

REFUGEES INTERNATIONAL

Addressing the Legacy of Expedited Removal: Border Procedures and Alternatives for Reform

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May 2021



Guatemalan youth arrive on an ICE deportation flight from Brownsville, Texas to Guatemala City. Photo by John Moore/Getty Images

Introduction

Though he has already revoked some of the former administration's highly restrictive policies on asylum, President Biden has thus far left in place an expulsion policy first imposed by the Trump administration under [Title 42 of the U.S. Code](#), and based on the [unreasonable assertion](#) that public health requires such restrictive measures be essentially directed at asylum seekers. Ports of entry have remained closed to asylum seekers except to a select few exempted from Title 42 in response to a lawsuit challenging the policy. This month, the Biden administration moved to expand the [humanitarian exemption](#) process further, tasking NGOs with identifying vulnerable migrants in Mexico and getting information about them to U.S Customs and Border Protection officials (CBP) in order to speed processing at ports. In addition, since February, Mexico's refusal to accept back expelled Honduran, Salvadoran, and Guatemalan families with young children has meant that the Border Patrol has released some families and allowed them to proceed to their destinations—often the homes of relatives—to pursue their claims for asylum there. This is currently a practice borne of the necessity of limiting congregate detention during the pandemic. But a return to the pre-existing policy and practice—a border screening process called expedited removal—will recreate long-standing problems, and the Biden administration should now consider alternatives.

Under expedited removal, border officials are tasked with asking migrants who lack valid travel documents about their fear of return to their home country and with referring them to preliminary interviews with asylum officers if they express this fear. U.S. asylum officers assess whether the migrants have “a credible fear” of persecution—that is, a significant possibility of establishing eligibility for asylum. If they fail this interview, they are removed or remain detained (without real access to counsel) for a review by an immigration judge within seven days. A negative decision by a judge is final and leads to removal. A positive credible fear decision leads the Department of Homeland Security (DHS) to place the asylum seeker in full (non-expedited) proceedings designed to secure the “removal” of unauthorized migrants, and the asylum seeker must then prove to an immigration judge (who works for the Executive Office of Immigration Review in the Department of Justice) that they merit refugee status.

Expedited removal created an entirely “defensive” system—whereby asylum seekers are presumed removable. It is also an adversarial system, and, as applied, has undermined the right to seek asylum at the border and recognition that asylum is a legal pathway to

protection regardless of status. For example, prior to a determination of eligibility, U.S. officials have [criminally prosecuted](#) those who have sought refuge but have been without travel documents or have entered without inspection. Many arriving asylum seekers get screened out even before credible fear assessments can be made, as they have been unfairly rejected by CBP officers who did not ask them about fear or inform them of their right to seek protection. Those who CBP refer for credible fear interviews are required to show they can meet a complex legal protection standard just after arrival and while detained; those denied at the credible fear stage have inadequate opportunity for appeal. Expedited removal has cut off access to the federal courts for border arriving asylum seekers; as a result, asylum jurisprudence is left to develop without addressing protection issues raised by a large majority of today's asylum seekers. In practice, expedited removal has limited the ability of Central Americans in particular to obtain access to protection and fair assessments of their asylum claims, and many have been [removed to life-threatening danger](#).

Expedited removal has been justified as a means to promote efficiency in asylum processing. Yet over the last decade, when large numbers of families have come to the border to seek refuge, expedited removal has proven extremely inefficient. President Trump expanded expedited removal—[extending](#) its application far beyond the border (anywhere within the United States to anyone present for less than two years without authorization), putting credible fear interviews in the hands of enforcement officers, and raising eligibility standards.

On February 2, 2021, President Biden issued [Executive Order 14010](#) on “Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border.” The Executive Order called for a review of the use of expedited removal within 120 days. The Order suggests that the Biden administration intends to implement expedited removal in a way that is more efficient and respectful of due process after the lifting of Title 42. For reasons described in this brief, it is highly questionable that such a system will prove to be fair or even effective and workable. Thus, this issue brief suggests alternative ways the United States can have a fair and efficient system that better fulfills its obligation to provide access to protection at the border. A different reception system at the border is an essential component of a new, comprehensive, protection-oriented approach to migration from Central America.

Background

Before Expedited Removal: The Refugee Act and Reception of Asylum Seekers, 1980–1996

In March 1980, Congress passed and the President signed the [Refugee Act](#), which mandated the establishment of a procedure whereby those present in the United States or at a land border or port of entry, irrespective of their status, could apply for asylum. The Act also forbade return of anyone to a country where their life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. This meant that the Attorney General, and later the Department of Homeland Security (DHS), was required to permit migrants to request asylum at the border or after entering the country and could not deport anyone before ensuring they would not face persecution.

Just after the law was enacted, more than 100,000 Cubans and some 15,000 Haitians sought refuge in Florida in the span of three months. President Carter used the parole authority of the Immigration Act and established a special entrant status for them in part to avoid undercutting the right to seek asylum before the procedures called for in the Refugee Act were established. A provision of the Refugee Act giving the Office of Refugee Resettlement the authority to set up reception centers was invoked to accommodate the Cubans.¹

In 1981, the Select Commission on Immigration and Refugee Policy suggested that the United States plan for “[mass asylum emergencies](#)” by creating an interagency planning body, the development of federal processing centers, and “group profiles” that would help speed adjudication of individual claims in such circumstances. Instead, the Reagan administration opted for a policy of interdiction that prevented Haitian asylum seekers who fled Haiti by boat from reaching the United States.

The Reagan administration did not publish a regulation clarifying asylum procedures (for those who did reach the United States) until the end of the decade. Immigration officials interpreted existing regulations and policy guidance in ways that limited access to asylum at the southwest border. For example, officials in California expelled

¹ “The Secretary is authorized...to make arrangements (including cooperative arrangements with other Federal agencies) for the temporary care of refugees in the United States in emergency circumstances, including the establishment of processing centers.” This provision of the Refugee Act was invoked later to accommodate Kosovar Albanians and Iraqi Kurds in the 1990s.

Salvadoran asylum seekers by [forcing them to sign voluntary departure forms](#). In 1988 and 1989, the Immigration and Naturalization Service first instituted a policy forbidding Central American asylum seekers from leaving South Texas, thus overwhelming local communities, and then a policy of adjudicating their asylum claims within a single day and detaining them to encourage abandonment of immigration court hearings.

