

## ASYLUM: A Call for Reform

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### EXECUTIVE SUMMARY

With beginnings rooted in international norms, our domestic asylum law provides that any person at a port of entry to the United States who claims credible and reasonable fear about returning to her home country is afforded some due process in America. If she can establish that she meets the standards for an asylum seeker, she may be able to obtain asylum status, which can eventually translate into permanent residence.

Our asylum law is contained in the Immigration and Nationality Act of 1965 and the Refugee Act of 1980, which brought the United States into compliance with two iconic United Nations agreements, the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, which reaffirmed Articles 2-34 of the Refugee Convention. Subsequent statutes, regulations, court rulings, and administrative rules make up the remainder of our asylum law.

But asylum is becoming an increasingly divisive and misunderstood issue in the United States. Despite a rich history of international and domestic law that protects asylum seekers in this country, feverish nationalism and unsubstantiated national security and public safety concerns are threatening the asylum process. The ongoing humanitarian crisis in the Northern Triangle countries—Honduras, El Salvador, and Guatemala—prompts debate over affording asylum status to the growing number of individuals, many of them children, seeking asylum in America by traveling to the southwestern border.

Significant problems exist with our current system, but it is not fraught with fraud and abuse. First and foremost, the United States must tackle the backlog of asylum cases in immigration courts by reforming procedural and administrative processes and improving oversight, and by better accommodating the increasing number of unaccompanied children appearing at the border with asylum claims. Congress, in coordination with the White House and its agencies, must fix the problems legislatively.

## CURRENT POLICY

An asylee is an alien in the United States or at a port of entry who is found to be unable or unwilling to return to his or her country of nationality, or is seeking the protection of the United States, because of persecution or a well-founded fear of persecution.<sup>1</sup>

Persecution, or the fear thereof, must be based on the individual's race, religion, nationality, membership in a particular social group, or political opinion. For example, the political opponent of a powerful regime who suffered imprisonment or threats due to his political beliefs is a good candidate for asylee status. On the other hand, a person who is fleeing poverty or a natural disaster is not.

For people without any nationality, the country of nationality is considered to be the country in which the alien last habitually resided. Asylees are eligible to adjust to lawful permanent resident (LPR) status after one year of continuous presence in the United States.<sup>2</sup>

### Asylum by the Numbers

In 2016, 115,399 affirmative asylum applications — cases in which the individual presented himself at a U.S. port of entry and presented evidence that he is seeking entry as an asylee — were filed with United States Citizenship and Immigration Services (USCIS). This was an increase of 39 percent from 2015. It is also the seventh consecutive annual increase and the highest level since 1995, when applications reached close to

144,000.<sup>3</sup> China remains the largest country of origin for affirmative asylum applications.

*China remains the largest country of origin for affirmative asylum applications with 4,484 (21.9%) in 2016*

Total defensive asylum applications — cases in which individuals entered the United States illegally, but presented evidence of a legitimate claim of asylum to pause their removal or deportation from the United States — also increased, to 65,218 in 2016. This is up from 45,770 applications in 2015. The largest number of applications came from individuals coming from Northern Triangle of Central America (NTCA)—Honduras, El Salvador, and Guatemala.

Over 90 percent of those granted affirmative asylum between 2000 and 2011 gained LPR status by 2015.

