



Effective Border Management Begins with Improving the U.S. Asylum System

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In response to the [recent increase in migration](#) at the U.S. southern border, the Trump administration has implemented a range of policies designed to deter migrants from coming or to expedite their removal once they arrive.¹ The administration has justified its approach with inaccurate claims that many migrants pose public safety threats and that few qualify for humanitarian relief despite clear evidence that more families and children are arriving from Central America fleeing persecution and violence. The effect of these policies has been the denial of access to humanitarian protection without any notable improvement in the processing of migrants' claims.

The humanitarian crisis in Central America demands a new approach that will process migrants in an efficient and orderly way while ensuring those who qualify for relief receive asylum or other humanitarian protection. The U.S. government can increase the capacity and efficiency of the adjudication process by building up the corps of asylum officers and improving the functioning of the immigration court system. Ensuring that migrants have legal representation will also increase the efficiency and fairness of proceedings. In addition, the U.S. government should invest in a coordinated strategy with other countries in the Americas region to address the root causes of the current migration and provide a robust humanitarian response to protect those fleeing danger. In the long-term, these solutions will more be effective in providing a fair, orderly and efficient system for processing asylum seekers and other migrants.

More Central American Families Are Seeking Protection

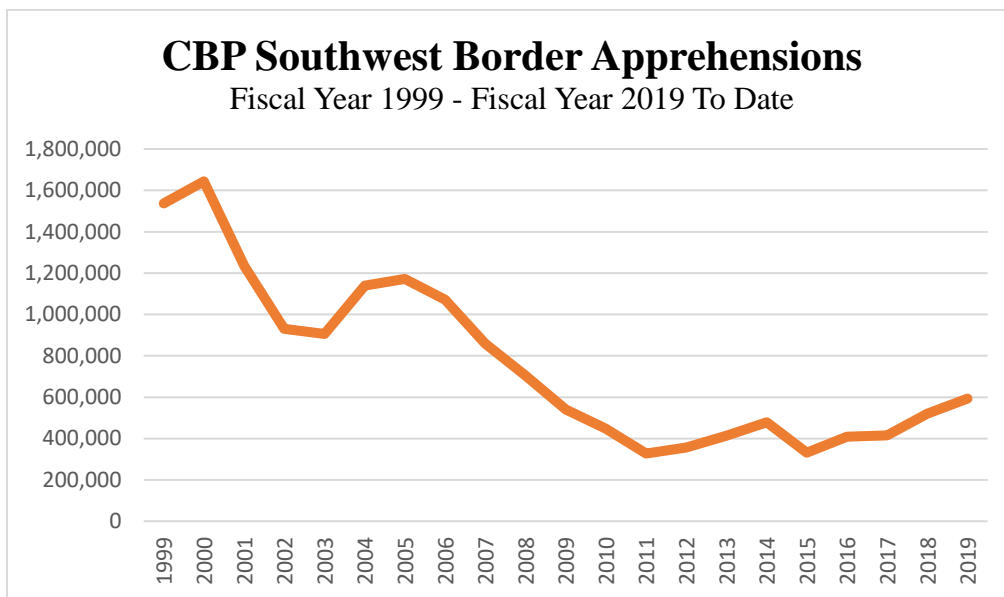
This year, the number of people U.S. Customs and Border Protection (“CBP”) has apprehended at the southern border has increased dramatically. But while the current surge in migration is substantial, the U.S. has experienced even larger migration flows at many times during the past two decades.² Moreover, the federal government responded to those greater numbers of migrants with far less resources than it currently has. For example, since 1999, the U.S. Border Patrol budget has grown more than five times to a current 2019 level of \$4.7 billion.³

Importantly, a growing percentage of the migrants arriving at the border consists of families and children from Central America who are actively presenting themselves to U.S. officials to seek asylum or other humanitarian protection. [CBP data shows that in May 2019](#), roughly 72 percent

of apprehensions were families or children.⁴ By contrast, in 2012, families and children comprised only 10 percent of all border apprehensions.⁵

More people are also fleeing violence or persecution in Guatemala, Honduras, and El Salvador, countries that are wracked by uncontrolled crime, gang violence and poverty. Migrants from these three countries now comprise about 74 percent of all apprehensions at the U.S. southern border.⁶ By comparison, in 2000, when the highest number of border apprehensions in U.S. history was recorded, 98 percent were Mexican nationals.⁷ With more families and children arriving and more people intending to apply for humanitarian protection, the U.S. government must invest in a more effective and orderly process to screen and adjudicate the claims of those who are arriving.

