# A FASTER WAY TO YES: Re-Balancing American Asylum Procedures

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*The United States asylum system, like many other asylum systems, is under immense pressure to process asylum applications faster. The primary response to this pressure is negative, namely to deny asylum claims quickly by categorizing them as manifestly unfounded. In the United States, this is done through the "credible fear" process. This negative orientation leads to a structural imbalance in which denials can be fast and easy for the system, but approvals take time and extensive effort. Using domestic and international comparative examples, this Article proposes re-balancing the asylum system by establishing a process for expedited approvals of clearly eligible asylum claims.*

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## INTRODUCTION

Let me begin with a true story.[1] An Afghan woman fled Kabul in August 2021 with the U.S. evacuation. She had been the leader of a local women's rights organization and carried with her documents from her work, including a smiling photograph of herself standing with the former President of Afghanistan, who had just been ousted by the Taliban. Suffice it to say, she would be in grave danger from the Taliban—because she was a notable activist, and an outspoken and secular woman who had associated with the prior regime. It would be difficult for a trained refugee law expert to develop a case that more clearly established a well-founded fear of persecution, with all the essential elements of an asylum claim. It was well documented with photographs and certificates. Plus, she had been through security screening by American security agencies while waiting in Qatar, and was already living and working in the United States legally, albeit on only a temporary legal status.

Yet, nearly two years after her arrival in the United States, no American immigration official had reviewed the basic facts of her asylum case, which were lingering with her paper application in a queue as she waited for an interview. When she finally got an interview, an asylum officer spent an entire day examining her, her husband, and her children, mostly about questions that were fully answered in the paper application, with corroborating documents attached. Months later, she was granted asylum, so this is a success story by the jaded standards of most immigration lawyers. An easy case with no real hiccups. And yet, this easy case took years, including extensive time spent by the U.S. Asylum Office—including the attention of a single officer for an entire day just to do the interviews—at a time when the Asylum Office was straining to cover all the screenings and adjudications required by asylum-seekers reaching the southern border.

An easy case should not be so hard. The point of this Article is that the United States can process and approve many asylum cases like this faster. And it needs to, because this Afghan woman did not wait alone. In 2022, there were more than 1.5 million people waiting for asylum adjudication in the United States.[2] By May 2023, the average asylum case in the United States took 4.25 years to adjudicate.[3] In November 2023, the backlog of cases in U.S. Immigration Courts exceeded

1. Certain identifying details altered to protect anonymity.

2. *A Sober Assessment of the Growing U.S. Asylum Backlog*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Dec. 22, 2022), https://trac.syr.edu/reports/705 [https://perma.cc/5NJX-J89Y].

3. AM. IMMIGR. COUNCIL, BEYOND A BORDER SOLUTION 1–2 (2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/02.23_border_whitepaper_v6.pdf [https://perma.cc/5VLP-YN5W].

3 million.[4] Such delays mean that people in danger of persecution wait in limbo, usually with employment authorization but without access to other government benefits.[5] Their cases often grow weaker while they wait, as both the evidence and the urgency of their flight from danger becomes more remote. Their long-term interests are seriously injured too. Because so much time has passed, they should theoretically be close to applying for citizenship, not the mere right to stay in the country, according to statutory timelines.[6]

In the United States and around the world, one of the primary challenges to an effective system for protecting refugees fleeing persecution is that it takes a very long time to adjudicate asylum applications. In the best of times, this means that governments must commit significant resources to operating a system for adjudicating asylum cases.[7] In the worst of times, this means that restrictionist critics of asylum can complain that merely lodging an asylum claim can entitle a person to live and work in the country for years while their asylum case waits for a final resolution.[8] In his 2024 State of the Union Address, President Biden complained about the long delays in asylum adjudication, in apparently impromptu remarks:

> [I]f we change the dynamic at the border—people pay these smugglers 8,000 bucks to get across the border because they know if they get by . . . and let into the country, it's six to eight years before they have a hearing. And it's worth the taking a chance for the $8,000.[9]

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4. *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Dec. 18, 2023), https://trac.syr.edu/reports/734 [https://perma.cc/KM9G-EF68].

5. *See infra* Section I.D.

6. *See infra* Section I.D.

7. *See* James C. Hathaway, *The Global Cop-Out on Refugees*, 30 INT'L J. REFUGEE L. 591, 593 (2018) (noting "rich countries spend at least US$20 billion each year to fund their refugee reception efforts"); U.N. HIGH COMM'R FOR REFUGEES, GLOBAL APPEAL 2025: IMPACT, FOCUS, OUTCOME AND ENABLING AREAS 42 (2024), https://reporting.unhcr.org/sites/default/files/2024-11/Global%20Appeal%202025%20-%20Impact%2C%20Focus%2C%20Outcome%2C%20Enabling%20Areas.pdf [https://perma.cc/DFJ4-8WPH] (seeking $213 million globally for U.N. refugee status determination procedures).

8. *See, e.g.*, David Frum, *Why the GOP Doesn't Really Want a Deal on Ukraine and the Border*, ATLANTIC (Dec. 12, 2023), https://www.theatlantic.com/ideas/archive/2023/12/republican-opposition-ukraine-israel-aid-border-security/676315 ("The fundamental reason for America's present border crisis is that would-be immigrants are trying to game the asylum system. The system is overwhelmed by the numbers claiming asylum. Even though the great majority of those claims will ultimately be rejected, their processing takes years, sometimes decades. In the meantime, most asylum seekers will be released into the United States."); Editorial, *Asylum Has Become a Parallel Immigration System. Here's How to Fix That*, WASH. POST (Jan. 31, 2023), https://www.washingtonpost.com/opinions/2023/01/31/asylum-immigration-parallel-system-solutions ("The backlog encourages people to make a dangerous and expensive trip to the U.S. border, knowing that — even if their asylum cases are weak — they can live and work in the United States for years pending a ruling.").

9. *Compare Full Transcript of Biden's State of the Union Speech*, N.Y. TIMES (Mar. 8, 2024), https://www.nytimes.com/2024/03/08/us/politics/state-of-the-union-transcript-biden.html, *with Read the Full Transcript of Biden's 2024 State of the Union Address, as Prepared for Delivery*, CBS NEWS (Mar. 8, 2024), https://www.cbsnews.com/news/state-of-the-union-transcript-2024 [https://perma.cc/XH42-9NJ7] (missing the quoted remarks).

In the United States, we are very much in the worst of times, fueled by crossings on the Southwest border that rose during the first three years of the Biden Administration[10] and partisan politics. As a result, the American asylum system has come under considerable political stress.

Long delays in asylum adjudication put structural pressure on asylum systems to deny protection to more people. Across multiple continents, the most common response to large numbers of asylum applications has been for governments to create fast ways *to reject* them.[11] That is the path that the United States has followed. Since the late 1990s, the United States has screened out asylum-seekers arriving to the border through the credible fear process, which is, in essence, a screening for frivolous asylum claims.[12] At worst for an asylum-seeker, a person can be immediately rejected and deported. The best thing that can happen to an asylum-seeker in this process is to simply be allowed to have their asylum application considered in full through a separate process in a heavily backlogged bureaucracy.[13] The regulations governing the interviews do not provide for the asylum officer to immediately grant the application if it is clearly valid.[14] During the Biden Administration, there were executive actions aimed at screening out asylum applications even more rapidly.[15]

At the end of 2023 and in early 2024, there was high-level congressional interest in new asylum restrictions that would block many people from even applying or would force denials of their claims without examination of the merits. Most of these efforts were aimed at rejecting asylum applications earlier in the process.[16] The compromise bill proposed on February 4, 2024, to limit access to asylum at the border would have called for essentially closing the asylum system to most asylum-seekers if the number of arrivals exceeded a pre-set level, except for a limited quota who would be permitted to enter at ports of entry.[17] That would

10. *See Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT. (Sept. 16, 2024), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters [https://perma.cc/AL4Z-4JGW].

11. *See infra* Section I.C (discussing manifestly unfounded procedures).

12. *See infra* Section I.C; Lucio Vasquez, *Houston Asylum Office Is Mishandling Asylum Screening Process, Immigration Attorneys Say*, HOUS. PUB. MEDIA (Apr. 27, 2022, 12:57 PM), https://www.houstonpublicmedia.org/articles/news/politics/immigration/2022/04/27/424183/houston-asylum-office-is-mishandling-screening-process-immigration-attorneys-say [https://perma.cc/M3S2-E8AD].

13. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (requiring that when a noncitizen arrives without admission or parole, "the officer shall order the alien removed . . . unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution"); *id.* § 1225(b)(1)(B) (prescribing that asylum-seekers will be interviewed by an asylum officer and that "[i]f the officer determines . . . that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum").

14. *See* 8 C.F.R. § 208.30 (procedure for credible fear interviews).

15. *See, e.g.*, Quinn Owen, *Biden Administration to Speed Up Asylum Cases, Expand Legal Resources at the Border*, ABC NEWS (Apr. 7, 2023), https://abcnews.go.com/Politics/biden-administration-speed-asylum-cases-expand-legal-resources/story?id=98431530 [https://perma.cc/5PTZ-45SL].

16. *See, e.g.*, *FACT SHEET: Biden-Harris Administration Calls on Congress to Immediately Pass the Bipartisan National Security Agreement*, WHITE HOUSE (Feb. 4, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/02/04/fact-sheet-biden-harris-administration-calls-on-congress-to-immediately-pass-the-bipartisan-national-security-agreement [https://perma.cc/BGA4-LM38].

17. *See* H.R. 815, 118th Cong. § 3301 (2024) (text released February 4, 2024).

have represented a drastic about-face for American asylum law, which until then guaranteed the right to apply for asylum no matter how a person enters U.S. territory.[18] The bill also would have made it substantively more difficult for asylum-seekers to pass "credible fear" interviews, which allow them to access the full asylum process.[19] Both changes typify the inclination of governments to respond to large numbers of asylum-seekers by finding ways to reject them ever faster.

