

November 9, 2018

### **BRIEF ANALYSIS**

November 8, 2018 Rule: Aliens Subject to a Bar on Entry under Certain Presidential Proclamations, Procedures for Protection Claims;  
November 9, 2018 Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States

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The Tahirih Justice Center reviewed the November 8, 2018 Rule: Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims and the November 9, 2018 Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States.<sup>i</sup> This policy change impacts all individuals coming to the southern border and bars asylum for anyone who crosses the border between U.S. government-operated ports of entry.

- **The rule will have a significant, detrimental impact on survivors of violence, including women and children.** Many of the individuals coming to the southern border are women, girls, and gay, transgender, and other nonconforming individuals fleeing gender-based violence. Systemic failures to respond to gender-based violence such as rape, trafficking, and domestic abuse, and to address its root causes, have led to increased rates of gender-based violence and impunity for perpetrators. Having experienced this violence, and needing to find safety, survivors travel to the U.S. risking further harm, often carrying mental and physical symptoms of trauma. It is critical that these survivors are met with trauma-informed services and treated like victims, not criminals, and that they have an opportunity to make their case for asylum, regardless of where they are able to first approach the U.S. government and ask for protection.
- **Forcing people to use check points in order to obtain asylum as a deterrence tactic may amount to a categorical bar on asylum.** Ports of entry may close for long periods of time, making it impossible for anyone attempting to enter via the southern land border with the U.S. to obtain asylum.<sup>ii</sup> Already, check points have been closed for days, leaving adults and children waiting on bridges and in parking lots in inhumane conditions.<sup>iii</sup> In addition, studies have shown how dehumanizing and dangerous it can be to go through a Customs and Border Protection check point. Many people who approach check points are turned around even though they articulate their fear of return and should be sent to an officer for a legal screening interview. Even once inside a port of entry, tactics such as using “iceboxes” to make immigrants so cold that they will give up and turn around are common. It is critical that the pathway to asylum remain open to all, regardless of how they enter the U.S.

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- **By prejudicing people who cross the border outside of a port of entry but not those who arrive at a port of entry, the rule is arbitrarily limiting the possibility of protection of one group instead of another.** Whether crossing at a border port of entry or between check points, a person who fears persecution should have a chance at asylum. The U.S. must not take away a critical pathway to safety that is provided for in binding international law.
- **The rule is framed as a return to law and order but violates the law itself.** U.S. immigration law, passed by Congress, provides that anyone may apply for asylum regardless of where or how they enter or seek to enter.<sup>iv</sup> This executive action goes against that fundamental provision.
- **In general, the rule and proclamation are contrary to the meaning and spirit of basic tenets of human rights and refugee protection under international law.** These include:
  - Article 14 of the Universal Declaration of Human Rights recognizes the right of all people to seek asylum from persecution in other countries.<sup>v</sup>
  - In general, the Refugee Convention obligates countries that are parties to it, such as the United States, to provide a pathway to protection for refugees who fit the definition therein. The withdrawal of asylum as a pathway for certain individuals is contrary to this obligation.
  - Article 3 of the Convention obligates governments to avoid discrimination on the basis of country of origin, among other things. The rule affects only the U.S. southern border and names Guatemala, Honduras, and El Salvador as the countries from which the majority of migrants are arriving and with which the U.S. government has attempted to negotiate.
  - Article 31 of the Convention requires that states do not punish them for their arrival even if they are present unlawfully.
  - Article 34 of the Convention also obligates countries to facilitate the naturalization of refugees. Under this rule, not only will there be no path to asylum for possibly qualifying refugees, but if they do receive withholding of removal, they will not be eligible for naturalization.
- **The lack of any public notice or comment period for this dramatic change raises significant due process concerns.** Where people have relied on existing law by making their way to the U.S. to seek asylum, and the way to obtain asylum changes literally overnight, people without notice of that change will be materially prejudiced. With no clear immediate need or urgency, the new rule violates the Administrative Procedures Act's requirement of notice periods for shifts in policy and prejudices existing rights without sufficient notice.
- **There is no evidence to suggest that there are more border crossers than ever before.** In fact, data shows that there were fewer border crossers during the past year than in previous years.<sup>vi</sup> The migrating groups currently moving through Mexico also do not represent significant numbers given the typical traffic across the border. Even if it was clear that the numbers of migrating or asylum seeking individuals were higher, the solution should not be taking away the possibility of asylum from people fleeing persecution.