Figure A



The Administration Has Not Established a Fair, Orderly Process for Screening Migrants

The Trump administration has not created an efficient or fair system for processing migrants at the border. Instead, deterrence policies, such as the [metering](#) of arrivals at ports of entry, the [asylum ban](#), [“Remain in Mexico.”](#) and the increased use of detention have all but guaranteed that the situation at the border continues to deteriorate.⁸ As more restrictive policies have been implemented by the Trump administration, an increasing sense of urgency and panic has led to a greater number of migrants presenting themselves at the border seeking to apply for protection.⁹

Reports by non-governmental organizations indicate that families are being forced to wait for longer periods, between three weeks to two-and-a-half months, on the Mexican side of the border before being screened for humanitarian protection at some ports of entry.¹⁰ During that time, the migrants are stranded in Mexico in increasingly dangerous places.¹¹ The Remain in Mexico program, which to date has been applied to over 11,000 people,¹² failed to provide adequate

notice of court hearings and resulted in migrants failing to appear through no fault of their own.¹³ The asylum ban, Remain in Mexico, family separation, and several other policies were halted at least temporarily by federal courts, resulting in haphazard implementation and confusion about U.S. law and policies. These are just some examples of policies that exacerbated the plight of migrants at the border while at the same time restricting or closing off meaningful access to legal protection.

Improving the Adjudication Process for Asylum Seekers and Other Migrants

Solution #1: Increase the capacity of asylum officers to process border cases.

To improve the efficiency of case processing, more USCIS asylum officers should be hired and sent to the border region to conduct preliminary screenings for asylum known as “credible fear interviews.”¹⁴ Recognizing that USCIS’s asylum division is already stretched thin, more asylum officers should be hired using existing DHS border appropriations reprogrammed to USCIS or new appropriations. Hiring more asylum officers will also avoid adding to the large case backlogs affecting a wide range of other immigration petitions and applications.¹⁵

Due to the sensitivity and complexity of claims of persecution, these interviews should only be conducted by asylum officers trained in asylum law and trauma-informed methods for interviewing victims of violence and persecution. Immigration law specifies that asylum officers must conduct the credible fear interviews.¹⁶ For these reasons, Congress should reject the Administration’s request for \$23 million in funding and authorization for Border Patrol agents to conduct the interviews.¹⁷ Border Patrol’s mission does not include the adjudication of asylum claims, and their agents lack the necessary training to fairly and effectively interview asylum seekers and adjudicate their claims.¹⁸

In addition, asylum officers could be given the authority to make full asylum adjudications for border arrivals as they do in the affirmative asylum context. Currently only immigration judges can adjudicate claims for those subject to expedited removal. Asylum officer adjudications are more efficient when compared to the adversarial proceedings of an immigration court hearing, which require the involvement of court personnel and government counsel and more complex procedures. Having asylum officers conduct full adjudications could resolve many cases quickly and avoid forcing asylum seekers to wait several years before being heard in immigration court. Many cases would not need to come before the court at all, leading to a long-term reduction in the court backlog. DHS would need to reprogram existing border management funds to hire more asylum officers to adjudicate these claims. DHS could launch a pilot program to evaluate the efficiency and cost-savings of this approach.

Giving asylum officers the authority to adjudicate claims for border arrivals would also ensure a thorough review process because an immigration judge could review the officers’ decisions and applicants found ineligible would have the opportunity to seek review before the court. For this solution to be effective and fair, it is essential that the government provide legal counsel to migrants and conduct the adjudications after people are released (discussed below).

Solution #2: Increase the efficiency and independence of immigration courts.

To ensure more timely and fair processing of cases, the administration should restore case management tools and decisional independence to immigration judges. At a time when our immigration courts suffer from a staggering case backlog of more than 900,000 cases, the Department of Justice (DOJ) has stripped immigration judges of their power to continue, administratively close, and terminate cases—critical tools that allow them to process their cases more efficiently. For example, if a victim of trafficking is applying for a visa, the immigration judge should be able to postpone that case until USCIS completes its review, instead of wasting judicial resources on a case that could be resolved by USCIS without going to court. The Attorney General (AG) has also reinterpreted longstanding legal precedent without warning, sending judges and attorneys alike scrambling to understand the new interpretations and significantly increasing case litigation. The Executive Office for Immigration Review (EOIR) has shuffled adjudication priorities, creating inefficiencies by requiring courts to reschedule cases. Similarly, EOIR's deployments of judges to the border did not prove effective and resulted in disruptions of court operations.¹⁹

Hiring and training additional judges could improve efficiency, but only if accompanied by reforms that ensure judicial independence. Judges must have the ability to control their own dockets, adequate support staff, and decisional authority to make the right legal decision in a timely manner. Such reforms must also address growing concerns about the Administration's politicization of the judicial selection process.²⁰ Ultimately these reforms will restore the public's faith in the system.

