



Policy Proposals to Address the Central American Migration Challenge

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Introduction

Since 2014, the United States has seen a major shift in migrant flows as more families and children from El Salvador, Guatemala, and Honduras arrive at the U.S.-Mexico border. While these migrants' motivations for traveling to the United States are mixed and include fleeing poverty and seeking to reunite with families already in the country, many are also seeking protection from gang-related threats and violence as well as the public corruption that results in crimes going uninvestigated or punished. In fact, unlike previous generations of migrants—including those from Central America's Northern Triangle—who tried to enter the United States illegally and evade border authorities, the majority of the arriving families today seek out border agents to turn themselves in and make a claim for asylum, the one legal avenue available to most of them to obtain entry to the United States.

In spite of this drastic change in the demographic, motives, and actions of this migrant flow from previous generations, as the number of family-unit apprehensions increased to historic levels in 2019, the Trump administration continued to rely on the same enforcement-based strategy that his predecessors used to deter past migrants at the border, albeit with more punitive effects in an effort to deter and reduce the influx. However, rather than deterring people from making the trek to the U.S. border, measures such as the zero-tolerance policy that led to the separation of families have failed to meet these goals. In fact, such policies may have spurred additional migration, as smugglers encourage migrants to rush to the border before yet another wave of enforcement measures are implemented, and more and more families and children have arrived at the border, and in larger groups, in the latter half of 2018 and into the summer of 2019.

These policy failures demonstrate that the deterrent-heavy strategies of the past do nothing to improve the U.S. immigration system's ability to manage extraordinary shifts in migrant flows, nor do they target the conditions that push emigration from Central America. At the border, enforcement-only strategies do not improve the U.S. asylum system's capacity to process applications, especially for people who arrive between ports of entry and must go through the immigration court system to receive asylum status if they meet a credible fear standard. A system set up as a limited humanitarian exception to the rule of expedited removal for those who arrive between ports of entry or who are ineligible for admission at a port of entry has instead become the norm, overwhelming the ability of the existing border enforcement infrastructure to process these exceptions.

Furthermore, enforcement measures at the U.S.-Mexico border do not address the "push factors" of crime, violence, and poor economic conditions that undermine human security in Central America and are significant factors in prompting emigration from the region. This approach does not help strengthen Mexico's asylum system, which has become increasingly strained as more people from Central America apply for humanitarian protections in a country that is emerging as both a transit nation and a receiver of migrants. And while enforcement-only strategies make securing the border their primary goals, they do not help the United States and Mexico work together to target and dismantle criminal cartels that operate in the region, which facilitate the movement of migrants and exploit vulnerable populations seeking their services.

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This brief presents proposals for developing an integrated framework to manage the current migrant flows from Central America and to address the weaknesses in the current U.S. approach. In addition to addressing the near-term challenges of housing and processing the migrants requesting humanitarian protection after arriving in Mexico and the United States, these measures also target the longer-term factors that generate emigration from Central America and strengthen the resilience of the U.S. and Mexican asylum and immigration systems for future extraordinary migration events. The United States should not abandon using border enforcement measures, which remain a critical component of maintaining an effectively managed border and are essential to addressing traditional or irregular migration as well as other criminal and security threats attempting to clandestinely cross the border. However, the United States must move beyond an enforcement-only approach toward a more holistic policy of migration management if it wants to effectively deal with current and future migration challenges. These measures represent a good starting point for meeting these goals.

Domestic Policy Efforts

While the treatment and processing of those who arrive at the U.S.-Mexico border represents the last part of the migration flow, it is the part in most urgent need of solutions, since the lack of appropriate infrastructure and processes has resulted not only in a humanitarian crisis in the border area, but also the tragic deaths of migrants, including children, in U.S. government custody. It is also the portion of the migration system that is most amenable to rapid action on policy, resources, and perhaps legislation, and that could have the most immediate effects on the influx of migrants at the border. Domestic policy is thus addressed first here for that reason, not due to its relative importance to a holistic set of policy solutions, but merely to acknowledge what can most likely be accomplished in the short and medium term.

CHANGES TO THE U.S. ASYLUM SYSTEM

Address the existing backlog in immigration courts and find ways to expedite the cases of newly arrived asylum applicants.

