

reduction in black carbon emissions by any Arctic Council state. We are doing our part, and we encourage other states to do the same, and to do so with full transparency. That's true for every issue before this council⁵

The day before the official Arctic Council ministerial meeting, Pompeo delivered a separate address in which he argued that the Arctic Council could no longer afford to focus exclusively on cultural and scientific issues and indicated that it should also consider strategic ones.⁶ In the same speech, Pompeo raised security concerns relating to China and Russia, arguing that “China could use its civilian research presence in the Arctic to strengthen its military presence” and that Russia’s attempts to control the passage through the Northern Sea Route were “part of a pattern of aggressive Russian behavior . . . in the Arctic.”⁷ China’s Special Representative for Arctic Affairs responded that Pompeo’s accusations were groundless and would not affect China’s involvement in the Arctic.⁸ In his official remarks at the council meeting, Russian Foreign Minister Sergey Lavrov stated, “there are absolutely no pretexts for conflicts or attempts to address any issues arising here with a military response.”⁹

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

Trump Administration Takes Domestic and International Measures to Restrict Asylum
doi:10.1017/ajil.2019.61

The Trump administration has continued its efforts to restrict immigration through a series of measures designed to limit the availability of asylum in the United States and to promote increased immigration enforcement in Mexico. In July of 2019, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) promulgated an interim final rule disqualifying asylum applicants who transited through third countries without seeking protection in those countries. This rule immediately became the subject of ongoing litigation, and, in September of 2019, the Supreme Court stayed an injunction that had been issued against its enforcement, with two justices dissenting. At the international level, over the summer

⁵ U.S. Dep’t of State Press Release, Remarks at the Arctic Council Ministerial Meeting (May 7, 2019), at <https://www.state.gov/remarks-at-the-arctic-council-ministerial-meeting-2> [<https://perma.cc/VRS8-N5ZU>].

⁶ Secretary of State Pompeo Remarks on U.S.-Arctic Policy, C-SPAN, at 3:20 (May 6, 2019), at <https://www.c-span.org/video/?460478-1/secretary-state-pompeo-warns-russia-china-arctic-policy-address-finland>.

⁷ *Id.* at 8:40, 10:56.

⁸ Ming Mei, *Chinese Representative Refutes Unwarranted U.S. Accusation on Arctic Cooperation*, XINHUA (May 7, 2019), at http://www.xinhuanet.com/english/2019-05/07/c_138040973.htm. China has observer status at the Arctic Council. See Arctic Council, Observers, at <https://arctic-council.org/index.php/en/about-us/arctic-council/observers>.

⁹ Arctic Council Press Release, Foreign Minister Sergey Lavrov’s Remarks at the 11th Arctic Council Ministerial Meeting, Rovaniemi, at 1 (May 7, 2019), at https://oaarchive.arctic-council.org/bitstream/handle/11374/2405/2019_Rovaniemi_Ministerial_Statement_by_the_Russian_Federation_English.pdf?sequence=5&isAllowed=y.

and early fall of 2019, threats of economic sanctions led Guatemala, El Salvador, Honduras, and Mexico to make agreements with the United States aimed at curbing unauthorized migration into the United States. Guatemala signed an agreement with the United States under which asylum applicants in the United States who had transited through Guatemala on the way could be returned to Guatemala to pursue their asylum claims. El Salvador and Honduras also reached agreements with the United States relating to migration. Mexico committed to increasing its efforts to stem the flow of unauthorized immigration through its borders and assented to the U.S. expansion of its Migrant Protection Protocols. The Trump administration has continued pursuing other tactics to limit immigration and the availability of asylum, including through the issuance of legal decisions by Attorney General William Barr and continued litigation surrounding the construction of a border wall.

Throughout his presidency, Trump has implemented policies designed to reduce immigration to the United States.¹ In the past year, the Trump administration has intensified efforts to curb migration across the southern border by severely restricting the ability of individuals to seek asylum in the United States.² On November 9, 2018, Trump announced his intention to limit access to asylum to those who entered the United States at an official port of entry,³ and DHS and DOJ promulgated an interim final rule to this effect.⁴ Litigation contesting the rule was swift, and a preliminary injunction against its enforcement was granted on December 19, 2018.⁵

On July 16, 2019, DHS and DOJ published an interim final rule that would further limit the availability of asylum. Under this rule, individuals who transited through third countries and did not apply for asylum in those countries would be ineligible to apply for asylum in the United States.⁶ The rule states:

¹ For additional background, see Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 377 (2019) [hereinafter *Asylum Story*]; Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 741 (2018).

