



THE TRUMP ADMINISTRATION'S LAWLESSNESS AT THE BORDER: STORIES FROM TIJUANA

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Following the law should not be a radical idea. Yet the governments of the United States and Mexico somehow find advocacy for the codified rights of asylum seekers reprehensible.

I travelled to Tijuana in mid-January to provide pro bono assistance to asylum seekers trying to present themselves at the San Ysidro Port of Entry and lawfully claim asylum. I was hosted by the [Border Rights Project of Al Otro Lado](#), an amazing non-profit organization that provides critical legal orientations and know-your-rights trainings to asylum seekers in Tijuana, as well as documents human rights abuses against asylum-seekers by the Mexican and US authorities. Given their zealous advocacy and pursuit of justice, Al Otro Lado has become [public enemy #1](#) in the eyes of US Customs and Border Protection (CBP) and the Mexican Instituto Nacional de Migración (INM). But what Al Otro Lado and volunteers are fighting for, in part, is for the US and Mexican governments to follow the law – in particular, the right to seek asylum. They are met with shockingly hostile resistance.

[Section 208 of the Immigration and Nationality Act \(INA\)](#) provides,

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

INA § 208 does not limit the number of asylum seekers allowed to present at a port of entry and claim asylum on any given day. It does not allow for a waitlist

for entry, which forces asylum seekers to wait in Mexico until their numbers are called. Critically, INA § 208 [does not limit asylum protections to only those who present at ports of entry](#). Somehow, the plain meaning of INA § 208 is lost on this administration; or, it simply does not care. Regardless of intent, this administration is flagrantly violating the law by preventing asylum seekers from lawfully claiming asylum and sentencing them to death in the process.

I have previously blogged about the various ways in which the Trump administration has [eroded the rights of asylum seekers](#) and has made it [increasingly difficult](#) for these folks to [access justice](#) once already in the US. The Trump administration has now taken aim at asylum seekers even before they reach the US in an attempt to prevent them from asserting their rights through its illegal metering tactics and the recent rollout of the [Migrant Protection Protocol](#).

Illegal Turn Back Policy and the Metering of Asylum Seekers

Since at least the summer of 2016, CBP has consistently violated INA § 208 by turning back asylum seekers who lawfully present themselves at ports of entry and claim asylum. CBP officers regularly tell asylum seekers that “[Donald Trump just signed new laws saying there is no asylum for anyone](#)” or that they will be separated from their children if they claim asylum, and even coerce asylum-seekers into signing documents stating that they do not have a fear of returning to their home country. CBP has attempted to justify such unlawful conduct by claiming that there is [not enough room](#) to process all of the asylum seekers who present at a port of entry on any given day.

As a result of the illegal turn back policy, asylum-seekers are forced to remain in Mexico while they await the opportunity to access basic asylum procedures. In Tijuana and several other ports of entry, this has resulted in an unlawful metering list (referred to as *la lista*), where asylum seekers and their families take a number and wait to be called before they may access the port of entry. Although asylum-seekers themselves are the ones responsible for giving out numbers to newly arrived asylum-seekers, *la lista* is actually managed by Grupos Beta (the so-called ‘humanitarian division’ of the Mexican INM) at the direction of US CBP. Each morning, CBP officials convey to Mexican INM how many asylum seekers they will accept that day. Mexican INM then relays this information to the asylum seeker tasked with running *la lista*, who then relays the numbers to asylum seekers anxiously awaiting their opportunity to claim

asylum. Asylum seekers whose numbers are called line up at El Chaparral border crossing, but are then transported via van to a different port of entry several miles away.

