

Asylum Law and the Border: Historical Context

by Kristin Mohrman

To better understand what is happening at the border, you have to go back in time. All the way back to June 27, 1954, when democratically elected Guatemalan president Jacobo Arbenz Guzmán was deposed in a CIA backed coup, known as PBSuccess, to protect profits of the United Fruit Company.¹ This set in motion a chain of events that is linked directly to what is happening at the border today. The events following the coup triggered a 36 year civil war in Guatemala between the U.S. backed Guatemalan military government and leftist insurgents. Caught in the middle were the civilians,

particularly the indigenous Mayan population. Human right violations were committed on both sides but primarily by the U.S.-backed military, including torture, disappearances, and ultimately genocide. In 1998, Bishop Juan Gerardi published his report, “Guatemala: Nunca Mas,” which detailed these human rights violations. Two days later, he was assassinated. In 1999, the United Nations published, “Guatemala: Memory of Silence,” and labeled the campaign by the government against the indigenous Mayan population a genocide. Over 200,000 civilians were killed, and around 1 million were displaced with an estimated 400,000 immigrating to the U.S. or Canada between 1960 and 1996. According to the Guatemala office of the International Organization for Migration, as of 2010, over 1.5 million Guatemalan migrants resided in the U.S.²

Kristin Mohrman



Kristin Mohrman is an attorney at Koley Jessen P.C., L.L.O in Omaha and has nearly twenty years of experience as an immigration attorney. She focuses on a variety of immigration cases in the areas of deportation defense, asylum law, naturalization, and family-sponsored petitions. She is fluent in Spanish.

Kristin has held numerous leadership positions with the American Immigration Lawyers Association (AILA) and set on the board of directors for non-profit organizations serving immigrants in the community. She also served as an adjunct professor of immigration law at the University of Nebraska at Omaha. In 2019 Kristin established the Immigration Court Representation Project. The project provides funds for indigent clients to secure legal representation in immigration court, bridging the gap between pro bono services available through the private bar and non profit organizations.

During the same period, El Salvador and Nicaragua also experienced civil wars in which the U.S. backed military governments fought against insurgents. Spanning decades and causing numerous human right violations, these wars triggered an exodus from the region. Many of these immigrants came to the U.S. and applied for asylum. At this time, of those who applied, the U.S. granted asylum to approximately 23%. The grant rate for those from Nicaragua was 14%, from El Salvador was 3%, and from Guatemala was 1%.³ These low grant rates led to a class action lawsuit in 1985 initiated by the American Baptist Churches on behalf of Salvadoran and Guatemalan asylum seekers alleging discrimination. The case was settled outside of court and provided for relief for those denied and eventually led to the passage of the Nicaraguan Adjustment and Central American Relief Act (NACARA).⁴ Meanwhile, the immigration legal landscape continued shifting in the U.S. In 1986, Congress passed the Immigration Reform and Control Act hoping to reduce illegal immigration while also



ASYLUM LAW AND THE BORDER

granting amnesty to nearly 3 million immigrants already in the country. In 1996, Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was passed and instituted one of the largest changes to immigration law. The purpose of IIRIRA was to increase penalties for immigrants who violated the law including the expansion of legal immigrants subject to deportation and make it substantially more difficult for undocumented immigrants to get legal status. This law also instituted mandatory detention, including for asylum seekers subject to expedited removal. IIRIRA also imposed a filing deadline for asylum cases and a 180-day waiting period for employment authorization through an asylum application.

