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ASYLUM UNDER ATTACK: IS IT TIME FOR A CONSTITUTIONAL RIGHT?

Stephen Meili[†]

“‘We cannot allow all of these people to invade our Country,’ [President] Trump tweeted while on the way to his golf course in Virginia. ‘When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.’”¹

INTRODUCTION

In the past three years, the Trump Administration has proposed several changes in U.S. immigration policy that severely restrict the due process rights of asylum-seekers. They reflect the Administration’s view that asylum is a “loophole” around U.S. immigration law rather than a right based on both U.S. domestic and international law. Four of the more notorious such policies are “Zero Tolerance” which separated children from their parents at the southern border with Mexico, “Turnback” which forces asylum-seekers to lodge their asylum applications only at designated border stations and returns other asylum-seekers to Mexico without the opportunity to apply for asylum, the “Migrant Protection Protocols” which forces many asylum-seekers to remain in Mexico while their applications for asylum in the United States are processed, and “Third Country” which forces asylum-seekers to apply for asylum in certain countries through which they traveled on their way to the United States.

Each of these policies has been challenged in federal court litigation. The majority of the claims in those lawsuits arise under the Administrative Procedure Act and the Immigration and Nationality Act. While some invoke the Constitution, they are limited to either the due process rights accorded to non-citizens generally or the substantive due process right to family integrity. What they do *not* assert is a constitutional right to seek

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1. NY Times June 24, 2019 , at <https://www.nytimes.com/2018/06/24/us/politics/trump-immigration-judges-due-process.html?action=click&module=RelatedCoverage&pgtype=article®ion=footer>.

asylum derived from the Due Process clause of the Fifth Amendment, which has been recognized in several Circuit Courts, rejected in others, and never adjudicated by the U.S. Supreme Court. This omission begs the question that this article addresses: Is it time for the Supreme Court to recognize a constitutional right to seek asylum?

Such a right has been growing increasingly prevalent around the world. While only 11 percent of the world's nations had recognized such a right in 1951, by 2017 that percentage had grown to 35 per cent.² The constitutionalization of the right to seek asylum is part of a larger trend toward the constitutionalization of human rights law more generally.³ The national constitutions of most countries now feature a variety of human rights provisions.⁴ As Wayne Sandholtz has observed, by the end of the 20th century, constitutionalization of human rights had become the norm around the world.⁵

While the U.S. Constitution (particularly the Bill of Rights) includes a number of human rights provisions (most notably freedom of expression, association, and religion, as well as the right to due process and equal protection), it lags behind most countries in this area. This is not necessarily a pejorative critique. Indeed, one criticism of the expanded constitutionalization of human rights law is that it is all words and no action. As Roberto Gargarella has observed in the context of Latin America (which has seen an exponential increase in constitutionalized human rights provisions in recent decades), such provisions are rendered virtually meaningless when they are not accompanied by other measures to address the organization of power within society.⁶ The relative lack of human rights provisions in the U.S. Constitution has accorded particular strength to those which made their way into that document.

2. Lucas Kowalczyk & Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 CORNELL L. REV. 1219 (2017). These provisions constitutionalize the right to *seek* asylum, not to receive it.

3. See Stephen Meili, *Constitutionalized Human Rights Law in Mexico: Hope for Central American Refugees?* 32 HARV. HUM. RTS. J. 103-145 (2019).

4. See COMPARATIVE CONSTITUTIONS PROJECT (February 9, 2019, 3:31 PM), <http://comparativeconstitutionsproject.org/> [<https://perma.cc/Z5JY-PLR8>].

5. Wayne Sandholtz, *Treaties, Constitutions and Courts: The Critical Combination*, in THE POLITICS OF THE GLOBALIZATION OF LAW: GETTING FROM RIGHTS TO JUSTICE 31 (Alison Brysk ed., 2013).

6. Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Problem of the 'Engine Room' of the Constitution*, in LAW AND POLICY IN LATIN AMERICA: TRANSFORMING COURTS, INSTITUTIONS, AND RIGHTS 213-16 (Pedro Fortes et al. eds., 2017).

Given the gravity of the interests at stake for asylum-seekers, as well as the threat posed by the restrictive policies advanced by the Trump Administration, it is time for serious re-consideration of the need for a constitutionally recognized right to seek asylum. Such a right is not without precedent in the U.S. Indeed, several Circuit Courts have acknowledged that it resides within the constitutionally protected due process rights of non-citizens. However, the Supreme Court has ducked the issue, preferring to issue rulings on other grounds.⁷ The spate of litigation currently challenging various restrictions on the right to seek asylum provides the Court and the advocates who appear before it with a timely opportunity to address this issue head on.

This article is divided into five parts. Part I reviews the literature on the constitutional right to asylum and the constitutionalization of human rights law more generally. Part II discusses the constitutional right to asylum in the U.S., reviewing the Circuit Court jurisprudence on the subject. Part III reviews the litigation challenging the Trump Administration's Zero Tolerance, Turnback, Migrant Protection Protocols, and Third Country policies, with particular emphasis on the constitutional arguments asserted by the plaintiffs in those cases and any preliminary rulings by courts to date. Part IV argues that a right to asylum would provide a more constitutionally appropriate way for courts to adjudicate the claims of asylum-seekers who have been adversely affected by these policies. A conclusion follows.

I. THEORETICAL FRAMEWORK: THE EVOLUTION, POTENTIAL, AND LIMITATIONS OF A CONSTITUTIONAL RIGHT TO SEEK ASYLUM.

As noted above, in 1950, only 11 per cent of the world's constitutions contained a right to seek asylum.⁸ In most of these cases, the right had been created in the immediate aftermath of World War II and was thus influenced by two geopolitical factors: in some cases, such as France and Italy, it was included as a sign of the gratitude that those countries felt toward other states that had accepted French and Italian refugees before and during World War II.⁹ And in Soviet Bloc countries such as Poland, the right to seek asylum was conditioned on shared ideologies.¹⁰ As Lucas Kowalczyk

7. See e.g., *Jean v. Nelson*, 472 U.S. 846 (1985).

8. Kowalczyk & Versteeg, *supra* note 2, at 143-44.

9. See Hélène Lambert et al., *Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat in Pace?*, 27 REFUGEE SURV. Q., 17-32 (2008).

10. Kowalczyk & Versteeg, *supra* note 2, at 1242. One example of such an ideologically-framed constitutional right to asylum is contained in the 1952 version of the Polish Constitution: "The Polish People's Republic grants asylum to citizens of foreign

and Mila Versteeg note, political and economic self-interest, as opposed to humanitarian concern, drove many states to include a right to seek asylum in their constitution.¹¹ These self-interested motivations included condemning foreign states, encouraging opposition groups in foreign states, attracting a younger workforce, and announcing good intentions with little or no interest in actually following through.¹²

By 2017, the percentage of countries with constitutions containing a right to seek asylum had risen to 35 per cent, with the greatest increase occurring during the 1990s.¹³ By this time, the nature of the constitutional right to seek asylum came to reflect the emphasis on human rights that had taken hold in many parts of the world in the intervening decades. As Kowalczyk and Versteeg note, most of these constitutional provisions (as well as updated provisions that were initially included in constitutions after World War II) frame asylum as a human right, rather than limiting it to those persons who can demonstrate a well-founded fear of persecution on account of one or more of the five grounds enumerated in the Refugee Convention.¹⁴ Thus, under most of the constitutions within which the right to seek asylum appears, it is theoretically available to those non-citizens whose human rights have been violated by their countries of origin. In this way, the constitutionalized right to seek asylum mirrors what has come to be known as the human rights approach to asylum law, which links eligibility for asylum to the denial of human rights protections by one's home country or territory.¹⁵ Indeed, this broad view of the notion of asylum (i.e.,

countries persecuted for defending the interests of the working people, for fighting for social progress, for activity in defence of peace, for fighting for national liberation or for scientific activity." *Constitution of the Polish People's Republic*, July 22, 1952, art. 75. Another example is the right to asylum in the Iranian Constitution, which states, in article 155, that "The Islamic Republic of Iran shall offer sanctuary to all those asking for political asylum, excepting those who are known, in accordance with the laws of Iran, to be traitors and criminals." *Constitution of the Islamic Republic of Iran*, December 2-3, 1979 art. 155. Kowalczyk and Versteeg also note the trend since the Cold War era away from limiting the right to asylum to persons whose ideologies were consistent with the host country. Kowalczyk & Versteeg, *supra* note 2, at 142-145.

11. Kowalczyk & Versteeg, *supra* note 2, at 1250-57.

12. *Id.*

13. Kowalczyk & Versteeg, *supra* note 2, at 144.

14. See Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150 [hereinafter "Refugee Convention"]. Kowalczyk and Versteeg also note the trend since the Cold War era away from limiting the right to asylum to persons whose ideologies were consistent with the host country. Kowalczyk & Versteeg, *supra* note 2, at 142-145.

15. See HATHAWAY & FOSTER, *THE LAW OF REFUGEE STATUS* 194 (2d ed. 2014). See also Deborah Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15

broader than the definition of a refugee under the Refugee Convention), is what María-Teresa Gil-Bazo envisions in asserting that asylum is a general principle of international law.¹⁶

While international refugee law sets out the parameters for refugee status, it does not compel individual states to grant asylum to anyone. Indeed, the Refugee Convention, the principle international instrument pertaining to refugees and asylum-seekers, is silent as to an individual right to asylum.¹⁷ The decision to grant asylum, and the permanent immigration status to which it leads, is purely a matter of domestic law applied by sovereign states.¹⁸ In most cases, that domestic law is a statute that, at a minimum,

HARV. HUM. RTS. J. 133, 143 (2002) (finding that the human rights approach assists both the refugee law and human rights law regimes). The human rights approach manifests itself most prominently through domestic court interpretation of undefined terms in the Refugee Convention, such as “being persecuted.” To proponents of this approach, it is appropriate-and logical-to rely on human rights treaties to inform the scope of “persecution” because these treaties reflect a global consensus about the scope of persecutory harms. See HATHAWAY & FOSTER at 194.

16. María-Teresa Gil-Bazo, *Asylum as a General Principle of International Law*, 27 INT’L J. OF REFUGEE L. 3, 3 (2015).

17. One of the recommendations of the drafters (the Plenipotentiaries) of the Refugee Convention was that governments continue to receive refugees such that they may find asylum. However, this was not stated in terms of a right. See United Nations General Assembly, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, July 25, 1951 “The Conference recommends. . . that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement.” In its Introductory Note as part of the 60-year anniversary of the Refugee Convention, the UN High Commissioner for Refugees stated “Grounded in Article 14 of the Universal Declaration of human rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries, the United Nations Convention relating to the Status of Refugees, adopted in 1951, is the centrepiece of international refugee protection today (emphasis added).” This may have been an attempt to make up for the lack of a definitive statement of the right to seek asylum in the Refugee Convention.

18. The only international instrument that contains a right to asylum is the Universal Declaration of Human Rights, which states at Article 14 (1): “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III). The United Nations General Assembly Declaration on Territorial Asylum states the exceptions to the right to asylum, without explicitly declaring that such a right exists: “The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.” UN General Assembly, *Declaration on Territorial Asylum* art. 1(2), *Declaration on Territorial Asylum*, 14 De-

incorporates the definition of a refugee from the Refugee Convention and the principle of *non-refoulement*.¹⁹ In this way, domestic law transforms the non-binding standards of international refugee law into a pathway to permanent protection.

For the most part, however, those domestic statutes do not create a right to either apply for or receive asylum; they merely set forth an administrative procedure through which someone fleeing persecution or other harm can apply for protection. In addition, of course, such statutes can be amended to make the process of applying for asylum both more logistically difficult and the standards for granting asylum more restrictive.²⁰

ember 1967, A/RES/2312(XXII). Several regional human rights instruments contain a right to seek asylum, including the American Convention on Human Rights, at Article 22 (7) (“Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes”), Organization of American States (OAS), *American Convention on Human Rights, “Pact of San Jose”, Costa Rica*, 22 November 1969; the African Charter on Human and Peoples’ Rights, at Article 12 (3) (“Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and International conventions”), Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights (“Banjul Charter”)*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); and the European Charter of Fundamental Rights, at Article 18 (“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union”), European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.

