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Commentaries
August 2021

Biden Administration Asylum Processing Revamp at the U.S. Border Could Be a Game Changer

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The policy blueprint the Biden administration has just outlined for fixing the nation's broken asylum system at the border is at once straightforward and potentially a game changer. Because it is being done through a regulation—the strongest legal footing to enact policy change short of legislation—its implementation cannot be immediate, due to the required public comment period before issuing a final rule. But it promises a fundamental shift aimed at ensuring the twin goals of meaningful humanitarian protection for those who are eligible for asylum and border control that supports safe, legal, and orderly migration in the face of flows across the U.S.-Mexico border that are currently anything but that.

At its simplest, the proposed rule unveiled Wednesday would shift asylum decisions from being made by immigration judges in courtrooms to being adjudicated in interviews with asylum officers specially trained to decide protection claims. At present, asylum officers decide asylum cases when they arise within the United States; in fiscal year (FY) 2020, they completed nearly 79,000 applications in the affirmative asylum caseload. The border has been treated differently because asylum applicants are already in removal proceedings for having crossed the border without authorization, and so they enter a separate and much slower “defensive asylum” process before the immigration courts. The proposed rule would permit border asylum cases to be decided by asylum officers, as all other asylum cases are, with immigration courts then serving more like an appellate body should a denied applicant seek review.

Asylum officers are part of the Asylum Division of U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security. They already do what is known as the credible-fear screening of those making claims for protection at a U.S. border to determine whether the person has a “significant possibility” of establishing eligibility for asylum. Asylum seekers who pass are then permitted to enter the country to present their case for protection before an immigration judge as a defense against deportation. Immigration judges are housed in the Executive Office for Immigration Review (EOIR) in the Justice Department.

Instead of screened-in cases being referred to immigration judges, where the entire process must begin anew—often years later because of backlogs—the new rule would authorize asylum officers to maintain jurisdiction over these cases and subsequently complete what is known as the full merits adjudication at a USCIS asylum office near the destination of the asylum seeker. As with immigration courts, asylum offices are located throughout the country.

The core idea is based on research and recommendations the Migration Policy Institute (MPI) made in a **2018 report** as a policy solution to make border case management more effective and timely. Under the new policy, asylum seekers found to merit protection will not be kept in limbo for years at a time while awaiting a final status determination. At the same time, those who may not have a strong asylum claim will have less incentive to apply for protection as a means of gaining U.S. entry, as often happens now,

since the cases take so long to be decided. The recent increase in arrivals at the U.S.-Mexico border, which are the latest in a series of periodic spikes, make this change all the more compelling.

Tackling Massive Immigration Court Backlogs

From a workload standpoint, the immigration court system is failing at its mission. Its caseload stands at an all-time high of more than 1.3 million cases. Nearly half (619,837) are asylum claims. Asylum applicants typically face court dates that are years away. Their cases have already undergone asylum officer screening and fact-finding relevant to the fuller merits review, but the process starts all over again once the courts take over.

Keeping border asylum cases with the Asylum Division capitalizes on the investment of time and expertise government agencies have already made, which enables meritorious cases to be resolved more quickly and uses limited resources—the time that asylum officers and immigration judges dedicate to asylum cases—more efficiently. In turn, the processing change will slow the rapid growth of the immigration court docket and enable the court system to manage its overall workload more effectively. This should interrupt a negative spiral that has further deepened backlogs and delays for all immigration court cases, whether asylum-related or not.

The delays in asylum adjudications have become chronic and forestall protection for those eligible for asylum while serving as an incentive for those without strong claims to also seek asylum. The current system allows people to stay in the United States for years while their cases are pending, and only rarely are people removed once their claims are resolved. Thus, today's asylum system is failing both by undermining U.S. obligations in domestic and international law to protect those fleeing from persecution and by undermining the ability to ensure orderly and predictable control of entries at the border.

An Already Trained, Professional Asylum Corps

Asylum officers are well suited to handle humanitarian protection decision-making since they already handle the affirmative asylum caseload. They are highly trained professionals, schooled in country conditions and interview techniques. Their sole responsibility is asylum determinations, one of the most sensitive, consequential areas of decision-making in the immigration system.

Unlike courtrooms, in which asylum cases are adversarial proceedings before a judge, with U.S. Immigration and Customs Enforcement attorneys serving as prosecutors, asylum officer determinations are made through an interview with the applicant (and counsel, if the applicant has representation) that is private and non-adversarial. The asylum officer interview is designed to fully elicit and assess the facts and circumstances of the individual's protection claims for remaining in the United States.

