



Creating a More Humane Asylum System

Applied Policy Project

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Disclaimer

The author conducted this study as part of the program of professional education at the Frank Batten School of Leadership and Public Policy, University of Virginia. This paper is submitted in partial fulfillment of the course requirements for the Master of Public Policy degree. The judgments and conclusions are solely those of the author, and are not necessarily endorsed by the Batten School, by the University of Virginia, or by any other agency.

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Honor Pledge

On my honor as a student, I have neither given nor received unauthorized aid on this assignment.

A handwritten signature consisting of the first name "Monica" and the last name "M" joined together in a cursive script.

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Executive Summary

Too many migrants from El Salvador, Guatemala, and Honduras, three countries often referred to as the Northern Triangle, experience inhumane treatment while in pursuit of asylum from the United States. The large number of migrants arriving at the U.S. southern border from the Northern Triangle poses both a humanitarian and security challenge to the United States and Mexico. The Biden administration is currently experiencing the biggest surge on the border in twenty years, and as many as 2 million migrants will have traveled to the U.S.-Mexico border by the end of this year (Parker et al., 2021). The U.S. government must do more to protect the human rights of migrants fleeing from threats such as gang violence and poverty. The Biden administration has the opportunity to build an asylum system that values the humanity of all individuals.

The policy options reviewed in this report aim to identify and revise policies that cause the greatest trauma to migrants, either through denying migrants asylum or through forcing migrants to wait in dangerous, uncertain conditions while moving through the process. The Biden administration has promised to deliver a more compassionate immigration policy that reinforces American principles, such as justice and equality of opportunity. Under a Democratic administration and Congress, momentum for addressing the most damaging features of the United States' asylum process may be greater than in recent years. Policy options considered throughout this report include ending prolonged detention through expanding use of alternatives to detention; restructuring the credible fear interview and ending expedited removal; eliminating Title 42 asylum restrictions; processing MPP migrants removed *in absentia*; and eliminating asylum case backlogs and immigration court biases.

Upon analyzing these options against the criteria of asylum seeker well-being, viability, cost effectiveness, and consistency with American values, this report recommends repealing Title 42 restrictions and establishing the public health infrastructure needed to process asylum seekers efficiently and safely. This option would ensure that all migrants eligible for asylum have the opportunity to receive their day in court, removing the largest barrier to those currently seeking protection. In order to minimize public health risks to opening our borders, this option suggests that the Department of Homeland Security expand Covid testing capacity for migrants. Potential challenges to implementation could include establishing the testing and quarantine space capacity needed to begin processing large numbers of migrants; decreasing the risk of further surges at the border; and addressing political pushback from conservative state and local government officials.

Finally, it is important to note that many of the policy options considered throughout this report would work best when implemented as complements to each other. Due to the interconnected nature of asylum processes such as credible fear interviews, detention, and immigration court proceedings, implementing multiple reforms at once could augment the asylum process for migrants seeking protection.

Problem Definition and Client Orientation

Increasing numbers of migrants from El Salvador, Guatemala, and Honduras are seeking asylum in the U.S. due to gang violence, high homicide rates, extortion, and corruption in their home countries (Bolter et al., 2019). Between fiscal years 2017 and 2019, the Department of Homeland Security received 77,850 affirmative asylum filings and 267,238 defensive asylum cases from these three countries alone (Baugh, 2020). Particularly under the Trump administration, the U.S. has used a number of policies to limit the number of migrants from the Northern Triangle who successfully receive asylum. These restrictive tactics include COVID-19 travel restrictions, credible fear screenings, asylum eligibility requirements, the Migrant Protection Protocols (MPP), and Asylum Cooperative Agreements (ACA). With diminished access to asylum protections, asylum seekers often experience assault, rape, robbery, kidnapping, poor health conditions, crowded living spaces, and inadequate education while waiting for asylum approval in Mexico or detention centers. Migrants who do not ultimately receive asylum may be forced to return to their home countries, where they may continue to face violence or even death.

This report seeks to identify ways that the Biden administration can make the U.S. asylum application process more humane. This report also explores advocacy solutions for Las Americas, a 501(c)(3) and legal advocacy center located in El Paso, Texas that provides legal representation to low-income migrants in West Texas and New Mexico.

Too many asylum seekers from the Northern Triangle experience inhumane treatment at the hands of the U.S. asylum system.

Background

Asylum Seekers from the Northern Triangle Seek Relief from Poverty, Domestic Violence, and Gang Violence

Despite the dangers of the trip from the Northern Triangle to the U.S., Central American migrants continue making the journey to the U.S.-Mexico border to escape poverty, domestic violence, gang violence, and climate change (*see Figure 1 for homicide rates*) (Leutert, 2020). Worsening economic conditions due to the COVID-19 pandemic and destruction caused by two hurricanes in 2020 have only worsened conditions in the Northern Triangle (Kitroeff & Volpe, 2021). In 2019 alone, U.S. border officials apprehended more than 607,773 individuals from El Salvador, Guatemala, and Honduras (Leutert, 2020).

- In Guatemala, two thirds of the population live on less than two dollars per day, climate change has impaired the agricultural industry, and high levels of impunity enable gangs to recruit new members (Leutert, 2020).
- In 2011, MS-13 and the 18th Street Gang caused Honduras to become the most violent country in the world, with 85.1 murders per 100,000 people (Leutert, 2020). Gangs in Honduras also frequently charge businesses and transportation companies extortion fees (Leutert, 2020). In 2020, two hurricanes destroyed the neighborhoods of half the Honduran population (Kitroeff & Volpe, 2021).

- In El Salvador, 29% of citizens live below the poverty line, and government corruption enables sexual assault, murder, extortion, and robbery to go unchecked (Leutert, 2020).

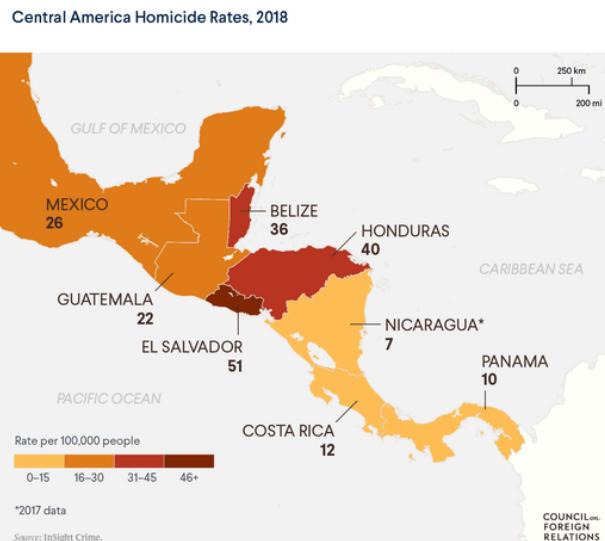


Figure 1: Central American Homicide Rates During 2018 (Cheatham, 2019)

Interviews with asylum seekers have demonstrated the fear that drives many of these migrants to apply for asylum in the U.S. (see *Figure 2*). While critics of asylum argue that migrants can abuse the system to submit false claims, evidence suggests that Central Americans are not the main perpetrators of this abuse (“The out crowd,” 2019).

"I fled because I knew who was responsible and they were going to take my life. They were looking for me to kill me."
-Manuel, 18-year-old man, El Salvador

"They said that this was a warning but next time they would kill all of us. That is why we left in the middle of the night. We do not feel safe. They are not playing games." -Javier, 36-year-old man, El Salvador

"I am afraid. I think something would happen to me. I think they would kill me and my parents." - Antonio, eight-year-old boy, Honduras

Figure 2: Quotes from Northern Triangle Migrants (Nelson & Habbach, 2019)

Overview of U.S. Immigration Authorities

In addition to the President, Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE) are integral to examining asylum claims and enforcing immigration laws. USCIS, CBP, and ICE are all part of the Department of Homeland Security (DHS), but serve different functions:

- U.S. Citizenship and Immigration Services (USCIS) conducts background checks for visa applicants, verifies employment eligibility, and processes asylum and refugee applications (“US Government Agencies…”, 2019).
 - U.S. Customs and Border Protection (CBP) personnel inspect migrants upon entry and serve as border patrol officers (“US Government Agencies…”, 2019).
 - With a budget of about \$8 billion and a workforce of over 20,000 law enforcement officers, ICE conducts immigration enforcement and removal, leads homeland security investigations, and represents the DHS in immigration removal proceedings (U.S. Immigration and Customs Enforcement, 2021).

The U.S. Department of Justice (DOJ) also has some stake in the asylum process. The Executive Office for Immigration Review (EOIR), a subagency of the DOJ, facilitates immigration proceedings in immigration court and adjudicates court appeals.

How the U.S. Asylum Process Works: Most Affirmative and Defensive Asylum Applicants Never Receive Protection

While the asylum process looks slightly different for everyone, the UNHCR provides two useful roadmaps for the general path that affirmative asylum seekers, arriving asylum seekers, and defensive asylum seekers take to receive asylum status (*see Figure 3*). All three of these categories seek protection from persecution. However, affirmative asylum seekers often enter the country on a valid visa, arriving asylum seekers request asylum at the border, and defensive asylum seekers enter the United States without requesting asylum. Migrants can apply for affirmative asylum if they are in the U.S. or have successfully applied for asylum at a port of entry (“Fact sheet...,” 2019). Migrants on the defensive track can apply for asylum as a defense against deportation after U.S. Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP) have apprehended them in the U.S. or at a port of entry without a visa (“Fact sheet...,” 2019).

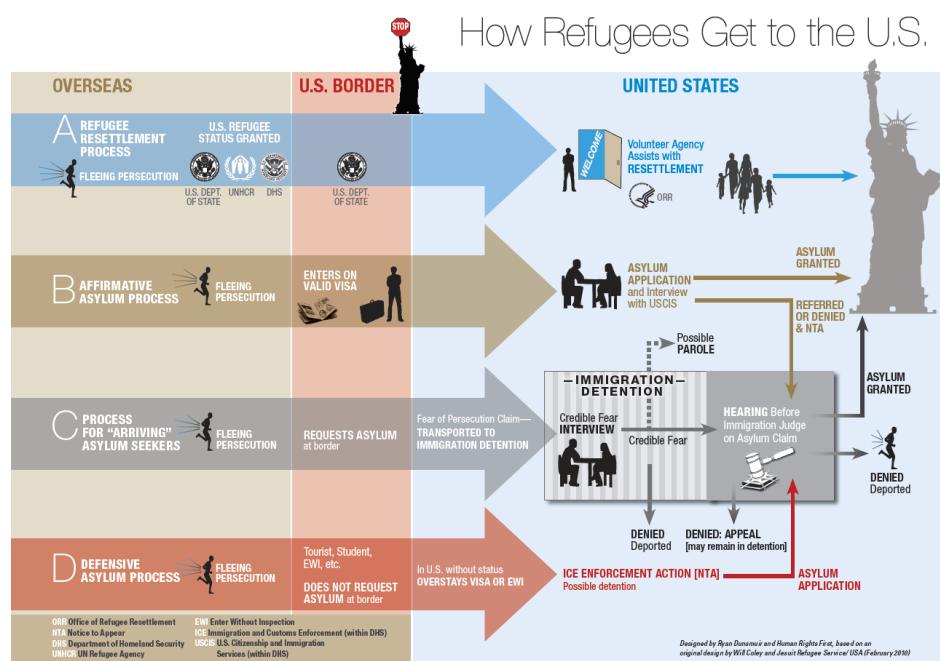


Figure 3: Asylum Process Roadmap (Dunsmuir, 2010)

While affirmative asylum seekers may only have to apply and interview with USCIS in order to receive asylum, those on the arriving or defensive track face a more arduous process. Arriving asylum seekers are typically placed in expedited removal proceedings and are detained until they are able to receive a credible fear interview with a USCIS officer. If the case officer determines that the migrant has a “credible fear” of persecution in his or her home country, the migrant will receive a hearing before an immigration judge to determine whether or not they receive asylum. If the asylum officer does not find evidence of credible fear, ICE initiates removal proceedings and deports the asylum seeker. For those on the defensive asylum track (such as those who entered the country without inspection or those who overstayed their visas), ICE may detain these asylum seekers before they are given a hearing before a judge.

No matter whether migrants enter on the affirmative or defensive tracks, the proportion of migrants from both categories who ultimately receive asylum status remains relatively low. Figures 4, 5, and 6 depict how few asylum seekers have received protection relative to affirmative and defensive asylum claims.