Federal courts ultimately ruled that the Refugee Act of 1980 required a [fairer chance](#) to seek asylum and an assessment of claims [unbiased by enforcement or foreign policy](#) considerations. Further, Congress, in the Immigration Act of 1990, created an emergency contingency fund to reimburse localities for their support of sudden large numbers of asylum seekers.² A Government Accountability Office ([GAO](#)) report at about the same time suggested such funding for communities was well advised. “We do not believe that it is feasible to expand INS’ detention capabilities sufficiently” to handle a mass influx, the GAO reported, adding that “detaining all aliens until their cases are resolved is too costly.”³

In the early 1990s, the Immigration and Naturalization Service (INS) began to develop an asylum adjudication system that was separated from enforcement and that applied to all asylum seekers, including those who arrived at the border. Asylum officers worked in seven new offices in different parts of the country and reported to the INS Central Office. Asylum seekers applied at these offices and had non-adversarial interviews with specially trained asylum officers. One study of the new system found that, though additional training and staffing were needed, asylum adjudication was becoming fairer—with the exception of newly devised interviews assessing which of more than 36,000 Haitian asylum seekers at Guantanamo Bay had “credible fear of persecution,” a standard that was not found in the Refugee Act or the regulations and consequently was “ill defined.”⁴

INS officials constructed a separate process to handle the asylum cases of Haitians who fled from Haiti after the military coup in September 1991 and whom the Coast Guard indicted on the high seas. INS asylum officers conducted credible fear interviews of these Haitians at the United States military base at Guantanamo Bay from October 1991 to June 1992. Haitians who passed these credible fear interviews could enter the United States to pursue their claims in the asylum office, while those who failed were

² Section 705 of the Immigration Act of 1990, <https://www.congress.gov/101/statute/STATUTE-104/STATUTE-104-Pg4978.pdf>.

³ Immigration Control: Immigration Policies Affect INS Detention Efforts, June 1992, <https://www.gao.gov/assets/ggd-92-85.pdf>.

⁴ Sarah Ignatius, Interim Assessment of the Asylum Process of the Immigration and Naturalization Service (National Asylum Study Project, Harvard Law School, 1992), 44.

repatriated to Haiti. Procedural problems abounded with the credible fear interviews at Guantanamo: the interviews were not private and did not allow access to counsel; asylum officers asked applicants for documents to support their cases but did not explain the asylum process. More striking, however, was that credible fear interview pass rates fluctuated from a high of 85 percent in January 1992 to a low of 2 percent in April 1992.⁵ The credible fear interview standard used to handle a “crisis” of mass asylum seeker migration proved manipulatable for political and policy reasons; in early 1992, high ranking INS officials stated publicly and at asylum officer trainings that almost all Haitians would be denied.⁶ As a result of this flawed process, some Haitian asylum seekers were wrongfully repatriated. Moreover, those admitted to the United States were treated differently than other asylum seekers.⁷ Further, because large numbers of asylum officers were diverted to conduct credible fear interviews at Guantanamo Bay, backlogs of cases developed in the asylum offices in the United States.

Concurrently, the INS was also using the credible fear standard to prescreen asylum seekers (who arrived at ports of entry without proper travel documents) to determine whether to release them from detention during their asylum cases. Those who failed credible fear under this process were not returned to their home countries but rather remained detained pending full adjudication of their claims. A pilot parole program, in which credible claimants would be released pending a determination of their claims, had already proved effective; the problem was that, when the INS General Counsel’s office tried to expand it, enforcement officers rejected parole recommendations for asylum seekers of particular nationalities or required bonds for parole, which asylum seekers could not afford.

The same procedural problems were evident as in the Haitian screenings; credible fear interviews took place without access to counsel and only after several weeks. While waiting, the asylum seekers remained detained.⁸ The program overall was under resourced, shirked altogether in some districts, and never effectively evaluated. Officials

⁵ Ibid., 4.

⁶ Ibid., 58, citing a presentation by INS Deputy Commissioner R. Inzunza at the Fletcher School of Law and Diplomacy, Tufts University.

⁷ At least 54 Haitians whom INS had found to have a credible fear of persecution were mistakenly repatriated to Haiti due to faulty record keeping; 89 who passed credible fear screenings but were HIV positive were forcibly repatriated to Haiti. Those who passed credible fear screenings and were admitted to the United States were scheduled for interviews in asylum offices on an expedited schedule and grants of asylum received additional scrutiny by the Central Office. (Ibid, 42-58).

⁸ Lawyers Committee for Human Rights, “Detention of Refugees: Problems in Implementation of the Asylum Pre-Screening Officer Program,” September 1994.

responsible for overseeing asylum-prescreening were unable to assess the correlation between credible fear determinations made and the ultimate outcome of asylum claims. As the Associate INS Commissioner observed at the time, “asylum pre-screening” and parole of those screened-in was “not a core commitment of the agency.”⁹

The Screening System in the Illegal Immigration Reform and Immigrant Responsibility Act, (IIRIRA), 1997–2004

Despite these experiences, Congress mandated credible fear interviews for asylum seekers in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Under the new law, those failing to establish credible fear would be subject to removal. But Congress deliberately [set](#) a “low” standard or threshold of proof of potential entitlement to asylum, recognizing that, within two or three days of arrival, asylum seekers are still traumatized and have not had time to gather evidence to support their claim.¹⁰ The [1997 INS regulation](#) implementing the law did not further refine the credible fear standard, insisting that INS would do extensive training that would “ensure that the standard is implemented in a way which will encourage flexibility and a broad application of the statutory” definition (i.e., a significant possibility of establishing eligibility for asylum.)

At the same time, in the name of deterring abuse of the asylum system by migrants without good faith claims of persecution, the statute called for the detention of asylum seekers who arrived without travel documents and eliminated federal court appeals for those who failed credible fear interviews. The 1997 regulation applied expedited removal only to ports of entry, so that it affected less than 10 percent of all asylum seekers and precisely those who asked for asylum at ports of entry rather than those who entered without inspection.

The 1997 regulation devised a particular screening system that went into effect in April 1997. If they did not have valid documents, migrants would be asked “standard questions” regarding “any fear or concern of being removed.” It is this important inspection stage—when there is no access to counsel or assured interpretation—and which determines access to the credible fear interview itself—that has remained of most

⁹ T. Alexander Aleinikoff, quoted in Margaret Taylor, “Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform,” *Connecticut Law Review* 29.4 (Summer 1997).

¹⁰ 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Orrin Hatch: “The [credible fear] standard adopted in the conference report is intended to be a low screening standard for admission into the *usual full asylum process*.”) (emphasis added).

It was not, however, the same as the “manifestly unfounded” screen-out standard used by immigration ministers in the European Union.

concern to many advocates since expedited removal went into effect. As the [U.S. Commission on International Religious Freedom](#) (USCIRF) observed on its visits to ports of entry early in the new millennium, CBP inspecting officers did not provide required information and refer all who expressed fear to asylum officers. Significantly, at the land border port of entry on the U.S.-Mexico border observed by the Commission, CBP officers were least likely than elsewhere to inform migrants of the existence of protection for those who feared return to their home country or to refer a migrant to credible fear interviews if the migrant expressed fear. The majority of cases observed in which a CBP officer encouraged migrants to withdraw their applications for admission after they expressed fear involved Central Americans. Another study found that women survivors of rape and abuse were particularly vulnerable because they had difficulty expressing fear to border officials and even asylum officers conducting credible fear interviews did not believe they could claim asylum based on gender-related persecution.¹¹

Expedited removal underlined a distinction between the few people subject to the “defensive” asylum system—claiming asylum as a defense against removal—and the vast majority of asylum seekers at the time, who were in the “affirmative” asylum system. Many of the latter were people who had the resources to enter the country initially on a temporary visa (such as a tourist, student, or business visa) and then applied to the asylum office. After a non-adversarial interview, an asylum officer granted or denied them asylum; if denied, they had access to a new hearing in immigration court and were not typically detained. The treatment of asylum seekers in the two systems diverged dramatically—in 2003, 190 of the 56,120 affirmative asylum seekers were detained, while 13,759 of the 17,034 placed in expedited removal and applying defensively were detained.¹² Detention is traumatizing and dramatically reduces the ability to secure counsel that can be crucial to winning asylum. In 2003, the immigration court grant rate for those applicants who initially applied for asylum affirmatively was almost double that of the grant rate for those who applied defensively.¹³ Further, release from detention of asylum seekers who passed credible fear interviews varied widely from one part of the country to another despite the

¹¹ Lawyers Committee for Human Rights, “Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers,” 2002 https://web.archive.org/web/20170926002402/http://www.humanrightsfirst.org/wp-content/uploads/pdf/refugee_women.pdf.