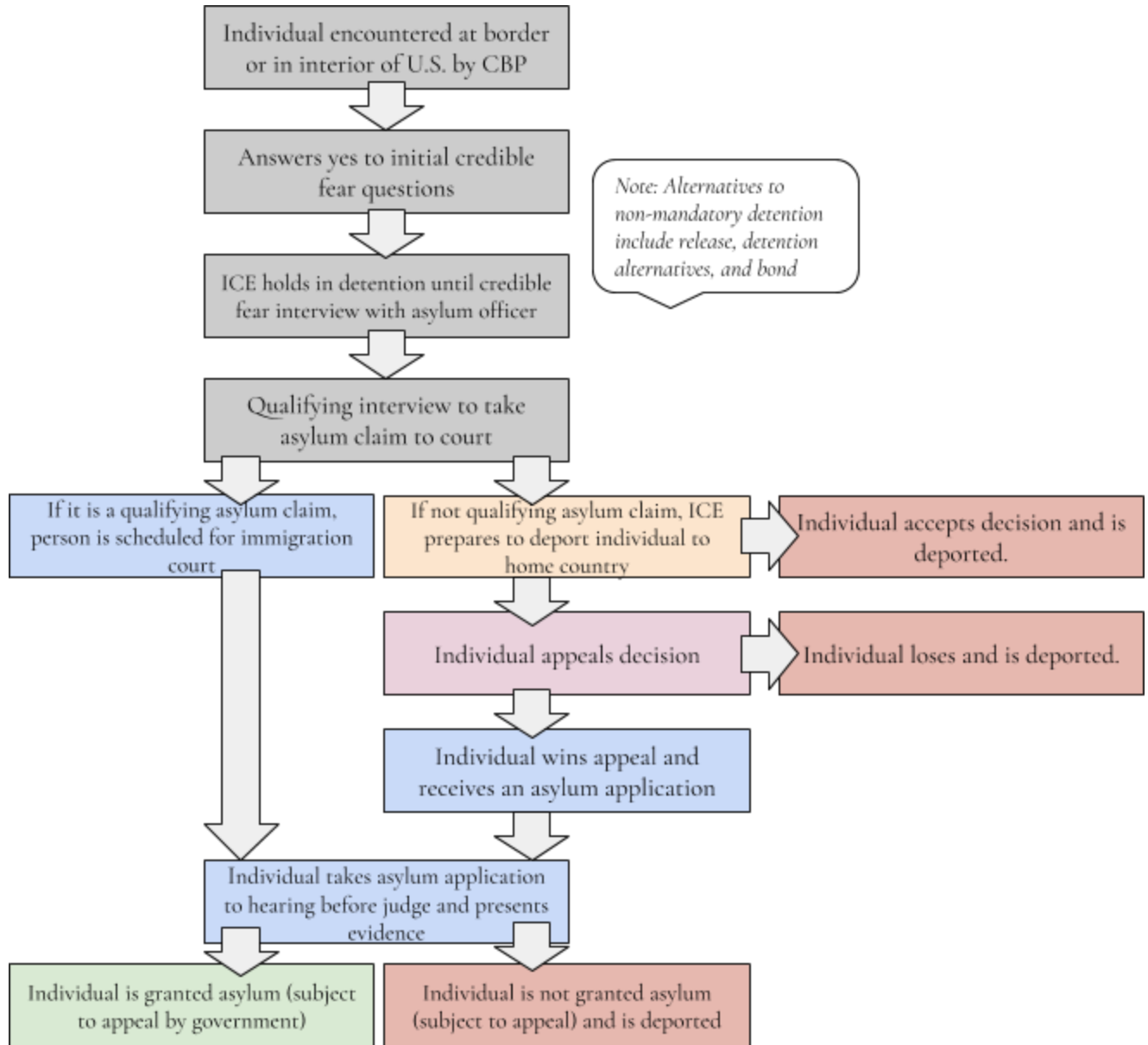
The asylum process is long and complicated, and involves multiple hearings. In most cases, an asylee will wait between two and five years for a final decision. See the figure below.

<sup>1</sup> Immigration and Nationality Act § 208.

<sup>2</sup> U.S. Citizenship and Immigration Services, "[Asylee](#)". Last accessed 9 May 2016.

<sup>3</sup> Nadwa Mossaad and Ryan Baugh, Office of Immigration Statistics, [Annual Flow Report, Refugees and Asylees: 2016](#) (Washington, D.C.: Department of Homeland Security, January 2018).

## Overview of Asylum Process



Note: In many cases, this process can exceed five years.

## Unaccompanied Children from the Northern Triangle

Since 2013, there has been a surge of asylum applicants from NTCA countries, many of whom are children who are not accompanied by an adult.

In March 2018, 4,100 unaccompanied alien children (UACs) crossed into the United States through the southwest border; all told, nearly 62,000<sup>4</sup> children have arrived over the past six months fleeing violence, drug trafficking, and gangs from Honduras, El Salvador, and Guatemala.

The influx of children coming to the southwest border has steadily increased over the past five years. In 2014, the Obama administration launched the Central American Minors (CAM) Program to try to stem the tide of UACs arriving at the border, and to provide children a safer option to seek protection.<sup>5</sup>

CAM allowed parents who were lawfully present in the United States to apply for refugee status for an unmarried child in a NTCA country. Even if the child did not qualify as a legal “refugee,” evidence of danger or threat of harm was enough to allow for a two-year, renewable parole period in the U.S. CAM was expanded to allow individuals accompanying a qualifying child to also apply for refugee status on the same application.

In August 2017, President Trump ended the program and did not admit the 2,700 minors with conditional approval to enter the United States at that time.

In part as a result of that decision, caravans of individuals have traveled through Mexico to the border to seek asylum. Most notably, in April 2018, nearly 200 people from NTCA arrived at the San Diego port of entry seeking asylum. There, they were met by immigration advocates ensuring the individuals received adequate processing, and border officials, who were governed by a cautionary statement all but condemning the immigrants’ arrival issued by DHS Secretary Kirstjen Nielsen.<sup>6</sup>

## Challenges

The most pressing issue of our asylum system is the ever-growing backlog of asylum cases. The delays and confusion in the current system often leave individuals waiting for years—two to five—to get into the courts, prolonging separation from their families.