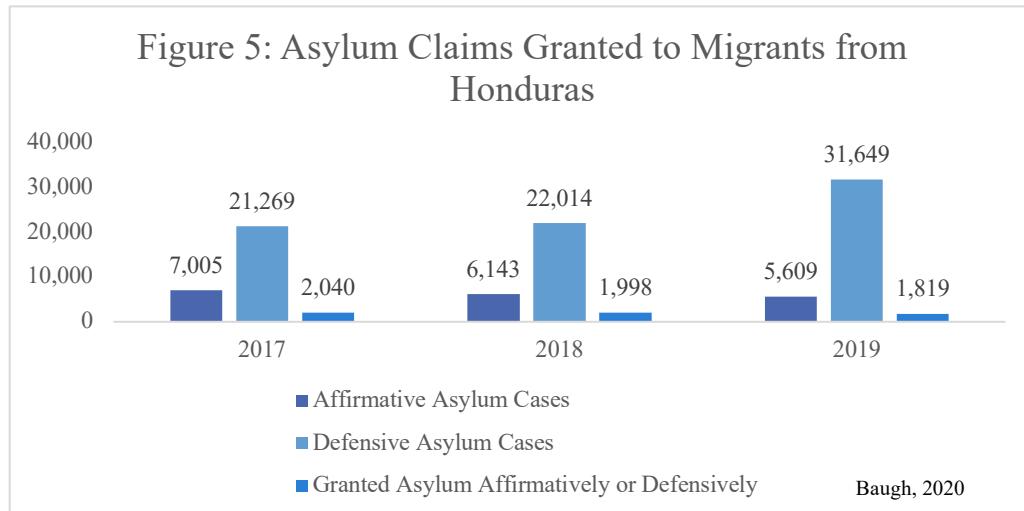
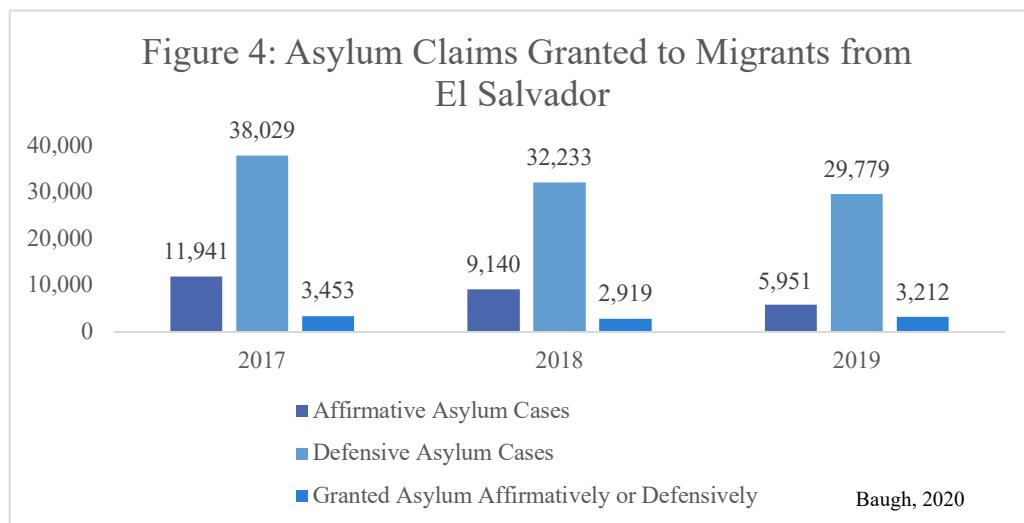
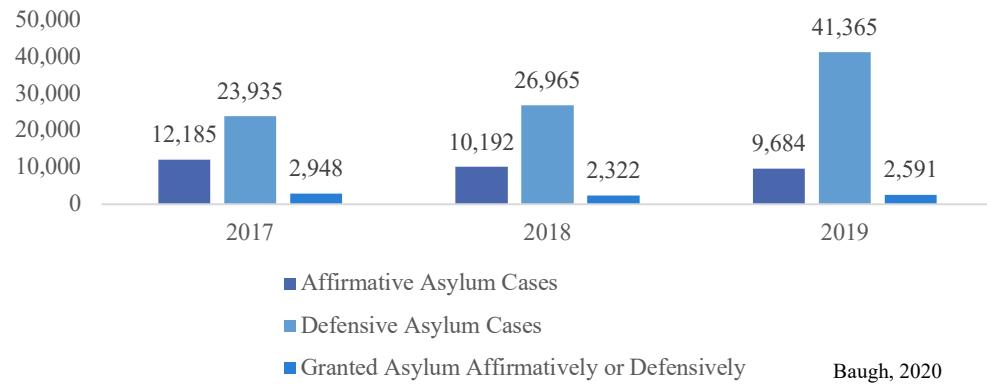


Figure 6: Asylum Claims Granted to Migrants from Guatemala



Credible Fear Screenings and Expedited Removal Limit Asylum Seekers' Rights to Fair Trials

As outlined above, credible fear screenings and expedited removal proceedings are key parts of the asylum process. The Illegal Immigration and Immigrant Responsibility Act of 1996 established both the credible fear interview and expedited removal, a process which grants low-level immigration officers the authority to deport asylum seekers without a hearing before a judge. Expedited removal is generally applied to migrants:

- (1) apprehended when arriving at a designated port of entry; (2) who arrived in the United States by sea without being admitted or paroled into the country by immigration authorities, and who had been physically present in the United States for less than two years; or (3) who were found in the United States within 100 miles of the border within 14 days of entering the country, who had not been admitted or paroled into the United States by immigration authorities (Smith, 2019).

Opponents of expedited removal argue that this process harms asylum seekers' chances for receiving protection and contributes to an increasing backlog of asylum applications.

Similarly, critics of credible fear interviews suggest that they give asylum officers too much power, contribute to the asylum backlog, and lead to unjust final case determinations. Because immigration officers conducting credible fear interviews decide whether or not an asylum seeker receives a hearing before a judge, in a sense immigration officers serve "both as prosecutor and judge" for thousands of asylum seekers who never receive their day in court ("A Primer on Expedited Removal," 2019). Many of these same immigration officers have been accused of pressuring asylum seekers into withdrawing their applications for asylum and neglecting to ask asylum seekers if they feared returning to their home countries ("A Primer on Expedited Removal," 2019).

Additionally, immigration officers who conduct credible fear screenings for asylum seekers subject to expedited removal are often the same officers who process affirmative asylum claims. Because asylum seekers on the expedited removal track frequently are detained until their credible fear screening, immigration officers are incentivized to complete expedited removal

cases first, contributing to a growing backlog of affirmative asylum applications. The American Immigration Council suggests that the rushed nature of the credible fear process for migrants subject to expedited removal could lead to premature deportations that send asylum seekers back to countries where they will face violence or death (“A Primer on Expedited Removal,” 2019).

Finally, the accelerated processing timeline for asylum seekers facing expedited removal presents roadblocks to commissioning legal counsel prior to immigration proceedings. Despite these concerns with the expedited removal process, the Trump administration directed the DHS to expand expedited removal “to its full statutory extent” (“A Primer on Expedited Removal,” 2019).

Detention and Prolonged Detention Strain DHS Capacity and Traumatize Asylum Seekers

Detention centers are often overcrowded and unsanitary, putting migrants at increased risk for trauma. Asylum seekers frequently wait in overcrowded detention cells with little access to bathrooms, adequate nutrition, clean clothing, or showers (Bier, 2019). According to a 2019 report from DHS’ Office of Inspector General (OIG) on CBP detention center conditions in the Rio Grande Valley, a cell with a maximum capacity of 35 housed 155 detainees (Costello, 2019). Some single adults were “held in standing room only conditions for a week,” while other asylum seekers were fed a diet of bologna sandwiches only (Costello, 2019). At least six children died in detention in 2019 (Bier, 2019). Although these conditions violated many of the CBP’s own regulations (such as rules about providing showers to children every 48 hours), the Department of Justice defended this treatment by asserting that “safe and sanitary” conditions do not require sleep, toothbrushes, or soap for children (Bier, 2019).

Despite these conditions, DHS has historically used detention as a means of tracking asylum seekers while they wait for their credible fear interviews or court dates. Detaining migrants for long periods of time contributes to overcrowding in many detention centers. According to *Zadvydas v. Davis*, prolonged or indefinite detention is defined as having “no significant likelihood of removal in the reasonably foreseeable future,” while *Jennings v. Rodriguez* defines prolonged detention as “disproportionate in time period to stated purpose; lacking in procedural safeguards” (“Habeas Corpus and Prolonged Detention,” 2019). President Biden has already stated that he might support plans to end prolonged detention to free up DHS capacity and to improve living conditions in detention centers (Hernandez & Sieff, 2020).

The U.S. Asylum System Inflicts Trauma on Asylum Seekers

Numerous immigrant advocacy organizations have conducted research demonstrating that well-established features of the asylum system cause trauma to asylum seekers. Features of the asylum system that may inflict trauma on migrants include detention, interactions with CBP officials, immigration court proceedings, asylum case backlogs, and work permit delays. Detention can produce severe anxiety and dread; increase chronic levels of stress that damage immune, cardiovascular, and nervous systems; and increase incidence of depression, PTSD, and suicide in migrants. For asylum seekers who have had traumatic experiences with police or militia figures in their home countries, interactions with CBP border officials can re-traumatize. Similarly, long waiting periods for asylum can keep asylum seekers from seeing immediate family members for years and contribute to looming feelings of uncertainty and anxiety. Court

proceedings can exacerbate these feelings through creating an atmosphere of confrontation. According to a report published by the Center for Victims for Victims of Torture:

Court proceedings are inherently adversarial. Asylum seekers must describe the details of their traumatic experiences, often multiple times and through an interpreter, to government lawyers who are attempting to demonstrate that they do not qualify for or otherwise deserve asylum and to judges who are evaluating their every word and behavior. Even the courtroom setting itself – a witness stand that sits next to but is purposefully lower than the judge’s bench, and directly facing the lawyer’s podium or table – coupled with the formality of the proceedings, contributes to an atmosphere of confrontation (“Designing a Trauma-Informed Asylum System…”, 2021).

These features of the asylum system can be particularly devastating to children. Children with chronic exposure to toxic stress may develop post-traumatic stress disorder and separation anxiety and may be more prone to developing heart disease and diabetes later in life (Lussenhop, 2018). In Tijuana, for example, 65% of asylum-seeking children exhibit signs of PTSD (Diamond et al., 2020).

Past Presidential, Congressional, Court, and International Organization Changes to the Asylum System

Amidst many of these problems, past U.S. Presidents, Congresses, court cases, and international organizations have attempted to reform the asylum system. A table of the most important historical actions to amend the asylum and immigration system are listed in *Table 1* below.

Table 1: Overview of Landmark Changes to the Asylum System

Policy	Date Implemented	Impact of the Policy on the U.S. Asylum System
The 1951 Refugee Convention	July 28, 1951	Although President Truman refused to sign the U.S. onto this convention, the United Nation’s convention established the core international principle of non-refoulement, which states that “a refugee should not be returned to a country where they face serious threats to their life or freedom” (The 1951 Refugee Convention, n.d.).
Immigration and Nationality Act of 1965 (Hart-Celler Act)	January 15, 1965	This law created the first caps on immigrants from the Americas and established many key procedures that currently impact the asylum system. This law has since been reformed to include regulations for expedited removal and credible fear interviews.
United Nations High Commissioner for Refugees’ Refugee Protocol	October 4, 1967	This protocol implemented all the specifications of the 1951 Refugee Convention, such as non-refoulement.
The Flores Settlement	1997	The Flores settlement, resulting from the 1993 Supreme Court case <i>Reno v. Flores</i> , created unofficial standards for immigrant children in detention facilities and required the U.S. government to release children from detention to a responsible adult figure. The settlement specifies that children who remain in detention must have “few restrictions, the ability to contact family, and appropriate standards of care and comfort, including food, water,

		and medical care" (The Flores Settlement, n.d.). The Trump administration attempted to invalidate the settlement in a 2019 regulation, but a federal district court blocked this attempt.
The Family Case Management Program (FCMP)	2016	Implemented by the Obama administration in 2016, this program aimed to keep asylum seeking families together through employing alternatives to detention. The Trump administration canceled this program, citing relatively higher costs compared to similar programs (Timm, 2018).
“Zero-Tolerance” Policy	May 7, 2018	This policy enabled the DOJ to prosecute all undocumented immigrants who crossed the border illegally, including asylum seekers and migrants with children. This policy led 3,000 children to become separated from their parents at the border. President Trump stopped these separations via an executive order issued on June 20. U.S. officials have been unable to locate the parents of 545 of the 5,400 children they separated from parents, although President Biden has issued an order to reunify families (Armus & Sacchetti, 2020).

Trump Administration Changes to the Asylum System

Although some might argue that the Obama administration also pursued a fairly punitive immigration policy, the Trump administration’s recent policies to dismantle the asylum system have drawn attention to the need for reforms (Lind, 2018). This portion of the report’s background section addresses a number of Trump administration policies that damaged asylum seekers’ chances for a fair and safe asylum proceeding, from the Migrant Protection Protocols to COVID-19 asylum restrictions.

Migrant Protection Protocols (MPP)

In November 2018, the United States announced the Migrant Protection Protocols, also known as the “Remain in Mexico” policy. The Migrant Protection Protocols originated amongst growing tensions between the U.S. and Mexico over Central American migration levels. In October 2018, a caravan of Central American migrants passing through Mexico and new Customs and Border Protection (CBP) data spurred U.S. President Donald Trump to threaten to close the U.S.-Mexico border if Mexico could not stem the flow of Central American migrants (Leutert, 2020). In November 2018, members of the Trump administration, including Secretary of State Mike Pompeo and former Secretary of Homeland Security Kirstjen Nielsen, met with Mexico’s Foreign Minister Marcelo Ebrard to search for solutions to the border crisis. Following the meeting, media reports indicated that Central American asylum seekers would now have to wait in Mexico after filing their asylum cases with the U.S. government (Leutert, 2020).

MPP forced asylum seekers from Spanish-speaking countries to wait in Mexico until their court dates in the U.S. As of March 2020, 35% of MPP asylum seekers in the program were from Honduras, 24% from Guatemala, and 12.5% from El Salvador (Leutert, 2020). By April 2020, MPP courts had already returned more than 64,000 asylum seekers to Mexico under the program (Leutert, 2020). Human rights activists argued that the conditions in Mexico were too dangerous to send migrants back into (“Delivered to Danger,” 2020). While waiting in Mexico, migrants experienced assault, rape, robbery, kidnapping, and lack of access to shelter, healthcare, education, and legal counsel. Many of these crimes were perpetrated by cartel members competing for drug smuggling routes along the U.S.-Mexico border or criminals seeking to

extort or harm migrants dropped off at the border (Aguilar, 2019). These criminal groups were often aware that asylum seekers had limited knowledge of their surroundings and had connections to family or friends in the U.S. who could pay ransom money (Leutert, 2020).

Although the Trump administration had previously urged American citizens not to travel to Mexican border states due to high levels of violence, there were at least 16,000 children and 500 infants under the age of one among the 64,000 asylum seekers the U.S. government sent back to Mexico (Aguilar, 2019; Diamond et al., 2020). While MPP was not supposed to apply to Mexican citizens, unaccompanied minors, non-Spanish speakers, those with certain medical conditions, and “asylum seekers who have shown that they are likely to face persecution or torture in Mexico,” CBP officials have previously sent pregnant women, LGBTQ+ migrants, minors, and those with disabilities back to Mexico under the MPP program (Leutert, 2020).

On President Biden’s first day in office, the Department of Homeland Security announced that it would not enroll any new asylum seekers in the Trump administration’s Migrant Protection Protocols (MPP) program (Aguilar, 2021). Initially the DHS instructed MPP migrants to wait in place until they had received further information from government officials (Aguilar, 2021). The Biden administration subsequently stated that it would let the 25,000 MPP migrants with pending court dates into the U.S. while they waited for determinations in their asylum cases (Rose, 2021; Hesson & Dwyer, 2021). These asylum seekers will not be put in detention. Instead, ICE will monitor them via ankle bracelets (Hesson & Dwyer, 2021).