¹² Department of Homeland Security Oversight: Terrorism and Other Topics, Hearing before the Committee on the Judiciary, United States Senate, 108th Congress, 2nd Session, June 9, 2004, 93.

¹³ See figure 17 and figure 18 in the Executive Office for Immigration Review FY2003 Statistical Yearbook showing that the immigration court affirmative grant rate was 44 percent while the immigration court defensive grant rate was 26 percent.

<https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/18/fy03syb.pdf>.

existence of policy guidance clearly authorizing parole to credible claimants who showed they were neither a flight risk nor a danger to the community. In 2003, while one ICE field office paroled almost 98 percent of applicants, another paroled just 0.5 percent. Release rates in other parts of the country varied widely between those two figures.¹⁴

After the implementation of expedited removal, the Women's Refugee Commission interviewed dozens of asylum-seeking women and children who were detained for prolonged periods under "appalling conditions." At the Wicomico County detention center in Maryland, the Women's Commission interviewed a Guatemalan asylum seeker whose husband was an affirmative asylum applicant living near Washington D.C. As Wendy Young of the Commission told Congress:

Her husband traveled three hours to deliver some toiletries and personal items to her. The facility refused to let her have them....He...had to tell her to stop phoning him, because [of] the exorbitant rates charged for collect calls...He returned one more time to the prison... [and] was told to "get lost" or risk deportation himself. After five months of incarceration, his wife abandoned her asylum claim and was deported to Guatemala.¹⁵

Senator Edward Kennedy, one of the co-authors of the Refugee Act, found it particularly disturbing that credible fear interviews occurred while asylum seekers were in detention—frequently alongside criminals in state and local prisons and subject to abusive treatment and a lack of adequate care—and that many asylum seekers were detained after passing these interviews. "By immediately detaining those who have been subjected to persecution and who have lived in constant fear, we contribute to their trauma and hardship. By detaining asylum seekers, we are also restricting their access to adequate legal representation, which they need in order for their claims to be decided fairly....We need to do more to protect the rights of asylum seekers," he stated to Congress. Senator Kennedy also noted that U.S. practice of detaining asylum seekers was out of line with the guidelines of the United Nations High Commissioner for Refugees.¹⁶

¹⁴ USCIRF Report on Asylum Seekers in Expedited Removal, Feb. 8, 2005, Statistical Report on Detention, 2001-2003,

https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/detentionStats.pdf.

¹⁵ Statement of Wendy A. Young, "INS Oversight and Reform: Detention" Hearing before the Subcommittee on Immigration of the Senate Committee on the Judiciary, 105th Congress, 2nd Session, September 16, 1998, 146.

¹⁶ "INS Reform" Hearing before the Subcommittee on Immigration of the Senate Committee on the Judiciary, 105th Congress, 2nd Session, September 16, 1998, 102.

Between 1999 and 2002 a bipartisan group of legislators—including Senator Kennedy and others who were aware that IIRIRA’s expedited exclusion provisions were not thoroughly discussed during final Congressional consideration of the legislation and, in the words of Senator Sam Brownback, were “flawed”—introduced the Refugee Protection Act.¹⁷ The bill included “safeguards against erroneous exclusion of asylum seekers” (specifically expanded review of removal orders) and mandated parole or alternatives to detention for asylum seekers who passed a credible fear screening. The first version of the bill also excepted from expedited removal anyone coming from countries with poor human rights records or where “conflict or other extraordinary conditions would pose a serious threat to the alien’s safety.”¹⁸ The bill reinforced the idea that different asylum seekers should not be subjected to different treatment based on how they entered the country. The bill also recognized that migrants from particular countries should be presumed to have credible fears and be exempted automatically from expedited removal.¹⁹

Though the RPA was not enacted, it is significant that, in the early 2000s, certain Central Americans were not subjected to expedited removal precisely because the process lacked safeguards mandated by federal courts for them before IIRIRA.²⁰

¹⁷ “A Overview of Asylum Policy,” Hearing Before the Subcommittee on Immigration of the Senate Judiciary Committee, 107th Congress, 1st Session, May 3, 2001, 2.

During the Conference on the Senate and the House versions of IIRIRA, the Republican conferees announced that the Democrats would not be allowed to offer any of their amendments, including to the provisions on expedited removal, for consideration. Senator Leahy protested about his “summary exclusion” from negotiations on the bill. See Philip Schrag, *A Well-Founded Fear: The Congressional Battle to Save Political Asylum in America* (New York: Routledge, 2000) 182.

¹⁸ <https://www.congress.gov/bill/106th-congress/senate-bill/1940/actions>
<https://www.congress.gov/bill/107th-congress/house-bill/4074>

The earliest version of the bill also defined credible fear as not manifestly unfounded (when a claim of eligibility for asylum “is not clearly fraudulent and is related to the criteria for granting asylum”).

¹⁹ It is worth noting that, between 1987 and 1995, it remained INS policy to, essentially, provide Nicaraguans with complementary protection: their denied asylum applications received another review and, regardless, they generally were not deported. To take just one year as an example, in 1990, 7460 Nicaraguan asylum applications were denied, covering over 10,000 individuals. 107 people were deported to Nicaragua in 1990 and 253 in 1991.

<https://eosfcweb01.eosfc-intl.net/U95007/OPAC/Search/AdvancedSearch.aspx>

For the policy on Nicaraguans, see:

[https://www.washingtonpost.com/archive/politics/1987/07/09/meese-signs-order-giving-nicaraguans-haven-in-us/3041bc0a-814f-4b69-bdd1-2a7e390d0d3d/;](https://www.washingtonpost.com/archive/politics/1987/07/09/meese-signs-order-giving-nicaraguans-haven-in-us/3041bc0a-814f-4b69-bdd1-2a7e390d0d3d/)

<https://www.aila.org/infonet/ins-phase-out-of-the-nicaraguan-review-program>

²⁰ “Expedited Removal cannot be applied to the following aliens... due to judicial action:... El Salvadorans; and verified members of the class action settlement in American Baptist Churches (ABC) v. Thornburgh.” See “Solving the OTM undocumented alien problem: Expedited Removal for Apprehensions Along the U.S. border,” Hearing before the Subcommittee on Economic Security, Infrastructure Protection, and

The Problems with Expedited Removal, 2005–2021

If, in 2000, expedited removal seemed “a key tool in overall border control and anti-fraud strategy” because “the vast majority of people subjected to it never assert a fear of return or of persecution,”²¹ this seems less plausible in 2021, given the demographic shift of border arrivals from single Mexican adults to asylum seeking families and children from Central America.