² See *Asylum Story*, *supra* note 1. On April 29, 2019, Trump cited asylum fraud as “the biggest loophole drawing illegal aliens to our borders” and issued a presidential proclamation calling on officials to “strengthen asylum procedures” by promulgating regulations to restructure court proceedings for asylum seekers, institute fees to apply for asylum or request work authorization, and “reprioritize the assignment of immigration officers.” White House Fact Sheet, President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis (Apr. 29, 2019), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis> [<https://perma.cc/T72G-GCRS>]; Donald J. Trump, Presidential Memorandum on Additional Measures To Enhance Border Security and Restore Integrity to Our Immigration System, 2019 DAILY COMP. PRES. DOC. No. 251 (Apr. 29).

³ Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018).

⁴ *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018).

⁵ *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. Dec. 19, 2018). For additional information, including a discussion of the Supreme Court’s decision not to stay the injunction, see *Asylum Story*, *supra* note 1, at 382–83. Trump extended the November 9 proclamation, which was set to expire ninety days after its issuance, through two additional proclamations issued on February 7, 2019, and May 8, 2019. In each of these additional proclamations, Trump dismissed the preliminary injunction as “hamper[ing]” “the ability of the United States to address these problems” of migration through the southern border and indicated that “[t]he United States is appealing that injunction.” Proclamation No. 9842, 84 Fed. Reg. 3,665 (Feb. 7, 2019) (extending the November 9 proclamation for another ninety days); Proclamation No. 9880, 84 Fed. Reg. 21,229 (May 8, 2019) (extending the November 9 proclamation until ninety days after either (1) “the United States obtains relief from all injunctions that prevent full implementation of the interim final rule promulgated” on November 9, or (2) the United States enters into a safe third country agreement with Mexico).

⁶ *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019).

[A]n alien who enters or attempts to enter the United States across the southern border after failing to apply for protection in a third country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States is ineligible for asylum.⁷

Although the rule would serve to deny access to asylum to migrants who had transited through and not sought protection in any third country, it did not purport to disqualify such individuals from seeking withholding of removal or relief under the Convention against Torture (CAT).⁸

The 1951 Refugee Convention does not require an asylum seeker to apply for protection in the first country transited, but rather allows a covered individual to be considered a refugee unless that person has “acquired a new nationality, and enjoys the protection of the country of his new nationality” or “is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.”⁹ The Office of the United Nations High Commissioner for Refugees (UNHCR) expressed “deep[] concern[]” about the interim final rule and its compliance with international law:

UNHCR believes the rule excessively curtails the right to apply for asylum, jeopardizes the right to protection from *refoulement*, significantly raises the burden of proof on asylum seekers beyond the international legal standard, sharply curtails basic rights and freedoms of those who manage to meet it, and is not in line with international obligations.

. . .

People have been leaving parts of Central America in growing numbers in recent years for reasons ranging from extreme economic deprivation to persecution.

⁷ *Id.* at 33,830.

⁸ *Id.* Under U.S. immigration laws, asylum, withholding of removal, and relief under CAT carry with them different requirements and burdens of proof and provide the successful applicant with different benefits. *See, e.g., Wakkary v. Holder*, 558 F.3d 1049, 1065 (9th Cir. 2009) (“[A]sylum and withholding of removal have different quantitative standards of proof [that the applicant, if returned will suffer persecution based on a protected ground]—ten percent for asylum, and ‘more likely than not’ for withholding”); 8 C.F.R. § 1208.16(c)(2) (requiring a showing under [CAT] that it is more likely than not that the applicant will be tortured if returned to his or her home country). Asylum is a discretionary benefit, while it is mandatory for a judge to grant withholding of removal or CAT if an applicant meets the requirements. *See, e.g., Ismaiel v. Mukasey*, 516 F.3d 1198, 1204 (10th Cir. 2008) (“Although a grant of asylum is in the discretion of the Attorney General, [withholding of removal] is granted to qualified aliens as a matter of right . . . [and] [r]elief under the CAT is mandatory if the convention’s criteria are satisfied”) (internal citations omitted). Relief under withholding of removal and CAT do not carry the same benefits as asylum—a successful applicant does not have a path to becoming a lawful permanent resident under withholding of removal or CAT as he or she would under asylum. U.S. Dep’t of Justice Fact Sheet, *Asylum and Withholding of Removal Relief Convention Against Torture Protections*, at 1, 6–7 (Jan. 15, 2009), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf> [<https://perma.cc/EM68-4S4S>].