Metering

Under the Trump administration, CBP began a process called “metering” to limit the number of migrants who could begin the asylum process each day. Asylum seekers who hoped to enter the U.S. without committing the misdemeanor of “improper entry” presented themselves at one of 45 ports of entry, such as the bridge between El Paso and Ciudad Juárez (Isacson, 2019). Metering enabled CBP officers to bar migrants without documentation from approaching the port, forcing asylum seekers to wait on unofficial, “first-come-first-served” lists before even registering their cases with U.S. officials (Isacson, 2019). Approximately 7,100 individuals, 4,101 non-Mexicans and 3,000 Mexicans, experienced metering in Ciudad Juárez throughout the Trump administration (Isacson, 2019).

Asylum Cooperative Agreements and Safe Third Country Agreements

The Trump administration established Asylum Cooperative Agreements (ACAs), also known as “safe third country” agreements, with Guatemala, El Salvador, and Honduras in 2019. To bring Guatemala to the negotiations table, the Trump administration threatened tariffs, travel bans, and taxes on remittances (“The dangers of Trump’s...”, 2020). As a part of these agreements, the CBP promised to deploy U.S. officials to these countries to “mentor host nation police, border security, immigration, and customs counterparts” (“Fact Sheet...”, n.d.). Following the publication of an interim final rule in November 2019, the U.S. government gained the authority to deport asylum seekers from El Salvador, Honduras, and Guatemala back to Guatemala, forcing migrants to apply for asylum there first (“Safe Third Country Agreements...”, 2019). The Trump administration deported roughly 1,000 individuals under this policy (“The dangers of Trump’s...”, 2020). Like MPP, these safe third country agreements forced migrants to wait in dangerous conditions while applying for asylum.

Changes to Credible Fear Screenings and Asylum Qualifications

Changes to the credible fear screening process during the Trump administration drastically changed the ability for asylum seekers to receive protection. Although the credible fear interview was originally intended “to demand a low threshold of evidence from applicants,” changes to the process have made asylum more elusive (Meyer & Pachico, 2018). While in 2014 the standard of proof for credible fear interviews was “significant possibility,” the Trump administration changed this standard to a “preponderance of evidence” in 2017 (“USCIS revises protection...” 2017). Beginning in 2017, asylum officers were also required to evaluate all “relevant evidence” in order to come to a conclusion based on “a totality of the circumstances.” In other words, the officers were required to consider any discrepancies in an asylum seeker’s story, even if these discrepancies were not relevant to the asylum claim itself (“USCIS revises protection...” 2017).

The Trump administration also imposed a number of procedural changes that have limited the definition of who qualifies for asylum. Previously, asylum seekers could gain protection if they had a “well-founded fear” of persecution in their home countries based on their religion, race, nationality, political opinion, or membership in “a particular social group” (“How Trump is making...”, 2020). The Trump administration proposed a number of new rules to edit these parameters, including changing what counts as “a particular social group.” Changes to eligibility requirements may harm the applications of groups who claim asylum based on threats to a family member, domestic violence, or gang violence—claims which had traditionally been accepted in the past. Additionally, the Trump administration has barred those who have committed misdemeanors from receiving asylum.

In addition to altering who qualifies for asylum, the Trump administration also slowed asylum processing through instating the “last in, first out” policy (which ensures those who applied for asylum before 2018 have to wait until recent asylum claims are processed before they receive a determination); closing 16 out of 21 international immigration offices; and directing USCIS employees to help ICE with immigration enforcement instead of processing visa applications (“How Trump is making...”, 2020).

Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP)

Through the Prompt Asylum Claim Review (PACR) program, the Trump administration limited the amount of time asylum seekers had to contact a family member or a lawyer before their first asylum hearing to 24 hours. Additionally, the administration sped up the deportation process to just ten days. Throughout past administrations, ICE was required to provide asylum seekers with a phone and a chance to meet with a lawyer before proceeding to a credible fear interview or a review with an immigration judge (“How Trump is making...”, 2020). While HARP applied to Mexican citizens and PACR to non-Mexicans, both of these pilot programs, first rolled out in El Paso, operated in a similar way. Both kept asylum seekers in short-term CBP facilities instead of in ICE detention, and both only gave asylum seekers 30 minutes to contact a lawyer or family member in advance of the credible fear interview (“Policies affecting asylum...,” 2020). As of December 2020, 1,000 asylum seekers had been enrolled in this program.

Changes to the Immigration Courts and the Asylum Case Backlog

Trump administration changes to immigration court procedures exacerbated asylum case backlogs and asylum seekers' chances for a fair trial. For instance, the Trump administration imposed a quota system that forced judges to decide asylum cases more quickly in order to keep their jobs. Despite this quota, the number of pending cases doubled from 600,000 to 1.3 million under the Trump administration, worsening the asylum case backlog (Chen, 2020). As a result, USCIS currently has a backlog of around 370,000 asylum cases that have not yet been processed ("Designing a Trauma-Informed Asylum System...", 2021). These practices could have also contributed to worse outcomes for asylum seekers. In 2020, immigration courts in the U.S. denied 72% of all asylum cases (Chen, 2020).

COVID-19 Title 42 Restrictions

COVID-19 has exacerbated the struggles that asylum seekers face, effectively shutting down the entire asylum application process to adult asylum seekers (Loweree et al., 2020). 42 U.S.C. § 265, or Title 42, enables the U.S. government to close the border partially or completely to stop the spread of communicable disease (Nowrasteh, 2020). Although this statute is not supposed to supersede legislation passed by Congress or commitments to international treaties, the broad application of this policy under the Trump administration was detrimental to asylum seekers (Lind, 2020). While those claiming fear of torture in their home countries may not be deported if they can convince Border Patrol officers of their case, those seeking asylum on the basis of a protected class such as race or religion no longer have recourse to relief (Lind, 2020). These migrants are often processed immediately in the field. They are deported within hours to their last country of transit in order to limit COVID-19 transmission in border facilities and detention centers ("Nationwide Enforcement Encounters," 2021). Public health officials have argued that this policy is not necessary to contain the spread of COVID-19.

While this policy began under President Trump, President Biden has only removed these restrictions for unaccompanied minors. In FY2020, Title 42 was used to expel 197,043 migrants from the country at the southwest border (FY 2020 Nationwide Enforcement Encounters," 2020). In FY2021, U.S. Border Patrol leveraged Title 42 to expel 247,116 migrants from the country at the southwest border ("Nationwide Enforcement Encounters," 2021).

Biden Administration Immigration Priorities

The Biden administration is currently facing the largest surge of migrants at the border in twenty years (Parker et al., 2021). This surge includes a large increase in unaccompanied, asylum-seeking children. President Biden has tapped Vice President Kamala Harris to lead diplomatic efforts with Mexico and the Northern Triangle to address this growing crisis. Commentators believe Harris' efforts will focus on slowing the flow of migrants and deepening relationships with Central American countries (Liptak & Wright, 2021).

Even before this recent surge, Biden's "Executive Order 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" underscored how the Biden administration plans to pivot from the Trump administration's attacks on asylum. Issued on February 2, President Biden's order called for a strategy to address "the root causes of migration" and to work collaboratively with other nations

to address migration from the Northern Triangle (“Executive Order on Creating a Comprehensive Regional Framework…”, 2021). The executive order also initiated a systematic review of asylum processing procedures and directed the DHS to reorganize interior enforcement measures to prioritize those who pose national security threats or those who have criminal convictions (“Factbox…”, 2021).

Similarly, the Biden administration’s proposed immigration reform bill, the U.S. Citizenship Act of 2021, provides \$4 billion over four years to reduce corruption in the Northern Triangle, fortify transnational gang task forces in Central America, and prevent migrants from making the dangerous trip to the U.S.-Mexico border by establishing immigration processing centers (Vega & Owen, 2021). The Biden administration does not appear to have the votes needed to pass the bill.

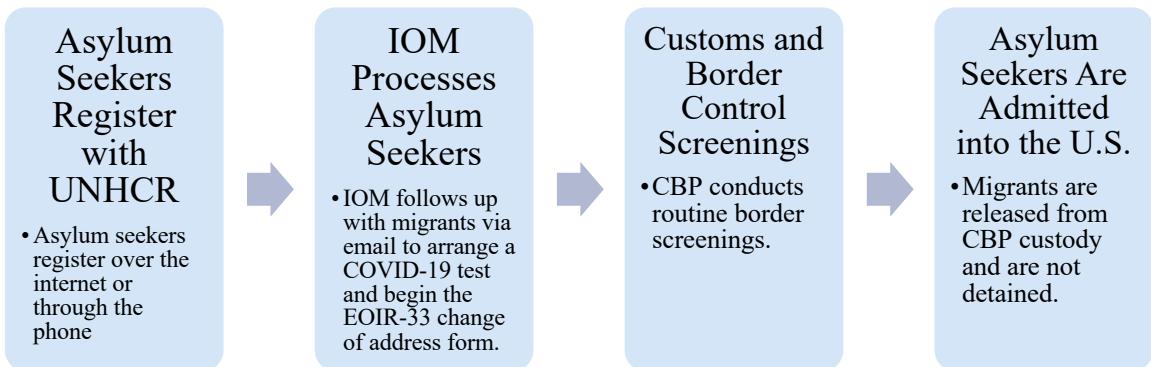
Biden Administration MPP Termination

Since the end of the Trump administration, President Biden has terminated the Migrant Protection Protocols and initiated the first phase of processing 25,000 asylum seekers who still have active cases in the U.S. court system. At this point, processing procedures do not account for the roughly 30,000 migrants who had received removal orders *in absentia*. *In absentia* removal orders are issued when asylum seekers fail to appear on their court dates, no matter their reasons for not showing.

Throughout Phase 1 of MPP’s rollback, the Biden administration has collaborated with the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), and numerous NGOs to develop the process (*see Figure 7*) for admitting these 25,000 migrants in groups of 300 per day at three undisclosed ports of entry (Hesson & Dwyer, 2021). Phase 1 processing occurs as follows:

1. UNHCR registers migrants online or over the phone. During this registration process, UNHCR discloses the location of the COVID-19 testing site and asks migrants if they have any particular vulnerabilities that might make them eligible for entry sooner. Prioritized populations include those with medical conditions (particularly those that put migrants at higher risk for COVID-19 complications), pregnant women, survivors of gender-based violence, and persons in immediate risk of danger (“Terminacion de MPP,” 2021). Aside from asylum seekers with vulnerabilities, UNHCR prioritizes processing migrants who have been in the MPP program longest.
2. IOM sends a follow-up email telling migrants when to show up for their COVID-19 testing and directing them to fill out the EOIR-33 change of address form. NGOs will conduct the COVID-19 testing, and migrants must receive a negative result 24 hours in advance of crossing the border (“Terminacion de MPP,” 2021; Rose, 2021). Migrants will be quarantined after their negative results to eliminate possibilities for infection.
3. Customs and Border Patrol verifies the identity of asylum seekers and registers asylum seekers’ entry into the U.S.
4. CBP then releases the asylum seekers and does not detain them.

Figure 7: Process for Phase One of MPP Termination



The Biden team may eventually increase the number of migrants processed per day by expanding this model to other immigration ports if the initial phase of this experiment runs smoothly (Hesson & Dwyer, 2021). However, several problems have already arisen with this processing system:

1. During the initial UNHCR registration process, migrants are asked for photo identification and email addresses, even though many asylum seekers do not have email addresses or access to a stable internet connection. Additionally, many asylum seekers from the Northern Triangle do not have passports, or their photo identification has been stolen on their journeys to the U.S.
2. The UNHCR registration website crashed within the first couple days of launching.
3. Waiting for follow-up communication from IOM on the precise dates of COVID-19 testing could create an additional hurdle that needlessly lengthens the process.
4. Many migrants have already rushed the border upon hearing that the Biden administration has repealed the MPP program. Homeland Security Secretary Alejandro Mayorkas has acknowledged that it will be a “very significant challenge” to encourage asylum seekers to wait for a chance to register for entry into the U.S. in order to avoid rushes at U.S. border entry-points (Wise, 2021). DHS has relied heavily on social media networks to disseminate information about eligibility for admission into the U.S. to asylum seekers (Wise, 2021).

Role of Nonprofits in Assisting Asylum Seekers

Nonprofits have traditionally filled gaps in the U.S. asylum system that the government has not been able to address. For example, NGOs frequently provide asylum seekers with pro-bono legal services. In Texas, nonprofits like RAICES and Las Americas Immigrant Advocacy Center provide free or low-cost legal services to migrants, while organizations like the Texas Civil Rights Project employ legal advocacy to spur policy change (“Border Advocacy Groups,” n.d.). Accessing legal counsel can be one of the biggest barriers to successfully receiving asylum.

Although retaining a lawyer can increase migrants' chances of receiving asylum by 500% (Herrera, 2020), only 30% of asylum seekers had legal representation before the Remain in Mexico program, and only 5% of asylum seekers had lawyers throughout the MPP program (Herrera, 2020). This large decrease demonstrates how the MPP program exacerbated existing difficulties in contacting migrants who were living across the border.

Many nonprofit organizations also focus on delivering medical and educational resources to the migrant populations they serve. During the COVID-19 pandemic, organizations such as the Sidewalk School provided migrant children in Matamoros, Mexico and Ciudad Juárez, Mexico with lessons in English, math, and science, as well as gym classes and mask-sewing tutorials ("Education," n.d.). The Sidewalk School recently donated over 200 Amazon Fire tablets to students living in Juárez, enabling them to participate in online classes ("Sidewalk School provide over...," 2020). Some nonprofits which feed, shelter, or transport migrants have even received payments from the U.S. federal government for their work to address migrants' basic needs (Attanasio & Galvan, 2019). However, much of this community support dried up following the onset of the coronavirus pandemic in March, leaving migrants with even fewer resources than before the public health crisis (Solis & Corchado, 2020).

Criteria

In this section, the report will define the criteria of Asylum-Seeker Well-being, Viability, Cost, and Consistency with American Values. The report will use these criteria to compare the strengths and weaknesses of each of the policy options and the status quo in addressing the problem: inhumane treatment of asylum seekers throughout the U.S. asylum process. Each of these criteria are defined as follows.