Also troubling is the wait to receive a work permit. Now, an applicant with a pending asylum case must wait 150 days to apply for an Employment Authorization Document (EAD) and then wait another 180 days to receive it.

The major concern—other than the inability of an individual to support themselves for at least 11 months while their asylum application is pending—is that various incidents can “stop the clock,” meaning that minor things like filing a motion can potentially stall the EAD process.

The Executive Office for Immigration Review (EOIR), housed within the Department of Justice, is tasked with adjudicating immigration cases. As of April 2018, EOIR had 300,000 outstanding asylum cases to review.

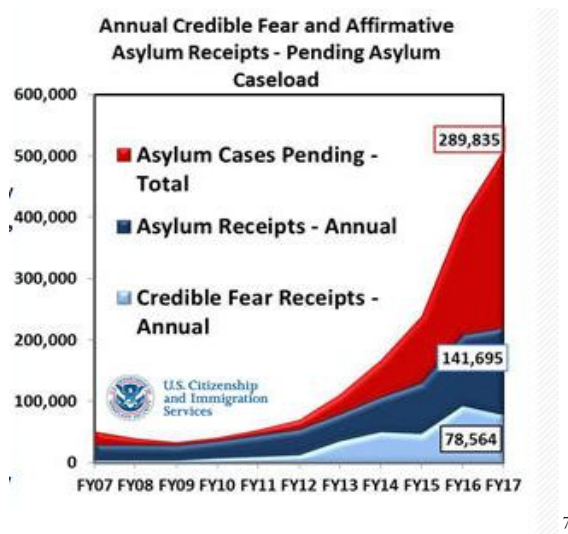
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<sup>4</sup> U.S. Customs and Border Protection, “[Southwest Border Migration FY2018](#),” April 4, 2018.

<sup>5</sup> Andorra Bruno, [In-Country Refugee Processing: In Brief](#), CRS Report, 7-5700 (Washington, D.C.: Congressional Research Service 7 May 2016).

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<sup>6</sup> Department of Homeland Security, “[Secretary Nielsen Statement on Arrival of Central American ‘Caravan](#),” 25 April 2018.



The legal limbo leaves potential asylees open to abuses by employers and potential coercion from outside influencers from whom they are seeking protection. Lack of status leaves many workers with little recourse if subjected to harmful working conditions and egregiously low pay, and undermines the ability of individuals to integrate into their communities.

But it is the practical considerations that make asylum so difficult. At the start, many individuals have no idea how to prove their case. In many cases, individuals are kept in detention centers, sometimes separated from their families and children. With no guidance about a foreign system and little access to help in a language they speak, it is no wonder that hearings on the merits of cases are extraordinarily time-consuming.

### 1. Lack of Legal Representation

Currently, most prospective refugees, asylees, and immigrants have no access or right to legal counsel. Affording counsel in certain circumstances will not only increase the odds that justice will be served but will help immigration

cases move more expeditiously through the system and reduce the backlog.

Granting counsel allows overburdened immigration judges to offload tasks, like eliciting critical facts from applicants, to the appointed lawyers. Legal counsel can also expeditiously review copies of relevant documents provided by the Department of Homeland Security—another proposed change to the process—which will help avoid costly delays.

Counsel can also coordinate translators ahead of hearings to translate applicants’ statements, identify the relevant facts, and present them clearly and concisely to the fact-finder. Due to the nature of immigration proceedings, final determinations rely most heavily on facts presented by the applicant. The judge often finds it necessary to ask multiple, similar questions to ensure that he or she thoroughly understands the nature of the claim and does not overlook critical information.

In many cases, children qualify for asylee status, but their age, lack of English skills, and ignorance of the legal process can leave them without a fair chance of successfully applying for legal entry and status.

Compare this to the criminal court system, which generally appoints children a guardian ad litem — a person who works for the best interest of the child — and an attorney (who is sometimes the same person). These roles require not only fact-finding responsibilities, but zealous advocacy on behalf of the child.

Countless standards govern the behavior of attorneys, the court, and other involved parties to ensure that the child is adequately protected in criminal courts.<sup>8</sup> Children facing immigration courts deserve similar protections.

<sup>7</sup> USCIS, “[USCIS to Take Action to Address Asylum Backlog](#),” 31 Jan. 2018.

<sup>8</sup> *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (Chicago: American Bar Association, 1996).

## 2. Detention Conditions

There exist significant issues relating to detention practices and facilities for asylum seekers. It is important to note that immigration detention facilities are considered civil—not criminal—detention facilities. The facilities are not meant to serve as a deterrent for certain behaviors or a means of punishment, but are rather simply a holding facility for individuals who, in many cases, have done nothing wrong. Many individuals detained in the facilities are awaiting a hearing on their asylum claim; most are women and children.

