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CLINIC Transition Paper: Restoring the United States' Commitment to Asylum

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The Catholic Legal Immigration Network, Inc., CLINIC, promotes the dignity and protects the rights of immigrants in partnership with our network of immigration legal services providers. Visit us at cliniclegal.org/transition.

“I ask leaders and legislators and the entire international community to confront the reality of those who have been displaced by force, with effective projects and new approaches in order to protect their dignity, to improve the quality of their life and to face the challenges that are emerging from modern forms of persecution, oppression and slavery.”

— Pope Francis, [Address to Participants in the Plenary of the Pontifical Council for the Pastoral Care of Migrants and Itinerant People](#), 2013

“We just need the basics. To have food, a home, happiness, go to a park without fear of being pursued or killed. We don’t live here because we felt like it, we came here because we had to seek help. We are trying to do everything we can to do things right.”

— Elizabeth, Venezuelan asylum seeker

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Why asylum matters

The United States' asylum laws are based upon the international principle of non-refoulement, a promise — stemming from the aftermath of World War II — that the United States will not send people back to countries where their lives or freedom will be at risk. These laws were intentionally designed by Congress to protect the world's most vulnerable people from persecution. They put U.S. values and the commitment to be a beacon of hope for those in need of safety and security into action. As Pope John XXIII has taught, "Every human being has the right to freedom of movement and of residence within the confines of his own country; and, when there are just reasons for it, the right to emigrate to other countries and take up residence there. The fact that one is a citizen of a particular state does not detract in any way from his membership in the human family as a whole, nor from his citizenship in the world community."¹

Number of people affected

In Fiscal Year 2019, nearly 100,000 people filed for affirmative asylum, and there were more than 350,000 applications pending.² More than 210,000 defensive cases were received by The Executive Office for Immigration Review, or EOIR, in Fiscal Year 2019.³ There is a backlog of over 1,200,000 cases pending in immigration court, many of which involve asylum seekers.⁴ Many of the approximately 70,000 people subject to the misnamed Migrant Protection Protocols, or MPP, have had their asylum hearings indefinitely suspended due to COVID-19 and are in need of an urgent response from the Biden administration.⁵

Previous administrations' policy and the human consequences

Until recently, the principle that refugees and asylum seekers deserve protection under international and U.S. law has received wide, bipartisan support. In 2001, Senator Sam Brownback (Rep. Kan.) said, "it must be our continued aim that upon reaching these shores, persecution would end, dignity would be restored, and justice would prevail. This is a practical expression of America's core identity as both the defender of human dignity for the most vulnerable and a gracious refuge of escape for those fleeing gross injustice. We are a better Nation because of the asylees amongst us."⁶

Yet, during the past four years, the Trump administration has vilified asylum seekers, claiming that they exploit "loopholes" in the U.S. immigration system,⁷ and launched an all-out attack on the U.S. asylum system, radically changing substantive asylum law and creating procedures that are designed to make asylum seekers fail. With a worldwide crisis of people displaced by conflict and persecution,⁸ it has never been more important for the United States to resume its position as a world leader in providing hope and safety to those who flee harm. CLINIC also calls on the Biden administration to particularly examine and address the challenges and obstacles Black asylum seekers face, which far predate Trump administration policies and attacks on asylum.

In order to restore the American legal obligations and moral values that include treating asylum seekers fairly, the Biden administration should do the following in the first 100 days:

Recommendation 1

Immediately Rescind the Misnamed “Migrant Protection Protocols” and Other Border Initiatives Designed to Make Asylum Seekers Fail

The Trump administration implemented several programs at the border that are designed to make asylum seekers fail in court or simply give up their claims because the human toll of pursuing asylum is too great. CLINIC fully supports the Biden administration’s campaign document⁹ that pledges to end the misnamed MPP. It is also critically important that the thousands of asylum seekers who have been stranded in Mexico for months awaiting hearings be immediately paroled into the United States to pursue their claims. CLINIC urges the Biden administration to work with immigration advocates to create an orderly procedure to do so that ensures protection and meets the humanitarian needs of this vulnerable population.