19. Gil-Bazo, *supra* note 16, at 39-40. *Non-refoulement* prohibits a country from returning a non-citizen to a territory where she is likely to face torture or cruel, inhuman, or degrading treatment or punishment. Guy Goodwin-Gill and Jane McAdam, *THE REFUGEE IN INTERNATIONAL LAW*, (3d ed. 2007); James C. Hathaway, *THE RIGHTS OF REFUGGES UNDER INTERNATIONAL LAW* (2005). The INA incorporates the principle of *non-refoulement* in a form of relief known as withholding of removal, which prohibits the return of a non-citizen to a country where it is more likely than not that their life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. See INA § 241 (b)(3)(B).

20. Exemplifying this possibility, President Trump has indicated that the current crisis facing asylum-seekers at the U.S.-Mexico border could be eradicated quickly if Democrats in Congress would simply change the nation’s immigration laws. See Franco Ordoñez & Bobby Allyn, *Trump Delays Immigration Raids, Giving Democrats ‘Two Weeks’ To Change Asylum Laws*, NPR, June 22, 2019, <https://www.npr.org/2019/06/22/735083190/trump-delays-immigration-raids-giving-democrats-two-weeks-to-reform-asylum-laws?t=1562163148237>.

Constitutions, and the rights they afford, are more durable than statutes. While they are certainly not set in stone, their provisions are generally more impervious to regime changes and political whims than statutes. As Kowalczyk and Versteeg have stated, “where a right to asylum is constitutionalized, states effectively restrict their ability to make their response to refugees dependent on prevailing political sentiments.”²¹ And, as noted above, Gil-Bazo argues that the right to asylum enshrined in national constitutions is broader than refugee status under the Refugee Convention (and other international instruments) thus affording broader protection to those fleeing persecution and other forms of harm in their states of origin.²²

The durability and breadth of a right to seek asylum in a national constitution is particularly important in today’s geopolitical climate of nationalism, xenophobia and anti-globalization. At a time when many states scorn international constraints on their behavior and question their obligation to protect refugees, statutory asylum law would seem to be particularly vulnerable.²³ Ignoring – or altering – the rights of asylum-seekers embedded in a national constitution presents more of a challenge, particularly in a country with a strong, independent judiciary.²⁴

In addition, the constitutional right to seek asylum has the potential to assume a more meaningful role because of the increasingly apparent limitations of the Refugee Convention, which has for decades been the main source of protection for the world’s refugees. These failings include, but are certainly not limited to, desperately underfunded humanitarian assistance programs, nearly universal disregard for the socioeconomic rights of refugees protected under international law, and inadequate and inconsistent refugee determination processes in various countries.²⁵ As a result, the

21. Kowalczyk & Versteeg, *supra* note 2, at 143-44.

22. See Gil-Bazo, *supra* note 16.

23. Refugees have traditionally been among the most politically marginalized and powerless groups in any society. See Brysk, *The Future of Human Rights* (2018).

24. An independent judiciary is consistently cited as one of the factors associated with improved human rights behavior by states. See, e.g., Sandholtz, *supra* note 5.

25. Alexander Betts & Paul Collier, *Refuge: Transforming a Broken Refugee System* 7-8 (2017). The authors note that contrary to popular belief, most refugees around the world live in urban areas rather than in camps, in the Middle East and sub-Saharan Africa rather than in Europe, and are often left unsupported by their host countries. *Id.* Under the Refugee Convention, refugees are entitled to the right to health care, education, employment, and other socioeconomic benefits, but these often go unfulfilled. The Refugee Convention was limited both temporally and geographically, applying only to refugees who had been displaced by World War II. United Nations General Assembly, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, art. I(A)(2). July 25, 1951. It was seen as a temporary measure to deal with that particular refugee crisis.

world's refugees lack most of the legal, social, and economic guarantees to which they are entitled under international law.

Despite this potential, the constitutional right to asylum suffers from significant limitations. For example, Kowalczyk and Versteeg observe that constitutions can be amended and that judges can defer to executive will.²⁶ Hélène Lambert et. al. argue that because countries such as France, Germany and Italy have chosen to adjudicate asylum claims almost exclusively according to the Refugee Convention, constitutional asylum in those countries has become virtually meaningless.²⁷ In a similar vein, Gil-Bazo notes that because many countries have blurred the distinction between refugee status and asylum, constitutional asylum has come to be viewed as obsolete.²⁸

In addition, most states include an "escape clause" in their constitutionalized right to asylum, indicating that such a right will be interpreted according to national law.²⁹ Given that such laws can be more restrictive than the protections afforded by the Refugee Convention, a constitutional right to seek asylum will be of little use.³⁰ Moreover, in some situations constitutional asylum is based on the same (limited) criteria as in the Refugee Convention.³¹

Subsequent geopolitical events, such as the decolonization movement in Africa and the refugee migrations resulting from it, made it obvious that the world's refugee problem was neither temporary nor confined to Europe. Deborah Anker, *LAW OF ASYLUM IN THE UNITED STATES* 2 n.1 (2014 ed.) (explaining the context of the creation of the Protocol). Hence, the Protocol Relating to the Status of Refugees ("1967 Protocol") removed the temporal and geographic restrictions from the Refugee Convention. *See* Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6233, 660 U.N.T.S. 267 [hereinafter 1967 Protocol].

26. Kowalczyk & Versteeg, *supra* note 2, at 133.

27. Lambert, *supra* note 9, at 16, 17.

28. Gil-Bazo, *supra* note 16, at 4.

29. My thanks to my University of Minnesota colleague Chris Roberts for this term. For example, the Constitution of Portugal states, in relevant part: "The status of political refugees shall be defined by law." *Constitution of the Portuguese Republic* [Portugal] art. 22, 25 April 1976. Similarly, the Constitution of Poland states, in relevant part "Foreigners shall have a right of asylum in the Republic of Poland in accordance with principles specified by statute." *Constitution of the Republic of Poland*, Apr. 2, 1997, art. 56.

30. On the other hand, in some states, including Mexico, any "escape clause" that is inconsistent with Mexico's obligations under international human rights law would be nullified.

31. For example, the Constitution of Hungary states, in relevant part, "Hungary shall grant asylum to all non-Hungarian citizens as requested if they are being persecuted or have a well-founded fear of persecution in their native countries or in the countries of their usual residence due to their racial or national identities, affiliation to a particular social group, or to their religious or political persuasions, unless they receive

A constitutional right to asylum in some national contexts also suffers from the same source of ineffectiveness as other constitutionalized human rights: it is mere window dressing rather than a meaningful attempt to improve human rights outcomes for marginalized groups. States have many motivations for taking on human rights obligations that they have little intention of fulfilling. Much scholarly research has focused on the effectiveness (and lack thereof) of constitutionalized human rights law in particular.³² The results of this research – much of it large-N analyses of statistically significant relationships between treaty ratification and state behavior according to various benchmarks – is mixed.³³

If endorsed by the United States Supreme Court, a constitutional right to seek asylum (through the Due Process clause) would benefit from most of the advantages identified above, and few of the burdens. For example, while it would not be part of an actual amendment to the U.S. Constitution, it would benefit from the durability of Supreme Court precedent linking the right to seek asylum with the Constitutional right to due process accorded to non-citizens. Such durability is particularly important at a time when U.S. policy towards asylum-seekers has become increasingly motivated by nationalistic influences within the U.S. government and society generally. Moreover, Supreme Court jurisprudence over time demonstrates that the U.S. takes its Constitutional responsibilities seriously. While the executive and legislative branches of government sometimes resist fulfilling those responsibilities, an independent judiciary and active civil society have held them accountable under the Constitution.³⁴ Few would deem the U.S. Constitution mere window dressing. In short, and unlike in many other countries, a constitutionalized right to seek asylum in the United States would have real clout.

protection from their countries of origin or any other country.” *The Fundamental Law of Hungary*, 18 April 2011, art. 65.

32. For a general discussion of this literature, see Stephen Meili “The Effectiveness of an Emerging Pathway of Rights: the Constitutionalization of Human Rights Law”, in *CONTESTING HUMAN RIGHTS: PATHWAYS OF CHANGE*, Alison Brysk et al., eds. (2019).

33. One such study found a statistically significant association between the constitutionalization of two organizational rights (the rights to form political parties and unions) and improved human rights behavior by states, but no such association with four individual rights ((the rights to freedom of expression, association, religion and movement). See Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 *AM. J. OF POL. SCI.* 575 (2016). One treaty protection that has been consistently shown *not* to be associated with improved state behavior is the prohibition against torture. See Meili (in Brysk) *supra* note 32.

34. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958).

The next part of this article analyzes the current state of a right to seek asylum in U.S. jurisprudence.

II. THE CONSTITUTIONAL RIGHT TO SEEK ASYLUM IN THE UNITED STATES

The question at the heart of this article lies at the intersection of two conflicting views of the Constitutional rights of non-citizens more generally. On the one hand, the U.S. Supreme Court has long held that non-citizens enjoy due process protections under the 5th and 14th Amendments to the U.S. Constitution.³⁵ On the other hand, the Supreme Court has held that admission to the United States is a privilege, and that there is no constitutional right regarding the application to enter.³⁶ The distinction between these perspectives has, in most cases, depended on whether the non-citizen was already within the United States (and thus entitled to the due process rights accorded to all “persons” under the 5th and 14th Amendments) or was seeking entry into the U.S., either for the first time or after having left and was seeking to return.³⁷ Most asylum-seekers have actually been in the U.S. for some time: they are individuals whose legally procured visas have expired.³⁸ They are clearly entitled to the due process protections of the Constitution, which include a hearing on their asylum claim. The due process rights of asylum-seekers at the border are less clear cut. On the one

35. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding protections under the 14th Amendment applied to “all persons,” textually, and so in reality must apply to all persons within the jurisdiction of the U.S. and do not depend on citizenship status); *Wong Wing v. United States*, 163 U.S. 228 (1896) (holding the provisions of the Fifth Amendment applied to ‘aliens’ as well as citizens); *Mathews v. Diaz*, 426 U.S. 67 (1976) (affirming the Fifth and Fourteenth Amendment do protect the millions of “aliens” within the jurisdiction of the U.S., including Due Process.).

36. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (noting that “the power to exclude or admit aliens is a sovereign prerogative”); see also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-660 (1892).

37. *Landon*, *supra* note 36. In this case, the Supreme Court held that non-citizens facing deportation after having been present in the country were entitled to greater due process protections than those who were seeking admission to the U.S. for the first time. *Id.* at 32-37. The issue presented in *Landon* was the degree of process due to a lawful permanent resident who had left the country for a relatively short period of time before seeking re-entry.

38. Individuals who overstay their visas outnumber asylum-seekers at the U.S. southern border by more than two-to-one. Krishnadev Calamur, *The Real Illegal Immigration Crisis Isn't on the Southern Border*, ATLANTIC, April 19, 2019, <https://www.theatlantic.com/international/archive/2019/04/real-immigration-crisis-people-overstaying-their-visas/587485/>.

hand, they are seeking admission to the country and, according to Supreme Court, that “privilege” carries with it no constitutional guarantees.³⁹ On the other, they are seeking to enter the U.S. via a procedure guaranteed through statutory law that, at least according to some Circuit Courts, carries with it a constitutionally protected liberty interest. It is to that legislative and constitutional basis for seeking asylum that we now turn.

The statutory basis for seeking asylum in the U.S. is section 208 of the Immigration and Nationality Act (“INA”), which states in relevant part:

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. . .⁴⁰

The standard for granting asylum in the U.S. became part of the INA with passage of the Refugee Act of 1980, which incorporated into the INA the definition of “refugee” from the 1951 Refugee Convention.⁴¹ Thus, in order to establish eligibility for asylum, an applicant must demonstrate that he or she will be persecuted on the grounds of race, religion, nationality, membership in a particular social group, or political opinion.⁴²

Soon after passage of the Refugee Act of 1980, several Circuit Courts began to consider whether the right to asylum had roots in the U.S. Constitution, as well.⁴³ Indeed, the U.S. Supreme Court was faced with the question of whether there is a constitutionally protected right to petition for asylum in *Jean v. Nelson* in 1985 but chose to determine the case on statutory grounds.⁴⁴ *Jean* (1985) was appealed to the Supreme Court from the Eleventh Circuit, where the appeals court rejected the argument that non-citizens seeking admission had any constitutional rights. Because the Supreme Court did not approve or reject this holding, Circuit Courts have been left to determine the law for themselves.

