

ISSUE BRIEF

No. 4912 | OCTOBER 24, 2018

Immigration Law and Enforcement in Dire Need of Clarity and Major Overhaul

David Inserra

Recent, increasingly worrisome, events indicate that the U.S.'s ability to enforce its immigration laws is strained to the breaking point. In some ways, the system has already failed. Unfortunately, enforcement failures only invite further illegal immigration, meaning that this problem is likely to continue, and to spiral out of the U.S.'s control completely. In the face of this growing problem, the U.S. needs Congress to fix broken immigration laws now.

A Host of Issues

The start of the Trump Administration ushered in the promise of better immigration enforcement. The Administration delivered administratively, doing a great deal to allow U.S. immigration agencies to do their job. In light of these promises, illegal immigration dropped from the October 2016 high of almost 67,000 individuals apprehended or deemed inadmissible at a port of entry to the March and April 2017 low of around 16,000.¹ As a point of reference: In April 2016, there were over 48,000 apprehensions or inadmissible individuals.

Unfortunately, that low number has steadily climbed again, as the Administration, hamstrung by various laws and court cases, proved unable to stop and deter illegal immigration. In April this year, there were nearly 51,000 apprehensions or inadmissible

individuals. Migrant “caravans” in Central America continue to form and head for the U.S. border. The immigration court system as of August 2018 took an average of 717 days to adjudicate cases and had 764,561 cases to complete, both the highest figures for any given year on record.² While the Department of Homeland Security (DHS) has not prepared asylum data for the most recent years, in fiscal year (FY) 2016, asylum claims continued to rise, with the DHS carrying out over 92,000 “credible fear” hearings in FY 2016, a dramatic rise from just over 5,000 in FY 2008.³

Similar to illegal immigration as a whole, family units and unaccompanied alien children illegally entering the U.S. decreased in FY 2017, but once again increased in FY 2018. New Customs and Border Protection data provided to the media indicates that since the collapse of the Administration’s “zero tolerance” policy for illegal border crossers earlier this year, family units crossing the border have increased by over 75 percent, from 9,435 in June to 16,658 in September. Recently, so many people have been crossing the U.S. border illegally that the DHS simply cannot keep up and, because of existing U.S. laws and court cases, is now forced to release most family units without knowing how or if the illegal crossers will appear at an immigration court. A senior DHS official referred to these forced releases of illegal immigrants as “the start of a dam breaking.”⁴ Based on 2016 data, around 40 percent of those with immigration court dates will eventually fail to show, and disappear into the U.S.⁵

The Root Cause

These and other problems have a common cause—dysfunctional immigration laws. While many push-and-pull factors contribute to illegal immigration,

This paper, in its entirety, can be found at <http://report.heritage.org/ib4912>

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

loopholes and defects in U.S. immigration laws are among the largest problem sets and are fully within Congress' power to fix. U.S. asylum laws and policies dealing with families and children are in especially dire need of an overhaul.

The U.S. asylum system is overwhelmed because it has become the easiest way for illegal immigrants to attempt to remain in the United States. The U.S. grants asylum to individuals who are persecuted or who fear persecution based on their race, religion, nationality, membership in a social group, or political opinion.

There are two ways to seek asylum. Affirmative asylum claims are when a person claims asylum at a port of entry or while *legally* in the U.S. Defensive asylum claims occur when a person who was picked up for crossing the border illegally or for crimes in the interior of the U.S. claims asylum in order to avoid deportation. Defensive asylum seekers must go through a "credible fear" hearing that determines if there is a "significant possibility" that they could prove their asylum claims in an immigration court.

This standard is set fairly low in order to avoid turning away those who really face persecution, but it has significant negative consequences on enforcement. Little or no evidence beyond the testimony of the asylum seekers is necessary to make a claim, and the DHS is often restricted from seeking information outside the U.S. government to verify claims.⁶ The result is that many who will not end up qualifying for

asylum can pass a "credible fear" hearing. Approximately 75 percent of cases will pass the credible fear standard, but in the past several years for which the U.S. has data, less than 20 percent of cases received by an immigration court will be granted asylum.⁷ Another problem is that the current influx of asylum seekers is coming from Central America and will pass through or forgo other, closer, countries that will provide asylum, such as Costa Rica, Panama, and Mexico.⁸ This indicates that asylum seekers are ignoring other safe havens in favor of the U.S. for economic, family, or other reasons, knowing that the U.S. system can be manipulated.