A report by the Office of Inspector General (OIG) at the Department of Homeland Security in December 2017 found overly aggressive enforcement, poor hygiene, a lack of adequate medical care, and potentially unsafe food at detention facilities.<sup>9</sup>

In unannounced visits to six facilities, the OIG found that intake procedures could affect the safety and privacy of individuals, that language barriers persist despite availability of interpretation services, and most notably, that detainees were routinely treated improperly, with the facilities showing a “disregard for detainees’ basic rights, lack of cleanliness and delayed medical care, including no toilet paper, shampoo, soap and toothpaste, and potentially unsafe food handling.”

In the report, Immigration and Customs Enforcement (ICE) concurred in the findings and agreed to take the necessary corrective actions,

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<sup>9</sup> Office of Inspector General, [Concerns about ICE Detainee Treatment and Care at Detention Facilities](#), OIG-18-32. (Washington, D.C: Department of Homeland Security, 11 December 2017).

but the problem persists, and in some cases, it is getting worse.<sup>10</sup>

## 3. Separation of Parents and Children at the Border

Since October 2017, the federal government has separated more than 700 children from their parents as they entered the United States, according to the Office of Refugee Resettlement.<sup>11</sup>

*Of the 700 children  
separated from their families  
at the border, 100 were  
under the age of 4*

<sup>12</sup>

The *New York Times* repeated requests to Congress to find out precisely how many families are being separated at the border have been ignored or declined by administrative officials.

It is a long-standing practice to separate children from parents who are prosecuted for illegal entry crimes.

However, it is critical that the United States track the children who are separated from parents — particularly infants — who the guardians of these children are, the protocols for handling the children, and strategy for ensuring children are reunited with their parents safely.

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<sup>10</sup> Tina Vasquez, “[#ICEOnTrial: Advocates Rally to Hold Federal Agency Accountable for Systemic Abuses](#),” Rewire.News, 11 April 2018.

<sup>11</sup> Caitlin Dickerson, “[Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border](#),” *The New York Times*, 20 April 2018.

<sup>12</sup> Ibid.

#### 4. Immigration waivers

Following a directive from Attorney General Jeff Sessions in April 2017, prosecutions for illegal entry or re-entry to the United States jumped nearly 500 percent.<sup>13</sup>

Sessions' "zero tolerance" policy requiring prosecution for all illegal entries has raised the monthly rate of prosecutions so far this year 19.5 percent higher than in 2017.

The policy is all the more problematic because of the nature of these prosecutions; since most are guilty plea agreements that avoid detention or incarceration, individuals forgo rights associated with criminal defenses, like an appeal.

Many agreements stipulate "immigration waivers," that require the defendant to forgo claims for asylum or parole, regardless of whether they may have legitimate rights to claim relief.

## PROPOSED CHANGES TO CURRENT POLICY

We need changes that are bipartisan enough to move through Congress, and that are the outcome of pragmatic, thoughtful discussions that carefully consider information from statistics, history, morals, experience, and law. Below are a number of recommendations for future policy:

DOJ/Executive Office for Immigration Review (EOIR) changes:

- DOJ/EOIR should prepare a short-list of all cases ready for final adjudication;
- DOJ and EOIR should make all case documentation/records and court proceeding information available online;

- DOJ and EOIR should share information about available pro bono services with defendants;
- DHS should review all policies that may be contributing to the backlog of cases, including its policies on establishing/proving asserted facts;
- DOJ should hire at least 200 new immigration judges over the next two years;
- AG should reverse quotas imposed on immigration judges that may threaten the quality of hearings;
- Increase the number of attorneys rotated through immigration courts;
- Consider making EOIR part of Article I courts; and
- Reverse quotas imposed on immigration judges that may threaten the quality of hearings.

Congressional changes:

- Increase access to pro bono counsel near detention facilities;
- Prevent agreements that preempt defensive asylum claims;
- Require representation for children;
- Require regular oversight and reporting about detention facility numbers and conditions;
- Require the recording of asylum credible-fear interviews;
- Require the presence and/or use of interpretation services or interpreters for all interactions with CBP or ICE officials;
- Requiring families to be detained together;
- Require automated interviews of asylum applicants;
- Provide for penalties for officers who skip questions or who fail to review recorded interviews in making key determinations;
- Impose a ban on immediate removals of admissible aliens before a meeting with an asylum officer;

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<sup>13</sup> American Immigration Council, "[Prosecuting Migrants for Coming to the United States](#)," 1 May 2018.

- Increase the number of asylum officers; and
- Reinstitute CAM (or similar) programs that aim to process unaccompanied children prior to encountering them on the border.

## CONCLUSION

Congress, agencies, and the White House have a number of options to improve justice and increase the efficiency of the U.S. asylum process, and to ensure that credible asylum seekers are able to find refuge in America.