⁹ UN Convention Relating to the Status of Refugees, Art. 1, July 28, 1951, 189 UNTS 150 [hereinafter *Refugee Convention*] (also identifying several other situations in which the person will no longer be considered a refugee). The United States is not a party to the Refugee Convention but has accepted its obligations by acceding to the 1967 Protocol Relating to the Status of Refugees, January 31, 1967, 606 UNTS 267.

Many of them are fleeing horrific violence by brutal gangs and are in need of international protection.¹⁰

The interim final rule faced immediate court challenge. In a complaint filed in the Northern District of California, the plaintiffs argued, among other things, that this rule was inconsistent with existing asylum laws and did not comport with international legal obligations.¹¹ The U.S. statutory provisions governing asylum state that non-citizens present in the United States “may apply for asylum” subject to specified exceptions.¹² These exceptions include two that are related to third countries, but neither of these is invoked by the interim final rule. One exception is if the individual has been “firmly resettled in another country prior to arriving to the United States”¹³ and the other is if he or she may be removed pursuant to a safe third country agreement.¹⁴ The firm resettlement bar has consistently been interpreted to require an offer or receipt of permanent status or citizenship in a third country and thereby cannot be satisfied solely by transit through another country.¹⁵ The third safe country provision permits removal where the United States has entered into an agreement with a country, other than the one of which the individual in question is a citizen, which permits removal to that country.¹⁶ In addition to the case in the Northern District of California, plaintiffs also brought a case challenging the interim final rule in the District of Columbia.¹⁷

On July 24, opposing rulings were issued by federal district courts in the two cases. While District of Columbia Judge Timothy Kelly issued a decision that would have allowed the interim rule to take effect,¹⁸ Northern District of California Judge Jon Tigar granted a preliminary nationwide injunction enjoining enforcement of the rule.¹⁹ Judge Tigar concluded that an injunction was appropriate because the rule likely conflicted with existing asylum laws, violated the procedural requirements of the Administrative Procedure Act, and was arbitrary and capricious.²⁰

¹⁰ UN High Commissioner for Refugees (UNHCR) Press Release, UNHCR Deeply Concerned about New U.S. Asylum Restrictions (July 15, 2019), at <https://www.unhcr.org/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html>.

¹¹ Pl.’s Memo. in Supp. of Mot. for T.R.O. at 3, E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922, 930 (N.D. Cal. 2019) (No. 19-cv-04073) (“Critically, as part of our nation’s commitment to the protection of people fleeing persecution and consistent with our international obligations, it is longstanding federal law that merely transiting through a third country is not a basis to categorically deny asylum to refugees who arrive in the United States.”).

¹² See 8 U.S.C. § 1158(a)(1).

¹³ 8 U.S.C. § 1158(b)(2)(A)(vi).

¹⁴ 8 U.S.C. § 1158(a)(2)(A) [hereinafter Safe Third Country Provision].

¹⁵ See, e.g., 8 C.F.R. § 208.15. For an in-depth explanation of the firm resettlement bar, see USCIS, *Firm Resettlement Training Module* (Jan. 17, 2019), available at https://www.uscis.gov/sites/default/files/files/native/documents/Firm_Resettlement_LP_RAIO.pdf [<https://perma.cc/2XNJ-6P89>].

¹⁶ Safe Third Country Provision, *supra* note 14; see also 8 U.S.C. § 1158(a)(2)(E) (stating that this provision does not apply to unaccompanied minors). Additional qualifications to the Safe Third Country Provision are discussed in note 32 *infra* and accompanying text.

¹⁷ See Adina Appelbaum, *CAIR Coalition Joins in Challenge of New Rule Barring Asylum Eligibility for Many Migrants*, CAPITAL AREA IMMIGRANTS’ RTS. COAL. (July 16, 2019), at <https://www.caircoalition.org/news-clip/cair-coalition-joins-challenge-new-rule-barring-asylum-eligibility-many-migrants>.

¹⁸ Capital Area Immigrants’ Rights Coal. v. Trump, No. 1:19-CV-02117-TJK, 2019 WL 3436501 (D.D.C. July 24, 2019).

¹⁹ E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922 (N.D. Cal. 2019).