Asylum Seeker Well-being

This criterion will attempt to measure asylum seekers' mental and physical health as a result of any given policy option. This criterion is particularly difficult to measure due to its subjectivity. Literature suggests that well-being can be measured in income and life satisfaction (Nikolova, 2014). However, lack of data necessitates using more qualitative measures to assess asylum seekers' well-being throughout the asylum application process. For the purpose of this analysis, asylum seeker well-being will be measured as follows:

1. The option makes the asylum process less adversarial, satisfies asylum seekers' humanitarian needs, or minimizes asylum seeker trauma.
2. The option fulfills United States commitments to non-refoulement established in the UNHCR's 1951 Refugee Convention and 1967 Protocol. The option minimizes sending asylum seekers back into dangerous conditions, both while they are processing for asylum and after they have received a determination from the courts.
3. The option supports asylum seekers' due process rights.

Scoring: Each of these three statements will receive a score of 0-3, for a maximum score of 9 for each policy option. While a 3 indicates perfect adherence to the statement, a 2 indicates adequate adherence to the statement, a 1 some adherence to the statement, and a 0 no adherence to the statement.

Viability

This criterion will measure the extent to which the option is feasible politically and bureaucratically. Political viability encompasses support from the Biden administration, the public, members of Congress, and other state and local governments that might be impacted by an increase in migration. In considering the likelihood that a given policy could reach implementation, the capacity of the immigration court system and the Department of Homeland Security will also be examined.

1. The Biden administration, the American public, Congress, or state and local governments support this measure.
2. The option does not require significant changes to standard DHS operating procedure.
3. The option does not require significant changes to the immigration courts.
4. The option does not require a significant amount of new funding.
5. The option necessitates a limited amount of new training, staff, or infrastructure.

Scoring: Each of these statements will receive a score of 0-3, for a maximum score of 15 for each policy option. While a 3 indicates perfect adherence to the statement, a 2 indicates adequate adherence to the statement, a 1 minimal adherence to the statement, and a 0 no adherence to the statement.

Cost Effectiveness

This criterion will measure the cost effectiveness of the option, or the total cost divided by the total units of effectiveness, through the following formula:

$$\frac{\text{Estimated Cost to the U.S. Government of Implementing the Option}}{\text{Total Number of Asylum Seekers Positively Impacted Per Year}}$$

While this criterion aims to weigh the costs to the U.S. government of implementing an option against the number of asylum seekers positively impacted per year, many liberties are taken in this analysis given the difficulty of projecting costs and estimating future migration patterns. For example, the phrase “positively impacted” refers to asylum seekers who have seen some increase in well-being as a result of the option. While this positive impact most often will refer to the entire, yearly population of asylum seekers who would reap a net positive increase in prosperity from the action, in the case of the status quo the only asylum seekers who could feasibly meet this “positive impact” threshold would be those who ultimately receive asylum status. Likewise, where data is not available on the number of asylum seekers impacted, I substitute the number of migrants in general who would benefit.

Scoring: Each of these statements will initially receive a score consistent with its cost effectiveness calculation. While smaller scores indicate higher levels of cost effectiveness, larger scores indicate lower levels of cost effectiveness. Rankings of 0-5 are then assigned in the weighted outcomes matrix. While a 5 indicates that the option was the most cost effective of all options analyzed in this research, a 0 indicates that the option was the least cost effective.

Consistency with American Values

This criterion measures the extent to which an option advances American values such as justice, liberty, and respect for human dignity while also respecting the rule of law and maintaining the security of our nation.

1. The option extends principles of justice, liberty, respect for human dignity, or the right to a free and fair trial to asylum seekers.
2. The option maintains border security.
3. The option facilitates sufficient security processing to ensure that asylum seekers would not pose a threat to national security if released or admitted into the United States.

Scoring: Each of these statements will receive a score of 0-3, for a maximum score of 9 for each policy option. While a 3 indicates perfect adherence to the statement, a 2 indicates adequate adherence to the statement, a 1 minimal adherence to the statement, and a 0 no adherence to the statement.

Criteria Scoring						
Criteria Name	Measure #1	Measure #2	Measure #3	Measure #4	Measure #5	Max Score
Asylum Seeker Well-being	Score Range of 0-3: Makes the asylum process less adversarial, satisfies asylum seekers' humanitarian needs, or minimizes asylum seeker trauma.	Score Range of 0-3: Fulfills United States commitments to non-refoulement and minimizes sending asylum seekers back into dangerous conditions.	Score Range of 0-3: Supports asylum seekers' due process rights.	N/A	N/A	9
Viability	Score Range of 0-3: The Biden administration, the American public, Congress, or state and local governments support this measure.	Score Range of 0-3: The option does not require significant changes to standard DHS operating procedure.	Score Range of 0-3: The option does not require significant changes to the immigration courts.	Score Range of 0-3: The option does not require a significant amount of new funding.	Score Range of 0-3: The option necessitates a limited amount of new training, staff, or infrastructure.	15
Cost Effectiveness	Score Range 0-5: How cost effective the option was compared to the other options and the status quo.	N/A	N/A	N/A	N/A	5

Consistency with American Values	Score Range of 0-3: Extends principles of justice, liberty, respect for human dignity, or the right to a free and fair trial to asylum seekers.	Score Range of 0-3: Maintains border security.	Score Range of 0-3: Facilitates sufficient security processing to ensure that asylum seekers would not pose a threat to national security if released or admitted into the United States.	N/A	N/A	9
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Evaluating Outcomes: Maintaining the Status Quo

The status quo is not a policy alternative in this paper due to the Biden administration's own admission that the asylum system needs significant changes. However, comparing the proposed policy options against the status quo through using the same criteria is a useful exercise in determining how much a policy alternative would improve asylum relative to the current system.

Asylum Seeker Well-being: Low (0)

Continuing with the status quo would do nothing to protect asylum seekers' physical and mental health. Asylum seekers would continue to face detention in overcapacity detention centers, the asylum backlog would continue to grow, and features of the asylum system such as the credible fear interview and Title 42 would continue to undermine asylum seekers' hopes for relief. Maintaining the status quo receives a 0 on Asylum Seeker Well-being because the status quo sends migrants back into dangerous conditions, continues an adversarial method of immigration enforcement, and erodes asylum seekers' due process rights.

Viability: High (13)

According to Pew Research, 60% of Americans believe it is very or somewhat important to make it easier for asylum seekers to receive legal status in the U.S. ("Public's Priorities," 2019). Given mild public support for changes to the asylum system and a newly Democratic Congress, the status quo receives a 1 for consistency with public opinion. This option receives a 3 for affecting minimal changes to the DHS and immigration courts, requiring no new funding, and limiting the amount of new training and staff. In total, this option receives a 13 for viability.

Cost Effectiveness: 1,138.69 units

The cost effectiveness of the status quo is measured by dividing the total FY2020 budget of U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and United States Citizenship and Immigration Services (\$32,989,461.02) by the number of asylum seekers who were projected to receive asylum in the year 2020 (roughly 31,000). Using these measurements, cost effectiveness of the status quo is calculated as follows (“FY2020 Budget in Brief,” 2020; “Report to Congress...,” 2020):

$$\frac{\$32,989,461.02}{31,000} = 1,138.69 \text{ units of effectiveness}$$

Consistency with American Values: Medium (6)

Maintaining the status quo does not uphold American values. However, it does maintain border security and largely protects the United States’ national security prerogatives. This option receives a 0 for extending justice to asylum seekers and a 3 for preserving border and internal security.

Alternatives

In the following section, I outline potential policy options that the Biden administration and Las Americas could pursue to improve the experience of asylum seekers in the U.S. immigration system relative to the status quo.

Alternative 1: Ending Prolonged Detention through Expanding Alternatives to Detention and Implementing Trauma-Informed Practices in Asylum Processing.

Main Policy Changes: This alternative would institute a trauma-informed approach to asylum by ending the prolonged detention of asylum seekers, expanding alternatives to detention, connecting asylum seekers to social workers in their designated destinations, and equipping government workers with the knowledge needed to recognize signs of migrants’ trauma. In order to stop prolonged detention practices, this option recommends increasing ATD use through expanding the capacity of ICE’s Intensive Supervision Appearance Program III (ISAP III) program. Other intermediate steps to eliminating prolonged detention not considered here include stopping family detention in private prisons and abolishing bond for those eligible for release (Roehm, 2021).

ICE has previously implemented two successful ATD programs: ISAP III and the Family Case Management Program (FCMP). ICE’s conditions of release under these programs include measures such as parole, bond, check-ins at ICE offices, home visits, telephonic monitoring, GPS monitoring through electronic ankle bracelets, and a recently-approved phone app called SmartLINK, which uses facial recognition software to verify the identity and location of migrants (Government Alternatives to Detention, 2016; Singer, 2019). While ISAP III is the only current ATD program that ICE utilizes, FCMP was successful in protecting highly vulnerable populations from detention until the program was terminated in June 2017 (after only 1.5 years

of its scheduled five-year lifetime) due to the Trump administration's shift in immigration priorities ("The Family Case Management Program", 2019).

ISAP III requires migrants to participate in more extensive case management than other previous ATD program counterparts on the non-detained docket (Singer, 2019). While DHS claims that ISAP III is not a substitute for detention, it acknowledges that ISAP III has been effective in enabling ICE to monitor certain migrants more closely.

Numerous studies have found that these ATD programs have been successful in securing migrants' compliance with court appearances ("The Real Alternatives to Detention," 2019):

- 95% of migrants in "full-service" ATDs with comprehensive case management showed up for their final court hearings.
- 91.5% of migrants with only some case management appeared at their final court hearings.
- 96% of asylum seekers released from ICE detention between 2001 and 2016 appeared for all immigration court hearings.

Despite these high rates of appearance, connecting migrants with social workers in their designated destinations could ensure compliance with court demands, facilitate migrants' integration into their new communities, and connect migrants to legal and medical resources. This option recommends that the Department of Homeland Security create a network of social worker contacts in prominent destination cities for asylum seekers. Upon releasing asylum seekers from detention, individual case managers or deportation officers could assign one of these social workers to communicate with the asylum seeker up through their court date.

To address the causes of asylum seekers' trauma more completely, the DHS could also implement a number of other complementary practices, such as:

- Requiring all CBP, ICE, and USCIS employees to receive trainings on recognizing and addressing the signs of asylum seekers' trauma. According to the Center for Victims of Torture, this training might discuss "how to ask questions in a non-interrogative manner; incorporating boundaries, transparency and choice; and allowing for breaks as needed" ("Designing a Trauma-Informed Asylum System...", 2021).
- Shifting to a reception center model at the border which emphasizes satisfying migrants' immediate medical and humanitarian needs ("Designing a Trauma-Informed Asylum System...", 2021).

Especially with these extra steps included, this alternative would require a massive change in how the U.S. thinks about immigration enforcement and could be difficult to implement as a result. However, the Biden administration seems open to rethinking the way the asylum system has traditionally operated, providing an opening to eliminate one of the ways the U.S. government most directly contributes to migrants' trauma throughout the asylum process.

Evaluating Option 1 Outcomes

Asylum Seeker Well-being: High (7)

Expanding alternatives to detention would enable migrants to stay with family members or friends in the U.S. while waiting for asylum determinations. This option would minimize the

number of asylum seekers housed in unsanitary, overcapacity detention facilities. Additionally, this option would seek to connect asylum seekers with social workers in their destination upon release, enabling asylum seekers to get connected to health, education, and legal resources that could facilitate better outcomes in immigration court and improve asylum seekers' quality of living. As a result, this option receives a 3 for making the asylum system less adversarial, a 2 for removing migrants from unsanitary conditions, and a 2 for supporting migrants' due process rights.

Viability: High (12)

This option maintains significant support from the American public, the Biden administration, and many members of Congress. 82% of Americans believe it is very or somewhat important that the U.S. provide safe and sanitary conditions for asylum seekers ("Public's Priorities," 2019). On the campaign trail, the Biden administration promised to expand alternatives to detention and case management programs for migrants, and several members of Congress have proposed bills to expand ATDs for vulnerable populations (Misra, 2020). Congress has become more amenable to funding ATDs since 2004, recognizing that ICE has limited capacity to detain migrants in such large numbers (Singer, 2019). Other factors, such as the increasing number of migrants requesting asylum, a backlog of cases in immigration courts, and a growing number of migrants traveling with family members could make Congress more open to funding ATDs (Singer, 2019).

Expanding existing ATD programs (such as DHS' ISAP III program) would require some modification of existing DHS procedures but would not impact immigration courts. While the DHS might need to allocate more of its funding and staff towards administering ATDs, ATDs are significantly less expensive than detention itself. According to a 2014 Government Accountability Office (GAO) report, ATDs cost less than detention, even if asylum seekers are in an ATD program longer than they would have been in detention ("Alternatives to Detention," 2014). For example, the cost of detention per day is \$119, while the cost of an electronic monitoring device is just \$14 per day ("Prolonged Detention Fact Sheet," n.d.). Although this option would connect asylum seekers with community social workers, these social workers would not need to be on DHS payrolls.

Consequently, this option receives a 2 for public support, a 2 for some changes to DHS procedure, a 3 for minimal changes to immigration courts, a 3 for funding, and a 2 for staff and training.

Cost Effectiveness: 1825 units

In order to have enrolled every family that crossed the border in March of 2019, ISAP III would have needed to increase its enrollment by 254,772 migrants a year, or 21,231 asylum seekers a month.¹ The average ATD contract costs \$5 to \$6 a day (Benenson, 2018). Given these figures, expanding the ISAP III program to full capacity would cost roughly \$464,958,900.

$$\frac{\$464,958,900}{254,772 \text{ migrants per year}} = 1825 \text{ units of effectiveness}$$

¹ This calculation is borrowed from a prior Batten Applied Policy Project written by Isabel Coughlin.

With the available data, it is difficult to estimate how many of these 254,772 migrants would have been asylum seekers from the Northern Triangle.

Consistency with American Values: **Medium (6)**

This option would uphold American values of human dignity and liberty by minimizing the physical and psychological damage detention inflicts on asylum seekers. However, some argue that private companies such as BI, Inc., the primary company that administers ICE's case management and technology services for ISAP III ATDs, have conflicting revenue streams that contribute to high levels of immigrant detention (Fernandes, 2017).

