IRLI IMMIGRATION REFORM LAW INSTITUTE

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Founded in 1986, the Immigration Reform Law Institute (IRLI) is a public-interest legal education and advocacy law firm dedicated to achieving responsible immigration policies that serve national interests.

IRLI is a supporting organization of the Federation for American Immigration Reform.

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January 8, 2019

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VIA Federal eRulemaking Portal

DOJ Docket Number EOIR-18-0501: Public Comment of the Immigration Reform Law Institute Regarding Certain Aliens Subject to a Bar on Entry under Certain Presidential Proclamations

Dear Director Reid:

The Immigration Reform Law Institute (IRLI) respectfully submits the following public comment, in response to the joint notice of interim final rulemaking (IFR) by the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice (DOJ) and the U.S. Department of Homeland Security (DHS), as published in the Federal Register. *See Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful.

IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

I. The factual basis for the IFR is unambiguous and generally accepted, and the presidential policy articulated in response is eminently reasonable.

IRLI endorses and supports the IFR, and strongly concurs with the policy justifications for this joint agency action as summarized in the contemporaneous Presidential Proclamation 9822:

> The United States expects the arrival at the border between the United States and Mexico (southern border) of a substantial number of aliens primarily from Central America who appear to have no lawful basis for admission into our country. They are traveling in large, organized groups through Mexico and reportedly intend to enter the United States unlawfully or without proper documentation and to seek asylum, despite the fact that, based on past experience, a significant majority will not be eligible for or be granted that benefit. Many entered Mexico unlawfully—some with violence—and have rejected opportunities to apply for asylum and benefits in Mexico. The arrival of large numbers of aliens will contribute to the overloading of our immigration and asylum system and to the release of thousands of aliens into the interior of the United States. The continuing and threatened mass migration of aliens lacking any basis for admission into the United States through our southern border has precipitated a crisis and undermines the integrity of our borders. ….
>
> The great number of aliens who cross unlawfully into the United States through the southern border consumes tremendous resources as the Government seeks to surveil, apprehend, screen, process, and detain them.

Addressing Mass Migration Through the Southern Border of the United States. 83 Fed. Reg. 57661 (Nov. 9, 2018).

> The entry of large numbers of aliens into the United States unlawfully between ports of entry on the southern border is contrary to the national interest, and our law has long recognized that aliens who seek to lawfully enter the United States must do so at ports of entry. Unlawful entry puts lives of both law enforcement and aliens at risk. By contrast, entry at ports of entry at the southern border allows for orderly processing, which enables the efficient deployment of law enforcement resources across our vast southern border.
>
> Failing to take immediate action to stem the mass migration the United States is currently experiencing and anticipating would only encourage additional mass unlawful migration and further overwhelming of the system.

Id. at 57662.

Together, the Proclamation, the IFR, and the Secretary of Homeland Security's subsequent announcement of new Migration Protection Protocols, *Historic Action to Confront Illegal Immigration* (Dec. 20, 2018), *see* https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration, articulate a compelling description of a complex crisis. That crisis threatens fundamental national interests and self-evidently implicates the conduct of foreign affairs:

(1) There is a continuing influx of Central American nationals into Mexico and towards the United States in large, organized groups.
(2) The aliens have no apparent basis for lawful admission and collectively intend to enter unlawfully and apply for asylum.
(3) The aliens have overwhelmingly declined to apply for asylum or other humanitarian protection available under Mexican asylum and humanitarian law.
(4) Unlawful entry is contrary to the national interest and puts lives of both law enforcement and aliens at risk.
(5) The mass influx consumes tremendous limited government resources available for enforcement, adjudication, and detention.
(6) The mass influx contributes disproportionately to overloading U.S. immigration and asylum systems, causing the involuntary release of thousands of detainable aliens into the interior of the United States.
(7) The United States has an overwhelming and rapidly growing asylum backlog of more than 786,000 pending cases.
(8) Of all aliens who file applications, barely more than ten percent are granted asylum.
(9) Entry at ports of entry at the southern border allows for orderly processing, which is necessary for the efficient deployment of law enforcement resources.
(10) Failing to take immediate action to stem the mass influx thus encourages additional mass unlawful migration and will further overwhelm of the immigration system.