Likewise, the Biden administration should end the “Prompt Asylum Claim Review,” or PACR, and “Humanitarian Asylum Review Process,” or HARP, programs that speed asylum seekers through adjudications and make it nearly impossible for them to receive legal representation. The administration should further ensure that no asylum seekers are sent to Guatemala, Honduras or El Salvador through “Asylum Cooperative Agreements,” when those countries are themselves unsafe and lacking developed asylum adjudication systems.

Recommendation 2

Vacate Attorney General Precedential Asylum Decisions that Make It Nearly Impossible for Asylum Seekers to Win Their Claims

During the Trump administration, the attorneys general have used their authority to adjudicate individual immigration cases to radically alter settled precedent in several areas of immigration law including asylum. CLINIC urges the Biden administration to appoint an attorney general who will immediately focus their attention on the radical changes the Trump administration has made to the immigration court system and Board of Immigration Appeals, or BIA, and to appoint a special assistant to the attorney general whose sole focus will be reforming and improving the EOIR.

As soon as an attorney general is confirmed, the attorney general should vacate the following precedential decisions:

- *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) — which overturned *Matter of A-R-C-G-* 26 I&N Dec. 338 (BIA 2014) and attempted to foreclose asylum for survivors of domestic violence
- *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) — which overturned *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017) and attempted to foreclose asylum for family-based particular social groups in most cases¹⁰
- *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) — which requires asylum seekers to prove every element of every asylum claim before the immigration judge and on appeal, effectively preventing asylum seekers from ever stipulating to any issue with the Department of Homeland Security or DHS
- *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) — which imposes additional unlawful burdens on asylum seekers

Vacating these decisions would be an important first step towards restoring substantive asylum rights. There are many other attorney general and BIA decisions that have caused lasting damage to the fair adjudication of asylum applications. All of the Trump-era attorney general decisions should be reconsidered by the new attorney general, but these three should be immediately vacated.

Recommendation 3

Withdraw and/or Reissue Proposed and Recently Published Regulations that are Designed to Make Asylum Seekers Lose Their Claims and Suffer in the Process

During the past year, the Trump administration has used the notice and comment rulemaking process to radically alter the substance and procedure of asylum law. The Biden administration should rescind rulemaking that is currently under consideration, including but not limited to the following proposed regulations:

- "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 Fed. Reg. 36264 (June 15, 2020)¹¹
- "Security Bars and Processing," 85 Fed. Reg. 41201 (July 9, 2020)¹²
- "Procedures for Asylum and Withholding of Removal," 85 Fed. Reg. 59692 (Sept. 23, 2020)¹³

Additionally, the Trump administration has published rules designed to make it more difficult for asylum seekers to prevail on their cases or survive in the United States while their cases are pending. The Biden administration should engage in new notice and comment rulemaking including but not limited to the following published regulations:

- "Procedures for Asylum and Bars to Asylum Eligibility" 85 Fed. Reg. 67202 (Oct. 21, 2020)¹⁴

- “Asylum Application, Interview, and Employment Authorization for Applicants” 85 Fed. Reg. 38532 (June 26, 2020)¹⁵

There are additional published and proposed rules not specifically focused on asylum that will have a severe negative impact on asylum seekers. These rules should also be rescinded, including but not limited to, fees for asylum applications and increased fees for appeals and motions to reopen, as well as procedures before EOIR which will prejudice respondents including asylum seekers.

Recommendation 4

Review the Government’s Position on all Pending Federal Litigation Involving Asylum to Ensure it is Consistent with Our Country’s Values of Protecting Asylum Seekers

During the past four years, immigration advocates have challenged changes in the law designed to restrict the rights of immigrants generally, and asylum seekers in particular. The Biden administration should appoint a senior attorney within the Department of Justice to review all pending federal litigation involving asylum law and procedure and reconsider its litigation position if the prior position was politically motivated by the Trump administration’s desire to end asylum.

