

THE TRUMP ADMINISTRATION'S THIRD COUNTRY TRANSIT BAR

SHELBY MCGUIRE SMITH*

Despite the challenges that the Trump Administration has faced in erecting a physical border wall, its legal actions and reforms appear to have resulted in the creation of what many have described as an invisible legal wall.¹ On July 16, 2019, it laid the latest brick in this legal wall – a new interim final rule known as the “Third Country Transit Bar.”² With limited exceptions,³ the Transit Bar denies asylum to individuals entering the United States through the southern land border if they passed through other countries en route to the United States and were not denied asylum in those transit countries.⁴ Thus, the Transit Bar effectively precludes almost all non-Mexican asylum seekers at the southern border from pursuing refuge in the United States. The Transit Bar sparked an immediate backlash from immigrants’ rights organizations, resulting in two federal lawsuits.⁵ Furthermore, international organizations such as the United Nations High Commission on Refugees (UNHCR) criticized the Bar, questioning its compliance with United States’ treaty obligations.⁶

* Shelby McGuire-Smith, J.D. Candidate, 2021, Georgetown University Law Center; B.A. International Relations, *summa cum laude*, 2015, Rollins College. © 2020, Shelby McGuire-Smith.

1. AM. IMMIGR. L. ASS’N, *Deconstructing the Invisible Wall* (Apr. 24, 2018), <https://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall>; Rachel Morris, *Trump Got His Wall After All*, HUFFPOST (Nov. 24, 2019), <https://www.huffpost.com/highline/article/invisible-wall/>.

2. Asylum Eligibility and Procedural Modifications, 8 C.F.R. §§ 208.13, 208.30, 1003.42, 1208.13 (2019).

3. The Bar is subject to three limited exceptions for “(1) an alien who demonstrates that he or she applied for protection from persecution or torture in at least one of the countries through which the alien transited en route to the United States, and the alien received a final judgment denying the alien protection in such country; (2) an alien who demonstrates that he or she satisfies the definition of ‘victim of a severe form of trafficking in persons’ provided in 8 C.F.R. 214.11; or (3) an alien who has transited en route to the United States through only a country or countries that were not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol, or the CAT.” Asylum Eligibility and Procedural Modifications, 8 C.F.R. §§ 208.13, 208.30, 1003.42, 1208.13 (2019).

4. *Id.*

5. *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019), *order reinstated*, 391 F. Supp. 3d 974 (N.D. Cal. 2019); *CAIR v. Trump*, No. 1:19-CV-02117-TJK, 2019 WL 3436501 (D.D.C. Jul. 24, 2019).

6. *UNHCR deeply concerned about new U.S. asylum restrictions*, U.N. HIGH COMM’R FOR REFUGEES (July 15, 2019), <https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html> [hereinafter U.N. HIGH COMM’R FOR REFUGEES].

Six immigrants' rights organizations filed two federal lawsuits against the Trump Administration⁷ challenging the Transit Bar: *East Bay Sanctuary Covenant v. Barr* in the Northern District of California and *Capital Area Immigrants' Rights Coalition v. Trump* in the District of Columbia. These organizations argue, *inter alia*, that the Bar is unlawful because it contravenes the Immigration and Nationality Act (INA), which provides all aliens present in the United States the right to apply for asylum.⁸ The INA only grants the government authority to remove asylum-seekers to third countries under a limited set of circumstances.⁹ First, the INA provides that the government may return an alien to a third country if they were "firmly resettled"¹⁰ there before entering the United States.¹¹ However, the Transit Bar makes no distinction between asylum seekers who have firmly resettled in a third country and those who have not.

Second, the INA provides that an alien "may be removed, *pursuant to a bilateral or multilateral agreement*, to a country *in which the alien's life or freedom would not be threatened . . . and where the alien would have access to a full and fair procedure for determining a claim to asylum* or equivalent temporary protection."¹² In effect, this provision creates a three-part requirement to remove an alien. First, the United States must have an agreement with a third country that permits the government to send aliens to that country for adjudication of their asylum claim. Second, there must be an individualized inquiry that ensures that a particular alien will be safe from persecution in the third country to which they are sent. Third, notwithstanding the agreement, the third country must have an adequate asylum process that provides aliens with full and fair procedures for seeking asylum. The Transit Bar fails to comply with this procedure and would allow the return of aliens to many Central and South American transit countries that do not meet any of these criteria.¹³ Evidence shows that refugees in Mexico and Guatemala are at risk

7. For conciseness, this piece refers to the defendants as the "Trump Administration." The Transit Bar was promulgated by the Department of Homeland Security and the Department of Justice and the named defendants include a number of officials from these Departments.

