



A Short-Term Plan to Address the Central American Refugee Situation

By Philip E. Wolgin May 2016

Center for American Progress



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Contents

- 1 Introduction and summary**
- 5 The increase in asylum seekers from Central America**
- 9 Upon arrival**
- 18 During custody determinations and in immigration detention**
- 24 In immigration proceedings**
- 30 Conclusion**
- 31 About the author**
- 32 Endnotes**

Introduction and summary

Over the past half-decade, rising violence and structural poverty in the Northern Triangle region of Central America—which encompasses El Salvador, Honduras, and Guatemala—have pushed thousands of children and families to flee for safety. These three countries are some of the most dangerous on the planet, with high rates of homicide and specifically femicide—the killing of women and girls.¹ Violence, corruption, and extortion play a big part in everyday life.²

Since 2014, more than 120,000 children and another 120,000 people in family units from this region have arrived in the United States seeking protection. The flow of these asylum seekers peaked in fiscal year 2014 before dipping, perhaps temporarily, in FY 2015.³ This drop occurred not because conditions improved in the region but because of a sustained effort by the U.S. government—with the help of Mexico and the Northern Triangle countries—to stop people from making the dangerous journey or to intercept them on the way to the United States.⁴ This year, in FY 2016, the numbers of children and families arriving in the United States have begun to rise again as conditions in the region continue to deteriorate.⁵

This report lays out short-term recommendations for ensuring that all asylum seekers who reach the United States receive a full and fair shot at protection. The recommendations are structured to follow the process that children and families go through when seeking protection: arrival in the United States, custody determinations and detention, and proceedings in the immigration courts.

In a companion report, the Center for American Progress lays out a series of medium-term recommendations, to create a safe place for children and families to flee in Latin America and to process them as asylees and refugees, and long-term recommendations, to tackle the root causes of violence and structural poverty facing the Northern Triangle countries of Central America. Together, these reports lay out a comprehensive approach to meeting the challenge presented by refugees arriving from the Northern Triangle.

Upon arrival

- As soon as possible following apprehension, each person should receive a “know your rights” presentation by a qualified nongovernmental organization, or NGO.⁶
- The U.S. government must ensure that the protections for unaccompanied children in the Trafficking Victims Protection Reauthorization Act, or TVPRA,⁷ remain intact.
- Every immigration agency dealing with children—from the U.S. Department of Homeland Security and the Executive Office of Immigration Review to the Office of Refugee Resettlement—should adopt the “best interest of the child” principle in all aspects of care—from apprehension, shelter, and release to immigration proceedings. The U.S. Congress should codify this principle into the Immigration and Nationality Act.⁸
- Congress should leave the responsibility to care for unaccompanied children with the Office of Refugee Resettlement, or ORR.
 - The ORR should do more to ensure that sponsors are thoroughly screened before children are released to them and must expand post-release services to ensure the safety of children released from their custody.
 - Congress must give the ORR the resources to conduct these pre-release screenings and provide expanded post-release services.

During custody determinations and in immigration detention

- The administration should close the South Texas Family Residential Center in Dilley, Texas, and the Karnes County Residential Center in Karnes City, Texas, and release those detained mothers and children who do not pose a security or flight risk that cannot otherwise be mitigated.
- Rather than placing families who have expressed fear of returning to their home country in expedited removal, the U.S. Department of Homeland Security, or DHS, should place them into formal removal proceedings—known as 240 proceedings—that allow them to make their case for protection in front of an immigration judge.⁹

- The administration should create short-term processing centers for families upon arrival that function like shelters rather than prisons. These centers would give families the ability to get their bearings in the United States; attend legal orientations and connect with pro bono counsel; and receive medical, mental health, and other needed care.
 - The DHS should also complete the initial security and background checks in these centers and place individuals into formal removal proceedings at these centers.
 - Unless families pose a security or flight risk that cannot be mitigated with an alternative to detention, such as community supervision or an ankle bracelet, the DHS should release them from processing centers within 72 hours of apprehension.
- The default response when it comes to custody determinations should be to release asylum seekers while they await their immigration proceedings, unless there is a clear reason for using an alternative to detention or detention itself. In each case, such decisions should use the least restrictive form of supervision necessary and should take into account the unique circumstances of each family.

In immigration proceedings

- Congress should quickly pass the Fair Day in Court for Kids Act, which would instruct the U.S. attorney general to appoint attorneys for all children as well as other vulnerable individuals—such as those with disabilities and victims of abuse or violence—in immigration proceedings.¹⁰
- The administration should explore settlement negotiations to resolve *J.E.F.M. v. Holder*—in which advocates are challenging the government’s failure to appoint counsel for children in immigration courts—and/or adopt a policy of appointed counsel for children that would render the case moot.¹¹
- The U.S. Department of Justice, or DOJ, should appoint child advocates for unaccompanied children in immigration proceedings; currently, the government does not appoint advocates except in extreme cases of trafficking or other mitigating circumstances. Congress should appropriate the necessary funds for such a change.¹²

- The government should end its use of rocket docket—speedy trial dates for children and families seeking protection.
- Congress should increase staffing and resources for the immigration courts, which are creaking under the weight of a crushing caseload and backlog.¹³

In the short term, providing all those fleeing violence with the opportunity to make a full and fair case for protection will ensure that the United States lives up to its moral and legal obligations. These obligations start as soon as an asylum seeker arrives in the United States and continue through custody determinations and detention and then through the immigration court proceedings.

Certainly, all immigration laws on the books must be followed. Nothing in this report suggests that people who receive a full and fair process—including access to counsel and proper adjudication—and still lose their cases must be allowed to remain in the United States. But the country also has an obligation to make certain that its refugee laws are fully enforced—which means ensuring due process for persons who arrive in this country to request protection.

Ultimately though, these short-term fixes cannot address the bigger issue: the violence and structural poverty that plague the Northern Triangle countries and force children and families to look for safety wherever they can. Until the United States, Northern Triangle countries, and nations throughout the Western Hemisphere work to tackle these root causes, children and families will continue to seek protection at U.S. borders and in other countries throughout the region.