It is important to note that unaccompanied minors are not allowed on *la lista*, thus leaving them to languish in Tijuana where they are at severe risk of exploitation and violence. Although not officially confirmed, one can infer that CBP does not wish to accept UACs because they are entitled to additional protections under the law. One can also infer that CBP conveys this desire to the Mexican INM who then conveys this to the list-keepers to not allow UACs on *la lista*. As a result, UACs are systemically blocked from accessing US asylum procedures, and are forced to age out while in Mexico before they are allowed to present at the port of entry. Once in the US, they will be treated as adults and entitled to fewer protections, despite their heightened vulnerability.

Illegal Metering in Practice: A Typical Morning at El Chaparral

Each morning at 7:00am, Al Otro Lado staff and volunteers arrive at El Chaparral to welcome newly arrived asylum seekers and to let them know that we are here to help them navigate the confusing US asylum process. We let them know about the organization's daily Know Your Rights trainings and legal clinics, medical assistance, and free food and water.

The second half of the morning, Al Otro Lado volunteers turn their attention to asylum seekers whose numbers are called off of *la lista* and who will be allowed to present at the port of entry and claim asylum. During my stay in Tijuana, CBP allowed in anywhere from 15 to 60 people on any given morning – a shockingly low number given that San Ysidro port of entry is [one of the largest and busiest land border crossings in the world](#) which processes over 70,000 vehicles and 20,000 pedestrians per day. For about an hour before the asylum seekers are transported to the port of entry, volunteers scramble to provide last minute Credible Fear Interview (CFI) preparation for those asylum seekers whose numbers are called. We also told folks to dress in their warmest layer on the bottom because they are only permitted one layer of clothing once they are processed by CBP. All other clothing will be confiscated. This is despite the fact that asylum seekers are held for weeks on end in [freezing hieleras](#). We also told the asylum seekers to write the phone numbers of friends or family in the US on their bodies because all of their documents will be taken from them. We told mothers with their children that we could not guarantee that they wouldn't be

separated. One mother had a teenage daughter with autism. She wanted to know what would happen to her if they were separated. We couldn't provide her with any guarantee that the US government would comply with the law and provide her daughter with the heightened care she was entitled to. Around 9:30am, the first vans took off to the port of entry. Volunteers were hopeful that each asylum seeker would be okay, but we will never know for sure what happens to them once they are processed by CBP.

The US government's metering practices and endorsement of *la lista* are unlawful. Under both [US](#) and [international law](#), when someone expresses a fear of returning to their country of origin, the US is obligated to provide that person with an opportunity to seek protection. The US is in flagrant violation of their international and domestic obligations by refusing admission to asylum seekers who lawfully present at ports of entry, whether they turn back those asylum seekers who make it to the port of entry, through their endorsement of *la lista*, or the wholesale ban on admission of UACs.

Given their on-the-ground knowledge of what the US and Mexican governments are perpetrating, Al Otro Lado, the Center for Constitutional Rights, and the American Immigration Council filed suit to challenge the US government's unlawful metering practice in [Al Otro Lado, Inc., et al. v. Kirstjen Nielsen, et al.](#) The complaint explains that CBP has utilized various tactics to deny asylum seekers access to protection through "misrepresentations, threats and intimidation, verbal abuse and physical force, and coercion." *Id.* at 1. It argues that such tactics have deprived asylum seekers of their "statutory and regulatory rights to apply for asylum, violated their due process rights under the Fifth Amendment, and violated the United States' obligations under international law to uphold the principle of non-refoulement." *Id.* at 2. In particular, CBP has violated its statutory duty to inspect all noncitizens who arrive at ports of entry under INA § 235(a)(3), which provides "all aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States **shall be** inspected by immigration officers." INA § 235(a)(3) is not discretionary; thus, when CBP refuses to refer an asylum seeker to a CFI or to place them in proceedings, they are in violation of INA § 235(a)(3), as well as in violation of the Due Process Clause of the Fifth Amendment for failure to comply with mandatory asylum procedures. On August 20, 2018, the court denied in part and granted in part the government's motion to dismiss, allowing the majority

of Al Otro Lado's claims to go forward.

What Happens Next?