U.S. immigration law allows migrants who arrive at the U.S.-Mexico border and express a fear of return to their home country to appear before an immigration judge who decides if they qualify for asylum. However, the growth in the immigration court backlog in recent years, from cases arising inside the United States and from the border, has extended waiting periods for hearings to two or more years. This delay, and the fact that court decisions have meant that most families cannot be detained during this process and must be released into the United States, is one reason that many more migrants are making asylum claims—knowing that they will gain at least several years of legal presence in the United States, regardless of the strength of their claims under U.S. immigration law. Further, any delay can harm those who have good cases for asylum and who have to wait in limbo several years before gaining regular status.

Addressing the timely adjudication of these claims is imperative to ensure both the integrity of the asylum system for those qualifying for protection and the certain removal of those without claims for relief. While the United States must take seriously its obligation not to return those with a well-founded fear of persecution or torture, the current asylum system is insufficient to address all of those seeking to improve their living conditions. Balancing these interests in a way that manages the migration flows while respecting America's protection obligations will require some fundamental changes to how U.S. immigration courts and the asylum system at the border function.

- 1. Refer all new positive credible-fear cases to the Department of Homeland Security's Asylum Division for adjudication of the asylum claim rather than proceeding straight to immigration court.** Instead of referring all border-related

cases into the existing immigration court backlog, legislators should change the law to allow U.S. Citizenship and Immigration Services (USCIS) asylum officers to immediately process all new positive credible fear cases as affirmative asylum cases, especially for individuals arriving between ports of entry. Aside from decreasing the influx of new cases in the immigration court system, this measure would save time and resources by allowing the USCIS to use information from its officers' credible-fear interviews to process these cases. It would also allow clear-cut approvable cases to be rapidly approved and individuals released from custody. If denied by the asylum officer, the case could still be remanded to the immigration court for appeal at the request of the migrant. To meet this new assignment, USCIS must ensure it has sufficient staffing for this process.

- 2. Adopt “last-in, first-out” protocols for processing asylum cases during significant influxes of new cases.** As a part of the effort to shift new asylum cases from the immigration court system to USCIS, The Department of Homeland Security (DHS) should consider adopting “last-in, first-out” protocols in which the USCIS processes new and recently filed cases within three months. Using this case-management protocol would allow the division to reduce new additions to the asylum and immigration court backlog, especially when facing influxes of migrants seeking humanitarian protection that can overwhelm the asylum system. This protocol should set aside asylum officers to process critical cases in the existing backlog, especially those involving families and children. As the new influx recedes, resources could be reallocated to process the longest-waiting cases in the backlog, reducing overall average wait times.
- 3. Hire more immigration judges.** The fastest answer to addressing the immigration court backlog is to hire more immigration judges. This issue has bipartisan support, and Congress has authorized the hiring of up to 700 judges over the last few years, but the U.S. Department of Justice has been slow to bring these judges on. While the United States must tackle long-term issues like addressing the courts' independence from the Justice Department's political influence and ensuring the new judges do not show biases that would inhibit fair hearings, it is clear that the immigration court system, however construed, must have sufficient capacity to adjudicate cases in a timely manner. Furthermore, those longer-term changes should not defer the hiring of additional judges in the short term as a measure to address the current influx of migrants at the border and to ensure the system does not become further backlogged.