39. See *Landon*, *supra* note 36.

40. 8 U.S.C. §1158 (a)(1). (The grounds for asylum in the United States mirror those set forth in the Refugee Convention: a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion). See also 8 U.S.C. § 1158 (b)(1)(B)(i); Refugee Convention, Article 1.

41. Refugee Convention, *supra* note 14.

42. I.N.A. § 101 (a)(42).

43. *Id.*

44. *Jean v. Nelson*, 472 U.S. 846 (1985). *Jean* was a class action on behalf of Haitians that challenged a change by the former Immigration and Naturalization Service (“INS”) from a policy of general parole for undocumented non-citizens seeking admission to the U.S. to a policy, based on no statute or regulation, of detention without parole for non-citizens unable to present a *prima facie* case for admission.

A. *Developing Circuit Law on the Constitutional Right to Asylum*

In her 2000 article “The Due Process Right To Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy,” Kendall Coffey analyzed the Circuit decisions which had addressed this question to that point.⁴⁵ This section of this article reviews those decisions and key developments in this area since Coffey’s article was published.

1. The Fifth Circuit was the first to find a constitutional right to asylum, with several circuits following suit.

The foremost case holding that there is a constitutionally protected right to petition for asylum in the United States is from the Fifth Circuit. In *Haitian Refugee Center v. Smith*, the Circuit Court ruled that significant flaws in INS processing of asylum applications resulting in mass denials for relief violated constitutional due process on grounds that petitioning for asylum is constitutionally protected.⁴⁶ The Court articulated two bases for its ruling: (1) constitutional protections, including due process, apply to all persons within U.S. borders regardless of citizenship, and (2) the applicable INS regulation and U.S. treaty commitments established a constitutionally protected right to petition the government for asylum.⁴⁷

The Fifth Circuit reasoned that even though Congress enjoys broad powers over immigration, including the ability to exclude non-citizens altogether, the executive is subject to the constraints of due process in implementing congressional policy precisely because due process applies to all persons within the jurisdiction of the U.S., regardless of their immigration status.⁴⁸ According to the Court, there is a separate source of liberty interest based on state and federal laws that creates a “substantive entitlement to a particular governmental benefit.”⁴⁹ Based on Congressional immigration law and agency regulation, the Court held that non-citizens had been granted a right to submit and substantiate their claim for asylum. From this, the Court applied the Supreme Court’s due process doctrine to hold that the Constitution protected the right to seek asylum.⁵⁰

45. Kendall Coffey, *The Due Process Right To Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL’Y REV. 303 (2000).

46. *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1036-39 (5th Cir. 1982).

47. *Id.*

48. *Id.* at 1039 (emphasis added).

49. *Id.*

50. *See Morrissey v. Brewer*, 408 U.S. 471 (1972).

Essentially, because federal statutory law (i.e., the INA) established a right to petition for asylum, it concomitantly established an entitlement giving rise to a liberty interest protected under the Constitution. As such, because the right to seek asylum had its roots in procedural due process, the Fifth Circuit held that “some form of a hearing” was required before that interest could be deprived, and that the hearing must be held in a meaningful time and manner.⁵¹ In a passage particularly relevant to the limits on access to asylum instituted by the Trump Administration, the Fifth Circuit held that “the government violates the fundamental fairness which is the essence of due process when it creates a right to petition and then makes the exercise of that right utterly impossible.”⁵²

The Second Circuit and the D.C. Circuit soon followed the Fifth Circuit’s lead on this question. In *Augustin v. Sava*, the petitioner challenged defects in the translation of asylum proceedings as violating the right to receive a fair asylum hearing.⁵³ The Second Circuit held the lack of adequate translation of asylum proceedings violated the procedural due process rights of asylum applicants.⁵⁴ The Court reasoned that because the Refugee Act of 1980 had created a substantive entitlement to seek asylum, the right to apply for asylum and receive a fair hearing required adequate procedural safeguards.

In *Maldonado-Perez v. INS*, the D.C. Circuit Court followed the Fifth Circuit’s analysis to recognize a procedural due process right to petition for asylum.⁵⁵ The Court found that due process protections applied to a petitioner who had entered without inspection and been deported in absentia.⁵⁶ Though due process did not create a right to be granted asylum, “the minimal procedural due process in this contest requires only a meaningful or fair evidentiary hearing with reasonable opportunity to be present.”⁵⁷

Indeed, even the Eleventh Circuit, which in 1984 had rejected the notion of a constitutional right to asylum in *Jean*, has since changed its view. In *Jean*, the Eleventh Circuit had held that there was no constitutional duty to notify non-citizens of their asylum rights and held that courts should

51. *Haitian Refugee Ctr.*, 676 F.2d at 1039-40.

52. *Id.* at 1039. The relevant discussion in *Haitian Refugee Center* concerned the due process protection applied to the act of *seeking* asylum, not to the granting of asylum relief itself, which is discretionary under the INA.

53. *Augustin v. Sava*, 735 F.2d 32 (2nd Cir. 1984).

54. *Id.* at 36-37.

55. *Maldonado-Perez v. Immigr. and Naturalization Serv.*, 865 F.2d 328 (D.C. Cir. 1989).

56. *Id.* at 331-33.

57. *Id.* at 333.

defer to the INS on issues of detention and release.⁵⁸ Importantly, the Court opposed constitutional due process for all ‘excludable aliens,’ stating “aliens seeking admission . . . have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress.”⁵⁹ The Court continued to explicitly disavow the Fifth Circuit’s reasoning in *Haitian Refugee Center*, stating “the grant of asylum does not . . . create an interest protected by the due process clause.”⁶⁰

However, in 2007, in the case of *Marin v. U.S. Attorney General*, the Eleventh Circuit shifted course and held that (1) the Fifth Amendment entitles non-citizens to due process of law, (2) non-citizens do have a protected interest in petitioning for asylum, separate from receiving relief which is discretionary, and (3) due process can only be satisfied by a full and fair hearing.⁶¹ In 2008, in *Mendez v. U.S. Attorney General*, the Eleventh Circuit again cited *Haitian Refugee Center* in stating that “aliens do have a protected interest in petitioning for asylum,” thus foreclosing and dismissing the Government’s arguments in the case at hand.⁶²

The Court’s shift in reasoning was a mixture of evolving doctrine and circuit court restructuring. As to the former, in *Qiang Wang v. U.S. Attorney General*, the Eleventh Circuit stated that “Congress and the executive have created, at a minimum, a constitutionally protected right to petition our government for political asylum.”⁶³ And as to the latter, the Court acknowledged that it is “bound [by] decisions issued by Unit B of the former Fifth Circuit,” as required under its own Circuit law.⁶⁴

2. Some Circuits fall somewhere in between expressly adopting the Fifth Circuit precedent and expressly denying it.

In her 2000 article, Coffey described the Third Circuit’s position on this question as one offering a middle ground. In *Marincas v. Lewis*, the Court held that INS regulations were legally inadequate for stowaway asylum-seekers because they differed from those applied to other asylum-seek-

58. *Jean v. Nelson*, 727 F.2d. 957 (1985).

59. *Id.* at 968.

60. *Id.* at 981-82.

61. *Marin v. U.S. Atty. Gen.*, 35 F. App’x 719, 724 (11th Cir. 2007) (citing *Haitian Refugee Ctr.*, 676 F.2d at 1038) (citations omitted).

62. *Mendez v. U.S. Atty. Gen.*, 285 F. App’x 685, 687 (11th Cir. 2008).

63. *Wen Qiang Wang v. U.S. Atty. Gen.*, 395 F. App’x 670, 672-73 (11th Cir. 2010) (citing *Haitian Refugee Ctr.*, 676 F.2d at 1038).

64. *Id.* at 673 n. 3, citing *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir.1982). *Haitian Refugee Ctr.* was decided by Unit B of the former Fifth Circuit.

ers.⁶⁵ The Third Circuit held, however, that they were not entitled to Constitutional protection in seeking admission, and instead relied on general due process Supreme Court cases to support its holding.⁶⁶ According to Coffey, the Court ruled on statutory grounds, thus avoiding a Constitutional question.⁶⁷

Since then, the Third Circuit has continued to forge a middle ground. For example, the opinion in *Mudric v. Attorney General of U.S.* seems at first to follow *Jean* (1984) and the original Eleventh Circuit position, but then states:

“While an alien may be eligible for a grant of asylum or an adjustment of status under the immigration laws, he is not entitled to such benefits as a constitutional matter. There is no constitutional right to asylum per se. An alien seeking admission to the United States through asylum “requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.”⁶⁸

However, in this passage the Court seems to be discussing the grant of asylum, as opposed to the constitutional right to petition for asylum.

This view is supported by the Third Circuit’s language in *Abdulai v. Ashcroft*, where the Court states:

“Despite the fact that there is no constitutional right to asylum, aliens facing removal are entitled to due process. . . . The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. . . . In adjudicative contexts such as this one, due process requires three things. An alien: (1) is entitled to fact finding based on a record produced before the decision maker and disclosed to him or her; (2) must be allowed to make arguments on his or her own behalf; and (3) has the right to an individualized determination of his [or her] interests.”⁶⁹

However, the Third Circuit has also ruled that “although the Fifth Amendment entitles aliens to due process . . . in deportation proceedings, due process is flexible,” and calls for such protections as the situation demands.⁷⁰ The due process “afforded aliens stems from those statutory rights

65. *Marincas v. Lewis*, 92 F.3d 195 (3d Cir. 1996).

66. Coffey, *supra* note 45, at 323.

67. *Id.*

68. *Mudric v. Attorney Gen. of U.S.*, 469 F.3d 94, 98 (3d Cir. 2006).

69. *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001) (citations omitted).

70. *Dia v. Ashcroft*, 353 F.3d 228, 238–39 (3d Cir. 2003) (citations omitted).

granted by Congress and the principle that ‘minimum due process rights attach to statutory rights.’”⁷¹

The Eighth Circuit has not expressly disavowed the reasoning in *Haitian Refugee Center*. In *Minwalla v. I.N.S.*, the Eighth Circuit rejected the argument that failure to notify a non-citizen of her statutory right to apply for asylum violates due process because of the factual circumstances of the case, not because the Court found any issue with the legal basis of the argument.⁷² The Court merely analyzed the petitioner’s argument “assuming that due process entitles an alien to notice of his right to apply for asylum.”⁷³ While this is not an express adoption, neither is it an express rejection.

3. Some Circuits expressly reject a constitutional right to asylum.

In *Selgeka v. Carroll*, the Fourth Circuit held that “aliens have no independent constitutional rights in an asylum procedure.”⁷⁴ In reaching this conclusion, the Court held that non-citizens only have those rights Congress sees fit to provide, and that assuming Congress intends immigration procedures to be fair, minimum due process rights attach to statutory rights provided.⁷⁵

The First Circuit has echoed the Eleventh Circuit’s position in *Jean*. In *Amanullah v. Nelson*, the Court cites *Jean* for the proposition that “aliens seeking admission to the United States therefore have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress.”⁷⁶

In summary, three Circuits (the Fifth, Second and DC) recognize a right to seek asylum under constitutional due process guarantees. Two (the Fourth and First) reject such a right. Still others have either taken a middle ground (the Third and Eighth) or not addressed the issue. This Circuit split has now endured for several decades without resolution by the U.S. Supreme Court.

Of course, the existence of a procedural due process right to seek asylum is only the first question in this inquiry. The second question (assuming

71. *Id.* at 238, quoting *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 2003).

72. *Minwalla v. I.N.S.*, 706 F.2d 831, 834 (8th Cir. 1983).

73. *Id.*

74. *Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999).

75. *Id.*; see also *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) (also stating non-citizens have only those rights Congress sees fit to provide, e.g. non-citizens do not have a constitutional right to an administrative appeal).

