

ISSUE BRIEF

No. 4851 | MAY 7, 2018

Seeking Asylum: Congress Should Fix Critical Loopholes to Secure the Southern Border and Help the Persecuted

David Inserra

A caravan of asylum seekers recently arrived at the U.S. southern border. The Mexican government stopped many of the individuals in the course of the journey, but news reports indicate that at least a hundred have made their way to northern Mexico with the intent of seeking asylum in the U.S.¹

This case directly highlights particular weaknesses in U.S. asylum policies. While the U.S. should continue to protect individuals who have been persecuted in their home countries, the number of invalid asylum claims have been growing, especially at the southern border. The U.S. immigration system is struggling to appropriately investigate and adjudicate asylum cases and Congress should pursue reforms that serve U.S. interests by discouraging illegal immigration, decreasing the burden of the asylum process on the U.S. immigration system, and better serving legitimate asylum seekers.

Asylum Basics

According to the U.S. Department of Homeland Security, asylum seekers must meet the same criteria as refugees—“a person who is unable or unwilling to return to his or her country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in

a particular social group, or political opinion”—and is generally located in the U.S. or at a U.S. port of entry.² Asylum seekers can claim affirmative asylum—when an immigrant or visitor in the U.S. requests asylum from DHS proactively—or defensive asylum—when an individual claims asylum in the process of deportation proceedings before an immigration judge to prevent her removal from the U.S.

Both affirmative claims and defensive claims of asylum have risen significantly. In 2016, 115,399 affirmative asylum applications were submitted, an approximate increase of 100 percent from 2014 and the seventh consecutive year of increases.³ These growing number of affirmative claims of asylum are adjudicated by an ever-shrinking number of U.S. Citizenship and Immigration Services (USCIS) asylum officers, as these officers have increasingly been sent to conduct credible fear interviews. As a result, USCIS asylum officers are adjudicating fewer affirmative cases and referring fewer cases to immigration judges in the U.S. Department of Justice’s Executive Office for Immigration Review (EOIR).⁴ Defensive asylum claims also increased to 65,218 in 2016, up from 45,770 in 2015.⁵

In addition, immigrants who are placed into expedited removal—streamlined removal of illegal immigrants who have been in the U.S. for less than two years by immigration officers rather than immigration courts—may claim a credible fear of persecution to stop their removal. This claim prompts a credible fear interview, in which asylum officers determine if there is a “significant possibility” that an alien can establish persecution or a well-founded fear of persecution before an immigration judge. If such credible fear is found, then the alien must make her case to

This paper, in its entirety, can be found at <http://report.heritage.org/ib4851>

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.

an immigration judge as a defensive claim to asylum. If credible fear is not found, she is removed. In 2008, DHS asylum officers referred 5,100 cases meeting this credible fear threshold to immigration courts but in 2016 DHS referred almost 92,000 cases.⁶

The Problems with the System

The U.S. embraces the noble act of protecting those who face persecution. However, the current asylum system has several concerning features that call into question its effectiveness.

As asylum claims are increasing, grants of asylum in U.S. immigration courts have fallen, both as a percentage of those applying and in absolute numbers.⁷ In fiscal year (FY) 2012, immigration courts approved 56 percent of asylum claims; this number fell in each following year, reaching 43 percent in FY 2016. Similarly, the total number of asylum grants fell from 28,000 in FY 2012 to 20,455 in FY 2016. Increasing numbers of aliens are seeking asylum but fewer are judged to have a legitimate claim. As seen with the present caravan situation, asylum claims are overwhelming the ability of DHS and the EOIR to process claims and keep track of asylum seekers, resulting in:

1. Overburdened immigration courts. As of March 2018, U.S. immigration courts faced a record backlog of almost 700,000 pending cas-

es.⁸ In 2008, the courts had 186,108 pending cases. The expansion has resulted in increasing wait times for court appearances, from an average of 438 days (2008) to 718 days (2018).⁹ While asylum cases are not the only cases heard in immigration courts, the increase in claims are a major contributor to the problem.

2. Catch and release. With increasing numbers of asylum seekers and immigration court backlogs, the U.S. Immigration and Customs Enforcement (ICE) is unable to detain all illegal immigrants or even all asylum seekers once they have cleared the credible fear interview. The result is that many will be released into the U.S. to await a court hearing, often at immigration courts scattered across the U.S. Such release allows the alien to disappear from federal authorities, working and living in the U.S. illegally. According to the EOIR, of aliens not detained, 39 percent failed to show up to their court hearing in FY2016.¹⁰

3. Delayed asylum to those deserving of protection. Many asylum seekers have real claims of persecution, but the overwhelmed system does not serve them well.¹¹

Asylum determinations and credible fear interviews are also subject to significant limitations that weaken