Yet, the proposed bill did include one provision that permitted a streamlined way to approve asylum applications after credible fear interviews.[20] The bill died amid considerable partisan acrimony and with no known public debate of this provision.[21] President Biden then proceeded to enact by regulation a numbers-driven closure of the asylum system,[22] which is now being challenged in court.[23] The new system, as of 2024, blocks people from applying for asylum based on how they enter the country,[24] even though the statute enacted by Congress explicitly says people can apply regardless of whether they arrived legally.[25] What the Biden Administration did not do, but what the Department of Homeland Security should do, is use its regulatory power to allow asylum officers to grant asylum at the front end of the process, rather than send refugees with strong claims into the labyrinth of an already backlogged system.

Mechanisms for denying refugee claims at the front-end of the asylum process go by different names in different places. In the United States, they are part of the expedited removal process at the border, through which asylum-seekers must pass a credible fear interview to be allowed into the regular asylum adjudication system.[26] In Europe and in much of the rest of the world, similar mechanisms are known as "manifestly unfounded" procedures.[27] As the names imply, these mechanisms are built on a desire to kick cases (and people) out of the process quickly, combined with the belief that their asylum applications do not deserve more careful review anyway, since they are not "credible" or are clearly "unfounded."[28]

Refugee advocates have long been critical of these rapid-exclusion programs for denying asylum-seekers access to a fair procedure and for putting endangered

18. *See* 8 U.S.C. § 1158(a)(1) ("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 . . . ), irrespective of such alien's status, may apply for asylum . . . .").

19. *See* H.R. 815, 118th Cong. § 3202 (2024).

20. *Id.* § 3141.

21. *See* William A. Galston, *The Collapse of Bipartisan Immigration Reform: A Guide for the Perplexed*, BROOKINGS INST. (Feb. 8. 2024), https://www.brookings.edu/articles/the-collapse-of-bipartisan-immigration-reform-a-guide-for-the-perplexed [https://perma.cc/U6WR-AQ8R].

22. *See* 89 Fed. Reg. 48710 (June 7, 2024).

23. *See* Complaint at 2, Las Americas Immigr. Advoc. Ctr. v. U.S. Dep't. Homeland Sec., No. 24-cv-01702 (D.D.C. June 12, 2024).

24. *See* 89 Fed. Reg. 48710, 48735 (June 7, 2024) (noting limitations apply to those who do not enter the United States through "lawful, safe, and orderly pathways").

25. 8 U.S.C. § 1158(a)(1).

26. *See* Vasquez, *supra* note 12.

27. *See infra* Section I.C.

28. *See infra* Section I.C.

persons at higher risk of errant denial of protection.[29] But administrative pressures on governments create an untenable problem for asylum-seekers, especially when the number of arrivals grows. Essentially, government officials confront a situation in which either they would have to walk down a long and difficult road to fully vet and then approve an asylum application, or they could take a short and easy path to a denial. The more that governments are under pressure to reduce the number of cases in the system and to reduce how long it all takes, the more that the shortcut becomes irresistible. In many ways, this is the story of the U.S. asylum system over the last two decades.[30]

This Article argues that there is another way: A faster way to yes. Just as governments screen out obviously weak claims, government agencies with expertise in asylum cases ought to be able to quickly spot asylum claims that are likely to succeed—cases that are manifestly *well*-founded—and speed these cases along to approval. Such cases are identifiable by essentially the same indicia that officials would look for to find cases to reject quickly. They should look for categories of people who are known to be targeted for human rights abuses, people who have clear documentation of central facts, and people whose asylum claims fit clearly within the legal rubrics of asylum law. Instead of being asked to look only for weaknesses in asylum claims, asylum officers conducting initial screenings should also be directed to look for strengths. By doing so, they can avoid the inevitable pressure for expediency translating into a pressure to deny protection. There is no reason why a need to move efficiently cannot lead to an efficient *approval* just as easily as it might lead to a fast denial. In this Article, I propose specific procedural and substantive changes that would make expedited approvals possible.

Establishing an efficient mechanism to accept strong asylum claims would help rebalance the administrative pressures on the system by weakening the assumption that the only way to make the asylum system efficient is to exclude more people more quickly. Right now, a government agency screening asylum claims at the border has two options that are both bad in some way for genuine refugees: an easy no or a hard yes. That is because if the claim is strong, it will

29. *See, e.g.*, EUR. COUNCIL FOR REFUGEES & EXILES, ACCELERATED, PRIORITISED AND FAST-TRACK ASYLUM PROCEDURES: LEGAL FRAMEWORKS AND PRACTICE IN EUROPE 3–4, 14 (2017), https://www.ecre.org/wp-content/uploads/2017/05/AIDA-Brief_AcceleratedProcedures.pdf [https://perma.cc/L8M2-9P3U]; Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum-Seekers*, 20 GEO. IMMIGR. L.J. 167, 167–68, 170–71 (2006).

30. Denise Gilman has pointed out that many of the troubles plaguing the U.S. asylum system can be traced to a misperception that asylum should be "exceptional." Denise Gilman, *Making Protection Unexceptional: A Reconceptualization of the U.S. Asylum System*, 55 LOY. L.J. 1, 5 (2023). Because the U.S. system assumes that asylum will be rare, migration patterns in which viable asylum applicants arrive in large numbers become a "crisis." *Id.* The system is thus oriented toward exclusion in an effort to make real the assumption that asylum should be exceptional, even though conditions that create forced migration are common and refugee flows throughout history have often been very large. *Id.* at 14, 20–21. Gilman proposes a range of reforms that would be quite complementary to the one I offer here, including increased use of group-based designations, which as I describe, are common in refugee law globally but have not been fully deployed in the United States. *Id.* at 66–67.

take the government a great deal of time and resources to say so.[31] It is thus essential that the government also have the option of an easy yes for cases that clearly qualify for asylum, and for whom extensive adjudication would waste time and money. Such an approach is possible and not at all radical. For example, there are a few training manuals issued by the United Nations and European governments that reference the possibility of a "manifestly well-founded" procedure.[32] In the United States, a fast way to yes for facially strong cases is actually built into the adjudication of many other immigration applications. U.S. Citizenship and Immigration Services routinely decides other visa applications without an interview, for example.[33]

Reforming the procedural mechanisms of asylum would hardly resolve all of the many challenges facing our asylum system. As many have noted for years, the international refugee definition—which for the most part still defines the limits of refugee protection and asylum—is too limited to encompass many people who are compelled to migrate.[34] Although there are exceptions and much nuance, this definition does not easily apply to many people who flee rampant crime, generalized violence, natural disasters, and extreme poverty.[35] These limitations are coupled with largely restrictive and exclusionary legal regimes governing migration in general in many destination countries, including the United States.[36] These factors position the asylum system as a besieged island in the middle of a harsh sea. These structural problems are made even worse by the rise of populist,

31. *See infra* Section I.B (discussing U.S. asylum procedure).

32. *See, e.g.*, U.N. HIGH COMM'R FOR REFUGEES, RESETTLEMENT HANDBOOK § 1.4 (2023), https://www.unhcr.org/resettlement-handbook/1-refugee-status-and-resettlement/1-4-unhcrs-case-processing-modalities-for-rsd [https://perma.cc/259L-MLZ7]; U.N. HIGH COMM'R FOR REFUGEES, FAIR AND FAST: UNHCR DISCUSSION PAPER ON ACCELERATED AND SIMPLIFIED PROCEDURES IN THE EUROPEAN UNION 2 (2018), https://www.refworld.org/docid/5b589eef4.html [https://perma.cc/N95D-Q4GJ]; Michala Clante Bendixen, *The Three Phases of Asylum Procedure*, REFUGEES.DK (June 23, 2023), http://refugees.dk/en/facts/the-asylum-procedure-in-denmark/the-three-phases-of-the-asylum-procedure [https://perma.cc/SDU7-8YDE] (guide to the Danish asylum system); U.N. HIGH COMM'R FOR REFUGEES, UNHCR'S GUIDE TO ASYLUM REFORM IN THE UNITED KINGDOM 3 (2021), https://www.unhcr.org/uk/media/unhcrs-guide-asylum-reform-united-kingdom-0 [https://perma.cc/S8AA-WJZT].

33. *See infra* Section III.C.

34. *See, e.g.*, Ibrahim Abro, *The Refugee Convention and Armed Conflict*, DLP FORUM (March 6, 2023), https://www.dlpforum.org/2023/03/06/the-refugee-convention-and-armed-conflict [https://perma.cc/MB6X-3KL7]; Valentina Canepa & Daniela Gutierrez Escobedo, *Can Regional Refugee Definitions Help Protect People Displaced by Climate Change in Latin America?*, REFUGEES INT'L (Feb. 16, 2021), https://www.refugeesinternational.org/can-regional-refugee-definitions-help-protect-people-displaced-by-climate-change-in-latin-america [https://perma.cc/7KLL-YAS8]; SANJULA WEERASINGHE, DIV. OF INT'L PROT., U.N. HIGH COMM'R FOR REFUGEES, REFUGEE LAW IN A TIME OF CLIMATE CHANGE, DISASTER AND CONFLICT 91 (2020), https://www.refworld.org/pdfid/5ff43e894.pdf [https://perma.cc/Y29N-99D8].

35. *See* CONG. RSCH. SERV., R43716, ASYLUM AND GANG VIOLENCE: LEGAL OVERVIEW 12 (2014), https://www.everycrsreport.com/files/20140905_R43716_a01610e98101e5c76874dd5efc39005a24c8ec3a.pdf [https://perma.cc/A2ZH-FHQ2]; WEERASINGHE, *supra* note 34, at 91.

36. *See* Michael Kagan, *Legal Refugee Recognition in the Urban South: Formal v. de Facto Refugee Status*, 24 REFUGE 11, 15 (2007) ("In international law, refugee status is an exception to the general rule that migrants can be forced to go back to their own countries . . . . This system in which refugee law is an exception to general migration law makes it quite advantageous (from a legal point of view) to be formally labelled a refugee.").

anti-immigrant, xenophobic, racist, and authoritarian politics infecting mainstream political parties in many traditional asylum states, including the United States.[37] No tweak to the asylum procedure can address all of these daunting challenges. Yet, making the asylum procedure more efficient and more balanced is important.