All of this created a perfect storm for an already teetering Central America. The low asylum approval rates for Guatemalans and Salvadorans coupled with increased immigration enforcement led to high rates of removal of Guatemalan and Salvadoran nationals in the 1990s, some of whom had been initiated into U.S. street gangs, such as MS-13. They were deported to countries that had been destabilized after decades of civil war. In those same countries, including Guatemala, many high ranking military members had started criminal enterprises, using the training and weapons they had acquired from the U.S.⁵ The newly created police force after the peace accords in Guatemala in 1996 was untrained and unable to control the rising violence springing up from within the country as well as the new gangs being deported back from the

U.S. Impunity, already a long standing problem in Guatemala, continued as gangs and criminal organizations infiltrated the government at all levels. Active and former members of the military were and continue to be a key part of this corruption. They are collectively called Illegal Clandestine Security Apparatuses (Cuerpos Ilegales y Aparatos Clandestinos de Seguridad) and are rooted in Guatemala's civil war.⁶ The corruption, impunity, and insecurity in Guatemala, as well as El Salvador and Honduras, has only increased, pushing more people to seek safety in the U.S.

Protection of refugees and asylum law has a long standing history in the U.S. following the initial U.S. failure to adequately protect refugees during World War II.⁷ The U.S. signed on to the 1951 Refugee Convention and has implemented this treaty through domestic legislation. The core principal of the 1951 Convention is non-refoulement, which holds that a refugee should not be returned to a country where they face serious threats to their life or freedom.⁸ The law mandates that, even if an immigrant is subject to expedited removal, they must be granted the opportunity to express a credible fear of returning to their country. The Convention also includes specific prohibitions against detention and forbidding the use of punitive measures for refugees fleeing threats against their lives or their freedom.

As the law stands at the time of writing this article, to be eligible for asylum, one must prove that they have been persecuted or have a well-founded fear of persecution in their home country based on their race, religion, national origin, political opinion, or membership in particular social group. Persecution must be by the government or a group the government cannot or will not control. Additional analysis is done regarding possible safe internal relocation.⁹ There are two tracts for asylum applications. Affirmative applications are filed by individuals not in removal proceedings and are adjudicated by the asylum office, part of the United States Citizen and Immigration Services (USCIS), a division of the Department of Homeland Security. Defensive applications are filed after an immigrant is placed into removal proceedings. These applications are adjudicated by an immigration judge through the Executive Office for Immigration Review (EOIR), which is part of the Department of Justice.

Many of the individuals arriving at the southern border are seeking asylum. Under immigration law, individuals encountered at the border who do not have permission to enter the U.S. are subject to expedited removal.¹⁰ Expedited removal is a process that allows a DHS official to summarily issue a removal order without a hearing. An expedited removal order cannot be appealed and carries a 5-year bar to re-entry. However, individuals arriving at the border have a right to apply for asylum. If an individual expresses a fear of returning to their home country or asks to apply for asylum, they are given a credible fear inter-

BH | BAIRDHOLM
BAIRD HOLM LLP
ANNOUNCES
➤ **TWO NEW PARTNERS**

ERIN E. BUSCH

ROBERT L. KARDELL

WITHIN THE FIRM

1700 Farnam Street, Suite 1500 • Omaha, NE 68102 • 402.344.0500 • www.bairdholm.com

ASYLUM LAW AND THE BORDER

view. If an individual can demonstrate a significant possibility that they will be able to establish eligibility for asylum, they are found to have a credible fear and are referred to removal proceedings to apply for asylum.¹¹ If they are not found to have a credible fear, they are removed. However, individuals can request to have a negative credible fear determination reviewed by an Immigration Judge.¹²

The last three administrations have faced challenges in how to balance our commitment to the protection of refugees and the application of asylum law against increasing immigration due to the continued fallout from the destabilization of a number of countries in Central America, as well as other countries facing war and humanitarian crises. The result has been policies that have not adequately addressed the problem at its root or at the U.S. border. For example, the Obama administration instituted family detention and opened up Artesia detention facility in Artesia, New Mexico, in June 2014. The facility boasted some of the highest and fastest removal rates of asylum seekers, as well as a 1,200% increase in detention. The facility was shut down in December 2014.¹³