- 4. Prioritize immigration court hearings of recent asylum cases at the border first.** The newly hired judges should immediately be tasked with the most recent border-related cases and exempted from the existing docket. This would ensure that cases in the existing backlog are not placed further back in the queue while allowing for rapid decisions on the current influx of cases. Timely and fair adjudication of these cases, and, for those not qualifying for relief from removal, timely repatriation should be the goal. Conducting these hearings near the border would also manage the current flow better, both by reducing the waiting period between arrival at the border and a final court decision and by reducing the incentive provided by onward movement into the United States. Although this might require investment in new facilities near the border (see below), ultimately, this effort should reduce the dilemma of long-term family detention or release into the United States and would enhance compliance with final removal orders. If the wait time for a court decision can be reduced from years to months, moreover, it would reduce the likelihood of those with marginal claims for asylum to migrate to the United States.
- 5. Set legislative requirements for “speedy” case hearings in immigration court that can be enforced in federal court.** Unlike criminal law, defendants in immigration court have no right to a “speedy trial.” In fact, there is no legal requirement that either the government or judges or immigration counsel work to ensure timely adjudication of cases before the immigration courts. With almost no recourse built into the system or consequence for lengthy delays, there is little incentive for anyone to add resources to the system, to find ways to improve efficiencies like developing more efficient electronic case processing or tracking systems, and to ensure timely decisions that can provide integrity to the system. The absence of these requirements allows extraordinary migration influxes to rapidly increase the number of pending cases in the system and lengthen average times for all cases. A requirement for a speedy process can also incentivize judges and attorneys to use discretion in ways that can speed up cases as well as better manage government resources, such as permitting administrative closure when other immigration avenues are available to the immigrant.
- 6. Provide legal counsel to arriving migrants so they understand their chances of receiving protection in the United States.** Many migrants arrive with an unshakeable faith that their desperate circumstances will sway U.S. officials to allow them to stay without understanding whether they meet the legal criteria and burden of proof for relief from removal. To enable migrants to appropriately assess the viability of their asylum claims, all arriving

migrants should be provided legal counsel as soon as possible after arriving and for any adjudication of an asylum claim whether before an asylum officer or before an immigration judge. Having counsel to explain the process and ascertain the legal strength of their claims can help with the discernment of those that have a likely basis to stay from those who do not, and counsel can ensure the immigrants' compliance with the process, especially for non-English-speaking arrivals and unaccompanied children. Regardless, providing this level of counsel and due process would insulate the asylum system from charges of a lack of minimal due process.

MEASURES AT THE U.S.–MEXICO BORDER

- 1. Create dedicated facilities to intake and process families and children at and between ports of entry.** Although officials have used Border Patrol stations to hold families and to conduct substantive interviews to determine whether individuals may qualify for asylum, these facilities are designed for the short-term holding of apprehended adult migrants, primarily males, and they lack adequate spaces for separating and caring for vulnerable populations. As a result, officials should consider building new facilities where Customs and Border Protection authorities and other volunteers can tend to the humanitarian and medical needs of the migrants as well as help these arriving populations understand their options and make informed decisions in a safe environment that can accommodate families and children. These facilities should support and fund an expansion of legal services and medical providers and should have specific protocols for dealing with medical emergencies. These facilities, of necessity, should also have sufficient capacity to house migrants at least until their credible-fear interviews or initial asylum decisions.
- 2. Eliminate metering at ports of entry.** DHS's own inspector general and significant anecdotal reports from migrant organizations document that the practice of severely limiting the number of migrants allowed to apply for asylum at ports of entry is creating incentives for migrants to enter illegally between ports of entry, where Border Patrol has no choice but to process all the migrants it encounters. This practice also supports criminal migrant-smuggling organizations, who prey on the desperation of migrants waiting in dangerous circumstances and who charge increasingly more extortive fees to carry them to the border. The establishment of dedicated processing centers as described above, as well as sufficient transportation and support at the ports of entry should allow for the elimination of this practice on a regular basis.

- 3. Provide more immigration legal advice to arriving migrants at the U.S.-Mexico border and across the region.** Reporting on the migrant caravans and interviews with asylum seekers show that many migrants' have faith in America's reputation as a "safe haven." Anecdotes from previous migrants and coaching from migrant smugglers distort their knowledge and understanding about the legal requirements and processes for gaining asylum in the United States. Working with trusted organizations in Central America to provide more information about the realities of the asylum process in the United States would allow migrants to make better-informed decisions about migrating to the United States, which would reduce the number of cases entering the system and weaken the ability of smugglers to use false information to encourage migrants to use their services regardless of the merits of their individual cases.

- 4. Increase penalties for smugglers who transport families and minor children and for persons falsely claiming a family relationship or who put migrants in situations that lead to migrant deaths.** Smugglers and traffickers have evolved into sophisticated criminal enterprises that exploit families and minor children traveling to the United States. As a result, targeting and dismantling these organizations is critical to protecting vulnerable populations and to deterring efforts to facilitate unlawful immigration into the United States. DHS must work with Mexican and Central American partners and increase efforts to go after these organizations. U.S. officials should also consider expanding the use of the U and T visas for migrants willing to assist in these investigations.