Conversely, critics of expanding ATDs suggest that they create chances for migrants to abscond by avoiding removal proceedings and orders (Singer, 2019). This belief is not born out in the data—96% of asylum seekers released from ICE detention between 2001 and 2016 appeared for all immigration court hearings (“The Real Alternatives to Detention,” 2019). Additionally, asylum seekers who could potentially pose a threat to national security are not eligible for release through ATD programs.

Due to both of these viewpoints, this option scores a 2 on advancing American values, a 2 on maintaining border security, and a 2 on facilitating sufficient asylum seeker security processing.

Alternative 2: Restructuring the Credible Fear Interview, Ending Expedited Removal, and Redefining Who Qualifies for Asylum.

Main Policy Changes: Alternative 2 suggests that the Biden administration end expedited removal and restructure the credible fear interview. In order to do so, this option recommends that the Biden administration issue an executive order to lower the standard of proof in credible fear interviews to the “significant possibility” standard (or something even lower) and specify that only USCIS agents can conduct credible fear screenings. This option also recommends that the Biden administration redefine who qualifies for asylum under the “membership in a particular social group” category of the Immigration and Nationality Act to include protections for those affected by domestic and gang violence.

In his February 2 executive order, President Biden directed the DHS to review President Trump’s expansion of expedited removal, asking the department to consider whether the U.S. immigration system should be “modifying, revoking, or rescinding” the expansion (Hernandez, 2021). However, the Biden administration has not yet committed to terminating the expedited removal process. This option recommends that President Biden issue an executive order to the Department of Homeland Security to halt expedited removal proceedings. The DHS will then need to engage in a period of public comment before reversing this policy, a process which could take months or years.

President Biden should also use this executive order to reverse a number of harmful Trump administration changes to the credible fear screening process. While federal judges ultimately blocked or issued preliminary injunctions on three of the Trump administration’s most significant attacks on the credible fear interview, the Biden administration has a unique opportunity to restructure the credible fear screening process following a period of tumult.

Throughout the Trump presidency, the administration took several actions to limit the rights of asylum seekers in these interviews:

- **Changing the Standard of Proof:** Although the credible fear interview was originally intended “to demand a low threshold of evidence from applicants,” Trump administration changes to the process have made asylum more elusive (Meyer & Pachico, 2018). While in 2014 the standard of proof for credible fear interviews was “significant possibility,” the Trump administration changed this standard to a “preponderance of evidence” in 2017 (“USCIS Revises...”, 2017). Beginning in 2017, asylum officers were also required to evaluate all “relevant evidence” in an asylum seeker’s case in order to come to a conclusion based on “a totality of the circumstances.” In other words, the officers were required to consider any discrepancies in an asylum seeker’s story, even if these discrepancies were not relevant to the asylum claim itself (“USCIS Revises...”, 2017). A federal judge ultimately blocked this policy.
- **Reducing the Waiting Period Before Interviews:** In July 2019, USCIS reduced the waiting time before asylum seekers completed their initial credible fear interviews. This action limited migrants’ ability to find lawyers before their interviews took place (Van Fossen & Pena, 2021). A federal judge blocked this policy.
- **Allowing CBP Agents to Conduct Credible Fear Interviews:** In 2019, Customs and Border Protection agents began conducting credible fear interviews. In August 2020, federal judge issued a preliminary injunction blocking the agreement between the CBP and USCIS that enabled CBP to head this process, citing asylum seekers’ right to have a non-adversarial interview with a USCIS officer (Van Fossen & Pena, 2021).

In order to reverse these policies, President Biden should revert the credible fear standard to the “significant possibility” metric, or something even lower. The Biden administration should also specify that only USCIS officers can conduct credible fear interviews.

Finally, the Biden administration should redefine who is eligible for asylum. Under the Trump administration, requests for asylum based on threats to a family member, domestic violence, or gang violence were typically not accepted as sufficient reasons for granting asylum (“How Trump is making...”, 2020). Prior to this change, around 10,000 people per year had received asylum on the basis of domestic or gang violence (“Domestic and Gang Violence...”, 2018). Organizations such as the Children’s Defense Fund worry that this decision may further limit asylum claims on the basis of sexual orientation, gender, and child abuse and will send women and children back into dangerous environments (“Domestic and Gang Violence...”, 2018).

President Biden’s recent executive order asks the Attorney General and the Secretary of DHS to take 180 days to determine whether to extend asylum to victims of domestic and gang violence and 270 days to interpret the phrase “membership in a particular social group” (Arthur, 2021). While Biden’s DHS and DOJ seems likely to reinstate these protections, sustained pressure from immigration advocacy groups on the administration and the Biden bureaucracy may be needed to ensure these protections are reinstated.

Evaluating Option 2 Outcomes

Asylum Seeker Well-being: High (8)

This alternative would protect asylum seekers from being deported unfairly to their home countries due to high standards of proof in credible fear screenings. Additionally, this option would seek to make the asylum process less adversarial by ensuring that only USCIS officers conduct credible fear interviews and lowering the standard of proof for credible fear. By removing asylum seekers from the expedited removal process, judges will not be incentivized to rush through these asylum seekers' cases. This option receives a 3 for making the asylum process less adversarial, a 2 for minimizing sending asylum seekers back into dangerous conditions, and a 3 for supporting asylum seekers' due process rights.

Viability: Low (3)

Members of Congress have proposed a wide variety of bills to address the credible fear interview and expedited removal process. For example, H.R. 3775, H.R. 3918, H.R. 4202 would outline which immigration officers could conduct credible fear interviews, while H.R. 517 and H.R. 3360 would raise the credible fear standard ("Immigration Laws...", 2020). President Biden did not roll back expedited removal in his initial executive order on immigration, perhaps suggesting that there is not the political will to address this issue at the moment. Even though this option would not stop expedited removals for those with criminal convictions, this option would place significantly more strain on the DHS' ability to monitor and detain migrants and the immigration courts' ability to process asylum seekers in a timely manner, perhaps increasing their budgets as a result. While this alternative would not directly require more staff or infrastructure, an increase in staff or detention facilities could be a byproduct of not expediting removal for asylum seekers. Consequently, this option receives a 1 for public support, a 0 for DHS operating procedure, a 0 for immigration court changes, a 0 for requiring little new funding, and a 2 for requiring new staff or infrastructure.

Cost Effectiveness: 75,290 units

In FY2019, the Department of Homeland Security deported 62,359 migrants from El Salvador, Guatemala, and Honduras who had not had any prior criminal convictions (Guo, 2019). There is no data available about how many of these migrants were asylum seekers. Expedited removal lowers DHS expenses by reducing the costs associated with a full trial before an immigration judge and monitoring the asylum seeker through detention or alternatives to detention. While data is sparse on how much it costs the U.S. government to process one asylum seeker and how many asylum seekers in expedited removal proceedings are detained, we can estimate the highest possible cost of ending expedited removal for roughly 62,359 migrants per year by multiplying this number of migrants by the average cost of detention per migrant per year in 2018: \$75,920 (Benenson, 2018). This calculation yields a total cost of \$4,734,295,280 per year, assuming that all these migrants are detained and are not placed in ATD programs.

$$\frac{62,359 \text{ migrants} \times \$75,920 \text{ detention cost per year}}{62,359 \text{ migrants}} = 75,920 \text{ units of effectiveness}$$

Consistency with American Values: High (9)

This option would increase justice and asylum seekers' rights to a free and fair trial. This option would maintain border security and the United States' internal national security, since the DHS would still maintain the power to remove migrants with criminal convictions. This option

receives a 3 for expanding principles of justice, a 3 for maintaining border security, and a 3 for maintaining national security.

Alternative 3: Ending Title 42 Expulsions and Establishing Public Health Infrastructure to Process Asylum Seekers.

Main Policy Changes: This alternative proposes revoking Title 42 restrictions on asylum. In order to stop Title 42 enforcement actions, President Biden will need to reverse a Department of Health and Human Services (HHS) rule, a Center for Disease Control (CDC) order implementing the HHS rule, and a Customs and Border Patrol memorandum directing CBP agents to implement the restrictions (Sandhu, 2020). Working closely with the CDC director could hasten this process. This option also explores means to increasing public health infrastructure at the border that could support the removal of Title 42 restrictions in a safe manner.

Although the CDC originally resisted issuing this order, claiming “there was no valid public health reason” for the rule, pressure from the Trump White House helped push Title 42 through the interim final rule (IFR) process (Sandhu, 2020). The IFR process can be used to circumvent the usual public comment period required by the Administrative Procedure Act (APA) when an agency determines there is “good cause” that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest” (Sandhu, 2020). Unlike the normal rule-making process, the IFR public comment period coincides with the interim rule going into effect. After a brief comment period on the Title 42 regulation occurred from March 24 to April 21, 2020, the HHS issued a final-final rule, and the CDC re-published its order.

President Biden has several options for reversing the HHS rule and the CDC order. The CDC order should be relatively easy to walk back, since the Biden administration can rescind the order as soon as the CDC director decides that “the danger of further introduction of COVID-19 into the United States [through the Title 42 covered immigrants] has ceased to be a serious danger to the public health, and continuation of the Order is no longer necessary to protect the public health” (Sandhu, 2020). The CDC already reviews the progress of the COVID-19 pandemic response every 30 days to determine whether the order is still necessary, creating an opening for the Biden administration to reverse the restrictions.

However, repealing the HHS regulation will be more difficult since the DHS has already finalized the rule. As a result, the Biden administration will need to issue an executive order to prompt HHS to issue a new rule revoking the prior Title 42 regulation, or it will need to work with Congress to lift the rule under the Congressional Review Act (Sandhu, 2020). Both of these options have their challenges—while issuing a new rule could be a lengthy process, leveraging the Congressional Review Act bars the Biden administration from implementing any future regulation that is “substantially similar” to the Title 42 rule (Sandhu, 2020). As a result, this alternative recommends that the Biden administration issue a new rule to repeal the original HHS regulation.

Finally, repealing asylum restrictions perpetuated by Title 42 will necessitate establishing the public health infrastructure to process asylum seekers safely, particularly if the rule is lifted before the end of the pandemic (McDevitt, 2021). This alternative recommends that the Biden administration provide more guidance to the DHS on facilitating social distancing and

purchasing masks, disinfectants, and sanitation supplies (“Public Health Measures…”, 2020). Currently, the CBP only asks migrants at border crossings to practice social distancing, but CBP officers do not facilitate this distancing in processing lines. The Biden administration should work alongside the CBP and CDC to ensure that CBP officers have the capacity to set up “lines or other demarcations to set six-feet distances where people should stand in lines or sit during interviews” (“Public Health Measures…”, 2020). Similarly, the Biden administration should collaborate with the DHS to recommend that all asylum seekers wear face coverings. CBP officers should be prepared to provide asylum seekers with face coverings if they do not have them. Even with all these precautions, expanding Covid testing for asylum seekers and expanding alternatives to detention in congregate settings will be crucial to limiting the spread of COVID-19 and to unwinding Title 42 successfully.

Evaluating Option 3 Outcomes

Asylum Seeker Well-being: High (9)

This option would make the asylum process less adversarial by limiting automatic deportations under Title 42. It would also do more to satisfy asylum seekers’ health needs by connecting them to COVID-19 testing before entry into the U.S. This option would stop returning asylum seekers to the sources of their trauma and would ensure they receive a fair chance at asylum. The option receives a 3 on all three metrics of asylum seeker well-being.

Viability: Medium (9)

While this alternative might be one of the most effective measures at giving asylum seekers a fair chance for asylum and due process, it could be difficult for the Biden administration to eliminate this policy given the administration’s public emphasis on controlling the spread of COVID-19. President Biden has not yet expressed support for ending Title 42 restrictions.

Similarly, Congressional support for Title 42 has also been mounting. A coalition of 25 Republican Congressmen and women drafted a bill to keep Title 42 in place until “all state and federal lockdowns, stay-at-home orders, curfews and other COVID-19 restrictions end, until all COVID-19 public and federal public health emergencies end and until the CDC travel recommendations for Canada and Mexico are reduced to Level 1” (McDevitt, 2021). This option could be particularly difficult for the American public to accept, especially as they continue to face restrictions on their personal liberties as a result of Covid.

Ending Title 42 could potentially increase the short-term strain on the DHS and on immigration courts as migrants who had previously had no chance for asylum seek protection in the U.S. However, in the long term this option would not have a significant impact on asylum case numbers. This option might require some additional funding and staff in order for the U.S. to secure asylum seekers Covid tests prior to them entering the U.S. This option receives a 1 on public support, a 2 on changes to DHS and immigration court procedure, and a 2 on new funding and staff.

Cost Effectiveness: 100 units

In FY2020, Title 42 expelled 197,043 migrants from the country at the southwest border (FY 2020 Nationwide Enforcement Encounters,” 2020). In the beginning of FY2021, U.S. Border Patrol leveraged Title 42 to remove 247,116 migrants from the country at the southwest border

(“Nationwide Enforcement Encounters,” 2021). Combining these numbers for a total of 444,159 individuals, we can estimate the number of migrants who could potentially benefit from a removal of Title 42 restrictions in the coming year. Rescinding Title 42 restrictions would not involve any direct costs besides potential expenses of supplying asylum seekers with Covid tests or PPE. Estimating the cost of a Covid test at around \$100 per person, we can calculate the following level of cost effectiveness:

$$\frac{444,159 \text{ migrants} \times \$100 \text{ per Covid test}}{444,159 \text{ migrants per fiscal year}} = 100 \text{ units of effectiveness}$$

Consistency with American Values: High (8)

This option would improve justice for asylum seekers by enabling them to have their day in court. This option could potentially lead to large numbers of migrants approaching the border, leading to unrest and strain on border officials. However, this option would not affect internal national security or the extent to which migrants’ backgrounds are scrutinized. The option receives a 3 for upholding American values, a 2 for maintaining border security, and a 3 for maintaining national security.

Alternative 4: Processing MPP Migrants Removed *in Absentia* and Evaluating the Technological Success of the MPP Phase-Out.

Main Policy Changes: This alternative recommends that the Biden administration establish a second phase of the MPP termination process that processes the 30,773 MPP migrants given removal orders *in absentia* (“Details on MPP…”, 2021). This option also proposes establishing a structured evaluation system to determine the success of MPP’s rollback, particularly in relation to the online registration program.