²⁰ *Id.* at 922–23; see also *id.* at 924 (expressing additional concerns about the application of the rule to unaccompanied minors).

The Trump administration responded to the rulings in turn, first with praise,²¹ and then with criticism,²² ultimately vowing with respect to the second decision that it would “pursue all available options to address this meritless ruling and to defend this Nation’s borders.”²³ On August 16, the Ninth Circuit issued a ruling allowing the interim final rule to go into effect outside of the Ninth Circuit while litigation continues, but denying the government’s motion for a stay with respect to asylum applicants within the Ninth Circuit.²⁴ On August 26, the Trump administration requested that the Supreme Court stay the preliminary injunction in order to permit the interim final rule to also go into effect within the Ninth Circuit while the litigation continues.²⁵

On September 11, the Supreme Court granted the government’s motion and stayed the lower court injunction “pending disposition of the Government’s appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government’s petition for a writ of certiorari, if such a writ is sought.”²⁶ Justice Sotomayor dissented, joined by Justice Ginsburg. She stated:

Given the [Northern District of California’s] thorough analysis, and the serious questions that court raised, I do not believe the Government has carried its “especially heavy” burden [for obtaining a stay]. . . . The rule here may be, as the District Court concluded, in significant tension with the asylum statute. It may also be arbitrary and capricious for failing to engage with the record evidence contradicting its conclusions. It is especially concerning, moreover, that the rule the Government promulgated topples decades of settled asylum practices and affects some of the most vulnerable people in the Western Hemisphere—without affording the public a chance to weigh in.²⁷

The Trump administration issued the July rule at a time when it was negotiating an agreement with Guatemala concerning Guatemala’s designation as a safe third country for asylum seekers.²⁸ Although negotiations had appeared to break down as Guatemala’s constitutional court declared that the president was unable to enter into a safe third country agreement

²¹ White House Press Release, Statement from the Press Secretary (July 24, 2019), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-68> [<https://perma.cc/8Y4L-4AVS>] (“Today’s ruling in the United States District Court for the District of Columbia is a victory for Americans concerned about the crisis at our southern border. The court properly rejected the attempt of a few special interest groups to block a rule that discourages abuse of our asylum system.”).

²² White House Press Release, Statement from the Press Secretary (July 25, 2019), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-69> [<https://perma.cc/MM6B-AD52>] (“Yesterday evening, a single district judge in California, based on a complaint filed by a few activist groups with no legal standing, issued a nationwide injunction against a lawful and necessary rule that discourages abuse of our asylum system—and did so despite a ruling from another Federal judge earlier in the day rejecting the same request by other plaintiffs and suggesting that the Government was likely to prevail against challenges to the rule.”).

²³ *Id.*

²⁴ *E. Bay Sanctuary Covenant v. Barr*, No. 19-16487, 2019 WL 3850928 (9th Cir. Aug. 16, 2019).

²⁵ Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit and Pending Further Proceedings in This Court, *Barr v. E. Bay Sanctuary Covenant*, S. Ct. No. 19A230 (Aug. 26, 2019), at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19a230.html>.

²⁶ Decision on Application for Stay at 1, *Barr v. E. Bay Sanctuary Covenant*, S. Ct. No. 19A230 (Sept. 11, 2019), available at https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf. The order itself did not contain any substantive legal reasoning. *See id.*

²⁷ *Id.* at 4 (Sotomayor, J., dissenting). Justice Sotomayor’s dissent also detailed several further proceedings in the lower courts that occurred between the August 16 decision of the Ninth Circuit and the Supreme Court’s order. *See id.* at 4-5.

²⁸ Marcia Brown, *Trump’s Latest Asylum Rule, Explained*, AM. PROSPECT (July 22, 2019), at <https://prospect.org/article/trumps-latest-asylum-rule-explained>.

without legislative consent,²⁹ the two countries abruptly signed an agreement on July 26³⁰ amidst threats from Trump of tariffs and other retaliatory measures.³¹ When asked how the agreement would function, Acting Secretary of Homeland Security Kevin McAleenan explained:

So this is a return to the appropriate approach with—under international law to protecting asylum seekers at the earliest possible point in their journey. If you have a Honduran family or an El Salvadorian national, instead of having them pay a smuggler, come all the way to our border to seek asylum, when they arrive in Guatemala, they're in a country that has a fair proceeding for assessing asylum claims, and that's where they should make that claim. That returns that understanding under international law.