The factual basis for the government's rulemaking—regarding the scope and composition of the alien mass influx, the migratory intent of its participants, the limited U.S. resources available for immigration enforcement on the southern border, the scope of the mass releases of aliens detained on the southern border, the size of the asylum backlog, and even the disparity between applications for and grants of asylum—has not been refuted by any major stakeholder or government official at the federal or state level of which IRLI is aware.

II. The new regulations are consistent with the asylum statute.

Promulgated on November 9, 2018, the IFR bars from eligibility for asylum all aliens who enter the country in contravention of a presidential proclamation suspending entry across the southern border. 83 Fed. Reg. 55934 (Nov. 9, 2018). Also on November 9, 2018, the President issued a proclamation pursuant to 8 U.S.C. § 1182(f) suspending just such entry, except at ports of entry. 83 Fed. Reg. 57661 (Nov. 9, 2018).

In *East Bay Sanctuary Covenant v. Trump*, No. 18-17274, 2018 U.S. App. LEXIS 34542, *42-44 (9th Cir. December 7, 2018), the U.S. Court of Appeals for the Ninth Circuit held that the plaintiffs, nonprofit groups providing assistance to asylum claimants, were likely to succeed in their challenge to the IFR because the Attorney General's eligibility bar is inconsistent with the right to apply for asylum, set forth in the asylum statute as follows:

> 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…

8 U.S.C. § 1158(a)(1).

The Ninth Circuit recognized that, facially, the IFR is not inconsistent with the right to apply for asylum, because the IFR implements the Attorney General's authority to limit eligibility for grants of asylum set forth in 8 U.S.C. § 1158(b)(2)(C), and it is not logically inconsistent to have a right to apply for a benefit one is ineligible to receive. *East Bay Sanctuary Covenant*, 2018 U.S. App. LEXIS 34542, *42. The court found this "the hollowest of rights," however, and held that, because that right was of "no consequence to a refugee," the Attorney General's eligibility bar was "equivalent" to a limit, inconsistent with § 1158(a)(1), on the right to apply for asylum. *Id.* at 43.

The glaring problem with this argument, however, is that asylum claimants are conferred this "hollowest of rights" numerous times in the statute itself. For example, an alien "who arrives in the United States … whether or not at a designated port of arrival" has an unfettered right to *apply* for asylum, 8 U.S.C. § 1158(a)(1), but immigration officials lack the authority to *grant* that application if the alien in question has been convicted of certain crimes. 8 U.S.C. § 1158(c)(2)(A)(ii). As Judge Leavy explained in his partial dissent:

> Congress placed authorization to apply for asylum in one section of the statute, 8 U.S.C. § 1158(a)(1). Congress then placed the exceptions to the authorization to apply in another

> section, 8 U.S.C. § 1158(a)(2). Congress placed the eligibility for asylum in a different subsection, 8 U.S.C. § 1158(b)(1), and disqualifications for eligibility in 8 U.S.C. § 1158(b)(2)(A)(i)-(vi)…. Congress has instructed, by the structure and language of the statute, that there is nothing inconsistent in allowing an application for asylum and categorically denying any possibility of being granted asylum on that application. Thus, Congress has instructed that felons and terrorists have a right to apply for asylum, notwithstanding a categorical denial of eligibility.

East Bay Sanctuary Covenant, 2018 U.S. App. LEXIS 34542, *64 (Leavy, J., dissenting).

In summary, as the Ninth Circuit itself recognized, the IFR is not inconsistent with the asylum statute as a matter of pure logic. Nor (contrary to the Ninth Circuit) is it inconsistent with that statute because it bars the grant of asylum to a category of aliens who may, nevertheless, apply for asylum—for the statute itself does the same thing numerous times.