While Phase 1 of the Biden Administration’s termination of the MPP program addresses migrants with active court cases, Phase 1 does not address migrants who received deportation orders *in absentia*. Because the U.S. government often had no way to contact migrants once they sent asylum seekers back to Mexico, many asylum seekers missed their court dates and were given removal orders. Due to the dangerous conditions that asylum seekers experienced while waiting in Mexico, some asylum seekers were even in the custody of kidnappers at the time of their court hearings—these individuals still received *in absentia* removal orders (“Recommendations to end...” 2021). According to an Amici Curiae brief filed with the EOIR Board of Immigration Appeals, many migrants in the MPP program never received written or oral notice of their court hearings in their native languages, and DHS errors often caused asylum seekers to fail to show at their hearings, resulting in these *in absentia* orders (“CLINIC and partners...,” 2020).

This option would expand the process used for Phase 1 migrants to Phase 2 migrants issued *in absentia* orders. This option should be fairly easy to implement, since Phase 1 has already established the infrastructure needed for processing migrants in these numbers. The Biden administration has also already expressed support for identifying and processing migrants who, when faced with the prospect of waiting indefinitely in Mexico, returned to their home countries and were removed *in absentia* (Narea, 2021). Doing so would require the administration to direct

DHS lawyers, DOJ immigration judges, and USCIS asylum officers that “an asylum seeker’s return to his or her home country after being subjected to MPP should not on its own be considered evidence that the asylum seeker lacks a well-founded fear of persecution or torture” (“Recommendations to end…”, 2021).

Expanding asylum processing to asylum seekers given removal orders *in absentia* could raise a number of equity issues regarding migrants that the MPP courts already deported or denied asylum. Under this policy option, these migrants would not automatically receive a second chance at asylum since the courts have already ruled on their cases. However, the Biden administration could eventually consider offering this last group of migrants a similar processing timeline once this Phase 2 is complete (“HRW Letter…”, 2021).

Given the relatively small number of migrants whom Biden’s MPP termination plan currently seeks to process (around 25,000), this policy could prove a useful testing ground for online technology platforms that register migrants. This alternative recommends that the DHS conduct a thorough post-mortem report on the role of technology in MPP’s elimination, including interviews with stakeholders such as the online registration platform’s developers, the international organizations that assisted asylum seekers in registering online, and the asylum seekers themselves. If the Biden administration determines that the online registration platform was successful, it could consider implementing this as a more widespread, efficient means of communicating with asylum seekers while they wait for their court dates, reducing the level of uncertainty and fear that migrants experience throughout the lengthy process.

Evaluating Option 4 Outcomes

Asylum Seeker Well-being: High (8)

This option would attempt to make amends for one of the most adversarial aspects of the Trump administration’s changes to the asylum process—the Migrant Protection Protocols program. This option would give asylum seekers who had been issued *in absentia* removal orders a fair chance at asylum, thereby upholding asylees’ due process rights. However, this option would not immediately extend the same processing to migrants who had been issued regular removal orders under MPP, perhaps raising questions regarding the equity of this option. This option receives a 2 for making the asylum process less adversarial, a 3 for keeping migrants from dangerous conditions, and a 3 for satisfying asylum seekers’ due process rights.

Viability: High (13)

The Biden administration has already expressed support for processing MPP migrants with *in absentia* removal orders into the U.S. Many immigration advocacy organizations have called on the Biden administration to do so as well. This option would not require significant changes to DHS procedures, immigration courts, and staff, as the Biden administration has already set up all the necessary protocols and infrastructure to process MPP migrants with current asylum cases in Phase 1 of MPP’s termination. This option might require some marginal amount of new funding to continue registering and Covid-testing migrants through international organizations. This option receives a 2 for public/governmental support, a 3 for minimal changes to DHS procedure, immigration courts, and staff, and a 2 for new funding.

Cost Effectiveness: 1825 units

This option would benefit the 30,773 MPP migrants given removal orders *in absentia*, as well as a number of future migrants who might use similar online or telephone registration programs if this registration process proves successful (“Details on MPP…”, 2021). Given that all of these migrants will be monitored using alternatives to detention, which cost on average \$5 a day, we can calculate the following cost effectiveness ratio:

$$\frac{30,773 \text{ migrants} \times \$1,825 \text{ ATD cost per year}}{30,773} = 1825 \text{ units effectiveness}$$

Consistency with American Values: High (7)

This option would right the wrongs that the Trump administration inflicted on asylum seekers through the Remain in Mexico program by processing those with *in absentia* MPP orders. This option would also study best practices for executing online registration platforms that could help the government more efficiently correspond with asylum seekers in the future. This option could potentially cause rushes at the border— Homeland Security Secretary Alejandro Mayorkas has acknowledged that it will be a “very significant challenge” to encourage asylum seekers to wait for a chance to register for entry into the U.S. in order to avoid rushes at U.S. border entry-points (Wise, 2021). In general, this option would not compromise national security, although the use of alternatives to detention could create some small potential for asylum seekers to evade court dates. This option receives a 3 on extending principles of justice, a 2 on maintaining border security, and a 2 on promoting national security.

Alternative 5: Eliminating Asylum Case Backlogs and Immigration Court Biases Through a Comprehensive Series of Reforms.

Main Policy Changes: This alternative seeks to eliminate the asylum case backlog in order to reduce the amount of time that asylum seekers have to wait for asylum determinations. Steps to decreasing the backlog include creating a parallel track to the “last-in-first-out” (LIFO) policy, increasing the number of immigration court judges and staff, and limiting the number of cases directed to immigration courts. In order to decrease institutional biases against asylum seekers’ cases, the Biden administration should also encourage EOIR to repeal judge performance metrics and grant immigration judges greater discretion.

This alternative recommends that the Biden administration take a number of simultaneous steps to reduce the backlog, which contributes to longer periods of uncertainty for migrants who are seeking protection in the U.S. First, the Biden administration could create a “parallel track” to the LIFO policy that begins processing migrants at the “other end of the backlog, focusing on the cases that have been waiting longest” or those that involve children (“Designing a Trauma-Informed Asylum System…”, 2021). Second, the Biden administration should work with Congress to designate funding for increasing the number of staff needed at all points of the asylum process, from case officers who conduct credible fear interviews to immigration court judges and staff. Third, the Biden administration could direct the DHS to limit the number of asylum cases that need to be resolved in immigration court by settling jurisdiction issues and small discrepancies through USCIS, not the courts (“Designing a Trauma-Informed Asylum System…”, 2021). The DHS could conduct an internal review to determine which parts of the asylum investigation process are necessary and which could be streamlined.

While the Biden administration has already promised to double the number of immigration judges, court staff, and interpreters within the court system, this increase in staff will be more effective when paired with cultural reforms in both the DHS and the DOJ. Under the Trump administration, several immigration courts established “asylum-free zones,” or areas where judges denied almost all asylum requests (Van Fossen & Pena, 2021). Additionally, Trump-era “enforcement-oriented performance metrics for immigration judges” forced judges to decide cases more quickly in order to keep their jobs (Van Fossen & Pena, 2021; Chen, 2020). Even though judges were forced to complete at least 700 cases a year to get a “satisfactory” rating, the number of pending cases doubled from 600,000 to 1.3 million themselves (“Panelists debate...”, 2018; Chen, 2020). This alternative proposes two key actions to reform the cultural ways in which the DHS and DOJ are biased against asylum seekers, harming their ability to begin new lives in the U.S. after prolonged waiting periods. First, the DOJ should repeal judge performance metrics that prioritize immigration enforcement over the well-being of the asylum seeker (Aguilar, 2021). Doing so would ensure that every asylum seeker’s case is given the due diligence it deserves. Second, the DHS should grant immigration judges greater discretion to dismiss cases of asylum seekers that do not pose a flight or security risk (Aguilar, 2021).

Many immigration court experts have also suggested that the Biden administration should also move the immigration courts out from under the Department of Justice’s Executive Office for Immigration Review (EOIR), establishing the courts as an independent entity in and of themselves (“Panelists debate...”, 2018). While doing so could help address public perceptions that the courts are unfair due to high levels of politicization, this structural change would be difficult to implement and is not considered here as a result (“Panelists debate...”, 2018).

Evaluation Option 5 Outcomes

Asylum Seeker Well-being: High (7)

This option would reduce the psychological toll that long waiting periods for asylum can take on asylum seekers’ mental health. This option would also make the asylum system less adversarial by permitting USCIS, not immigration courts, to resolve small discrepancies in case information. By eliminating judge performance metrics that incentivize asylum denials, this alternative could potentially reduce the number of migrants who are sent back to dangerous conditions and increase asylum seekers’ access to fair and timely trials. This option receives a 3 for making the asylum system less adversarial, a 1 for minimizing sending migrants back to dangerous conditions, and a 3 for protecting asylum seekers’ due process rights.

Viability: Medium (7)

52% of the American public believes it is very important for the U.S. to increase the number of judges handling asylum cases (“Public’s Priorities...”, 2019). The growing asylum case backlog has attracted attention over the years, perhaps creating a window of opportunity for action. This option would require significant changes to immigration courts and would require large numbers of new staff and funding. However, this option would not require significant changes to DHS procedure. This option receives a 3 for public support, a 3 for minimal changes to DHS procedure, a 0 for minimal changes to immigration court procedure, a 1 for new funding, and a 0 for minimal numbers of new staff.

Cost Effectiveness: 184.76 units

Many aspects of this option, such as giving judges greater discretion, limiting the types of cases brought to immigration court, and removing Trump-era judge performance metrics would cost little to no additional funds. However, increasing immigration court judges and staff would cost a significant amount of new funds. On the campaign trail, the Biden administration promised to double the number of immigration judges, court staff, and interpreters within the court system. In the first quarter of 2019, there were 414 immigration judges (“FY 2020 Congressional Budget Submission,” 2019). In the FY2019 budget request, the EOIR proposed spending \$67.4 million on 390 judges and support staff, or roughly \$165,128 per person (“U.S. Department of Justice...”, n.d.). USCIS currently has a backlog of around 370,000 asylum cases that have not yet been processed (“Designing a Trauma-Informed Asylum System...”, 2021). According to the EOIR, “Each IJ [Immigration Judge] and support staff could help reduce the pending caseload by approximately one percentage point once it is fully staffed and operational” (“FY 2020 Congressional Budget Submission,” 2019).

$$\frac{414 \text{ new judges} \times \$165,128 \text{ per person}}{370,000 \text{ asylum seeker cases backlogged}} = 184.76 \text{ units effectiveness}$$

Consistency with American Values: High (9)

This option increases the chances that asylum seekers will receive a fair trial in a timely manner. It does not negatively impact border security or national security. This option receives a 3 on enforcing American values and a 3 on border security and national security.

Outcomes Matrix

The outcomes matrix below records the scores that each policy alternative received on each of the aforementioned policy criteria. Each of these criteria have been standardized to fit on a range of 0-5, with 0 being the lowest possible score and 5 being the highest possible score (*see Appendix B2 for unstandardized scores*). The row immediately beneath the criteria displays the total possible point value of each criterion before standardization. For example, if an option scored a five out of nine for asylum seeker well-being, this value of .56 would have been multiplied by 5 to yield a standardized value of 2.8.

Standardized Outcomes Matrix					
	Asylum Seeker Well-being	Viability	Cost Effectiveness	Consistency with American Values	Total (Standardized)
Max. Points	5	5	5	5	20
Status Quo	0	4.33	3	3.33	10.66
Ending Prolonged Detention	3.89	4	1.5	3.33	12.72
Credible Fear Interview and Expedited Removal	4.44	1	0	5	10.44
Title 42	5	3	5	4.44	17.44
MPP Termination	4.44	4.33	1.5	3.89	14.16
Asylum Case Backlogs and Immigration Court Reforms	3.89	2.33	4	5	15.22

Recommendation

This report recommends that the Biden administration retract all Title 42 restrictions on asylum seekers. Though many questions remain regarding how much longer the pandemic will persist before things “return to normal,” the growing spread of infectious diseases due to urbanization and globalization require the United States to find a humane formula for asylum processing during public health crises (Hilsenrath, 2020). This option has the potential to benefit the greatest number of migrants, since the border is effectively sealed to all adults’ requests for asylum until pandemic-related restrictions are lifted.

Potential Challenges

While retracting Title 42 restrictions is a relatively straightforward administrative process, ensuring that all migrants are properly quarantined and tested for COVID-19 is a much more difficult task. For example, in Phase 1 of the Biden administration’s MPP termination, every asylum seeker is given a test for COVID-19 by the International Organization for Migration within 24 hours of entering the country. Asylum seekers who test negative are quarantined separately from those who test positive in DHS facilities until all the necessary paperwork is

completed for their release. Given the numbers of migrants who would become eligible for asylum if Title 42 restrictions were lifted, the DHS may not have the capacity to quarantine all asylum seekers following Covid test results, potentially enabling migrants who are positive for COVID-19 to infect others. Additionally, conducting testing on this large of a scale would be a challenge for the DHS. Some of the options for funding and requiring this testing could include:

1. Creating a cost-sharing agreement with the Mexican government in which both governments help source and pay for diagnostic tests. Determining whether Mexico could help provide quarantine spaces.
2. Requiring migrants to take a Covid test in Mexico within 24 hours of crossing the border. This option could potentially enable migrants to become infected with COVID-19 between testing and entering the U.S., but would relieve the DHS of creating a testing network.
3. Enlisting public health NGOs and international organizations that could connect the U.S. government to Covid testing resources.
4. Enabling CBP officers to conduct rapid testing in the field to minimize contamination within detention centers.

Additionally, the Biden administration could receive significant public pushback for allowing migrants to begin entering the country again. While public health experts have doubted the efficacy of Title 42 ever since the Trump administration implemented the new regulation through the HHS and CDC, the American people may view this policy as contradictory to Biden's more heavy-handed approach on pandemic policy.

Unintended Consequences

Ending Title 42 restrictions could potentially sap resources from the ongoing termination of the MPP program. DHS border officials might prefer to complete Phase 1 of the MPP termination process before considering processing any other subcategories of asylum seekers.

