

The Evolving U.S. Policy Toward Asylum Seekers

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Abstract

Immigration to the United States via the southern border has proved a delicate political and legal issue throughout the years. The issue has become especially complicated given new pressures like the COVID-19 pandemic and the recent increase of illegal immigrants, especially children, at the border. The question arises as to how to reconcile international human rights for immigrants seeking asylum against the need to deter the untenable influx of illegal immigration. To untangle this question, this paper will discuss the history of immigration law and the stringent enforcement policies enacted during the Trump administration. It will also examine the difficult transition in immigrant policy since Joe Biden's election to office in 2020. The essay will then explore the international circumstances contributing to the recent immigrant surge. Ultimately, the future of immigration law requires that the Biden administration balance fulfilling campaign promises to reverse Trump-era protocols against managing the immigration spike at the southern border.

Keywords: asylum, refugees, Customs and Border Patrol, Migrant Protection Protocols, 1951 Refugee Convention, U.S. citizenship, zero tolerance policy

Introduction

Seeking asylum in the United States can be a complex and arduous process, generally governed by civil procedures, but which may also have criminal implications for asylees, depending

on the circumstances of their entry. The process has grown increasingly challenging, as policy changes made during the Trump administration have resulted in stricter enforcement of immigration procedures. The matter is further complicated by a swell of anti-immigration sentiment and rhetoric bolstered by the Trump administration and former president Trump himself. The messaging and policy positions articulated by the new Biden administration purport to bode well for advocates of broad progressive immigration reform, as the administration is poised to reassess immigration policies dating back to the second Bush administration. This process will likely not be without challenges for the Biden administration, as it seeks to balance Biden's campaign promises of a more humane and equitable asylum process against the logistical and potential socioeconomic consequences of the current immigration surge at the southern border.

This essay will examine the history of the asylum process in the United States and will discuss both civil and criminal aspects of the process. Additionally, contrasting policy positions will be examined to highlight the differences between the approaches of the Obama, Trump, and Biden administrations.

The Southern Border Surge

During the first six months of the Biden administration, unlawful entry through America's southern border reached a 20-year high (Hackman & Caldwell, 2021). The number of families intercepted by U.S. agents at the

southwestern border soared to 17,773 in February 2021, up from 6,173 in January 2021 (Jordan, 2021). Although coverage and public opinion about the recent border surge may suggest that the surge is unprecedented, such surges are a normal, cyclical part of the U.S. immigration system. Internal factors such as capacity to manage incoming migrants may impact America's ability to successfully manage incoming migrants; however, it is external, and not internal factors that typically drive such periodic surges. Conditions in asylees' countries of origin are constantly in flux, and U.S. infrastructure and policy changes may not be sufficient by themselves to create or curb an immigration surge. For example, recently drought conditions in Guatemala and economic insecurity in Central and South America heavily influence the number of individuals attempting border crossings or seeking asylum, regardless of internal U.S. policies (NPR, 2021). Massive refugee crises typically do not wait for administrations with favorable immigration policies to come into power and so the conclusion that one may draw between an administration's policies and the occurrence of a surge may be entirely illusory.

The Asylum Process

In considering the U.S. asylum process, it is important to note the contextual discrepancies between U.S. policies and international norms. Under international law, an asylee may invoke asylum protection to avoid persecution in their country of origin. The United States was at least initially in agreement with this principle, as it ratified Article 31 of the 1951 Refugee Convention, which holds that a nation may not impose "penalties" upon refugees seeking asylum—even if they entered illegally—if coming directly from a territory where their lives or freedom were threatened, so long as they show good cause for their illegal entry or presence (Convention, 1951).

The U.S. is still a party to this convention, and U.S. Citizenship and Immigration Services

(USCIS) policies guarantee asylees a right to a fair hearing, so long as they assert a claim within one year of entry. However, bureaucratic and political realities often impede the exercise and efficacy of this right by hindering the making of necessary claims and mandating the removal of some asylees pending their court hearing, which may prevent them from working and financially supporting their families, which may ultimately harm their asylum applications (Frum, 2019).