Early warning signs were visible between 2004-2006, when the number of people placed in expedited removal doubled as it was [expanded](#) to apply to those who entered between ports of entry, especially the rising number of “other than Mexicans,” primarily Brazilians and Central Americans.²² While one of the stated goals of the expansion of expedited removal was to “decrease the deaths of illegal immigrants in the [Arizona] deserts,” the number of bodies found in Arizona [kept rising](#).

Though violence was on the rise in Central America, DHS and State Department officials insisted to Congress that “economic factors” were spurring all Central American migration and that the appropriate response was detention and rapid repatriation.²³ Because DHS wanted to put migrants who crossed the border into expedited removal but did not have sufficient detention space for families, it separated children and sent them to Office of Refugee Resettlement facilities.²⁴ Pressured by advocates concerned about family separation, Congress, in report language, urged DHS “to release families or use alternatives to detention...whenever possible.”²⁵ But, in 2006, DHS announced the opening of a detention center in Texas to detain families subject to expedited removal so as to “[send the clear message that families entering the United States](#)

Cybersecurity of the Committee on Homeland Security, House of Representatives, 109th Congress, 1st session, September 28, 2005, 26.

²¹ David A. Martin, “Two Cheers for Expedited Removal in the New Immigration Laws,” *Virginia Journal of International Law* 40, no. 2 (Winter 2000): 675.

²² It is important to point out that expedited removal was originally only meant to be applied to Mexicans if they were criminals or has several unauthorized entries. The majority of Mexican nationals were given voluntary departure, as they always had been, before 2008.

²³ “Solving the OTM undocumented alien problem: expedited removal for apprehensions along the U.S. border,” Hearing before the Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity of the Committee on Homeland Security, House of Representatives, One Hundred Ninth Congress, first session, September 28, 2005 30. In December 2004, the Intelligence Reform and Terrorism Prevention Act authorized an increase in detention and removal operation bed space by 8,000 beds each year from fiscal year 2006 through 2010 for a total increase of 40,000 detention beds.

²⁴ Office of Inspector General, Department of Homeland Security, “A Review of DHS’ Responsibilities for Juvenile Aliens,” OIG-05-45 4 (2005). https://www.oig.dhs.gov/assets/Mgmt/OIG_05-45_Sep05.pdf.

²⁵ H.R. Rep. 109-79 (2005), at 38. <https://www.congress.gov/congressional-report/109th-congress/house-report/79>

[illegally will be returned home.](#)" Families remained detained there for months even after passing credible fear screenings despite Congressional appropriations for alternative to detention programs that had proven effective.²⁶ In 2008, the Trafficking Victims Protection Act reaffirmed that unaccompanied children would not be placed in expedited removal proceedings and instead have their asylum claims adjudicated fully by asylum officers in a non-adversarial setting.²⁷ But the problem of families remained.

In the early 2010s, expedited removal certainly did not deter non-Mexican nationals fleeing violence, absence of rule of law, and human rights violations from coming to the border.²⁸ Credible fear interviews more than doubled between 2012 and 2013 and asylum officers sent an increasing number of Central Americans who passed their credible fear hearings on to the immigration courts for consideration of their claims; the number of defensive asylum claims eclipsed affirmative ones by 2014.²⁹ Still, the [U.S. Commission on International Religious Freedom \(USCIRF\)](#), the [American Civil Liberties Union \(ACLU\)](#), and [Human Rights Watch](#) documented the way expedited removal as administered hindered the ability to seek asylum, penalized asylum seekers—including those who passed credible fear screenings—with detention, limited their access to counsel, and led to refoulement. As the USCIRF found, "certain CBP officers [expressed] outright skepticism, if not hostility, toward asylum claims." Human Rights Watch found that CBP referred a particularly small percentage of Central Americans for credible fear assessments and that, more generally, most credible fear referrals came from agencies

²⁶ Women's Refugee Commission and Lutheran Immigration and Refugee Service, "Locking Up Family Values: The Detention of Immigrant Families," February 2007, <https://www.womensrefugeecommission.org/research-resources/locking-up-family-values-the-detention-of-immigrant-families/>

²⁷ Under the TVPRA, unaccompanied children are placed directly into Section 240 removal proceedings, but their cases are initially adjudicated by the Asylum Office. Before that, generally, unaccompanied children were not placed in expedited removal. See INS, Memorandum, "Unaccompanied Minors Subject to Expedited Removal" (Aug. 21, 1997).

²⁸ That Central Americans are bona fide asylum seekers with viable claims under U.S. law is clear from the fact that, despite caselaw developments and procedural changes have made it more difficult for them to lodge claims and qualify as refugees, Honduras, El Salvador and Guatemala have been among the top 10 countries of origin for individuals granted asylum for the last several years.

<https://www.dhs.gov/immigration-statistics/refugees-asylees>

UNHCR recognized Central American migration as a refugee crisis almost a decade ago and has since found that Central Americans have valid refugee protection claims: UNHCR and International Centre for the Human Rights of Migrants, "Forced Displacement and Protection Needs produced by new forms of Violence and Criminality in Central America," May 2012; UNHCR, Women on the Run (Oct. 2015), <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>; UNHCR, Children on the Run, <http://www.unhcr.org/56fc266f4.html>; UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador (March 2016); UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras (July 2016)

²⁹ <https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview>

<https://trac.syr.edu/phptools/immigration/asylum/>

other than CBP, despite CBP encountering most migrants and being obliged to inform them about the interviews. The ACLU found that language barriers were a major problem in encounters with CBP and that officers pressured asylum seekers to sign forms they did not understand. Further, CBP officers did not accurately record accounts of asylum seekers they inspected on official forms which later were relied upon by asylum officers and immigration judges.³⁰

At the same time, the credible fear interview grew more detailed and more like a full merits adjudication than a preliminary screening. In light of the increase in credible fear interviews in 2013, the asylum division of USCIS revised its lesson plan for officers as to how to conduct these interviews. It removed language on the function of the credible fear as a low-threshold screening and instead cautioned against passing those with only a minimal or mere possibility of winning asylum. In the wake of the revision of the 2014 lesson plan, there was a reduction in the grant rate. Before the lesson plan was implemented, in January 2014, 83 percent of those who received credible fear interviews were permitted to apply for asylum. In July 2014, six months later, that figure was 63 percent.³¹

Despite these wide fluctuations, the [large majority of asylum seekers still passed](#) credible fear screenings between 2014 and 2019 and were sent on to the immigration courts; the asylum case backlog grew in [both](#) the immigration courts and the [asylum office, since so many asylum officers were diverted from handling the affirmative case load to conduct credible fear interviews](#).³² Unfortunately, resources for adjudication remained insufficient to keep up with need while DHS's enforcement and detention budgets grew. Asylum officers detailed to the border to conduct credible fear screenings did not obtain adequate training or have adequate time and it showed in the quality of their work: a 2018 USCIS review found that asylum officer notes did not reflect a skilled interview in an estimated 58 percent of cases. For most of these cases, the reason for

³⁰ John Washington, "Bad Information: Border Patrol Arrest Reports Are Full of Lies that Can Sabotage Asylum Claims," *The Intercept*, Aug. 11, 2019, <https://theintercept.com/2019/08/11/border-patrol-asylum-claim/>

³¹ Human Rights Watch, "You Don't Have Rights Here": US Border Screening and Returns of Central Americans to Risk of Serious Harm," October 16, 2014, <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk>

In family residential centers, the passage rate for credible fear interviews was 43.4 percent in July 2014, although in the five months that followed it rose to nearly 90 percent and then fell back to 67.5 percent in 2016.