In addition to this broken asylum system are specific loopholes regarding children and families. First, there is the well-intended 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) that requires unaccompanied minors from countries other than Mexico or Canada to go through a longer legal process, which limits enforcement and contributes to the inundated immigration court system.⁹

A similar loophole exists as a result of a recent Ninth Circuit Court of Appeals interpretation of a 1997 settlement agreement known as *Flores v. Reno*.¹⁰ That settlement has been interpreted to require the DHS to release from its custody all children, even if they are with their parents. The result is that when adults cross the border with a child, the DHS is required to release the child within 20 days. Since

1. U.S. Customs and Border Protection, "Southwest Border Migration FY2018: U.S. Border Patrol Apprehensions FY2018 YTD (October 1–August 31)," <https://www.cbp.gov/newsroom/stats/sw-border-migration> (accessed October 19, 2018).
2. TRAC Immigration, "Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location," for FY 2018, http://trac.syr.edu/phptools/immigration/court_backlog/ (accessed October 19, 2018).
3. Nadwa Mossaad and Ryan Baugh, "Refugees and Asylees: 2016," U.S. Department of Homeland Security, Office of Immigration Statistics, *Annual Flow Report*, January, 2018, https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2016.pdf (accessed October 19, 2018).
4. Julia Ainsley, "Abrupt Release of Hundreds of Migrants in Phoenix Is 'Start of Dam Breaking,'" NBC News, October 9, 2018, <https://www.nbcnews.com/politics/immigration/abrupt-release-hundreds-migrants-phoenix-start-dam-breaking-n918256> (accessed October 19, 2018).
5. U.S. Department of Justice, Executive Office for Immigration Review, Office of Planning, Analysis, and Statistics, "FY 2016 Statistics Yearbook," March 2017, <https://www.justice.gov/eoir/page/file/fysb16/download> (accessed October 22, 2018).
6. Andrew R. Arthur, "Fraud in the 'Credible Fear' Process," Center for Immigration Studies *Background*, April 19, 2017, <https://cis.org/Report/Fraud-Credible-Fear-Process> (accessed October 19, 2018).
7. U.S. Department of Justice, Executive Office for Immigration Review, Office of Planning, Analysis, and Technology Immigration Courts, "Asylum Statistics FY 2012–2016," <https://www.justice.gov/eoir/file/asylum-statistics/download> (accessed October 19, 2018).
8. David Inserra, "Seeking Asylum: Congress Should Fix Critical Loopholes to Secure the Southern Border and Help the Persecuted," Heritage Foundation *Issue Brief* No. 4851, May 7, 2018, <https://www.heritage.org/immigration/report/seeking-asylum-congress-should-fix-critical-loopholes-secure-the-southern-border>.
9. Paul Fredrick and David Inserra, "Fixing This Immigration Loophole Would Help Address Child Migrants," The Daily Signal, April 4, 2018, <https://www.dailysignal.com/2018/04/04/fixing-immigration-loophole-help-address-child-migrants/>.
10. *Flores v. Lynch* (9th Cir. 2016), <https://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf> (accessed October 19, 2018).

the parents broke the law by crossing the border illegally, the government tries to detain and prosecute them after their asylum claims are completed. And, since that will take more than 20 days, the DHS has to release the child, leaving the government with the choice of detaining the parents or releasing them all. With the end of the zero tolerance policy, the DHS has decided that it will simply release anyone accompanied by a child in order to comply with *Flores v. Reno*. As a result, the number of family units crossing the border is skyrocketing, overwhelming the DHS's ability to even figure out basic details of their travel, and exhausting the immigration court system.

Restoring Order to a Broken System

If the U.S. wants to deter and better handle illegal immigration, important reforms are necessary—now. Every day that goes by further strains the overstretched capabilities of the DHS and the immigration courts, encouraging more illegal immigrants and diverting resources from other threats or helping those deserving of asylum. Congress should:

- **Increase funding for immigration court judges, prosecutors, and associated staff.** The U.S. immigration adjudication and court system is falling further and further behind. More immigration judges, prosecutors, and staff to assist in immigration proceedings as well as more U.S. Citizenship and Immigration Services (USCIS) asylum officers are essential to enforcing U.S. immigration laws in a timely and effective manner.
- **Adjust the asylum claim process.** There are multiple ways Congress could improve the asylum system. Rather than applying for asylum at U.S. borders, asylum seekers travelling to the U.S. southern border should be required to have their asylum claims heard by a USCIS asylum officer at a U.S. consulate in Mexico in a credible

fear interview. Credible fear interviewers should also ask the asylum seeker why he or she did not assert asylum in other countries, such as Mexico. Failure to explain the refusal to pursue asylum in other countries should be considered in the decisions of immigration officials. The Administration should also pursue safe-third-country agreements with countries in Latin America, requiring asylum seekers to first pursue asylum in those closer countries before making a claim in the United States.

- **Close the loopholes.** Congress should reject the *Flores* settlement in order to allow accompanied children to remain with their parents while awaiting asylum adjudication or prosecution of misdemeanor violations of immigration law. Congress should reform the TVPRA of 2008 to allow unaccompanied children from countries that are non-contiguous with the U.S. to be quickly repatriated to their home countries.

Enforcing Laws and Advancing U.S. Interests

The broken U.S. immigration system is encouraging ever more illegal immigration, especially of children and families. While more can and should be done to work with countries in Latin America to combat illegal immigration and push factors, such as violence and poverty, the U.S. ultimately has control over its laws and how they are enforced. Closing critical loopholes in the U.S. asylum system is essential to alleviating the U.S.'s immigration woes. Then, the U.S. can better defend Americans, welcome legal immigrants, and assist those who truly merit asylum.

—*David Inserra is Policy Analyst in the Douglas and Sarah Allison Center for Foreign Policy, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation.*