Admin. (FDA), *FDA Drug Safety Communication: New Warnings Against Use of Terbutaline to Treat Preterm Labor* (Feb. 17, 2011), <https://www.fda.gov/drugs/drug-safety-and-availability/fda-drug-safety-communication-new-warnings-against-use-terbutaline-treat-preterm-labor>.

⁵⁴ U.S. National Library of Medicine, Medline Plus, *Terbutaline Injection*, <https://medlineplus.gov/druginfo/meds/a611026.html> (last visited Oct. 9, 2019).

⁵⁵ In 1997, the *Flores v. Reno* Settlement Agreement established standards for the treatment of minors while in Federal custody policy. *Flores v. Reno*, No. CV 85-4544-DMG (C.D. Cal. Jan. 28, 1997). In 2015, DHS issued National Standards on Transport, Escort, Detention, and Search (the TEDS Standards) incorporating the terms of the *Flores* Agreement. In September 2018, DHS and HHS proposed regulations intended to terminate the *Flores* Agreement. 83 Fed. Reg. 45,486 (Sept. 7, 2018). Implementation of the regulations were enjoined by a September 27, 2019 Order of the *Flores* court. In the accompanying Memorandum Opinion the court wrote:

Defendants cannot simply ignore the dictates of the consent decree merely because they no longer agree with its approach as a matter of policy Relief may also come from a change in law through Congressional action. Having failed to obtain such relief, Defendants cannot simply impose their will by promulgating regulations that abrogate the consent decree's most basic tenets.”



PHOTO: Detained children are lined up in the Casa Padre detention facility in Brownsville, Texas. (Courtesy of HHS Administration for Children and Families)

That should mean that ORR works to find a sponsor (e.g. an immediate family member, a relative, or a close family friend) to serve as caregiver in a residential home environment while the child's immigration status is adjudicated.

Children without sponsors remain in ORR custody, usually in groups in locked-down facilities like Casa Padre in Brownsville.⁵⁶

Casa Padre – a huge, locked-down, ORR-supervised facility for children in Brownsville, Texas – was originally a Walmart. Last year, it was the largest child detention facility in the nation, housing nearly 1,500 boys from ages 10 to 17.⁵⁷ Senator Merkley attempted to make an unannounced inspection visit in June 2018 and was turned away. In the ensuing uproar,

⁵⁶ NBC News, Jacob Soboroff, *Surge in Children Separated at Border Floods Facility for Undocumented Immigrants* (June 14, 2018), <https://www.nbcnews.com/news/us-news/surge-children-separated-border-floods-facility-undocumented-immigrants-n883001>.

⁵⁷ *Id.*

the facility was opened for a media tour. Reporters were told to smile at the hundreds of kids in line for a meal because “they feel like animals in a cage being looked at.”⁵⁸

ORR Expects to Hold Thousands in Custody for Years. ORR has held, now holds, and is projected to hold unaccompanied migrant children without sponsors in custody for unimaginably long periods of time. According to a July 2019 congressional report, of 1,063 children separated from their families by the Trump administration’s “zero tolerance” policy between April and late-June 2018, 597 were in ORR custody for more than 61 days – including 30 children held for *more than one year*.⁵⁹ Seven hundred additional children had been separated between late-June 2018 and May 2019; at least 153 were still in ORR custody when limited data was produced to congressional investigators in March 2019.⁶⁰

ORR expects the situation to worsen. In August 2019, 8,700 unaccompanied children were in ORR custody.⁶¹ According to the head of ORR, “conceivably someone could come into our care at 15 years old and not have an identifiable sponsor in the United States and *remain with us for a few years* [emphasis added].”⁶² ORR classifies more than 4,000 of these children as having no identifiable sponsor willing to care for them.⁶³ There is no dispute that warehousing children for years in institutions puts them a high risk of significant, life-long adverse consequences.

Why the Shortage of Child Sponsors? The reason for the absence of identifiable sponsors is seemingly due to actions by the Trump administration that have deterred potential

⁵⁸ Id.

⁵⁹ House Oversight and Reform Committee Report, *Child Separations by the Trump administration* at 18 (July 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf>. According to the report, the Trump administration had asserted that between April and June 2018, the “zero tolerance” policy separated 2,648 children from their families (the total is in fact higher). 1,063 children represent only 40% of this figure. See id. at 7.

⁶⁰ Id. at 13 (citing American Immigration Council, *Family Separation FOIA Response from HHS Key Documents: Instances of Family Separation* (April 2019), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/family_separation_foia_request_hhs_production_instances_of_family_separation.pdf).

⁶¹ Office of Refugee Resettlement (ORR), *Fact Sheet Unaccompanied Alien Children (UAC) Program* (Aug. 6, 2019), <https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf>.

⁶² CBS News, Graham Kates, Angel Canales & Manuel Bojorquez, *Thousands of Unaccompanied Migrant Children Could Be Detained Indefinitely* (July 23, 2019), <https://www.cbsnews.com/news/thousands-of-unaccompanied-migrant-children-could-be-detained-indefinitely>.

⁶³ Category 1 children have immediate family sponsors; Category 2 children have close relatives as sponsors; Category 3 children have potential sponsors who identify as distant family or close family friends. Category 4 children have no sponsors. Office of Refugee Resettlement (ORR), *Children Entering the U.S. Unaccompanied: Section 2* (Jan. 30, 2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2>.

sponsors from stepping forward. Trump administration policy now requires ORR to share personal information from sponsors with ICE and CBP. On April 13, 2018, HHS and DHS entered into an MOA to share sponsor information.⁶⁴ Under the MOA, and contrary to prior practice, background information that sponsors supply to HHS to qualify for sponsorship is to be sent to DHS – which can use the information to apprehend and deport sponsors who may be subject to deportation orders.

DHS and HHS officials entered into the MOA in furtherance of the Trump deterrence strategy. The December 2017 *Policy Options to Respond to Border Surge of Illegal Immigration* document provided by a whistleblower states that the MOA “would result in a deterrent impact” on sponsors, thus “requiring HHS to keep the UACs (unaccompanied migrant children) in custody longer.”⁶⁵

Chilling Effect Caused by Information Sharing. Congressional action, specifically the *Consolidated Appropriations Act of 2019*, has barred DHS from using information shared by HHS to apprehend, detain, or remove sponsors.⁶⁶ However, the MOA is still having its intended effect: deterring potential sponsors from stepping forward to apply out of fear that they will be apprehended by DHS. In a survey conducted at the end of 2018, 75% of service providers who work with unaccompanied children said that fewer potential sponsors have come forward out of fear that their information would be sent to CBP or ICE for immigration enforcement purposes.⁶⁷

⁶⁴ A copy of the Memorandum of Agreement (MOA) is publicly available at <https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf>.

⁶⁵ NBC News, Julia Ainsley, *Trump Admin Weighed Targeting Migrant Families, Speeding up Deportation of Children* (Jan. 17, 2019), <https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811>;

⁶⁶ H.J.Res.31, Consolidated Appropriations Act 2019 § 224 (Feb. 25, 2019), <https://www.congress.gov/116/plaws/publ6/PLAW-116publ6.pdf>.

⁶⁷ Women's Refugee Commission, National Immigrant Justice Center & American University College of Law Clinical Program, *Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement* (Mar. 26, 2019), <https://wrc.ms/bait>.

FINDING #10:**Unaccompanied children face extreme obstacles in adjudicating their immigration cases, including being forced to represent themselves in court.**

Children that enter the immigration system face a particular set of challenges when they are unaccompanied, and those difficulties are compounded when children don't have access to immigration attorneys.

Children face logistical hurdles in successful navigation of our immigration court systems, including language barriers and transportation difficulties in showing up to immigration courts that can often be hours away from where they are staying. Emotional hurdles include being in an unfamiliar country, with absent or partial support networks from immediate family members, and fear of authority figures.

The absurdity of expecting a child to weather these challenges alone is apparent, including to the judges tasked with adjudicating children's cases. In an AP interview, Judge John W. Richardson noted his discomfort with the prospect, stating, "I'm embarrassed to ask it, because I don't know who you would explain it to, unless you think that a one-year-old could learn immigration law," when speaking about his legal obligation to ask the defendant—in this case, a one-year-old baby—if they understand the proceedings.⁶⁸

Sixty-eight percent of unaccompanied children do not have legal counsel.⁶⁹ The benefits that counsel provide to children are undisputable when comparing outcomes of deportation hearings. According to Syracuse University's TRAC Immigration database, when children have no counsel, more than 80% are deported. When they do have legal advocates, the percentage of deported children drops to just 12%.⁷⁰

While legal obstacles children face in the immigration system are not unique to the Trump administration, they were exacerbated by its "zero tolerance" family separation policy that falsely assigned an "unaccompanied" status for children that had arrived in the United States with family members.

⁶⁸ AP News, Astrid Galvan, *Kids as Young as 1 in U.S. Court, Awaiting Reunion with Family* (July 8, 2018),

<https://apnews.com/4cb60fc06ca34160bf7445fdc1f47eed/Kids-as-young-as-1-in-US-court.-awaiting-reunion-with-family>.

⁶⁹ Syracuse University Transactional Records Access Clearinghouse (TRAC) Immigration Report, *Representation for Unaccompanied Children in Immigration Court* (Nov. 2014), <https://trac.syr.edu/immigration/reports/371/>.

⁷⁰ The Atlantic, Misyrlena Egkolopoulou, *The Thousands of Children that Go to Immigration Court Alone* (Aug. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/08/children-immigration-court/567490/>.

The consequences for unrepresented children can be dire and life-altering, including instances of children who were adopted out to U.S. families without their parents' consent or even knowledge after being separated.⁷¹ Additionally, these children may be deported back to unsafe conditions. In FY2018, 92% of unaccompanied children were from Honduras, Guatemala, or El Salvador,⁷² which consistently rate as among the hardest-hit countries struggling to contend with gang violence, drug trafficking, corruption, and disproportionately high homicide rates. The State Department estimates that there are 140,000 at-risk youth across the region.⁷³

To further complicate the challenges children face in the hands of our immigration system, in May of 2019, the Trump administration attempted to redefine the term "UAC" to rescind due process and care protections that accompany that status, and pass the burden of proof to a child for establishing their identity, age, and the fact that they are unaccompanied.⁷⁴ Expecting children to have adequate documentation, hand-carried in long, grueling journeys from their countries of origin to the U.S.-Mexico border, unfairly miscategorizes children instead of providing a good-faith efforts to address the best interests of children arriving in the United States without a parent.

These policies, unveiled and implemented by the Trump administration, serve the ultimate purpose of denying asylum and legal protections to children—leaving them adrift to navigate a complex system without the support of families, parents, or legal advocates.

⁷¹ AP News, Garance Burke & Martha Mendoza, *Deported Parents May Lose Kids to Adoption* (Oct. 9, 2018),

<https://apnews.com/97b06cede0c149c492bf25a48cb6c26f>.

⁷² Office of Refugee Resettlement, *General Statistics* (Sept. 30, 2019), <https://www.acf.hhs.gov/orr/about/ucs/factsand-data>.

⁷³ Department of State, *Progress Report for the United States Strategy for Central America's Plan for Monitoring and Evaluation* (May, 2019), p.2, available at: <https://www.state.gov/wp-content/uploads/2019/05/FY-2019-Central-America-Strategy-Progress-Report.pdf>.

⁷⁴ U.S. Customs and Immigration Services (USCIS) Memorandum, *Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children* (May 31, 2019), https://www.uscis.gov/sites/default/files/USCIS/Refugee_Asylum_and_Int%27Ops/Asylum/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf.

TRUMP STRATEGY #2: BLOCKING ACCESS TO AMERICA

While trying to inflict enough trauma on the men, women, and children seeking asylum to prevent others from coming, the Trump administration has also aggressively moved to ensure that the U.S. would no longer provide assistance to refugee populations.

This has taken multiple forms. In some cases, it has meant cutting off U.S. aid that would help potential refugees to make a better life in their home countries rather than needing to flee to the U.S. In other cases, it has meant closing our doors to asylum seekers and refugees, by physically or administratively blocking people from actually reaching American soil to make a claim.

This section examines cuts to refugee admissions and the withdrawal of U.S. aid to the Northern Triangle. It also investigates three separate programs the Trump administration has created to frustrate and deter asylum applicants at the southern border: metering, MPP, and third country asylum. The legality of all three is now being challenged in the federal courts. However, court injunctions temporarily staying implementation are, in most cases, unavailable, and these programs largely continue to operate.