8. Immigration and Nationality Act, 8 U.S.C. § 1158(a)(1) (2009).

9. Complaint at 29, *East Bay Sanctuary Covenant*, 385 F. Supp. 3d; Complaint at 39, CAIR, No. 1:19-cv-02117-TJK.

10. An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement. 8 C.F.R. 208.15.

11. 8 U.S.C. § 1158(b)(2)(A)(vi).

12. 8 U.S.C. § 1158(a)(2)(A) (emphasis added).

13. Until recently, the United States had only one Safe Third Country Agreement – with Canada. However, in the last half of 2019, the Trump Administration signed agreements with Guatemala, Honduras, and El Salvador. As of January 2020, the Guatemala agreement was being challenged in federal court. See Nicole Narea, *Trump's agreements in Central America are dismantling the asylum system as we know it*, VOX (Nov. 20, 2019, 3:08 PM), <https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained>; Peniel Ibe, *The dangers of Trump's "safe third country" agreements in Central America*, AM. FRIENDS SERV. COMM. (Jan. 16, 2020), <https://www.afsc.org/blogs/news-and-commentary/dangers-trumps-safe-third-country-agreements-central-america>; *Groups File Federal Lawsuit Challenging Trump Administration's So-Called 'Safe Third Country' Asylum Policy*, HUM. RTS. FIRST (Jan. 15, 2020), <https://www.humanrightsfirst.org/press-release/groups-file-federal-lawsuit-challenging-trump-administration-s-so-called-safe-third>.

of being kidnapped, raped, assaulted, and extorted.¹⁴ Furthermore, rights organizations have harshly criticized Mexico's asylum system for returning refugees to their countries of persecution and failing to provide adequate asylum.¹⁵

The organizations that oppose the Transit Bar argue that, in addition to violating the INA, the Bar also violates the Administrative Procedures Act (APA).¹⁶ First, they contend that in publishing the Interim Final Rule, the Trump Administration did not adequately justify its failure to observe the requisite notice and comment period when promulgating the rule.¹⁷ Second, they argue that the Transit Bar itself is "arbitrary and capricious" because the Administration "failed to provide any reasoned explanation" for the implementation of such a rule.¹⁸

In addition to the challenges that the plaintiffs in these cases brought under domestic law, the UNHCR publicly criticized the Transit Bar¹⁹ and submitted an amicus brief to the Ninth Circuit in *East Bay Sanctuary v. Barr* contending that "[the Bar] is at variance with the United States' obligations under international law."²⁰ The United States is bound by the 1951 Convention on the Status of Refugees and the 1967 Protocol.²¹ The UNHCR argues that the Bar is at odds with two core provisions of these treaties: the right to seek asylum and the principle of non-refoulement.²² It states that the Transit Bar "denies the right to seek asylum to nearly all refugees who transit through a third country and fail to apply for protection and receive a final denial there prior to entering the United States through the southern border – thereby leaving affected refugees vulnerable to refoulement."²³

In the "Anticipated Effects" section of the Transit Bar, the Department of Homeland Security and the Department of Justice argue that the rule is "in keeping with the efforts of other liberal democracies to prevent forum shopping by directing asylum seekers to present their claims in the first safe

14. Susan Gzesh, "Safe Third Country" Agreements with Mexico and Guatemala would be Unlawful, JUST SECURITY (Jul. 15, 2019), <https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/>.

15. *Id.*

16. Complaint at 30, *East Bay Sanctuary Covenant*, 385 F. Supp. 3d 922 (No. 19-cv-04073-JST); Complaint at 39-40, CAIR, No. 1:19-cv-02117-TJK.

17. 5 U.S.C. §§ 553(b), (c); Complaint at 30, *East Bay Sanctuary Covenant*, 385 F. Supp. 3d 922 (No. 19-cv-04073-JST); Complaint at 40, CAIR, No. 1:19-cv-02117-TJK.

18. 5 U.S.C. § 706(a)(2); Complaint for Declaratory and Injunctive Relief at 31, *East Bay Sanctuary Covenant*, 385 F. Supp. 3d 922 (No. 19-cv-04073-JST); Complaint for Declaratory and Injunctive Relief, at 39, CAIR, No. 1:19-cv-02117-TJK.

19. U.N. HIGH COMM'R FOR REFUGEES, *supra* note 6.

20. Brief of the Office of the United Nations High Commissioner For Refugees as Amicus Curiae in Support of Plaintiffs and Affirmance, at 33 [hereinafter *Brief of the UNHCR*]; *East Bay Sanctuary Covenant*, 934 F. 3d 1026 (Nos. 19-16487, 19-16773).