III. Expanded use by the Departments of capacity control measures to manage the influx of asylum seekers attempting to enter without inspection on the southern border would complement the temporary *per se* ineligibility of such aliens under the IFR.

IRLI believes that the need for long-term reductions in illegal entries should point government border control policy toward a broader agenda of restrictions, based on the limited capacity of the Departments to detain, process, and adjudicate asylum seekers on the southern border. Indeed, DHS and DOJ have already implemented a number of regulations and policies that are primarily capacity-based.

IRLI suggests that additional measures implement what might be called *provisional ineligibility* for asylum. Provisional, as opposed to categorical ineligibility, could offer increased operational flexibility without de-emphasizing the humanitarian concerns that influential stakeholders in Congress, the judiciary, and the international community continue to invoke. The following are examples of initiatives that would include capacity control and provisional ineligibility elements:

A. Make all excluded entrants subject to Proclamation 9822 submit complete asylum applications.

INA § 208(a)(1) only entitles "an alien … present in the United States or who arrives … [to] *apply for asylum*…" Application must be "in accordance with the requirements and procedures

established by the Secretary of Homeland Security or the Attorney General…." INA § 208((b)(1)(A).

DHS regulations require that "an asylum applicant must file Form I-589, Application for Asylum and Withholding of Removal, together with any additional supporting evidence…." 8 C.F.R. § 208.3(a). An application that does include a response to every question and all of the alien's evidence in support of his claim, or is not otherwise "in accordance with instructions on the form," is deemed "incomplete" and will not be adjudicated. 8 C.F.R. §§ 208.3(c)(3), 208.4(b). An application may only be amended at the discretion of an asylum officer or immigration judge. 8 C.F.R. § 208.4(c).

The disparity between the scope of the illegal migrant influx described in Proclamation 9822 and the resources available to process and adjudicate asylum applications is undisputed. IRLI suggests that DHS consider adding a provision to the final regulations that would designate aliens who arrive in the United State on the southern border anywhere other than at a port of entry and who do not possess a completed Form I-589 as provisionally ineligible to apply for asylum.

The determination of provisional ineligibility due to illegal entry would be made in a field inspection. Detained aliens would be provided a variant Form I-589 and instructions, and then given the option (1) to return immediately to Mexico at or near the point of entry, until the application is completed, or (2) to consent to transport to the nearest port of entry, where an asylum officer or other delegated official would be available to offer further information and guidance on completion of the application, before the alien is provisionally returned to the corresponding Mexican port of entry. The regulation would provide that a second or subsequent instance of the alien being deemed provisionally ineligible would constitute a heavily weighted negative factor in any future determination pursuant to the exercise of discretion in a grant or denial of asylum. Under this approach, illegal entrants would not be deemed categorically ineligible, although repeat offenders would accrue negative equities should they advance to adjudication stage. The administrative requirement to file an application at a port of entry would easily be justified as a critical capacity control measure.

B. Give applicants for asylum at southern border ports of entry priority over illegal entrants for processing dates by using distinct asylum application forms.

Under current practice, DHS has established capacity controls for the acceptance and processing of asylum applications at individual ports of entry. Aliens are given a future appointment or number to manage their place in a given port of entry queue. The alien is not permitted to remain in the United States prior to their appointment for inspection, wherein they indicate an intent to

apply for asylum. *See* U.S. DHS, *Migration Protection Protocols*; *Historic Action to Confront Illegal Immigration* (Dec. 20, 2018) available at https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration.

The new Protocol appears to implement the Secretary's discretionary authority under INA § 235(d)(2)(C) to return

> an alien who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States… to that territory pending a proceeding under section 240.

8 U.S.C. § 1225(d)(2)(C).

Where a port of entry has in place capacity controls for scheduling asylum interviews, IRLI suggests that DHS consider adding a provision to the final regulations that would require aliens interdicted while a proclamation described in interim 8 C.F.R. § 208.13(c)(3) is in effect to be issued a Notice to Appear, with a hearing date and time scheduled *after* any alien who initially requested an asylum interview at the port of entry. This approach would impose no new categorical ineligibility on southern border asylum seekers, but could create a strong incentive for such aliens to apply initially at a port of entry, especially if implemented in coordination with the requirement for submission of a complete application, proposed in III.A above.