FINDING #1:

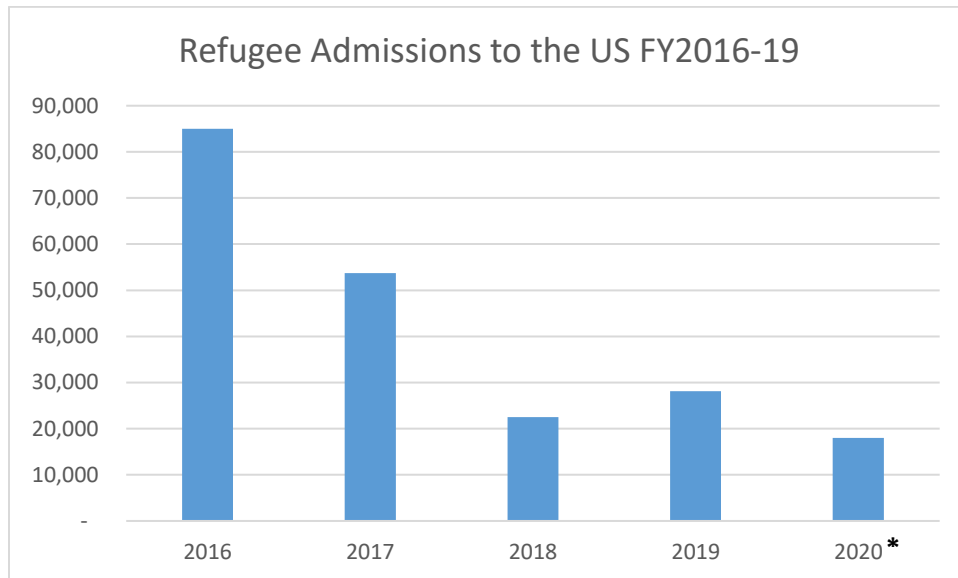
The Trump administration has drastically cut the number of refugees allowed into the United States, slashing refugee admittances by tens of thousands per year.

On January 27, 2017, President Trump issued Executive Order (EO) 13769 – the first of a series of recurring travel bans barring entry into the U.S. of residents of select majority-Muslim countries.⁷⁵ The EO also lowered the number of refugees that could be admitted into the country annually from 110,000 to 50,000 – which immediately affected refugee admissions.

The cap on refugees continues to be lowered. For FY2016 ending September 30, 2016, the U.S. admitted approximately 85,000 refugees. This number went down to 53,700 in FY2017, 22,500 in FY2018, and to 28,100 in the first eleven months of FY2019. The Trump administration wants to

⁷⁵ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), <https://www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states>, *revoked by* Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017), <https://www.federalregister.gov/documents/2017/03/09/2017-04837/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states>.

continue to cut admissions, proposing lowering the cap to 18,000 in FY2020.⁷⁶ *POLITICO* reported that a USCIS official “closely aligned with White House immigration adviser Stephen Miller” suggested setting the cap all the way down to zero.⁷⁷



* proposed

FINDING #2:

President Trump has gutted aid programs to Northern Triangle countries to blackmail them into stopping refugees from fleeing to the U.S.

Families from the Northern Triangle countries of Honduras, Guatemala, and El Salvador make up the vast majority of migrants apprehended by CBP at the southern border. For the eleven months of FY2019 through August 31, 2019, CBP apprehended almost 420,000 individuals who were

⁷⁶ American Immigration Lawyers Association (AILA), Doc. No. 19092701, *President Trump Proposes a Refugee Ceiling of 18,000 for FY2020*, (Sept. 26, 2019), <https://www.aila.org/infonet/trump-proposes-refugee-ceiling-of-18000-fy2020>.

⁷⁷ Politico, Ted Hesson, *Trump Officials Pressing to Slash Refugee Admissions to Zero Next Year* (July 17, 2019), <https://www.politico.com/story/2019/07/18/trump-officials-refugee-zero-1603503>.

members of family units.⁷⁸ That is more than one percent of the total 2019 population for the three countries combined.⁷⁹

There are many reasons for the exodus. According to the Congressional Research Service (CRS), “[t]he Northern Triangle includes some of the poorest nations in the Western Hemisphere. Land ownership and economic power historically have been concentrated in the hands of a small group of elites, leaving behind a legacy of extreme inequality.”⁸⁰ Crop destruction resulting from repeated droughts over the past five years and unemployment hovering at 60% in Guatemala and Honduras have exacerbated economic desperation and malnutrition. Additionally, the dominance of criminal organizations, government corruption, and gender-based violence are significant factors driving women and families to flee.⁸¹ According to the UN High Commissioner for Refugees, “women [in this region] face a startling degree of violence that has a devastating impact on their daily lives. With no protection at home, women flee to protect themselves and their children from murder, extortion, and rape. They present a clear need for international protection.”⁸²

The Trump administration policy supposedly seeks to deter further migration. That has taken the form of cutting off foreign aid until the migration stops – \$450 million was frozen in 2019.⁸³ The administration restored \$143 million of the aid⁸⁴ after Northern Triangle countries acquiesced to Trump’s pressure campaign to sign “safe third country” agreements, but approximately \$300 million remains frozen.

⁷⁸ U.S. Customs & Border Patrol, U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019, (last modified Oct. 29, 2019), <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions>. CBP defines Family Unit as representing “the number of individuals (either a child under 18 years old, parent, or legal guardian) apprehended with a family member by the U.S. Border Patrol.” Apprehensions through August 31, 2019 totaled 419,831 as follows: El Salvador (54,915), Guatemala (182,467) and Honduras (182,449).

⁷⁹ World Population Review, *Total Population by Country 2019*, <http://worldpopulationreview.com/countries/>. The total for the three is 33,781,142, 1.24%.

⁸⁰ Congressional Research Service (CRS), IF11151, *Central American Migration: Root Causes and U.S. Policy 1* (June 13, 2019), <https://fas.org/sgp/crs/row/IF11151.pdf>.

⁸¹ Id.

⁸² The United Nations Refugee Agency, *First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, (Oct. 2015) <https://www.unhcr.org/56fc31864.pdf>.

⁸³ Politico, Ted Hesson, *Democrats Fume as Trump Cuts Central American Aid* (Mar. 31, 2019), <https://www.politico.com/story/2019/03/31/trump-central-america-democrats-1308680>.

⁸⁴ Washington Post, Nick Miroff, *President Trump says he will unfreeze security aid to Central American countries* (Oct. 16, 2019), available at https://www.washingtonpost.com/immigration/president-trump-says-he-will-unfreeze-security-aid-to-central-american-countries/2019/10/16/69438a94-ef7c-11e9-b648-76bcf86eb67e_story.html

HARMING THE 6,000 POOREST FAMILIES IN GUATEMALA

Perversely, the foreign aid cut-off will encourage migration. Among other cuts, the freeze shut down projects funded by the U.S. Agency for International Development Food for Peace Program, which has invested nearly \$60 million to fight hunger in Guatemala since 2017.⁸⁵ One project was intended to help its 6,000 poorest families. These families were receiving \$60 per month and were encouraged to use the money to purchase healthy food – fresh fruit, cereal, dairy products and other grocery staples – to supplement their diets, which rarely varied beyond black beans and corn tortillas.⁸⁶ Ending this program will increase malnutrition and hunger, exacerbating one of the root causes driving migration.

FINDING #3:

The Trump administration has denied thousands of asylum seekers access to the border to assert asylum as part of its metering policy. Some asylum seekers have died as a direct result of this policy, drowning in the Rio Grande attempting to seek access to the border between official ports of entry.

In 2019, the Trump administration ramped up its policy of metering on the southern border. At ports of entry, such as Tijuana, CBP officers stand on the U.S.-Mexico international border line. They only allow asylum seekers to cross into the U.S. to apply when they say space is available, and on virtually all days CBP claims only limited space is available. In the meantime, the asylum seekers are told to put their names on waitlists, are handed line numbers, and must wait in Mexico for their numbers to be called.

Thousands Now Waiting to Apply. The waitlists now number in the thousands and wait times span months. As of August 2019, more than 26,000 asylum seekers were on waitlists in 12 Mexican border cities – a 40% increase in two months. Ten thousand were on the Tijuana waitlist as of August 16; CBP processed between zero and 69 applicants each day and the estimated wait time was six to nine months.⁸⁷

⁸⁵ NPR, Tim McDonnell, *Trump Froze Aid to Guatemala. Now Programs Are Shutting Down* (Sept. 17, 2019, 9:48 AM ET), <https://www.npr.org/sections/goatsandsoda/2019/09/17/761266169/trump-froze-aid-to-guatemala-now-programs-are-shutting-down>.

⁸⁶ Id.

⁸⁷ University of Texas at Austin Robert Strauss Center for International Security and Law & University of California San Diego School of Global Policy & Strategy Center for U.S.-Mexican Studies, *Metering Update: August 2019*, https://www.strausscenter.org/images/MSI/MeteringUpdate_190808.pdf.

Long wait times, coupled with the absence of shelter space and the high crime rate in Mexico, push asylum seekers to enter the U.S. between ports of entry.⁸⁸ With greater official restrictions, many have resorted to more desperate measures and risk dire consequences.

METERING AND THE RIO GRANDE DROWNINGS



PHOTO: The bodies of Oscar Ramirez and his 23-month-old daughter Valeria on the banks of the Rio Grande. (Julia Le Duc/AP)

On the morning of Monday June 24, 2019, the bodies of a man and a toddler were discovered floating face down in the Rio Grande near the Brownsville-Matamoros port of entry.⁸⁹ The victims were Oscar Ramirez and his daughter, 23-month-old Valeria. Their deaths are directly linked to metering.

The previous day, Mr. Ramirez, a citizen of El Salvador fleeing violence in his home country, had attempted to claim asylum for himself, his wife, and his

daughter at the international bridge crossing the river. He was told the CBP office was closed and that he could add his family's names to a waitlist of people seeking to apply for asylum, which already contained hundreds of names. In the meantime, they would have to wait for months in Matamoros, Mexico until it was their turn. Matamoros is now among the most dangerous cities in Mexico; the State Department advises not to travel to the region due to crime and kidnapping. Faced with waiting months or years in a dangerous foreign city, the Ramirezes decided to gamble by attempting to ford the Rio Grande. Ultimately, they lost their lives.

⁸⁸ DHS-OIG, *Special Review – Initial Observations Regarding Family Separation Issues under the Zero Tolerance Policy*, No. OIG-18-84 (Sept. 27, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

⁸⁹ AP, Peter Orsi & Amy Guthrie, *A Grim Border Drowning Underlines Peril Facing Many Migrants* (June 26, 2019), <https://www.apnews.com/2f8422c820104d6eaad9b73d939063a9>.

FINDING #4:

Not only has the administration's MPP program put thousands at risk as they await their asylum hearings in dangerous Mexican border towns, but new standards designed by the administration make it virtually impossible for any asylum-seeker—regardless of the actual danger they face—to be granted permission to leave Mexico and await a hearing in the U.S.

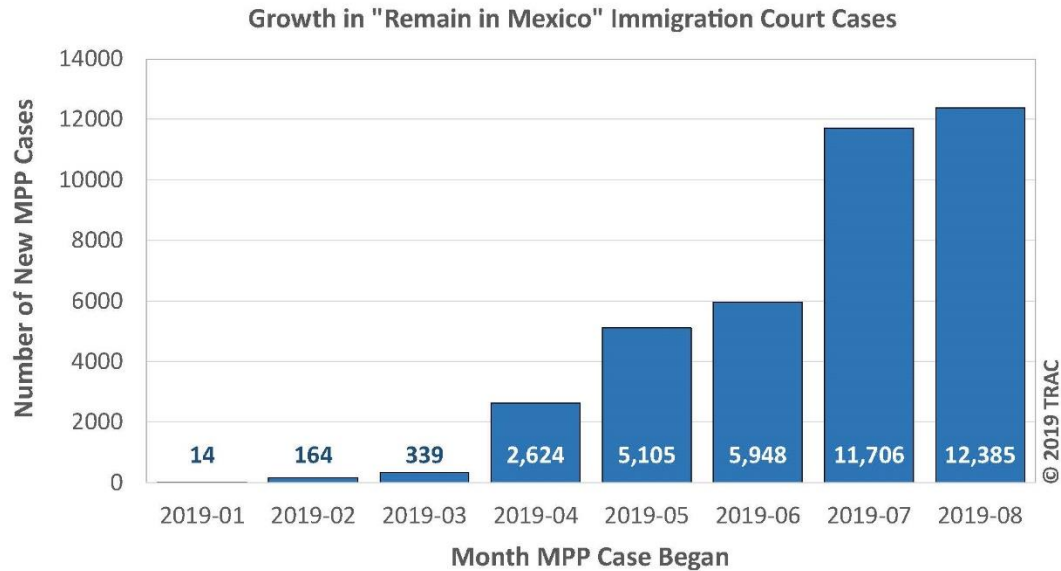
After having waited for months in Mexico for a credible fear hearing, and passing the credible fear standard, a refugee faces a second obstacle: the MPP program.

This program sends non-Mexican refugees back to Mexico to await their asylum hearings, stranding them in hostile border towns, often without funds or friends to provide support and protection.

