

## Fair, Timely, and Less-Traumatizing Asylum Process

The backlogs and delays at the U.S. Citizenship and Immigration Services (USCIS) [Asylum Office](#) and the [immigration courts](#) have reached new record highs, as long-standing challenges and pandemic-related adjournments continue, leaving refugees waiting years to have their asylum applications resolved and reunite their separated families. Over the course of its four years, the Trump administration [decimated](#) the U.S. asylum system through policies that [rigged](#) adjudications against asylum seekers and [exacerbated backlogs](#) and [delays](#) that had grown over many years. The Biden administration must take urgent action to address these escalating challenges.

As Human Rights First has detailed in a [series](#) of [reports](#), the delays and backlogs at the [Asylum Office](#) and immigration courts create enormous suffering for asylum seekers, often subjecting them to prolonged separation from their families and leaving their children and spouses in danger abroad. Many asylum seekers are unable to secure employment or pursue educational opportunities, all the while living in fear that they could be deported to persecution or torture because their asylum cases have not yet been resolved.

Over the last year, Human Rights First has repeatedly detailed, and shared with the Biden administration, recommendations for addressing these backlogs and strengthening asylum processing so that it is more fair, timely, humane, and orderly. These recommendations have been outlined in [blueprints](#), a [report](#) on Asylum Office backlogs, a [paper](#) on improving fairness in immigration courts, public health [measures](#) for processing cases during the pandemic, and in January 2022 [recommendations](#) to the Biden administration at its one-year anniversary. This paper updates prior recommendations, taking into account steps already taken by the Biden administration as well as missteps that thwart due process and refugee protection.

### Background: Backlog Growth and Exacerbation

While delays and backlogs in the Asylum Office and immigration courts have slightly different causes, both were prompted by [failures](#) over multiple administrations and Congresses to properly staff adjudicatory functions – while staffing and funding for “enforcement” actions skyrocketed – and as adjudicatory agencies adopted [policies](#) aimed at sending “deterrent” messages to asylum seekers.

The Asylum Office backlog exploded under the Obama administration, which increased the use of expedited removal and redirected Asylum Officers from adjudicating asylum cases to instead conduct fear screenings. This backlog continued to grow as the Trump administration diverted Asylum Division resources to block and turn back refugees seeking U.S. asylum protection at the U.S.-Mexico border. In addition, long backlogs and delays in the adjudication of [employment authorization](#) applications and asylee family reunification [petitions](#) have had devastating impacts on individuals and families seeking protection in the United States.

The backlog in the immigration courts was initially triggered by lagging resources, a chronic imbalance in funding for adjudicatory (as opposed to “enforcement”) functions and a three-year hiring freeze, as Human Rights First detailed in reports issued in [2016](#) and [2017](#), and logjams grew further as incoming cases rose. The backlog was exacerbated by both Obama and [Trump](#) administration policies that sought to send a deterrent message by imposing expedited dockets and other policies that actually increased delays and undermined the ability of judges to efficiently manage their dockets. Studies conducted by the [Marshall Project](#) and the [Migration Policy Institute](#) detailed how the Trump administration repeatedly limited immigration judges’ ability to manage their dockets and further complicated adjudications with rulings that sought to limit asylum eligibility. Also contributing to the immigration court backlog is the Asylum Office’s referrals of thousands of cases that could have been granted by asylum officers (and ultimately were granted by immigration judges). For instance, by

Fiscal Year (FY) 2018 and 2019, asylum cases [referred](#) from the Asylum Office to immigration court had grown to nearly 30 percent of new [asylum filings](#) in immigration court in those years.

The backlogs and delays in both the Asylum Office and immigration courts have grown even larger as more people seek asylum in the United States and due to pandemic-related closings. People seeking refugee protection in the United States [include](#) asylum seekers from China, Cuba, Haiti, Nicaragua, and Venezuela in addition to the Central American countries of El Salvador, Guatemala, and Honduras. Many have also sought refuge in Colombia, Costa Rica, Panama, and other countries in the Americas including Mexico, which received a [record](#) number of asylum applications in 2021. In addition, [hundreds of thousands](#) of [interviews](#) and [hearings](#) were canceled, rescheduled, and/or delayed over the last two years due to the pandemic.