They can make a protection claim, if they would like, in Guatemala. So if they arrive in the U.S. not having availed themselves of that opportunity, they'll be returned to Guatemala.³²

Despite the Trump administration's statements, critics have decried the agreement as an inadequate protection of migrants' rights.³³ U.S. asylum law requires that removal pursuant to a safe third country agreement can occur only when, in the determination of the attorney general, it will not threaten the life or freedom of the individual removed "on account of race, religion, nationality, membership in a particular social group, or political opinion" but will provide "access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection."³⁴ UNHCR has similarly concluded that "in keeping with relevant international law standards" the safe third country should be one which will "grant the person access to a fair and efficient procedure for determination of refugee status and other international protection needs" and "accord the person standards of treatment commensurate with

²⁹ Ministerio de Relaciones Exteriores, Noticias de Interés (July 23, 2019), at <https://www.minex.gob.gt/noticias/Noticia.aspx?id=28309>. See also Marcia Brown, *As a Guatemala Asylum Agreement Fades, a New Trump Rule Threatens Migrants*, AM. PROSPECT (July 15, 2019), at <https://prospect.org/article/guatemala-asylum-agreement-fades-new-trump-rule-threatens-migrants>.

³⁰ The White House (@WhiteHouse), TWITTER (July 26, 2019, 2:10 PM), at <https://twitter.com/whitehouse/status/1154861528539160576> [<https://perma.cc/D62L-VRDV>]. Guatemala may not view the agreement as amounting to a safe third country agreement. See Lauren Carasik, *Trump's Safe Third Country Agreement with Guatemala Is a Lie*, FOR. POL'Y (July 30, 2019), at <https://foreignpolicy.com/2019/07/30/trumps-safe-third-country-agreement-with-guatemala-is-a-lie> ("For his part, [the President of Guatemala] has declined to characterize the accord as a safe third country agreement, calling it a 'Cooperation Agreement' instead, apparently to circumvent the Constitutional Court's injunction."). The countries did not officially release the contents of this agreement at first, but the text appears to have become available online, including at <https://www.justsecurity.org/wp-content/uploads/2019/07/Guatemala-Cooperative-Agreement-with-Signature-Blocks-ENG.pdf>.

³¹ Donald J. Trump, Remarks in an Exchange with Reporters Prior to Departure for Wheeling, West Virginia, 2019 DAILY COMP. PRES. DOC. NO. 506 (July 24) ("So, Guatemala gave us their word. We were going to sign a safe third agreement and then, all of a sudden, they backed up. They said it was their supreme court. I don't believe that. But they use their supreme court as the reason they didn't want to do it. So we'll either do tariffs or we'll do something. We're looking at something very severe with respect to Guatemala . . . So, Guatemala we're going to take care of and it won't even be tough. We're going to do—we're looking at a couple of different things.").

³² Remarks on the Signing of the Guatemala-United States Safe Third Country Agreement and an Exchange with Reporters, 2019 DAILY COMP. PRES. DOC. NO. 509 (July 26).

³³ Michael D. Shear, Zolan Kanno-Youngs & Elizabeth Malkin, *After Tariff Threat, Trump Says Guatemala Has Agreed to New Asylum Rules*, N.Y. TIMES (July 26, 2019), at <https://www.nytimes.com/2019/07/26/world/americas/trump-guatemala-asylum.html>.

³⁴ Safe Third Country Provision, *supra* note 14.

the 1951 [Refugee] Convention and international human rights standards, including—but not limited to—protection from *refoulement*.³⁵ It is far from clear that Guatemala will meet these standards. The most recent U.S. State Department’s human rights country report on Guatemala describe it as rife with human rights abuses,³⁶ and the incoming president of Guatemala, who takes office in January of 2020, stated in an interview that “I do not think Guatemala fulfills the requirements to be a third safe country.”³⁷ Both U.S. and Guatemalan advocates have threatened to go to court if this agreement takes effect.³⁸

On September 20, 2019, the Trump administration announced that the United States had reached an agreement with El Salvador whose “signing reflects the partnership and commitment between both nations to discourage dangerous irregular migration across Central America towards the U.S. and to combat transnational criminal organizations, strengthen border security, and reduce human trafficking and smuggling.”³⁹ A similar agreement was reached with Honduras on September 25, and reporting indicates that both agreements have much in common with the Guatemala agreement.⁴⁰