We should be clear about what can and cannot be accomplished by technical reforms. If the goal of political leaders is simply to exclude more migrants no matter the merits of their cases, then nothing in this Article will be of any use. This Article's intent is to offer a means to improve an asylum system that is inadequate and part of a highly problematic system of restrictions on migration, and yet still capable of protecting many who need asylum. Giving the American asylum system the capacity to say yes efficiently will help to insulate it, partially, from the structural pressures it faces today. That is important for government officials who still want to operate a genuine asylum system within current legal structures, but who must address the problems that long adjudication delays cause. This Article will propose a way to ensure that procedural pressures do not pressure the system to be biased toward denial of asylum claims because that is the only way to dispense with cases quickly. But it does not attempt to solve the problems that come from an overall restrictionist approach to migration or from an assumption that only a small number of people should be granted asylum.

The Article begins in Part I with an overview of the basics of refugee and asylum law, especially in the United States. Part II describes group-based status as an alternative to the individual refugee status determination. Part III conceptualizes expedited approval in the United States by relying on international examples and pre-existing U.S adjudication methods. Part IV describes how exactly an expedited system might work in the United States, by employing a streamlined paper review and by granting asylum after credible fear interviews.

## I. THE U.S. ASYLUM SYSTEM

### A. ELIGIBILITY FOR ASYLUM

The centerpiece of international refugee law and the foundation of American asylum law is the 1951 Geneva Convention Relating to the Status of Refugees (Refugee Convention).[38] That Convention, which was updated in a 1967 Protocol which the United States ratified,[39] contains the most widely used global definition of a refugee. A refugee is a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular

37. *See, e.g.*, David Leonhardt, *The Force Shaping Western Politics*, N.Y. TIMES: THE MORNING (June 12, 2024), https://www.nytimes.com/2024/06/12/briefing/immigration-european-us-elections.html.

38. *See* Geneva Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

39. The 1967 Protocol incorporates the operative articles of the 1951 Convention, so that ratification of the Protocol has a similar impact as ratification of the original Convention. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[40] In U.S. law, a close variant of the 1951 Convention refugee definition is enshrined by statute to define eligibility for asylum.[41]

There are other related grounds for claiming protection from deportation based on a risk of human rights abuses abroad. In U.S. law, the refugee definition is used for asylum, which is the best status available to a noncitizen based on human rights violations abroad. But not everyone can apply for asylum. For instance, a person might be ineligible for failure to file an application within one year of arrival.[42] In that case, the person could still apply for withholding of removal, which uses a very similar but slightly more stringent set of criteria.[43] A person who cannot get asylum might also be able for obtain protection under the United Nations Convention Against Torture if the person would be in danger of "torture" in the country of removal.[44] The Biden Administration severely limited who can apply for asylum through a regulation known as the "Circumvention of Lawful Pathways" rule, which impacts people who entered the country without inspection.[45] The Biden Administration justified the rule as a means "to incentivize the use of lawful pathways," meaning to enter at an official port of entry.[46] Excluding people from applying for asylum because they entered the country illegally seems to conflict with the statute which states that any noncitizen "who is physically present in the United States" may apply for asylum, including any manner of arrival, "whether or not at a designated port of arrival."[47] The rule is subject to litigation,[48] and does not prevent people from applying for withholding of removal and protection under the Convention Against Torture.[49]

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40. Refugee Convention, *supra* note 38, at art. 1(A)(2). The U.S. statutory incorporation of the refugee definition changed the wording slightly, replacing "for reasons of" with "on account of." 8 U.S.C. § 1101(a)(42).

41. 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(A).

42. *See* 8 U.S.C. § 1158(a)(2)(B).

43. *See* 8 U.S.C. § 1231(b)(3)(A) (requiring that the person "would be threatened" rather than having a well-founded fear).

44. *See* 8 C.F.R. § 208.18(a) (definition of torture); *id*. § 208.16 (procedures for deferral of removal and withholding of removal under the Convention Against Torture).

45. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023) (to be codified at 8 C.F.R. pts. 208, 1003, 1208).

46. U.S. DHS, *Fact Sheet: Circumvention of Lawful Pathways Final Rule* (May 11, 2023), https://www.dhs.gov/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule [https://perma.cc/254Q-4QL4].

47. 8 U.S.C. § 1158(a)(1).

48. *See, e.g*., E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 671 (9th Cir. 2021) ("[T]he Rule is substantively invalid because it conflicts with the plain congressional intent instilled in 8 U.S.C. § 1158(a), and is therefore 'not in accordance with law.'" (quoting 5 U.S.C. § 706(2)(A))); E. Bay Sanctuary Covenant v. Biden, 683 F. Supp. 3d 1025, 1043 (N.D. Cal. 2023) ("[T]he Rule is contrary to law because it presumes ineligible for asylum noncitizens who enter between ports of entry, using a manner of entry that Congress expressly intended should not affect access to asylum.").

49. 8 C.F.R. § 208.18(b)(1) (providing that any noncitizen "who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under [the Convention Against Torture], and, if applicable, may be considered for deferral of removal").

### B. STANDARD ASYLUM PROCEDURE

Needless to say, there are myriad interpretive problems with the substantive definitions governing who can win protection from removal based on human rights violations. But this Article is about asylum *procedure*, not substance. All that is necessary to understand for present purposes is that among the broad category of people who approach U.S. borders without authorization, or who are present inside the country without authorization, some may be eligible for asylum or a related form of protection. Thus, in any system that seeks to restrict migration generally while also protecting refugees, there must be a system to adjudicate asylum claims. Internationally, this process is generally called "refugee status determination," or RSD.[50] In the United States, it usually is just known as applying for asylum.

I will describe here the normal asylum process in the United States. Then, I will describe the quite different process that operates when people arrive at the border. According to the statute, anyone who is inside the United States can apply for asylum, no matter how they entered.[51] Like most immigration statuses, this procedure is based around an application form, known as the I-589. This ten-page form can be—and, if an applicant has access to a competent attorney, will be—supplemented by a declaration from the applicant and other witnesses, copies of personal documents, and reports documenting relevant human rights problems in the country of origin.[52]

Asylum applications in the United States are lodged through two different procedures, known as defensive or affirmative applications. When DHS puts a person into removal (deportation) proceedings, that person may raise an asylum claim as a form of relief from removal, which roughly equates to an affirmative defense against deportation.[53] Immigration lawyers call applying for asylum in immigration court a *defensive application* because it offers asylum as a defense against deportation.[54] Defensive asylum applications are adjudicated by immigration judges in the U.S. Immigration Court system.[55] This contrasts with

50. *See* U.N. High Comm'r for Refugees, *Master Glossary of Terms*, https://www.unhcr.org/glossary [https://perma.cc/T9N5-EJVE] (last visited Mar. 31, 2025) (defining "refugee status determination (RSD) procedure" as "[t]he legal or administrative process by which governments or UNHCR determine whether a person seeking international protection is considered a refugee in under international, regional or national law").

51. *See* 8 U.S.C. § 1158(a)(1) (providing that any noncitizen "who is physically present in the United States . . . whether or not at a designated port of arrival . . . may apply for asylum").

52. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., DHS, INSTRUCTIONS FOR APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL 6 (2023) (providing instructions for submitting secondary evidence and affidavits).

53. U.N. HIGH COMM'R FOR REFUGEES, *Types of Asylum*, https://help.unhcr.org/usa/applying-for-asylum/types-of-asylum [https://perma.cc/E5ED-9FRL] (last visited Mar. 31, 2025).

54. *See id.*

55. Immigration Courts are part of the Department of Justice, and (despite their name) their primary role is to hear removal cases in which DHS is seeking a removal order against a person. In blunt terms, they adjudicate deportation, not immigration. Cases in these courts begin with DHS filing a charging document to initiate removal proceedings. *See* 8 C.F.R. § 1003.14(a). Then "[a]t the conclusion of the

*affirmative asylum applications*. In this procedure, a person who is inside the United States and not in removal proceedings mails the I-589 asylum application form to U.S. Citizenship and Immigration Services (USCIS).[56] A person who does this could be undocumented, or on a temporary visa, or in some provisional status.[57]

The U.S. Asylum Office, a part of USCIS, adjudicates affirmative asylum applications by scheduling asylum-seekers for in-person, non-adversarial interviews.[58] I have accompanied many applicants to these interviews. They are often lengthy and intensive affairs. When interpretation and multiple family members are involved, it is not unusual for asylum interviews to take the better part of a day. This does not include time spent by asylum officers and their supervisors reviewing written evidence submitted with the I-589.

When asylum is raised in immigration court, the noncitizen submits the I-589 form and supporting evidence to the immigration court, which will typically schedule an Individual Hearing—essentially, a mini-trial—at which witness testimony will be taken.[59] These are adversarial hearings, in which a lawyer from Immigration and Customs Enforcement is able to cross examine the applicant and any other witnesses offered to support the asylum application.[60] Either side may appeal the immigration judge's decision to the Board of Immigration Appeals (BIA).[61] If the noncitizen is ordered to be removed by the BIA, they may seek review of the decision at the U.S. Court of Appeals. This appellate process has produced extensive caselaw from the BIA and the circuit courts on eligibility for asylum and related forms of relief.[62]

While affirmative and defensive applications begin in different agencies, they usually end in roughly the same place. A grant of asylum will confer the same rights no matter which agency makes the decision.[63] Also, when the Asylum Office makes a negative decision on an asylum application and the person has no other immigration status, the case is referred to immigration court, where DHS may pursue removal proceedings.[64] This referral mechanism means that there is a risk in submitting an affirmative asylum application that fails; if unsuccessful, the applicant is put into deportation proceedings. But it also gives the applicant a

proceeding the immigration judge shall decide whether an alien is removable from the United States." 8 U.S.C. § 1229a(c)(1)(A).

56. U.N. HIGH COMM'R FOR REFUGEES, *supra* note 53; U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 52, at 9.

57. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 52, at 2 (providing that noncitizens "may apply for asylum irrespective of . . . immigration status").