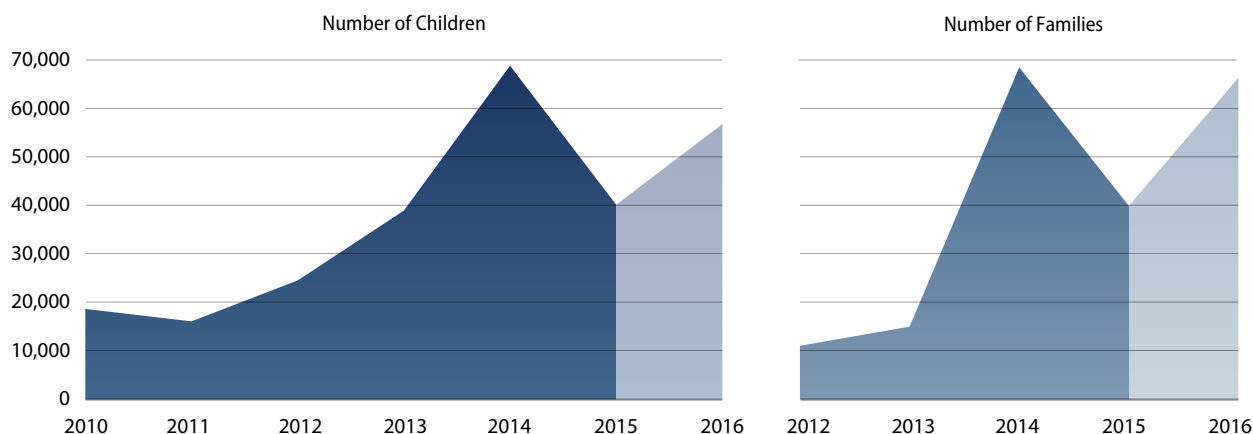
The increase in asylum seekers from Central America

Violence and structural poverty in the Northern Triangle of Central America have increased significantly in the past half-decade.¹⁴ El Salvador, Honduras, and Guatemala are three of the most violent countries in the world: Homicides in El Salvador increased 196 percent between 2011 and 2015. These countries also rank first, second, and fourth, respectively, in femicide—the murder of women and girls.¹⁵

Concurrently, the number of unaccompanied children and family units—which U.S. Customs and Border Protection, or CBP, defines as “individuals (either a child under 18 years old, parent or legal guardian) apprehended with a family member”—arriving from the Northern Triangle has increased, peaking in 2014.¹⁶ (see Figure 1)

FIGURE 1

Unaccompanied children and family units apprehended by year, FY 2010–2016*



* FY 2016 projections based on average monthly data from October through February. Data on the number of families is not available for FY 2010 and 2011.

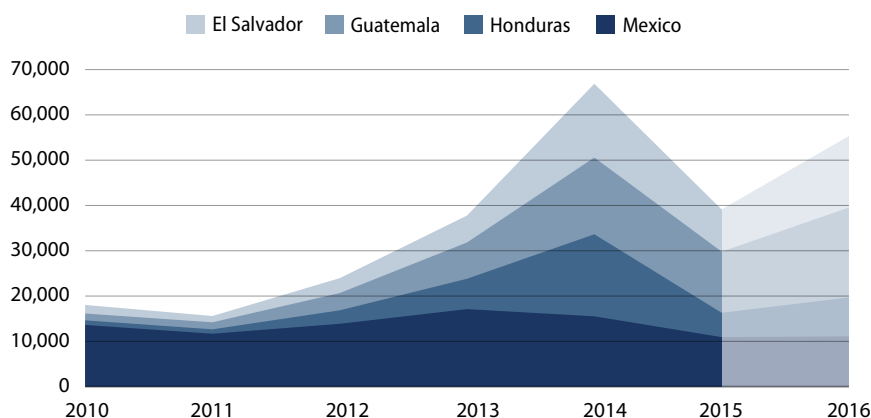
Source: U.S. Customs and Border Protection, "United States Border Patrol Total Unaccompanied Alien Children (0-17 Years Old) Apprehensions By Month—FY 2010–2016 To Date Through January" (2016); U.S. Customs and Border Protection, "United States Border Patrol Total Family Unit* Apprehensions by Month—FY 2013–FY 2016 To Date Through January" (2016); Lazaro Zamora, "August Increase in Unaccompanied Minor and Family Apprehensions," Bipartisan Policy Center, September 24, 2015, available at <http://bipartisanpolicy.org/blog/august-increase-in-unaccompanied-minor-and-family-apprehensions/>; U.S. Department of Homeland Security, "Statement By Secretary Jeh C. Johnson On Southwest Border Security," Press Release, March 9, 2016, available at <https://www.dhs.gov/news/2016/03/09/statement-secretary-jeh-c-johnson-southwest-border-security>.

Breaking these figures down by country of origin puts these numbers into even starker relief. While arrivals of unaccompanied children from Mexico have ebbed and flowed over the years—and have decreased since 2013—the Northern Triangle countries saw a steady increase in children fleeing from 2011 through the peak of 2014. (see Figure 2)

FIGURE 2

Unaccompanied children by country of origin, FY 2010–2016*

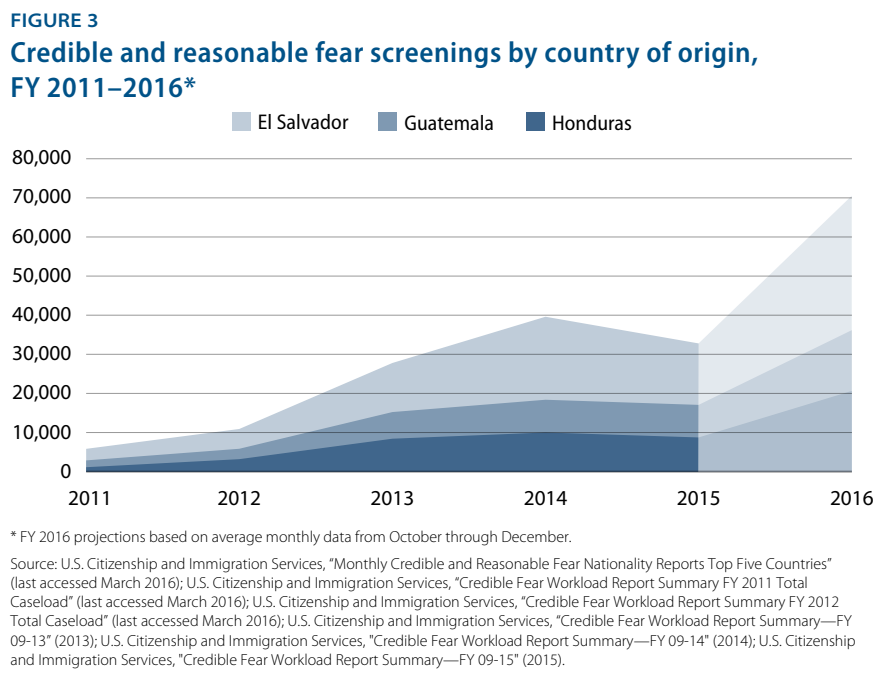
Arrivals to the United States from El Salvador, Guatemala, Honduras, and Mexico



* FY 2016 projections based on average monthly data from October through February.