Rapid Expansion. MPP began as a small pilot project in January 2019. Since its inception, MPP has grown dramatically – from 14 cases in Immigration Court in January to more than 12,000 cases through August. The reason for the change is largely due to a federal appeals court's sharp curtailment in May 2019 of a preliminary injunction that had stayed implementation nationwide.⁹⁰ As of mid-August, 32,000 had been put into MPP; coupled with the 26,000 on metering waitlists, 58,000 asylum applicants were waiting in Mexico for their cases to be heard.⁹¹

⁹⁰ *Innovation Law Lab v. McAleenan*, No. 19-15716 (9th Cir. filed May 7, 2019). The appeals court heard oral argument on October 1, 2019.

⁹¹ New York Times, Jason Kao & Denise Lu, *How Trump's Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico* (Aug. 18, 2019), <https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html>.



Source: Transactional Records Access Clearinghouse

Applicants may be excluded from MPP (and therefore not wait in Mexico) provided that: (i) they *affirmatively* state that they have “a fear of persecution or torture in Mexico, or a fear of return to Mexico;” and (ii) an asylum officer determines, after an interview, “whether it is more likely than not” that the applicants will face persecution or torture if returned to Mexico.⁹²

To Remain in the U.S. a Higher Hurdle. The “more likely than not” standard is far more stringent than the low threshold standard asylum officers were traditionally instructed to use when conducting credible fear interviews (until April 2019, discussed in more detail below).

DHS recognizes a number of other categorical exclusions from MPP, including unaccompanied children, citizens and nationals of Mexico, and people with “[k]nown physical/mental health issues.”⁹³ However, in practice, it is apparent that the exclusions are ignored or, when not ignored, narrowly applied.

CBP’s use of MPP to return seven women in late-term pregnancies to Mexico (discussed above in the “Cruelty as Deterrence” section, pg. 22) is an obvious example. Women in late-term pregnancy plainly have a known health issue. Why they were put into MPP is inexplicable and warrants further investigation.

⁹² U.S. Customs & Border Patrol (CBP), *MPP Guiding Principles* (Jan. 28, 2019) <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>.

⁹³ *Id.*

Pernicious Results. Because different standards apply when assessing claims of fear of persecution in an applicant's home country (low threshold of evidence needed) versus in Mexico (high threshold), applicants often pass credible fear interviews but fail when asserting fear of persecution if they must wait in Mexico.

The Mexican states adjacent to the U.S. southern border are dangerous places, especially so for Central Americans who travel through or remain in Mexico and are vulnerable to being extorted, kidnapped, raped and murdered.⁹⁴ The MPP screening process is failing and this failure is well-documented. As of October 1, Human Rights First had identified *more than 350 publicly reported cases of rape, kidnapping, sexual exploitation, assault, and other violent crimes* against asylum seekers returned to Mexico under MPP.⁹⁵

FAMILY KIDNAPPED IN MEXICO FAILS MPP SCREENING, SENT BACK TO MEXICO

Three Central American children and their parent applied for asylum at the El Paso port of entry. An asylum officer interviewed the parent, who said they feared waiting in Mexico because they had been kidnapped, held for ransom for days, and escaped. The family failed the MPP screen and was returned to wait in Mexico. According to Human Rights First, the parent appeared to be in shock, was not given an opportunity to rest and recuperate from the ordeal, and had not had an attorney present during the interview.⁹⁶

⁹⁴ U.S. Department of State Travel Maps, <https://travelmaps.state.gov/TSGMap> (last accessed Oct. 15, 2019).

⁹⁵ Human Rights First Fact Sheet, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* (Oct. 2019), <https://www.humanrightsfirst.org/resource/orders-above-massive-human-rights-abuses-under-trump-administration-return-mexico-policy>.

⁹⁶ Human Rights First Fact Sheet, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process* (Aug. 2019), <https://www.humanrightsfirst.org/resource/delivered-danger-illegal-remain-mexico-policy-imperils-asylum-seekers-lives-and-denies-due>.

FINDING #5:

The Supreme Court's September 2019 decision to allow the "safe third country" program to go into effect will likely have a devastating effect on asylum seekers arriving at the U.S.-Mexico border.

The third program, described in an interim final rule issued in July by DOJ and DHS⁹⁷, is known as the "safe third country" rule. This program is likely to be the most devastating for asylum applicants. It permits Central Americans (or applicants from countries other than Mexico) at the southern border to apply for asylum only if they were first denied asylum in a "safe third country," which now includes Guatemala, Honduras, and El Salvador. These three nations recently signed safe third country agreements with the United States, following an extensive pressure campaign from the Trump administration, including the withdrawal of hundreds of millions of dollars in aid to the Northern Triangle countries.

Historically, safe third countries agreements were meant to apply in countries that were safe for people seeking asylum—countries with high human rights standards and low rates of violence. By any objective evaluation, Guatemala, Honduras, and El Salvador clearly fail to meet this standard. In 2017, El Salvador had the highest murder rate in the world, with 62 murders per 100,000 people.⁹⁸ While the homicide rate in El Salvador continues trending down, it is still the highest rate anywhere in Latin America.⁹⁹ Honduras also ranked in the top five for murders.¹⁰⁰ The U.S. State Department has issued travel advisories for each of the three countries warning that serious violent crime is common, and that local police often are incapable of responding effectively to such criminal incidents.¹⁰¹

⁹⁷ Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (interim final rule proposed July 16, 2019), <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>.

⁹⁸ United Nations Office on Drugs and Crime, *International Homicide Statistics* (homicide statistics through 2017), https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?most_recent_value_desc=true.

⁹⁹ U.S. State Department, *El Salvador 2019 Crime & Safety Report* (Apr. 25, 2019) <https://www.osac.gov/Country/ElSalvador/Content/Detail/Report/d1222be6-4e5d-461f-912c-15f4aec90b02>.

¹⁰⁰ International Homicide Statistics, U.N. Office on Drugs and Crime.

¹⁰¹ U.S. State Department, *Travel Advisories (Guatemala)* (last updated Feb. 28, 2019), <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Guatemala.html>; U.S. State Dep't, *Travel Advisories (Honduras)* (last updated June 24, 2019), <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Honduras.html>; U.S. State Dep't, *Travel Advisories (El Salvador)* (last updated Oct. 1, 2019), <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/ElSalvador.html>.

While a federal district court issued a temporary stay of this policy within days of its issuance, the Supreme Court dissolved this stay on September 11, 2019, allowing the rule to go into effect.¹⁰²

Supreme Court Dissent. Justice Sotomayor dissented from the ruling. She would have affirmed the findings of the district court that the rule was likely unlawful on three separate grounds. First, that it was probably and improperly inconsistent with the ruling; second, because the government had not promulgated the rule in accordance with the requirements of the federal *Administrative Procedure Act*; and, finally, because the justification offered for issuing the rule was “so poorly reasoned that the government’s action was likely arbitrary and capricious.”¹⁰³

As matters stand, the rule’s legality continues to be contested in the federal courts – a process that, at best, will take months to resolve. And while the rule makes its way through the courts, following the Supreme Court’s lifting of the stay, countless asylum seekers will be turned away until there is a final ruling.

¹⁰² *Barr v. East Bay Sanctuary Covenant*, No. 19A230, 588 U.S. ____ (2019).

¹⁰³ *Id.*

SUMMARY: KEY FINDINGS OF PART I

- **The Trump administration has massively expanded the detention of asylum seekers within the U.S.** Between FY2016 and FY2020, the administration has nearly doubled immigration-related detention, from 30,539 beds in 2016 to 54,000 beds in 2020.
- **The administration's "zero tolerance" policy—more commonly known as family separation—was intentionally formulated to deter asylum seekers.** In internal documents, administration officials theorized that reports of family members being arrested and separated from children would reach potential asylum seekers in Central America, deterring them from presenting themselves at the U.S.-Mexico border so that they could spare their families those circumstances.
- **The administration intentionally increased prosecutions and detentions without a plan for appropriate space to hold increased numbers of migrants in CBP detention.** As a result, many facilities became dangerously overcrowded. As reported by DHS's own Inspector General, some facilities were found to be more than 500% over capacity when inspected.
- **At least seven Central American children died in U.S. custody between September 2018 and May 2019, including three from the flu.** In the U.S. as a whole, the rate of pediatric death from the flu is only two per million, indicating that medical breakdowns within the detention system likely contributed to these deaths.
- **CBP officers sent late-term pregnant women back to Mexico under the MPP policy, despite the fact that individuals with known health issues are supposed to be exempted from the program.** In one case, doctors gave a woman who was already experiencing contractions medication to stop the contractions so that she could be sent back across the border to Mexico.
- **As of July 2019, more than 4,000 migrant children with no identified sponsor were being held in ORR's child detention system.** Without a sponsor, these children could conceivably be held in detention for years on end while their asylum cases are adjudicated. The report finds that shortage of sponsors is likely directly linked to a new policy created by the Trump administration in 2018, which began sharing sponsors' and their family members' immigration status with immigration enforcement agencies.

PART II

THE ANSWER IS ALWAYS NO: GUTTING THE ASYLUM SYSTEM

Unable to deter or prevent children, families, men and women from seeking refuge at America's doorstep, the Trump administration is using many more tools to keep the door shut. This part of the report documents the systematic effort underway to effectively rewrite U.S. asylum laws, rules, and procedures without congressional approval or involvement.

The drive to subvert the U.S. asylum system starts in the White House. Miller and his political appointees have repeatedly displayed contempt for the USCIS Asylum Division, its employees (civil servants who have dedicated careers to the agency's missions), and its practices and policies.

Miller reportedly believes asylum officers to be bleeding hearts who are too quick to believe the claims of people seeking asylum and who are extending asylum protections indiscriminately.¹⁰⁴ Miller and his political colleagues within the administration have taken extreme steps to force a culture change within USCIS and the Asylum Division, with the ultimate goal of changing how U.S. asylum laws are implemented.

Thanks largely to reports from whistleblowers, this office has obtained new information from within the asylum system about the changes underway. This information sheds new light on recent and notable personnel actions, management decisions, and policy changes that, collectively, are quietly transforming the U.S. asylum system behind the scenes.

¹⁰⁴ New York Times, *Shoot Migrants' Legs, Build Alligator Moat: Behind Trump's Ideas for Border* (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html> (quoting Hirshfeld Davis & Shear, *Border Wars: Inside Trump's Assault on Immigration*, at 394 (published Oct. 8, 2019)).

FINDING #1:

Whistleblowers reported that former USCIS Asylum Division head John L. Lafferty was forced out of his job by Acting USCIS Director Ken Cuccinelli.

The reassignment of John L. Lafferty, an experienced career manager, delivered a harsh message to USCIS staff. His forced reassignment is clearly part Miller's DHS purge.

A Respected Civil Servant. Mr. Lafferty's term as Asylum Division head spanned two different administrations. On September 4, 2019, USCIS sent out a broadcast email notifying the staff that Mr. Lafferty had been reassigned.¹⁰⁵ The email – sent out under the name of Lafferty's immediate supervisor, one of his former mentees – praised him as “truly one of the most talented civil servants I have ever had the privilege to work for...”¹⁰⁶

At an August 2018 Town Hall meeting, Mr. Lafferty paid tribute to the late Senator John McCain's unwavering support of our immigration system.¹⁰⁷ He reiterated those words in his final minutes as Asylum Division Chief in a September 9 broadcast email to all staff supplied by a whistleblower:

For my Asylum Division colleagues, these days our public service is not rendered in anonymity, but in the public spotlight. For your duty, your commitment is to the American public that you serve, the Constitution that you took an oath to defend, and to the law. And to faithfully applying these laws to the facts as they are presented to us, irrespective of outcome. The late Senator McCain said just a few months before his death that we show our very patriotism as Americans when we carry out these duties in a manner that shows “[r]espect for the God-given dignity of every human being, no matter their race, ethnicity or other circumstances of their birth.” Asylum colleagues, I am confident in your patriotism.¹⁰⁸

The “Reassignment.” Whistleblowers have reported that Mr. Lafferty was told he was being reassigned just days before it was announced. It took the form of a “rubber-stamped”

¹⁰⁵ Washington Post, Nick Miroff, *Chief of U.S. Asylum Officer Reassigned as White House Pushes for Tighter Immigration Controls* (Sept. 4, 2019), https://www.washingtonpost.com/immigration/chief-of-us-asylum-office-reassigned-as-white-house-pushes-for-tighter-immigration-controls/2019/09/04/0ac3705e-cf4e-11e9-8c1c-7c8ee785b855_story.html.

¹⁰⁶ Higgins, Jennifer. “Message from the RAIO Associate Director: Personnel Update.” Email to RAIO – All staff. September 4, 2019. See Appendix Exhibit G.

¹⁰⁷ Lafferty, John. “Thank you.” Email to RAIO – Asylum Field Office Staff, HQ, and Leadership. September 9, 2019. See Appendix Exhibit H & J.

