

## How to Manage the Increase in Families and Protection Requests at the Border

### Introduction

Over the last few months, national attention has focused on the increase in Central American migrants apprehended in the Rio Grande Valley after crossing the southern border. These migrants, primarily from El Salvador, Guatemala, and Honduras, include unaccompanied children, parents with children, and adults. Some are seeking to reunite with family in the United States. Many are fleeing violence and persecution in their home country and have requested asylum or other protection in the United States. A rise in murders, rape, violence against women, kidnappings, extortion, and other brutality is prompting many people to flee their homes, often in fear of gangs and drug cartels. Smugglers and others engaged in criminal activity seek to exploit the situation, often spreading misinformation to lure some families into paying them to transport them or their unaccompanied children to the border.

On June 20, 2014, World Refugee Day, the Obama Administration announced a series of steps to address the surge at the border. In addition to announcing new aid for programs in Central America and Mexico to address gang violence, rule of law deficiencies and reintegration of returned migrants, the administration announced “additional steps to enhance enforcement and removal proceedings.” While the details were not specified, the administration stated that it was “surging government enforcement resources to increase our capacity to detain individuals and adults who bring their children with them and to handle immigration court hearings – in cases where hearings are necessary – as quickly and efficiently as possible while also protecting those who are seeking asylum.” This announcement signaled a rise in detention of children and their families as well as the potential for rushed asylum hearings.

This report focuses on the importance of strengthening the U.S. asylum and immigration processing systems based on a foundation of fair and timely, but not rushed, individualized assessments so that each person apprehended or detained on entry at the border is appropriately managed once inside the United States. This approach is especially important to ensure that the United States is extending proper protections to those fleeing persecution. The recommendations below are informed by Human Rights First’s research along the border, including visits to key border points, border patrol stations and immigration detention facilities in Arizona, California and Texas – and by Human Rights First’s June 2014 comprehensive [blueprint](#) outlining the steps the United States government should take to address the increase in requests for protection at the border. As noted in that blueprint, any strategy to deal with the crisis at the border starts with attention to the impunity and rule of law deficits that are driving many to flee in search of protection. This report outlines recommendations relating to U.S. immigration policy which should accompany those efforts.

## Overview

The Obama Administration and Congress have the tools to confront the complex challenges at the border including the surge in families with children. The immediate response of the administration and Congress to the challenges posed by the increase in unaccompanied children, families and other migrants at the border should ensure: effective implementation of safeguards for asylum seekers, victims of trafficking and others with protection concerns; timely – but not rushed – immigration and asylum proceedings; legal information presentations early in the process; and enhanced initiatives of alternatives to detention. Congress should properly resource the protection screening interviews and immigration courts to reduce delays and vulnerability to abuse, support legal presentations in more immigration detention facilities and within days of detention, and properly resource the increased use of alternatives to detention. The United States has a strong interest in maintaining the integrity and effectiveness of its immigration and asylum systems and safeguarding them from abuse. In addition, U.S. immigration authorities, at every step in the process, also have extensive tools to identify potential abuse, criminal activity and security risks and these tools have been significantly enhanced in recent years.

The solutions outlined in this report are fiscally prudent, effective and reflect American ideals. Detention has long been the default tool used by immigration authorities. But reliance on detention is both unnecessary and prohibitively costly, especially when numerous studies have documented that case management, supervision, monitoring or alternative measures lead to the same goals -- high appearance rates for immigration court hearings. The most recent statistics available from Intensive Supervision Appearance Program (ISAP) II, the program currently contracted by Immigration and Customs Enforcement (ICE) for its alternatives to detention monitoring, reported that individuals attended their final hearings 97.4 percent of the time and complied with final orders 85 percent of the time. Moreover, detaining children and families in U.S. detention facilities is not consistent with American ideals, and research by the U.N. High Commissioner for Refugees and the International Detention Coalition has confirmed that detention is not a deterrent to those seeking protection from harm. In fact, the use of detention to attempt to deter people from seeking asylum is actually impermissible under international standards and the detention of families sets a poor example to the rest of the world.