The first Trump administration instituted Migrant Protection Protocols (MPP) also known as “Remain in Mexico,” which required asylum applicants at the border to wait in Mexico while waiting for adjudication of their asylum case. The program went into effect in January 2019. During its

pendency, nearly 70,000 migrants were sent back to Mexico. These migrants were instructed to return to a specific port of entry at a specific date and time for their court hearing. One of the primary concerns with MPP was the impact on due process. Roughly 7.5% of individuals in MPP were able to secure representation in immigration court. Though immigrants have a right to be represented by counsel, this right is not grounded in the Constitution and, as a result, the government will not provide counsel in the event the immigrant cannot afford representation. Of the 42,012 cases that were completed by December 2020, only 521 were granted relief in immigration court.¹⁴

The first Trump administration followed MPP by implementing Title 42, which closed the border completely due to health concerns during the global pandemic. During this time, roughly 1.8 million expulsions were carried out. However, Title 42 also increased border crossings substantially as many people who were expelled tried to cross again.¹⁵ The Biden administration kept Title 42 in place until May 11, 2023. Following a steep increase in border apprehensions after Title 42 was lifted, the Biden administration established new protocols that create additional legal burdens on asylum seekers based on certain circumstances. These protocols were known as the Circumvention of Lawful Pathway Rule (CLP), Securing the Border Interim Rule, and Securing the Border Final Rule (together, the STB).¹⁶



MINNESOTA LAWYERS MUTUAL
INSURANCE COMPANY



**Lawyers seek advice from lawyers.
Why wouldn't you buy your insurance
from lawyers as well?**

Insuring Nebraska Firms Since 1996 and an Annual Supporter of the Nebraska State Bar Association

- MLM has returned a dividend check to policyholders annually, since 1988, over \$80 million total
- First dollar defense- a loss only deductible can produce a substantial savings for firms facing nuisance type claims
- Full prior acts coverage
- Offers an array of services to mitigate risks including three free CLEs for policyholders each policy year, \$165 value



Get a fast quote today!
Clayton Jones
402-699-1985
cjones@mlmins.com
www.mlmins.com

Protecting Your Practice is Our Policy.®

ASYLUM LAW AND THE BORDER


As applied during the Biden administration, the CLP applies to someone who entered the U.S. from Mexico at the southwest land border or adjacent coastal waters between May 11, 2023, and May 11, 2025, without documents allowing lawful admission after traveling through one country other than their own country of citizenship. Those who are subject to the CLP are barred from asylum unless they can rebut the presumption of ineligibility by demonstrating exceptionally compelling circumstances. Exceptionally compelling circumstances may be acute medical emergency or imminent threat to life or safety.

On June 4, 2024, President Biden issued a proclamation using INA 212(f) and The Securing the Border Interim Final Rule (STB).¹⁷ This implemented an emergency set of policies that take effect when border encounters exceed a certain threshold. When that happens, those who are encountered or who cross the border are ineligible for asylum unless they can demonstrate exceptionally compelling circumstances. Those processed at the border are subject to heightened screening standard for evaluating if they have a credible fear of return. This policy has been in effect since June 5, 2024, and remains so at the time of writing this article. The STB applies when the seven day average border encounters exceed 2,500 on a single day. The STB stops if the 7-day average border encounters are less than 1,500 for 28 days in a row at which time the STB ends 14 days later. This rule essentially keeps the border closed. In the last six fiscal years, monthly average border crossings have exceeded 1,500 in every month but one.¹⁸

Another element of the STB is the elimination of the requirement of a Customs and Border Patrol (CBP) official to ask if the person subject to expedited removal has a fear of returning to their home country. Under the STB, someone encountered at the border must affirmatively “manifest or express” a fear of return in order to initiate a credible fear interview. Additionally, when the STB is in effect, a new, higher standard for credible fear determinations is applied called “reasonable probability” which the regulations define as “substantially higher” than reasonable possibility but “somewhat lower than more likely than not.” Neither the CLP nor the STB address the challenge of an overburdened immigration system but rather focus on deterrence in attempt to fix the problem. Overall, deterrence-based policies temporarily suppress arrivals on the southern border but create a ricochet effect of increased arrivals as the factors pushing those to come to the U.S. remain a problem.¹⁹