76. *Amanullah v. Nelson*, 811 F.2d 1, 8 (1st Cir. 1987) (citing *Jean v. Nelson*, 727 F.2d at 968).

the answer to the first is “yes”) is what process is due? The Supreme Court, in *Mathews v. Eldridge*, enumerated the factors which must be considered in determining whether a particular process is constitutionally satisfactory:

1. The private interest that will be affected by the official action;
2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
3. The Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁷⁷

As the Supreme Court held in *Landon v. Plasencia*, a non-citizen’s interest in remaining in the U.S. is “weighty”.⁷⁸ However, the interest of an asylum-seeker in remaining in the U.S. is even weightier, given the persecution that she has alleged she is fleeing from. Moreover, the risk of an erroneous deprivation of that interest through inadequate procedures may be extremely high, depending on the severity of those inadequacies. As the Supreme Court has held, the inquiry into the process due in any given situation is analyzed on a case-by-case basis. Part IV of this article will examine each of the Trump Administration restrictions on access to asylum according to the criteria outlined above.⁷⁹

B. *Why This Matters Now More Than Ever*

The Circuit split on the constitutional right to seek asylum has become more important given the recent (and likely ongoing) increase in challenges to the limits that the Trump Administration has placed on the right of asylum-seekers. The recognition of such a right by the U.S. Supreme Court would give clear direction to the lower courts as to how to resolve these challenges. Indeed, the lack of such a right appears to have affected the presentation of the challenges to the procedures, which are primarily based on procedural flaws under the APA and violations of the statutory opportunity to apply for asylum. The next two sections of this article catalogue those challenges, and suggests ways that they would be strengthened under a constitutional right to seek asylum.

77. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (internal citations and quotations omitted).

78. *Landon*, *supra* note 36, at 330. In that case, the Supreme Court ruled that the non-citizen, who was a lawful permanent resident seeking to re-enter the country after a visit to Mexico, stood to “lose the right ‘to stay and live and work in this land of freedom’”. *Id.* (citations omitted).

79. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). (“(D)ue process is flexible and calls for such procedural protections as the particular situation demands.”).

III. RECENT LITIGATION CHALLENGING U.S. LIMITATIONS ON ACCESS TO CLAIMING ASYLUM.

In the past three years, the Trump Administration has initiated a series of proposals that constitute an unprecedented attack on the right to seek asylum in the United States. These include limitations on who can file asylum applications, where they can be filed (both nationally and extraterritorially), and where applicants must reside outside the U.S. while those claims are being decided. It has also sought to limit the scope of asylum to exclude persons fleeing domestic violence in their home countries and who are family members of those threatened with violence and other forms of persecution. And in perhaps its most sweeping move to date, in July 2019 the Administration proposed denying access to the U.S. asylum process to anyone who passed through certain designated countries on their way to the United States.⁸⁰

This section of this article examines the litigation over four of those policies, and the extent to which a broadly recognized Constitutional right to asylum would clarify the issues and provide asylum-seekers with the protections to which they are entitled under both international and domestic law.

A. *The Zero Tolerance Policy*

On April 6, 2018, the Trump Administration announced its “Zero Tolerance” policy as a means of discouraging undocumented persons from migrating into the United States and to reduce the burden of processing asylum claims that Administration officials contend are often fraudulent.⁸¹ Under the Zero Tolerance policy, the Department of Justice prosecuted all adult non-citizens apprehended crossing the border illegally, with no exception for asylum-seekers or those with minor children.⁸² DOJ’s policy repre-

80. Michael D. Shear & Zolan Kanno-Youngs, *Most Migrants at Border With Mexico Would Be Denied Asylum Protections Under New Trump Rule*, N.Y. TIMES, July 15, 2019, <https://www.nytimes.com/2019/07/15/us/politics/trump-asylum-rule.html>.

81. Congressional Research Service, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy*, Updated February 26, 2019, available at <https://fas.org/sgp/crs/homsec/R45266.pdf>. In reality, the Trump Administration had been separating families since July 2017. See Order Granting in Part and Denying in Part Plaintiffs’ Motion to Enforce Preliminary Injunction, in *Ms. L. v. U.S. Immigr. and Customs Enforcement*, No. 18-cv-00428-DMS-MDD (S.D.Cal. 2018), issued on January 13, 2020, at 6.

82. SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 108 (2019).

sented a change in the level of enforcement of an existing statute rather than a change in statute or regulation. Prior Administrations prosecuted illegal border crossings relatively infrequently.⁸³ Because there are limitations on the detention of children, the incarceration of adults apprehended as part of the Zero Tolerance policy resulted in the separation of children from their parents that led to widespread public outcry.⁸⁴

The challenge to Zero Tolerance was initially brought by an individual parent (“Ms. L”) who had been separated from her child. A class of plaintiffs filed an amended complaint after Ms. L. had been reunited with her child. The class action complaint asserted that Zero Tolerance violates both substantive and procedural due process, though none of these due process arguments references a right to petition for asylum.⁸⁵ The substantive due process claim was based on the right to family integrity that the U.S. Supreme Court has recognized in other contexts, and the procedural due process claim was based on the lack of a hearing before parents were separated from their children. The plaintiffs also claimed that Zero Tolerance served no legitimate purpose or compelling state interest.⁸⁶ Although the complaint also alleges that Zero Tolerance violates the plaintiffs’ opportunity to apply

83. Congressional Research Service, *supra* note 81.

84. Deborah Barfield Berry & Alan Gomez, *Tiny Shoes, Caged Children: Protesting Trump Administration ‘Zero Tolerance’ Immigration Policy*, USA TODAY, May 7, 2019, <https://www.usatoday.com/story/news/politics/2019/05/07/migrant-family-separation-under-zero-tolerance-protested-activists-immigration-policy/1132932001/>. Estimates of the number of children separated from their parents vary. One such estimate claims that as many as 6,022 family units could have been separated between April 19, 2018 and August 15, 2018. *See* Amnesty International, *USA: Catastrophic Immigration Policies Resulted in More Family Separations than Previously Disclosed* (October 11, 2018), <https://www.amnestyusa.org/reports/usa-catastrophic-immigration-policies-resulted-in-more-family-separations-than-previously-disclosed/>. Moreover, at least 1,712 children may have been separated from their parents before the policy’s implementation. Jacob Soboroff and Julia Ainsley, *Trump Administration Identifies at Least 1,700 Additional Children it May Have Separated*, NBC NEWS (May 18, 2019), <https://www.nbcnews.com/news/us-news/1-700-additional-separated-migrant-children-identified-trump-administration-n1007426>. A report issued by the Inspector General for the Department Health and Human Services on September 4, 2019 listed anxiety, depression, anger, guilt, acute grief, and PTSD among the mental health issues exhibited by children who had been separated from their parents. *See* Joanne M. Chiedi, *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody* (U.S. Department of Health and Human Services), http://cdn.cnn.com/cnn/2019/images/09/03/oei-09-18-00431_mentalhealthreport.pdf.

85. Amended Complaint at 9, *Ms. L. v. U.S. Immigr. and Customs Enforcement*, No. 18-cv-00428-DMS-MDD (S.D.Cal. 2018).

86. *Id.*

for asylum, it couches this as a statutory violation (i.e., of the INA), rather than a constitutional due process violation.⁸⁷

In its decision granting a Preliminary Injunction, the Southern District of California concluded that the family separation policy itself, and the way it was implemented, was sufficient to meet the “shocks the conscience” standard necessary for the plaintiffs’ substantive due process claim to proceed.⁸⁸ Yet, as noted above, that due process claim (and its vindication by the District Court) was rooted in the substantive due process right to family integrity, rather than a procedural due process right to seek asylum.⁸⁹

87. *Id.* at 11-12. The Complaint alleges that Zero Tolerance violates 8 U.S.C. § 1158, which outlines the procedure for applying for asylum.

88. *Ms. L. v. Immigr. and Customs Enforcement*, 310 F.Supp.3d 1133, 1142-1146 (S.D.Cal. 2018). The District Court focused on the policy’s separation of parents and children without any inquiry into whether the parents were unfit to care for their children and without any procedure for allowing communication between parents and their children or later reuniting children with their parents. *Id.* at 1142. The court thus went on to conclude that, “[a] practice of this sort implemented in this way is likely to be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience, interferes with rights implicit in the concept of ordered liberty[,] and is so ‘brutal’ and ‘offensive’ that it [does] not comport with traditional ideas of fair play and decency.” *Id.* at 1145-1146 (internal quotations and citations omitted).

89. *Id.* at 1142 (“Specifically, Plaintiffs contend the Government’s practice of separating class members from their children, and failing to reunite those parents who have been separated, without a determination that the parent is unfit or presents a danger to the child violates the parents’ substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution.”). The *Ms. L.* litigation is ongoing, but it now concerns the circumstances under which families previously separated under the Zero Tolerance policy will be reunited, rather than any due process right to seek asylum. Two additional lawsuits have challenged the Zero Tolerance policy, though they focused more on the reunification of separated families rather than a due process right to apply for asylum. See *Dora v. Sessions*, Case No. 1:18-cv-01938 (D.C.D.C. 2018) (filed on behalf of parents seeking reunification with their children) and *M.M.M. v. Sessions*, Case No. 18cv1832 (S.D. CA 2018) (filed on behalf of children seeking reunification with their parents). *Dora* was voluntarily dismissed in February 2019. See U.S. District Court District of Columbia (Washington, DC) CIVIL DOCKET FOR CASE #: 1:18-cv-01938-PLF, available at <https://www.clearinghouse.net/chDocs/public/IM-DC-0065-9000.pdf>. The District Court granted class certification and approved the settlement of *MMM* in November 2018. See Order Certifying the Settlement Classes and Granting Final Approval of Class Action Settlement, dated November 15, 2018 (available at <https://www.courtlistener.com/recap/gov.uscourts.casd.585969/gov.uscourts.casd.585969.99.0.pdf>). *MMM* is ongoing, though it now concerns enforcement of the settlement agreement, rather than the adjudication of substantive issues.

B. *The Turnback Policy*

In November 2018 the Trump Administration issued an Interim Final Rule (IFR) as well as a Presidential Proclamation (No. 9822), barring asylum-seekers who enter the US between designated ports of entry from seeking asylum. This policy, known as “Turnback” was the culmination of a long series of less formalized policy initiatives undertaken by the Department of Homeland Security (and more specifically Customs and Border Patrol) to restrict access to the U.S. asylum system. According to the plaintiffs who sued the government over the policy, these actions included turning away asylum-seekers by falsely informing them that the U.S. is no longer providing asylum, that President Trump signed a new law ending asylum, that a law providing asylum to Central Americans ended, that Mexican citizens are not eligible for asylum, and that the U.S. is no longer granting asylum to mothers with children.⁹⁰ CBP officials also allegedly intimidated asylum-seekers by threatening to take away their children if they do not renounce a claim for asylum and by threatening to deport asylum-seekers.⁹¹

The Trump Administration justified the Turnback policy on several grounds, perhaps the most striking of which was then-Secretary Nielsen’s charge that non-citizens are using the asylum system as a “loophole” to get around U.S. immigration law.⁹² Similarly, then-Attorney General Sessions claimed that asylum-seekers are attempting to undermine our laws and overwhelm our system.”⁹³ Indeed, the Turnback policy was a response to what Sessions had earlier described as a process through which “dirty immigration lawyers” would tell their otherwise inadmissible clients to claim

90. Order at 8, *Al Otro Lado, Inc. v. McAleenan*, No. 17-cv-02366-BAS-KSC (S.D.Cal. 2019).

91. *Id.* Other alleged tactics by CBP include compelling asylum-seekers to sign forms recanting previous statements of fear of persecution in English without translation, instructing some asylum-seekers to recant their fears of persecution while being recorded, turning asylum-seekers away from points of entry (“POEs”) without any substantive explanation, physically blocking access to POEs, imposing a fixed number of asylum-seekers per day and placing asylum-seekers on a waiting list that results in asylum-seekers waiting for extended periods of time on or near bridges leading to POEs in rain, cold, and heat, without sufficient food or water and with limited bathroom access, and racially discriminatory denials of access by CBP officers, including by denying asylum-seekers from specific countries access to POEs and allowing lighter-skinned individuals to pass. *Id.* at 8-9.

92. See *Lawsuit Challenges Trump Administration’s Turnback Policy Against Asylum Seekers*, SOUTHERN POVERTY LAW CENTER (Oct. 15, 2018), <https://www.splcenter.org/news/2018/10/15/splc-lawsuit-challenges-trump-administration%E2%80%99s-turnback-policy-against-asylum-seekers>.