America is a global leader in protecting the persecuted, a commitment President Obama affirmed in his statement on World Refugee Day. Over thirty three years ago, the Refugee Act of 1980, which passed Congress with strong bipartisan support, enshrined into domestic law America's historic commitment to protect the persecuted. As the Council on Foreign Relations Independent Task Force on Immigration Policy, co-chaired by former Florida Governor Jeb Bush and former Clinton White House chief of staff Thomas “Mack” McLarty, pointed out—and a group of leading Republicans recently affirmed—the U.S. commitment to protect refugees from persecution is “enshrined in international treaties and domestic U.S. laws that set the standard for the rest of the world; when American standards erode, refugees face greater risks everywhere.” America can and should stand firm as a beacon of hope for those fleeing persecution.

## Recommendations

### Maximize Use of Alternatives to Detention

Asylum seekers have traditionally appeared for their immigration court hearings at relatively high rates. Recent data provided to the U.N Refugee Agency (UNHCR) indicated that in FY 2012 only five percent of completed removal proceedings of asylum seekers had in absentia removal orders. Where needed, additional measures could support appearance. With the increase in apprehensions and arrivals in a few key border areas, especially in the Rio Grande Valley in Texas, the number of asylum seekers detained in these border areas has increased sharply, as detailed in Human Rights First's blueprint. Despite the increase in apprehensions and in those placed in expedited removal, only a portion request asylum and are referred for a credible fear screening.

While detention has long been the default tool used by immigration authorities, further escalating reliance on detention would be exceedingly expensive. ICE already detains up to 34,000 immigrants and asylum seekers each day, with over 478,000 immigrants detained in FY 2012, the most recent year with statistics available. The current situation at the border is particularly complicated because so many of those crossing are families; mothers or fathers with children who are, in some cases, infants and toddlers. The United States currently detains family units in only one facility, a relatively small shelter in Pennsylvania. In 2009, the administration shut down the other, much larger facility it used at the time due to serious allegations of abuse and inappropriate conditions. Despite the increase in families today, costly immigration detention facilities are not appropriate settings for children and parents with children, particularly given that alternatives are much more cost-effective. At an average cost of approximately \$160 per person, per day, the U.S. immigration detention system costs taxpayers over \$2 billion annually, despite the availability of less costly, less restrictive and highly successful alternative to detention programs.

To address the increase in asylum seekers, including families with children, the administration and Department of Homeland Security (DHS) should support a shift to using alternatives to detention. In cases that do not present safety risks but are determined to need support with appearance, this would mitigate concerns otherwise addressed through detention.

- *Launch Nationwide Initiative of Alternatives to Detention for Border Cases that Need Supervision.* ICE should launch a stepped up initiative to increase its use of alternatives to detention with a strong emphasis on case management for cases released in the border areas that need additional supervision to mitigate flight risk. This nationwide initiative should provide case management, supervision, monitoring and/or other measures to support appearance in the locations to which individuals relocate upon release. With alternatives to detention used increasingly in the criminal justice system, a wide range of experts—including the Council on Foreign Relations Independent Task Force on Immigration Policy, the Pretrial Justice Institute, the Texas Public Policy Foundation (home to Right on Crime)—have endorsed alternatives as cost-saving. Congress should increase appropriations for alternatives to detention and eliminate the bed “quota,” appropriations language that some interpret as a

requirement that a minimum number of beds be filled regardless of need. Congress should also grant ICE flexibility to shift funds, based on need, between detention and alternatives to detention. Moreover, by adequately funding the immigration courts and eliminating hearing delays (as outlined below), alternatives measures would ideally be needed only for months, not years.

- *Expand the Use of Community-Based Alternatives Model For Families.* ICE should use alternatives to detention in cases where additional supervision of families is needed, rather than resorting to detention, which is not appropriate for children. For families, DHS should build on models of community-based alternatives, such as the pilots already in place with Lutheran Immigration and Refugee Service or the U.S. Conference of Catholic Bishops. The case management, legal and social services elements would be particularly important for families seeking asylum to better understand their cases and requirements for appearance and compliance.
- *Children and Families Should Not Be Detained and DHS Should Only Use Facilities and Standards Appropriate to Civil Immigration Detention.* ICE should phase out the use of prisons, jails and facilities with similar conditions to hold asylum seekers and other immigration detainees, and Congress should reject the notion that the government must fill a minimum number of beds. Children and families with children especially should not be held in immigration detention facilities. In 2009, DHS and ICE ceased use of the T. Don Hutto facility as a family detention facility after grave concerns over conditions of detention for families and children and committed to shift away from the longtime reliance on jails and facilities with similar conditions more appropriate for civil immigration law detainees. Despite some progress, ICE continues to hold the overwhelming majority of its daily detention population in jails and facilities with similar conditions, with approximately 50 percent held in actual jails. The bipartisan U.S. Commission on International Religious Freedom (USCIRF) has also recommended that asylum seekers be held only in “non-jail-like” facilities when detained, and that DHS create detention standards tailored to the needs of asylum seekers and survivors of torture. Any facilities used to hold children should comply with legal requirements to use the least restrictive setting.