Source: U.S. Customs and Border Protection, "Southwest Border Unaccompanied Alien Children Statistics FY 2015," available at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2015> (last accessed March 2016); U.S. Customs and Border Protection, "United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016," available at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (last accessed March 2016).

Similarly, the number of people arriving from El Salvador, Honduras, and Guatemala who have received credible or reasonable fear screenings has skyrocketed over the past few years. (see Figure 3) Credible or reasonable fear screenings—interviews with trained U.S. Citizenship and Immigration Services, or USCIS, personnel—are conducted in cases where people express fear of returning to their countries of origin after being placed in expedited removal proceedings or while being otherwise ordered removed from the country outside of the immigration court process.¹⁷ People from the three Northern Triangle countries now rank in the top three for number of monthly credible and reasonable fear screenings—a stark contrast to just a few years ago, when those from other countries such as China, Haiti, or India routinely broke into the top three.¹⁸



In the first five months of this fiscal year, from October 2015 through February 2016, more than 23,000 unaccompanied children arrived in the United States. On an annualized basis, these numbers are on track to exceed the 2015 totals while falling roughly 10,000 children below the record level in FY 2014. Likewise, close to 28,000 people in family units have arrived so far in FY 2016—on track to come in just below the 2014 surge level.¹⁹

And because the numbers of children and families from Central America traditionally rise and fall with the seasons—fewer people arrive in winter when cold weather can make travel more difficult, while more arrive in summer—the FY 2016 statistics are likely to increase.²⁰ The Office of Refugee Resettlement is already preparing for a new influx of children by creating temporary shelter space in places such as Homestead, Florida.²¹

The violence pushing children and families out of the Northern Triangle region has meant continued arrivals from these countries, even as overall unauthorized migration to the United States has dropped significantly. From 2010 to 2014, for example, the unauthorized population as a whole dropped 7 percent, and unau-

thorized migration from Mexico to the United States dropped 13 percent.²² From the uptick in 2014 through February 2016, more than 120,000 children and an additional 120,000 people in family units from the Northern Triangle of Central America arrived in the United States.²³ To put this figure in perspective, approximately 80,000 refugees fled to Europe in just the first month and a half of 2016.²⁴

Upon arrival

Upon arriving in the United States and being apprehended—generally by Customs and Border Protection after turning themselves in at the border—unaccompanied children and family units, made up of mothers and children, face differing pathways under immigration law.²⁵

Pathways for unaccompanied children and families under U.S. law

Unaccompanied children

Under the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act, unaccompanied children from noncontiguous countries—countries that do not share a border with the United States—who are apprehended in the United States are first placed in formal removal hearings.²⁶ Within 72 hours, they must be transferred to the custody of the Office of Refugee Resettlement in the U.S. Department of Health and Human Services, or HHS.²⁷ The ORR houses children temporarily and works to release them to parents, relatives, or other sponsors while they wait for their court hearings.²⁸ Under the terms of a 1997 court-ordered agreement known as the *Flores* settlement, children must be released from custody “without unnecessary delay” to a parent, family member, guardian, or sponsor.²⁹

By contrast, an unaccompanied child from Mexico or Canada—contiguous countries—must first be screened within 48 hours by the CBP to determine that the child:

- Is not a victim of severe trafficking
- Would not be at risk of being trafficked if returned to his or her home country
- Does not have a credible fear of persecution if returned to his or her home country

- Has the capacity to make his or her own decision to withdraw his or her application for admission into the United States and instead be voluntarily returned to his or her home country³⁰

If the CBP agent or officer is unable to make even one of these findings, the unaccompanied child is placed in formal removal proceedings to appear in front of an immigration judge and is transferred to ORR custody, as with any unaccompanied child from a noncontiguous country. Children from contiguous countries who meet all of the CBP criteria, however, can be voluntarily returned to their home countries without ever appearing in immigration court, based on the DHS's discretion.³¹

Family units

Unless they express fear of persecution in their home countries, people arriving in family units can be quickly deported from the border through the expedited removal process.³² Upon expressing fear of persecution, such families must be interviewed by a specially trained U.S. Citizenship and Immigration Services asylum officer to determine whether they meet an initial threshold for a credible or reasonable fear of persecution, depending on their circumstances. Only those who meet this threshold—either following the interview with the asylum officer or upon review by an immigration judge—are entitled to make their case for protection in an immigration court.³³ All others may be removed from the country without an immigration court hearing or further process.

To protect against returning people to dangerous conditions, Congress intentionally set the standard for establishing a credible fear lower than the standard for proving a full claim for asylum; as such, it may be somewhat unsurprising that the fear-found rates for families who get these interviews are high. In the second quarter of FY 2015, for example, 86 percent of families from the Northern Triangle who received credible fear interviews in a family detention facility were found to possess such fear.³⁴

On the other hand, the standard for establishing a reasonable fear—applied to people who have prior removal orders that are being reinstated or who are being given administrative removal orders—is identical to the standard for winning asylum. Because such persons are statutorily ineligible for asylum, however, being found to possess a reasonable fear only means that they will have the opportunity to go before an immigration judge to request a form of protection that requires a

still higher standard of proof: either statutory withholding of removal or protection under the Convention Against Torture.³⁵ Nevertheless, it is striking that in the second quarter of FY 2015, 82.5 percent of those from the Northern Triangle who received reasonable fear interviews in family detention were found to possess such fear and, therefore, would have met the standard for winning asylum in the United States—were they only eligible for that form of protection.³⁶

Some portion of families who arrive at the border are placed into the expedited removal process and detained, while others are placed into formal removal proceedings before an immigration judge and released while they wait for their hearings, often with an alternative to detention such as community supervision or an ankle monitor.³⁷ The decision by DHS personnel—generally from either U.S. Immigration and Customs Enforcement, or ICE, or the CBP—of whether or not to place a particular family in detention is largely arbitrary, based on the availability of bed space rather than individualized consideration of whether the family presents a risk of flight or a danger to the public that cannot be mitigated without detention.³⁸ The DHS currently has just more than 3,000 beds available in family facilities; last year, in FY 2015, close to 40,000 people arrived in family units.³⁹

Security screenings for asylum seekers from Central America

While laws such as the TVPRA require children to be released from custody without unnecessary delay, nothing mandates that a child or family be released if they pose a threat to security.⁴⁰ In fact, every single person who arrives in the United States claiming asylum goes through a multilayered security screening process prior to any decisions being made about custody.