- 5. Address U.S. policies that encourage fraudulent claims.** U.S. policies that separate family members without a parent-child relationship encourages false claims of parentage even when the migrants are otherwise related (such as older siblings or cousins, aunts and uncles, or grandparents). Changing policies that separate children from custodial adults and allowing families to remain together would reduce both the incentive to make false claims and the harms caused to the children by the separation.

Regional Efforts

Although the United States can and should take measures to address the immediate needs of processing and caring for the migrants who arrive at the border, addressing the continuing arrival of additional immigrants will require doing more with Mexico and other countries in the region to address the broad range of factors that motivate and enable migration. This includes

addressing the region's capacity to provide protection to vulnerable people; addressing the criminal organizations that are encouraging, enabling, and profiting from the irregular migration flow; and addressing the root causes that push migrants to abandon their homes in search of a better life. The following recommendations focus first on bilateral efforts with Mexico—which is both a transit nation and, increasingly, a destination country—and other regional efforts at development and capacity building.

COOPERATION WITH MEXICO

- 1. Boost Mexico's capacity to process and integrate more asylum seekers.** Since 2016, Mexico has shifted from being a sender of migrants to one that receives them, as the number of people applying for humanitarian protections in Mexico has expanded to new historic levels. However, the Commission for Refugee Assistance, Mexico's asylum agency, lacks the staff and resources to adapt to these migratory changes, making it vulnerable to collapse as migrants continue to enter the country. As a result, the United States should work with the United Nations High Commissioner for Refugees (UNHCR) to navigate this new status by strengthening its capacity to receive and integrate more migrants, including helping the agency hire more staff and open new permanent offices across the country.
- 2. Develop a formal agreement with the Mexican government to mutually manage the migration flows.** Although the United States announced a plan that required individuals to wait in Mexico during the asylum adjudication process, it was not a formal agreement with Mexico that established agreed-upon protocols for this process or provided any support for Mexico to protect and house these migrants during their stay. However, the United States and Mexico can negotiate a formal agreement that would help both countries process the influx of humanitarian protection requests and mutually manage the migration flows. The agreements could result in additional support to Mexico to improve and expand its capacity to accept and process asylum claims, encouraging more migrants to apply for protection there. The United States and Mexico could agree to permit in-country processing of asylum claims or refugee claims in Mexico for those wishing to come to the United States.

Regardless, the United States should provide additional support to Mexico to protect migrants in the country awaiting their case outcomes, including protection from violence and the ability to support themselves. Support could also extend to non-governmental organizations working to shelter and care for migrants in Mexico. Alternatively, the United States and Mexico could work with UNHCR to establish formal refugee processing

in Mexico. This would not require any changes to U.S. law but would require an increase in the refugee allotment made by the administration for Western Hemisphere refugees and an increase in the allocation of resources. However, the United States must treat Mexico with care to avoid establishing “refugee camps” that limit migrants’ access to temporary living facilities and working permissions as their cases are processed.

- 3. Work with Mexico to secure its southern border with Guatemala.** The United States has been helping Mexico with these measures for many years, but securing this border is a challenge because it crosses through remote jungles and has been relatively freely crossed by smugglers for generations. Though Mexico has recently agreed to send additional National Guard assets to its border with Guatemala, this newly merged force is not trained in border security and does not have migration authorities. Integration with the Mexican National Immigration Institute to process visas for legal migrants at the border and access to asylum application in Mexico should also be part of the efforts to regularize migration along this border.
- 4. Work with Mexico to identify and dismantle smuggling organizations and cartels that facilitate unauthorized migration.** The United States and Mexico have a greatly improved law enforcement relationship that is currently under some strain due to political forces in both countries. However, efforts to curb the criminal enterprises that prey on immigrants and that facilitate their migration are necessary, especially as these illegal operations become more sophisticated and efficient at smuggling individuals into the United States.