93. *Id.*

a credible fear in order to initiate the asylum process and thus stave off removal.⁹⁴ Like Zero Tolerance, the Turnback Policy has had demonstrable effects: As of late September 2019, approximately 26,000 asylum-seekers were waiting in Mexican border towns in overcrowded shelters and dangerous conditions.⁹⁵

The Turnback policy has been challenged in several lawsuits. One, titled *East Bay Sanctuary Covenant v. Trump*, was heard in the Northern District of California.⁹⁶ Two others, *O.A. v. Trump* and *S.M.S.R. v. Trump*, were filed in the District Court for the District of Columbia.⁹⁷ Another, filed after some of the claims in *East Bay* were rendered moot, is *Al Otro Lado, Inc. v. McAleenan*⁹⁸

For purposes of this article, the claims in these cases were virtually identical, with one important exception. All alleged that the Turnback policy violated the INA and the APA. With respect to the first of these claims, they alleged that forcing asylum-seekers to enter the U.S. at designated ports of entry violates Section 1158 of the INA, which provides asylum-seekers with the opportunity to file asylum applications regardless of where they enter the U.S.⁹⁹ And they alleged that the policy violates the APA because it is contrary to law, arbitrary and capricious, and was promulgated without the proper notice and comment.¹⁰⁰ The complaints in *East Bay* and *A.O.*, however, were silent as to a constitutional right to seek asylum, even though the plaintiffs alleged that the result of the Turnback policy denied

94. See UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL JEFF SESSIONS DELIVERS REMARKS TO THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> (“We also have dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum providing them with the magic words needed to trigger the credible fear process.”).

95. Daniella Silva, *Advocates Seek Motion to Block U.S. from Applying “Asylum Ban” to Some Migrants*, NBC NEWS, September 26, 2019, <https://www.nbcnews.com/news/latino/advocates-seek-motion-block-u-s-applying-asylum-ban-some-n1059161>.

96. *East Bay Sanctuary Covenant v. Trump*, 349 F.Supp.3d 838 (N.D.Cal. 2018).

97. *O.A. v. Trump*, 404 F.Supp.3d 109 (D.D.C. 2019); *S.M.S.R. v. Trump*, 1:18-cv-02838-RDM (D.D.C.). In December 2018 these cases were consolidated, with *O.A.* becoming the lead case. University of Michigan Law School, Civil Rights Litigation Clearinghouse, *Case Profile, S.M.S.R. v. Trump* (May 21, 2019), available at <https://www.clearinghouse.net/detail.php?id=17043>.

98. *Al Otra Lado, Inc. v. McAleenan*, F.Supp.3d 1168 (S.D.Cal. 2019).

99. See Complaint at 1, *East Bay Covenant Sanctuary v. Trump*, No. 3:18-cv-06810 (S.D.Cal. 2018).

100. *Id.* at 16-17.

access to the asylum process.¹⁰¹ That denial of access was achieved by Border Patrol officials turning back asylum-seekers at the U.S. border, often under the false pretext that the government lacked the resources to adequately process asylum claims.¹⁰²

In February 2020, in the *East Bay* litigation, the Ninth Circuit upheld the nationwide injunction against the Turnback policy that had been previously issued by the District Court. Its decision was based on the plaintiffs' arguments under the INA and the APA. Not surprisingly, it says nothing about a constitutional right to seek asylum.¹⁰³

Similarly, in an Order dated August 2, 2019 in the *O.A.* litigation, the District Court for the District of Columbia held that the Rule is unlawful for lack of compliance with the APA (the Attorney General and DHS Secretary exceeded the authority conferred on them by Congress) and therefore, did not reach Plaintiffs' substantive and procedural challenges.¹⁰⁴

The complaint in *Otro Lado* did assert constitutional due process claims, and in its decision dated July 29, 2019, the District Court denied the government's motion to dismiss those claims. First, it held that the Fifth Amendment to the U.S. Constitution applies extraterritorially, such as when non-citizens encounter U.S. Border Patrol agents at the border.¹⁰⁵ Second, it

101. See Order, *supra* note 90, at 2. The omission of a claim based on the right to seek asylum is particularly noteworthy in the *O.A. v. Trump* litigation, given that the D.C. Circuit has recognized such a right in the past. See *Maldonado-Perez v. Immigr. and Naturalization Serv.*, 865 F.2d 328 (D.C. Cir. 1989). Such an omission is perhaps more understandable in the *East Bay* litigation, given that the Ninth Circuit has not recognized a constitutional right to seek asylum. The complaint in *S.M.S.R. v. Trump* does allege a due process violation of the statutory right to seek asylum, but, as noted above, *S.M.S.R.* was consolidated with *O.A.*, with *O.A.* becoming the lead case. See *supra* note 97.

102. *Id.* at 3.

103. With respect to the INA, the Ninth Circuit held that the district court had correctly concluded that the Rule is not "in accordance with law," as it bans migrants who use a method of entry explicitly authorized by Congress from seeking asylum. See Order in *East Bay Sanctuary Covenant v. Trump* (9th Cir., February 28, 2020) at 38-39, available at <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/02/28/18-17274.pdf>. With respect to the APA, the Ninth Circuit held that the rule is arbitrary and capricious because it conditions asylum eligibility on the way that the asylum-seeker enters the country, a factor that has long been understood as worth little, if any weight, in determining whether an applicant should be granted asylum. *Id.*, at 42.

104. See *O.A.*, *supra* note 97.

105. Order, *Al Otro Lado, Inc.*, *supra* note 90, at 70-76. The government had argued that the Fifth Amendment's protections for non-citizens do not extend beyond the U.S. border, and were thus inapplicable to situations where potential asylum-seekers were turned away before entering the U.S. (e.g., on bridges between Mexico and the U.S.). In this part of its opinion, the district court noted that the executive branch cannot

held that the plaintiffs had stated adequate due process claims because they alleged that government officials had denied them procedural protections that Congress had “plainly established.”¹⁰⁶ In a decision issued on March 5, 2020, the Ninth Circuit denied the Trump Administration’s Motion for a Stay of the District Court opinion, lifting an emergency temporary stay that it had earlier issued pending its decision on the merits.¹⁰⁷ Therefore, the District Court order remains in effect.

C. “Migrant Protection Protocols” (MPP)

In January 2019, the Department of Homeland Security (DHS) issued the Migrant Protection Protocols (MPP), which initiated a new inspection policy along the southern border. Before the MPP, immigration officers would typically process asylum applicants who lack valid entry documentation for expedited removal. If the applicant passed a credible fear screening, DHS would either detain or parole the individual until her asylum claim could be heard before an immigration judge. The MPP now directs the “return” of asylum applicants who arrive from Mexico as a substitute to the traditional options of detention and parole. Under the MPP, these applicants are processed for standard removal proceedings, instead of expedited removal. They are then made to wait in Mexico until an immigration judge resolves their asylum claims.

As of February 2020, over 60,000 asylum-seekers (many of whom are from Cuba, El Salvador, Guatemala, Honduras and Venezuela) have been forced to wait in Mexico under the MPP.¹⁰⁸ The wait for a hearing can take

turn the Constitution on and off at will, quoting *Boumediene v. Bush*, 553 U.S. 723, 767 (2008).

106. Order, *Al Otro Lado, Inc.*, *supra* note 90, at 77. (“Here . . . Congress has plainly established procedural protections for aliens like the New Individual Plaintiffs in this case, who allege that they were in the process of arriving to the United States and expressed an intent to seek asylum. The New Individual Plaintiffs have plausibly alleged that immigration officers failed to discharge their mandatory duties under the relevant provisions. Consequently, the Court concludes that the New Individual Plaintiffs have stated procedural process claims and the Court denies Defendants’ motion to dismiss these claims.”).

107. See American Immigration Council, et al., “Federal Court’s Preliminary Injunction Restores Asylum Eligibility for Asylum Seekers”, Updated March 17, 2020, available at https://www.americanimmigrationcouncil.org/sites/default/files/other_litigation_documents/challenging_custom_and_border_protections_unlawful_practice_of_turning_away_asylum_seekers_faq.pdf.

108. Vanessa Romo, *Federal Court Suspends Injunction On Trump’s ‘Remain In Mexico’ Program*, NPR (Feb. 28, 2020, 4:41 PM), <https://www.npr.org/2020/02/28/810440516/federal-court-again-blocks-trumps-remain-in-mexico-program>; Maria

months, and applicants must travel across the border for each hearing by buses provided by DHS.¹⁰⁹ Covid-19 has exacerbated the problem, as the Trump Administration has postponed MPP hearings due to the epidemic.¹¹⁰ Approximately 4,600 MPP hearings have been postponed, nearly half of which are for persons who had already been waiting in Mexico for six months.¹¹¹ In the meantime, asylum-seekers are left to languish in Mexico.¹¹² They face “insurmountable odds” to find shelter, employment, and safety.¹¹³ Vulnerable migrants are particularly impacted: young children cannot go to school, and often contract illnesses from the makeshift camps or suffer from lack of medication for diseases they already have; families separated by the U.S. southern border are often trapped in terrible situations trying to reunite with family in the U.S.¹¹⁴

Sacchetti, Kevin Sieff, and Nick Miroff, *Federal appeals court blocks President Trump’s ‘Remain in Mexico’ policy but stays its own ruling*, *The Washington Post* (Feb. 28, 2020, 11:55 AM), https://www.washingtonpost.com/immigration/trump-remain-in-mexico-halted-federal-court/2020/02/28/87bbf85e-e481-11e9-b403-f738899982d2_story.html. <https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf>.

109. According to one recently published empirical study of those forced to remain in Mexico under the MPP, the average wait for a hearing on asylum claims is 88.6 days, with a maximum of 245 days. *See* Tom K. Wong, *SEEKING ASYLUM: PART 2*, 13 (2019), <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

110. Adam Shaw, *DOJ postpones ‘Remain in Mexico’ hearings in response to coronavirus threat*, *FOX NEWS* (March 26, 2020), <https://www.foxnews.com/politics/doj-remain-in-mexico-hearings-coronavirus>.

111. Cat Cardenas, *Still Fearing Violence, Migrants Subject to Trump’s Remain in Mexico Policy Are Now Bracing for a Pandemic*, *TEXAS MONTHLY* (April 10, 2020), <https://www.texasmonthly.com/news/matamoros-migrant-camps-coronavirus-remain-mexico/>.

112. Stacy Caplow and Maryellen Fullerton, *Migrant ‘Protection’ Protocols: A Report from the Front Lines*, *LEXISNEXIS: LEGAL NEWS ROOM*, Sept. 10, 2019, <https://www.lexisnexis.com/legalnewsroom/immigration/b/outsidenews/posts/migrant-protection-protocols-a-report-from-the-front-lines>.

113. Camilo Montoya-Galvez, *“Farce of Due Process”: Lawyers Denounce New Border Tent Courts for Migrants*, *CBS NEWS*, Sept. 19, 2019, <https://www.cbsnews.com/news/asylum-seeker-tent-courts-at-border-denounced-by-attorneys-as-farce-of-due-process/>; Camilo Montoya-Galvez, *U.S. says asylum seekers encountered along entire southern border can now be returned to Mexico*, *CBS NEWS*, Sept. 27, 2019, <https://www.cbsnews.com/news/remain-in-mexico-u-s-says-it-can-now-return-asylum-seekers-to-mexico-along-entire-southern-border/>; Caplow & Fullerton, *supra* note 112.

114. Montoya-Galvez, *supra* note 113, (Sept. 27, 2019). *See also* Jonathan Blitzer, *How the U.S. Asylum System Is Keeping Migrants at Risk in Mexico*, *NEW YORKER*, Oct. 1, 2019, <https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico>.

The vast majority of asylum-seekers forced to remain in Mexico under the MPP expressed a fear of return to that country when they were interviewed by U.S. officials at the border.¹¹⁵ Ignoring that fear violates both longstanding U.S. policy and the principle of *non-refoulement*, which many scholars contend has achieved the status of customary international law.¹¹⁶

MPP is also plagued by severe limitations on the due process rights of asylum-seekers. For example, many asylum-seekers waiting in Mexico have presented their cases in court without counsel.¹¹⁷ This is due to several factors: U.S.-based attorneys attempting to represent asylum-seekers returned to Mexico face a dangerous journey and risk being arrested for practicing law in Mexico without a license.¹¹⁸ Moreover, given the physical danger in many of the places where asylum-seekers are forced to remain, many have chosen to accelerate their hearings rather than seek continuances to find attorneys.¹¹⁹

Beyond limitations on the right to seek counsel, the facilities constructed by the Trump Administration to consider asylum applications are woefully inadequate. These “tent courts” feature collective hearings where dozens of asylum-seekers are given notice and read their rights by the judge in a single announcement.¹²⁰ Interpretations are inadequate and the opportunity to meet with counsel is very limited.¹²¹

The Trump Administration justified the MPP with the now familiar trope of an “invasion” of undocumented immigrants who are exploiting the asylum-system in order to gain unlawful entry into the United States. According to then-DHS Secretary Nielsen, “Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates.”¹²² Within a few months

115. Wong, *supra* note 109, at 4.

116. Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law* 20 INT’L J. OF REFUGEE L. 373-390 (2008).