¹⁰⁸ Id.

letter from Acting Director Cuccinelli.¹⁰⁹ Mr. Lafferty reluctantly accepted the transfer – albeit by informing management that he considered it “involuntary.”¹¹⁰

The Consequences. It is not apparent whether there are specific actions that cost Mr. Lafferty his job, but whistleblowers report that his firing is perceived as the result of acting as a committed, civil servant who played it by the book.¹¹¹ In other words, he was too neutral. His reassignment was intended to send a message, and that message was received. Rank-and-file officers drew their own obvious conclusion: that Lafferty was fired for applying asylum law as written rather than skewing it to meet the administration's political goals.

FINDING #2:

Under Trump administration leadership, USCIS has begun using CBP law enforcement officers to replace asylum officers in conducting credible fear interviews.

In May 2019, USCIS began to train CBP law enforcement officers to serve as asylum officers, apparently due to Miller's dissatisfaction with asylum officers' handling of credible fear interviews – they were passing far too many asylum applicants.¹¹²

Slashing Credible Fear Interview Pass Rates. Consistent with his contempt for asylum officers, Miller sees them passing “97%+” credible fear interviewees. He has told DHS the pass rate will fall once CBP officers start conducting interviews.¹¹³ Miller reportedly expected the agents, who typically have no experience working with or aiding refugees fleeing from persecution, would be tougher on migrants.¹¹⁴

Miller also wants to go further – by eliminating asylum officers entirely from the process. For example, an internal DHS email states that Miller, at a then-upcoming meeting, “might

¹⁰⁹ Confidential conversation with DHS CRCL source, Sept. 6, 2019.

¹¹⁰ Confidential conversation with USCIS source, Nov. 8, 2019.

¹¹¹ Id.

¹¹² NBC News, Julia Ainsley, *Stephen Miller Wants Border Patrol, Not Asylum Officers, to Determine Migrant Asylum Claims* (July 29, 2019), <https://www.nbcnews.com/politics/immigration/stephen-miller-wants-use-border-agents-screen-migrants-cut-number-n1035831>.

¹¹³ Id.

¹¹⁴ Id.

press for an answer on when the [asylum] officers will no longer be looking over the shoulders of [CBP] agents.”¹¹⁵

To date, 60 CBP agents have received what is considered by DHS to be sufficient training to conduct asylum interviews. They have started interviewing. On November 7, *Buzzfeed News* revealed the initial data on CBP agents' passage rates. The data shows a dramatic difference between USCIS asylum officers and CBP agents. While trained USCIS asylum officers typically pass 80% or more of individuals seeking asylum through the credible fear phase, CBP agents passed less than half – just 47%.¹¹⁶ USCIS is actively seeking to hire asylum officers with backgrounds in law enforcement and the military. A recent USAJobs announcement for asylum officers prominently states, “[L]aw enforcement professionals are encouraged to apply.”¹¹⁷ Whistleblowers report that earlier job announcements did not emphasize that.¹¹⁸

Criticism. Academic commentators have reacted with alarm. For example:

If CBP Officers effectively become asylum officers, then enforcement-minded officers will occupy the roles of police, judge, and jury. ... Complete and proper referrals from arresting officers to an asylum officer are one of the very few ways that asylum seekers can have their information fairly heard and evaluated outside of the closed expedited removal process. Moving enforcement officers into the role of asylum officers, especially officers who resent immigrants having legal rights, exacerbates this closed circuit of police-judge-removal.¹¹⁹

The Consequences. For asylum cases, these staffing changes produce fewer credible fear passes – from the newly hired who don't know (or don't want to know) better, and from an existing workforce that now knows what is expected.

¹¹⁵ Id.

¹¹⁶ BuzzFeed News, Hamed Aleaziz, *Under Trump's New Project, Border Patrol Agents Have Approved Fewer Than Half of Asylum Screenings*, (Nov. 7, 2019), https://www.buzzfeednews.com/article/hamedaleaziz/border-patrol-asylum-screenings?bftwnews&utm_term=4ldqpgc#4ldqpgc.

¹¹⁷ USAJobs Announcement for Asylum Officers, <https://www.usajobs.gov/GetJob/ViewDetails/549959700>.

¹¹⁸ Confidential conversation with USCIS source, Nov. 8, 2019.

¹¹⁹ Center for Migration Studies, Josiah Heyman, Jeremy Slack, & Daniel E. Martínez, *Why Border Patrol Agents and CBP Officers Should Not Serve as Asylum Officers* (June 21, 2019), <https://cmsny.org/publications/heyman-slack-martinez-062119/>.

FINDING #3:

When asylum officers found that an applicant had a legitimate reason to fear staying in Mexico until their asylum court date, those decisions were reviewed by political supervisors.

Standard Asylum Division protocol requires a supervisory asylum officer to review the initial assessment made by the interviewing asylum officer before making a final assessment. But new orders are now in place. Positive final assessments – removing asylum applicants from MPP based on successful showings of fear of remaining in Mexico – are now forwarded up the USCIS supervisory chain where they are being overruled. In the words of one asylum officer union member, “[i]f you want to go positive [on an interview], you will face Herculean efforts to get it through... If your supervisor says yes, headquarters will probably say no.”¹²⁰ Moreover, decisions to send the asylum seeker back to Mexico reportedly don’t appear to get reviewed at all, only the rare positives.¹²¹

STANDARD PROTOCOLS OVERRULED

Whistleblowers report on an MPP case where an asylum officer and the officer’s supervisor (a supervisory asylum officer with years of experience) concluded – after following standard protocols – that an asylum applicant should be taken out of MPP.¹²² They agreed the applicant had made the necessary showing of fear of persecution in Mexico and thus should not be returned.

Soon afterwards, the supervisory asylum officer spoke by telephone to the deputy director of that field office (who was two ranks higher than the Officer) and two USCIS headquarters staffers. They wanted to know why the asylum applicant had been taken out of MPP. As requested, the officer provided the supporting analysis.

The deputy director then reversed the decision and told the supervisory asylum officer to run any more decisions taking applicants out of MPP past a higher-ranking supervisor. According to the whistleblowers, never before had a deputy director and headquarters staff intervened to override line officer decisions.

¹²⁰ Vox, Dara Lind, *Civil Servants Say They’re Being Used as Pawns in a Dangerous Asylum Program* (May 2, 2019), <https://www.vox.com/2019/5/2/18522386/asylum-trump-mpp-remain-mexico-lawsuit>.

¹²¹ Id.; see also Los Angeles Times, Molly O’Toole, *Trump Administration Appears to Violate Law in Forcing Asylum Seekers Back to Mexico, Officials Warn* (Aug. 28, 2019), <https://www.latimes.com/politics/story/2019-08-28/trump-administration-pushes-thousands-to-mexico-to-await-asylum-cases> (even when Officers decide that the asylum seekers meet the higher standard and would be in grave danger in Mexico, Homeland Security officials are overruling them and returning them anyway).

¹²² Confidential Conversation with USCIS sources, September 3, 2019.

The Consequences. Putting all favorable asylum screening decisions in the hands of headquarters ensures that, at best, only a trickle of applicants pass. That is what the Trump administration wants.

FINDING #4:

Refugees who had been kidnapped, beaten, and raped were turned away due to the administration's new restrictions on gang violence and domestic violence as grounds for asylum.

In addition to personnel and programmatic changes, the Trump administration has been acting without Congress to narrow asylum policies. The best example is the wholesale elimination of domestic abuse and gang violence as grounds for granting asylum. In June 2018, former Attorney General Sessions handed down a wide-ranging decision reversing long-standing precedent in Immigration Court:

An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government's difficulty controlling private behavior. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims.¹²³

Since that decision, asylum officers have repeatedly described cases of men and women who said they had been kidnapped in Mexico, then were beaten and raped. Once their families sent money, the kidnappers released them. Yet when the victims fled for the border, the asylum officers had to turn them back. Fear of gang and domestic violence is no longer enough.¹²⁴

¹²³ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1070866/download>.

¹²⁴ Los Angeles Times, Molly O'Toole, *Trump administration Appears to Violate Law in Forcing Asylum Seekers Back to Mexico, Officials Warn* (Aug. 28, 2019), <https://www.latimes.com/politics/story/2019-08-28/trump-administration-pushes-thousands-to-mexico-to-await-asylum-cases>.

ASYLUM OFFICER BELIEVES APPLICANT MIGHT BE MURDERED IN MEXICO, STILL SENDS APPLICANT BACK

A Central American asylum seeker was interviewed by an asylum officer. He told of threats from Mexican drug cartels during his journey to the southern border. The officer believed the man's life was in danger: "This was a guy truly afraid he was going to be murdered, and frankly, he might be," the officer said. That was no longer a good enough ground under the new standard ("applicant seeking to establish persecution based on violent conduct of private actor must show ... the government condoned the private actions or demonstrated an inability to protect the victims.").¹²⁵

The Consequences. People fleeing the Northern Triangle countries, officials in those countries, and foreign aid workers all describe unchecked gang violence as a key driver of migration.¹²⁶ In many places, there is no effective police force to protect individuals subjected to extortion, threats, or sex trafficking by gangs. People will die and be raped and tortured as a result of blocking asylum claims on these grounds.

FINDING #5:

In April 2019, USCIS quietly changed their policies for credible fear screenings to make it much more difficult for asylum seekers to pass their initial screening at the border.

Asylum officers are asked to determine whether an applicant has established "that there is a 'significant possibility' that he or she could establish in a full hearing before an immigration judge that he or she has been persecuted or has a well-founded fear of persecution or harm on account of his or her race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her country."¹²⁷

¹²⁵ Vox, Dara Lind, *Civil Servants Say They're Being Used as Pawns in a Dangerous Asylum Program* (May 2, 2019), <https://www.vox.com/2019/5/2/18522386/asylum-trump-mpp-remain-mexico-lawsuit>.

¹²⁶ Council on Foreign Relations, Amelia Cheatham, *Central America's Turbulent Northern Triangle* (Oct. 1, 2019), <https://www.cfr.org/background/central-americas-turbulent-northern-triangle>.

¹²⁷ U.S. Customs & Immigration Services (USCIS), *Credible Fear FAQ, How Is an Individual Found to Have a Credible Fear of Persecution?* (last reviewed Sept. 26, 2008), <https://www.uscis.gov/faq-page/credible-fear-faq#t12831n40132>.

The Traditional “Low-Threshold” Standard. Historically and by design, the Asylum Officer Basic Training Lesson Plan instructed asylum officers “to apply ‘a low-threshold test designed to screen all persons who could qualify for asylum into the hearing process.’”¹²⁸ This is consistent with U.S. Supreme Court precedent noting that an asylum applicant’s showing of a “well-founded fear” of persecution is not precluded, even where the applicant shows he or she “only has a 10% chance” of being persecuted.¹²⁹ Indeed, as the lesson plan that took effect on February 27, 2017 points out:

When interim regulations were issued to implement the credible fear process, the DOJ described the credible fear “significant possibility” standard as one that sets “a low threshold of proof of potential entitlement to asylum; many aliens who have passed the credible fear standard will not ultimately be granted asylum.”¹³⁰

Now, a Higher Standard. In April 2019, USCIS issued a new lesson plan striking this language and raising the threshold for the credible fear standard to one that is nearly impossible for many seeking asylum to meet.¹³¹ The new policy requires applicants to present a factual record demonstrating a “significant possibility of future persecution” at the initial screening interview, rather than at the full hearing in Immigration Court where the applicant would be afforded the time and opportunity to gather needed evidence in support of the claim.

The plan is now being challenged in federal court on the grounds that USCIS, on its own initiative, is illegally raising the standard set by Congress and found in the controlling law; however, it is already being implemented while the legal challenge works its way through the courts.¹³²

¹²⁸ *Zhang v. Holder*, 585 F.3d 715, 724 n.3 (2d Cir. 2009), quoting 2001 Asylum officer Basic Training Plan, Part V (Credible Fear); Immigration and Naturalization Service, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10320 (Mar. 6, 1997).

¹²⁹ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

¹³⁰ U.S. Citizenship & Immigration Services (USCIS), *2017 Asylum Officer Basic Training Plan, Part V.B (Credible Fear Standard of Proof: Significant Possibility)* (quoting 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997)), <https://www.aila.org/infonet/raio-and-asylum-division-officer-training-course>.

¹³¹ U.S. Citizenship & Immigration Services (USCIS), *2019 Asylum Officer Lesson Plan* (review date Apr. 30, 2019) <https://fingfx.thomsonreuters.com/gfx/mkt/11/10239/10146/2019%20training%20document%20for%20asylum%20screenings.pdf>; see also American Immigration Lawyers Association (AILA) *Updated Credible Fear Lesson Plans Comparison Chart* (May 30, 2019), <https://www.aila.org/infonet/updated-credible-fear-lesson-plans-comparison>.

¹³² *Kiakombua v. McAleeneen*, No. 1:19-CV-1872-KBJ (D.D.C.) (Amended Complaint filed June 28, 2019, ECF # 6), <https://dockets.justia.com/docket/district-of-columbia/dcdce/1:2019cv01872/208674>; see also Washington Post, Greg Sargent, *Trump Keeps Slashing Asylum-Seeking. Now Asylum Workers Are Fighting Back* (Sept. 20, 2019),

The Consequences. This higher standard will prevent thousands from having the opportunity to adequately present their claims. If left standing by the courts, it could turn a process intended to be non-adversarial into one that begins with a presumption of denial.