58. *See id*. at 11–12 (describing the asylum interview process).

59. *Id*. at 9; 8 C.F.R. § 1240.7.

60. 8 C.F.R. § 1240.2(a).

61. *Id*. § 1240.15.

62. *See, e.g*., Miguel-Pena v. Garland, 94 F.4th 1145, 1161–62 (10th Cir. 2024) (affirming BIA's denial of asylum based on the holding that "women business owners in El Salvador" does not constitute an immutable particular social group); Gomez-Abrego v. Garland, 26 F.4th 39, 47 (1st Cir. 2022) (holding no jurisdiction to review arguments that were not raised during BIA proceedings).

63. *See* 8 C.F.R. § 208.14(a), (b).

64. *Id*. § 208.14(c)(1).

second bite at the apple. When a case is referred to immigration court, the immigration judge makes a de novo decision on the asylum application, which can then be appealed just like a defensive application.[65]

It is debatable whether this system can reliably identify refugees entitled to protection.[66] More recently, it has become crystal clear that it cannot handle the quantity. The sheer number of people whose cases it must process and decide has overwhelmed the system. The United States experienced a seven-fold increase in the asylum backlog from 2012 to 2022.[67] In 2016, there were fewer than 200,000 asylum cases waiting for hearings in immigration court, which was considered to be a very large number at the time.[68] By the end of 2022, there were 787,882 people waiting for asylum hearings in immigration court.[69] In the same year, a nearly identical number of people—778,084—were waiting for their cases to be decided by the Asylum Office.[70] By March 2024, the Asylum Office backlog had grown to one million.[71] According to a 2022 estimate, it takes immigration courts an average of 4.3 years to decide an asylum case.[72]

The Asylum Office is comparatively faster; it now usually schedules an interview within a few months of when an application is lodged. But it is only able to do that because in 2018 it adopted a "last in, first out" system for prioritizing interviews.[73] That means that new applications move quickly, relatively speaking. But around 430,000 people who filed asylum applications between 2015 and 2017 are in limbo.[74] They have been waiting now for up to ten years, with no sign of when—if ever—they will actually have an interview, much less a decision.[75] During that time, they will usually enjoy employment authorization.[76] But their path to a permanent status is indefinitely stalled.

For those whose cases are likely to be rejected (if they were ever decided), this delay is arguably a benefit. For those whose cases are strong and would likely lead to an asylum grant, it is quite the opposite. By the time they get an interview—if

65. *See id.* § 208.14 (approval or denial by Immigration Judges or asylum officers); *id.* § 1240.15 ("[A]n appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals."); *id.* § 1003.3(a) (providing that a party affected by a decision of an Immigration Judge or DHS officer may appeal to the Board of Immigration Appeals).

66. *See* Vasquez, *supra* note 12.

67. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *supra* note 2.

68. *See A Mounting Asylum Backlog and Growing Wait Times*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Dec. 22, 2021), https://trac.syr.edu/immigration/reports/672 [https://perma.cc/CZY2-UP8Q].

69. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *supra* note 2.

70. *Id.*

71. DHS OFF. OF INSPECTOR GEN., USCIS FACES CHALLENGES MEETING STATUTORY TIMELINES AND REDUCING ITS BACKLOG OF AFFIRMATIVE ASYLUM CASES 1 (2024), https://www.oig.dhs.gov/sites/default/files/assets/2024-07/OIG-24-36-Jul24.pdf [https://perma.cc/73LP-9DMR].

72. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *supra* note 2.

73. Alexandra Martinez, *Asylum-Seekers Have Been Waiting Years for an Interview Because of a Trump-Era Processing System*, PRISM (Mar. 31, 2022), https://prismreports.org/2022/03/31/asylum-seekers-last-in-first-out [https://perma.cc/UKW3-94A2].

74. *Id.*

75. *See id.*

76. *See* 8 C.F.R. § 208.7(a)(1) (eligibility employment authorization for asylum-seekers).

they ever do—so much time will have passed that many of them could have been eligible to apply for citizenship.[77] While they wait, they cannot sponsor family members to be reunited with them in the United States.[78] Instead, they are just waiting in limbo for a decision that should have come relatively soon after their entry to the country in most cases. And, based on my twenty-five years of experience representing refugees in asylum procedures, these cases tend to become weaker with age. Frightening experiences and circumstances that initially produced a well-founded fear fade into the past. Witnesses become unavailable. It becomes easier for an adjudicator to wonder why a persecutor would still be interested in hurting the person sitting in front of them, after so much time has passed. Meaning, if these cases ever get adjudicated, some people who would have easily won asylum closer to the time of their original arrival and who might have already acquired U.S. citizenship in a more efficient system may now instead be eventually denied.

Federal statute provides a few mandates concerning the asylum procedure.[79] Before asylum can be granted, applicants' identities must be checked against government security databases.[80] There should be an "interview" or "hearing,"[81] but there is no definition of what these require. Both the statute and the regulations prescribe that the government should establish an asylum procedure, but say little about what it must look like, other than there should be a hearing of some kind.[82] As a result, the Department of Homeland Security has quite a bit of flexibility to redesign the system without congressional action.

The asylum backlog became one of the Biden Administration's central challenges in managing migrant arrivals.[83] Asylum-seekers cannot obtain employment authorization until their asylum applications have been pending for six months.[84] That six-month clock does not start when the person arrives in the country. It starts when they lodge the I-589 asylum application[85]—which many people cannot complete without assistance (ideally from an attorney). This means that asylum-seekers will typically be unable to work legally for their first year in the country at least, roughly speaking. In 2023, with migrants crowding into

77. A successful asylum-seeker—if their case were decided—would be able to naturalize potentially five years after being granted asylum, not counting processing time at U.S. Citizenship and Immigration Services. *See Fact Sheet: Naturalization for Lawful Permanent Residents Who Had Asylee or Refugee Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/document/fact-sheets/DO_FactSheet_NaturalizationForLawfulPermanentResidents_wAsyleeOrRefugeeStatus_V4_508.pdf [https://perma.cc/4TS7-TYKG] (last visited Mar. 31, 2025); 8 U.S.C. § 1427(a).

78. *See Family of Refugees and Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 25, 2017), https://www.uscis.gov/family/family-of-refugees-and-asylees [https://perma.cc/HSL9-6GZV].

79. 8 U.S.C. § 1158(d)(5).

80. *Id.* § 1158(d)(5)(A)(i).

81. *Id.* § 1158(d)(5)(A)(ii).

82. *See id.* § 1158(d)(1) ("The Attorney General shall establish a procedure for the consideration of asylum applications . . . ."); 8 C.F.R. § 1240.11(c).

83. *See, e.g.*, Martinez, *supra* note 73.

84. 8 C.F.R. § 208.7(a)(1).

85. *See id.*

shelters, New York officials pushed for the federal government to find a way to give many of the asylum-seekers some status while their asylum cases were pending so that they could work.[86] The Biden Administration did so, partly, by extending temporary protected status to Venezuelans who had arrived through the middle of 2023.[87]

Anti-immigrant politicians have an easy time attacking the long period of asylum adjudication as a weak link in immigration restrictionism. For instance, in 2018 President Donald Trump claimed:

> [I]f you look at the records, not very many people are allowed to stay once they go to court. But what happens is they'd go into—they were using asylum—first of all, they were told what to say by lawyers and others. "Read this statement." You read the statement, and now you're seeking asylum. The whole thing is ridiculous. And we won't put up with it any longer.[88]

Trump's claim that the asylum-seekers would not succeed "once they go to court" shows that his complaint is really about the delay in cases ever reaching that stage.

To be clear, I do not generally believe that such objections are made in good faith. Trump has been generally hostile to immigrants regardless of legal technicalities; he has also borrowed Hitleresque rhetoric, saying of immigrants: "They're poisoning the blood of our country. They're coming into our country from Africa, from Asia, all over the world."[89] I am unaware of any statement from Trump indicating an interest in offering asylum to people in genuine danger. When the primary motivation is racism, xenophobia, or any variation thereof, faster adjudication of asylum applications is unlikely to change such minds. Not surprisingly, prominent American politicians on the political right have proposed simply shutting down asylum adjudications, period.[90] And, as noted, the Biden Administration to some extent complied with this demand.[91]

Yet, the mismatch between the number of asylum applicants and the capacity of the system to process their cases is a real problem that any defender of the

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86. Julia Ainsley, *Under Pressure from New York City, the Biden Admin Gives More Venezuelan Migrants Temporary Protected Status*, NBC NEWS (Sept. 20, 2023, 10:31 PM), https://www.nbcnews.com/politics/immigration/biden-admin-gives-venezuelan-migrants-temporary-protected-status-rcna108753 [https://perma.cc/GT55-C2YX].

87. *Id.*

88. President Donald Trump, Remarks on the Illegal Immigration Crisis and Border Security (Nov. 1, 2018) (transcript available at https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security [https://perma.cc/T85K-JJ6H]).

89. Jacob Rosen et al., *Trump Blasted for Saying Immigrants Are "Poisoning the Blood of our Country,"* CBS NEWS (Dec. 18, 2023, 7:43 PM), https://www.cbsnews.com/news/trump-immigrants-poisoning-the-blood-of-our-country-reaction [https://perma.cc/M4SE-3UAS].

90. *See, e.g.*, Greg Sargent, Opinion, *Jim Jordan's New Shutdown Threat Highlights an Unnerving Right-Wing Trend*, WASH. POST (Oct. 10, 2023, 8:00 AM), https://www.washingtonpost.com/opinions/2023/10/10/jim-jordan-house-gop-government-shutdown.

91. *See supra* notes 45–49 and accompanying text (discussing the Circumvention of Lawful Pathways Rule).

present system must wrestle with urgently. Governments have long been frustrated that asylum-seekers whose cases will eventually be rejected might thwart restrictions on migration by claiming asylum, winning the right to stay in the host country while their cases are pending. The anxiety here is that the longer asylum applications remain pending, the more migrants have an incentive to cross the border and apply even if they do not have strong cases.[92] The more backlogged an asylum process becomes, the more plausible this concern is likely to be, since a person with a pending case would stay in that interim status longer.