117. HUMAN RIGHTS FIRST, TRUMP ADMINISTRATION’S THIRD-COUNTRY TRANSIT BAR IS ANOTHER ASYLUM BAN (2019), <https://www.humanrightsfirst.org/sites/default/files/Third-Country-Transit-Ban.pdf>.

118. Montoya-Galvez, *supra* note 113, (Sept. 19, 2019) (“The Trump Administration failed to secure any guarantees from Mexico about whether U.S.-licensed lawyers would require work visas to visit clients in person or might face sanctions for the unlicensed practice of law in Mexico. Indeed, U.S.-based attorneys have reported that Mexican government officials have threatened to arrest American lawyers for practicing law in Mexico without a license.”).

119. HUMAN RIGHTS FIRST, *supra* note 117.

120. Montoya-Galvez, *supra* note 113, (Sept. 19, 2019).

121. *Id.*

122. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, SECRETARY KIRSTIEN M. NIELSEN ANNOUNCES HISTORIC ACTION TO CONFRONT ILLEGAL IMMIGRA-

of the announcement of the MPP, the White House issued a “Fact Sheet” which included a heading entitled “The Asylum Loophole”. The subsequent text reads: “Migrants are flooding to our border to use asylum to gain entry into our country and remain here indefinitely.”¹²³

As of this writing, two lawsuits have been filed in response to the MPP. The first of these, *Innovation Lab v. Nielsen*, was filed in the Northern District of California shortly after the program was implemented.¹²⁴ The allegations in the complaint included the following:

- The MPP deprived asylum-seekers of a meaningful opportunity to seek asylum by forcing them to return to Mexico, which has record levels of violence, to wait while their proceedings continue;
- The Government’s new procedure to determine who is returned cannot ensure that those who face persecution, death, or torture in Mexico would not be erroneously returned;
- The MPP violated the INA and the APA. For example, INA § 235(b)(2), which allows removal to contiguous foreign territory pending removal proceedings is not applicable to asylum-seekers. Moreover, INA § 241(b) prohibits removal to a country where one could face persecution. And the Government failed to comply with notice and comment, and the policy is arbitrary, capricious, and contrary to law;
- Mexico lacks a functioning asylum system, and asylum-seekers face a significant risk of being involuntarily returned to their home countries. Beyond this, conditions in Mexico make it almost impossible for asylum-seekers to meaningfully exercise their right to asylum; and
- DHS erred in adopting “unprecedented” policy without the notice and comment required by the APA.

On April 8, 2019, The District Court held that the MPP violated both the INA and the APA, and issued a nationwide injunction against its implementation. In the course of its decision, the Court held that the plaintiffs had a substantial likelihood of success on the merits of their claims (that DHS was not statutorily authorized to impose contiguous territory return for those subject to expedited removal proceedings; that DHS implemented the

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

123. THE WHITE HOUSE, PRESIDENT DONALD J. TRUMP IS WORKING TO STOP THE ABUSE OF OUR ASYLUM SYSTEM AND ADDRESS THE ROOT CAUSES OF THE BORDER CRISIS (2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis/>.

124. See Complaint in *Innovation Law Lab v. Nielsen*, No. 3:19-cv-00807 (N. D. Cal. 2019).

policy without concern for the legal obligation to avoid *refoulement*; and that DHS implemented the policy without the requisite notice and comment). The District Court also found that Plaintiffs would likely suffer irreparable harm by being subjected to violence in Mexico in the absence of a preliminary injunction, and that the balance of equities and public interest favored such a preliminary injunction.¹²⁵

The U.S. government appealed, and in a decision issued on February 28, 2020 the Ninth Circuit affirmed the District Court's order.¹²⁶ The Ninth Circuit concluded that the MPP violates the INA because (1) the INA prohibits returning an asylum-seeker to a contiguous country to await a hearing, and (2) the MPP is inconsistent with U.S. *non-refoulement* treaty obligations that were incorporated into the INA as part of the Refugee Act of 1980.¹²⁷ Shortly thereafter, the government sought a stay from the U.S. Supreme Court, which granted it, declaring the "district court's April 8, 2019 order granting a preliminary injunction is stayed pending the timely filing and disposition of a petition for a writ of certiorari."¹²⁸ The government quickly filed its petition for a writ of certiorari.¹²⁹

The second case regarding the MPP is *Doe v. McAleenan*, which was filed in the Southern District of California in November 2019. Unlike *Innovation Lab*, it does not challenge the MPP per se, but rather the lack of access to counsel for asylum-seekers during the so-called non-refoulement interviews conducted by DHS in order to determine whether those asylum-seekers have a fear of persecution upon being deported to Mexico to await the processing of their asylum claims.¹³⁰ The plaintiffs in *Doe* assert procedural and substantive due process claims (as well as claims under the INA,

125. *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1121-1130 (N.D. Cal. 2019).

126. *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020). The Ninth Circuit had earlier stayed the District Court order. See *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).

127. *Id.* Following this decision, the government filed an emergency motion for stay pending disposition of petition for certiorari to the Supreme Court. On March 4, 2020 the Ninth Circuit denied the government's motion for such a stay but held that a stay of the injunction was warranted "insofar as it operates outside the geographical boundaries of the Ninth Circuit." *Innovation Law Lab v. Wolf*, 951 F.3d 986, 990 (9th Cir. 2020).

128. *Wolf v. Innovation Law Lab*, No. 19A960, 2020 WL 1161432, at *1 (U.S. Mar. 11, 2020).

129. See Petition for Writ of Certiorari, Chad Wolf, Acting Secretary of Homeland Security, et al. v. Innovation Law Lab, et al., (No. 19-1212) (filed April 14, 2020).

130. See Complaint in *Doe v. McAleenan*, 3:19-cv-02119-DMS-AGS (S. D. Cal. 2019), available at <https://www.clearinghouse.net/chDocs/public/IM-CA-0152-0001.pdf>.

APA and the First Amendment), but they concern access to counsel and the right not to be housed under conditions of confinement that amount to punishment, rather than a constitutional right to seek asylum.¹³¹ The District Court granted a temporary restraining order with respect to the plaintiffs' APA claims in November 2019, enjoining the government from denying plaintiffs access to counsel before and during their on-refoulement interviews.¹³² The government's appeal is pending as of this writing.

For purposes of this article, neither the complaints nor the subsequent court rulings in either *Innovation Lab* or *Doe* discuss whether the MPP violates the due process right to seek asylum.¹³³ In the meantime, tens of thousands of individuals seeking asylum in the U.S. wait in Mexico.¹³⁴

D. "Safe" Third Country

On July 16, 2019, the Attorney General and Acting Secretary of Homeland Security promulgated an interim final rule providing that non-

131. *Id.*

132. See Order Granting Motion for Temporary Restraining Order in *Doe v. McAleenan*, dated November 12, 2019, available at <https://www.clearinghouse.net/chDocs/public/IM-CA-0152-0004.pdf>.

133. One potential bar to such an argument is INA § 1252 (b)(9), which significantly limits the judicial review of removal proceedings. The MPP concerns the treatment of non-citizens in removal proceedings (either expedited removal proceedings or regular removal proceedings). As the First Circuit has noted, § 1252 (b)(9) is "breath-taking" in scope and "vise-like" in grip and therefore swallows up virtually all claims that are tied to removal proceedings. See *Aguilar v. Immigr. and Customs Enforcement*, 510 F.3d 1, 9 (1st Cir. 2007). According to the Ninth Circuit, "taken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the PFR process." *JEFM v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) See also *Vitoria v. Lynch*, 808 F.3d 764, 767 (9th Cir. 2015) ("It is well established that this court's jurisdiction over removal proceedings is limited to review of final orders of removal."). Nevertheless, when challenging executive action under the imprimatur of substantive due process, "the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *City of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). One could certainly assert that the MPP shocks the conscience and is thus a means of avoiding the "vise-like grip" of § 1252 (b)(9).

134. Jason Kao and Denise Lu, *How Trump's Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. TIMES, August 18, 2019, <https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html>. See also, Robert Moore, In Juárez, 'Remain in Mexico' Policy Casts Asylum-Seekers Back Into Uncertainty, NPR, July 10, 2019, <https://www.npr.org/2019/07/10/740159720/under-trump-policy-migrants-seeking-asylum-must-wait-in-mexico>.

citizens who transit through another country prior to reaching the southern border of the United States are ineligible for asylum in the U.S. The Rule has only three narrow exceptions, for those who applied for protection in a transit country and were denied it in a final judgment; who meet the definition of a “victim of severe form of trafficking in persons”; or who transited only through countries that are not parties to the Refugee Convention or the Convention Against Torture. Mexico, the only country adjoining the southern border of the United States, is a party to the Refugee Convention and the Convention Against Torture.

In furtherance of this policy, the United States has reached tentative agreements with all three countries constituting Central America’s so-called Northern Triangle. The first such agreement was with the then-Guatemalan President Jimmy Morales on July 26, 2019 as a result of economic pressure.¹³⁵ Originally, the Guatemalan Constitutional Court blocked the agreement from being implemented, arguing such a decision required the knowledge and approval of the Guatemalan Congress.¹³⁶ Since then, the agreement has been signed into law.¹³⁷ In November 2019, the Trump Administration began sending asylum-seekers to Guatemala under the terms of this agreement.¹³⁸

The Trump Administration reached a similar third country agreement with El Salvador on September 20, 2019.¹³⁹ The United States stated its

135. Sofia Mechu, *Guatemalan Court Halts ‘Safe Third Country’ Designation for Asylum Seekers*, REUTERS, July 15, 2019, <https://www.reuters.com/article/us-usa-immigration-guatemala/guatemalan-court-halts-safe-third-country-designation-for-asylum-seekers-idUSKCN1UA1TK>. See Associated Press, *US to sign agreement to send asylum seekers to El Salvador*, GUARDIAN, Sept. 20, 2019, <https://www.theguardian.com/us-news/2019/sep/20/us-el-salvador-asylum-seekers-deal-immigration> (“US threatened to withhold all federal assistance to three Central American countries unless they did more to end the migrant crisis.”); Mica Rosenberg, *Honduras to Accept More Asylum Seekers under Latest U.S. Immigration Deal*, REUTERS, Sept. 25, 2019, <https://www.reuters.com/article/us-usa-immigration/honduras-to-accept-more-asylum-seekers-under-latest-us-immigration-deal-idUSKBNIWA2QI>.

136. Sofia Mechu, *supra* note 135.

137. José García Escobar and Kevin Sieff, *Guatemala’s Next President Likely to Face Pressure from Trump over ‘Safe Third Country’ Agreement*, WASHINGTON POST, Aug. 9, 2019, https://www.washingtonpost.com/world/the_americas/guatemalas-next-president-to-face-trump-pressure-for-safe-third-country-asylum-agreement/2019/08/08/a0414d48-b9e8-11e9-8e83-4e6687e99814_story.html.

138. Camilo Montoya-Galvez, *U.S. Begins Deporting Migrants to Guatemala under Asylum Deal*, CBS NEWS, Nov. 22, 2019, <https://www.cbsnews.com/news/guatemala-asylum-deal-us-begins-deporting-asylum-seekers-to-guatemala-under-new-deal/>.

139. Nick Miroff, *Trump Administration Reaches Deal to Send Asylum Seekers to El Salvador in an Effort to Deter Migrants from Entering the United States*, WASHING-

promise to invest in El Salvador in return for El Salvador's agreement to take in "extraregional migrants," i.e., those from outside Central America.¹⁴⁰ Few details have been provided regarding specifics, such as how the arrangement will work or when it goes into effect.¹⁴¹ White House officials termed this agreement with El Salvador an "asylum cooperation agreement ("ACA")," possibly because of the backlash at using the term "safe third country agreement" for one of the most dangerous countries in the world.¹⁴²

The United States announced it had reached a 'third country agreement' with Honduras on September 25, 2019.¹⁴³ DHS and Honduran government officials, led by President Juan Orlando Hernández, reached an

TON POST, Sept. 20, 2019, https://www.washingtonpost.com/immigration/trump-administration-reaches-deal-to-send-asylum-seekers-to-el-salvador-in-an-effort-to-deter-migrants-from-entering-the-united-states/2019/09/20/17350a16-dbbd-11e9-ac63-3016711543fe_story.html.