Attempts to create fast-track adjudication processes and impose additional deadlines and timelines have repeatedly had the counterproductive effect of exacerbating and increasing delays. Despite this reality, some proposals proffered under the Biden administration to address backlogs and delays in the Asylum Office and immigration court systems are fixated on timelines requiring fast processing. The reality is that these backlogs and delays have emerged and grown, despite the existence of such requirements. Creating even shorter timelines will not cure delays, it will only lead to mistaken decisions that need to be corrected, exacerbating delays in rendering final decisions.

Instead, the Biden administration should overhaul USCIS asylum adjudications and upgrade immigration courts to provide more timely, humane, effective, and fair decisions.

## **Recommendations:**

### **Overhaul USCIS Asylum Adjudications**

To improve the U.S. asylum system, the administration should take steps that address the significant backlogs, delays, and inefficiencies in Asylum Office processes that leave refugees waiting for years for interviews and adjudication of their cases. USCIS should:

- Resolve more cases at the Asylum Office level**, so they are not unnecessarily referred to already backlogged immigration courts. The Asylum Office must urgently address its failure to grant asylum cases that are overwhelmingly later granted by the immigration court. For instance, immigration court [data](#) shows that between FY 2012 and 2016, 76 percent of cases that asylum officers did not grant after interview were subsequently determined to qualify for refugee protection and were, as a result, granted asylum by the immigration courts. While U.S. agencies issued a [proposed rule](#) on asylum processing that would include additional avenues for initial Asylum Office adjudications, the potential changes included in that proposal [fall short](#) and reflect a flawed paradigm of curtailing [due process](#) safeguards for people seeking asylum. Steps the Biden administration should take include:
  - **Hire qualified asylum officers, with appropriate levels of experience, and ensure appropriate and accurate training and oversight** of all officers, supervisors, and offices. The Asylum Office should review all referrals and denials while Trump administration policies and rulings remain under review to ensure cases are accurately resolved and unnecessary referrals to immigration court minimized.
  - **Take steps to address the interrogation-like approach of some Asylum Officers and the unnecessarily lengthy multi-hour interviews** that officers conduct in some cases, as well as any discriminatory policies or practices targeting asylum seekers of certain races or religions for excessive questioning. The harsh and inquisitorial manner of some asylum officers has prompted asylum seekers to remark that the supposedly non-adversarial approach of the Asylum Office [reminded](#) them of interrogations they experienced in their home countries.