FINDING #6:

In mid-August 2019, USCIS ended standardized training for new asylum officers.

USCIS explains on its website that the “Asylum Division’s Training Section provides training on a national level as well as on a local level in the field offices.”¹³³ It goes on to say:

All asylum officers are required to attend and complete the Asylum Officer Basic Training Course (AOBTC), which is a national training course that is specific to asylum adjudications... The training course includes topics such as international refugee law and the U.S. Asylum Program’s role in world-wide refugee protection; U.S. asylum law and its interpretation by the Board of Immigration Appeals and federal appellate courts; interviewing techniques; researching country of origin information; and decision-making/writing.

About Boot Camp. The Basic Training Course runs for five-and-a-half weeks and is held at the Federal Law Enforcement Training Center (FLETC) in Columbia, South Carolina.¹³⁴ The training is mandatory. Like other basic training courses for organizations, it is intended to ensure consistency across the nation and to reduce the risk of bias and inconsistency among the USCIS field offices.

That ended in mid-August 2019. Former Asylum Division Chief Lafferty then told asylum officer trainees “they were the last FLETC class.”¹³⁵ The ostensible reason is because the Asylum Division plans to hire 200 by year-end and “FLETC can’t train that many in a year”¹³⁶.

<https://www.washingtonpost.com/opinions/2019/09/20/trump-keeps-slashing-asylum-seeking-now-asylum-workers-are-fighting-back/>.

¹³³ U.S. Citizenship & Immigration Serv. (USCIS), *Asylum Division Training Programs* (last updated Dec. 19, 2016),

<https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs>.

¹³⁴ U.S. Department of Homeland Security (DHS) Federal Law Enforcement Training Centers, *U.S. Citizenship & Immigration Services – Academy Training Center* (last visited Oct. 15), <https://www.fletc.gov/us-citizenship-and-immigration-services---academytraining-center>.

¹³⁵ Confidential Conversation with USCIS sources, September 3, 2019. See Appendix Exhibit K.

¹³⁶ *Id.*

The Consequences. New hires will only receive on-the-job training in the USCIS field offices. A whistleblower reports: “So, the training is becoming spitballing whatever might work.” FLETC provides “baseline training” and a “national standard” for all asylum officers; “[g]etting trained at your hiring office creates an echo chamber.”¹³⁷

It also means the newly-hired asylum officers are likely to be trained by local politically-installed leaders to be far harsher in making credible fear asylum assessments. With only on-the-job training and no experience, they will be further subject to intense pressure from supervisors to deny all asylum claims.

FINDING #7:

By “surging” personnel to the southern border to exclusively address asylum seekers arriving at the U.S.-Mexico border, the Trump administration has left thousands of people seeking asylum in other parts of the country stranded in an indefinite limbo.

The Trump administration’s war on immigration and asylum cuts across the entire system. Earlier in 2019, Miller ordered USCIS to “surge all nonessential staff” to the southern border to conduct credible fear interviews. That would mean fewer officers available to process green card requests and naturalization applications.¹³⁸ It has stalled the processing of asylum applications for hundreds of thousands of others who are living in the U.S. legally.

Current Backlog: More than 338,000 Cases.¹³⁹ Individuals who enter the U.S. through lawful means may apply for affirmative asylum. Asylum officers process those cases. They are responsible for interviewing applicants and granting asylum.

At the end of FY2018, the backlog of open cases remaining to be processed was 319,302; six months later (as of March 31, 2019) it was 327,984.¹⁴⁰

¹³⁷ Id.

¹³⁸ Hirshfeld Davis and Shear, *Border Wars: Inside Trump's Assault on Immigration* (published Oct. 8, 2019), as quoted in Politico Playbook (Oct. 7, 2019), <https://www.politico.com/newsletters/playbook/2019/10/07/inside-this-seasons-hottest-books-485937>.

¹³⁹ PBS, Gretchen Frazee, *U.S. Claims Reducing Refugee Numbers Helps with the Asylum Backlog. Will it?* (October 2, 2019), <https://www.pbs.org/newshour/politics/u-s-claims-reducing-refugee-numbers-helps-with-the-asylum-backlog-will-it>.

¹⁴⁰ Dep’t of Homeland Security, *Citizenship and Immigration Services Ombudsman Annual Report 2019* at 58 (July 12, 2019), https://www.dhs.gov/sites/default/files/publications/dhs_2019_ombudsman_annualreport_verified.pdf; U.S. Citizenship & Immigration Services, *Asylum Office Workload March 2019* (Mar. 2019), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsMar2019.pdf.

Pulling Asylum Officers Off of Affirmative Cases. Miller's "surge" has redirected staff resources towards asylum cases in which the applicant is already in removal proceedings, pulling staff off of all other asylum cases. For example, on August 15, 2019, USCIS management announced that the Newark and Boston field offices would be processing far fewer cases of those already in the U.S. legally.¹⁴¹ Asylum officers in both offices had been reassigned. That meant that the backlog in the two offices (40,739 cases at March 31, 2019) would continue to grow.¹⁴²

The Consequences. The reassignment of asylum officers is harming countless asylum applicants who are in the U.S. legally but living with massive uncertainty hanging over their lives. The hundreds of thousands of open cases in backlog remain open with no end in sight. In the meantime, applicants will remain in an indeterminate legal limbo, continuing to cause adverse emotional and psychological effects for applicants, their families and friends. Moreover, their asylum applications will weaken as supporting evidence grows stale, making it more difficult for these applicants to successfully win asylum in the U.S. when their cases are finally processed.

FINDING #8:

Trained asylum officers strenuously objected to being forced to implement the administration's programs, such as MPP, that appear to be in clear violation of domestic and international asylum law.

In the face of this, asylum officers – to their credit – have bravely voiced their objections to Trump administration policies. For instance, in June 2019, their union filed an amicus brief in support of the lawsuit challenging MPP.¹⁴³ Like others, they argue MPP violates the law and puts vulnerable asylum seekers in harm's way.

¹⁴¹ Rauffer, Susan, USCIS Email "Dear U.S. Citizenship and Immigration Services Newark Asylum Office and Boston Asylum Sub-Office Stakeholder," (August 15, 2019), See Appendix Exhibit L.

¹⁴² *USCIS Asylum Office Workload March 2019* (Mar. 2019). For March 2019, the Newark and Boston offices reduced their combined affirmative case backlog by 567; 802 applications were received, 1,369 completed.

¹⁴³ *Innovation Law Lab v. McAleenan*, No. 19-15716 (9th Cir.) The appeals court heard oral argument on October 1, 2019.

Some asylum officers have gone even further and refuse to conduct MPP screening interviews. “Every day, it gets a little bit worse,” according to one who refused to participate.¹⁴⁴

A Paper Trail. In an August 12, 2019 email, which this office obtained through a whistleblower, a USCIS asylum officer detailed numerous concerns with implementation of the MPP program that the Trump administration announced in January 2019.¹⁴⁵ The email, directed to USCIS management, noted a multitude of moral and legal objections to the process, and explicitly states “the MPP is illegal.”

The asylum officer confirms the fact that DHS has no statutory authority to implement the MPP, noting “implementation of a program for which there is no legal authority violates my oath to office.”

Further, the whistleblower explains that DHS not only ignored statutory authority, the agency bypassed regulatory procedures by implementing a regulatory change without adequate Notice of Public Rulemaking to allow the mandatory period for public comment and input. Effectively, the Trump administration is trying to make an illegal end-run around Congress and the American people.

The letter continues to explain that DHS is *not* providing adequate legal notice to migrants that seek asylum. These notices provide details about where and when credible fear interviews are to take place, and a person’s legal rights and responsibilities.

Insufficient legal notice has serious consequences for migrants seeking asylum. Without a system for notifying applicants of changes to their hearing dates or locations, or for an applicant to provide a change of address to courts and Border Patrol (a necessity for migrants living in often temporary housing or shelters near the Mexican border), if a migrant misses a court date, an immigration judge is required to order the migrant removed in absentia. This bars the migrant from returning to the United States for between 5 and 10 years. Implicit in this explanation is the de facto denial of due process to migrants by means of insufficient notice, and then further barring a targeted population from re-entering the United States years into the future.

¹⁴⁴ Los Angeles Times, Molly O’Toole, *Trump Administration Appears to Violate Law in Forcing Asylum Seekers Back to Mexico, Officials Warn* (Aug. 28, 2019), <https://www.latimes.com/politics/story/2019-08-28/trump-administration-pushes-thousands-to-mexico-to-await-asylum-cases>.

¹⁴⁵ Confidential Whistleblower Source, Email from Asylum Officer to USCIS Management (August 15, 2019). See Appendix Exhibit M.

The whistleblower also emphasizes the moral and international implications of MPP, specifically that it contradicts the principle of non-refoulement mandated by international agreements to protect human rights. Non-refoulement prohibits states from removing individuals from their jurisdiction when there are substantial grounds for believing a person would be at risk of harm. By amending asylum interview procedures to enact MPP without first establishing implementing regulations, there is no standard that ensures the United States is complying with international asylum agreements. The letter notes that the “description of the MPP read at the beginning of the interview does not even explain what a ‘protected ground’ is or what the applicant is required to prove.”

The whistleblower also notes that MPP likely forces asylum officers to engage in illegal discrimination. The US. is bound by law not to discriminate against refugees on the basis of their race, religion, or nationality, and not to penalize refugees for how they enter the country to claim asylum. “However, the MPP both discriminates and penalizes,” the letter notes. “Implementation of the MPP is clearly designed to further this administration’s racist agenda of keeping Hispanic and Latino populations from entering the United States.”

The totality of the letter conveys the reality of MPP as an opaque and oppressive asylum process that operates outside of established regulations and statutes. It seems no mistake that the system was designed by the Trump administration in a way that fails to inform defendants of their rights and legal responsibilities, and that fails to deliver required notices or take into consideration the operational realities of migrants who are living in temporary conditions without access to legal services or their own files and paperwork. The result is a Kafkaesque system designed to ensure that refugees from a particular region and ethnic background effectively have no hope of finding safety by presenting themselves for asylum at the U.S.-Mexico border.

SUMMARY: KEY FINDINGS OF PART II

- **Whistleblowers reported that former U.S. Citizenship and Immigration Services (USCIS) Asylum Division head John L. Lafferty was forcibly reassigned by Acting USCIS Director Ken Cuccinelli.** This forced reassignment resulted in the perception among rank-and-file officers that Lafferty was fired for applying asylum law as written rather than skewing it to meet the administration's political goals.
- **Under Trump administration leadership, USCIS has begun using CBP law enforcement officers to replace asylum officers in conducting credible fear interviews.** This is an apparent strategy to cut the number of asylum applicants who pass the credible fear screening by removing trained asylum officers from the equation as much as possible.
- **When asylum officers found that an applicant had a legitimate reason to fear staying in Mexico until their asylum court date, those decisions were reviewed by political supervisors.** Decisions to send migrants back to Mexico were not reviewed, while decisions that migrants should remain in the U.S. for their safety were forwarded on to supervisors, and in some cases all the way up to headquarters. Whistleblowers reported that in nearly all cases where they found that asylum seekers should be allowed to await their hearing within the U.S. for safety reasons, they were overruled by their superiors, with one whistleblower reporting that it would take "Herculean efforts" to get final approval on any recommendation to allow an asylum seeker to wait in the U.S.
- **In April 2019, USCIS quietly changed their policies for credible fear screenings to make it much more difficult for asylum seekers to pass their initial screening at the border.** The new policy would require applicants to present a factual record demonstrating "a significant possibility of future persecution" at their initial screening interview, despite the fact that most asylum seekers are freshly arrived from difficult circumstances and would need time to gather evidence in support of their claim. This policy is currently being challenged in federal court, but has been allowed to go into effect in the interim; if allowed to stand, it will ultimately deny thousands of applicants the chance for a fair hearing in a full immigration court.
- **In mid-August 2019, USCIS ended standardized training for new asylum officers.** This training was previously mandatory for all asylum officers, to ensure consistency across the nation and to reduce the risk of bias and inconsistency among USCIS field offices. Without standardized trainings, new asylum officers are likely to be trained by politically-installed leaders and more vulnerable to pressure from supervisors to deny as many asylum claims as possible.

- **Trained asylum officers strenuously objected to being forced to implement the administration's programs, such as MPP, that appear to be in clear violation of domestic and international asylum law.** One whistleblower, who refused to participate in MPP on both legal and moral grounds, wrote in a letter: "Implementation of a program for which there is no legal authority violates my oath to office." The asylum officer noted that the U.S. is bound by law not to discriminate against refugees on the basis of their race, religion, or nationality, and not to penalize refugees for how they enter the country to claim asylum. "However, the MPP both discriminates and penalizes," the officer continued. "Implementation of the MPP is clearly designed to further this administration's racist agenda of keeping Hispanic and Latino populations from entering the United States."