To truly make a difference in the court's operations, Congress must establish an independent immigration court system.²¹ For years, the immigration court system has suffered from profound structural problems rooted in an inherent conflict of interest: the court is overseen by the AG, who also supervises the DOJ lawyers who prosecute immigration cases in federal courts.²² This inherent conflict violates the fundamental principles of our judicial system that require adjudication by a neutral arbiter who is impartial to the positions of either party. Lacking independence, the immigration court is also vulnerable to political pressure and the changing priorities of different administrations, which have resulted in disruptions to the court's operations like those described above.

Solution #3: Government-funded legal counsel will promote efficiency and fairness.

The adjudication of cases would also be made more efficient and fairer if the government provides lawyers to migrants. Immigration judges widely agree that legal counsel increases efficiency because a person who is represented by a lawyer is less likely to bring unmeritorious claims and is more likely to appear in court.²³ In April, the administration's Homeland Security Advisory Council recommended providing migrants with legal counsel, noting that they will be less likely to seek continuances once they are represented.²⁴

Importantly, asylum seekers represented by counsel are many times more likely to receive a fair hearing and win their claims.²⁵ Unrepresented individuals face profound challenges when forced to navigate complex immigration law and procedure.²⁶ Given the benefits of legal counsel, the

administration should immediately halt Remain in Mexico and other programs or practices, such as the restrictions placed on counsel at detention facilities, that have made it for more difficult for asylum seekers to obtain or access legal counsel.²⁷

Solution #4: Expand alternatives to detention for arriving asylum seekers

The government can reduce costs and improve processing by expanding alternatives to detention programs which help ensure asylum seekers appear at immigration hearings. Alternatives to detention are extremely effective at facilitating high appearance rates. The DHS Family Case Management Program reported an appearance rate of 99 percent for court proceedings.²⁸ Alternatives also cost as little as one tenth the price of detention.²⁹

Moreover, detention in remote regions puts unwarranted pressure on courts and asylum officers to hear cases under extreme time constraints, which further compromises the accuracy and fairness of decisions. For these reasons, the proposal by the DHS Advisory Council to set up a “rocket” immigration court docket at border processing centers will undermine due process and likely result in the denial of relief to eligible asylum seekers. The DHS proposal calls for the adjudication of cases within 20 days during which time the person would be detained. Even with counsel, in a period of 20 days it would be nearly impossible to interview witnesses, research the applicable asylum law, and prepare evidence and legal documents needed to support an asylum claim.

The escalating detention of asylum seekers and other border arrivals, which has become a default practice, is unwise and unjustified.³⁰ The system would be more efficient and less costly if federal government implemented more alternatives to detention and built up the response capacity of the asylum corps and the courts.

Solution #5: Address the Root Causes of Forced Migration with Regional Solutions

In addition to improving the adjudication process for migrants arriving at the border, the federal government should invest in and partner with the governments of countries in the Americas region to address the root causes of displacement. A multilateral strategy is needed that would enhance the control of narcotics and weapons, reduce human trafficking, and support economic growth, food security, and rural and social development in the region. The U.S. government should also increase support for the UN refugee agency to strengthen asylum and refugee protection systems in Mexico and other countries in the region. Finally, the United States should recommit to a robust refugee resettlement initiative to resettle more refugees from the Northern Triangle of Central America.

Conclusion

As the number of people seeking protection at our southern border has surged, the administration has resorted to policies that are fueling the sense of crisis and disorder. An efficient and orderly system for processing border arrivals can be implemented without compromising due process or the humanitarian protections guaranteed under U.S. law. The solutions set forth above are also less costly than current policies that rely heavily on detention and border enforcement but have proven ineffective. DHS and DOJ have the resources to begin immediate implementation of a

plan to improve the adjudications procedures and capacity of USCIS's asylum division and the immigration courts. If the administration is serious about effective border management, it will invest in these solutions without delay.

¹ See U.S. Border Patrol Southwest Apprehensions, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

² See Figure A.

³ See, American Immigration Council, *The Cost of Immigration Enforcement and Border Security*, May 2019, available at https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf.

⁴ U.S. Border Patrol Southwest Apprehensions, *supra*.

⁵ See Migration Policy Institute, *Eight Key U.S. Immigration Policy Issues*, May 2019, available at <https://www.migrationpolicy.org/research/eight-key-us-immigration-policy-issues>.