- **Address the Asylum Office’s apparent policy of punting certain classes of asylum claims to immigration court** for adjudication instead of determining whether they are eligible for asylum protection. DHS should clarify that the Asylum Office may grant any asylum claim supported by the facts in the individual case and applicable law – whether statutory, federal court precedent, Board of Immigration Appeals (BIA) decision, or regulation – and that the Asylum Office may not, by policy or in practice, deny or refer to immigration court particular classes or categories of asylum claims (including in cases involving the potential application of one or more bars to asylum). Human Rights First’s attorneys and pro bono partners have long observed that asylum seekers with a well-founded fear of future persecution appear often to be referred to immigration court for adjudication of their claims instead of granted asylum in the first instance by the Asylum Office. Similarly, the Asylum Office also seems to refer, instead of grant, cases involving imputed political opinions in which a persecutor has harmed or threatens to harm an applicant based on the imputed political opinion associated with their actions or statements. In addition, [asylum adjudication data](#) (which the Asylum Office largely stopped regularly releasing in 2019) have long revealed disparities in referral rates by office, with some offices referring an even higher percentage of cases to the immigration courts.
- **The administration should support [proposed legislation](#) that would eliminate the arbitrary one-year filing deadline ban that** deprives refugees of asylum protection, leaves many separated from their families, and **contributes significantly to delays and backlogs at both the Asylum Office and immigration courts.** Each year, thousands of asylum claims are referred from the Asylum Office to the immigration courts due to the filing deadline, even though many of these applicants meet the refugee definition under U.S. law, qualify for exceptions to this asylum ban, and should have been granted asylum by the Asylum Office. According to USCIS [data](#), in FY 2018 alone, 18,050 cases were referred from the Asylum Office to immigration court due solely to the filing ban – 39.2 percent of referrals in cases adjudicated that year. [Studies](#) have shown that over time the Asylum Office has increasingly used the filing deadline to avoid adjudicating asylum claims and to instead refer these cases to immigration court. While this flawed provision remains in law, the Asylum Office should **address patterns of improper referrals – or punting of cases – where an exception to the filing deadline should have been granted.**
- ☑ **Ramp up asylum officer hiring to address the backlog and establish initiatives to boost retention of asylum officers.** The Biden administration should move to:
  - Swiftly hire new asylum officers dedicated to address the asylum backlog and take steps to ensure retention of officers in the Refugee, Asylum, and International Operations.
  - Reduce or eliminate the diversion of Asylum Office staff to conduct credible fear screenings by ending or reducing the use of expedited removal and instead refer asylum seekers for full Asylum Office interviews in the manner recommended below.
  - Consider authorizing additional overtime for asylum officers who volunteer to help clear the backlog of affirmative cases instead of using overtime pay for [fear screenings](#) to implement illegal restrictions on seeking asylum at the border.
  - Regularly publish the current number of asylum officers (including the number assigned to clear backlogs), average length of service, on-board rates, estimated number of asylum officer positions needed to clear the affirmative asylum backlog, and other retention and staffing information.
- ☑ **Exercise initial decision-making authority in all asylum cases**, including those originating along the border and at ports of entry, just as the process works now for affirmative cases. Resolving more cases at the Asylum Office will help to reduce the immigration court backlog. But this change [should not](#) be

accompanied by cutting access to immigration court removal hearings, nor should it be embedded in [fundamentally flawed](#) expedited removal – a process that should not be used.

- This authority can be provided without new legislation by terminating or adjourning (with the consent of the asylum applicant) the immigration court removal proceedings of individuals who have filed an asylum application with the immigration court (which had not already been referred from the Asylum Office) or who indicate an intent to file an application for asylum. These cases should be referred to the Asylum Office for initial adjudication of the request for asylum. This process can be implemented as staffing at the Asylum Office increases.
  - All cases not granted by the Asylum Office should be referred to immigration court for full removal proceedings under 8 U.S.C. § 1229a including a de novo hearing on the asylum claim as well as consideration of applications for withholding of removal, protection under the Convention against Torture, and other available forms of relief from deportation.
  - The government [should not](#) convert Asylum Office interviews into “hearings,” as recently [proposed](#) in a change that would cut access to immigration court hearings and limit due process safeguards. Non-adversarial interviews are [less traumatizing](#) for asylum seekers and more efficient for the system.
- ☑ **Prioritize applications pending the longest for interview** in addition to child applicants and other recently filed applications.
  - ☑ **Initiate a process for asylum seekers stuck in the backlog to request prompt interviews** and create a formal process to advance from the backlog pending asylum interviews for applicants with medical, humanitarian, or other pressing concerns, including family members in danger abroad.
  - ☑ **Leverage technology and improved processes to promote efficiency**, including by allowing electronic filings, establishing online interview scheduling and rescheduling, creating a uniform short notice list for interviews, and providing longer interview notice periods to reduce rescheduling. USCIS should also consider establishing an external review process by technology experts to identify other key reforms that would not undermine due process or accurate decision-making.
  - ☑ **Provide qualified and competent interpreters for asylum interviews** (preferably certified for Article III courts) to minimize mistaken referrals but permit asylum seekers to also bring their own interpreter as well. DHS should amend proposed 8 C.F.R. § 208.9(g)(1), (2) to: (1) provide competent, qualified interpreters for any Asylum Office interview where an applicant is unable to proceed in English and has not supplied their own interpreter; (2) exempt an applicant who is unable to proceed with a government-provided interpreter because the interpreter is not competent in the applicant’s best language, the applicant cannot hear or understand the interpreter or for other good cause from being considered to have not appeared for (see 8 C.F.R. § 208.10) or caused a delay in the interview; and (3) permit an interpreter supplied by the applicant to interpret by telephone.
  - ☑ **Assess application processing and vetting efforts**, such as the Asylum Vetting Center and Fraud Detection and National Security Directorate, to identify ways to improve efficiency and effectiveness of USCIS resources.
  - ☑ **Create an application process for “cancellation of removal”** so such cases are not initiated via the Asylum Office. This can be accomplished by establishing a process for individuals to apply directly to USCIS for cancellation of removal, such as through a separate USCIS application and adjudication unit. Applicants for this humanitarian relief can then be referred for assessment, avoiding the addition of these cases to asylum backlogs.