### **Increase Access to Legal Information and Counsel**

Many who request protection lack accurate information about “credible fear,” asylum, and their eligibility for protection. Some receive inaccurate information in their home countries, whether from friends, news pieces, social media, smugglers, or other sources. Some articles in the U.S. and other media have mistakenly described passing the credible fear screening process as a status of “temporary asylum,” with officials or unnamed sources quoted saying that it is a way for people to stay in the United States. This kind of misinformation can then be circulated through social media and word of mouth, potentially encouraging people to make decisions based on inaccurate information.

People facing persecution have a right to seek asylum and the fact that an individual expresses a fear of return after learning about the possibility of seeking protection does not mean that the asylum seeker's request is fraudulent. The most crucial tool to address the absence of critical information by those crossing the border is access to legal information and counsel. Currently, the highly cost-efficient government funded Legal Orientation Programs (LOP), which provide for non-profit attorneys to present basic legal information presentations to detained individuals in certain facilities, reach 25 of ICE's approximately 250 detention facilities across the country. In addition to the due process and fairness increased by providing some legal information, a 2012 study by the Justice Department showed that the government saved approximately \$18 million in the years studied, mainly on the reduced time an individual who receives LOP spends in detention. Although the Executive Office for Immigration Review (EOIR) has received additional funding to expand the program, the program will still reach only a fraction of detention facilities.

- *Expand Access to Early Legal Information Presentations – Including for Families.* Congress should appropriate sufficient funds for, and the Department of Justice should expand, Legal Orientation Programs from the existing 25 programs to all facilities nationwide. Consistent with the bipartisan Senate immigration bill, S. 744, and subsequent proposed legislation, these presentations should be provided to all who are detained within a few days of their arrival to ensure that individuals receive prompt and accurate information. Congress should support this initiative. ICE should coordinate with non-profit legal offices to provide access to newly arrived immigration detainees *before* a credible fear interview takes place. Given the large increase in protection requests and the potential for misinformation that exists, it is more important than ever for respected and competent legal service providers to have access to immigration detainees within a few days of their arrival in a facility.
  
- *Support Increased Quality Representation Early in the Process for Indigent Asylum Seekers.* The U.S. government recently announced a new pilot effort to provide representation to some unaccompanied alien children – a population in critical need of legal representation given the due process concerns. However, the government does not generally provide funding for legal representation for asylum seekers and other immigrants in their immigration proceedings, despite the well-documented importance of counsel. Only about one in five detained individuals have a lawyer in immigration proceedings. Yet a recent academic study showed that people in the New York immigration courts with a lawyer are 500 percent more likely to win their cases than those without representation. One study found that representation was the single biggest factor in the outcome of an asylum case. The administration should build on efforts to pilot legal representation for vulnerable groups such as children and individuals with mental disabilities, and should also extend this effort to indigent asylum seekers in detention who do not have pro bono representation. Consistent with S.744, Congress should support projects to increase access to legal counsel for vulnerable populations. To minimize the exposure of asylum seekers to unauthorized or unethical legal practitioners, EOIR and DHS should continue efforts to identify and refer for investigation and potential prosecution lawyers or non-lawyers who are perpetrating fraud, such as in the recent high-profile cases in New York City and California.