In addition to taking measures designed to limit the availability of asylum in the United States, the Trump administration has ratcheted up pressure on Mexico to increase enforcement of its own immigration laws and inhibit migrants’ progress toward the United States. On May 30, Trump issued a statement condemning Mexico’s “passive cooperation” in “allowing th[e] mass incursion” of unauthorized immigrants into the United States.⁴¹ He cited the “severe and dangerous consequences of illegal immigration” that Mexico has “allowed . . . to go on for many years” and called on Mexico to “step up and help solve this problem.”⁴² Trump threatened devastating economic consequences if Mexico failed to act:

³⁵ UNHCR, Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries (Apr. 2018), available at <https://www.refworld.org/docid/5acb33ad4.html>. For further discussion of the principle of *non-refoulement*, see Asylum Story, *supra* note 1.

³⁶ U.S. Dep’t of State, 2018 Country Reports on Human Rights Practices: Guatemala (Mar. 13, 2019), at <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/guatemala> (stating that “Civilian authorities at times did not maintain effective control over the security forces”; that “[h]uman rights issues included reports of harsh and life-threatening prison conditions; widespread corruption; trafficking in persons; crimes involving violence or threats thereof targeting lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons, persons with disabilities, and members of other minority groups; and use of forced or compulsory or child labor”; and that “[c]orruption and inadequate investigations made prosecution difficult, and impunity continued”).

³⁷ Sonia Perez D., *President-Elect Says Guatemala Can’t Do Migrant Deal with US*, ASSOC. PRESS (Aug. 13, 2019), at <https://www.apnews.com/ecd51531cbf2428c823ab06233c222a9> (also stating that the agreement would need the approval of the Guatemalan legislature).

³⁸ Kirk Semple, *The U.S. and Guatemala Reached an Asylum Deal: Here’s What It Means*, N.Y. TIMES (July 28, 2019), at <https://www.nytimes.com/2019/07/28/world/americas/guatemala-safe-third-asylum.html>.

³⁹ U.S. Dep’t of Homeland Security Press Release, Joint Statement Between the U.S. Government and the Government of El Salvador (Sept. 20, 2019), at <https://www.dhs.gov/news/2019/09/20/joint-statement-between-us-government-and-government-el-salvador>.

⁴⁰ Nick Miroff, *U.S. Announces Asylum Deal with Honduras, Could Send Migrants to One of World’s Most Violent Nations*, WASH. POST (Sept. 25, 2019), at https://www.washingtonpost.com/immigration/us-announces-asylum-deal-with-honduras-could-send-migrants-to-one-of-worlds-most-violent-nations/2019/09/25/cca94a86-dfb6-11e9-8fd3-d943b4ed57e0_story.html.

⁴¹ Donald J. Trump, Statement on Emergency Measures to Address Illegal Migration at the Mexico-United States Border, 2019 DAILY COMP. PRES. DOC. NO. 354 (May 30).

⁴² *Id.*

[S]tarting on June 10, 2019, the United States will impose a 5 percent Tariff on all goods imported from Mexico. If the illegal migration crisis is alleviated through effective actions taken by Mexico, to be determined in our sole discretion and judgment, the Tariffs will be removed. If the crisis persists, however, the Tariffs will be raised to 10 percent on July 1, 2019. Similarly, if Mexico still has not taken action to dramatically reduce or eliminate the number of illegal aliens crossing its territory into the United States, Tariffs will be increased to 15 percent on August 1, 2019, to 20 percent on September 1, 2019, and to 25 percent on October 1, 2019. Tariffs will permanently remain at the 25 percent level unless and until Mexico substantially stops the illegal inflow of aliens coming through its territory.⁴³

Shortly thereafter, the United States and Mexico reached an agreement and Trump indicated that “[t]he Tariffs scheduled to be implemented by the U.S. . . . against Mexico, are hereby indefinitely suspended.”⁴⁴ The United States and Mexico signed a joint declaration on June 7 involving “a set of joint obligations” that, in the words of the accompanying U.S. State Department press release, “benefit both the United States and Mexico” with the goal of “stem[ming] the tide of illegal migration across our southern border and to make our border strong and secure.”⁴⁵ The joint declaration promised that the United States and Mexico would “work together to immediately implement a durable solution” to “the humanitarian emergency and security situation” resulting from “the dramatic increase in migrants moving from Central America through Mexico to the United States.”⁴⁶ Mexico agreed to “take unprecedented steps to increase enforcement to curb irregular migration, to include the deployment of its National Guard throughout Mexico, giving priority to its southern border.”⁴⁷ Since signing this joint declaration, Mexico has taken certain measures to increase its enforcement against unauthorized migration.⁴⁸