Since they are responsible solely for asylum decisions, asylum officers receive considerably more training on asylum matters than immigration judges and can readily tap research support that provides up-to-date, comprehensive information about country conditions relevant to asylum case determinations. The Asylum Division also employs rigorous quality assurance processes and requires supervisory review of all cases, leading to greater consistency in decision-making across asylum offices than occurs in immigration courts—where average approval rates by individual judges can vary from 0.9 percent of all cases to 96.7 percent. As such, asylum officer work closely parallels refugee eligibility determinations that USCIS refugee officers make abroad in applying the same statutory definition and policy guidance.

Under the Biden administration rule, asylum officers also would resolve two other protection claims against deportation: withholding of removal and relief under the Convention Against Torture. Currently, only immigration judges can resolve such claims. Thus, if a case is denied by an asylum officer and reviewed by immigration courts, all potential claims for relief would already have been heard, adding to the ability of immigration judges to better manage their caseloads.

For many years after the Asylum Division was established in the 1990s, it succeeded in demonstrating the self-correcting characteristics and dynamics of a healthy, effective system. New filings decreased as non-meritorious claims were rejected and approval rates increased, indicating that a larger share of the applications filed were strong claims for protection.

However, in more recent years, pressures from changing migration flows have hampered the Asylum Division's ability to keep up. Beginning in 2010, and especially since 2014, Asylum Division workloads have ballooned, as have those of the immigration courts. Since the proposed rule would add to the Asylum Division workload, it will take some time to achieve timely decisions on prospective border cases along with the existing affirmative asylum caseload. But with a pool of nearly 800 asylum officers, the Asylum Division has greater resources for taking on future border cases than the immigration courts, which presently have just over 500 judges. Both EOIR and USCIS need resource increases; the administration has requested these.

The Road Ahead

Timeliness and fairness must be the hallmarks of a functional, successful asylum system. Cases should be decided in months, not years; due-process protections must be in place. The new rule paves the way to get there. But other interlocking measures must also be incorporated.

These efforts have begun with Attorney General Merrick Garland having reinstated longstanding precepts that govern the substantive grounds for granting asylum, undoing the prior administration's actions to throttle asylum grants.

To more fully ensure fairness, the goal should be for all applicants to have access to legal services, initially through legal advice when formal representation is not possible, but ultimately through universal representation. Asylum seekers are not entitled to legal counsel at government expense. The administration has requested a small amount of funding from Congress (\$15 million) to broaden the availability of legal resources offered by the nongovernmental community and is encouraging state and local governments, philanthropies, and other civil-society actors to scale up representation for asylum seekers.

A system of timely, fair determinations must also include humane repatriation processes. In the case of asylum seekers from Central America, for example, some will not be successful in their asylum claim. That does not mean, however, that they do not face desperate conditions in their home countries. Thus, repatriation should aim at connecting returning migrants with services that can strengthen safety and livelihoods, as well as avert return migration. Such efforts are embryonic at present. However, they are part of the administration's overall approach to managing migration from the region.

In recent weeks, the administration has rolled out more detailed strategies for regional collaborative migration management and for addressing root causes of migration from Central America. The plans articulate smart, necessary policies for bringing order and legality to flows that have surged with regularity every few years but have been addressed only with ad hoc measures. The strategies focus in particular on humanitarian protection and ways in which the United States can facilitate protection for those in need from the region, support the growth of nascent asylum systems in Mexico and Central America, and involve countries such as Canada in protection efforts. In addition, the administration is trying to expand labor pathways for those whose primary motivation for migrating is economic. These and other efforts, including restarting an in-country processing program for Central American children, all signify ways the administration is leading and building a migration framework that meets today's challenges and those that lie ahead.

Taken together, these changes require longer time horizons and sustained collaborative efforts within the U.S. government and among neighbor nations. While they may test the patience of an anxious public, such strategies represent the only reliable course for building resilience and enabling the U.S. asylum system to address both its current, pressing challenges and better respond in future situations of influx.

Absent such an integrated, systemic approach, the asylum crisis will persist and continue to undermine both vital humanitarian protection and immigration enforcement aims. The Biden administration's new rule represents a fundamental retooling of the asylum system that preserves asylum as a bedrock element of the U.S. immigration system while also recognizing that a secure border and deterring unlawful crossings are legitimate and necessary attributes of an effective, credible immigration system.

Links

- [Rethinking U.S. Immigration Policy initiative](#)
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