**Strengthen—Do Not Weaken—Protection Safeguards**

DHS should strengthen, rather than weaken, safeguards to identify and protect asylum seekers, victims of trafficking, vulnerable children and others with protection concerns and Congress should support staffing and resources for timely in person protection screening:

- *Conduct credible fear interviews in person, in a timely manner, and not by telephone.* United States Citizenship and Immigration Services (USCIS) should request, and Congress should support, sufficient resources and staff to conduct credible fear and reasonable fear interviews in person. At the very least, these interviews should not be conducted by telephone. These interviews should occur in a timely manner, within 14 days of arrival, but also allowing a short period where asylum seekers have several days to recover from their travels and to receive a legal orientation presentation. For all the reasons outlined in the blueprint, credible fear interviews should be conducted in person, rather than by telephone, and USCIS should prohibit denials of credible fear based on telephonic interviews. The use of a telephone interview from an immigration detention facility to attempt to meet critical *non-refoulement* obligations sets a poor example for the rest of the world.
- *Revise Flaws in Lesson Plan on Credible Fear.* USCIS should revise the February 2014 Lesson Plan on Credible Fear in a number of ways including to: clarify in additional places that screenings are not full-blown adjudications; restore prior language on the legislative history concerning the “low” level screening standard; make adjustments to revise other language that appears to attempt to further raise the “significant” possibility standard; and clarify that asylum seekers are not expected to produce documentary evidence at credible fear interviews. USCIS should immediately intensify supervisory review of credible fear determinations under the plan, and should invite UNHCR to observe the conduct of credible fear interviews during this surge.
- *Customs and Border Protection (CBP) officials should effectively implement safeguards to identify individuals who should be referred to a credible fear interview.* In its research, Human Rights First heard numerous reports from legal service providers that asylum seekers are not always appropriately screened. In its 2005 study on expedited removal, the bipartisan USCIRF found serious flaws in the conduct of CBP interviews. CBP officers are required to follow a standard script informing each individual in expedited removal that he or she may ask for protection if he or she has a fear of returning home. In approximately *half* of inspections observed by USCIRF researchers, inspectors failed to inform the immigrant of the information in that part of the script. CBP should: require, and allocate as larger spaces are secured, confidential settings for I-867A&B interviews; allocate sufficient staff to conducting these interviews in person; and ensure all officers who conduct expedited removal interviews, including both at the Office of Field Operations (OFO) and Border Patrol, are trained on the requirements relating to identifying potential protection requests. In addition, Congress should authorize, and appropriate resources for, a comprehensive updated study by USCIRF on expedited removal that includes an examination of “expanded” expedited removal. DHS should cooperate with, and direct its component agencies to cooperate with, any USCIRF study of expedited removal and immigration detention.

**Reduce Backlogs and Vulnerability to Abuse, Without Rushing Cases**

- Increase asylum office staffing and resources for the conduct of timely, but not rushed, in-person credible fear and reasonable fear interviews and to address backlogs. USCIS should conduct an assessment of staffing, space and resources needed for the agency to meet its caseload (under expedited removal and reinstatement of removal, as well the affirmative asylum process) and conduct these interviews in person in a timely manner, including for parents with children. These interviews should be conducted and completed generally within two weeks days of arrival, but should only be held after asylum seekers have had a legal orientation presentation and several days to recuperate from their often arduous travels to the United States. USCIS should request, and Congress should support, appropriations necessary to allow the Asylum Division to conduct timely screening interviews in expedited removal and reinstatement of removal without diverting officers from the affirmative asylum process which is supported through fee-based funding. If the administration and Congress cannot provide the necessary resources to staff the credible fear process adequately without undermining the integrity of the asylum process, DHS should roll back its expansion of expedited removal which has always raised serious protection concerns.
  
- Increase immigration court staffing to address removal hearing delays and eliminate hearing backlog, without rushing hearings. Congress should increase resources and staffing for the immigration courts to ensure that individual merits hearings are generally scheduled within approximately six months of the filing of an asylum application. For FY 2015, Congress should appropriate at minimum the president's requested \$347.2 million (for a total of \$351 million), which would allow for some expansion of LOPs as well as add 35 full immigration judge teams that would help alleviate some of the resource deficiencies currently facing the immigration courts. In subsequent fiscal years, the administration should request, and Congress appropriate funds for, 75 new immigration judge teams per year for three fiscal years—the level called for in the Senate's bipartisan comprehensive immigration reform bill. This significant and overdue increase in resources is needed to allow the courts to begin to reduce existing backlogs and delays, and would help address concerns that some individuals who pass their screening interviews at the border and are placed into immigration court removal proceedings may not appear at their hearings so far in the future. Any proposals to address the increase in asylum requests along the border should ensure that asylum seekers are not denied adequate time to secure representation, gather evidence and prepare their asylum cases. While individuals should not wait years for an immigration court hearing, their cases should also not be rushed through the system in an effort to address an increase in cases.