Recommendation 5

Ensure that Members of the Board of Immigration Appeals and Immigration Judges Come from Varied Backgrounds and Respect Asylum Seekers’ Rights

The Trump administration has increased the total number of immigration judges from 306 to 520,¹⁶ almost all of whom come from an immigration enforcement or prosecutorial background. At the same time, experienced immigration judges quit in higher than average numbers during the past three years.¹⁷ Many of the newly hired immigration judges had no experience with immigration law, aptly considered the most complex area of law other than tax law, before ascending the bench. At the same time, the Trump administration expanded the power of the EOIR director and added members to the BIA who have some of the lowest asylum grant rates of any immigration judges in the country.¹⁸ The Biden administration should ensure that BIA members and immigration judges come from diverse backgrounds, including as many members of the defense bar as members of the prosecution bar, while ensuring that all EOIR adjudicators are committed to a fair process for all asylum seekers. The administration should also ensure that all EOIR adjudicators receive robust training on asylum law and how to interact appropriately with vulnerable populations, including trauma survivors and children.

Recommendation 6

Ensure the Rights of Unaccompanied Children Seeking Asylum

The Trump administration has ignored important statutory protections for asylum-seeking unaccompanied children through which unaccompanied children in removal proceedings are entitled to first present their

asylum claim at a non-adversarial interview with an asylum officer, rather than being forced to proceed in immigration court against an experienced DHS prosecutor, with no guarantee of representation.¹⁹ The Biden administration should have the new DHS Secretary and EOIR Director issue a joint memo directing that those agencies afford respondents whom the government has previously determined are unaccompanied children the opportunity to first have their asylum applications adjudicated with U.S. Citizenship and Immigration Services, or USCIS, and that immigration court proceedings must be postponed until the USCIS adjudication is complete. The new attorney general should vacate *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018), which allows immigration judges to take jurisdiction over the asylum claims of respondents whom the government previously determined to be unaccompanied children, without first providing such respondents a non-adversarial USCIS asylum adjudication.

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To learn more about CLINIC's Administrative Advocacy Priorities, please visit: cliniclegal.org/advocacy.

Endnotes

¹ Fr. Fred Kammer, S.J., *Catholic Social Teaching (CST) and Migration, Summer 2009*, Jesuit Social Research Institute Newsletter, loyno.edu/jsri/sites/loyno.edu.jsri/files/CSTandMigration-Summer2009jsq.pdf (last visited Nov. 18, 2020).

¹ Ryan Baugh, Annual Flow Report: Refugees and Asylees 2019, Department of Homeland Security (Sept. 2020), dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf; Annual Report 2020: Citizenship and Immigration Services Ombudsman, Department of Homeland Security (June 30, 2020), dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf.

² *Id.*

³ *Id.*

⁴ TRAC, *Immigration Court Backlog Tool*, trac.syr.edu/phptools/immigration/court_backlog/

⁵ Annual Report 2020: Citizenship and Immigration Services Ombudsman, Department of Homeland Security (June 30, 2020), dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf.

⁶ An Overview Of Asylum Policy, U.S. Senate, Subcommittee On Immigration, Committee On The Judiciary, at 1, (May 3, 2001), loc.gov/law/find/hearings/pdf/00092836976.pdf.

⁷ President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis, The White House (April 29, 2019), [whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis/](https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis/).

⁸ Omer Karasapan, *Sharing The Burden Of The Global Refugee Crisis*, The Brookings Institution, (Jan. 27, 2020), [brookings.edu/blog/future-development/2020/01/27/sharing-the-burden-of-the-global-refugee-crisis/#:~:text=There%20are%2071%20million%20forcibly,flee%20their%20homes%20every%20day.](https://www.brookings.edu/blog/future-development/2020/01/27/sharing-the-burden-of-the-global-refugee-crisis/#:~:text=There%20are%2071%20million%20forcibly,flee%20their%20homes%20every%20day.)

⁹ The Biden Plan for Securing our Values as a Nation of Immigrants, joebiden.com/immigration, (last visited Nov. 18, 2020).

¹⁰ Subsequent developments have called into question whether the Board's 2017 decision in *Matter of L-E-A-* correctly denied asylum because the applicant's family membership was a "means to an end." *Compare Matter of L-E-A- I*, 27 I&N Dec. at 45 (using "means to an end" formulation) with *Gonzalez Ruano v. Barr*, 922 F.3d 346, 356 (7th Cir. 2019) (rejecting the "means to an end" formulation of the nexus standard). The Attorney General should immediately withdraw *L-E-A- II* and remand to the BIA to reassess its holding on nexus. CLINIC represents Mr. L-E-A- in his EOIR proceedings and is co-counsel in *S-A-P- v. Barr*, 1:19-cv-03549-RC (D.D.C. filed Nov. 22, 2019), which challenges the government's implementation of *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), in credible fear proceedings.