CONCLUSION + RECOMMENDATIONS

This report highlights how the Trump administration is systematically attacking our asylum system from within: violating domestic and international laws, and undermining one of our nation's most cherished ideals – that our country will act as a refuge for the oppressed and persecuted around the world. It can and should be used as an issue outline for future action.

RECOMMENDATIONS FOR CONGRESSIONAL INVESTIGATION

First, this report provides a roadmap to topics where the Congress should use its investigative power to expose the truth. Here are six areas that merit further congressional investigation, particularly by committees with subpoena power.

1. **The White House's Purge of DHS Immigration Leadership in 2019:** Congress should investigate the summary firings, "reassignments," and replacements of career leaders with political loyalists.
2. **The White House's Treatment of the Asylum System with Contempt:** Congress should investigate whether there are further internal documents that shed light on the administration's attitude towards the legal system of asylum and key players' motivations for pursuing the policy changes that are detailed in this report.
3. **Destroying Asylum by Replacing Asylum Officers with Law Enforcement Agents:** Congress should investigate how far these plans have progressed, and whether there are further plans to systemically replace trained asylum officers with CBP officers, or with other individuals who will approach the process from a law enforcement perspective rather than an asylum law perspective.

4. **Saying “No” to Everyone:** Congress should investigate the administration’s attempts to eliminate established grounds for asylum, illegally raise the credible fear standards, and allow headquarters officials to intervene to overrule established protocols.
5. **Ending Affirmative Asylum:** More than 325,000 cases are now in backlog, yet the White House has slowed or stopped USCIS from processing affirmative cases. Congress should investigate whether the administration has any plans to address this backlog, and what the medium-to-long term consequences will be if the status quo remains and this backlog continues to grow.
6. **Asylum Officers Objecting to or Refusing to Participate in the MPP Program:** Congress should conduct further investigation into rank-and-file asylum officers who have objected to the MPP program, and whether the view that this program is illegal is shared widely among asylum officers.

RECOMMENDATIONS FOR POLICY CHANGES

This report also makes clear that there is ample room for changes to laws and policies that could help mitigate or stop the damage from politically driven decisions designed to undermine the asylum system. Here are eight recommendations for policy changes to address the findings of this report.

1. **Establish a \$10,000 civil claim against the U.S. government for delaying or preventing asylum seekers from crossing the U.S. border.** The Trump Administration has been instructing CBP to violate American law—as clearly stated in the Immigration and Naturalization Act: If an immigrant “indicates either an intention to apply for asylum... or a fear of persecution, the [immigration] officer shall refer the alien for an interview by an asylum officer.” Unfortunately, this provision of law has no teeth because no penalty exists to compel compliance.

Equipping the U.S. code with meaningful penalties provides leverage to mandate compliance with existing laws that are currently being ignored without consequence. Physically turning away people seeking asylum at ports of entry, sending families to be warehoused in other countries, and outsourcing quasi-governmental lists that meter entry for asylees are all documented violations of law, established precedent, and international agreements that continue to this day without deterrence or consequences. (*pgs. 33-34*)

2. **Prohibit CBP Officers from acting as USCIS officers.** Unprecedented efforts redirecting CBP officers from their law enforcement duties to hear asylum cases is an inappropriate jurisdictional overstep, and undermines the integrity of the asylum process currently conducted by specialized and trained USCIS asylum officers. This proposal would provide sufficient oversight of this process, given that CBP officers receive limited training to conduct asylum interviews and lack sufficient study of the conditions of a person's country of origin to effectively assess an asylum claim. (pgs. 43-46)

3. **Establish stringent hiring qualifications for immigration judges to ensure a competent and independent judicial process.** The independence of immigration courts is paramount to an effective asylum system. Currently, immigration courts are under the jurisdiction of the DOJ - an executive branch agency - rather than the judicial branch of the government. This structure gives the DOJ the authority to hire partisan or underqualified immigration judges. Independence is a necessity to due process, and unfortunately, this has been subsumed in the gargantuan efforts to reduce the asylum case backlog and instead of focusing on the task at hand, immigration law judges are forced to fight the Trump administration efforts to decertify their unions and weaken their judicial independence. (pgs. 8-11)

4. **Right to counsel for all unaccompanied children.** No group is more vulnerable in the asylum process than unaccompanied children, many of whom do not speak English, and certainly are in no position to understand the complexities of our asylum process and immigration courts. They must have an advocate that does. Thousands of children are currently left to navigate immigration courts without representation, leaving them susceptible to family separation, exploitation, and to be forced to return to unsafe conditions. (pgs. 28-29)

5. **Prioritize family-based and small group care for all unaccompanied children, unless a trained child welfare expert makes an affirmative, individualized determination that congregate care would be in the best interest of the child.** Children do not belong grouped together in cages. Shifting the care standard for children from using large warehouse-style detention facilities to smaller, tailored care settings, and including a particular emphasis on quickly placing children with family members or in non-family sponsor homes, minimizes the impact of what is already a traumatic and confusing process for children in an unfamiliar country. Additionally, requiring child welfare staff to be part of the decision making process will help provide oversight of children's wellbeing, in contrast to insufficiently trained guards at detention facilities. (pgs. 12-14; 18-21)

6. **Require daily monitoring of all immigration detention facilities (including contracted facilities) by independent and specialized legal counsel and child welfare experts.** Under current law, dangerous and unsanitary conditions in detention facilities have become all too common, and in some cases, have contributed to the deaths of detained refugees. The law should mandate weekly reports to Congress listing critical health and safety actions for ICE, CBP, and ORR to address within seven days. Any facility failing to remedy a listed action within three weeks must be immediately shut down.

Mandating compliance with basic protections for detainees is an unfortunate necessity, given that for-profit facilities have demonstrated repeated violations of safety, sanitation, and overcrowding standards. Raising the bar for standards of care will help prevent the unnecessary deaths that we have seen thus far and reduce the traumatic effect of jailing people that seek asylum legally. (pgs. 14-19)

7. **Ban for-profit detention centers.** For-profit prisons have no incentive to move children, adults or families out of their facilities expeditiously. For children, for-profit detention centers play a central role in the Trump administration's concerted efforts to keep them locked up for long periods of time in order to send a message of deterrence, a clear violation of the *Flores* settlement.
8. **Rescind the current information sharing MOA between DHS and ORR.** The current information sharing agreement between the agency responsible for children's welfare, ORR, and the agency in charge of detention and deportation, ICE, effectively deters family and close friends from stepping forward to sponsor a child waiting in detention. In order to move children out of detention as quickly as possible to an appropriate living situation reflecting their developmental and emotional needs, the MOA must be rescinded.

APPENDIX

APPENDIX EXHIBIT A: Eligibility for Asylum

INA § 208(a) (8 U.S.C. § 1158(a))

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

APPENDIX EXHIBIT B: Establishment of USCIS

6 U.S.C. § 271

(a) Establishment of Bureau

(1) In general

There shall be in the Department a bureau to be known as the “Bureau of Citizenship and Immigration Services”.

APPENDIX EXHIBIT C: Jurisdiction

8 C.F.R. § 208.2(a), (b)

(a) Refugee, Asylum, and International Operations (RAIO). Except as provided in paragraph (b) or (c) of this section, RAIO shall have initial jurisdiction over an asylum application filed by an alien physically present in the United States or seeking admission at a port-of-entry. RAIO shall also have initial jurisdiction over credible fear determinations under § 208.30 and reasonable fear determinations under § 208.31.

(b) Jurisdiction of Immigration Court in general. Immigration judges shall have exclusive jurisdiction over asylum applications filed by an alien who has been served a Form I-221, Order to Show Cause; Form I-122, Notice to Applicant for Admission Detained for a Hearing before an Immigration Judge; or Form I-862, Notice to Appear, after the charging document has been filed with the Immigration Court. Immigration judges shall also have jurisdiction over any asylum applications filed prior to April 1, 1997, by alien crewmembers who have remained in the United States longer than authorized, by applicants for admission under the Visa Waiver Pilot Program, and by aliens who have been admitted to the United States under the Visa Waiver Pilot Program. Immigration judges shall also have the authority to review reasonable fear determinations referred to the Immigration Court under § 208.31, and credible fear determinations referred to the Immigration Court under § 208.30.

APPENDIX EXHIBIT D: Removal Proceedings

8 U.S.C. § 1229a(d)(1)

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases, an evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien, if it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

APPENDIX EXHIBIT D: Removal Proceedings

(B)the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C)a complete record shall be kept of all testimony and evidence produced at the proceeding.

APPENDIX EXHIBIT E: Removal Proceedings

8 U.S.C. § 1225(b)(1)(A)(i), (iii)

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

**APPENDIX EXHIBIT F: Credible Fear of Persecution & Reasonable Fear of Persecution or Torture
Determinations**

Subpart B—Credible Fear of Persecution 208.30

Credible fear determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act or whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act.

208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

§ 1208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

(a) Jurisdiction. This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. The Service has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(c) Interview and procedure. The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable fear determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government, and may present evidence, if available, relevant to the possibility of persecution or torture.

The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

APPENDIX EXHIBIT G: Asylum Interview Procedure

8 C.F.R. § 208.9

§ 208.9 Procedure for interview before an asylum officer.

(a) The Service shall adjudicate the claim of each asylum applicant whose application is complete within the meaning of § 208.3(c)(3) and is within the jurisdiction of the Service.

(b) The asylum officer shall conduct the interview in a nonadversarial manner and, except at the request of the applicant, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for asylum. At the time of the interview, the applicant must provide complete information regarding his or her identity, including name, date and place of birth, and nationality, and may be required to register this identity. The applicant may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence.

(c) The asylum officer shall have authority to administer oaths, verify the identity of the applicant (including through the use of electronic means), verify the identity of any interpreter, present and receive evidence, and question the applicant and any witnesses.

(d) Upon completion of the interview, the applicant or the applicant's representative shall have an opportunity to make a statement or comment on the evidence presented. The asylum officer may, in his or her discretion, limit the length of such statement or comment and may require its submission in writing. Upon completion of the interview, the applicant shall be informed that he or she must appear in person to receive and to acknowledge receipt of the decision of the asylum officer and any other accompanying material at a time and place designated by the asylum officer, except as otherwise provided by the asylum officer. An applicant's failure to appear to receive and acknowledge receipt of the decision shall be treated as delay caused by the applicant for purposes of § 208.7(a)(3) and shall extend the period within which the applicant may not apply for employment authorization by the number of days until the applicant does appear to receive and acknowledge receipt of the decision or until the applicant appears before an immigration judge in response to the issuance of a charging document under § 208.14(c).

(e) The asylum officer shall consider evidence submitted by the applicant together with his or her asylum application, as well as any evidence submitted by the applicant before or at the interview. As a matter of discretion, the asylum officer may grant the applicant a brief extension of time following an interview during which the applicant may submit additional evidence. Any such extension shall extend by an equivalent time the periods specified by § 208.7 for the filing and adjudication of any employment authorization application.

(f) The asylum application, all supporting information provided by the applicant, any comments submitted by the Department of State or by the Service, and any other information specific to the applicant's case and considered by the asylum officer shall comprise the record.

(g) An applicant unable to proceed with the interview in English must provide, at no expense to the Service, a competent interpreter fluent in both English and the applicant's native language or any other language in which the applicant is fluent. The interpreter must be at least 18 years of age. Neither the applicant's attorney or representative of record, a witness testifying on the applicant's behalf, nor a representative or employee of the applicant's country of nationality, or if stateless, country of last habitual residence, may serve as the applicant's interpreter. Failure without good cause to comply with this paragraph may be considered a failure to appear for the interview for purposes of § 208.10.

APPENDIX EXHIBIT H: Credible Fear Determinations

8 C.F.R. § 208.30(d) (f)

(d) Interview. The asylum officer, as defined in section 235(b)(1)(E) of the Act, will conduct the interview in a nonadversarial manner, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture, and shall conduct the interview as follows:

(f) Procedures for a positive credible fear finding. If an alien, other than an alien stowaway, is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-862, Notice to Appear, for full consideration of the asylum and withholding of removal claim in proceedings under section 240 of the Act. If an alien stowaway is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-863, Notice of Referral to Immigration Judge, for full consideration of the asylum claim, or the withholding of removal claim, in proceedings under § 208.2(c). Parole of the alien may be considered only in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter.