Before going any further, it is important to say that there are many ways to understand the asylum adjudication capacity problem and many ways governments might respond to it. The better way, in my view, would be to understand that restrictionist immigration policies put asylum systems under untenable stress, creating chaos and system failure that is both a humanitarian and a political disaster. When the asylum system is the only small island of safety in a harsh sea of restriction, it is bound to become overcrowded. When governments restrict their interpretation of the refugee definition, they make the island even smaller. There is no single technical fix that can remedy this basic structural threat to the viability of asylum. The remedy must be a more comprehensive rethinking of migration regulation so that people who feel pressure to migrate have more safe and legal options. But, suffice it to say, this is not the path that governments have generally taken, as the next Section will explain.

### C. MANIFESTLY UNFOUNDED AND CREDIBLE FEAR PROCEDURES

One response from governments to the challenge of asylum adjudication capacity has been to try to prevent asylum-seekers from arriving at all and to treat them ever more harshly while their cases are pending—for instance, by keeping many in detention.[93] One key purpose of such harsh treatment is to deter other asylum-seekers from arriving.[94] The other common government response has been the development of a fast way *to reject* many asylum claims. That is, governments have long sought to prevent access to full adjudication of asylum claims, so that the lodging of an asylum application does not automatically guarantee a migrant a lengthy legal period of presence within a country's borders.[95] Governments of leading asylum states sought to develop expedited screening mechanisms to weed out weak cases quickly. These mechanisms have always been controversial, for good reason. But, for better or for worse, they have also

92. *See, e.g.*, Frum, *supra* note 8.

93. *See, e.g.*, Ryan Devereaux, *Joe Biden Detained Tens of Thousands of Asylum-Seekers in the Last Year*, INTERCEPT (Apr. 21, 2022, 12:00 PM), https://theintercept.com/2022/04/21/joe-biden-immigration-detention-asylum [https://perma.cc/X7FA-VW4E]; Jordana Signer, *Immigrant Detention Is Expensive, and Alternatives Are Just As Effective*, HUM. RTS. WATCH (Nov. 15, 2021, 9:00 AM), https://www.hrw.org/news/2021/11/15/immigrant-detention-expensive-and-alternatives-are-just-effective [https://perma.cc/DZ45-VT9W].

94. *See* Michael Kagan, *Limiting Deterrence: Judicial Resistance to Detention of Asylum-Seekers in Israel and the United States*, 51 TEX. INT'L L.J. 191, 198 (2016).

95. *See infra* text accompanying notes 102–04.

been largely legitimized by international organizations and are largely accepted as part of international refugee law, though not without critics and doubts.[96]

More than forty years ago, the Executive Committee of the United Nations High Commissioner for Refugees, known as UNHCR ExCOM, issued a set of conclusions on "the problem of manifestly unfounded or abusive applications for refugee status or asylum."[97] ExCOM is a collection of governments (currently 110 governments are members)[98] that issues periodic conclusions on questions of international refugee law.[99] It operates as a subsidiary of the U.N. General Assembly.[100] Like General Assembly resolutions, ExCOM Conclusions are not binding as a matter of international law, but they are part of the ambiguous category of international authorities often referred to as "soft law."[101] Though not binding per se, they are evidence of a general consensus of governments on what the law is.

In its 1983 Conclusion on manifestly unfounded refugee claims, ExCOM said that "applications for refugee status by persons who clearly have no valid claim to be considered refugees under the relevant criteria constitute a serious problem in a number of States parties."[102] To address this challenge, "national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure."[103] The Conclusion also said that certain procedural safeguards are required in such a procedure, although, other than a personal interview, most safeguards were described as mere suggestions. For example, regarding the opportunity to appeal a manifestly unfounded designation, the Conclusion says:

> [A]n unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. Where arrangements for such a review do not exist, governments should give

96. *See, e.g.*, HUM. RTS. WATCH, DISMANTLING DETENTION: INTERNATIONAL ALTERNATIVES TO DETAINING IMMIGRANTS 9–10 (2021), https://www.hrw.org/report/2021/11/03/dismantling-detention/international-alternatives-detaining-immigrants [https://perma.cc/P3F8-E6WM].

97. U.N. High Comm'r for Refugees Exec. Comm. of the High Comm'r's Programme, Conclusion No. 30 (XXXIV): The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, U.N. Doc. A/38/12 (Oct. 20, 1983), https://www.refworld.org/policy/exconc/excom/1983/en/15126 [https://perma.cc/G3LG-SKP2].

98. U.N. HIGH COMM'R FOR REFUGEES EXEC. COMM. OF THE HIGH COMM'R'S PROGRAMME, *Composition for the Period October 2024 – October 2025*, https://www.unhcr.org/media/executive-committee-members-and-standing-committee-observers-period-october-2024-october-2025 [https://perma.cc/QG79-HEB5] (last visited Mar. 31, 2025).

99. U.N. HIGH COMM'R FOR REFUGEES, *Executive Committee*, https://www.unhcr.org/executive-committee [https://perma.cc/3LNW-P9VS] (last visited Mar. 31, 2025).

100. *Id.*

101. *See* Jonathan Kent, *Liberal Democracies and Asylum: Legal Transformation and Implementation Challenges*, INT'L RELS., Sept. 4, 2023, at 1, 3–5 (describing the role of soft law authorities in legitimizing states' efforts to evade protection of refugee law).

102. Conclusion No. 30 (XXXIV), *supra* note 97.

103. *Id.*

> favourable consideration to their establishment. This review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive.[104]

There is a structural tension at the heart of the manifestly unfounded concept that continues to be a battlefront today. The UNHCR ExCOM Conclusion gave no definition of what made an asylum claim manifestly unfounded.[105] Presumably, this was meant to be a category of cases at the extreme, not encompassing all asylum claims that might ultimately be denied. But no criteria were offered to define what such a case would look like in the real world. If the manifestly unfounded category is defined narrowly, it poses less threat of errantly excluding people who have valid refugee claims. But, on the flip side of the same coin, if it applies only to a small number of asylum-seekers, it would not achieve the government objective of denying a significant chunk of the asylum caseload quickly.

In 1992, the Council of the European Union issued a resolution on manifestly unfounded asylum claims which offered a bit more in the way of definition. It stated that "[a]n application for asylum shall be regarded as manifestly unfounded if it is clear that it meets none of the substantive criteria" under the international refugee definition because either "there is clearly no substance to the applicant's claim to fear persecution in his own country" *or* "the claim is based on deliberate deception or is an abuse of asylum procedures."[106] An asylum claim could be deemed to have no substance if one of three tests were met:

- "the grounds of the application are outside the scope of the Geneva Convention," meaning that "the applicant does not invoke fear of persecution" for one of the five reasons listed in the 1951 Convention but instead states a reason "such as the search for a job or better living conditions;"
- "the application is totally lacking in substance: the applicant provides no indications that he would be exposed to fear of persecution or his story contains no circumstantial or personal details;"
- "the application is manifestly lacking in any credibility: his story is inconsistent, contradictory or fundamentally improbable."[107]

A government could deem an asylum claim to be a "deliberate deception" if the applicant used a false identity or false documents vis-à-vis the asylum government while insisting them to be true, destroyed travel documents in order to conceal his or her identity, made an application late in the process only when threatened

104. *Id.*

105. *See id.*

106. Council of the European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution")*, REFWORLD, https://www.refworld.org/docid/3f86bbcc4.html [https://perma.cc/79XP-7QSH] (last visited Mar. 31, 2025).

107. *Id.*

with deportation, or otherwise "deliberately made false representations about his claim."[108]

There are myriad conceptual, principled, and practical problems with each of these criteria. To start, the boundaries of the refugee definition are highly contested and rarely stable. To cite just a few examples: In 1983, when ExCOM endorsed manifestly unfounded procedures, many major asylum states denied that a person could be a refugee if they feared persecution from a non-state actor such as a rebel group.[109] Today that is widely accepted.[110] The definition of what it means to be persecuted for reason of membership in a particular social group has proven especially fraught. The United States' Board of Immigration Appeals adopted one definition in 1985,[111] which was considered highly persuasive in other countries,[112] but then the BIA itself abandoned that definition decades later.[113] Several U.S. courts of appeals have accepted the new U.S. interpretation only because of *Chevron* deference.[114] Even the idea that someone fleeing poverty cannot win asylum is not crystal clear. There are situations where discriminatory economic deprivations can be the basis of an asylum claim.[115] In general, how is anyone to know objectively when an application is a good faith legal argument for the extension of the refugee definition into the ambiguous gray zone around its boundaries, or clearly without substance?

Beyond legal ambiguities, there are factual and process problems. Credibility assessment in refugee cases is a well-known challenge in the asylum process.[116] By definition, the idea of a manifestly unfounded procedure is to assess claims quickly, likely close to the border physically and close in time to the person's arrival. But that also likely means assessing a claim when the person has had little or no access to legal assistance and little time to collect evidence. Asylum-seekers arrive to a foreign country, often in weakened states of health, without knowing the language of the host country, unfamiliar with legal procedures, and likely with good reason to fear authority.[117] The risk that this assessment will be conducted without all the facts or in a situation where the person will seem far less coherent and forthright than they might later on is exceedingly high.

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108. *Id.*

109. *See* Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 106–08 (1999).

110. *See* JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 295 (2d ed. 2014); Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUM. RTS. L. REV. 441, 447 (2021).

111. In re Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

112. *See, e.g.*, Canada v. Ward, [1993] 2 S.C.R. 689, 736–37 (Can.) (citing *Acosta*, 19 I. & N. Dec. 211).

113. *See* Michael Kagan, Chevron*'s Asylum: Judicial Deference in Refugee Cases*, 58 HOUS. L. REV. 1119, 1136–38 (2021).

114. *Id.* at 1141–45.

115. HATHAWAY & FOSTER, *supra* note 110, at 358.

116. *See* Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 367 (2003).

117. *Cf. id.* at 375–77 (discussing the inherent problems in subjective credibility assessments).