To better understand this process, it is helpful to examine how the nature of an asylee's entry into the U.S. affects their requests for asylum protection. The asylum process, while governed by civil laws, has potential criminal implications as well. In circumstances where an asylee has lawfully entered the U.S., they may make an affirmative declaration and application for asylum within one year of their entry. For an asylum application to be successful, the asylee must satisfy the "credible fear" standard; that is, they must sufficiently demonstrate that they are in reasonable fear of great physical harm if they return to their country of origin. If the asylum officer determines that this standard has not been satisfied, the asylee is placed in removal proceedings, which may ultimately lead to deportation, barring extenuating circumstances (American Immigration Council, 2020).

When an asylee enters the U.S. unlawfully, such as in an unlawful border crossing, a removal proceeding is initiated by the Department of Justice and the asylee may then assert an asylum claim as a defense against the removal proceedings. Prior to deportation, the asylee may obtain a hearing before an immigration judge. If the judge finds that the credible fear standard is unmet, deportation results. If the judge finds that the standard has been met, removal proceedings continue, and the asylee may present further evidence to justify the granting of asylum. In many instances, the asylee will opt to interrupt the deportation process by asserting a defensive claim for asylum and improve the likelihood of remaining in the U.S. (Frum, 2019). It is notable that because immigration and removal

proceedings are civil and not criminal, U.S. law does not provide for the appointment of counsel for asylees and potential deportees. While asylees may hire their own attorneys, they do not have the right to court-appointed counsel if they cannot otherwise afford it, thereby increasing the difficulty for many asylees to successfully present their case before the immigration court (Eagly, 2016). If an asylee is denied asylum, the decision may be appealed; however, it may take several years before the appeal is finalized and a decision is rendered.

Procedural Changes Under the Trump Administration

The Trump administration made several changes to immigration enforcement and the asylum process that have made it more difficult for asylees to obtain asylum. In the pre-Trump era, asylees who had been subjected to a deportation order, but who were awaiting a final decision on their appeal, were allowed to remain in the U.S. pending resolution. Under Migration Protection Protocols (MPP), the Trump administration withdrew this allowance, mandating that all persons appealing deportation orders, including asylum seekers, be required to first return to their countries of origin (American Immigration Council, 2021). Perhaps even more stringent than the MPP was the administration's 'metering' policy, which placed a limit on the number of asylee applicants accepted at various ports of entry. If the limit was reached, any additional asylum seekers would be added to a waitlist and were sent back to their country to await a hearing on their asylum petition (Frederick, 2019). The Trump administration also instituted a zero-tolerance policy, which resulted in the separation of children from their parents at the southern border. Because of this policy, parents were often detained or deported while their children remained in the custody of Immigration and Customs Enforcement (ICE). (Schmidt, 2019). After substantial public backlash and the failure of the federal government to reunite numerous

families, the program was terminated (Rose, 2020).

It is worth noting that numerous other Draconian policies that are often attributed to the Trump administration due to its openly anti-immigrant stance and rhetoric, were in place prior to Trump's rise to power. In 2005, the Bush administration enacted Operation Streamline, which enacted the mass prosecution of undocumented immigrants. These prosecutions superseded the asylum process and prevented asylees from obtaining preliminary screening interviews with asylum officers and further limited access to legal counsel.

The absence of legal representation may have resulted in numerous asylees waiving their appellate rights by signing plea agreements offered by the government in the absence of counsel to interpret the agreements and assist asylees in making informed decisions about whether to accept them. (Schmidt, 2019). Additionally, although the Trump administration was largely blamed for the separation of families at the border, this practice began under the Obama administration as early as 2014, although the Trump administration's zero tolerance procedures exacerbated the severity of the problem (Miroff, 2020).

Procedural Changes Under the Trump Administration

The Biden administration is in the process of reassessing and restructuring immigration policies and procedures enacted by the Trump administration and previous administrations. The Biden administration has come into power with significant public outcry from liberal voters to provide asylees with the full extent of their lawful protection under both international and domestic laws. The ongoing controversy over how to enforce illegal immigration laws without jeopardizing human rights may be one of the most important topics of discourse for the new U.S. President and the American people.