140. Nicole Narea, *Trump's Agreements in Central America Could Dismantle the Asylum System as We Know It*, VOX, Sept. 26, 2019, <https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained>; Michelle Hackman & Juan Montes, *U.S. Asylum Pact With Honduras Cements Trump Administration's Regional Strategy*, WALL STREET J., Sept. 25, 2019, <https://www.wsj.com/articles/trump-administration-uses-u-s-leverage-to-seal-migration-deals-11569415931>.

141. Miroff, *supra* note 139; Richard Gonzalez, *U.S., El Salvador Sign New Asylum Deal To Stem Tide Of Migrants*, NPR, Sept. 20, 2019, <https://www.npr.org/2019/09/20/762948556/u-s-el-salvador-sign-new-asylum-deal-to-stem-tide-of-migrants>.

142. Miroff, *supra* note 139; Gonzalez, *supra* note 141 ("A 2018 State Department report on human rights in El Salvador cites allegations of unlawful killings and torture by security forces, as well as forced disappearances by military personnel. The report describes a 'lack of government respect for judicial independence' and 'widespread government corruption.'"); Zolan Kanno-Youngs & Elisabeth Malkin, *U.S. Agreement With El Salvador Seeks to Divert Asylum Seekers*, N.Y. TIMES, Sept. 20, 2019, <https://www.nytimes.com/2019/09/20/us/politics/us-asylum-el-salvador.html> ("Tens of thousands of Salvadorans have been displaced from their homes, and the number of disappearances suggests that the official homicide rate may be considerably higher than the numbers reported by the police. In 2018, about 46,800 Salvadorans sought asylum worldwide, ranking the country sixth in the world for new asylum-seekers. In addition, according to a government study supported by the United Nations high commissioner for refugees, at least 71,500 Salvadorans have been internally displaced by violence. Overall, about 150,000 Salvadorans have become refugees or sought asylum in recent years.").

143. Nick Miroff, *U.S. Announces Asylum Deal with Honduras, Could Send Migrants to One of World's Most Violent Nations*, WASHINGTON POST, Sept. 25, 2019, 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.

agreement that allows the United States to take asylum-seekers at its borders and “return” them to Honduras to seek asylum there, a country with intense gang wars and one of the highest murder rates in the world.¹⁴⁴ Again, the United States threatened the Honduran government with economic harm.¹⁴⁵ The agreement came at a time when President Hernández had been named as a co-conspirator in a major U.S. drug trafficking case.¹⁴⁶

Mexico, on the other hand, has refused to enter in a third country agreement with the U.S.¹⁴⁷ Mexico argues that it has already made the majority of changes and concessions discussed with the U.S. government. In June 2019, the Trump administration threatened to impose tariffs on Mexican goods if Mexico did not join the effort to decrease the number of migrants traveling to the U.S. southern border.¹⁴⁸ Mexico assented, and since then has greatly increased its military presence and managed to show reduced migration and a decrease in numbers of border arrests.¹⁴⁹

According to the complaint challenging the Safe third Country policy, it bars virtually every non-citizen fleeing persecution from obtaining asylum in the United States if they passed through another country on their way there, no matter the conditions or purpose of their journey through that country or their prospect of protection, rights, or permanent legal status in that country.¹⁵⁰ It would mean that virtually all asylum-seekers from the Northern Triangle of Central America would be prohibited from applying for asylum in the United States.¹⁵¹

144. *Id.*

145. See Associated Press, *supra* note 135 (“US threatened to withhold all federal assistance to three Central American countries unless they did more to end the migrant crisis”).

146. Miroff, *supra* note 139.

147. Daina Beth Solomon, *Mexico Again Rejects ‘Safe Third Country’ Proposal by U.S. on Migration*, REUTERS, Aug. 22, 2019, <https://www.reuters.com/article/us-usa-immigration-mexico-decision/mexico-again-rejects-safe-third-country-proposal-by-us-on-migration-idUSKCN1VD02S>. See also Camilo Montoya-Galvez, *Mexico Writes off “Safe Third Country” Deal with U.S., Citing Drop in Border Crossings*, CBS NEWS, Sept. 10, 2019, <https://www.cbsnews.com/news/mexico-writes-off-safe-third-country-deal-with-us-citing-drop-in-border-crossings/>.

148. Narea, *supra* note 140.

149. *Id.*

150. See Complaint at 2-3, *East Bay Sanctuary Covenant v. Barr*, No. 3:19-cv-04073 (N. D. Cal. 2019).

151. See *id.* It would also bar asylum applicants from other countries who transit through the Northern Triangle on their way to the United States and, ultimately, the United States. Indeed, many asylum-seekers from sub-Saharan Africa first travel to South America before heading north through Central America and Mexico on their way to the U.S.

The policy would result in a number of harms. For example, if forced to apply for asylum in a third country, particularly in Mexico or the Northern Triangle of Mexico, asylum-seekers would face high homicide rates and broad security risks, including kidnapping, rape, assaults, and extortion.¹⁵² Moreover, forcing thousands of asylum-seekers to first apply in a third country is likely to overwhelm underdeveloped asylum systems in these countries. As a result, asylum-seekers will not receive a full and fair process.¹⁵³ In addition, asylum-seekers who request asylum at the U.S. southern border will be barred from asylum, which means that their only sources of protection in the U.S. will be withholding of removal or the Convention against Torture, neither of which allow for protection of family members or permanent refuge. As a result, enduring family separation will be far more likely for those who manage to obtain such relief.¹⁵⁴

In November 2019 the Trump Administration began a phase-in of the Safe Third Country policy by sending a Honduran man to Guatemala from the U.S. – Mexico border.¹⁵⁵ Under this phase-in, following initial screenings by border Patrol agents and USCIS asylum officers, U.S. immigration judges make the final determination as to whether an asylum-seeker can be sent to Guatemala. Asylum-seekers can challenge their removal to Guatemala by expressing a fear of being sent there, but in order to succeed they must establish that they are more likely than not to face persecution there, which is a higher standard than one must meet to receive asylum in the U.S.¹⁵⁶ As of March 2020, more than 800 asylum-seekers from Honduras and El Salvador had been sent to Guatemala under the Asylum Cooperative

152. See Susan Fratze, *International Experience Suggests Safe Third-Country Agreement Would Not Solve the U.S.-Mexico Border Crisis*, MIGRATION POL'Y INST. (June 2019), <https://www.migrationpolicy.org/news/safe-third-country-agreement-would-not-solve-us-mexico-border-crisis>; See also Lindsay Harris, *Trump's New Asylum Rule Will Guarantee More Separated Families*, THE WASHINGTON POST, July 17, 2019, <https://www.washingtonpost.com/outlook/2019/07/17/trump-administrations-new-asylum-rule-would-basically-end-asylum-border/>; HUMAN RIGHTS FIRST, *supra* note 117.

153. See Fratze, *supra* note 152; see also HUMAN RIGHTS FIRST, *supra* note 117; WASHINGTON OFFICE ON LATIN AMERICA, *New U.S. Third Country Asylum Rule Infeasible, Inhumane, and Illegal*, WOLA (2019), <https://www.wola.org/2019/07/third-country-asylum-rule-infeasible-inhumane-and-illegal/>.

154. See Harris, *supra* note 152.

155. See Montoya-Galvez, *supra* note 113.

156. *Id.* The U.S. Supreme Court has held that a chance of persecution as low as ten per cent may be enough to justify a grant of asylum. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

Agreement.¹⁵⁷ Interviews by U.S. officials are reported to last as little as five minutes, without a fair opportunity to make one's asylum claim.¹⁵⁸

Two separate lawsuits were filed in response to the Safe Third Country policy. This first (*East Bay v. Barr*) was filed on July 16, 2019.¹⁵⁹ It is based exclusively on the same two statutes that formed the challenge to the Turnback policy: the INA and the APA. In this case, the plaintiffs claim that the rule goes beyond two of the carefully delineated exceptions to the right to apply for asylum under the INA: when the applicant had been firmly resettled in a third country before arriving in the U.S. or when there is a bilateral or multilateral agreement allowing the U.S. to return the applicant to a country through which she had traversed on her way to the U.S.¹⁶⁰ The complaint also alleges that the rule violates the APA because it is not in accordance with law, is arbitrary and capricious, and was issued without the requisite notice and comment.¹⁶¹

The District Court for the Northern District of California granted a nationwide injunction against the rule on July 24, 2019. However, on August 16, 2019, the Ninth Circuit ordered a stay of that injunction insofar as it applies outside the Ninth Circuit.¹⁶² And on September 11, 2019 the Supreme Court granted a motion to stay both the district court's July 24, 2019 order granting the preliminary injunction and the September 9, 2019 order restoring the nationwide scope of the injunction pending appeal in the Ninth

157. Zolan Kanno-Youngs, *Immigration Officers Say Asylum Deal With Guatemala Is Unlawful*, THE NEW YORK TIMES (March 6, 2020), <https://www.nytimes.com/2020/03/06/us/politics/trump-asylum-guatemala.html>; Reynaldo Leños Jr, *Asylum-Seekers Reaching U.S. Border Are Being Flown To Guatemala*, NPR (March 11, 2020 4:09 PM), <https://www.npr.org/2020/03/11/814602596/asylum-seekers-reaching-u-s-border-are-being-flown-to-guatemala>.

158. Reynaldo Leños Jr, *Asylum-Seekers Reaching U.S. Border Are Being Flown To Guatemala*, NPR (March 11, 2020 4:09 PM), <https://www.npr.org/2020/03/11/814602596/asylum-seekers-reaching-u-s-border-are-being-flown-to-guatemala>. Guatemala has attempted to block flights coming from the U.S. with asylum-seekers aboard due to the Covid-19 outbreak. See Priscilla Alvarez, *Trump administration has made sweeping changes to the US immigration system during the coronavirus pandemic*, CBS58 NEWS (Apr. 21, 2020, 7:39 AM) <https://www.cbs58.com/news/trump-administration-has-made-sweeping-changes-to-the-us-immigration-system-during-the-coronavirus-pandemic>; Izer, *Guatemala: at least 50% of American deportees have a coronavirus*, PRESSSTORIES (April 15, 2020), <https://presstories.com/2020/04/15/guatemala-at-least-50-of-american-deportees-have-a-coronavirus/>.

159. See Complaint, *East Bay Covenant Sanctuary*, *supra* note 96.

160. See *id.* at 29.

161. See *id.* at 30-31.

162. Order, *East Bay Sanctuary Covenant*, *supra* note 96.

Circuit and disposition of any writ of certiorari that may be sought.¹⁶³ Thus, the rule may go forward in other parts of the country, including in Texas and New Mexico, where many asylum-seekers from Central America, Mexico and elsewhere cross the border from Mexico.¹⁶⁴

The second lawsuit challenging the Safe Third Country policy (*U.T. v. Barr*) was filed in the District Court for the District of Columbia in January 2020.¹⁶⁵ It alleges that the Safe Third Country violates a number of statutes, including the INA, the APA, and the Foreign Affairs Reform and Restructuring Act of 1998.¹⁶⁶ Most of the allegations center on the policy's lack of meaningful inquiry into an applicant's fear of persecution and its violation of statutory requirements that receiving nations of any asylum agreement must be equipped to provide asylum-seekers full and fair procedures to determine asylum claims.¹⁶⁷ It does not, however, allege that the policy violates a constitutional right to seek asylum. As of this writing, no courts have issued any decisions in this case.