The United States does not use the "manifestly unfounded" terminology, but we have an analogous procedure through the "credible fear interview."[118] The 1996 immigration statute signed by President Bill Clinton created a new expedited removal mechanism.[119] In expedited removal, an immigration officer working for the Department of Homeland Security—i.e., not a judge—can order an person who is arriving to the United States removed "without further hearing or review unless the alien indicates an . . . intention to apply for asylum."[120] If the person indicates an intention to apply for asylum, they will be referred for an interview by an asylum officer.[121]

In expedited removal, the asylum officer's job is to determine whether the person has a "credible fear of persecution."[122] A "credible fear" means "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."[123] This American definition is a conceptual contrast from the EU notion of manifestly unfounded claims, which attempts to define such claims substantively.[124] The American concept of a "credible fear" has no independent substantive content. Instead, it is predictive. It asks the asylum officer to assess whether there is a "significant possibility" that the person "could establish eligibility."[125] It seems to mirror the criteria for preliminary injunctions in civil litigation, which asks courts to assess likelihood of success on the merits once the claim is fully adjudicated. This predictive exercise is conceptually and practically problematic, as I explained in Part 0. But it also is a relatively low standard, theoretically. There must only be a possibility that the person should win asylum.

The asylum officers who conduct credible fear interviews are the same asylum officers who work in the U.S. Asylum Office and who in other contexts can grant asylum. But they cannot do so in expedited removal. Instead, when a person passes a credible fear interview, they are referred for further consideration by an immigration judge, and during that time they may be detained.[126] If the applicant fails the credible fear interview, they may ask that the decision be reviewed by an immigration judge.[127] But here, also, the immigration judge is not deciding to actually grant asylum, but rather only whether the person should be allowed to make a full asylum application.[128] In September 2023, the Asylum Office made

118. *See* 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 208.30.
119. 8 U.S.C. § 1225.
120. *Id.* § 1225(b)(1)(A)(i).
121. *Id.* § 1225(b)(1)(B)(ii).
122. *Id.* § 1225(b)(1)(B)(iii).
123. *Id.* § 1225(b)(1)(B)(v).
124. *See supra* notes 106–08 and accompanying text.
125. 8 U.S.C. § 1225(b)(1)(B)(v).
126. *See* 8 U.S.C. § 1225(b)(1)(B)(ii).
127. 8 U.S.C. § 1225(b)(1)(B)(iii).
128. *See id.*

12,500 credible fear decisions on the merits, denying 4,760 people access to the asylum procedure.[129]

A highly contested question in the United States is whether a credible fear interview can be used to deny refugee claims on complex and contested areas of law. One of the sharp edges of asylum law is that a person can be in genuine danger of heinous harm but can still fail to meet the refugee definition because they would not be harmed for the right legal reason.[130] Such cases are high stakes and also legally uncertain. During the first Trump Administration, the Attorney General issued a restrictive interpretation of the refugee definition with regard to gender-based violence specifically, and non-state harm generally.[131] That decision, *Matter of A-B-*, was intensely controversial. Attorney General Jeff Sessions overturned a prior Board of Immigration Appeals precedent that had opened up asylum to some victims of especially severe domestic violence in other countries.[132] In addition to closing the door to people escaping domestic violence, Sessions offered long commentary complaining that the asylum system was being used by "aliens seeking an improved quality of life" and generally narrowing the availability of asylum to anyone fleeing non-government violence.[133]

Sessions's decision was eventually vacated by Attorney General Merrick Garland after Trump left office.[134] While Sessions's decision in *Matter of A-B-* was in force, it was subject to challenge in the circuit courts through the normal petition-for-review process by which removal orders are adjudicated.[135] But that process takes years. Meanwhile, the Department of Homeland Security began implementing *Matter of A-B-* in credible fear interviews.[136] In other words, the Trump Administration began using a new and contested legal interpretation that had yet to survive judicial review to deny asylum-seekers who could be in danger, through a process specifically designed to prevent judicial review. This measure was eventually blocked by the D.C. Circuit as arbitrary and capricious, precisely because the government had shifted its longstanding position on the underlying legal questions.[137]

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129. *Immigration Enforcement and Legal Processes Monthly Tables – August 2024*, U.S. DHS (Dec. 6, 2024), https://ohss.dhs.gov/sites/default/files/2024-12/2024_1206_ohss_immigration-enforcement-and-legal-processes-tables-august-2024.xlsx [https://perma.cc/D8TX-QS7Z].

130. *See* Kagan, *supra* note 113, at 1136 ("The results are often strikingly harsh because it leads judges to effectively say: We know you will be killed or raped, but not for the right reason.").

131. *See* A-B-, 27 I. & N. Dec. 316, 337–38 (Att'y Gen. 2018).

132. *See id*. at 331–33.

133. *See id*. at 343–45.

134. Comment, *Attorney General Garland Vacates* Matter of A-B-, 135 HARV. L. REV. 1174, 1174 (2022).

135. *See* Joel Rose, *The Justice Department Overturns Policy That Limited Asylum for Survivors of Violence*, NPR (June 16, 2021, 6:51 PM), https://www.npr.org/2021/06/16/1007277888/the-justice-department-overturns-rules-that-limited-asylum-for-survivors-of-viol [https://perma.cc/LKW3-9XDE].

136. U.S. CITIZENSHIP & IMMIGR. SERVS., DHS, POLICY MEMORANDUM: GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-*, PM-602-0162, 4 (2018).

137. Grace v. Barr, 965 F.3d 883, 887, 900 (D.C. Cir. 2020).

### D. CONCEPTUAL UNDERPINNINGS OF EXPEDITED DECISIONMAKING

Timing matters. Specifically, the challenge in the asylum system is that processing time can thwart substantive policy. Legal scholarship and traditional legal analysis can be so focused on correctly parsing the substantive complexity of legal conflicts that we can easily forget the impact of the time it takes. We even have a legal maxim that captures this reality: Justice delayed is justice denied. It is not unusual for time to be of the essence in a legal dispute, and for the pressure to move quickly to impact the substantive outcome.[138] This is why design of a functional immigration system must take into account efficiency of processing and adjudication, not only substantive criteria. Asylum is no exception.

Political scientist Elizabeth F. Cohen has observed that the passage of time has always played a central role in legal and political processes.[139] Time has played an especially central role in laws governing migration and citizenship. Boundaries that determined whether a person becomes a subject of a particular sovereign typically combine elements of geography and time.[140] This might happen when the law defines citizenship with reference to their physical location at a particular point in time.[141] It also happens in American law when a person becomes eligible to naturalize after a certain number of years of residence.[142] Factors of time are often explicit criteria for many different immigration benefits. A form of relief from removal based on hardship to family members is available only to immigrants who have been present for a certain number of years.[143] The Deferred Action for Childhood Arrivals (DACA) program is available for certain people who were present in the United States from 2007 to 2012.[144] Several important grounds of inadmissibility apply for a preset period of time. For instance, a person who was unlawfully present in the country for more than a year must wait ten years to obtain a visa to re-enter the country again in most cases.[145]

In addition to making time an explicit criterion for many immigration benefits, Congress has indirectly prescribed processing delays for many visas through use of quotas that are far below the number of people who qualify substantively.

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138. *See, e.g.*, Mark S. Brodin, Bush v. Gore: *The Worst (or at Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563, 567 (2012) (noting that the Supreme Court found that there was no more time available to remedy flaws in the Florida vote counting process, and then designated its decision as "limited to the present circumstances" and thus not to be used as a precedent).

139. *See generally* ELIZABETH F. COHEN, THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE (2018).

140. *Id.* at 29.

141. *See id.* at 40–45 (giving examples such as location at time of birth, or location at a moment of a law's passage, or the state of affairs at a particular arbitrary moment in the past).

142. *See* 8 U.S.C. § 1427(a) ("No person, except as otherwise provided in this subchapter, shall be naturalized unless such applicant, . . . immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years . . . .").

143. *See id.* § 1229b (cancellation of removal).

144. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/DACA [https://perma.cc/US8H-UZRD] (last updated Apr. 8, 2024).

145. *See* 8 U.S.C. § 1182(a)(9)(B).

Thus, spouses of lawful permanent residents are, in principle, eligible to immigrate to the United States and to become lawful permanent residents themselves.[146] But, owing to a quota, they must wait. To get such a visa in February 2024, a person would have had to apply four years earlier, in February 2020.[147] Delays are even longer for several other family-based visas, and these delays are compounded for certain nationalities because of a second quota—the per country quota.[148] Thus, for one of the most backlogged categories, married sons and daughters of U.S. citizens, most people would have needed to apply in April 2009 to get a visa by February 2024.[149] Mexicans would have needed to apply by September 1998, more than a quarter century in advance.[150]

All these time delays are the result of explicit policy choices by Congress. But there is another kind of delay that is far less visible: processing time. Even when by statute a person is eligible for a visa immediately, there are substantial delays. For example, for a U.S. citizen to sponsor an immediate relative (e.g., a spouse or minor child), there is no quota. But it took USCIS twelve months to review and process the application form in 2023.[151] There is a regulation providing for immediate deferred action and employment authorization for someone who qualifies for a U visa for victims of primarily violent crime, years before the actual U visa would be available.[152] But that application also would not be reviewed and processed for months in most cases. For instance, at the Washington, D.C., Field Office, naturalization applications took seven months as of February 2025.[153] Many of these delays are actually improvements on the processing times that typified immigration processing during the first Trump Administration.[154]

The desire to find ways to fast track adjudication is not unique to asylum. In many areas of law there is intense interest in finding ways to decide some cases quickly. But in asylum processes, expedited procedures are most commonly not just a means of fast-track *adjudication*. They are explicitly forms of fast-track *denial*.[155] The existence and scope of these rapid exclusions from asylum

146. U.S. DEP'T OF STATE, VISA BULLETIN: IMMIGRANT NUMBERS FOR FEBRUARY 2024, 9514, at 1 (2024), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_February2024.pdf [https://perma.cc/R3TY-N8QP].

147. *See id.* at 2.

