



The U.S. Asylum System and Asylum Loopholes

By Pawel Styrna and Jennifer Hickey | July 2019

The Issue

While the United States remains a safe haven for foreign individuals who have been persecuted in their own country and is committed to having a humane asylum process, the current system is riddled with loopholes which make it ripe for abuse. Many of the recent aliens coming to our borders seeking asylum have left countries with severe economic problems. Many want to escape violence-plagued cities or regions. And many simply have grown impatient with the lengthy, but legal process. While those circumstances may be tragic, they do not reach the standard of “credible fear” necessary to be eligible for asylum.

Unfortunately, a growing number of asylum seekers are well-versed in our laws and, more importantly, what they need to say in order to get a foot beyond the first asylum hearing. As a result, many individuals claim “credible fear” of persecution in the hopes of being released or allowed to remain in the U.S.

This creates several significant problems:

- Improper claims clog the system and deny legitimate asylum seekers a swift adjudication of their claims;
- The U.S. government must devote valuable resources to the care, shelter and processing of large numbers of people who likely will not be ruled eligible for asylum or similar protections;
- The longer the asylum loopholes exist, there will be human traffickers and false asylum seekers who will abuse the system and put their own lives at risk too.

To help reduce the number of meritless asylum claims which have contributed greatly to the humanitarian and security [crisis at the southern border](#) – the Trump administration proposed a [new rule](#) on July 15, 2019 making potential asylum-seekers who pass

through a “safe” third country ineligible for asylum in the United States. The aim of requiring migrants to seek asylum in the first country they reach outside of their country is to address a major “pull” factor driving irregular migration to the United States.

How Asylum Works

The internationally-recognized purpose of asylum is to offer protection to individuals who have either suffered, or have a “credible fear” of suffering persecution, on the basis of race, religion, nationality, membership in a particular social group, or political opinion in their country of residence. The present understanding of asylum is rooted in the World War II era when millions of people were attempting to flee Nazi Germany and subsequently in the post-war age of Soviet communist oppression.

U.S. law (8 U.S.C. § 1158) states that “any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum.”

Aliens seeking asylum must apply within one year of arriving in the U.S. and they cannot have been convicted of a serious crime or engaged in persecution themselves. The statute makes an exception “if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement,” to a safe third country. The process begins with an interview with an asylum officer (AO) during which “credible fear” is established. If an AO determines “credible fear” exists, then the claim is referred to an immigration court. An alien who is not found to have a credible fear of persecution will be processed for removal by ICE but may request review of that determination by an Immigration Judge (IJ). If the alien does not request review by an IJ, or the IJ also determines that the alien does not have a legitimate credible fear claim, he/she will be removed from the U.S.

To put the current crisis in perspective, consider that over the last five years and nine months, 1,086,000 people have come in either as an unaccompanied child or as part of a family unit. Despite those numbers, only 12,021 – about 1.5 percent – of the people coming as a family unit have been removed. That is all the incentive needed for thousands to risk their lives every day to get to the border to make a claim.

The best estimate presently is that only about 15 percent of Central American asylum-seekers over the last five years actually have a valid asylum claim.

In FY 2017, according to the DHS *Yearbook of Immigration Statistics*, the U.S. granted asylum to almost [26,600 people](#) – more than during any other year since FY 2012.

How Aliens Abuse Our Asylum System

Offering asylum to people who are genuinely persecuted is a wise policy that affirms America's core values of freedom under the rule of law. However, asylum loopholes and a liberal interpretation of our laws continue to incentivize asylum fraud and abuse.

For example, the Obama administration broadened the grounds for asylum when they directed the U.S. Immigration Court to begin classifying domestic violence and gang crime as forms of persecution. Not surprisingly, since 2013, the number of aliens claiming credible fear upon arrival has risen by [2,000 percent](#). This has generated a backlog of [900,000 pending asylum cases](#). Although the Trump administration attempted to reverse this policy, a federal court has prohibited the Department of Homeland Security (DHS) from implementing the change.

According to DHS, a statistically significant proportion of asylum claims are [fraudulent](#), but this is nothing new. During a 2012 [investigation](#) into New York asylum mills, federal prosecutors arrested 30 immigration lawyers, paralegals and interpreters who had assisted asylum-seekers in filing bogus applications. Even today, some migrants are [coached](#) about what to say and not to say when claiming asylum.

Why are false claims a problem? According to Acting DHS Secretary Kevin McAleenan, as many as 90 percent of asylum-seekers fail to show up for their follow-up hearings and simply disappear into the American interior, thus adding to the [12.5 million illegal aliens](#) already in the United States.

Solutions

Among the solutions are:

- **Close** the biggest loophole – the *Flores* agreement, which mandates children be released within 20 days of their detention. The worthy intention of the 1997 *Flores* settlement was to ensure unaccompanied minors were treated humanely by requiring children to be released from custody within 20 days in favor of placement in foster families or other placements. However, it was expanded in 2015 by a court in California to include children traveling with their families. That change has driven the increasing number of migrant families seeking asylum, as well as the exploitation of children by traffickers. Congress must amend the *Flores* agreement.

Sen. Lindsey Graham (R-SC) introduced a bill in May which addresses some of these problems by allowing for unaccompanied Central American minors to be removed to their countries of origin (which is what currently happens to unaccompanied minors from Mexico and Canada). [Operation Safe Return](#) can also help speed up the asylum-seeking process. The pilot program – an initiative spearheaded by Sen. Ron Johnson (R-Wisc.) and a bipartisan group of senators – would “rapidly, accurately, and fairly determine those families who have

crossed the southern border that clearly do not have a valid legal claim, and safely return them to their home countries.”

- **Proceed** with the administration’s newly-published “safe third country rule,” which requires asylum-seekers to apply for asylum in the first “safe” country they enter (for Central Americans, this is usually Mexico). This would discourage long and dangerous journeys all the way to the U.S. As FAIR president [Dan Stein](#) notes, this “is common sense” because “true refugees don’t get to pick and choose where they seek asylum.”
- **Lastly**, Congress must ensure that funding for more immigration judges is made available immediately and work with agencies to streamline the hiring process.