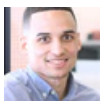


# Making Asylum Work

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From the earliest days of our history, the right of asylum – or the right to seek refuge from persecution – has been a principally valued and uniquely American ideal. Our very founding is traced back to those first settlers who crossed the Atlantic fleeing violence and persecution and seeking freedom and political self-determination. The principles of the government they established – since the beginning – innately understood and valued the right to flee persecution. Because of that history, that is etched into our collective DNA as a country, the right to arrive on American shores and seek shelter from dangers abroad has maintained a prominent presence, in some form or another, in American policy and law. And since the right to asylum was officially codified through the Refugee Act of 1980, more than 3 million people have sought and found refuge in the United States.

Shamefully, under the direction of President Trump, we no longer have an asylum system that is indicative of our values, our history, or our laws. Because of President Trump's failed approach to asylum policy, our border is now strife with mismanagement and chaos. The

Administration's "zero tolerance" policy, which required prosecution for all arriving migrants, including asylees exercising their legal right to apply for asylum, separated families and overextended our courts.<sup>1</sup> The Administration's metering and "Remain in Mexico" policies turned away migrants seeking to comply with the law and has created a growing backlog of more than 476,000 pending asylum cases.<sup>2</sup> The Administration's approach to asylum has also been incredibly expensive, wasteful, and punitive. Trump's approach to immigration has also massively expanded the detention of asylees, at great humanitarian and financial costs.<sup>3</sup> And because our system is so inundated with waste, our immigration courts are significantly less capable of processing cases in a timely manner—meaning that we are actually significantly less capable of returning those who do not legally qualify for asylum back to their home countries.<sup>4</sup> None of this makes sense for Americans or for anyone seeking protection on America's shores.

President Trump has inarguably failed at managing a functioning asylum system. We need an approach to asylum that restores order and legal process and upholds our foundational values. And while the challenges are undoubtedly there, we can do this through a series of changes to the current system that will restore fairness, order, and efficiency.

## **A system that works for everyone**

The Trump administration's chaotic approach to asylum policy is bad for asylum seekers and it's bad for Americans. We desperately need a system that ensures fairness and an orderly and efficient process for everyone.

### **Fairness**

The foundation of the American legal system is fairness—and every person is supposed to be able to find equal justice under our laws. Unfortunately, under President Trump, that principle has been seriously eroded. The guiding principle of any asylum reform effort must be the re-prioritization of fairness for both asylees and American citizens. Far too often, a false choice is created by those looking to use immigration as a political wedge issue that pits asylum seekers against citizens. The truth is, however, that just like asylees, American citizens benefit from an asylum system that prioritizes fairness.

One of the first steps that can be taken to bring back fairness to asylum is to **restore and streamline access** to pre-Trump norms. From its earliest days, the Trump administration has taken significant steps to limit access to asylum for several vulnerable and previously protected groups, including victims of gang and domestic violence and for individuals with minor legal infractions.<sup>5</sup> Women, children, and other victims of violence have been turned away at the border—forced to either return to potentially deadly circumstances or find refuge in the US outside the legal process. We can and must do better. Congress has the authority to

explicitly protect victims of domestic and gang violence under our asylum protections and, unfortunately, has failed to do so.<sup>6</sup> A new administration should act quickly to reverse the damage done by President Trump and push Congress to follow.

To further ensure a fair asylum process, asylum seekers should be **guaranteed access to legal counsel and orientation**. Applying for asylum is a complex process and migrants, often with limited English proficiency, are far too often forced to argue their cases without legal counsel or representation. When trying a case on their own, the results are damning for migrants—as immigrants represented by an attorney are five times more likely to pursue relief and are nearly five times more likely to win their cases than those without attorneys.<sup>7</sup> And currently, less than 40 percent of all immigrants are represented by counsel.<sup>8</sup> To be clear, guaranteeing the right to counsel to immigrants is not simply about creating a more litigious process. The merits of an individual claim should still ultimately decide cases, but financial resources and the ability to obtain legal counsel should never serve as a barrier to a fair asylum process. A fairer system encourages asylum seekers to stay within the system and avoid undocumented crossings. And studies estimate that a public defender system for immigration courts would offset its own costs. We can ensure access to counsel for \$208 million per year, but net savings associated with eliminating waste and unnecessary detainee and removal costs total at least \$204 to \$208 million every year, potentially offsetting the costs of this vital instrumentality of fairness entirely.<sup>9</sup> Furthermore, fairness and justice in immigration court has the added benefit of efficiency. When people feel they have experienced fairness and justice, they are less likely to appeal and continue use of court resources. And, when there is fairness and justice in court – including with legal orientation programs – government-commissioned studies have shown that cases move faster, in absentia rates fall, and judges report more efficiency in court.<sup>10</sup> All of that is to say that a fairer process for migrants also ensures fairer and better outcomes for Americans.