Implementation

Implementation Overview

In order to repeal Title 42 without negatively impacting Covid case numbers in the U.S., the Biden administration will need to devise a system for testing migrants for COVID-19 and releasing asylum seekers into the U.S. while they wait for their court dates. The Biden administration has already experimented with a test-and-release model on the 25,000 migrants with active cases in the terminated Migrant Protection Protocols (MPP) program. Throughout this process, the public and the media have consistently misrepresented the Covid testing process for migrants, and state governments have refused to assist in testing efforts. In this section, I outline the current COVID-19 testing process for MPP asylum seekers, address potential implementation roadblocks, and list a number of action items for both the Biden administration and my client Las Americas to pursue throughout the implementation stage.

Current COVID-19 Testing Procedures for MPP Asylum Seekers

In processing MPP migrants, DHS notes that it prioritizes the “public health and safety of our communities, U.S. government personnel, and migrants” during all stages of asylum requests (“Migrant Protection Protocols,” 2021). According to the Department of Homeland Security, the

following steps are used to test MPP asylum seekers for COVID-19 (“Migrant Protection Protocols,” 2021):

Once confirmed as having a pending immigration court case, individuals will be contacted by facilitating organizations and provided instructions for accessing a designated staging location, where they will complete a health questionnaire and undergo testing for COVID-19. Individuals who test negative will be sheltered and receive further assistance in preparation for U.S. processing. Those who test positive will be supported by facilitating organizations to isolate and/or seek treatment in line with the policy of the relevant local health authority in Mexico. Following isolation and screening, such an individual will again be eligible for facilitated arrival at a designated port of entry.

DHS notes that it is implementing all recommended CDC precautions against COVID-19, including mandatory face coverings and social distancing, antigen testing for COVID-19, temperature checks, and health questionnaires to determine whether asylum seekers have been exposed to the virus.

Misperceptions Regarding COVID-19 Testing for MPP Migrants

Misinformation could create an even larger public opinion problem for the Biden administration and could complicate attempts to repeal Title 42 restrictions. Although the Biden administration has made minimal changes to migrants’ Covid testing requirements since the end of the Trump administration, misinformation has abounded regarding the Biden administration’s testing efforts. On February 9, a Texas sheriff alleged in a conversation with Fox News host Tucker Carlson that the government was releasing detained migrants without testing them for COVID-19. Following this exchange, groups on Facebook called for Biden to be impeached and claimed that the Biden administration had committed “murder or attempted murder” (Spencer, 2021).

Resistance from State Governments

State governments might also resist expanding Title 42, condemning the associated influx of migrants and testing that this option would require. For example, Texas’ Governor Greg Abbott has sparred with the Biden administration over COVID-19 testing procedures for migrants. Governor Abbott refused help from the federal government to provide coronavirus tests to migrants before they are released from detention, arguing that it is the federal government’s job to provide this resource (Svitek & Aguilar, 2021). If Governor Abbott had agreed to this arrangement, this assistance would have enabled the DHS to use Federal Emergency Management Agency funds to empower local officials to test migrants.

Governor Abbott also accused the Biden administration of “releasing immigrants in South Texas that have been exposing Texans to Covid,” citing a report that 108 migrants had tested positive for COVID-19 since being released from federal detention facilities in Brownsville, Texas (Svitek & Aguilar, 2021). The Governor stated, “Instead of doing their job, the Biden Administration suggested it did not have the sufficient resources and, remarkably, asked Texas to assist them in aiding their illegal immigration program. Texas refused” (Svitek & Aguilar, 2021). Despite Governor Abbott’s claims, the Texas Division of Emergency Management has already provided around 40,000 Covid tests to Brownsville, McAllen, Laredo, and Del Rio testing centers for migrants (Svitek & Aguilar, 2021).

Implementation Plan for the Biden Administration

Given the misinformation problem and state government challenges to expanding Covid testing for MPP migrants, the Biden administration should consider involving the following stakeholders and minimizing the associated implementation risks:

Stakeholders

Local and state government assistance will be necessary to conduct wider-spread testing than is currently conducted under the MPP termination plans. Overcoming resistance from state and local officials will be essential for expanding testing levels, and precedent exists for such efforts. According to White House press secretary Jen Psaki, “The federal policy is for coronavirus testing for migrants released from custody ‘to be done at the state and local level with the help of NGOs and local governments’” (Svitek & Aguilar, 2021). Increasing federal monetary incentives given to the states or collaborating more closely with local governments near the border (as opposed to state governments) could help the Biden administration avoid public confrontations such as the one with Governor Abbott.

NGOs and international organizations could also assist in expanding testing availability to migrants. For example, UNHCR and the International Organization for Migration have served as liaisons between migrants and NGOs that provide Covid testing throughout the MPP termination process. Engaging these same stakeholders and soliciting suggestions for other NGOs who might be willing to help with Covid testing could ensure the government has the capacity to process larger numbers of migrants.

Finally, enlisting help from the Mexican government could ease some of the burden of testing and processing migrants effected by Title 42. The Biden administration could consider a number of approaches for engaging the Mexican government, including providing funds to the Mexican government to expand quarantine capacity in Mexico or drafting a cost-sharing agreement to get Mexico to pay partial costs for migrants’ Covid tests.

Risks and Opportunities

The number of migrants traveling to the U.S.-Mexico border has been increasing since April of 2020 (Romero, 2021). The Department of Homeland Security has recently had to enlist FEMA’s assistance in order to transport and house record numbers of unaccompanied children arriving at the border (Romero, 2021). Stopping Title 42 deportations could overwhelm DHS quarantine and detention facilities. Before the Biden administration can successfully repeal Title 42, the DHS should look for ways to expand quarantine facilities. The Biden administration should also direct the DHS to detain only those migrants who might pose a flight or security risk. DHS should release all other migrants to minimize overcrowding in detention facilities.

In the worst-case scenario, repealing Title 42 could lead further rushes at the border. While the U.S. government can pace how many MPP migrants it processes each day, it will not have this same planning advantage with Title 42 migrants. Setting up small consular offices throughout Mexico could enable migrants to report their intentions to travel to the U.S. as they are on their journey to the border. These offices could incentivize migrants to offer these reports by connecting migrants with medical or food resources available in the area. These reports could give border officials the ability to anticipate and plan for days with higher numbers of requests

for asylum. However, these consular offices might take too long to set up to gather information in a timely and effective manner.

Finally, the increasing rate of Covid vaccinations within the U.S. might eventually eliminate the need for such careful planning for testing and quarantine spaces. As more and more U.S. citizens get vaccinated, the Biden administration could consult with the Department of Health and Human Services to determine when it might be appropriate to begin offering vaccines to asylum seekers at the U.S.-Mexico border.

Advocacy Plan for Las Americas

Las Americas should use the following action plan to build support within the Biden administration and amongst the public for ending Title 42 restrictions (*see Table 2*). Las Americas should conduct each of these efforts concurrently to maximize awareness of this recommendation at the local, state, and federal levels.

Table 2: Action Plan for Las Americas

1. Initiate a Social Media Campaign.

- Initiate a **social media campaign** to build grassroots support for eliminating Title 42 restrictions.
- Make an **emotional appeal**, focusing on telling the stories of migrants who have been deported under Title 42.
- Make a **scientific appeal**, providing a platform for public health experts to explain why Title 42 restrictions are unnecessary for curbing the pandemic's spread.
- The social media campaign could also be used to prompt citizens to **contact their members of Congress and state and local officials** about the issue.

2. Organize a Congressional Briefing and Secure Meetings with State and Local Policymakers.

- Communicate information about Title 42 to Congressional staffers by hosting a virtual Congressional briefing. Staff members from both the House and Senate sides should be invited, particularly staff members of legislators from states near the border. To plan this briefing, Las Americas should **seek approval from the Congressional Planning Committee and arrange for migrants or representatives from Las Americas and other NGOs to speak**.
- In a similar manner, Las Americas should **secure meetings with policymakers in state and local government**, particularly in Texas where Las Americas is based, to begin explaining why repealing Title 42 is necessary.

3. Send a Letter to the Biden Administration from a Coalition of NGOs.

- Las Americas should **draft a letter to the Biden administration** explaining why repealing Title 42 is crucial for advancing a more humane immigration policy in the U.S.
- Las Americas should leverage its connections with other NGOs, advocacy groups, and public health institutions to get a **broad coalition of supporters to co-sign the letter** to the President.
- Las Americas could **compile a list of NGOs** willing to assist in expanding migrant Covid testing efforts. Including this list in the letter would demonstrate to the Biden administration that nongovernmental actors are willing to provide assistance in order to end Title 42.

Conclusion

Securing the Biden administration's approval for rolling back Title 42 restrictions is the first step in implementing this plan. From there, the Biden administration will need to collaborate with state and local policymakers as well as NGOs and international organizations to safely Covid-test and release migrants into the U.S. The Biden administration may also need to work with the Mexican government to expand quarantine and testing capacity. With an accelerating rate of vaccinations in the U.S., mass vaccination campaigns of migrants could eventually be a possibility.

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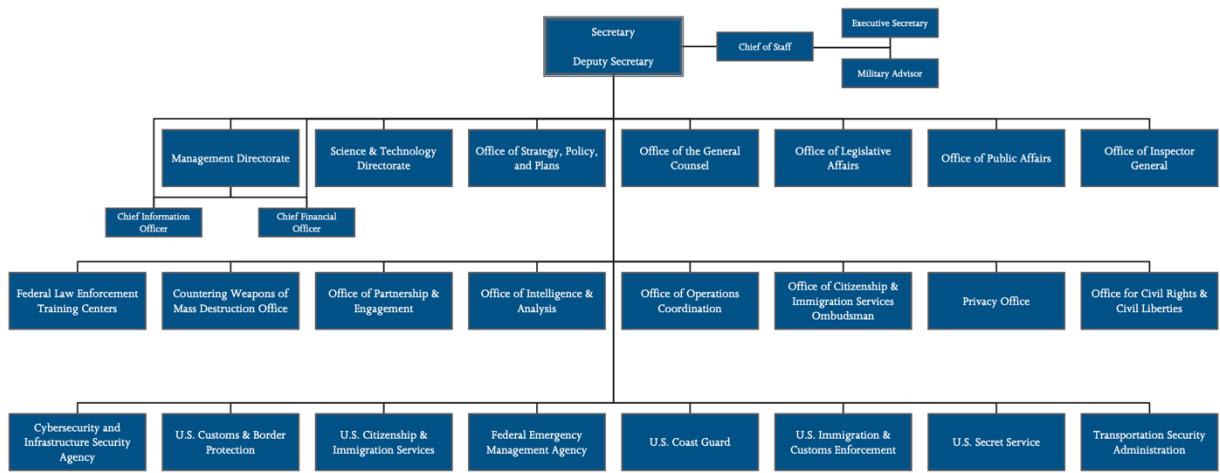
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Appendix

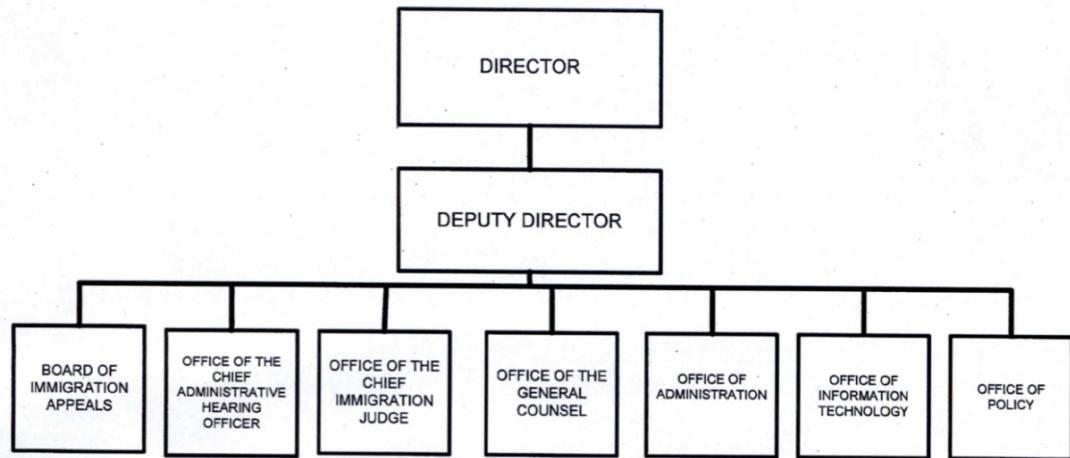
Appendix A1: Department of Homeland Security Organizational Chart (“Organizational Chart,” 2015)

U.S. Department of Homeland Security



Appendix A2: Executive Office for Immigration Review Organization Chart (“Executive Office for Immigration Review...”, 2017)

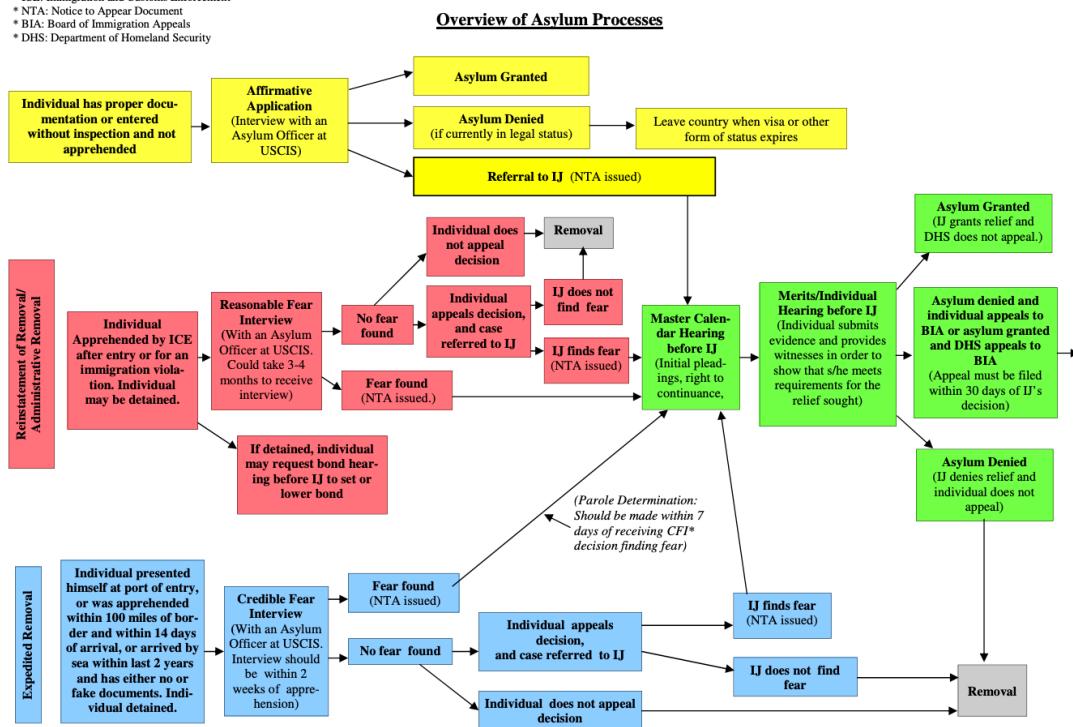
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW



Approved by:  Date: 7/26/17
Jefferson B. Sessions III
Attorney General

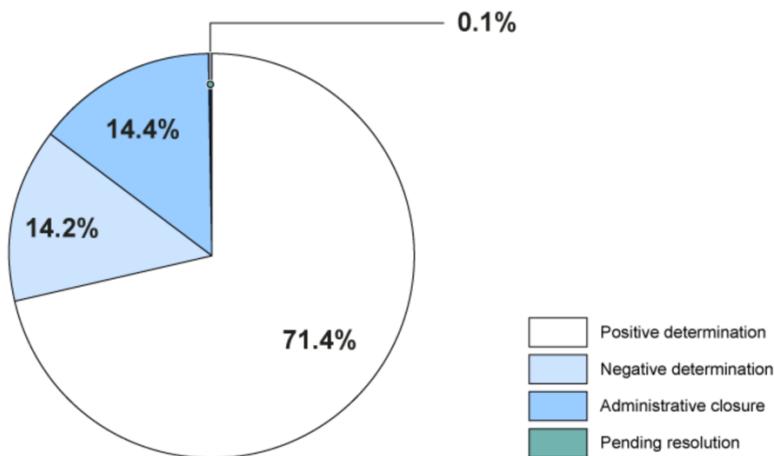
Appendix A3: Roadmap of the Asylum Process (Dunsmuir, 2010)

* USCIS: U.S. Citizenship and Immigration Services
 * IJ: Immigration Judge
 * CFI: Credible Fear Interview
 * ICE: Immigration and Customs Enforcement
 * NTA: Notice to Appear Document
 * BIA: Board of Immigration Appeals
 * DHS: Department of Homeland Security



Appendix A4: Credible and Reasonable Fear Screenings Results (“Immigration: Actions needed...”, 2020)

Outcomes of U.S. Citizenship and Immigration Services (USCIS) Credible and Reasonable Fear Screenings, Fiscal Year 2014 through the First Two Quarters of 2019



Source: GAO analysis of USCIS data. | GAO-20-250

Appendix A5: Individuals Granted Asylum Affirmatively or Defensively Between 2017 and 2019 (Baugh, 2020)

Defensive Asylum Cases Received (EOIR) by Country of Nationality: Fiscal Years 2017 to 2019

(Ranked by 2019 country of nationality)

Country	2017		2018		2019	
	Number	Percent	Number	Percent	Number	Percent
Total.	144,662	100.0	163,271	100.0	210,752	100.0
Guatemala	23,935	16.5	26,965	16.5	41,365	19.6
Honduras	21,269	14.7	22,014	13.5	31,649	15.0
Mexico	22,473	15.5	24,752	15.2	30,357	14.4
El Salvador	38,029	26.3	32,233	19.7	29,779	14.1
Venezuela.	418	0.3	5,246	3.2	11,623	5.5
India	4,729	3.3	7,831	4.8	11,019	5.2
China, People's Republic	6,309	4.4	8,091	5.0	6,838	3.2
Cuba	584	0.4	1,154	0.7	5,491	2.6
Ecuador	4,000	2.8	4,019	2.5	4,431	2.1
Nicaragua.	611	0.4	736	0.5	3,857	1.8
All other countries, including unknown .	22,305	15.4	30,230	18.5	34,343	16.3

Source: U.S. Department of Justice.

Affirmative Asylum Cases Filed (USCIS) by Country of Nationality:

Fiscal Years 2017 to 2019

(Ranked by 2019 country of nationality)

Country	2017		2018		2019	
	Number	Percent	Number	Percent	Number	Percent
Total.....	139,917	100.0	106,128	100.0	96,952	100.0
Venezuela.....	27,576	19.7	28,426	26.8	25,210	26.0
Guatemala.....	12,185	8.7	10,192	9.6	9,684	10.0
China, People's Republic.....	16,810	12.0	8,181	7.7	9,640	9.9
El Salvador.....	11,941	8.5	9,140	8.6	5,951	6.1
Honduras.....	7,005	5.0	6,143	5.8	5,609	5.8
Mexico.....	11,931	8.5	6,618	6.2	4,588	4.7
Haiti.....	3,872	2.8	2,958	2.8	3,278	3.4
India.....	4,039	2.9	2,909	2.7	2,957	3.0
Colombia.....	2,659	1.9	2,571	2.4	2,897	3.0
Nigeria.....	2,238	1.6	3,325	3.1	2,760	2.8
All other countries, including unknown..	39,661	28.3	25,665	24.2	24,378	25.1

Source: U.S. Department of Homeland Security.

Individuals Granted Asylum Affirmatively or Defensively by Country of Nationality:

Fiscal Years 2017 to 2019

(Ranked by 2019 country of nationality)

Country	2017		2018		2019	
	Number	Percent	Number	Percent	Number	Percent
Total.....	26,199	100.0	37,567	100.0	46,508	100.0
China, People's Republic.....	5,550	21.2	6,794	18.1	7,478	16.1
Venezuela.....	550	2.1	5,849	15.6	6,821	14.7
El Salvador.....	3,453	13.2	2,919	7.8	3,212	6.9
Guatemala.....	2,948	11.3	2,322	6.2	2,591	5.6
India.....	671	2.6	1,301	3.5	2,259	4.9
Egypt.....	1,154	4.4	1,566	4.2	2,301	4.9
Honduras.....	2,040	7.8	1,998	5.3	1,819	3.9
Turkey.....	28	0.1	501	1.3	1,799	3.9
Mexico.....	1,028	3.9	1,344	3.6	1,593	3.4
Russia.....	347	1.3	883	2.4	1,408	3.0
All other countries, including unknown ..	8,430	32.2	12,090	32.2	15,227	32.7

Note: Data exclude follow-to-join asylees.

Source: U.S. Department of Homeland Security and U.S. Department of Justice.

Individuals Granted Asylum Affirmatively by Country of Nationality:

Fiscal Years 2017 to 2019

(Ranked by 2019 country of nationality)

Country	2017		2018		2019	
	Number	Percent	Number	Percent	Number	Percent
Total.	15,639	100.0	24,382	100.0	27,643	100.0
Venezuela.	482	3.1	5,726	23.5	6,320	22.9
China, People's Republic	2,822	18.0	3,747	15.4	4,027	14.6
Egypt	1,014	6.5	1,402	5.8	2,156	7.8
Turkey.	15	0.1	475	1.9	1,739	6.3
Russia	288	1.8	765	3.1	1,109	4.0
Guatemala	1,998	12.8	1,307	5.4	1,047	3.8
El Salvador.	2,112	13.5	1,148	4.7	897	3.2
Mexico	477	3.1	717	2.9	791	2.9
Nigeria	123	0.8	461	1.9	785	2.8
Honduras	1,085	6.9	817	3.4	532	1.9
All other countries, including unknown .	5,223	33.4	7,817	32.1	8,240	29.8

Note: Data exclude follow-to-join asylees.

Source: U.S. Department of Homeland Security.

Individuals Granted Asylum Defensively by Country of Nationality:

Fiscal Years 2017 to 2019

(Ranked by 2019 country of nationality)

Country	2017		2018		2019	
	Number	Percent	Number	Percent	Number	Percent
Total.	10,560	100.0	13,185	100.0	18,865	100.0
China, People's Republic	2,728	25.8	3,047	23.1	3,451	18.3
El Salvador.	1,341	12.7	1,771	13.4	2,315	12.3
India	457	4.3	951	7.2	1,921	10.2
Guatemala	950	9.0	1,015	7.7	1,544	8.2
Honduras	955	9.0	1,181	9.0	1,287	6.8
Mexico	551	5.2	627	4.8	802	4.3
Cuba	62	0.6	161	1.2	710	3.8
Cameroon.	219	2.1	312	2.4	657	3.5
Nepal.	290	2.7	469	3.6	603	3.2
Venezuela.	68	0.6	123	0.9	501	2.7
All other countries, including unknown .	2,939	27.8	3,528	26.8	5,074	26.9

Note: Data exclude follow-to-join asylees.

Source: U.S. Department of Justice.

**Individuals Granted Asylum Affirmatively by Age, Sex, and Marital Status:
Fiscal Years 2017 to 2019**

Characteristic	2017		2018		2019	
	Number	Percent	Number	Percent	Number	Percent
AGE						
Total.....	15,639	100.0	24,382	100.0	27,643	100.0
0 to 17 years	4,905	31.4	5,704	23.4	6,119	22.1
18 to 24 years	3,041	19.4	3,892	16.0	3,832	13.9
25 to 34 years	3,381	21.6	6,351	26.0	7,073	25.6
35 to 44 years	2,611	16.7	5,180	21.2	6,384	23.1
45 to 54 years	1,192	7.6	2,291	9.4	2,920	10.6
55 to 64 years	357	2.3	700	2.9	1,013	3.7
65 years and over.....	152	1.0	264	1.1	302	1.1
SEX						
Total.....	15,639	100.0	24,382	100.0	27,643	100.0
Female.....	7,434	47.5	11,960	49.1	13,552	49.0
Male	8,205	52.5	12,422	50.9	14,088	51.0
Unknown	-	-	-	-	3	-
MARITAL STATUS						
Total.....	15,639	100.0	24,382	100.0	27,643	100.0
Married	5,169	33.1	9,715	39.8	11,800	42.7
Single.....	9,914	63.4	13,569	55.7	14,442	52.2
Other*	556	3.6	1,098	4.5	1,401	5.1

- Represents zero or rounds to zero.

* Includes persons who were divorced, separated, widowed, or of unknown marital status.

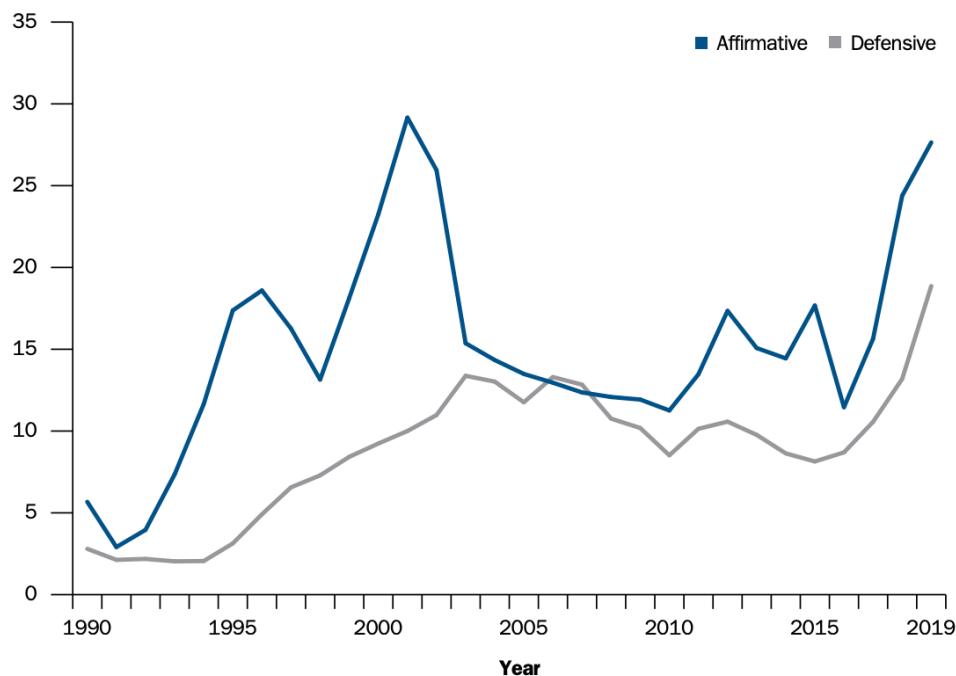
Note: Data exclude follow-to-join asylees.

Source: U.S. Department of Homeland Security.

Appendix A6: Grants of Affirmative and Defensive Asylum Between 1990 and 2019 (Baugh, 2020)

Annual Grants of Affirmative and Defensive Asylum: Fiscal Years 1990 to 2019

Thousands

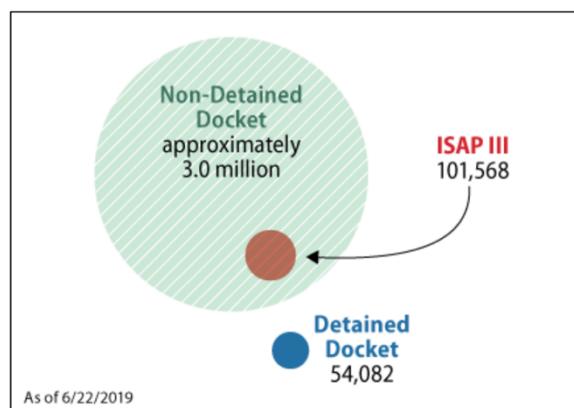


Note: Data exclude follow-to-join asylees.

Source: U.S. Department of Homeland Security and U.S. Department of Justice.

Appendix A7: ISAP III Enrollees (Singer, 2019)

Figure 1. ICE Caseload: Non-detained, Detained, and ISAP III Participants



Source: ICE Detention Management Statistics, as of June 22 2019, <https://www.ice.gov/detention-management>.

Appendix B2: Outcomes Matrix Before Standardization

Outcomes Matrix Before Point Standardization					
	Asylum Seeker Well-being	Viability	Cost Effectiveness	Consistency with American Values	Total
Max. Points	9	15	5	9	38
Status Quo	0	13	3	6	22
Ending Prolonged Detention	7	12	1.5	6	26.5
Credible Fear Interview and Expedited Removal	8	3	0	9	20
Title 42	9	9	5	8	31
MPP Termination	8	13	1.5	7	29.5
Asylum Case Backlogs and Immigration Court Reforms	7	7	4	9	27