The joint declaration also indicated the United States’ intention to “expand the implementation of the existing Migrant Protection Protocols across its entire Southern Border.”⁴⁹ The Migrant Protection Protocols are a Trump administration policy under which asylum seekers arriving in the United States from Mexico await their immigration proceedings in Mexico rather than in the United States.⁵⁰ The joint declaration explained: “This means that those

⁴³ *Id.* For a discussion of the extent to which Trump might have the legal authority to impose these tariffs under the International Emergency Economic Powers Act (IEEPA), see Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump’s New Tariffs on Mexico*, LAWFARE BLOG (June 3, 2019), at <https://www.lawfare-blog.com/legal-authority-behind-trumps-new-tariffs-mexico>.

⁴⁴ Donald J. Trump (@realDonaldTrump), TWITTER (June 7, 2019, 8:31 PM), at <https://twitter.com/realdonaldtrump/status/1137155056044826626?lang=en> [<https://perma.cc/75XT-V4GX>].

⁴⁵ U.S. Dep’t of State Press Statement, Conclusion of Negotiations with Mexico (June 7, 2019), at <https://www.state.gov/conclusion-of-negotiations-with-mexico> [<https://perma.cc/3S55-LLTE>].

⁴⁶ U.S. Dep’t of State Press Release, U.S.-Mexico Joint Declaration (June 7, 2019), at <https://www.state.gov/u-s-mexico-joint-declaration/> [<https://perma.cc/Q8CA-2JVJ>] [hereinafter Joint Declaration].

⁴⁷ *Id.*

⁴⁸ James Fredrick, *How Mexico Beefs Up Immigration Enforcement to Meet Trump’s Terms*, NPR (July 13, 2019), at <https://www.npr.org/2019/07/13/740009105/how-mexico-beefs-up-immigration-enforcement-to-meet-trumps-terms>.

⁴⁹ Joint Declaration, *supra* note 46.

⁵⁰ For additional background, see Asylum Story, *supra* note 1. The Trump administration began implementing the Migrant Protection Protocols in January of 2019. Although a federal district court judge initially imposed a preliminary injunction against enforcement of the Migrant Protection Protocols, the Ninth Circuit granted the

crossing the U.S. Southern Border to seek asylum will be rapidly returned to Mexico where they may await the adjudication of their asylum claims.”⁵¹

In April and July of 2019, Attorney General Barr issued binding immigration decisions designed to further deter asylum seekers from coming to the United States and to tighten the legal standard by which applicants could obtain asylum. On April 16, 2019, Barr issued a decision determining that all asylum applicants in DHS custody are subject to mandatory detention pending the adjudication of their claims unless the government allows that applicant to be released on parole—a decision that severely restricts the ability of asylum applicants to be released from detention.⁵² On July 2, a federal judge issued an injunction blocking the enforcement of Barr’s decision, holding that “it is unconstitutional to deny [immigrants who had entered the United States, requested asylum, and were determined to have a credible fear of persecution] a bond hearing while they await a final determination of their asylum request.”⁵³ Barr’s other decision, issued on July 29, 2019, changed the standard by which migrants could obtain asylum for claims involving family groups.⁵⁴ Under the Refugee Convention, individuals are eligible for asylum if they express a well-founded fear of persecution based on a protected ground, including “membership of a particular social group,”⁵⁵ and U.S. law has long interpreted an immediate family unit to compose a cognizable “particular social group.”⁵⁶ Barr’s ruling narrows this standard, declaring that “an alien’s family-based group will not constitute a particular social group unless it has been shown to be socially distinct in the eyes of its society, not just those of its alleged persecutor.”⁵⁷

In addition to efforts to restrict the availability of asylum and to encourage the United States’ southern neighbors to play an increasingly active role in stemming unauthorized migration through the region, the Trump administration has pushed its agenda with respect

government’s motion to stay the injunction and consequently, the program was allowed to take effect as litigation continues. *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019); *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).

⁵¹ Joint Declaration, *supra* note 46.