We can also add fairness to asylum by **ending the use of border patrol agents in asylum cases and ensuring qualified asylum officers make a preliminary order of asylum**. In June of 2019, the Trump administration began using border patrol agents to conduct initial “credible fear” screenings.<sup>11</sup> These interviews are meant to allow asylum applicants to establish a well-founded concern of persecution from their home countries; the first screening test in all asylum cases. They are also intended to sort-out non-credible claims before they are added to the backlog of cases awaiting a judge’s determination. Since border patrol agents were tasked with these interviews, approval rates have plummeted. Less than half of all screenings conducted by border agents are approved, compared to roughly 80 percent when done by an asylum officer.<sup>12</sup> Alarming approvals have fallen to as low as less than 10 percent in some locations.<sup>13</sup> Border patrol agents are simply ill-equipped and insufficiently trained to conduct these screenings properly. Additionally, their training as law enforcement tends to hinder their ability to conduct these interviews objectively, making them favor removal in a process

that is intended to allow most through. Asylum officers receive lengthy training to conduct credible fear screenings properly and fairly. Allowing them to make a preliminary determination (appealable before an immigration judge) would restore fairness as well as efficiency to the asylum process.

## Order

The chaos inflicted by the policies of President Trump have brought havoc to the border and instability to the asylum process. Upticks in border arrivals, overcrowding and lack of resources at detention centers, and the sobering loss of life we've witnessed at the border and in US custody are all a direct consequence of intentional policies eroding order in asylum under this president. Asylum seekers and American citizens, alike, deserve an orderly process of asylum.

We should quickly **reinstate the Family Case Management Program (FCMP)**. The Obama administration created the FCMP as a pilot program alternative to family detention. Individuals applying for asylum were placed with family in the US and provided with case managers to ensure that they complied with legal obligations as they moved through the asylum process. The program was incredibly successful both at facilitating better conditions for asylum seekers and compliance with the asylum process. FCMP enjoyed a 99% compliance rate with court hearings and ICE check-in appointments.<sup>14</sup> Despite terrific success, the Trump administration ended FCMP in 2017, replacing it with the administration's draconian and infamous "zero tolerance" policy.<sup>15</sup> The FCMP was not only incredibly effective and cost-saving (estimates project a scaled program costing four percent of our yearly costs for detention), but it was also a more just means of regulating asylum.<sup>16</sup>

To restore order to asylum we'll also need to **stop and prohibit CBP's use of "Metering" and replace it by creating regional resource centers**. One of the most harmful policies for asylees installed under President Trump has been the administration's "Metering". Under the policy, artificial and harmful caps have been placed on entry that have forced migrants to wait months along the border before they are allowed to make their case for asylum.<sup>17</sup> It's forced asylees to choose between waiting in overcrowded and dangerous conditions for months at a time at the border or face potentially even graver conditions as they seek to cross the border away from ports of entry.<sup>18</sup> Neither choice is ideal or part of an orderly asylum program. We should instead consider regional resource centers in urban areas along the border and widen the accessibility and availability of regional resource centers in the home countries of asylees. These one-stop-shops can be used as voluntary, safe, and temporary housing and processing centers during the life of an asylees pending case. Centralized but voluntary locations would be able to better provide counseling to asylees and increase capacity for asylum screening. Building centers in the home countries of asylees would provide similar refuge while saving asylees from making the high-stakes and often dangerous journey to the border. Of course,

once migrants have made the long and often dangerous trip north, we need to consider their claims in a timely and orderly fashion. Along with a revival of the FCMP, these regional processing centers would greatly ease the burden at the border and allow for a more orderly process.

Bringing order back to asylum will also require us to **provide aid and promote regional cooperation in the Northern Triangle to address the root causes of migration**. No matter the measures we take internally to bring order back to asylum, it will be difficult to achieve without, also, addressing the root causes of mass migration. Issues that push migrants from their home countries, if left unaddressed, will continue to put a strain on our asylum system that will be difficult to overcome otherwise. It is in our best interest to lead the charge in combating forced migration and the push factors present in El Salvador, Guatemala, and Honduras. We should engage and lead on securing safety and economic prosperity for these neighbors whose well-being is so interconnected with our own.

## **Efficiency**

Another symptom of a broken asylum system is waste and inefficiency. Because the Trump administration has left the current system bereft of any semblance of fairness or order, we also have an inefficient and ineffective asylum system that neither protects and admits those with valid claims or returns those who received a full and fair hearing and were found to have made nonmeritorious claims. Instead we have an overburdened system unable to provide just process for asylees or citizens.

To create a more efficient asylum system Congress should **provide for at least 50 percent more immigration judges**. As of the end of 2019, the immigration court backlog exceeded one million cases—nearly 500,000 of which are pending asylum cases.<sup>19</sup> The number of cases has nearly doubled since President Trump took office and is expected to reach almost 2.5 million by 2030.<sup>20</sup> Asylum seekers, in many cases, are facing life-and-death consequences that depend on judges being able to give great care to the merits of each and every case before them. As the system is currently constituted, there are simply too many cases for our current immigration courts to handle. We do not have the infrastructure or apparatus necessary to deal with the spike in cases created by the administration's draconian policies. It is simply not acceptable for an asylum seeker to be sent back into dangerous conditions because an overburdened immigration judge could not devote the time necessary to their case.