1. Delphine Schrank, "Trickle of 'Caravan' Migrants Seek Asylum on U.S. Soil," Reuters, May 1, 2018, <https://www.reuters.com/article/us-usa-immigration-caravan/trickle-of-caravan-migrants-seek-asylum-on-u-s-soil-idUSKBN112330> (accessed May 3, 2018).
2. Nadwa Mossaad and Ryan Baugh, "Refugees and Asylees: 2016," U.S. Department of Homeland Security, Office of Immigration Statistics, January 2018, https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2016_0.pdf (accessed May 3, 2018).
3. Ibid.
4. U.S. Department of Justice, Executive Office for Immigration Review, "FY 2016 Statistics Yearbook," March 2017, <https://www.justice.gov/eoir/page/file/fysb16/download> (accessed May 3, 2018).
5. Mossaad and Baugh, "Refugees and Asylees: 2016."
6. Ibid.
7. U.S. Department of Justice, Executive Office for Immigration Review, "FY 2016 Statistics Yearbook."
8. Transactional Records Access Clearinghouse, "Backlog of Pending Cases in Immigration Courts as of March 2018," http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (accessed May 3, 2018).
9. Transactional Records Access Clearinghouse, "Average Time Pending Cases Have Been Waiting in Immigration Courts as of March 2018," http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php (accessed May 3, 2018).
10. U.S. Department of Justice, Executive Office for Immigration Review, "FY 2016 Statistics Yearbook."
11. Other problems include a lack of investigative introspection. The EOIR and the DHS spend their time trying to catch up with the mountain of cases before them leaving little time or resources to think about how to improve their programs. The USCIS's Benefits Fraud and Compliance Assessment (BFCA), a great tool for reviewing its programs and preventing fraud, has not undertaken a BFCA since a draft was last prepared in 2008. See Louis D. Crocetti Jr., testimony before the Subcommittee on Immigration and Border Security, Judiciary Committee, U.S. House of Representatives, "Hearing: Asylum Fraud: Abusing America's Compassion?" February 11, 2014, <https://judiciary.house.gov/wp-content/uploads/2016/02/Crocetti-House-Judiciary-Asylum-Fraud-Testimony-final-2-7-14.pdf> (accessed May 3, 2018).

the ability of U.S. officials to adjudicate cases. Little or no evidence beyond the testimony of the asylum seeker is necessary to prove a claim and DHS is generally restricted from seeking information outside the U.S. government to verify claims.¹² The influx of cases also forces the U.S. government to hold aliens subject to expedited removal in detention facilities scattered across the U.S., so many interviews do not happen in person and often not in English. These restrictions and complications make proper examination difficult.

Another problematic element of the current system is that many asylum seekers at the U.S. border pass through other countries that provide asylum. Columbia,¹³ Costa Rica,¹⁴ Panama,¹⁵ and Mexico¹⁶ will all provide asylum to those fleeing persecution. When individuals from countries around the world—other than Mexico—claim asylum at the U.S. southern border, they may have ignored their opportunity to claim asylum in another country first.¹⁷ Ignoring such opportunities for safe haven can indicate that economic, family, or other factors may be at work beyond a potentially credible asylum claim.

Protecting the Persecuted

The current asylum system can be abused and act as a pathway to more illegal immigration. To better protect the most vulnerable, 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 the case load from traditional immigration court proceedings and

humanitarian claims such as asylum. More immigration judges, prosecutors, and staff to assist in these proceedings as well as more USCIS asylum officers are essential to enforcing U.S. immigration laws in a timely and effective manner.

- **Expand alternatives to detention.** Many asylum seekers or other immigrants in deportation proceedings cannot be detained because of resource constraints. A cost-effective way to ensure individuals appear at their court hearings is through the use of various alternatives to detention programs, the most effective of which involve GPS tracking anklets. Congress should require and fund the expansion of such alternatives to detention in addition to existing detention requirements.

- **Adjust the asylum claim process.** Rather than applying for asylum at U.S. borders, asylum seekers travelling to the U.S. southern border should be required to first have their asylum claims heard by a USCIS asylum officer at a U.S. consulate in Mexico in a credible fear interview. Credible fear interviews should also ask the asylum seeker why they did not assert asylum in other countries such as Mexico. Failure to adequately 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 U.S.

12. 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 May 3, 2018). According to Arthur, a former immigration judge, "[A]sylum fraud is particularly easy to commit because of the lower standard of evidence required to satisfy an asylum claim." See Andrew R. Arthur, "Massive Asylum Fraud Alleged in New York Case," Center for Immigration Studies, March 31, 2018, <https://cis.org/Arthur/Massive-Asylum-Fraud-Alleged-New-York-Case> (accessed May 3, 2018).

13. U.S. Department of State, Bureau of Democracy, Human Rights and Labor, "Country Reports on Human Rights Practices for 2017: Colombia," <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2017&dliid=277319#wrapper> (accessed May 3, 2018).

14. U.S. Department of State, Bureau of Democracy, Human Rights and Labor, "Country Reports on Human Rights Practices for 2017: Costa Rica," <https://www.state.gov/j/drl/rls/hrrpt/2016humanrightsreport/index.htm?year=2016&dliid=265576#wrapper> (accessed May 3, 2018).

15. U.S. Department of State, Bureau of Democracy, Human Rights and Labor, "Country Reports on Human Rights Practices for 2017: Panama," <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2017&dliid=277349#wrapper> (accessed May 3, 2018).

16. U.S. Department of State, Bureau of Democracy, Human Rights and Labor, "Country Reports on Human Rights Practices for 2017: Mexico," <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2017&dliid=277345#wrapper> (accessed May 3, 2018).

17. For example, many of the asylum seekers come from the Northern Triangle countries of Honduras, El Salvador, and Guatemala. They had to pass through Mexico to get to the U.S., and decided against the shorter journey to Costa Rica. Venezuelan asylum seekers could surpass those from the Northern Triangle as Venezuela withers under the dictatorial rule of Nicolas Maduro and his socialist government. They will pass through multiple countries that offer asylum on their way to the U.S.

Fixing Asylum to Serve the Vulnerable and the U.S.

The U.S. faces increasing asylum claims and is struggling to effectively adjudicate these claims, bogging down the entire immigration system and incentivizing more illegal immigration. Reforming the system will better serve the persecuted and America as a whole.

—David Inserra is Policy Analyst for Homeland Security and Cyber Policy 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.