⁵² *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019); see also Michael D. Shear & Katie Benner, *In New Effort to Deter Migrants, Barr Withholds Bail to Asylum Seekers*, N.Y. TIMES (Apr. 16, 2019), at <https://www.nytimes.com/2019/04/16/us/politics/barr-asylum-bail.html>. A recent document issued by UNHCR states that “[i]mportantly, as seeking asylum is not an unlawful act, detaining asylum-seekers for the sole reason of having entered without prior authorisation runs counter to international law. Under international law, individuals have the right to seek asylum, and if they do so, to be treated humanely and with dignity.” UNHCR, *BEYOND DETENTION 2014–2019: A GLOBAL STRATEGY TO SUPPORT GOVERNMENTS TO END THE DETENTION OF ASYLUM-SEEKERS AND REFUGEES*, at 5, at <https://www.unhcr.org/53aa929f6>.

⁵³ *Padilla v. U.S. Immigration & Customs Enft*, 387 F. Supp. 3d 1219, 1223 (W.D. Wash. 2019). The White House press secretary condemned this decision as “at war with the rule of law.” White House Press Release, *Statement from the Press Secretary* (July 3, 2019), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-61> [<https://perma.cc/TJ68-7HPC>].

⁵⁴ *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

⁵⁵ Refugee Convention, *supra* note 9, Art. 1(A)(2).

⁵⁶ See, e.g., *Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006), *overruled on other grounds by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (“Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.”).

⁵⁷ 27 I&N, *supra* note 54, at 582. In addition to these developments, the Trump administration is also seeking to revisit a long-standing court settlement that limits the extent to which minor children entering the United States can be held in detention. See Michael D. Shear & Zolan Kanno-Youngs, *Migrant Families Would Face Indefinite Detention Under New Trump Rule*, N.Y. TIMES (Aug. 21, 2019), at <https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html> (describing a newly issued regulation on this issue).

to constructing a wall along the southern border. After Congress refused to provide the desired level of funding to build the wall, Trump declared a national emergency at the southern border on February 15 in order to access additional emergency funds.⁵⁸ On April 5, the House of Representatives filed a lawsuit arguing that the Trump administration's attempts to circumvent Congress in using funding appropriated for other purposes violated the Appropriations Clause of the Constitution and the Administrative Procedure Act.⁵⁹ On June 3, the House of Representatives' motion for a preliminary injunction was denied for lack of standing and subject matter jurisdiction.⁶⁰ A separate challenge to the Trump administration's border wall was filed in the Northern District of California, leading a federal district court to grant a permanent injunction on June 28 against construction of portions of the wall.⁶¹ Although the Ninth Circuit denied the government's motion for a stay of the injunction,⁶² the Supreme Court overturned this decision and stayed the injunction on July 26.⁶³ The litigation is currently pending in the Ninth Circuit.

Secretary of State Establishes Commission on Unalienable Rights
doi:10.1017/ajil.2019.62

On July 8, 2019, Secretary of State Mike Pompeo established a Commission on Unalienable Rights. The Commission will “provide the Secretary of State advice and recommendations concerning international human rights matters . . . [and] provide fresh thinking about human rights discourse where such discourse has departed from our nation's founding principles of natural law and natural rights.”¹ The Commission has an initial two-year mandate. Democratic lawmakers have raised concerns that the Commission will circumvent existing structures and challenge LGBTQ+ protections and reproductive rights.

In May 2019, Pompeo gave formal notice of his intent to establish a Commission on Unalienable Rights, pursuant to the Federal Advisory Committee Act.² On July 8, he announced the creation of the Commission.³ The Commission will study the Universal

⁵⁸ Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019); *see also* Asylum Story, *supra* note 1.

⁵⁹ U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8 (D.D.C. 2019).

⁶⁰ *Id.*

⁶¹ Sierra Club v. Trump, No. 19-CV-00892-HSG, 2019 WL 2715422 (N.D. Cal. June 28, 2019).

⁶² Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2019).

⁶³ Trump v. Sierra Club, No. 19A60, 2019 WL 3369425 (U.S. July 26, 2019).

¹ Department of State Commission on Unalienable Rights, 84 Fed. Reg. 25109 (May 30, 2019).

² *Id.*; *see also* 5 U.S.C. App. § 9 (2018) (setting conditions on the establishment of advisory commissions, including that notice of their establishment be published in the Federal Register).

³ U.S. Dep't of State Press Release, Michael R. Pompeo, Secretary of State, Remarks to the Press (July 8, 2019), at <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3> [<https://perma.cc/V6MZ-TATP>] [hereinafter Pompeo Remarks].