148. *See id.*

149. *See id.*

150. *Id.*

151. *See How Long Does Family-Based Immigration to the US Take?*, USAFACTS (Aug. 1, 2024), https://usafacts.org/articles/how-long-does-family-based-immigration-to-the-us-take [https://perma.cc/GY2A-FFZ5].

152. 8 C.F.R. § 245.24(3).

153. *Check Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://egov.uscis.gov/processing-times (last visited Feb. 16, 2025) (choose "N-400" from dropdown; then choose "Application for Categorization"; then choose "Washington DC").

154. *See* Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549, 562 (2019); AM. IMMIGR. LAWS. ASS'N, AILA POLICY BRIEF: USCIS PROCESSING DELAYS HAVE REACHED CRISIS LEVELS UNDER THE TRUMP ADMINISTRATION 4 (2019) (processing time for N-400 naturalization applications more than ten months in FY 2018).

155. *See supra* Section I.C.

represent a structural bias of the system, since they are usually not paired with an equivalent mechanism to fast-track asylum *grants*. There are grave reasons for worry about whether either the European or American versions of these expedited procedures are wise, as well as whether they should be regarded as compliant with international law. But for present purposes, we need only observe that they are deeply entrenched and have largely been legitimized. They represent a huge barrier to protection for individual asylum-seekers. And they represent a structural weighting of the system toward rejection. To re-balance the system, there ought to be equally accessible procedures for fast-track acceptance of refugees.

Before going further with ways to make asylum adjudication faster, it is worth noting that the very concept of expedited adjudication taps into a deep and fraught philosophical question in jurisprudential thought. The time and resources required for legal adjudication of any kind impose tremendous transaction costs.[156] Asylum adjudication is hardly unique in this respect. The idea that some cases do not need to be fully litigated is thus attractive in many arenas. The problem is: How can a legal system reliably detect these cases that are ripe for faster processing at the front-end, when by definition the case has not been vetted yet? The theory, in asylum and in other arenas, is that some cases must be straightforward. But is it really possible to reliably identify them quickly, or do they only seem easy in retrospect?

If the goal is streamlining adjudication, there are other models that we could look to. Consider civil litigation, for which the American legal system has developed a wide range of options to keep litigation as efficient as possible. In civil litigation, full adjudication would mean a potential jury trial. But rules of civil procedure offer multiple off-ramps by which a court can avoid that. Working backwards, there is summary judgment, by which a court could decide that there are not any real disputes of fact to be tried.[157] Yet, summary judgment comes *after* a long period of discovery. It avoids a trial, but it does not avoid a still-expensive and time-consuming litigation process. But long before that there is the motion to dismiss, in which a court assumes the facts as alleged but decides there would be no legal basis for the claim to go forward.[158] This concept might approximate the manifestly-unfounded-claim standard. In theory, if an asylum-seeker initially states a claim that just does not resonate with the refugee definition—like if the asylum-seeker says, "I came to get a better job, no other reason"—an expedited denial might be easy to justify.

In civil procedure, we have a series of mechanisms that aim to streamline litigation by teasing out different discrete questions and building in a series of potential exit ramps along the road of litigation. The standard at the motion to dismiss

156. *See, e.g.*, David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61, 62 (2005).

157. FED. R. CIV. PROC. 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

158. FED. R. CIV. PROC. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted).

stage, for example, assumes all facts are true as alleged (hence, ignoring the potential for factual disputes) and allows an assessment of whether the alleged facts would state a legally valid claim.[159] What is interesting about civil procedure is that it seeks to find exit ramps without requiring judges to identify "easy" cases per se. A motion to dismiss could be decided early in litigation on a very hard question of law. Unlike the tools typically used in asylum procedures, civil procedure seeks efficiency by focusing on different questions at different stages, even if the questions are fraught and complex.

Translating this model to the asylum context is not without complications. First, asylum-seekers are likely to not know how to bring up all relevant facts early in the process, for reasons already mentioned.[160] In other words, perhaps there would be more to the story if there were more time to develop the facts. It is not clear how many asylum-seekers who are denied initially state a claim that is so obviously outside the domain of the refugee definition. The remedies for these problems are to give them access to support: legal assistance, therapy, and so on. In my quarter-century career working with refugees and asylum-seekers in the United States and abroad, I have certainly encountered many who had relatively weak claims. But they have typically been weak because they emphasized poverty or generalized discrimination and violence rather than persecution unique to the individual or their category of people. Sometimes, over time, more facts emerge that make the case stronger. Sometimes, they don't. It is one thing for an experienced practitioner to know from the first screening interview that such a case is relatively less likely to succeed. It is another to make a high-stakes bet that it is completely baseless, even if all facts become known.[161]

Second, we just do not know what is really lacking in most asylum claims that are denied at the credible fear or manifestly unfounded stage.[162] Are they saying something that, if true, might be a viable asylum claim, but the adjudicator finds them to be not credible? Are they making a credible claim to be in danger but not necessarily tying it to one of the recognized reasons for persecution in the refugee definition? Or, are they really saying something that makes denial simple and easy? Only the last of these possibilities is a truly ripe candidate for quick dismissal. The earlier two possibilities might look very different in a fuller system of adjudication with more fact development and legal argument.

There is another reason for worry about any type of fast asylum adjudication: there is empirical evidence that judges are not good at it. Several years ago, I was part of an empirical research project that examined how U.S. courts of appeals decided stay-of-removal requests at the outset of a petition for review of a decision on deportation by the Department of Justice.[163] Likelihood of success on the

159. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

160. *See supra* text accompanying notes 116–17.

161. *See* Kagan, *supra* note 113, at 1136.

162. *See* EUR. COUNCIL FOR REFUGEES & EXILES, *supra* note 29, at 3.

163. *See generally* Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337 (2014).

merits is supposed to be the central question in this decision.[164] That assessment requires a court to predict its own eventual adjudication of the case. With a sample of 1,646 cases, we found that "the circuit courts as a whole denied stays of removal in about half of the appeals that were ultimately granted."[165]

Despite these problems, civil procedure may still offer useful lessons for asylum, especially when it comes to narrowing issues in dispute. A guiding principle of civil procedure is that the parties should not be allowed to fight to the end about every single thing in a case.[166] Only real disputes should take up adjudicative resources, and different types of disputes should get different kinds of adjudication.[167] That is why weighty questions of law can be addressed at a motion to dismiss stage, with the court assuming a factual scenario that is not yet proven. The most resource-intensive adjudication is reserved for factual disputes. That is when a full trial and maybe even a jury is required. But to get that far, parties have to both show that their claims would have legal merit and that there is some evidence or some genuine dispute of fact.

As a practitioner in this field, it is a common frustration in asylum adjudication that there is far too little of this filtering of issues. First, it is difficult to engage in any pre-hearing dialogue about what the real disputes are when representing asylum-seekers in immigration court because opposing counsel from the DHS typically do not make an appearance in the case until the moment a hearing begins, and may not be assigned until a few days before the hearing. That means that there is, in a practical sense, no one to talk to on the government side until the eve of the hearing, and thus less opportunity to negotiate a narrowing of issues. It is also common when asking DHS counsel if there are particular issues of concern, to be told, "Everything is an issue," or some variation thereof. While asylum applicants submit applications, evidence, and briefing in advance, immigration judges do not usually require DHS to submit any responses in writing in which the Department would be expected to identify specific areas in dispute. Such a procedural requirement might at least allow immigration judges to limit the time spent taking live testimony, which typically takes the time of three government-paid professionals: the judge, the DHS attorney, and an interpreter, not to mention the counsel of the asylum-seeker. If immigration judges pushed for more narrowing of issues, more asylum cases might be resolvable on the paper record alone, or with very limited hearings.[168]

Civil litigation most often ends in settlement.[169] So, for that matter, does criminal procedure, in which most cases in the United States end in plea

164. *Id.* at 339–40; *see also* Nken v. Holder, 556 U.S. 418, 434 (2009) ("The first two factors of the traditional standard are the most critical.").

165. Marouf et al., *supra* note 163, at 340.

166. *See, e.g.*, *Iqbal*, 556 U.S. at 685.

167. *See id.*

168. Legal authority to do this already exists, at least in the Ninth Circuit. *See* Grava v. INS, 205 F.3d 1177, 1180 (9th Cir. 2000) ("[A]n applicant need not testify on his or her own behalf . . . and may rest on the application alone, subject to INS examination at the hearing.").

169. AM. BAR ASS'N, *How Courts Work* (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases_settling [https://perma.cc/BR5P-XKEY].

bargaining.[170] In theory, these negotiated case resolutions are a key mechanism by which the parties can resolve easy cases. This is probably true at least some of the time. It is not a perfect mechanism, to be clear. Especially in criminal cases, bargaining can be the product of unequal leverage between parties rather than the facts or law of the case.[171] The parties might settle just to manage risks in a hard, unpredictable case. They also might settle a case in spite of the merits simply because one side cannot bear to litigate it. Maybe it would be too costly, or they cannot bear to sit in jail any longer. Whatever the imperfections of negotiated settlements, the prospect essentially does not exist for asylum adjudication. Asylum applications in the end are denied or granted.

## II. GROUP-BASED STATUS: THE ALTERNATIVE TO INDIVIDUAL REFUGEE STATUS DETERMINATION

Before going any farther in discussing the potential to streamline American asylum procedures, it is worth noting that international refugee law has long had a ready solution to this problem. Namely: Do not adjudicate each asylum application one at a time. The premise of a manifestly unfounded procedure specifically, and of American asylum adjudication generally, is that refugee status must be assessed individually. But there is another way. Governments all over the world and the United Nations regularly recognize refugee status based on an easily verified group identity, with far less rigorous assessment of whether each individual meets each prong of the refugee definition.[172] In fact, this is how many, if not the majority, of refugees around the world are recognized and registered officially as refugees.[173] In international law, group-based refugee status actually developed before the advent of a generalized refugee definition that could be applied to individuals.[174] Aspects of a group-based approach are already present in U.S. immigration policy, principally through Temporary Protected Status.[175] As a result, understanding how group-based status can work is important to finding new approaches to streamline asylum adjudication. Even if pure group-based recognition is not used in the United States, some concepts and procedural tools from such systems are likely to be useful in searching for ways to make asylum adjudication more efficient.