³² The 2020 USCIS Ombudsman report details the large percentage of asylum officers that have been temporarily reassigned from adjudicating asylum applications to carry out fear screenings at the border since 2016.

https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf

the error was insufficient follow-up questions.³³ Asylum officers also faced logistical problems with accessing telephone interpretation and private interview space at detention centers. At credible fear interviews, indigenous language speakers received poor interpretation,³⁴ women survivors of gender violence had to speak to male officers while in front of their children, and some officers cut off asylum seekers and did not elicit important information.³⁵ In 2019, at least 16 percent (472 out of 2891) of adult women at the Karnes family detention center in Texas failed their credible fear interviews and nearly half (45 percent) of those negative determinations were later vacated, indicating errors in asylum office adjudication.³⁶

Despite a late 2009 [memo](#) that directed DHS to parole credible claimants, between 2015 and 2017, increasing numbers and percentages of asylum seekers remained detained long after passing their credible fear hearings.³⁷ After a 2015 federal court [ruling](#) that limited the time families with children could be detained, expedited removal led to family separations in an effort to subject at least one parent—usually the father—in a family that had entered without inspection to a deterrent “consequence.” Refugees International [interviewed](#) a Salvadoran asylum seeker who was released with her children while her husband was placed in expedited removal and detained in January of 2017; the detention of the father and the several month family separation was extremely, and needlessly, traumatic.³⁸ The [GAO](#) reported that for families who were subject to expedited removal and detained at Family Residential Centers, immigration judges vacated more than half of asylum officers’ negative credible fear determinations between 2014 and 2019. This was on top of an already extremely high positive credible fear determination rate at the Family Residential Centers. Not surprisingly, in early 2017 the [GAO](#) also found that the right “consequence” (a measure of overall policy efficiency

³³ Government Accountability Office, February 2020, “Actions Needed to Strengthen USCIS’s Oversight and Data Quality of Credible and Reasonable Fear Screenings,” <https://www.gao.gov/assets/gao-20-250.pdf>, 33.

³⁴ Report of the DHS Advisory Committee on Family Residential Centers (2016), 96-99.

³⁵ Regulations require that, during the credible-fear interview, the asylum officer “elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture.” 8 C.F.R. § 208.30(d).

³⁶ This data, and all the data about Karnes in this report, are from Andrea Meza, Director of Family Detention Services, RAICES.

³⁷ Human Rights First, “Lifeline on Lockdown,” July 2016, <https://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown.pdf>

³⁸ Refugees International, “Meet Mirna Linares”: <https://www.refugeesinternational.org/reports/2021/2/19/wecanwelcome-asylum-seekers-meet-mirna-linares>

This was a common process in El Paso, where the family entered, and other places along the border. See, Border Immigration Council, “Discretion to Deny,” Feb. 2017, <https://www.borderlandimmigrationcouncil.org/discretion-to-deny>.

and effectiveness) for families arriving without authorization was a notice to appear in immigration court—not expedited removal and credible fear interviews.

Notable, too, is that, while almost two in three inadmissible Haitians in 2016 were issued notices to appear and paroled into the United States (that is, not subject to expedited removal), the majority of inadmissible Haitians in 2017 were placed in expedited removal (5,200, up from 1,100 in 2016).³⁹ As such, detention of credible claimants has not been an issue confined to those from Central America. Credible claimants from Haiti and Africa, some [interviewed](#) by Refugees International, spent many months in ICE detention, where they lacked access to adequate care and faced discrimination, many to be, eventually, granted asylum.⁴⁰

During the Trump administration, expedited removal was further modified in ways that had discriminatory impacts and led to increases in human rights violations and refoulement. CBP officers increased the pressure on Central Americans to abandon their claims through the documented use of lies, threats, intimidation and [coercion](#), as well as verbal and physical abuse. An activist who had been tortured by police in Honduras [told](#) Refugees International that CBP tried to force him to accept deportation in 2018 by transferring to several “hieleras”—freezing detention cells—and telling him his prospects for winning asylum were poor.⁴¹ The credible fear standard was drastically changed to limit who could pass and CBP officers (rather than asylum officers) were assigned to conduct interviews, leading grant rates to plummet.⁴² The administration introduced a consequential pilot program—called Prompt Asylum Claim Review (PACR)—that [sped up](#) the expedited removal process such that credible fear interviews and reviews of denials by immigration judges were all done telephonically and while Central American asylum seekers were in CBP custody, conditions that the [DHS inspector general found](#) were

³⁹ DHS Office of Immigration Statistics, Annual Report, Immigration Enforcement Action: 2017, 8, https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf.

⁴⁰ <https://www.aclu.org/legal-document/damus-v-nielsen-damus-habeas-petition> ; <https://www.law360.com/articles/1060143>; <https://www.law360.com/articles/1115617>; <https://www.refugeesinternational.org/reports/2019/4/15/us-immigration-detention-centers-amp-treatment-of-immigrants-in-detention>; <https://www.refugeesinternational.org/reports/2019/6/17/world-refugee-day-2019-spotlight-6-mohamed-tounkara>

⁴¹ Refugees International, “Meet Jose Murillo”: <https://www.refugeesinternational.org/reports/2021/3/9/wecanwelcome-asylum-seekers-meet-jose-murillo>.

⁴² The new credible fear interview [lesson plan in 2019](#) stated that officers could require applicants to provide country conditions materials and eliminated language that officers should consider the impact of cross-cultural issues, trauma, and the effects of detention, on credibility assessments, as well as other previously listed factors which might explain or mitigate inconsistencies. It also eliminated text imposing on officer an “affirmative duty to elicit all information relevant to the nexus determination.” The lesson plan was [vacated](#) by a federal court.

substandard and limited access to counsel. Under this program, almost 70 percent received negative credible fear determinations in contrast to the 80 percent that received positive fear determinations during the George W. Bush and Obama administrations. Immigration judges upheld 99 percent of all negative credible fear determinations in “reviews” of PACR credible fear determinations.⁴³ And just at the time when the entire screening process was becoming ever more *pro-forma*, the Supreme Court ruled that an asylum seeker threatened with removal after being denied at the credible fear stage has absolutely no recourse to the federal courts—not even a petition for habeas corpus. In that case, both the credible fear interview and the review by the immigration judge were inadequate, as has been observed in many other cases.⁴⁴

The implications of the Supreme Court’s ruling are all-the-more significant in light of the arbitrary nature of the process and the resulting risks to applicants. As is true for all asylum proceedings in the immigration courts, which immigration judge presides is all important.⁴⁵ Moreover, data from the Karnes family detention center raise important questions relating to possible discrimination. The Refugee and Immigration Center for Educational and Legal Services (RAICES), an organization that provides free legal services to detainees at Karnes, reported that immigration judges vacated nearly half of non-Haitian negative credible fear determinations in 2019, but only a quarter of Haitian negative credible fear determinations, with one judge affirming 100 percent of the Haitian cases.