APPENDIX EXHIBIT I: MPP Referral Cases at PDN


Fri 5/24/2019 5:10 AM
RE: MPP Referral Cases at PDN - El Paso Port of Entry May 23, 2019
 To: [Redacted]
 Cc: [Redacted]

A number	Applicant name	# in FAMU	Interviewing Officer	Officer Phone number	Scheduled Start Time	Facility	Comments
A203	[Redacted]	1	[Redacted]	[Redacted]	7AM local (9AM EST)	ELP POE (PDN)	pregnant
A203	[Redacted]	3	[Redacted]	[Redacted]		ELP POE (PDN)	
A203	[Redacted]	1	[Redacted]	[Redacted]		ELP POE (PDN)	
A20	[Redacted]	1	[Redacted]	[Redacted]	7AM local (9AM EST)	ELP POE (PDN)	pregnant
A20	[Redacted]	1	[Redacted]	[Redacted]		ELP POE (PDN)	pregnant
A20	[Redacted]	1	[Redacted]	[Redacted]		ELP POE (PDN)	

Fri 5/24/2019 9:11 AM
Wanda Karstensen on behalf of [Redacted]
 RE: MPP Referral Cases at PDN - El Paso Port of Entry May 23, 2019
 [Redacted]

A203	[Redacted]	1	[Redacted]	[Redacted]	7AM local (9AM EST)	ELP POE (PDN)	has attorney/ pregnant 9 months
A203	[Redacted]	1	[Redacted]	[Redacted]		ELP POE (PDN)	
A203	[Redacted]	1	[Redacted]	[Redacted]		ELP POE (PDN)	
A20	[Redacted]	1	[Redacted]	[Redacted]	7AM local (9AM EST)	ELP POE (PDN)	pregnant
A20	[Redacted]	1	[Redacted]	[Redacted]		ELP POE (PDN)	pregnant
A20	[Redacted]	1	[Redacted]	[Redacted]		ELP POE (PDN)	

[Redacted]

Department of Homeland Security



Wed 9/4/2019 3:14 PM

Higgins, Jennifer B

Message from the RAIO Associate Director: Personnel Update

To RAIO - ALL1

Cc ■ Neufeld, Donald W; ■ Enrich, Matthew D; ■ Davidson, Andrew J

RAIO Colleagues,

I am writing to let you know about some leadership changes that will affect RAIO, SCOPS, and FDNS.

John Lafferty, Chief of the Asylum Division, has been appointed to

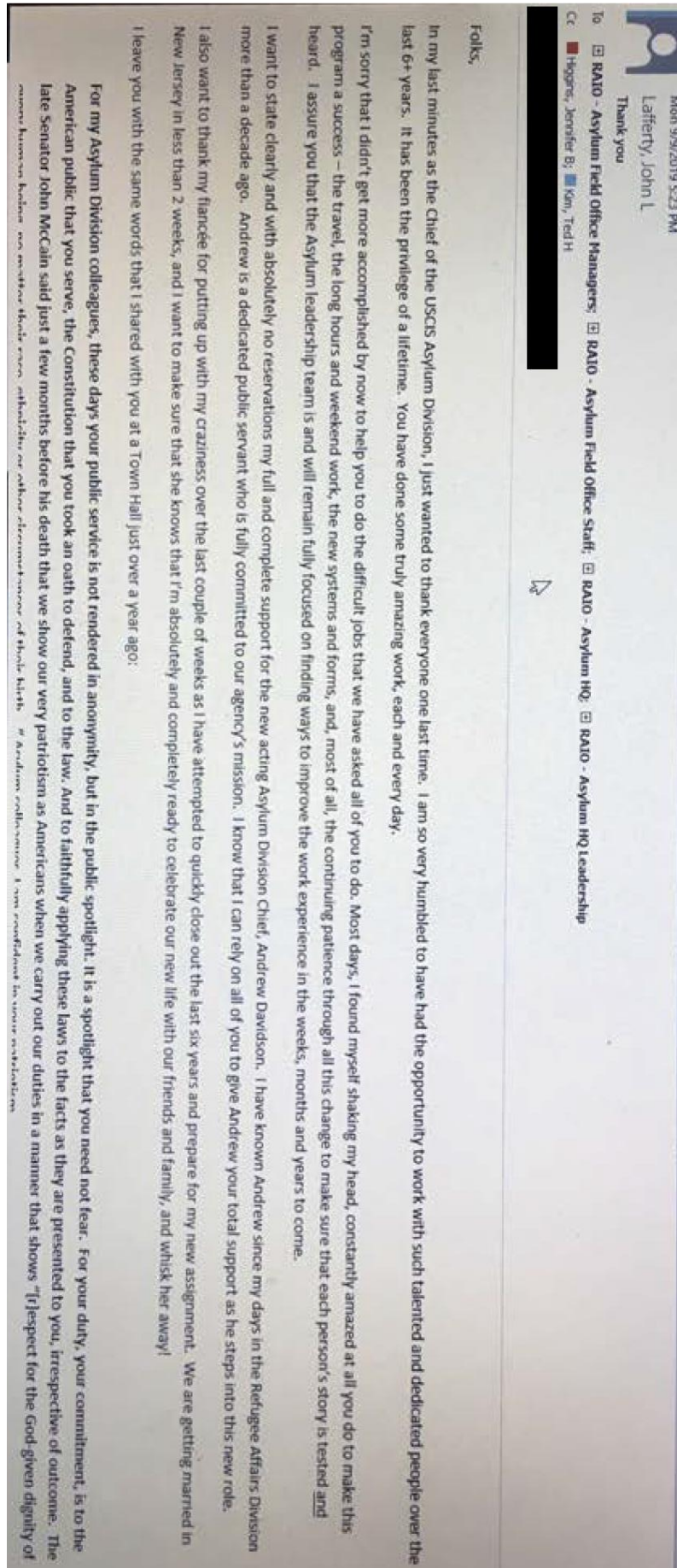
be the new Deputy Director of the Potomac Service Center (PSC). He will begin in his new position on September 10th. John has served with distinction as the Chief of the Asylum Division for the past six years and has led the Division through some of its most challenging times and a period of unprecedented growth and change. Under John's steadfast leadership and unparalleled expertise, the Asylum Division modernized its case management system, established a new vetting center, opened three sub-offices, doubled the size of its workforce, and managed historic, exponential surges of cases at the southwest border. Above all, John's leadership was characterized by a selfless, unwavering, and passionate commitment to those he served—the applicants, his staff, and the American public. John has made numerous contributions not just in the Asylum Division, but in his various leadership roles in the International Operations and Refugee Affairs Divisions. We thank John for his decades of extraordinary service in RAIO and his legacy of professionalism. John is truly one of the most talented civil servants I have ever had the privilege to work for and with. I am sorry to see John leave RAIO and will miss his leadership, exacting legal knowledge, and humor, but I know his legacy will remain. I also know that his talents will be put to good use at the PSC, where under its Director he will lead some 700 USCIS staff and more than 200 contractors in providing USCIS applicant services including I-90 and student EAD processing for the whole country as well as the entirety of other services that SCOPS offers.

Andrew Davidson, currently the Deputy Associate Director for the Fraud Detection and National Security Directorate (FDNS), will serve as the Acting Chief of the Asylum Division. Andrew previously served in several leadership roles throughout USCIS and the former INS, including serving as Deputy Associate Director of the Immigration Records and Identity Services Directorate, Kendall Field Office Director, and special assistant to the USCIS Deputy Director. Andrew is an alumnus of RAIO, and he and I had the opportunity to work very closely together in his role as the Security Vetting and Program Integrity Branch Chief in the Refugee Affairs Division. I am confident that Andrew's leadership and expertise will be a tremendous asset to the Asylum Division and to RAIO, particularly as we complete our hiring surge to fill existing vacancies, continue efforts to enhance program integrity, and implement new technologies and efficiencies. Please join me in welcoming Andrew back to the RAIO family.

With these changes, both John and Andrew will bring their many strengths, talents, and unique perspectives to different parts of USCIS. I look forward to our continued collaboration and working with John and Andrew as they take on their new roles.

Sincerely,
Jennifer B. Higgins

APPENDIX EXHIBIT K: Email from John Lafferty, "Thank you" (September 9, 2019)



Rather than spending my few minutes up here listing the Asylum Division's many accomplishments this year, and they are certainly many, along with the many challenges that are still ahead of us, I would instead like to take this moment to acknowledge the passing of an extraordinary public servant, Senator John McCain, and thank him for his commitment to public service and to those like you who also serve.

In our line of work, we are confronted on a daily basis with the full range of the human condition – the weak and the powerless, straining to hold on to their dignity, while fellow human beings use power to sow fear and violence because of some real or imagined difference in culture, creed, color, or conscience. There are certainly few among us who are more acutely aware of the suffering that one human being is capable of inflicting upon another than Senator McCain was. His knowledge of torture was personal, earned in the most brutal of fashions.

This man, given all that he had gone through, fully understood what makes America special and worth protecting. Senator McCain's unwavering support for the men and women of our armed services perfectly coexisted with his understanding that America's history of immigration and providing protection to those in need is also part of what makes this country strong. In a speech at a La Raza national conference in 1996, the Senator expounded on this belief in this way: "After independence and union, perhaps the most important accomplishment of America's founding generation was the preparation of the country to become, in Thomas Paine's words, 'an asylum for mankind,' an unprecedented land of immigrants. The epic migration that followed has no parallel in history and its impact on our national development is impossible to overestimate.

Our religion, politics, science, arts, industry and agriculture are the work of a multitude of cultures all united by their attraction to the universal appeal of our national ideals — by the desire to live free and prosperous lives. The fortunes of this heritage are measured in the success of our democratic experiment, and in our unrivaled growth and prosperity.”

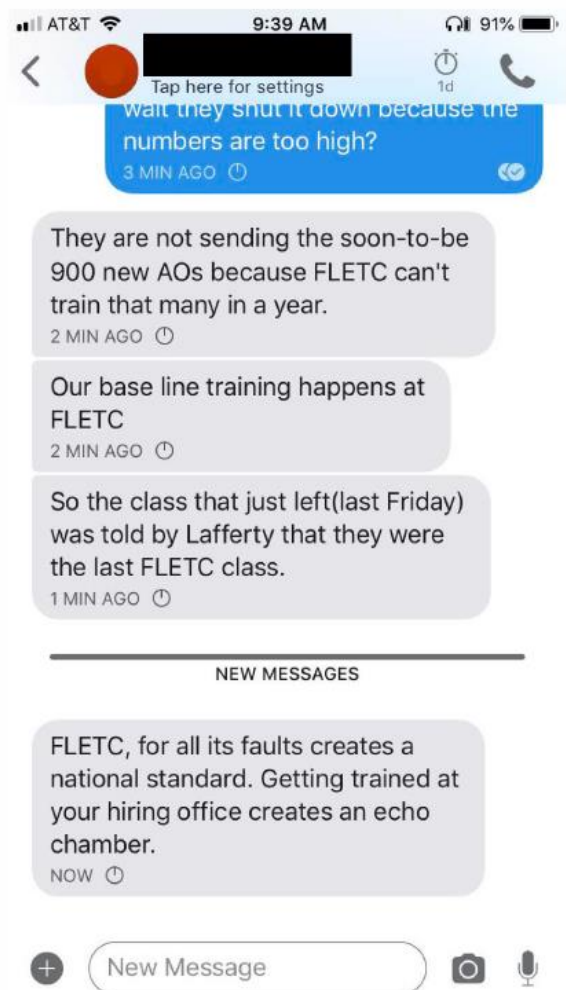
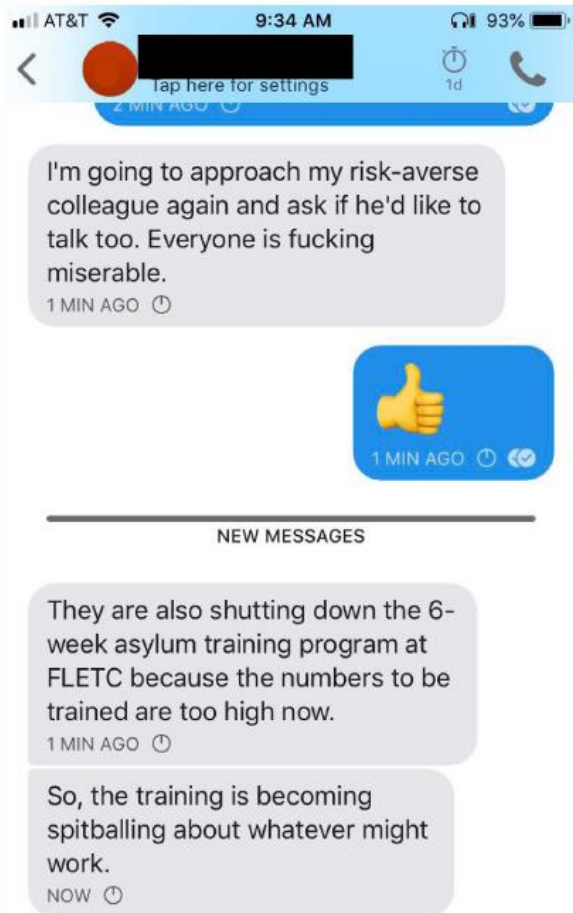
For my Asylum Division colleagues, these days our public service is not rendered in anonymity, but in the glare of the public spotlight. Senator McCain’s “asylum for mankind” is under scrutiny, but it is a scrutiny that we need not fear. For our duty, our commitment is to the American public that we serve and to the law. And to faithfully applying ^{these} those laws to the facts as they are presented to us, irrespective of outcome. Senator McCain himself said ^{just a few months ago} that we show our very patriotism when we carry out these duties in a manner that shows “[r]espect for the God-given dignity of every human being, no matter their race, ethnicity or other circumstances of their birth....” Asylum colleagues, I am confident in your patriotism.