¹¹ CLINIC Submits Comments on Proposed Rule That Would Gut Asylum Protections, Catholic Legal Immigration Network (July 15, 2020), [cliniclegal.org/resources/asylum-and-refugee-law/clinic-submits-comments-proposed-rule-would-gut-asylum-protections](https://www.cliniclegal.org/resources/asylum-and-refugee-law/clinic-submits-comments-proposed-rule-would-gut-asylum-protections).

¹² CLINIC Submits Comments on Proposed Rule That Would Use COVID-19 to Bar Virtually All Asylum Seekers, Catholic Legal Immigration Network (Aug. 11, 2020), [cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comments-proposed-rule-would-use-covid-19](https://www.cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comments-proposed-rule-would-use-covid-19).

¹³ CLINIC's Public Comment Opposing Proposed Rule on Procedures for Asylum and Withholding of Removal, Catholic Legal Immigration Network (Oct. 30, 2020), [cliniclegal.org/resources/federal-administrative-advocacy/clinics-public-comment-opposing-proposed-rule-procedures](https://www.cliniclegal.org/resources/federal-administrative-advocacy/clinics-public-comment-opposing-proposed-rule-procedures).

¹⁴ This rule is being challenged through litigation. See *Casa de Maryland, Inc. v. Wolf*, No. 8:20-CV-02118-PX, 2020 WL 5500165 (D. Md. Sept. 11, 2020). Read CLINIC's public comment at [cliniclegal.org/resources/removal-proceedings/defensive-asylum/clinic-comment-criminal-bars-asylum](https://www.cliniclegal.org/resources/removal-proceedings/defensive-asylum/clinic-comment-criminal-bars-asylum).

¹⁵ This rule is being challenged through litigation. See *Pangea Legal Services, et al v DHS et al*, nipnl.org/our_lit/impact/2020_02Nov_lit-pangea-v-dhs.html. Read CLINIC's public comment at: [cliniclegal.org/resources/removal-proceedings/defensive-asylum/clinic-comment-asylum-employment-authorization](https://www.cliniclegal.org/resources/removal-proceedings/defensive-asylum/clinic-comment-asylum-employment-authorization) and [cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comment-opposing-proposed-elimination-30](https://www.cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comment-opposing-proposed-elimination-30).

¹⁶ DOJ, *Executive Office for Immigration Review Announces Investiture of 20 New Immigration Judges, Resulting in a 70 Percent Expansion of the Immigration Judge Corps Since 2017*, (Oct. 9, 2020), [justice.gov/opa/pr/executive-office-immigration-review-announces-investiture-20-new-immigration-judges-resulting](https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-investiture-20-new-immigration-judges-resulting).

¹⁷ Molly Hennessy-Fiske, *Immigration Judges Are Quitting or Retiring Early Because of Trump*, Los Angeles Times (Jan. 27, 2020), [latimes.com/world-nation/story/2020-01-27/immigration-judges-are-quitting-or-retiring-early-because-of-trump](https://www.latimes.com/world-nation/story/2020-01-27/immigration-judges-are-quitting-or-retiring-early-because-of-trump).

¹⁸ Tal Kopan, *AG William Barr Promotes Immigration Judges with High Asylum Denial Rates*, San Francisco Chronicle (Aug. 23, 2019), [sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php](https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php).

¹⁹ *Matter of M-A-C-O-*, 27 I. & N. Dec. 477 (BIA 2018); Memorandum from John Lafferty, USCIS Asylum Div. Chief, Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children (May 31, 2019), uscis.gov/sites/default/files/document/memos/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf (currently enjoined through a preliminary injunction, *J.O.P. v. Dep't of Homeland Sec.*, No. 19-01944 (D. Md. Oct. 15, 2019), ECF No. 71, litigation in which CLINIC is class co-counsel).