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REGIONAL SOLUTIONS IN CENTRAL AMERICA

Although a long-term prospect, the ultimate arbiter of whether migrants from Central America will continue to travel northward will be whether those countries can provide safety, opportunity, and a future for their own populations. The United States should lead in regional development assistance that addresses these issues, including governmental corruption that leads to impunity and human rights abuses, economic instability caused by climate change and famine, and personal safety from crime and violence. In the absence of improving futures in these countries, migrants will continue to be susceptible to the promises of smugglers and the dreams of previous migrants of life in the north.

- 1. Development assistance to southern Mexico.** The current Mexican government is looking to expand economic opportunity in southern Mexico that might provide regional benefits with Guatemala and more job opportunities for both Mexicans and Central American migrants in the region. The United States should support these development efforts as well as the border security efforts at Mexico's southern border.

- 2. Work with regional partners in Central America to improve governance, root out corruption, and better protect vulnerable populations from crime and violence.** The long-term solution will be to work with Central American partners—Costa Rica, El Salvador, Honduras, Guatemala, and Panama—to improve conditions in the emigration countries, strengthen the rule of law and governance, and reduce the power of the gangs and criminal enterprises to terrorize their populations. The focus should be on addressing governmental corruption and human rights abuses, as well as criminal activity, and supporting democratic institutions and leaders who are working positively in these countries, often at the local level. These efforts should also improve educational and health institutions that can promote long-term human security in the region.

- 3. Resume in-country processing of potential refugee applicants in the region.** Although limited in scope, the Obama administration created processes in the Central American countries to screen and process applications from a select group of children with family in the United States. As noted above, creating an alternative asylum process in Mexico may help prevent some from making the journey to the border. But further expanding capacity to process applications across the whole the region could provide individuals with the chance to make their cases directly to the U.S. government without submitting to smugglers and traffickers or making a dangerous journey through other means. This should involve a regional, multilateral agreement, including the UNHCR, to ensure that other countries in the region also work to accept and process migrants in need of protection.

- 4. Increase development assistance to Northern Triangle countries.** Along with addressing institution-building, development that improves the economic fortunes of central and local governments in the three Northern Triangle countries will also reduce the factors pushing many to migrate north. These factors include a lack of job opportunities, which leads people to participate in criminal activities that generate violence or to leave for the United States to seek work, as well as poverty among agricultural regions as a result of drought and other climate conditions. These efforts should include direct monetary assistance in the

first instance, especially for those regions facing food shortages, as a means of subsistence until additional options are available. Assistance and development should focus especially on replicating those programs that have had success at the local level to other regions and localities, and should put continued pressure on national governments to address systemic issues that inhibit economic activity from expanding beyond entrenched elites.

Conclusion

As the United States and the rest of the region faces a migration event that continues to grow in scope each month, it is clear that a simple “valve” for policymakers to shut off this complex flow does not exist. Increasingly harsh tactics touted as quick fixes to this crisis not only undermine America’s reputation as a place of fairness and refuge, but also fail to address the region’s migration drivers that compel migrants to leave their homes and the operational factors that undermine the U.S. asylum system’s capacity to adjudicate the influx of new cases. However, the way that smuggling cartels have helped funnel a growing number of non-humanitarian migrants into the current flows entering Mexico and the United States from Central America shows the need for an approach that tackles bad actors who have taken advantage of this crisis and migrants for their own ends. Only a comprehensive plan—one that addresses every dimension of the short-, medium-, and long-term drivers of this crisis—will return the border to a place of managed migration and enforcement.

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However, developing this plan will require the administration and both parties in Congress to stop blaming each other for the crisis and make a good-faith effort to come together and listen to each other. There will need to be additional resources for these processes, but the resources must not be sidetracked toward projects or policies not authorized by Congress. And Congress will need to agree that changes to how the United States processes, and yes, where and how it houses migrants, must also be part of the solution. More broadly, this approach should also treat Mexico and other countries in the region as partners with vested interests in managing these flows, not as adversaries that require threats from the United States to comply with its demands. This situation did not come about in a few weeks, and it will take longer than that to address it, but the longer the United States delays in working cooperatively toward solutions, the worse it will be for migrants, regional neighbors, and the country.



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