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Trump's Deal With Mexico Could Make Asylum Next to Impossible

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Over the course of Trump's presidency, the administration has narrowed what the government considers grounds for asylum, and most recently, tried to ban those who cross the border illegally from requesting the protection. Now, it's considering yet another proposal that could make it even harder for individuals seeking refuge in the U.S.

The Trump administration is reportedly brokering a deal with Mexico's incoming government that would require asylum seekers to stay in Mexico while their claims are processed in the United States. Over the weekend, President Donald Trump said on Twitter that migrants would have to remain in the country "until their claims are individually approved in court." While Mexican officials pushed back against the president's tweets, saying no agreement had been reached, discussions are still under way, according to White House Press Secretary Sarah Huckabee Sanders.

"We won't have a final decision until the new government actually takes over, which will happen on Saturday," Sanders said at a press briefing on Tuesday, adding that a meeting between Trump administration officials and Mexico's new foreign minister will be held next week.

Few details have been provided about the arrangement, but the general outline, as described in media reports and by the president, suggests that it would effectively make Mexico a waiting room for thousands of Central American migrants. It's a dramatic divergence from current policy: Today, individuals apply for asylum once they're on American soil. Once they do, they're either detained or released into the U.S. until their immigration hearing. Trump has repeatedly expressed his frustration with the latter practice, which he decries as "catch and release." His criticisms of the process have escalated over recent months, as thousands of migrants traveling in a caravan arrive at the U.S.-Mexico border.

U.S. and international law would dictate that the migrants have the right to apply for asylum once they're inside the U.S. But a deal designed to keep asylum seekers in Mexico would make it difficult, if not impossible, for them to successfully present their case before an immigration judge, according to legal experts.

"I do not see a way to do this that will enable the United States to honor its own U.S. laws that guarantee asylum seekers the right to seek asylum," said Greg Chen, the director of government relations for the American Immigration Lawyers Association.

There are a number of problems that could arise, according to Chen. For one, applying for asylum is an arduous process that's made easier by the guidance of legal counsel, and it would be difficult for an American lawyer to provide assistance if clients are in Mexico. "If you can't meet with your counsel, it's almost impossible to provide counsel," he said. Conversations over the phone, which could be seen as an alternative, might also prove difficult, given asylum seekers' potentially limited phone access. There's also the challenge of obtaining documents to corroborate asylum claims, which while not required can significantly help a case. Attorneys often help their clients with that task, as well.

Lawyers have proven to be critical in immigration-court processes, particularly in asylum cases, where the burden is on individuals to prove that they've been persecuted or have a "well-founded fear" of future persecution in their home countries. Research has also shown that immigrants who have representation in court are more likely to succeed in their cases.

Still, the asylum process is long—and the success rate is low. Immigration courts have been bogged down for years: The backlog of cases stands at more than 760,000, and court appearances are often scheduled months, if not years, in the future. And only a fraction of those who pass the credible-fear screening are granted asylum: According to the Department of Homeland Security, less than 10 percent of those who applied were deemed qualified in the last year.

Legal obstacles aside, there's also the matter of whether migrants will be safe and self-sufficient while remaining indefinitely in Mexico.

Lee Gelernt, the deputy director of the ACLU's national Immigrant Rights' Project, told me that any proposal that doesn't guarantee migrants' safety or afford them the "same full immigration hearings they would've received in the U.S." is a "nonstarter legally."

Alex Nowrasteh, a senior immigration-policy analyst at the libertarian Cato Institute, noted that migrants would have to secure work authorization in Mexico, because "they'd have to be able to support themselves while they're waiting for asylum." The Trump-Mexico deal "sounds like a system basically designed to turn away as many asylum seekers as possible," Nowrasteh said, "to make it difficult for those who remain and to approve as few as possible."

The administration's clamping-down on asylum could exacerbate the situation at the U.S.-Mexico border, particularly near Tijuana, where more than 5,000 people, some of whom are caravan members, are waiting to make their case. U.S. Customs and Border Protection has said it only has the capacity to process up to 100 claims a day.

"For the next month or two, we have this difficult situation where there's all these people who have migrated north, and Mexico is not prepared to deal with it and they're getting desperate," said John Sandweg, the former acting director of Immigration and Customs Enforcement during the Obama administration. Referring to the events of this past Sunday, when a confrontation at the San Ysidro port of entry led to the use of tear gas, Sandweg said: "I worry that you might see similar things."

David Aguilar, who served as the CBP commissioner under President George W. Bush, largely concurred with Sandweg's assessment, but he supports the U.S. and Mexico working on a deal to address the influx of migrants at the border. "If this were to happen, I'd like to think the U.S. would assist Mexico in whatever way we can ... in order to bring orderliness to the situation,"

Aguilar said. “One of the things that would be critically important is how we handle those asylum claims.”

It’s not clear how, or if, the Trump administration will address concerns about the arrangement in its discussions with Mexico. The incentives for the White House would seem to point in the opposite direction: An already difficult asylum process would likely become more challenging—and that may be the point.