C. Establish consular refugee application processing centers in Mexico.

Treating persons seeking asylum by entering from a contiguous country as refugees reflects statutory congressional intent. Broad anti-crime legislation enacted in 1994 included a Sense of the Senate provision that persons seeking asylum should apply at U.S. refugee centers abroad. Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, § 130010(b).

DHS should consider adding a provision to the final regulations authorizing the establishment, in coordination with the Department of State, of consular refugee processing stations in Mexico, ideally in northern Mexican state capitals and major southern transit points such as Tapachulas, where aliens designated by proclamation could apply for and process *refugee* applications, pursuant to INA §207, in lieu of asylum interviews or applications at a port of entry. Such processing stations would also require the consent and coordination of the Mexican federal government. The President would need to provide annual quotas for such admissions, pursuant to INA § 207(a) or (b).

IRLI believes there would be ample reason for Mexico to find this approach in its own national interest. Application in the interior would reduce many of the inherent risks faced by asylum

applicants who use illegal means of entry, and could also reduce the incidence of organized criminal trafficking of asylum seekers in Mexican border states. When the opportunity to file a refugee application exists, asylum applications may be denied, due to the alien's willful circumvention of refugee procedures. The reduced cost of processing bona fide persecuted aliens as refugees rather than asylum applicants would potentially save American taxpayers large sums, which would otherwise have been expended for interdiction, detention, and adjudication operations in the United States.

D. Make failure to apply for asylum or other protection in Mexico a heavily negative factor in discretionary denials of asylum applications filed by entrants on the southern border.

Mexico has a well-developed legal system providing for various forms of humanitarian relief from removal, including asylum. *See* IRLI, *Public Comment Regarding Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children*, ICEB-2018-0002, at 6 (Nov. 9, 2018). Even if options to process asylum or refugee applications at locations in the Mexican interior never materialize, it is in the interest of both the United States and Mexico that as many non-Mexican asylum seekers as feasible apply for relief from removal under Mexican law. It is evident from public news reports that the Administration is fully engaged in diplomatic negotiations with the new Mexican President and his administration, to better coordinate and expand enforcement cooperation under future joint protocols. Ideally, the final result will be a safe third country agreement, creating a general exception to automatic eligibility for entrants from Mexico, as provided for by INA § 208(a)(2)(A).

In the interim, the Departments could achieve a similar goal, albeit to a lesser degree, by issuing final regulations that make failure to file an asylum application with the Mexican government a heavily-weighted negative factor in an immigration judges' exercise of discretion in granting or denying asylum.

E. Establish a *refoulement* tracking system to improve humanitarian protection monitoring in Mexico and Northern Triangle nations, backed by visa sanctions on noncompliant countries of origin.

Even if the rate of final adjudication of asylum applications were rapidly and successfully accelerated, the government would still be left with the logistical burden of removals, and the political burden of managing claims that failed asylum applicants who are removed to Central American will experience a renewed risk of persecution. Such burdens would likely increase as significant progress in controlling southern border mass influxes were made.

IRLI recommends that the Departments consider what can be termed expanded *refoulement* services. Aliens removed after unsuccessful asylum or other humanitarian relief proceedings could be registered in their home countries by the Department of State or the United Nations High Commissioner for Refugees. Offering this service could publically promote the safety of returnees, better ensure returnee protection during a transitional period, and improve the accuracy and timeliness of country condition reports. U.S. relatives who accompanied returnees could be provided specialized consular and contractual adjustment services in these Central Americans nations on a very economical basis.

IRLI recommended for many years that DHS ramp up use of its INA § 243(d) visa sanction authority to incentivize the cooperation of recalcitrant foreign governments. IRLI is pleased to see news reports of the progress that DHS has made in this activity, and notes that it could be readily applied to future instances of returnee abuse. *See* Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 Catholic U. Law Rev. 999, 1042-1054 (2006).