⁶ See U.S. Border Patrol Southwest Apprehensions By Sector FY 2019, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions>.

⁷ See Migration Policy Institute, *Eight Key U.S. Immigration Policy Issues*, May 2019 at page 4.

⁸ See *id.*

⁹ See Max Fisher and Amanda Taub, *Border Crackdowns Feed a Self-Reinforcing Cycle of Fear and Backlash*, April 2, 2019, available at <https://www.nytimes.com/2019/04/02/world/americas/us-immigration-crackdown.html>.

¹⁰ See Strauss Center for International Security and Law, *Metering Update May 2019*, available at https://www.strausscenter.org/images/strauss/18-19/MSI/Metering-Report-May-2019-MSI_5.20.pdf

¹¹ See *id.*

¹² See Reuters, *Trump ramps up returns of asylum seekers*, available at <https://fingfx.thomsonreuters.com/gfx/editorcharts/USA-IMMIGRATION-ASYLUM/0H001PBW36BD/index.html>.

¹³ On May 7, 2019, the Ninth Circuit Court of Appeals granted the Trump administration's request to temporarily allow the government to continue to forcibly return asylum seekers to Mexico while it appeals an April 8 ruling that had blocked the policy. See *Innovation Law Lab v. McAleenan*, Case No. 19-15716 available at https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000988.

¹⁴ See USCIS Asylum Division Quarterly Meeting, May 20 2019, at Page 2, available at https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AsymStakeholderMeetingQA_05202019.pdf

¹⁵ See AILA, *AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration*, January 30, 2019, available at <https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays>.

¹⁶ See 8 USC §1225(b)(1)(B). 8 USC § 1225(b)(1)(E) defines a "asylum officer" as a person who has had professional training in asylum law and is supervised by an officer who has had the same training and has had substantial experience adjudicating asylum applications. CBP border agents have not received the required training on asylum law, country conditions, and interview techniques and their supervisors do not have experience in adjudicating asylum claims.

¹⁷ See Acting Director of OMB Sends Congress FY2019 Emergency Supplemental Request, available at <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/acting-director-omb-sends-congress-fy2019>.

¹⁸ See Lindsay Harris, *Withholding Protection*, May 6, 2019, 50.3 Columbia Human Rights Law Review 1 (2019), available at <https://ssrn.com/abstract=3383646>.

¹⁹ Meredith Hoffman, *Trump Sent Judges to the Border. Many Had Nothing to Do*, September 27, 2017, available at <https://www.politico.com/magazine/story/2017/09/27/trump-deportations-immigration-backlog-215649>.

²⁰ See Senate and House Democrats Request IG Investigation of Illegal Hiring Allegations at DOJ (May 8, 2018), available at <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/senate-and-house-democrats-request-ig-investig>.

²¹ See AILA, *AILA Policy Brief: Restoring Integrity and Independence to America's Immigration Courts*, September 28, 2018, available at <https://www.aila.org/dueprocess#PDF>.

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- ²² Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish An Article I Immigration Court*, Bender's Immigration Bulletin (Jan. 1, 2008), available at <http://nieman.harvard.edu/wp-content/uploads/pod-assets/Image/microsites/immigration2013/resources/Urgent%20Priority%20FINAL%201-1-08.pdf>.
- ²³ See Ingrid Eagly & Steven Shafer, *A National Study To Access to Counsel in Immigration Court*, December 2015, available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review.
- ²⁴ See Homeland Security Advisory Council, April 16, 2019, available at https://www.dhs.gov/sites/default/files/publications/19_0416_hsic-emergency-interim-report.pdf.
- ²⁵ See Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, September 28, 2016, available at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.
- ²⁶ American Immigration Council, *Access to Counsel in Immigration Court*, available at https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.
- ²⁷ See AILA Sends Letter to DHS Acting Secretary Detailing MPP's Barriers to Counsel, June 3, 2019, available at <https://www.aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp>
- ²⁸ See Aria Bendix, *ICE Shuts Down Program for Asylum-Seekers*, June 9, 2017, available at <https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/>.
- ²⁹ See Women's Refugee Commission, *Family Case Management Report*, June 2017, available at <https://www.womensrefugeecommission.org/images/zdocs/Backgrounder-FCMP.pdf>.
- ³⁰ See Mitchell Ferman, *The New York Times*, *The Border Patrol's New Tent Camps Cost \$37 Million. Take a Look Inside*, available at <https://www.womensrefugeecommission.org/images/zdocs/Backgrounder-FCMP.pdf>.