⁴³ Even outside of the HARP and PACR context, these reviews were done in about half an hour, mostly by video. They do not always involve testimony or attorney participation. Attorneys frequently were not notified of review hearings or notified just before they occur. The government also took the position that there is “no right to representation prior to or during” immigration judge review of negative credible fear determinations. Exec. Office Immigration Review, Immigration Court Practice Manual, Ch. 7.4(d)(iv)(C) (Dec. 2016) (“the alien is not represented at the credible fear review”)18.

⁴⁴ See amicus briefs in *DHS v. Thuraissigiam* from human rights organizations and asylum law professors. Jeffrey Chase, “Attorneys and Credible Fear Review,” July 22, 2018 <https://www.jeffreyschase.com/blog/2018/7/22/attorneys-and-credible-fear-review>
Amicus Brief of Refugee and Human Rights Organizations and Scholars in *Rosa Elida Castro v. DHS*, <https://www.scotusblog.com/wp-content/uploads/2017/01/16-812-Refugee-Organization-Cert-Amicus-Brief.pdf>

⁴⁵ “During fiscal Years 2015 and 2016, one IJ reviewing credible fear determinations at the family detention center in Dilley, Texas affirmed 228 of the 333 credible fear determinations he reviewed, while another affirmed only 17 of 332 determinations.” Ibid.

Proposed Fixes: The Good, the Bad, and the Insufficient

Over the last three years there have been several proposed “fixes” to the asylum system. Some administrative fixes are straightforward and should be adopted immediately. For example, the Migration Policy Institute (MPI) has [suggested](#) removing from the asylum backlog applicants for cancelation of removal, a discretionary form of relief available to those without legal immigration status who have been present in the United States for ten years or more and whose removal would impose hardship on a U.S.-citizen or permanent- resident family member. Currently, many people seeking cancelation of removal apply for asylum to United States Citizenship and Immigration Services (USCIS) in order to be rejected and placed in removal proceedings so that they can ask an immigration judge for cancelation. MPI has suggested creating a process for individuals to apply to USCIS specifically for cancelation of removal.

Another suggestion from MPI is to allow asylum officers to fully adjudicate particularly strong cases. This is a good suggestion—first raised by the USCIRF in 2005—but insufficient because, at most, it will apply to a very small percentage of cases, while numerous asylum officers would continue to be diverted from full adjudication to conduct partial credible fear interviews.

The problems with credible fear interviews would likely be exacerbated if Congress were to enact recently introduced [legislation](#) suggesting that they be conducted at CBP-run processing centers at the border within 72 hours. Under these circumstances, traumatized and tired asylum seekers with meritorious claims will be denied. The imperative for speed would quickly overwhelm concerns about fairness, and it is very doubtful that sufficient counsel or other support could be available at the border to help with all arrivals at a time of mass influx and within such a short period of time.⁴⁶ Further, the legislation leaves unclear whether those who pass credible fear interviews will be detained or released.

Another suggestion in the legislation is that, in times of large-scale migration influx, all border arrivals be put on an expedited immigration court docket. This perpetuates the

⁴⁶ Although RAICES provided free, universal representation to all detainees at the Karnes family detention center, it was only able to meet with 157 women before their credible fear interview in 2019, even though hundreds/thousands were detained there that year.

misconception that, *because* people arrive at the border without documents, their cases are less likely to be meritorious and should be rushed through the system faster than those of other asylum seekers. The legislation establishes a blanket rocket docket for all border arrivals at a certain time. It is in opposition to the idea, in the 1980 Refugee Act, that the asylum system should be uniform and that claimants, regardless of status and mode of arrival, be [treated similarly](#).

On a related issue, Refugees International would not support any expedited policy that effectively creates negative presumptions about cases believed to be weak due to general characteristics of the relevant population. Mistakenly removing a refugee through this process is too grave a risk. (On the other hand, Refugees International would not object to reducing the evidentiary burden for members of a group whose characteristics have made them particularly vulnerable to persecution, as this could increase processing efficiency without risking denial of meritorious claims).

Refugees International would support efforts to develop one system in which all asylum applications received substantive assessment (excluding appeals) within a reasonable period of time, say six months, rather than a bifurcated system in which border arrivals have their adjudication, such as it is, completed [within three weeks](#) while detained, and all others—including those who enter without inspection and travel far from the border—have a process that can last years. Such a system would require that the United States sufficiently fund adjudication such that there are enough officers to handle cases in six months. If asylum seekers were not detained and could find counsel, that ought to be sufficient time to collect and translate evidence, including from home countries, and expert evaluations.

If any screening needs to be done at processing centers at times of a large-scale migration influx, it should simply be to determine if a migrant is an asylum seeker (i.e., has a fear of return) or has any special vulnerabilities (is a victim of torture, trafficking, gender violence, is severely ill or disabled), rather than an interview about his or her claim. Those not engaged in enforcement (and who do not report to CBP) should be tasked with asking about fear after CBP confirmed identity and completed security checks. The officers would ask the questions in the migrant's primary language and in private. Ideally processing centers would be overseen by an agency not engaged in enforcement and run by non-profit, non-governmental contractors.

As an alternative to expedited removal, those migrants who express fear could be given a short legal orientation and then released to pursue their cases. As laid out further in the recommendations below, this report suggests pilot programs proposing that asylum seekers who arrive at the border could have their claims adjudicated fully by asylum officers at their destination cities. This could ultimately result in a system similar to the one in place before expedited removal was instituted and which was proposed in the 2019 version of the Refugee Protection Act.⁴⁷ The best data indicates that if asylum seekers are released and provided with NGO-run case management and representation by attorneys, [almost all attend their hearings](#). The focus of enforcement should be on ensuring that those who lose their cases—after getting a genuine opportunity to have their cases fairly considered—leave the country. Rather than blocking access to due process and keeping asylum seekers detained, the United States should devote resources to repatriation programs *at the end of the process* that would encourage safe return.

Some may argue that reverting to a system more similar to one that existed in the early 1990s is unworkable at a time when the numbers of asylum seekers coming to the border has increased so dramatically and that the only way to handle so many asylum seekers efficiently is through expedited processing that rapidly screens out most claims.

There is a certain logic to that approach.

If you build a wall, virtual or otherwise, you will deter, physically prevent entry, or remove many though not all of those fleeing persecution and seeking admission to the United States. But we cannot escape the simple reality that expedited procedures, as applied, have not only been of limited effect in deterring non-meritorious claims, but also have almost certainly resulted in the denial of many thousands, if not tens of thousands, of meritorious ones. We also cannot escape the fact that further tinkering with the system is likely to be of limited benefit in terms of avoiding injustices against asylum seekers.⁴⁸

⁴⁷ Refugee Protection Act, S.2936/H.R. 5210, sec. 104(d) (vesting initial jurisdiction for asylum applications in the Asylum Division).