Against this backdrop, the Trump Administration has also recently carried out its inaccurately named [Migrant Protection Protocols \(MPP\)](#), which will force asylum seekers to remain in Mexico while they adjudicate their claims in immigration court. Under the plan, asylum seekers will be given a Notice to Appear (NTA) for an immigration hearing and returned to Mexico while awaiting their hearing. However, the NTA may or may not actually list an actual court date, forcing asylum seekers to constantly check the EOIR hotline to know when their hearing will actually be. [When the court date arrives](#), the onus is on asylum seekers to arrive at the port of entry in order to be escorted to their immigration hearing. UACs (if they can actually access the port of entry), Mexican nationals, and other undefined vulnerable individuals will not be subject to the MPP.

[Under the Policy Memorandum](#), in order to not be returned to Mexico, one must show that he or she "would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion or would more likely than not be tortured." As a reminder, in order to demonstrate a credible fear of persecution, one must only show a significant possibility of eligibility for asylum. [8 CFR § 208.30\(e\)\(2\)](#). To be eligible for asylum, one must only show that there is a one-in-ten probability of being persecuted in order to demonstrate that such fear is "well-founded." [INS v. Cardoza-Fonseca](#), 480 US 421, 431 (1987) ("That the fear must be 'well-founded' does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a "more likely than not" one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place"). When individuals are ineligible for asylum, they can alternatively show eligibility for withholding of removal or protection under the Convention Against Torture (CAT), by initially demonstrating a reasonable fear of being tortured. [8 CFR § 208.31\(c\)](#).

Withholding of removal and protection under CAT require the applicant demonstrate that "it is more likely than not" that he or she will suffer harm upon return. [8 CFR § 208.17](#) (Deferral of removal under the Convention Against Torture); see also [8 CFR § 208.16\(b\)\(2\)](#) (Withholding of removal). Thus, under the MPP, an applicant is subject to a higher standard of proof than they would be subject to in regular credible or reasonable fear interviews, a higher

standard of proof than they would be subject to in asylum proceedings, and the same standard of proof if they were in withholding proceedings. [Critically, in its Policy Memorandum](#), USCIS explicitly states that it is “unable to provide access to counsel during the assessments” because of supposed capacity issues and the need for “efficient processing.” Such a high burden and denial of access to counsel makes it entirely certain that asylum-seekers will be forced to remain in Mexico pending their hearings.

When the US was previously considering a safe third country agreement with Mexico (where an asylum seeker would be denied the ability to seek refuge in the US if they first travelled through Mexico), [I explained the numerous reasons why Mexico is not a safe third country](#) and how such an agreement would violate the United States’ obligations of non-refoulement. These same arguments are applicable to the MPP because the plan will continue to put asylum seekers in grave danger while awaiting refuge in the US. In particular, as reported by [Human Rights First](#) and [Amnesty International](#), asylum seekers are in extreme danger of [kidnapping, murder, rape, trafficking, and other crimes](#) by INM officers and civilians. If they are women, children, indigenous, LGBT, or a member of any other minority group, they are especially vulnerable. Forcing asylum seekers to remain in Mexico while they await their court date is also arguably a violation of [non-refoulement](#), which requires that no State, including the US, “shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.” Given the numerous reports of violence against asylum seekers in Mexico, it is clear that their life and freedom would be threatened.

The numerous assaults on asylum seekers by the Trump administration must be met with sharp rebuke by immigration advocates. Driven by xenophobia, Trump’s anti-asylum policies are not only morally objectionable, but expressly unlawful under US and international law. Although it will continue to be an uphill battle over the next few years, [advocates must continue to support the incredible work of organizations like Al Otro Lado](#), who continue to be on the frontlines of the battle at the border. If we have learned anything over the past several years, [it is that immigration advocates, backed by the power of the courts](#), will continue to uphold the law by ensuring that we provide safety and refuge to those fleeing persecution.