- **Assertions that people approaching the border are generally criminals are unsupported by facts.** Arguments in the rule and proclamation that keeping refugees and migrants away from the U.S. will help to control or prevent crime are wholly unsupported by facts. Reliable research has long shown that immigrants are far less likely to commit crimes than U.S. citizens.<sup>vii</sup> With regard to the current migrating groups in particular, reports indicate that there is no reason to believe that significant numbers of criminals are among them, and that a few individuals with criminal records were already deported by the Mexican government.<sup>viii</sup>
- **There is no evidence that eliminating asylum will relieve the overburdened immigration system when withholding of removal has been left in place.** Anyone who fears persecution will simply pursue withholding instead of asylum. Withholding of removal is a lesser form of relief that does not allow family unity or stability. It also will not put individuals on a path to citizenship, important so that refugees can achieve stability for themselves and their families, contribute to society in the long term, and be protected from exploitation in the work place, among other things. Withholding of removal can be withdrawn by the government even after being granted, which could burden the system more than asylum. It carries a higher standard, also, which will mean cases could take longer to prepare and present.
- **Policies that attempt to deter those who fear persecution from coming to the U.S. or applying for protection are generally ineffective.** There is no evidence that people will stop coming to the U.S. because of shifts in policy. The Obama Administration attempted to reduce the numbers of migrants from Central America by instituting family detention but did not see significant reduction in numbers as a direct result of the policy.<sup>ix</sup> Not only is it unlikely to be effective in deterring migrants in general, but it will actually harm asylum seekers who need protection.
- **Increased numbers of approved credible fear interviews do not indicate fraud or misuse of the system.** The fact that large percentages of applicants are passing their credible fear interviews means that many going through the initial screening process do in fact have colorable claims for asylum and may require protection to avoid harm. In fact, there are significant disparities in approval rates across adjudicators and locations, demonstrating how subjective this screening process is. Working with governments of origin to assist in effectively addressing root causes would be a more useful strategy to help when large numbers of people are seen to legitimately be fleeing persecution.

<sup>i</sup> <https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-24594.pdf> and <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/>

<sup>ii</sup> <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/us-ports-entry-government-denying-asylum-those>

<sup>iii</sup> <https://www.texastribune.org/2018/07/05/migrants-seeking-asylum-legally-ports-entry-turned-away-separated-fami/>; [https://www.washingtonpost.com/world/national-security/at-the-us-border-asylum-seekers-fleeing-violence-are-told-to-come-back-later/2018/06/12/79a12718-6e4d-11e8-afd5-778aca903bbe\\_story.html?utm\\_term=.5a6954e12012](https://www.washingtonpost.com/world/national-security/at-the-us-border-asylum-seekers-fleeing-violence-are-told-to-come-back-later/2018/06/12/79a12718-6e4d-11e8-afd5-778aca903bbe_story.html?utm_term=.5a6954e12012)

<sup>iv</sup> “Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section.” INA section 208(a)(1)

<sup>v</sup> <http://www.unhcr.org/en-us/3b66c2aa10>

<sup>vi</sup> <https://www.cbp.gov/newsroom/stats/sw-border-migration>

<sup>vii</sup> <https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html>

<sup>viii</sup> [https://www.washingtonpost.com/politics/2018/11/09/trump-administrations-fuzzy-math-criminals-caravan/?utm\\_term=.a4200ffe92db](https://www.washingtonpost.com/politics/2018/11/09/trump-administrations-fuzzy-math-criminals-caravan/?utm_term=.a4200ffe92db)

<sup>ix</sup> <http://graphics8.nytimes.com/packages/pdf/us/FloresRuling.pdf>