⁴⁸ It is worth noting that, during the last decade, England adopted a fast-track system similar to expedited removal that proved both [unfair](#) (in terms of access to counsel and appeals and especially to vulnerable populations with complex cases) and [inefficient](#) (if [safeguards](#) are in place and because it mandates unnecessary detention). The system was rejected by the UK judiciary and abandoned. See: <https://www.hrw.org/news/2010/02/26/uk-women-fast-tracked-asylum-denial#>; <https://www.bbc.com/news/uk-33113132>; <https://www.ein.org.uk/news/tribunal-procedural-committee-decides-fast-tracked-immigration-appeals-should-not-be>

Given those challenges, it makes sense to at least pilot projects adopting different approaches, as suggested in the next section, to see if alternatives might, in fact, work better.⁴⁹

A 2018 [UNHCR](#) study on refugee status determination and backlog reduction notes, “temporary protection and stay arrangements” may be the best way to handle large numbers of asylum seekers. Both the Trump and the Biden administration recognized that granting temporary protection to Venezuelans would help alleviate the asylum backlog. The MPI report suggests that it was administrative fixes and expedited removal that helped keep down the asylum case backlog before 2010, leaving to a parenthetical the extremely significant fact that a large share of the backlog was “ultimately resolved by provisions of the 1997 Nicaraguan Adjustment and Central American Relief Act, which eased the permanent-residence requirements for certain asylum seekers from El Salvador, Guatemala, and former Soviet-bloc countries.”

Without Congressional help—through legislation regularizing the status people who have been waiting for protection or in temporary protected status for several years—it will be difficult to clear the large asylum backlog. It will also be difficult to make most expansive use of the Central American Minors program, which requires that a parent in the United States have legal status in order to sponsor a child’s migration through the U.S. Refugee Admissions Program, as well as other legal migration pathways from Central America.

Recommendations to the Biden Administration

Changing the reception system at the border will be most effective if it is part of a new comprehensive approach to addressing forced migration issues, some of which has been discussed in earlier Refugees International reports and which involve [reform of asylum](#) and efforts to develop [other forms of protection](#) and legal pathways for Central Americans in the United States and in the region.

⁴⁹ At the for-profit Hutto detention center, notorious for its [poor conditions](#), there are currently increasing numbers of women who have high credible fear pass rates, who are pregnant so should not be detained, who are from Venezuela and Cuba, where they cannot be soon returned—so should never have been placed in expedited removal, which is a discretionary program.

Short-term Measures, while Title 42 is in Place and Ports Remained Closed to Asylum Seekers

As emphasized in previous reports, Refugees International believes that the imposition of Title 42 is unjustified, but we recognize that it is currently being enforced. Confident, or at least hopeful, that it will be ended within two to four months, Refugees International recommends the following interim measures.

Responsibly and Effectively Process Urgent Protection Cases

The criteria to qualify and the registration system for the Title 42 humanitarian exemption process being established by the Biden administration should also be made accessible to asylum seekers in Northern Mexico who may not be known to NGOs. The registration must remain just that and *not* an externalized screening system of any kind that would channel migrants into different procedures or evaluate the substance of claims. Transparency and formal U.S. responsibility for the exemption system will facilitate its expansion, ensure fairness, and make it a truer test of whether such a registration system will work effectively to incentivize migration through ports of entry and facilitate efficient port processing after Title 42 is lifted. The United States also needs to ensure the safety and security of those organizations and migrants involved in the system. The administration should consider family unity as one possible goal of the exemptions, especially for parents and children separated by the Title 42 policy or other Trump administration anti-asylum policies that are now canceled or being unwound. Those exempted from Title 42 should be given notices to appear in immigration court at their destination and be paroled.

In addition, the existing humanitarian parole system should be improved and expanded to handle particularly vulnerable cases. People should be able to apply for parole electronically, and remote adjudications should be available. In addition, applicants should be able to obtain their biometrics and [I-94](#) cards at U.S. embassies or consulates, with I-94 cards permitting vehicular or air travel. These elements would help to diminish crowding at ports of entry. This would require additional State Department and USCIS resources be devoted to humanitarian parole.

Continue the Practice of Family Release & Issue Instructions Regarding Such Cases

U.S. Customs and Border Protection (CBP) should continue the practice, now in place in Rio Grande Valley and to a limited extent elsewhere along the border, of releasing families who have entered without inspection to proceed to their relatives at destination locations. (As mentioned above, this practice is apparently based upon the Mexican government's refusal to accept expelled Central American families with young children). Congress has recently appropriated funds through FEMA's Emergency Food and Shelter Program for NGOs that serve families released by DHS, and NGOs operating in border communities can arrange for COVID-19 testing, short-term accommodations, legal orientation, and transportation.

Right now, some families are being released by CBP with notices to appear in immigration court at their destination location, and others with instructions to check in with Immigration and Customs Enforcement, also at their destination location. The former group, put into the defensive asylum system, is likely to languish in the asylum backlog, while the process for the latter group is simply unclear. The Biden administration can correct this by directing DHS and immigration judges to instruct the families to apply to the asylum office after they arrive at their destination locations, thus putting them in the affirmative system and enhancing the likelihood of efficient processing.⁵⁰

Revoke Restrictions on Asylum Eligibility Based on Unreasonable and Unfair Legal Interpretations

The Biden administration should vacate Trump administration rulings, including Attorneys General decisions *Matter of A-B-* (partially enjoined), *Matter of A-C-A-A-* and *Matter of L-E-A-*, that unlawfully narrow asylum eligibility.⁵¹ These decisions are causing denials of protection that would have previously been granted, as well as unnecessary litigation and protracted appeals, so vacating them is an immediate imperative. Doing so will prevent wrongful denials and appeals while DHS and the Executive Office of Immigration Review (EOIR) develop new guidance and regulations, consistent with U.S. and international law, on how to prove the failure of state protection where the persecutor is a non-state actor, how to prove a nexus between the persecution and a statutorily protected ground when persecutors have mixed motives, and on how to interpret persecution based upon particular social group and political opinion and to

⁵⁰ For those sent to immigration court, EOIR could exercise its discretion to [defer](#) cases so that they can be adjudicated by USCIS. For those families sent to ICE check-ins, ICE should refer families to legal services to help them apply for asylum to USCIS and to NGO-run case management programs if needed.