All individuals who are apprehended—the vast majority of whom turn themselves in to DHS personnel—at the southern border have their fingerprints, if they are 14-years-old or older, and biometric measures taken, which are then checked by the DHS against various federal databases for prior criminal history, ties to gangs, or any national security concerns.⁴¹ No one who raises any security concerns is released, including unaccompanied children, who may be held in secure ORR facilities if they pose a threat to themselves or others.⁴² Many of those released still receive some form of monitoring, from community supervision to GPS-enabled ankle monitors, and the decision to release an individual can be reversed by ICE if he or she is later determined to be a security or flight risk.⁴³

Likewise, children in ORR shelters are subject to multiple layers of screenings by case managers, teachers, psychologists, and pro bono attorneys. Vulnerable children are also eligible to receive post-release services and case management after being placed with a family member or sponsor, all of which add additional layers of screening in case any security flags arise.⁴⁴

Due process concerns

Under both domestic and international law, the United States has a legal obligation to allow those seeking protection to make a full and fair claim for asylum.⁴⁵ Ensuring that these asylum seekers receive full due process protections—guaranteed to all people without regard to immigration status by the Fifth Amendment of the Constitution—must be the standard for which the United States strives.⁴⁶

Yet failures of due process are evident throughout the asylum process. Take, for example, the disparate treatment of unaccompanied children from contiguous and noncontiguous countries: Both the Government Accountability Office, or GAO, and the United Nations High Commissioner for Refugees, or UNHCR, have found serious deficiencies in the screening procedures that the CBP uses for children from contiguous countries. The GAO found that CBP agents “made inconsistent screening decisions, had varying levels of awareness about how they were to assess certain screening criteria, and did not consistently document the rationales for their decisions.”⁴⁷ Even worse, the GAO found that the CBP was not adhering to its own policies: It has long been CBP policy to presume that children younger than age 14 cannot make independent assessments to voluntarily withdraw their applications for admission into the United States. Unless that presumption can be overcome, the TVPRA prohibits DHS personnel from quickly returning unaccompanied children to their countries of origin. Yet the GAO found that between FY 2009 and FY 2014, the CBP returned more than 9 out of 10 Mexican children younger than age 14 without any indication that the CBP applied—and overcame—the presumption that these young children were unable to make decisions on their own.⁴⁸

Similarly, the UNHCR found a litany of issues with the contiguous country screening process, including a lack of training for CBP personnel on what constitutes human trafficking or risk of human trafficking—two of the factors that agents and officers must affirmatively rule out before such children can be voluntarily returned from the border.⁴⁹ And while CBP personnel are only supposed to screen children for any fear of return under the TVPRA, the UNHCR found that instead, some agents and officers were taking the additional step of determining those fears to not be valid.⁵⁰ Making these determinations in the first place violates the TVPRA; even worse, CBP personnel lack the relevant training to determine what is or is not a valid claim. The UNHCR concluded that these actions have “likely resulted in Mexican children being returned despite their need for further evaluation of their

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protection needs.”⁵¹ Such faulty practices have real life consequences: Sending someone back could lead to harm or death. In its report “Children on the Run,” for example, the UNHCR found that 64 percent of the unaccompanied Mexican children it interviewed raised international protection needs.⁵²

At the height of the spike in children and families arriving from Central America in mid-2014, both the Obama administration and some members of Congress floated various proposals to amend and roll back protections provided to children from noncontiguous countries under the TVPRA that would treat unaccompanied children from Central America like those from contiguous countries.⁵³ Such changes would have allowed many of the children fleeing violence in the Northern Triangle to be returned to their home countries without any legal safeguards or a hearing before an immigration judge.⁵⁴

Although efforts to change the TVPRA failed,⁵⁵ members of Congress continue to propose similar changes: When the U.S. Senate considered the FY 2016 budget resolution, for example, Sen. John McCain (R-AZ) introduced a symbolic resolution to roll back these protections that passed by a vote of 58-42.⁵⁶ Two other proposals—Rep. Jason Chaffetz’s (R-UT) Asylum Reform and Border Protection Act and Rep. John Carter’s (R-TX) Protection of Children Act—have been voted favorably out of the U.S. House of Representatives Judiciary Committee and could be brought up on the House floor at any time.⁵⁷

Likewise, the recent highly publicized raids on Central American asylum seekers that the Obama administration has carried out since the start of 2016 have highlighted significant due process concerns. These include migrants’ lack of knowledge of the right to claim asylum, failures by the DHS and the immigration courts to inform children of their court dates, and inadequate or lack of counsel during immigration proceedings.⁵⁸ The U.S. government can and should bolster due process protections for asylum seekers, from apprehension through detention and from release through immigration proceedings.

Recommendations

The United States is first and foremost a nation of laws, and all immigration laws must be followed. Anyone who receives full due process—including, but not limited to, access to counsel and the ability to make a case for protection—and

The U.S. government can and should bolster due process protections for asylum seekers, from apprehension through detention and from release through immigration proceedings.

still loses his or her case does not have the right to automatically stay in the country. But due process must be paramount, and all refugee laws and refugee protections must be afforded to anyone who reaches our borders and fears returning to their home country.

Ensure that asylum seekers are fully informed of their legal rights

First and foremost, as soon as possible following apprehension, each person should receive a “know your rights” presentation by a qualified NGO. Such presentations would explain the legal right that each individual fleeing persecution or harm has to claim asylum or other forms of protection, such as T visas—for victims of human trafficking—or U visas—for victims of crime who cooperate with law enforcement;⁵⁹ the complicated process for winning protection; and the consequences of failing to appear in court for removal proceedings. The presentation could also provide information pertaining to securing pro bono representation.⁶⁰

The Legal Orientation Program, run by the Department of Justice in conjunction with the Vera Institute of Justice and other NGO partners, is one important model. The program focuses on adults in immigration proceedings as well as those responsible for caring for unaccompanied children, giving them information about their rights and the immigration court process. It also works to connect vulnerable immigrants to pro bono counsel.⁶¹ This program currently operates in only 35 out of 77 detention facilities,⁶² but it—or similar programs—should be expanded to cover all immigrants in removal proceedings, including those in expedited removal and those in CBP custody post-apprehension.