- ✔ **Promote transparency and accountability** by regularly and publicly releasing information on average/longest wait times and asylum adjudications by asylum office, which should be disaggregated by applicants' nationality and other key demographics.

By resolving more cases through Asylum Office interviews, the government will save resources, reduce the number of people referred to removal proceedings, and preserve the right of asylum seekers to full removal hearings if they face potential deportation after Asylum Office referral of their case to the immigration court.

## Upgrade Immigration Courts

The Biden administration should take immediate [steps](#) to improve the fairness and timeliness of hearings in the immigration courts. Trump administration policies rigged hearings against asylum seekers, [exacerbated](#) backlogs, and confirmed the need for an [independent immigration court](#). We commend the administration for vacating a Trump administration Attorney General ruling that prohibited immigration judges from managing their own dockets through administrative closure. This was an important step that Human Rights First and other organizations recommended to address delays and make immigration court adjudications fairer and more humane. The Biden administration should also act to rapidly reduce the immigration court backlog by terminating cases where individuals have avenues for relief through USCIS, facilitating Asylum Office adjudication for certain cases pending in the immigration courts, and deprioritizing and removing cases from the court docket.

While it should work with Congress to make the immigration courts independent, as Human Rights First has [recommended](#), the Biden administration should also take the following steps:

- ✔ **Champion and support legal representation and orientations**, which sharply increases the [efficiency and fairness of legal proceedings](#), in addition to [supporting](#) high court appearance rates.
- ✔ **Take additional steps to allow immigration judges to manage their dockets effectively, helping to decrease delays** in immigration courts. As the National Association of Immigration Judges [confirmed](#), reversing [administrative micromanagement](#) of immigration judges is critical to alleviating the court's backlog. The Biden administration has taken a number of welcome steps, including to [cancel](#) harmful policies and [vacate](#) a Trump administration Attorney General ruling that prohibited immigration judges from managing their own dockets through administrative closure. Critical additional steps include: continue to [terminate](#) and revise policies and rescind rulings that pressure judges to rush cases, including [PM 19-13](#), [PM 21-06](#), [Matter of L-A-B-R-](#), [Matter of L-N-Y-](#), and [Matter of S-O-G- & F-D-B-](#) ([overruled](#) in the Fourth Circuit).
- ✔ **Ensure [use](#) of pre-hearing conferences and stipulations to reduce hearing time and increase immigration court capacity**. Leveraging a pre-hearing conference [policy](#) can [identify issues](#) actually in dispute and [facilitate efficient resolution](#) of cases. Immigration judges should be instructed to direct counsel – including Immigration and Customs Enforcement trial attorneys – to confer together in a formal [pre-hearing conference](#) (including via telephonic or video conferencing) to discuss the potential to narrow issues for the hearing, stipulate to areas where the applicant's burden is met and there is no dispute, agree that relief is grantable based on the written submissions, and/or agree to terminate immigration court cases that can be resolved through pending USCIS petitions. If properly implemented, these conferences would greatly reduce the number of hearings conducted and length of those proceedings that are needed.
- ✔ **Prevent [counterproductive rocket dockets](#) or "[dedicated dockets](#)"** that impose rigid timelines on asylum seekers and wreak havoc on court dockets and due process. Ensure any immigration court dockets do not act as [rocket dockets](#), which [undermine](#) accurate decision-making and [due process](#), rushing cases through the system with arbitrary timelines and without sufficient time to obtain [counsel](#) or gather necessary evidence. When asylum seekers are working with their attorneys to prepare their cases and submit the requisite materials to the court, and when judges are afforded space on their dockets (with the removal of