In the Prologue to his 2002 memoir, Worth the Fighting For, Senator McCain, described public service as “an honorable profession, practiced more by the selfless than the self-serving.” As Senator McCain is laid to rest this week after 60+ years of extraordinary service to a country he loved so deeply, I want to thank him and his family for his inspiring example of selfless service.

Senator McCain, may you rest in well-deserved peace.

^{Asylum} ~~And~~ ^{colleagues} my hope for each of you is that you find the same pride that Senator McCain found in public service; in your service to this noble mission, protecting this nation as we protect those who have suffered or are threatened with harm. I want to thank all of you for your continuing selfless service, as well as the patriotism you exhibit each and every day. With you, there is no challenge that we cannot meet. I am proud and honored to serve alongside you. Thank you.

APPENDIX EXHIBIT M: Confidential Whistleblower Text Messages Regarding USCIS Training



USCIS Email sent August 15, 2019

Dear U.S. Citizenship and Immigration Services Newark Asylum Office and Boston Asylum Sub-Office Stakeholder,

This message is to notify you that, in response to shifting priorities and the continued influx of cases at the Southwest Border, both the Newark Asylum Office and the Sub Office in Boston will be diverting a greater number of staff to the APSO caseload.

Effective Monday, August 19th, both offices will assign a majority of interviewing officers to the Credible Fear/Reasonable Fear workload. Officers will continue to travel to the Southwest border, and an increased number of officers will be assigned to interview Credible Fear and Reasonable Fear cases either in-person or telephonically from the home offices.

This will necessarily have an impact on our Affirmative caseload. We intend to continue to interview a small number of cases in the Newark (Lyndhurst) office. In Boston, staff will continue to complete the process of interviewed cases, but no new interviews will be scheduled for the time being. In both offices, the caseload will be monitored and we will resume a more robust interview schedule as soon as possible. To the extent that cases are scheduled for an interview at all, the scheduling will continue to follow existing priorities. We will continue to maintain and schedule cases from our 'expedite' list and our 'short-notice' list, although, of course, the opportunities to do so will diminish.

We are disappointed not to be able to continue to cut into our backlog or to adjudicate affirmative cases. We appreciate your understanding.

Sincerely,

Susan
Raufer
Director,
Newark Asylum Office

Meghann Boyle,
Sub-Office
Director
Boston Asylum Sub-Office

**Email from Asylum Officer to USCIS Management After August 8, 2019 Meeting with
Management Over Refusal to Participate in MPP**

After careful consideration and moral contemplation, I have decided that I cannot conduct Migrant Protection Protocol interviews or otherwise participate in the MPP program. Following the various meetings with Supervisory Asylum Officers last Thursday, August 8, 2019, and possible continued disciplinary action, I am memorializing my objections in writing.

As an Asylum Officer, I have sworn to defend the constitution and faithfully discharge the duties of my office, including the fair administration of our immigration laws. The MPP is illegal. The program exists without statutory authority under the INA, violates normal rulemaking procedures under the APA, and violates international law. The program's execution impairs the fair implementation of our laws and runs directly counter to the values of RAIO. I respectfully decline any further participation in the program.

First, there is no statutory authority for the MPP, and the program violates US immigration law. I recognize that as an Asylum Officer I am not in a position of authority to declare the MPP illegal for RAIO. However, as an attorney trained in immigration and administrative law and well versed in statutory analysis, I have concluded that DHS does not have the authority to implement the MPP. I further note that, even when staying the injunction, no judge has made a final ruling that the MPP is legal. Implementation of a program for which there is no legal authority violates my oath to office.

The legal question at issue is whether the two provisions governing inspection for applications for admissions-expedited removal under INA§ 235(b)(1) and "other aliens" un INA§ 235(b)(2)-are mutually exclusive or if CBP can proceed under section (b)(2) even when an applicant falls within the requirements of expedited removal.¹ The administration has claimed legal authority to implement the MPP pursuant to INA§ 235(b)(2)(C), which allows for the return to a contiguous territory of an alien who is subject to admission and inspection procedures under (b)(2). However, section 235(b)(2)(B) provides explicit exceptions to individuals subject to section 235(b)(2) and specifically states that (b)(2) does not apply to aliens subject to inspection under (b)(1). Similarly, section (b)(1) provides an explicit exception for individuals who would otherwise be subject to expedited removal, and references this exception multiple times while describing expedited removal proceedings. INA§ 235(b)(1)(F); see also, INA§ 235(b)(1)(A)(i), (ii). The exclusion language under each provision makes clear that Congress considered and specifically determined who would be excepted from inspection under each provision. Individuals subject to inspection under (b)(1) are not subject to provisions of (b)(2). The separation of the two processes for admission, 235(b)(1) and (b)(2), has been recognized by both the Supreme Court and the Attorney General. *Jennings v. Rodriguez*, 138 S. Ct. 830,837 (2018); *Matter of M-S-*, 27 I&N Dec. 509, 510 (BIA April 16, 2019).

¹ Individuals are subject to expedited removal only if they are removable under INA §§ 212(a)(6)(C) or 212(a)(7).

**APPENDIX N: Confidential Whistleblower Email to USCIS Management Regarding
Migrant Protection Protocols (August 12, 2019)**

Furthermore, despite the poor use of language in Judge O'Scannlain's opinion, whether an applicant for admission is subject to inspection under (b)(1) and (b)(2) is not discretionary. The statutory language of whether an applicant is inspected pursuant to expedited removal is clearly prescriptive. If an immigration officer determines that an individual is removable under INA §§ 212(a)(6)(C) or 212(a)(7) "the officer shall order the alien removed" pursuant to expedited removal proceedings. INA §§ 235(b)(1)(A)(i) (emphasis added). The mandatory nature of expedited removal has not been disputed since its inception and conforms with the congressional intent of deterring undocumented migrations. Additionally, once an applicant expresses an intent to apply for asylum or a fear of persecution "the officer shall refer the alien for an interview by an asylum officer" for credible fear screenings. INA §§ 235(b)(1)(A)(ii) (emphasis added). In other words, individuals who apply for admission in the United States who are removable under INA §§ 212(a)(6)(C) or 212(a)(7) must be placed in expedited removal and must be given a credible fear interview if they request asylum or claim a fear of persecution. The MPP violates the INA because it improperly employs processes under section (b)(2) to remove individuals who must be inspected and processed under expedited removal and credible fear.

Second, even if statutory authority exists, the Asylum Office has not had proper jurisdiction to conduct the interviews. For any asylum office to have jurisdiction to conduct an MPP interview, the applicant must have already been placed in removal proceedings under INA § 240 proceedings. Section 235(b)(2) provides that if an immigration official determines that (1) an applicant for admission "is not clearly and beyond a doubt entitled to be admitted, [(2)] the alien shall be detained for a proceeding under section 240; . . . [and (3)] the Attorney General may return the alien to that [contiguous] territory pending a proceeding under section 240. INA § 235(b)(2) (emphasis added). However, 240 proceedings are not initiated until an NTA is properly served on the applicant and the immigration court. Without a properly served NTA-that is, having been read the allegations, charges, and warnings on the back of the NTA, and subsequently signed by the applicant and served on the court-the Asylum Office does not have jurisdiction to conduct the interviews. A statement in the text of the 1-213 does confer jurisdiction. To my knowledge, no applicant interviewed by our office has received an NTA prior to the interview.

Third, the MPP violates our country's obligation under the 1967 Protocol. By ratifying the Protocol, the United States, among other things, agreed to not discriminate against refugees on the basis of their race, religion, or nationality, and to not penalize refugees for their undocumented entry into the country. However, the MPP both discriminates and penalizes. Implementation of the MPP is clearly designed to further this administration's racist agenda of keeping Hispanic and Latino populations from entering the United States. This is evident in the arbitrary nature of the order, in that it only applies to the southern border. It is also clear from the half-hazard implementation that appears to target populations from specific Central American countries even though a much broader range of international migrants cross the southern border. It is also demonstrated by the exempting from MPP interviews certain populations from those countries who have a high likelihood of receiving a positive finding.

**APPENDIX N: Confidential Whistleblower Email to USCIS Management Regarding
Migrant Protection Protocols (August 12, 2019)**

Furthermore, the implementation is calculated to prevent individuals from receiving any type of protection or immigration benefits in the future. As such, it is a punitive measure intended to punish individuals who attempt to request protection in the United States. There is no clearly established policy and system for notifying applicants of changes to hearing dates and times, or for the applicants to provide change of addresses to the courts and Border Patrol. Without a highly functional notice system, the administration has ensured that a high number of applicants will miss their court dates. In such cases, immigration judges are required to order the applicant removed in absentia, thereby barring them from entering the United States for 5 to 10 years, subjecting them to reinstated orders of removal if the applicant again seeks protection in the United States, and thereby preventing them from applying for asylum.

Fifth, even if the Asylum Office did have statutory authority and proper jurisdictions for these interviews, participation in the MPP as it currently functions would still violate our oath to office. As Asylum Officers, we have sworn to "well and faithfully discharge the duties of the office." SF 61. Those duties include "proper administration of our immigration laws." See, USCIS/RAIO Mission and Core Values, available on the ECN. However, current USCIS policy governing MPP implementation is preventing us from complying with our sworn duty to properly administer the laws governing asylum. Individuals subject to MPP are almost certainly members of a particular social group consisting of "non-Mexican migrants traveling through Mexico " or some alternatively phrased variant. Such a group shares an immutable past experience, is particular, and the evidence suggests is socially distinct in Mexico. However, CIS policy regarding which social groups are considered cognizable, and the constraint on individual analysis, prohibits officers from analyzing whether such a group is cognizable and if an MPP applicant would be persecuted in Mexico for their membership in such a group. These arbitrarily imposed restrictions on factual and legal analysis prevent us, as officers from faithfully discharging the duties of our office.

Sixth, while purporting to comply with international law, in fact the MPP practically ensures violation of our international obligation of non-refoulement. Assuming that the statute does delegate DHS authority to conduct MPP-type interviews, we have no implementing regulations. The current system is ad hoc and has not been subject to notice and comment making or any type of review. The regulatory process is critical to ensure that proceedings such as the MPP does not commit the numerous legal violations already noted. The current process places on the applicants the highest burden of proof in civil proceedings in the lowest quality hearing available. This is a legal standard not previously implemented by the Asylum Office and reserved for an Immigration Judge in a full hearing.² However, we are conducting the interviews telephonically, often with poor telephone connections, while at the same time denying applicants any time to rest, gather evidence, present witnesses, and, most egregious of all, denying them access to legal representation. The description of the MPP read at the beginning of the interview does not even

² Additionally, anecdotal evidence reported by officers relating their experience with the MPP indicates that the level of proof found necessary by supervisors to sign a positive finding is in fact much higher than a preponderance of the evidence.

**APPENDIX N: Confidential Whistleblower Email to USCIS Management Regarding
Migrant Protection Protocols (August 12, 2019)**

explain what a "protected ground" is or what the applicant is required to prove. The ad hoc implementation, lack of regulations, denial of basic rights in all other immigration proceedings, and high legal standard all but ensure that an applicant is unable to meet his or her burden. Participating in such a clearly biased system further violates our oath of office.

Finally, even if all the above were remedied, the process is still morally objectionable and contrary to the RAIO mission of protection. The Asylum Office would still be complicit in returning individuals to an unsafe and unreasonable situation. One where we would likely find internal relocation unavailable were it the applicant's home country, and in fact regularly do make that determination for Mexican applicants. RAIO research recently reported the high levels of violence and crime specifically targeting migrant communities in Mexico, returned from the MPP. See RAIO Research Unit, News Summary Bulletin July 2019. Additionally, it is unreasonable to make individuals, often without financial resources and caring for small children, to wait an indefinite period of time without employment. The unreasonableness of such a requirement is why the law mandates the application clock and issuance of employment documents if the US government cannot process a request for protection in a timely manner. Assurances by the Mexican government that persons returned to Mexico under the MPP would receive work permits and protection were a key reason that the injunction was stayed. *Innovation Law Lab v. McAleenan*, No. 19-15716, 924, F. 3d 503 (9th Cir. 2019). However, the Mexican government has not fulfilled its promise of providing work permits and protection. See RAIO Research Unit, News Summary Bulletin July 2019. While other immigration processes may result in returning someone to a place where they face true risk of harm because they do not qualify for protection or an immigration benefit, such instances occur only after the applicant has received substantially more due process. Even then, those individuals are returned to their countries of nationality, not an arbitrary third country to which they likely have no ties. The MPP is substantively and morally distinct from other aspects of our work.

For the foregoing reasons I have respectfully declined to participate in the MPP.