Maintain protections for unaccompanied children in the TVPRA

Second, the United States must ensure that the protections for unaccompanied children in the TVPRA remain intact. The law provides important safeguards to protect children from trafficking, persecution, and other forms of abuse. Given the significant issues in the screening process for unaccompanied children from contiguous countries raised by the GAO and the UNHCR, this standard for dealing with children from contiguous countries should not be expanded.⁶³

... the United States must ensure that the protections for unaccompanied children in the TVPRA remain intact.

Adopt the “best interest of the child” principle

Finally, every immigration agency—from the DHS and the Executive Office for Immigration Review, or EOIR, to the ORR—that deals with children, whether they are unaccompanied or with their parents, should adopt the “best interest of the child” principle in all aspects of care—from apprehension, shelter, and release through immigration proceedings. This principle, as defined by the Young Center for Immigrant Children’s Rights, takes into account several factors, including children’s own opinions of their care; their safety, security, and mental and physical health; their family relationships; their well-being and development; and their background.⁶⁴

While the TVPRA mandates that children’s best interests be taken into account when making custody decisions and when appointing child advocates for particularly vulnerable children, immigration law as a whole does not recognize the principle, nor are the DHS and the immigration courts compelled to consider a child’s best interests when making custody and removal decisions.⁶⁵ Given the unique vulnerabilities of children, Congress should codify this principle into law for all immigration decisions.⁶⁶

The ORR should ensure that children released from its custody are protected

Under the Homeland Security Act of 2002, the care of unaccompanied children resides with the Office of Refugee Resettlement.⁶⁷ The ORR contracts with NGOs to run a network of shelters across the country that care for children after they arrive and are transferred from the custody of the DHS. It also holds legal orientation programs, makes connections to pro bono representation, and works to place children with sponsors—generally immediate relatives or family friends—while they await immigration proceedings.⁶⁸

Prior to the surge of children arriving in the United States from Central America in mid-2014, the ORR conducted robust investigations of every sponsor, including background checks, fingerprinting, and home studies.⁶⁹ The large numbers of children who arrived in 2014, however, pushed the agency to relax its standards in order to move children through the system and out of their custody as soon as possible.⁷⁰ In doing so, the ORR dropped requirements such as fingerprinting sponsors and running sponsors’ information through Federal Bureau of Investigation background checks.

An Associated Press investigation uncovered multiple cases in which children were released into situations in which they were subjected to human trafficking and sexual exploitation.⁷¹ In one case in Marion, Ohio, multiple children were released to sponsors pretending to be family members, only to end up to working as pseudo slave laborers on an egg farm.⁷² Although the ORR has resumed conducting full background screenings on sponsors and following up on each child by phone within 30 days of placement, as well as creating a hotline for children to report safety issues, the agency only completes home studies if a background check raises red flags or if a child requires extra care due to their special needs.⁷³

Beyond a phone check, most children receive no post-release services.⁷⁴ In FY 2014, for example, the ORR conducted home visit studies—which included background checks, investigations to make sure the needs of the child can be met by the sponsor in question, and education for the sponsor on the needs of the child—for only 2.5 percent of children placed with sponsors.⁷⁵ Similarly, only 7 percent of children released to sponsors received any type of services, such as case management by social workers to meet physical and mental health needs.⁷⁶

ORR emails from 2015 released by the Senate Committee on Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations reveal that the agency has based their budget requests “historically on the assumption that 10% of [unaccompanied children] would have home assessments and that [the] same 10% would have post-release service.” These emails make it clear that the ORR has viewed these post-release services as part of a pilot program based on available funding rather than as a standard for monitoring children who have been released to sponsors.⁷⁷

A GAO study from February 2016 also found that the ORR lacks the resources to do site visits for all of the NGOs with whom it contracts to provide shelter, educational, health, and well-being services to unaccompanied children. The GAO also found that the ORR lacks appropriate processes to collect and analyze data on children who are released from its custody to sponsors, potentially leaving children at risk.⁷⁸

While the ORR has made mistakes in its treatment of unaccompanied children, it is still the agency best positioned to take the needs and vulnerabilities of children into account when it comes to custody and release. Instead of removing the care of unaccompanied children from the ORR, as legislation currently pending before the House of Representatives has called for,⁷⁹ the ORR should thoroughly

screen sponsors before children are released to them, including—at a minimum—collecting fingerprints and running background checks for all sponsors and increasing the number of sponsors who receive home studies. After release, the ORR should regularly check up on all released children and provide robust case management and access to social services and mental health care when appropriate, on a case-by-case basis.⁸⁰

Congress must give the ORR the resources needed to perform these pre-release screenings and post-release services. The proposed HHS budget for FY 2017—which includes both \$1.23 billion in base funding for unaccompanied children and up to an additional \$400 million in contingency funding in case greater numbers of children than anticipated arrive—is a good start.⁸¹ Congress should grant the HHS’s request for a contingency fund that would enable the ORR to stabilize its funding stream. Congress should also appropriate sufficient funding for the ORR to fully vet sponsors before children are released to them and to provide all children with at least basic, continual follow-up.

Following the GAO’s February 2016 recommendations, the ORR should implement procedures to adequately and regularly screen its NGO partners that provide services to children and to capture and analyze data about children who have been released to sponsors.⁸² In its response to the GAO report, the ORR agreed to “improve its data collection process to provide more systematic and standardized information on post-release services.”⁸³ Advocates and the GAO must ensure that they do so.

During custody determinations and in immigration detention

The rebirth of family detention

Family detention has had a short and contentious history in the United States. In 2001, the Immigration and Naturalization Service—the precursor to the Department of Homeland Security—began detaining families in a former nursing home in Berks County, Pennsylvania, that had bed space for slightly more than 80 people.⁸⁴ In 2006, U.S. Immigration and Customs Enforcement opened the T. Don Hutto Residential Center, known as Hutto, outside of Austin, Texas, with bed space for 512 people.⁸⁵

Unlike the Berks facility, Hutto had previously been a prison, which the Lutheran Immigration and Refugee Service, or LIRS, and the Women’s Commission for Refugee Women and Children—now the Women’s Refugee Commission, or WRC—described as “a former criminal facility that still looks and feels like a prison, complete with razor wire and prison cells.”⁸⁶ A lawsuit brought by the American Civil Liberties Union, or ACLU; the University of Texas School of Law Immigration Clinic; and LeBoeuf, Lamb, Greene & MacRae LLP forced ICE to implement what should have been basic requirements for the care of children, such as ensuring that discipline for children did not include threats of being separated from their parents, not forcing children to wear prison garb, and having a full-time pediatrician on site.⁸⁷ In 2009, the Obama administration finally eliminated the family facility at Hutto, leaving only the smaller and less prison-like Berks family detention facility open.⁸⁸