F. Clarify the meaning of physically present in the U.S. to exclude border waters, wetlands, and adjoining annual floodplains on the southern border.

A critical element for eligibility even to apply for asylum is that an alien must be "physically present in the United States." INA § 208(a)(1). IRLI staff members inspected the Rio Grande Valley sector of the southern border during a field visit in October 2018. It is obvious that the topography of the border is highly complex, with no portion of the border east of El Paso, Texas, being a mere demarcated line.

This topography is legally significant for purposes of eligibility for asylum application. Until 1952, federal law defined "United States" for immigration purposes "to mean the United States, and any *waters*, territory, or other place subject to the jurisdiction thereof." *United States v. Maisel*, 183 F.2d 724, 726 (3d Cir. 1950) (emphasis added) (quoting 8 U.S.C. § 173, Immigration Act of 1917 §1 (repealed)). The Immigration and Nationality Act (INA) amended the definition to comprise "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands." 8 U.S.C. § 1101(a)(38). "Significantly, the current version does not include waters . . . subject to the jurisdiction of the United States. Nor can it be said that the current definition implicitly includes territorial waters. As the language . . . suggests, the INA provides expressly to the contrary." *Yang v. Maugans*, 68 F.3d 1540, 1548 (3d Cir. 1995).

Congress thus unequivocally removed United States "waters" from the operative definition of "United States" in 1952. *See* also *In re Li*, 71 F.Supp.2d 1052 (D. Haw. 1999) (holding aliens on Midway Island had no right to apply for asylum because that island is not part of the U.S. as defined in INA §101(a)(38)). "Such removal demonstrates Congress's intent that entry on land is required for entry into the United States." *Movimiento Democracia, Inc. v. Johnson*, 193 F. Supp. 3d 1353, 1376 (S.D. Fla. 2016); *id.* ("'[W]e presume Congress says what it means and means what it says.'") (quoting *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016)).

The Administration thus has clear authority to issue a rule essentially imposing a wet foot-dry foot-type policy construing the "present in the United States or arrives" phrase of INA § 208(a)(1) to exclude from eligibility to apply for asylum aliens apprehended in the Rio Grande, its wetlands, or its floodplains lying below the annual average flood stage. If imposed by regulation as a condition of such eligibility, a southern border wet-foot-dry foot policy could potentially be very effective in the sectors along the Rio Grande.

G. Impose asylum application fees on illegal entrant applicants to fund influx-driven needs for additional processing and adjudicatory personnel.

As part of its comprehensive legislation to lower the incidence of invalid applications for asylum, Congress in 1996 authorized the Attorney General to charge fees for asylum applications. IIRIRA § 604 (1996), amending INA § 208(d)(3).

IRLI recommends that the Departments study whether the collection of fees imposed on illegal entrant applications, in order to compensate for the heavy additional costs of adjudicating hearings and enforcing the removal of unsuccessful applicants released into the interior due to limited detention facility and immigration court capacity, would be cost-effective. In combination with the other reforms noted above, the option to avoid a substantial processing fee by applying for asylum at a port of entry, or alternatively at a future consular refugee processing center, would create a strong disincentive for bona fide asylum seekers to make costly and dangerous illegal entries into the United States.

IV. Conclusion

IRLI endorses and supports the IFR, both as a regulation and as part of the Administration's initiative to redirect executive discretion towards improved enforcement in the national interest. The essential facts of the influx of asylum seekers and its dangerous consequences are well stated, and the interim regulations are consistent with the asylum statute.

While the legal basis for the regulation is robust, as a practical matter its time-limited validity means that more sustainable coordinated measures will be needed. IRLI respectfully submits seven examples of reforms to a permanent regulation, based on principles of provisional ineligibility and capacity management, that we believe will strengthen the government's deep commitment to the rule of law in the field of immigration.

Respectfully submitted,

Immigration Reform Law Institute
by Michael M. Hethmon, Senior Counsel