Thus far, the Biden administration has made limited progress in delivering on his

campaign's promises. Although Biden pledged to end the process of family separation, the practice continues, and the administration has had limited success in reuniting children separated from their parents by ICE. (The Signal, 2021). Additionally, although the administration has sought to alleviate overcrowding and supply shortages at ICE detention facilities, such problems persist (The Signal, 2021). In the wake of the Covid-19 pandemic, the Biden administration continues to expel thousands of migrant families to Mexico under Title 42 of the United States Code, Section 265, which provides for expulsion of persons who were recently in a country where a communicable disease was present. (42 U.S.C. § 265). On other fronts, the administration has been more successful. The Biden administration lifted the Trump-imposed immigration ban from Muslim-majority nations and terminated the Migration Protection Protocols program (American Immigration Council, 2021). The administration has also issued an executive order to reinstate the Deferred Action for Childhood Arrivals (DACA) program, which provides a legal pathway to citizenship for undocumented migrants who entered the U.S. as children.

A more comprehensive proposal was sent to Congress in the hopes of enacting a more permanent and enduring immigration reform act. The United States Citizenship Act of 2021 would have enacted broad reforms at every level of the immigration process and would have rolled back many of the Trump administration's immigration-restricting executive orders, creating a pathway to citizenship for roughly 11 million undocumented persons (Dickson, 2021). In February 2021, the Biden administration outlined the establishment of a task force whose responsibilities would include reunifying families separated by the Trump administration, attempting to understand the reasons for the influx of migration, and developing a more just and humane screening process for refugees and asylum seekers (FACT SHEET, 2021). The task force will assess the impacts of the Trump administration's MPP program and will coordinate with local officials in affected countries

to ensure that those on federal asylum waitlists are permitted to return to the United States pending resolution of their asylum claims, as per pre-Trump policies. This process will involve extensive coordination between the State Department, DHS, and authorities in Mexico and Central and South American countries. (FACT SHEET, 2021). In addition to assessing the policy and logistical realities of the recent immigration surge, the task force would be charged with better understanding the individual and community impacts of the immigration policies, including the experience of hardships by asylees and undocumented migrants. (FACT SHEET, 2021).

Barriers to Reform and the Realities of Slow Reform

The Biden administration must carefully weigh the pros and cons of immigration reform with respect to migrants and the southern border. Currently, the U.S. is fighting the COVID-19 pandemic both from economic and public health perspectives. Biden has suggested the importance of managing expectations by stating that immigration reform will take at least a few months, if not years, to fully implement. The process will take time and not all immigration reform initiatives may be attained, especially without bipartisan support.

According to the American Immigration Council, migrants who sought asylum during the COVID-19 pandemic have been in limbo, living in tent camps along the U.S.-Mexico border without any opportunities for employment, as many are not Mexican citizens. Some have, in desperation, attempted to cross the border despite the perils and have lost their lives. Moreover, some did not even have an opportunity to plead for asylum under Trump's "metering" policy. These migrants have been told to wait in Mexico because the "quota" for asylees had been met, denying access to the asylum process, and forcing them to wait indefinitely in Mexico. The metering policy had been used previously by the Obama administration as well during an influx of Haitian refugees in 2016. However, that metering ended

in a timely fashion once “the bottleneck” had been alleviated (Murray, 2018). In contrast, the current metering policy in Mexico continued until March 2020 when processing asylum seekers at the southern border was suspended due to the COVID-19 pandemic (Leutart & Arvey, 2020).

The backlog in the processing of migrant children has raised humanitarian concerns about how long they are sheltered before being released to relatives or friends in the U.S. Another daunting issue for the Biden administration is addressing the underlying causes of immigration by confronting the instability, violence, and economic insecurity that encourages immigrants to flee from their home countries. The administration must collaborate with foreign governments and international organizations to better understand and resolve these complicated matters (FACT SHEET, 2021).

Conclusion

The asylum process is complicated and arduous, due to the complex nature of immigration waves and surges, combined with resource and infrastructure limitations and shifting political landscape of the U.S. Although immigration surges are largely the consequence of pressures external to the U.S., presidential administrations have the power to impact the way asylees and undocumented migrants are treated during the asylum and removal processes. While this paper detailed the policies and procedures that have been enacted and repealed during the last three presidential administrations, equal, if not greater energy must be devoted to better understanding the root causes of surges in asylum petitions, as seeking those answers may improve the humanitarian response to such crises in the future. Though public opinion may lay blame at the feet of one administration versus another, refugee crises exist regardless of the party in power. It is incumbent upon each administration to attempt to meet these crises in a manner that both seeks to alleviate the human and socioeconomic tolls that mass immigration may

present, while ensuring that the human rights of all immigrants and asylees are preserved.

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