In response to the surge of children and families from Central America in the summer of 2014, however, the Obama administration resurrected large-scale family detention as part of its “aggressive deterrence strategy” designed to stop families from making the journey north.⁸⁹ This process commenced with the opening of the now-shuttered Artesia facility in remote central New Mexico.⁹⁰

ICE currently runs three family detention facilities—called family residential centers—in Dilley, Texas; Karnes County, Texas; and Berks County, Pennsylvania. Altogether, these facilities have the capacity to detain approximately 3,000 people.⁹¹

The fight over licensing family detention centers

Under the terms of the 1997 *Flores* settlement, all children held in DHS custody who have not been charged or convicted of a crime, who are not a flight risk, and who are not deemed a danger to themselves or others—regardless of whether or not they came with family members—must be kept in licensed, nonsecure facilities. *Flores* defines such licensed facilities as “any program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children.”⁹²

These licensing provisions are currently at the center of the fight to end family detention. In July 2015, U.S. District Court Judge Dolly Gee found the DHS to be in violation of *Flores*, in part because facilities such as the Karnes County Residential Center were not licensed by the state of Texas.⁹³ The federal government argued that because Texas does not license facilities that hold both children and parents, it could not be required to seek licensing—an argument that Judge Gee rejected out of hand. The DHS has appealed this ruling to the U.S. Circuit Court of Appeals for the 9th Circuit.⁹⁴

In late January, the Department of Human Services for the state of Pennsylvania revoked the Berks facility’s operating license due to the fact that it was housing families instead of just children. In the process, the state also denied a request from Berks County to double the size of the facility to 192 beds.⁹⁵ While the county has appealed the denial, the future of the Berks facility is currently unclear.⁹⁶

Even as Pennsylvania has moved away from licensing the Berks facility, the Texas Department of Family and Protective Services changed its own rules in February 2016 to open the door to licenses for the Dilley and Karnes family detention centers—a move that advocates in Texas have vehemently opposed.⁹⁷ As the *Austin American-Statesman* put it, “Until now, the state ... had maintained that it didn’t have the legal authority to license, inspect and investigate the facilities. This week, the agency gave itself that power.”⁹⁸ While the licensing process will likely take months to complete, the facilities remain open in the interim.

Family detention can have a devastating impact on children and parents, often further traumatizing people who have fled violence and persecution. The LIRS and WRC, in their study of family detention, identified a litany of physical and psychological harms to children and families in detention, from weight loss and depression to cases of sexual assault and abuse by guards.⁹⁹ Advocates have filed multiple complaints with the DHS Office for Civil Rights and Civil Liberties highlighting cases of post-traumatic stress disorder among family detainees, as well as inadequate medical care.¹⁰⁰ Likewise, the American Academy of Pediatrics wrote to Secretary of Homeland Security Jeh Johnson that “continued detainment of any children and mothers ... puts them at greater risk for physical and mental health problems and unnecessarily exposes children and mothers to additional psychological trauma.”¹⁰¹

Detention as deterrence

Since the Artesia facility opened in mid-2014, the administration has portrayed the need to lock up families as part of a strategy to deter future arrivals from Central America.¹⁰² To be clear: Under domestic and international law, it is not illegal to request asylum.¹⁰³ And as the U.N. High Commissioner for Refugees has pointed out, “detention policies aimed at deterrence are generally unlawful under international human rights law.”¹⁰⁴

Given the root causes of violence that are pushing children and families out of Central America, scholars have found such deterrence strategies to be largely ineffective. In fact, surveys of Central Americans who have experienced crime and violence suggest that knowing the potentially dangerous consequences of migration makes no difference in their decisions to flee. These findings make clear that despite the dangers of seeking refuge elsewhere, Central Americans find migration preferable to continuing to live with violence every day.¹⁰⁵

In February 2015, a federal judge issued a preliminary injunction barring the administration from using deterrence as a rationale for detaining families. In particular, the lawsuit—*R.I.L.R. v. Johnson*—challenged ICE’s policy of either denying families release on bond entirely or setting a bond so high as to make it impossible for a family to be released.¹⁰⁶ As a result of the injunction, ICE ceased using deterrence as a rationale for custody determinations in May 2015 and announced a series of efforts to increase oversight of its family detention centers.¹⁰⁷

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Since then, calls to end family detention entirely have only increased: In late May and early June 2015, 136 House representatives and 33 senators called on the administration to fully end the practice, arguing—in the words of the senators—that “there is [no] system of mass family detention that will work or is consistent with our moral values.”¹⁰⁸ Pressure from Congress and the advocacy community pushed Secretary Johnson to announce a further set of reforms in June 2015, including beginning to release families who met the standard of credible fear and ensuring that these credible fear determinations were completed expeditiously. Johnson claimed that “the detention of families will be short-term in most cases” but stopped short of ending family detention entirely.¹⁰⁹

One month later, a district court judge found the DHS to be in violation of the *Flores* settlement, which requires that children be placed in the “least restrictive setting” and released to sponsors as quickly as possible; the administration has appealed the ruling to the U.S. Court of Appeals for the 9th Circuit.¹¹⁰ Even after disavowing the use of deterrence as a reason for family detention in May 2015, the administration’s brief to the 9th Circuit in January 2016 once again argued that family detention is a necessary part of its response to stop future Central American families from coming to the United States.¹¹¹

Nevertheless, the administration has signaled the start of a potential reduction in family detention. In the DHS’s FY 2017 budget request, the administration requested funding for 960 family detention beds, down from the 2,760 beds requested the previous year.¹¹² Concurrently, the DHS requested a 10 percent increase in funding for its alternatives-to-detention program.¹¹³ It is too early to tell if this is a true shift in priorities away from family detention—the administration’s appeal of the *Flores* decision throws such a contention into doubt, although ICE Director Sarah R. Saldaña has hinted that Karnes may cease functioning as a family detention facility¹¹⁴—but the administration should make it so.

Recommendations

Close family detention facilities

First and foremost, the administration should close the Dilley and Karnes family detention centers and release those detained mothers and children who do not pose a security or flight risk that cannot otherwise be mitigated. When detention in a secure location is not necessary to promote public safety or to ensure that individuals appear throughout immigration proceedings, it serves only to hinder access to due process.