⁵¹ For a list of problematic rulings, see appendix of this document by Human Rights First and the Center for Gender and Refugee Studies, <https://www.humanrightsfirst.org/sites/default/files/FairandTimelyAsylumHearings.pdf>

evaluate domestic-violence and gang-violence claims. Given the ongoing hiring of immigration judges, it is also crucial that leadership at EOIR immediately ensure that newly hired immigration judges come from diverse backgrounds and have experience in immigration and asylum law. It is also important that immigration judges—[two thirds](#) of whom were appointed during the Trump administration—receive training to reflect the Biden administration’s approach. Given the previous administration’s politicized policies regarding, and promotions to, the Board of Immigration Appeals, it is also worth considering establishment of a separate board within EOIR to hear appeals in asylum cases.⁵²

Medium-term Measures Once Title 42 is Lifted and Ports Open to Asylum Seekers

The administration should retract the *nationwide* expansion of expedited removal. While the pilot programs recommended below are implemented such that many asylum seekers are not subject to expedited removal, safeguards need to ensure that any ongoing application of expedited removal in border areas (despite the inefficiencies and problems of doing so already mentioned) does not lead to refoulement or the detention of credible claimants. After CBP completes biometrics and preliminary processing, officers who are not from an enforcement agency should ask the preliminary questions about fear of return and this should be monitored (by NGOs, USCIRF, or UNHCR). Asylum officers, who should be the only personnel conducting credible fear interviews, should base their inquiries on the statutory standard and USCIS guidance, training modules, and early [lesson plans](#), updated in collaboration with experts who serve asylum seekers to reflect research on the impact of trauma and the dynamics of LGTBQ and gender-based persecution. Asylum officers should be sure to elicit all information relevant to claims and to apply circuit law most favorable to the applicant. No bars or restrictions to asylum (including the possibility of internal relocation) should be assessed at the credible fear stage, as these involve complicated findings of fact and law. Inconsistencies or lack of details that do not go to the heart of the applicant’s claim should not lead to an adverse credibility finding. Quality assurance of credible fear decisions should be done in a way that does not incentivize negative decisions. Counsel should be given access to clients to prepare for the credible fear interview but also must be given notice and be allowed to consult and represent clients at immigration judge reviews. The asylum office process of reconsidering cases after an immigration judge affirms denial should be expanded. DHS should release all who pass credible fear

⁵² This is a variant on a proposal first made by David Martin in early 1990s. See Martin’s testimony at Hearing before the Subcommittee on Immigration and Refugee Affairs, Senate Judiciary Committee, May 28, 1993.

interviews and have them apply for asylum at the asylum office in their final destination.

Implement and Evaluate Two Pilot Programs as Alternatives to Expedited Removal

Over the course of some 25 years, the United States has been unable to devise a sustainable approach to expedited removal that guarantees fairness and proves efficient. Thus, it seems self-evident that the Biden administration ought to be exploring real alternatives. In fact, the Biden administration has already developed the makings of two pilot programs through the current Title 42 humanitarian exemption process and the family release practice.

The administration is currently not generally applying expedited removal at ports of entry but rather directing applicants included in the humanitarian exemption into full asylum processing. This effort could be transitioned into a pilot program for a more expanded population, possibly focusing on groups for which expedited removal has proven particularly unfair and inefficient. (It would not be hard to identify candidate groups, from Central American families to indigenous or rare language speakers—including speakers of Haitian Creole and many African languages.) Those within the selected population who ask for asylum at ports of entry could be released from CBP OFO with instructions to check in with ICE at their final destination. ICE could instruct them to apply to USCIS and refer them to legal counsel and NGO-run case management as needed. If they do not file timely asylum applications, DHS could then issue them a notice to appear in immigration court. USCIS should also designate a sufficient number of asylum officers to schedule interviews with these applicants within 45 days of application filing.

A second pilot could be modeled on current release policy (based on Mexico's refusal to accept all families apprehended by CBP). The pilot could establish a post-CBP processing reception center to receive people who are from countries to which it is difficult to effect removal and who DHS places in full, rather than expedited, removal proceedings. The reception center could be run under the Office of Refugee Resettlement (ORR). Officers at the centers who do not have enforcement responsibilities could ask migrants if they feared return to their home country and identify those with particular vulnerabilities who need special services. But no assessment of asylum claims would take place here; the reception centers would just

provide shelter and care for very short periods until transportation arrangements to final destinations could be arranged for those who are asylum seekers. Before asylum seekers departed, they would receive a legal orientation and be placed in an ORR-funded community case management program, if necessary. DHS and DOJ could work together so that ICE and the immigration judges terminate court proceedings at destination locations and refer these asylum seekers to the asylum office.

Assessments of the two pilots should be made within a year with a view towards a possible modification of the use of expedited removal generally. The report on the first pilot should include the demographics of those in the program, their destination cities, whether they had access to counsel, how long it took to resolve claims, and grant rates. The report on the second pilot should evaluate the quality of services provided at the reception center, the demographics of individuals and families served, the number placed in case management programs, case management participants' access to housing, legal services, health services, how long it took to adjudicate claims, and grant rates.

Since those denied asylum by USCIS will have their cases referred for immigration court removal hearings, the administration must ensure cases there are handled fairly and efficiently. To do so, the Biden administration must restore judge authority to manage dockets; have DOJ work with DHS to identify cases that can be closed or terminated; support legal orientation programs and legal representation initiatives; and allow for electronic filing.

Long-term Reforms, Some Needing Congressional Cooperation

As discussed in previous Refugees International reports, forced migration must be addressed comprehensively. Most of what follows would increase the availability of protection and diminish pressures on the border in the long term.

Expand Legal Pathways

The United States should expand refugee resettlement and other legal pathways from Central America, including through creative use of parole, in-country processing, processing from within Mexico and other countries in the region, and an expanded Central American Minors program. Moreover, the U.S. Congress should take legislative action to ease the evidentiary burden for categories of applicants likely to be at particular risk of persecution, as it has done in the past. Through this combination of approaches, the goal should be a five-year program that could annually provide protection in the United States, on average, to 50,000 or more Central Americans who would otherwise be at risk within or outside their countries of origin. In addition,

Congress should be prepared to consider an expansion of the immigration quotas from Central American countries.

President Biden should encourage Congress to pass legislation providing a path to permanent residence for asylum seekers whose cases have been backlogged for more than five years and for those who have had Temporary Protected Status for at least five years. The vast majority of such individuals are not likely to depart under any circumstances and most, if not the overwhelming majority, are likely to have serious protection concerns. In any event, their regularization will enhance their well-being as well as bring significant benefits to communities where they live. Further, regularizing the status of asylum seekers in this way, as Congress did in the 1990s, will eliminate a significant amount of the asylum backlog and allow relatives to sponsor family members.

Improve Asylum Adjudication with Increased Resources

The President should continue to press Congress to appropriate increased funds specifically to the asylum office for staffing, training, and space, as well as for legal services (orientation and representation) and community-based, NGO-run case management for asylum seekers. Given the increased role of asylum officers in adjudication, it is important that officers have legal and immigration experience, foreign language and regional expertise, or have worked with vulnerable populations in the United States or abroad. Resources should also be provided to the research division of the asylum office so that it can prepare country of origin information to facilitate adjudication.

Support Establishment of a Complementary Protection Screening

The administration should work with Congress to establish complementary protection that allows asylum officers to determine if applicants who do not qualify for asylum would be seriously harmed if returned to their home country and provide them temporary relief from removal.

Support Congressional Establishment of an Independent Immigration Court

The current Department of Justice immigration court system is neither efficient nor fair. A better system would be one in which an asylum officer establishes the administrative record and issues a decision which could be reviewed directly by a court established pursuant to Article I of the U.S. Constitution and part of the judicial branch. This would

eliminate unnecessary layers of administrative appeal but still allow for review by Article 3 federal courts, which have made important contributions to the development of asylum law.