IV. ANALYSIS – WHY A CONSTITUTIONAL RIGHT TO SEEK ASYLUM WOULD MATTER.

The cases reviewed above, and the political context in which they have emerged, demonstrate why a constitutional right to seek asylum under the Due Process clause would make a difference. That political context, in which the very notion of being able to apply for asylum in the U.S. is under serious attack, demonstrates why a constitutional right to seek asylum is necessary. The legislative basis for the opportunity to apply for asylum in the U.S. (“Any alien. . . may apply for asylum¹⁶⁸”) is something of a thin reed that could be severely limited through future legislative or administrative enactments. Indeed, the executive and administrative measures reviewed in this article provide a preview of what some of those limitations might look

163. *Barr v. East Bay Sanctuary Covenant*, 140 S.Ct. 3, 3 (2019). Justices Sotomayor and Ginsberg dissented from the grant of stay, echoing concerns in the District Court opinion, stating lower court decisions should be respected, and explaining a stay pending appeal is “extraordinary” relief with an “especially heavy” burden of proof for the government. *Id.* at *3-6 (Sotomayor, J., dissenting).

164. See Norman Merchant, *Court Says U.S. Can Reject Asylum Along Parts Of Mexico Border*, HUFFINGTON POST, August 16, 2019, https://www.huffpost.com/entry/united-states-reject-asylum-mexico-border_n_5d56f9f6e4b056fafd0b9f06.

165. Complaint for Declaratory and Injunctive Relief, *U.T. v. Barr*, (No. 1:20-cv-00116) (D.C. Cir. Filed Jan. 15, 2020). Available at <https://www.aclu.org/legal-document/complaint-ut-v-barr>.

166. *Id.*

167. *Id.*

168. 8 U.S.C. §1158 (a)(1).

like, depending on the composition of future sessions of Congress. As Kowalczyk and Versteeg and Gil-Bazo note, a constitutionalized right to asylum would be better able to withstand such changes in the political branches of government.¹⁶⁹ As Coffey put it, “When rights ascend to constitutional recognition, they reside in the province of the judiciary and cannot be reduced through the discretion of administrative agencies.”¹⁷⁰

The building blocks for such a constitutional right are firmly in place. Several Circuit Courts (most emphatically the Fifth, Second, Eleventh and DC) recognize it and have reviewed restrictions on it accordingly. Others (most notably the Fourth and First) have refused to do so. Still others (including the Third and Eighth Circuits) are agnostic. The courts in the first group have recognized that Congress’ passage of the Refugee Act of 1980 created a constitutionally protected interest in applying for asylum, restrictions on which are subject to due process analysis. They may have been motivated, in part, by the judiciary’s long-standing skepticism in the way that administrative agencies (the former INS and the current DHS) fulfill (or fail to fulfill) their responsibility to protect the interests of non-citizens.¹⁷¹

Moreover, the extension of a due process right to seek asylum would not place a significant burden on the federal judiciary, which has grown comfortable with the relatively uncomplicated due process analysis. As the Supreme Court has noted, “We have described ‘the root requirement’ of the Due Process Clause as being ‘that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.’”¹⁷² Indeed, given the judiciary’s skepticism toward the administrative agencies charged with enforcement of the nation’s immigration laws, many courts would welcome the opportunity to extend the analysis to asylum-seekers. A resolution of the conflict between Circuits on this issue would provide for a uniform means of testing the constitutional legitimacy of any restrictions on the right of access to the asylum process. As such, it would lessen the likelihood of controversy over whether an injunction issued by a single district court would have nationwide effect.¹⁷³ It would also ensure that the rights of

169. Kowalczyk and Versteeg, *supra* note 2; Gil-Bazo, *supra* note 16.

170. Coffey, *supra* note 45 at 334 (citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977)).

171. *Id.* at 305.

172. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

173. In its February 2020 decision upholding a nationwide injunction against the MPP program, The Ninth Circuit acknowledged the controversy over the nationwide scope of injunctions issued by district courts. See *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1094 (9th Cir. 2020).

asylum-seekers are protected according to the due process mandate of the Constitution, regardless of where they might have entered the United States.

Placing this issue in the international context, constitutionalizing the right to seek asylum in the United States would make it among the most effective such rights in the world. Only in Mexico and Ecuador has the constitutional right to asylum been given any effect in national jurisprudence.¹⁷⁴ Moreover, given the plethora of legal challenges to the Trump Administration's immigration policies, the U.S. would undoubtedly develop the world's most robust jurisprudence on the constitutional right to seek asylum. Indeed, it would likely become a leader in this area. The right to seek asylum in the U.S. would surely not be mere window dressing. It would have real power.

But it would not be unfettered. There are already many "escape clauses" which would limit any such constitutionalized right to asylum. For one thing, that right – unlike in many countries of the world – would be limited to the five grounds for asylum enumerated in the Refugee Convention.¹⁷⁵ It would not widen the scope of asylum protection; it would merely provide greater protection against executive or legislative efforts to restrict access to it. Moreover, any asylum restriction that arguably arises within the removal process would be subject to the jurisdiction-stripping section of the INA, which prohibits judicial review of such action until there has been a final agency action.¹⁷⁶ This would limit the scope of judicial oversight of the due process implications of at least certain agency actions, unless they were deemed to have "shocked the conscience".

The next section of this article analyzes whether a constitutional right to seek asylum would likely have made a difference in the adjudication of the challenges to the four asylum-restricting policies discussed above. Where appropriate, that analysis will be guided by the three factors against which procedural due process is measured, according to the decision in *Mathews v. Eldridge*; i.e., the interest at stake for the individual; the risk of erroneous deprivation of the interest through the procedures used and the probable value of additional or different safeguards; and the interest of the

174. See Meili, *supra* note 3.

175. As noted above, those five grounds are race, religion, nationality, membership in a particular social group, and political opinion. In several countries of the world, particularly in Latin America and Africa, the constitutional right to asylum has broadened those categories to include flight from armed conflict, massive violations of human rights, and serious disruptions to the public order. See, e.g., Constitución Política de los Estados Unidos Mexicanos [Constitution of the United Mexican States] (incorporating the Cartagena Declaration of 1984). See also Meili, *supra* note 3.

176. See 8 U.S.C. § 1252 (b)(9).

government in using the current procedures rather than additional or different procedures.¹⁷⁷

V. WOULD A CONSTITUTIONAL RIGHT TO ASYLUM MAKE A DIFFERENCE IN SPECIFIC CASES?.

A. *Zero Tolerance*

In its decision granting a preliminary injunction, the district court in *Ms. L v. ICE* held that the government had violated the plaintiffs' substantive due process right to family integrity. That finding was based on the court's conclusion that the family separation policy "shocks the conscience". It is unlikely that a constitutional right to petition for asylum would have made any difference in the outcome of this case, as the plaintiffs had achieved their desired result through the substantive due process argument. What this case does demonstrate, nevertheless, is that at least some courts (here, the Southern District of California) are willing to engage in due process challenges on behalf of asylum-seekers, albeit not with respect to a due process right to seek asylum.

B. *Turnback*

The District Court decision in *Otro Lado v. Trump* represents the most full-throated support for the procedural due process rights of asylum-seekers in the cases analyzed in this article. In its July 2019 decision, the District Court rejected the government's motion to dismiss the plaintiff's procedural due process claims against the amalgam of policies and practices that comprise the Trump Administration's Turnback program. It held that those claims derived from the statutory benefit that Congress afforded asylum-seekers as part of the Refugee Act of 1980. This decision demonstrates the utility of a due process right to seek asylum.

C. *Migrant Protection Protocols*

A due process right to seek asylum would be of significant assistance to the plaintiffs in this case.¹⁷⁸ It is readily apparent that forcing applicants

177. *Mathews*, *supra* note 77, at 334-35.

178. The efficacy of such an argument would depend on creative lawyering to evade the "vise-like grip" of INA § 1252 (b)(9), given that this case arises within the context of the removal of non-citizens from the United States. Such creativity might include the argument that by immediately sending certain asylum-seekers to Mexico before any sort of processing of their claims, the policy operates outside the scope of the removal process altogether.

to remain in Mexico while their claims are pending and where they face both danger and deprivation prevents them from adequately exercising their right to apply for asylum in the U.S. It also produces logistical hurdles to an effective exercise of that right to seek asylum, including limited access to counsel, immigration court and other immigration-related agencies, and to other resources that would allow them to articulate their claim in an effective manner.¹⁷⁹ One could persuasively argue that because of these obstacles, the Migrant Protection Protocols “make the exercise of [the right to petition for asylum] utterly impossible.”¹⁸⁰

The *Mathews v. Eldridge* factors suggest that the MPP would not pass muster under a constitutional right to seek asylum. As noted above, the interest at stake is significant for any asylum-seeker, but it is especially weighty in this instance because of the dangerous conditions under which asylum-seekers must await their hearing. Moreover, because of the physical hazards and procedural flaws of the MPP, the risk of erroneous deprivation of the interest at stake is extremely high. As such, the value of additional safeguards (such as decent living conditions and greater due process protections for asylum-seekers in the courts along the border) would be significant. On the other hand, the interest of the government in forcing asylum-seekers to wait in Mexico rather than in the U.S. is not equivalent. The MPP – and the legal challenges to it – does not implicate or threaten the sovereign authority of the U.S. to determine who may gain entry into the country. It is more a matter of administrative convenience and related budgetary priorities: forcing asylum-seekers to wait in Mexico means that the U.S. will be detaining or otherwise housing fewer asylum-seekers while they await their hearing. Such administrative and budgetary concerns would presumably not measure up to the interests of asylum-seekers in avoiding persecution.

D. *Safe Third Country*

This may be the clearest example yet of the need for a due process right to seek asylum in the U.S. This policy, which bears a significant likeness to Australia’s offshore processing of asylum-seekers, makes the exercise of that right “utterly impossible.”¹⁸¹ Nevertheless, the Ninth Circuit

179. See Camilo Montoya-Galvez, *Trump Administration Says “Remain in Mexico” Program Is One “We’re Building to Last,”* CBS NEWS, Aug. 19, 2019, <https://www.cbsnews.com/news/remain-in-mexico-trump-administration-says-controversial-program-is-one-were-building-to-last/>.

180. *Haitian Refugee Ctr.*, 676 F.2d at 1039.

181. *Id.* President Trump has praised Australia’s off-shore processing plan as a model for effective immigration control. See Luke Henriques-Gomes, *Donald Trump*

limited the injunction against the policy to the geographic limits of the Ninth Circuit, and the U.S. Supreme Court subsequently permitted the policy to go forward pending further litigation below. While these developments may not signal judicial favoritism toward the policy, they demonstrate the weakness of a Circuit-by-Circuit review of national immigration policies. Such a patchwork of decisions would be less likely if there were a uniformly recognized (and presumably enforced) Constitutional due process right to petition for asylum. In addition, the Safe Third Country policy would almost assuredly violate such a constitutional right to seek asylum, given that huge numbers of asylum-seekers would be barred from asserting an asylum claim in the U.S. before being sent to El Salvador, Guatemala or Honduras, among the most dangerous countries in the world. As such, the policy poses a significant risk of depriving these asylum-seekers of their significant interest in obtaining protection from persecution. And while the U.S. may have an interest in decreasing the number of asylum applications lodged within its borders, that interest –like the governmental interest underpinning the MPP – is largely administrative and budgetary. Accordingly, a court would likely deem it secondary to the weightier interests of individual asylum-seekers.

CONCLUSION

The Constitutional right to seek asylum in the United States has been in a holding pattern for several decades. The Circuit split on the issue has forced refugee advocates to keep the argument in reserve, relying instead on the more cramped, statutorily-based “opportunity” to apply for asylum under the INA, as well as administrative irregularities under the APA. These arguments have had limited success in the litigation challenging the Trump Administration’s unprecedented assault on access to the asylum system in the U.S.

Supreme Court approval of a procedural due process right to petition for asylum would provide a clearer and more robust basis for confronting these policies. It is a logical extension of the well-established due process rights of non-citizens generally. And from a global perspective, it would allow the U.S. to play a leading role at a time when the constitutional right to asylum in other countries is slowly emerging as an important part of the refugee advocate’s toolkit. Such a constitutional right would be far more than mere window dressing, which is its fate in most countries. In the U.S.,

Says ‘Much Can Be Learned’ from Australia’s Hardline Asylum Seeker Policies, GUARDIAN, June 26, 2019, <https://www.theguardian.com/us-news/2019/jun/27/donald-trump-says-much-can-be-learned-from-australias-hardline-asylum-seeker-policies>.

it would provide asylum-seekers and their lawyers with a meaningful basis for guaranteeing unfettered access to asylum. In the current global environment, where increasingly draconian limitations on such access have become the norm, such guarantees are more crucial than ever.