21. The US did not ratify the 1951 Convention; however, it ratified the 1967 Protocol, which incorporates Articles 2-34 of the 1951 Convention. *See* 1967 Protocol Relating to the Status of Refugees art. 1 (1), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

22. Non-refoulement is "a refugee's right not to be expelled from one state to another, esp. to one where his or her life or liberty would be threatened." *Black's Law Dictionary* (11th ed. 2019).

23. Brief of the UNHCR, *supra* note 20, at 10 (internal quotations and citations omitted).

country in which they arrive” and cites the European Union’s Dublin Regulations as evidence of similar policies.²⁴ The “efforts of liberal democracies,” such as the Dublin Regulations that the Administration refers to, reflect a principle of international refugee law known as the “safe third country” or “country of first asylum” principle. According to this principle, asylum seekers must request asylum in the first safe state that they reach, and to avoid forum shopping, the first safe state, not the final destination state, should be responsible for asylum adjudication.²⁵ However, the UNHCR notes that “[t]hough states may . . . enter into arrangements to transfer adjudicatory responsibility for asylum claims to third countries, they may do so *only under limited circumstances and with adequate safeguards*, neither of which the [Bar] contemplates.”²⁶

The UNHCR contends that the Transit Bar differs significantly from the Dublin Regulations with respect to these safeguards.²⁷ Unlike the Dublin Regulations, the Transit Bar does not require a mutual or reciprocal agreement with a third country before sending asylum seekers to that country.²⁸ Moreover, the Bar provides for no assessment of the third country’s asylum system to ensure that asylum seekers will have access to a full and fair asylum process, nor does it provide for an individualized inquiry to ensure that a particular asylum seeker will not face persecution in that country.²⁹ Without these safeguards, the UNHCR argues that the Transit Bar “may lead to refoulement, by returning a refugee to a country of persecution without ever having afforded him or her a fair opportunity to demonstrate his or her need for protection.”³⁰

Due to the very likely grave and irreparable harm that the Transit Bar poses to the organizations and asylum seekers, the plaintiffs in *Capital Area Immigrants’ Rights Coalition v. Trump* and *East Bay Sanctuary Covenant v. Barr* motioned for preliminary injunctions to prevent the Bar from taking effect until after a decision is reached on the merits.³¹ On July 24th, the U.S. District Court for the District of Columbia denied the plaintiff’s request for a preliminary injunction in *Capital Area Immigrants’ Rights Coalition*, holding that the irreparable harm that the organizations would face from the Bar was not “immediate,” “certain,” or “great” enough to meet the high standard of

24. Asylum Eligibility and Procedural Modifications, at 38–39, 8 C.F.R. §§ 208.13, 208.30, 1003.42, 1208.13 (2019).

25. Eirik Christopherson, *What is a Safe Third Country?*, NORWEGIAN REFUGEE COUNCIL (Mar. 9, 2016), <https://www.nrc.no/news/2016/march/what-is-a-safe-third-country/>.

26. Brief of the UNHCR, *supra* note 20, at 11 (emphasis added).

27. *Id.* at 29.

28. *Id.*

29. *Id.*

30. *Id.*

31. Plaintiff’s Memorandum in Support of Motion for Temporary Restraining Order, at 21–24, *East Bay Sanctuary Covenant*, 385 F. Supp. 3d 922 (No. 19-cv-04073-JST); Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction, CAIR, No. 1:19-cv-02117-TJK.

irreparable harm.³² On the same day, the U.S. District Court for the Northern District of California reached the opposite conclusion and issued a nationwide preliminary injunction in *East Bay Sanctuary Covenant*, preventing the Bar from taking effect anywhere in the United States.³³

On appeal, the Ninth Circuit partially stayed the injunction, finding the nationwide injunction overly broad but allowing it to take effect within the Ninth Circuit.³⁴ The Trump Administration sought emergency review in the Supreme Court.³⁵ Unfortunately, the Court, in a brief and unexplained opinion, stayed the District Court's injunction, allowing the rule to take effect nationwide until a ruling on the merits is reached.³⁶ The dissent lamented the majority's decision, finding not only that the stay was probably appropriate given the likelihood of the organizations' success on the merits, but also because the majority "sidesteps the ordinary judicial process to . . . implement a rule that bypassed the ordinary rulemaking process," fearing that it "risks undermining the interbranch governmental processes."³⁷ Though the legal battle over the Transit Bar is far from over, the Supreme Court's decision to stay the preliminary injunction puts the fate of many vulnerable asylum seekers in serious jeopardy as they await a ruling on the merits.

32. CAIR, No. 1:19-cv-02117-TJK at *2–3.

33. *East Bay Sanctuary Covenant*, 385 F. Supp. 3d at p. 960.

34. *East Bay Sanctuary Covenant v. Barr*, 934 F. 3d. 1026.

35. *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019).

36. *Id.*

37. *Id.* at 5.