In order to combat the growing backlog of asylum cases and to bring efficiency to the asylum process, it is critical that we invest in the system. There are currently 465 judges across our immigration courts. Just 150 more would dramatically reduce the backlog, at a cost of approximately \$259 million—just a small fraction of the \$11 billion already spent on Trump's border wall.<sup>21</sup> Doing so will both strengthen enforcement and humanitarian efforts by

shortening waiting periods for courts dates and by accelerating the process to either grant asylum to those who seek it or to remove those who do not qualify.

Lastly, even with reform, so long as a so-inclined administration can churn asylum to a halt by the stroke of a pen, we are still susceptible to future problems. For that reason, many have begun to call for independent immigration courts, removed from DOJ, that would operate free from undue influence from the executive branch, just as do all of our other judicial systems.<sup>22</sup>

## Proposals in Congress

To make headwind in this area, we'll ultimately need congressional action. Fortunately, there are already a series of legislative proposals ready to go in Congress. Their ideas serve as a strong menu of solutions to many of the challenges discussed above. At their core, all of the following piece of legislation prioritize returning fairness, order, and efficiency back to our country's asylum system.

### *Refugee Protection Act of 2019* #:

The Refugee Protection Act of 2019, sponsored by Sen. Patrick Leahy (VT) and Rep. Zoe Lofgren (CA-19), provides for the admission and protection of refugees, asylum seekers, and other vulnerable individuals. The bill eliminates metering, requires DHS to provide access to legal counsel and orientation, creates a presumption of release for asylum seekers, and restores the Family Case Management Program.

### *Funding Attorneys for Indigent Removal (FAIR) Proceedings Act* #:

The FAIR Proceedings Act, sponsored by Sen. Kirsten Gillibrand (NY), A. Donald McEachin (VA-04), and Zoe Lofgren (CA-19), provides access to counsel for children and other vulnerable populations. The bill amends Section 240(b) of the INA to provide: Attorney General may appoint or provide counsel, at Government expense, to the alien. Removal proceedings may not proceed until the alien has received legal documents and been provided meaningful time to review and assess such documents.

### *Equal Justice for Immigrants Act of 2019* #:

The Equal Justice for Immigrants Act of 2019, sponsored by Rep. Anthony Brown (MD-4), establishes greater right to counsel guarantees and access to petition review. The bill guarantees to all indigent persons in the immigration courts the right to request a government-appointed attorney, increases opportunity for appeal and judicial review, bans case production quotas required of immigration court judges, and repeals President Trump's "Remain in Mexico" policy.

### *Stop Cruelty to Migrant Children Act* #:

The Stop Cruelty to Migrant Children Act, sponsored by Sen. Jeff Merkley (OR) and Rep. Grace Meng (NY-6), provides against family separation and calls for the hiring of more immigration judges. The bill prohibits all family separations, excepts when authorized by a state court or child welfare agency, provides for all children in the immigration process to have access to legal counsel, and calls for the hiring of at least 75 additional immigration judges.

**Homeland Security Improvement Act #:**

The Homeland Security Improvement Act, sponsored by Sen. Tom Udall (NM) and Rep. Veronica Escobar (TX-16) establishes an Ombudsman for border and immigration enforcement related concerns in DHS. Currently, DHS develops its own policies for operations along the border. The Act creates an independent ombudsman to assist individuals with complaints against ICE and CBP, establish a Border Oversight Panel to evaluate and make recommendations related to border enforcement, conduct annual training evaluations, monitoring family reunification, and implement a body-camera program for Border Patrol agents and ICE officers.

***Northern Triangle and Border Stabilization Act <sup>23</sup> :***

The Northern Triangle and Border Stabilization Act, sponsored by Rep. Zoe Lofgren (CA-19), begins the work of addressing the root causes that force people from their home countries in search of refuge. The bill provides for a series of comprehensive solutions aimed at addressing the violence and instability in Central America while also increasing the federal government's ability to manage our southern border more effectively, fairly, and humanely. It calls for the establishment of Designated Processing Centers throughout Central America and the hiring of additional immigration judges. The Act also calls for the establishment of minimum care standards for individuals and children in CBP custody.

## **Conclusion**

The right to asylum is etched into the fabric of our country. Scores of American families and American success stories have been born through the asylum program—and our country has been enriched through it. We lose a great deal of ourselves when we turn our backs on improving such a vital aspect of our immigration system.

As we move forward, we need an approach to asylum that focuses on strengthening the positives in our current system and improving the shortcomings. If all involved embrace an approach that prioritizes creating a fair, orderly, and efficient process for citizens and asylees, we'll have a system that reflects the finest virtues of the American story.

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