As the second Trump administration begins in January 2025, more changes to asylum law are expected. Some of the proposed reforms to asylum law are raising the standard for credible fear determinations; codifying previous asylum bars and third country-transit rules; eliminating the particular social group ground; or codifying the holding in *Matter of A-B-*, 27 I&N Dec.316 (A.G. 2018). This decision, which was issued by Attorney General Jeff Sessions, vacated a previous precedent decision

on asylum issued by the Board of Immigration Appeals.²⁰ The decision in *Matter of A-B-*, restricted asylum applications based on particular social group and was later vacated in *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021).²¹ The new administration will have to decide how it will manage the border and those seeking asylum, and we as a country will have to decide on our moral and legal obligation to protect those fleeing harm.

In closing, as Warsan Shire says in her poem, *Home*, “No one leaves home unless home is the mouth of a shark... you only leave home when home won’t let you stay...”

Endnotes

- ¹ “Bitter Fruit: The Story of the American Coup in Guatemala,” Stephen Schlesinger and Stephen Kinzer, 2005.
- ² “Guatemalan Migration in Times of Civil War and Post-War Challenges,” Migration Policy Institute, March 27, 2023. <https://www.migrationpolicy.org/article/guatemalan-migration-times-civil-war-and-post-war-challenges>.
- ³ “Everyone Who Is Gone Is Here: The United States, Central America, and the Making of a Crisis,” Jonathan Blitzer, 2024.
- ⁴ <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/american-baptist-churches-v-thornburgh-abc-settlement-agreement>; Public Law 105-100 (111 Stat. 2160, 2193).
- ⁵ “Guatemala Profile,” Insight Crime, January 18, 2024. <https://insightcrime.org/guatemala-organized-crime-news/guatemala/>.
- ⁶ *Id.*
- ⁷ “Rescue Board: The Untold Story of America’s Efforts to Save the Jews of Europe,” Rebecca Erbelding; 2019.
- ⁸ Convention Relating to the Status of Refugees, July 28, 1951.
- ⁹ INA 101(a)(42)(A), 208(a)
- ¹⁰ INA 235(b)(1).
- ¹¹ 8 CFR 1208.30
- ¹² *Id.*
- ¹³ “Expose and close: Artesia Residential Facility, New Mexico,” Detention Watch Network, September 2024. <https://www.detentionwatchnetwork.org/sites/>.
- ¹⁴ “The “Migrant Protection Protocols”: an Explanation of the Remain in Mexico Program,” American Immigration Council, February 1, 2024. <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.
- ¹⁵ “A Guide to Title 42 Expulsions at the Border,” American Immigration Council, May 25, 2022. <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.
- ¹⁶ Circumvention of Lawful Pathways Rule, 8 CFR 208.33, 1208.33; Securing the Border Rule, 8 CFR 208.13(g), 208.35, 235.15, 1208.13(g), 1208.35.
- ¹⁷ President Joseph R. Biden, Proclamation 10773, “Securing the Border,” 89 Fed.Reg. 48487 (June 3, 2024).
- ¹⁸ “Analysis of the President’s 212(f) Proclamation & Interim Final Rule Restricting Asylum,” American Immigration Council, June 2024. <https://www.americanimmigrationcouncil.org/research/american-immigration-council-analysis-presidents-212f-proclamation-and-interim-final-rule>.
- ¹⁹ “Rising Border Encounters in 2021: An Overview and Analysis,” American Immigration Council, March 2022.
- ²⁰ See *Matter of A-R-C-G-*, 26 I&N Dec. 288 (BIA 2014).
- ²¹ “Mandate for Leadership: The Conservative Promise,” The Heritage Foundation, 2025.