Additionally, the DHS should discontinue its practice of placing families who arrive in the United States in expedited removal and should instead place them in 240 proceedings—that is, formal removal proceedings that allow them to make their case for protection in front of an immigration judge.¹¹⁵

Create short-term processing centers

Second, the administration should consider creating short-term processing centers—rather than detention centers—for families upon arrival and use the savings from the closure of family detention facilities to cover the costs of these centers. The centers would function more like shelters than prisons—a response far more befitting this refugee flow, which is made up primarily of mothers with children. Upon arrival, each and every family would receive a legal orientation and would have the opportunity to be connected with pro bono counsel; they would also receive medical, mental health, and other needed care. Each family would be placed into formal removal proceedings, allowing them to make their case for asylum in front of an immigration judge. As long as families do not pose a security or flight risk that cannot be mitigated by an alternative to detention—such as monitoring or an ankle bracelet—they should be released. The DHS should do everything in its power to make sure that families are released from these centers as quickly as possible, in no more than 72 hours after apprehension.

Such processing centers are routinely used in other countries to process large groups of refugees. For example, a processing site in Amman, Jordan that is run jointly by the International Organization for Migration and the Canadian government provides an orderly way to care for and screen Syrian refugees for resettlement in Canada.¹¹⁶

Prioritize alternatives to detention

Finally, whenever possible, the DHS should prioritize the use of alternatives to detention rather than locking people up. These alternatives range from basic monitoring—where a person checks in regularly with a case manager or an ICE officer, either by phone or in person—to more intrusive forms of monitoring, such as GPS-enabled ankle bracelets or house arrest.¹¹⁷ These alternatives have proven highly successful at ensuring that individuals appear at their immigration proceedings, with various studies finding that more than 80 percent of those who receive alternatives appear.¹¹⁸ They are also much cheaper than detention: While family detention costs anywhere from \$161 to \$343 per day,¹¹⁹ ICE’s formal alternatives-to-detention program costs only \$5.16 per day.¹²⁰ In each case, the DHS’s default response should be to use the least restrictive form of monitoring possible or, when appropriate, to release individuals without using formal alternatives while they await their immigration proceedings.

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In immigration proceedings

The importance of access to counsel

Immigration court proceedings are adversarial, with a trained government attorney arguing for the deportation of each child or family who comes before the court.¹²¹ Even so, children as young as toddlers have historically been permitted to appear before the courts without lawyers,¹²² despite the obvious reality that no 3-year-old without representation could possibly receive a full and fair hearing as required under the Fifth Amendment's due process clause.¹²³ The government now appoints counsel for some vulnerable populations, such as those with serious mental disabilities, as a result of a policy adopted in connection with a class action lawsuit, but it does not yet do so routinely for children appearing before the immigration courts.¹²⁴

The Transactional Records Access Clearinghouse, or TRAC—a research center that collects data about immigration enforcement and immigration courts, among other issues—found that as of March 2016, only 46 percent of all minors and 40 percent of mothers with children had representation in immigration proceedings.¹²⁵ Access to counsel dramatically increases an individual's chance of winning an asylum case: TRAC studies of closed cases uncovered that children were nearly five times more likely to win their cases with a lawyer than without, while families were a whopping 14 times more likely to win their cases with a lawyer.¹²⁶

Access to counsel also helps to ensure that children and families appear in court for their immigration proceedings. According to an American Immigration Council study, from FY 2005 through FY 2014, children with attorneys appeared at their hearings 95 percent of the time.¹²⁷ Meanwhile, 98 percent of families with representation who arrived in FY 2014 appeared at their hearings, according to a July 2015 Human Rights First report.¹²⁸ Many of those without representation end up being ordered deported in absentia, often for missing a single hearing.¹²⁹

When a child is released from ORR care to a sponsor, it is the child's obligation to file the appropriate paperwork to inform the immigration courts of a change in address.¹³⁰ Children who do not have counsel tracking their cases often fail to receive information about where and when to appear for court hearings, curtailing their ability to make a case for protection.¹³¹ A Migration Policy Institute study of closed cases from October 2013 through August 2015 involving unaccompanied children found that 48 percent were ordered deported in absentia.¹³² Similarly, the *Los Angeles Times* reported in March 2015 that more than 7,000 unaccompanied children who had arrived in the United States since the fall of 2013 were ordered deported in absentia.¹³³

As with their overall policies toward Central American asylum seekers, some members of the administration have framed their opposition to providing counsel for children around the idea of deterrence. In connection with a lawsuit arguing that children have a statutory and constitutional right to appointed counsel, Deputy Assistant Attorney General Leon Fresco told a federal court that ordering the government to appoint attorneys for children—especially without the guarantee that Congress would appropriate sufficient funds to appoint such attorneys—would bring proceedings to a halt and would signal that “the border is completely open to children under 18.”¹³⁴ Given the strides the United States has made in securing the border over the past decade, such a comment is hyperbolic at best.¹³⁵

And during a recent deposition taken in that case, Assistant Chief Immigration Judge Jack H. Weil argued that he had “taught immigration law literally to 3-year-olds and 4-year-olds” and that “you can do a fair hearing” for toddlers without counsel, though he added, “It’s going to take you a lot of time.”¹³⁶ Under questioning about Judge Weil’s deposition by Sen. Patrick Leahy (D-VT), however, Attorney General Loretta Lynch conceded, “In no way does the Department of Justice feel that children of that age, or even, frankly children even older, can or should represent themselves individually.” Asked why the DOJ does not simply refuse to hear immigration cases with unrepresented children, the attorney general said, “We may find ourselves there,” without committing to such a change at present.¹³⁷

Although the administration has provided funds for a pilot program to train lawyers and paralegals to represent some unaccompanied children, it has also continued to oppose a legal challenge attempting to ensure that it appoints counsel for all children.¹³⁸

Speedy trials for asylum seekers

Starting in mid-2014, as the number of unaccompanied children and families grew, the administration began expediting immigration hearings for the new arrivals in special “rocket dockets” designed to move children and families quickly through the process.¹³⁹ Under these proceedings, the immigration courts have sought to get children and families to a master calendar hearing—the first step in removal proceedings—within 21 days of a notice to appear in immigration court being filed by DHS personnel.¹⁴⁰ The administration’s goal has been to quickly process and remove people in order to send a message to future arrivals.¹⁴¹

In February 2016, the DOJ announced that it was expanding this timeframe somewhat—a child’s master calendar hearing is now to be held no earlier than 30 days and no later than 90 days from the immigration court’s receipt of the notice to appear. While a welcome change, the timeframe is still too expedited to allow a child fair access to the immigration court system.¹⁴²