many cases from the court dockets to reduce the backlog and sufficient staffing, as detailed below) and manage their dockets guided by due process, rather than arbitrary deadlines, cases will be decided in a timelier manner.

- ☑ **Reduce the court docket and improve hearing efficiencies** through administrative closures, initial adjudication of asylum claims by the USCIS Asylum Office (in the manner recommended above), **employing [case review](#) to remove non-priority cases from the docket and terminating cases that can be resolved via pending USCIS petitions or by grants of Temporary Protected Status.** Steps should include:

  - Clarify that immigration judges have authority to terminate removal proceedings to allow the respondent to pursue applications for permanent status before USCIS, if the respondent establishes prima facie eligibility for such status.
  - Pursuant to the Attorney General's decision in [Matter of Cruz-Valdez](#), 28 I&N Dec. 327 (2021), formalize via regulation immigration judge authority to use administrative closure of immigration court cases to manage their dockets.
- ☑ **Create a formal mechanism to advance hearings dates** for asylum seekers and other immigrants, including for those facing humanitarian and other challenges, to ensure their cases are timely heard and that hearing slots do not go unused. Many asylum seekers face years-long separation from family members, who may be stranded abroad in danger, as well as the psychological, physical, and economic toll from the uncertainty of their status in the United States.
- ☑ **Preserve full removal hearings.** Asylum seekers whose requests for asylum are not granted by the Asylum Office should be referred to the immigration court for a full hearing, as has long been the process. Depriving asylum seekers of immigration court hearings in such situations – as in the [proposed rule](#) on asylum processing – would diminish the efficiency and non-adversarial nature of Asylum Office interviews and risk erroneous decisions that return refugees to persecution and torture.
- ☑ **Implement [safeguards](#) against politicized interference.** Review the process and reassess the validity of appointments to the BIA of immigration judges with unusually high [asylum denial rates](#) and/or an established histories of abusive behavior on the bench, and abolish the “[office of policy](#)” and the powers of the director of the Executive Office for Immigration Review, created under the last administration. Immigration courts should be controlled by statute, regulation, and federal court case law, rather than politically influenced policies.
- ☑ **Address urgent immigration court staffing needs.** The administration should swiftly fill existing positions, surge [staffing](#) and asylum-related support to the immigration courts and request funding from Congress to increase immigration court interpreters, support staff, BIA legal and administrative staff – and, with reforms to eliminate politicized hiring – immigration judges and BIA members fairly and objectively selected, so that the courts can address both incoming and backlogged cases. This should include requiring significant prior immigration law experience of diverse professional backgrounds for new immigration judge hires and improvements to the pace and timeline for appointment, so that hiring is not delayed – including the hiring of attorneys who did not previously work for the U.S. government.

### Address Other USCIS Backlogs Affecting Asylum Seekers

- ☑ **USCIS should prioritize timely adjudication of I-730 petitions for asylee/refugee family reunification as well as initial and [renewal](#) employment authorizations applications for asylum seekers** who are otherwise unable to work to support themselves and their families as they wait for their cases to be decided.