To be clear, no one should have to wait in limbo for years before getting a court hearing and a decision on one’s protection claim; the average waiting time to get a hearing in the immigration courts is currently 666 days,¹⁴³ which is far too long. However, children and families must be allowed time to find counsel and to gather the evidence needed to prove their well-founded fears of persecution—the standard by which judges assess their claims for asylum.¹⁴⁴ And instead of solving the problem, rocket dockets have only led to longer waiting times for anyone else with a pending case before the immigration courts.¹⁴⁵

The immigration courts continue to creak under the weight of a crushing case load. The average person waits for nearly two years for their case to be completed, with many cases dragging on for more than double that time.¹⁴⁶ The enormous case load means that some people are only in front of a judge for mere minutes before a decision is made.¹⁴⁷ Judge Dana Leigh Marks, president of the National Association of Immigration Judges, has compared the rushed process and the enormous stakes involved in immigration proceedings to “death penalty cases heard in traffic court settings.” This hardly gives children and families the time or resources to have a fair shot at making their cases for protection.¹⁴⁸

Recommendations

Pass the Fair Day in Court for Kids Act

First and foremost, Congress should quickly pass Sen. Harry Reid's (D-NV) and Rep. Zoe Lofgren's (D-CA) Fair Day in Court for Kids Act of 2016.¹⁴⁹ The bill would make a number of important changes and clarifications when it comes to counsel for children, specifically by instructing the attorney general to appoint representation for all children, as well as other vulnerable individuals in immigration proceedings, such as those with disabilities and victims of abuse or violence. The bill would also mandate legal orientation programs for all detained immigrants and create a pilot program to provide legal orientations to nondetained immigrants at the immigration courts.¹⁵⁰ These changes would—as Wendy Young, the president of the nonprofit Kids in Need of Defense, has put it—“promote greater efficiency and integrity in our immigration system” by giving children and vulnerable families the ability to gain meaningful representation.¹⁵¹

Ensure counsel for kids

The administration should explore settlement negotiations to resolve *J.E.F.M. v. Holder*, a lawsuit that seeks to establish the statutory and constitutional right to appointed counsel for children in immigration proceedings, and/or consider adopting a policy of appointed counsel for children that would render the case moot.¹⁵² Even without the passage of legislation or court-ordered relief, the administration has the ability under existing law to appoint counsel for children, and it should do so.¹⁵³ In the meantime, the DHS and the immigration courts should grant continuances to children and families who do not have counsel, giving them time to secure it.

Likewise, Congress should appropriate funding to cover the costs of appointed counsel. This proposal can be cost effective: In 2014, NERA Economic Consulting produced a report examining the fiscal impact of providing counsel for all indigent people in removal proceedings and found that its \$208 million cost would likely be fully offset by reduced costs associated with immigrant detention, foster care, and legal orientation programs.¹⁵⁴

And because so many children without representation are being ordered deported in absentia—often without even knowing when and where they were supposed to appear for immigration hearings—the Executive Office for Immigration Review should reopen the cases of anyone whose ruling was made in absentia.¹⁵⁵

End rocket dockets

The government should also end its use of rocket dockets. No good comes from speeding up asylum hearings when the consequences of short-cutting a fair process could mean deporting a person back to a dangerous or deadly situation. Congress should also consider a broader restructuring of the immigration courts system—such as converting them into Article I courts—to achieve judicial independence from the DOJ and the administration.¹⁵⁶

Appoint an advocate for every unaccompanied child

The government should appoint child advocates—individuals appointed specifically to represent the best interests of the children, including by advising the courts on matters such as detention, care, and deportation—for every unaccompanied child in immigration proceedings. Similar to counsel, the government does not currently appoint an advocate except in extreme cases of trafficking or other mitigating circumstances. Under the Trafficking Victims Protection Reauthorization Act, the Department of Health and Human Services has the authority to appoint independent child advocates for vulnerable children “to effectively advocate for the best interest of the child.”¹⁵⁷ The ORR currently has a small child advocate program run by the Young Center for Immigrant Children’s Rights, but only roughly 1 percent of unaccompanied children in FY 2015 received an advocate through the program.¹⁵⁸ All unaccompanied children, by virtue of their age and status, are vulnerable. Ensuring that a child advocate is present and expanding the child advocate program would help children navigate the complexities of the immigration courts.¹⁵⁹ Congress should appropriate the necessary funds to make such a change.

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Increase funding for immigration courts

Finally, Congress should sufficiently fund the immigration courts. In December 2015, Congress granted funds for 55 new immigration judge teams—a good start toward shoring up an overworked system.¹⁶⁰ But given the current caseload, with more than 470,000 cases pending, an even greater number of judges are necessary.¹⁶¹ The roughly 250 immigration court judges have, on average, close to 1,800 cases on their dockets—nearly four times as many as a federal district court judge.¹⁶² More than half of these judges are currently eligible to retire, meaning that the system will struggle to maintain even its current pace over the next few years.¹⁶³

To fix these disparities, Human Rights First has called for an additional 75 judges to be added each year for the next three years at a cost of \$223 million, while Daniel Costa of the Economic Policy Institute has called for a tripling of the number of immigration judges at a cost of roughly \$500 million.¹⁶⁴ These changes would bring the average docket down to between 600 cases and 870 cases per year, a far more manageable load.¹⁶⁵

Conclusion

With the number of children and families arriving in the United States from the Northern Triangle expected to increase over the course of FY 2016,¹⁶⁶ the United States must ensure the highest standards of due process, access to asylum, and the availability of other forms of relief for all those fleeing violence and persecution. As a nation, the United States must meet the challenge of greater numbers of asylum seekers with a continued commitment to protection, rather than turning away those in need of America's help. That commitment must begin upon arrival—by ensuring that each individual seeking protection has the knowledge and ability to do so—and must continue into custody determinations and detention, as well as through the immigration court proceedings.

Given the overwhelming evidence that violence and structural poverty are pushing children and families out of Central America, such flows will not end until the root causes pushing people out are addressed.¹⁶⁷ In a companion report, the Center for American Progress lays out medium-term recommendations for creating a safe place for children and families in the region and for building an orderly refugee processing system to provide them with durable integration and resettlement solutions. That report also details the longer-term steps that the Northern Triangle countries, in conjunction with the United States and other nations in the Western Hemisphere, must take to stem the tide of violence and structural poverty in El Salvador, Honduras, and Guatemala.

Only by truly tackling the root causes of violence and insecurity will children and families no longer feel the need to risk the dangerous journey to safety. In the meantime, the United States has a moral and legal obligation to protect those in danger who arrive at our borders.

As a nation, the United States must meet the challenge of greater numbers of asylum seekers with a continued commitment to protection, rather than turning away those in need of America's help.

About the author

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