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170. Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023, 5:00 AM), https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice [https://perma.cc/HUL9-YYZ7].

171. *See id.*

172. *See* Kagan, *supra* note 36, at 12–15; Bonaventure Rutinwa, *Prima Facie Status and Refugee Protection* 2 (UNHCR, Working Paper No. 69, 2002).

173. *See* Kagan, *supra* note 36, at 12–15.

174. *See* Rutinwa, *supra* note 172, at 2.

175. 8 U.S.C. § 1254a(a)(1) ("In the case of an alien who is a national of a foreign state . . . the Attorney General, in accordance with this section . . . may grant the alien temporary protected status in the United States.").

During the 1920s, the League of Nations confronted three problems in direct tension with each other. There was lingering mass displacement from the First World War.[176] There was new forced migration from major post-war conflicts, such as the Russian Civil War.[177] And there was a rapid trend toward closing borders to migration, which made receiving refugees even more problematic.[178] This period gave birth to the first global "High Commissioners" for Refugees—the antecedents of today's UNHCR—and also the first international conventions governing the status of refugees.[179] In both cases, the new subject of concern was not defined by an open-ended set of criteria to define who was a "refugee."[180] Instead, they just listed nationalities of major refugee crises. In other words, the first international law definition of a "refugee" was a relatively simple list of groups, rather than a general set of criteria with ambiguous boundaries. So, in 1921 there was a League of Nations High Commissioner for *Russian* Refugees.[181] Three years later his mandate was extended to include Armenians.[182]

The term "refugee" was first defined in a 1926 Arrangement.[183] It included some elements that echo in our current definition of a refugee: "the defining characteristics were that those in question no longer enjoyed the protection of their 'former' government, and had not acquired another nationality."[184] But it was limited to just two nationalities (Russian and Armenian).[185] In 1928 the list was extended to include "Turkish, Assyrian, Assyro-Chaldean and assimilated refugees."[186] These Arrangements led to the 1933 Convention relating to the International Status of Refugees, which again included Russians and Assyrians.[187] This was followed in 1936 by a new Arrangement, and then in 1938 by a new Convention, for German refugees.[188]

This basic approach—naming large groups of forced migrants by nationality because they were presumed to be deserving of special humanitarian protection—is essentially how the American Temporary Protected Status system works today. There is a general statutory test for when TPS is appropriate,[189] but applying it is a discretionary act by the Secretary of Homeland Security.[190] In practice, eligibility

176. Guy S. Goodwin-Gill, *A Short History of International Refugee Law: The Early Years*, *in* OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 1, 3 (Cathryn Costello et al. eds., 2021).
177. *Id*. at 4.
178. *Id*. at 7.
179. *See id*. at 23, 26.
180. *Id*. at 19–20, 23.
181. *See id*. at 12.
182. *Id*. at 19.
183. *Id*.
184. *Id*.
185. *Id*.
186. *Id*.
187. *See id*. at 24–25.
188. *Id*. at 27.
189. 8 U.S.C. § 1254a(b)(1) (stating that a country may be designated for temporary protected status if "there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety," as well as certain natural disasters).
190. *Id*.

depends on a list of eligible nationalities, each with its own time horizon defining when a person with a listed nationality would need to have entered the United States to be eligible. If you are Sudanese or Salvadoran, you might be eligible. If you are Egyptian or Ecuadorian, you are not. Period, the end.

There are problems with a refugee definition based solely on a finite list of nationalities or groups. Even if a list includes the most urgent refugee crisis of its time, it excludes the victims of many other human rights problems. This was true in 1933 when the first Refugee Convention was promulgated:

> [A]t the time, it was well understood that many refugees—Italians, Hungarians, Austrians and Germans—continued to have no protection, and the following years would necessitate further *ad hoc* measures as nazism took hold and the Spanish civil war came to an end.[191]

And it is true today with the American TPS system. There are many groups of migrants who might seem to be good candidates for protection, and there are often calls to extend TPS to new groups.[192] But other than putting political pressure on the Secretary of Homeland Security, there is no procedure by which a person or group of persons can petition for temporary protected status by arguing they meet the humanitarian criteria.[193] You are either on the list or you are not. Not only does this system exclude potentially large groups of refugees who are not named, it also excludes individuals who may come from a country that is not producing large numbers of forced migrants but nevertheless persecutes certain people.

Group-based status cannot substitute for an individualized refugee definition. But group- and individual-based criteria can work together. While the refugee definition we use today seems to describe an individual, there is no rule that it may only be applied on an individualized basis.[194] In fact, the definition encompasses persecution of groups. An Armenian who fled persecution in Turkey in the 1920s could likely meet the post-1951 test of having a well-founded fear of persecution for reason of nationality.[195] In the international realm, there are regional definitions of a refugee that expand from the 1951 Convention's focus on

191. Goodwin-Gill, *supra* note 176, at 24 (internal footnote omitted).

192. *See, e.g.*, Press Release, Sen. Alex Padilla, Senate, Padilla Calls on Biden Administration to Extend and Re-Designate Venezuela for TPS (July 8, 2022), https://www.padilla.senate.gov/newsroom/press-releases/padilla-calls-on-biden-administration-to-extend-and-re-designate-venezuela-for-tps [https://perma.cc/3S35-VQM2]; Rafael Bernal, *Advocates Call on Biden Administration to Renew Haitian Migrant Protections*, HILL (Nov. 22, 2022, 2:14 PM), https://thehill.com/homenews/administration/3746733-advocates-call-on-biden-administration-to-renew-haitian-migrant-protections; Clara Garcia, *30+ Senators Ask Biden Admin for New TPS for Central Americans Amid 'Urgent' Crisis*, NBC4 WASH. (Jan. 12, 2022, 10:16 AM), https://www.nbcwashington.com/news/local/30-senators-ask-biden-admin-for-new-tps-for-central-americans-amid-urgent-crisis/2933992 [https://perma.cc/N2ED-6JHC].

193. *See* 8 U.S.C. § 1254a(b)(1).

194. *See* Kagan, *supra* note 36, at 13.

195. *See supra* Section I.B.

persecution so as to incorporate more cases of generalized violence.[196] But these expanded definitions can be applied to groups or to individuals.[197]

Worldwide, group-based refugee status is most commonly recognized through prima facie refugee recognition, by which a large group of arrivals is presumed to be refugees.[198] Prominent in the Global South, this is the standard means by which the UNHCR and many host governments register refugees, typically in cases of large-scale arrivals.[199] Much like TPS in the United States, prima facie refugee recognition typically allows any person from a certain country arriving in a certain place at a certain time to register.[200]

In practice, group-based recognition systems tend to be correlated with lesser statuses or fewer rights for the protected refugee. So, for example, in the United States TPS carries far fewer rights than asylum does. It is time-limited[201]—the Secretary of Homeland Security must renew it every eighteen months—does not include a path to lawful permanent residence or citizenship, and does not allow for sponsoring family members for visas or an array of other benefits that asylees enjoy.[202] These limitations are explicit in U.S. immigration law.[203]

Internationally, there is no rule of law that says that refugees recognized prima facie must get fewer rights. But prima facie or group recognition tends to be used in situations where refugees' rights are heavily impaired and living conditions especially harsh.[204] Refugee camps are the quintessential example.[205] This correlation relates to the political value of gatekeeping around the boundaries of refugee status. In individualized refugee status determination systems, the rewards of refugee status are often higher, leading governments and sometimes even the UN to want to scrutinize each application more rigorously.[206] When the rewards of refugee status are lower, it is not surprising that governments and the UN feel less need for this scrutiny. Likewise, while governments in wealthier countries often fear that an open asylum system will subvert their migration control policies, the political economy of refugee status in much of the global south is inverted. It can actually be an advantage for a host government to recognize more people as refugees, because doing so is a means to shift responsibility for their care to the United Nations.[207]

196. *See* Kagan, *supra* note 36, at 13.
197. *See id.*
198. *Id.*
199. *See id.* at 13–14.
200. U.N. High Comm'r for Refugees, Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/11, at 7 (June 24, 2015).
201. 8 U.S.C. § 1254a(b)(2).
202. *Id.* § 1254a(b)(3).
203. *Id.* § 1254a(b).
204. *See* Kagan, *supra* note 36, at 13–14.
205. *Id.* at 17.
206. *See id.* at 13, 15–16.
207. *See* Michael Kagan, *The UN "Surrogate State" and the Foundation of Refugee Policy in the Middle East*, 18 U.C. DAVIS J. INT'L L. & POL'Y 307, 308, 310 (2012).

While governments may feel that adjudicating all applications individually is essential, they also may need to recognize that it is not practical to apply maximum scrutiny to all aspects of all cases. Much as in civil procedure, efficient procedures allow for issues to be narrowed, so that adjudication resources are only spent on questions that matter. To that end, group-based systems illustrate the potential for hybrid systems that can operate adaptably and efficiently.

## III. THE POSSIBILITY AND PRACTICE OF A MANIFESTLY WELL-FOUNDED PROCEDURE IN THE UNITED STATES

### A. CONCEPTUALIZING EXPEDITED APPROVAL

The basic idea of an expedited approval process in asylum is, at its core, the mirror image of expedited denial mechanisms that already exist. In principle, if it is possible for government officials to quickly screen out asylum cases that clearly do not qualify, they should equally be able to identify and screen *in* those that clearly do qualify. The concept is certainly open to similar objections, namely that it might make the wrong decisions. That would mean rapidly granting asylum to someone too quickly, missing details or issues that might have emerged later that would have shown that the person really should have been denied. That could happen. But it is really just the flip side of the objection that has always been raised about expedited denial systems: that they risk rejecting people who should be accepted. If we accept risk of error against asylum-seekers, we should be able to accept risk in their favor. One might even argue that it is less dangerous to err in favor of accepting an application, since at least that does not lead to the deportation of someone to a place where they are actually in grave danger.[208]

An expedited system for approving strong cases would allow the government to maximize its own effort. If a credible fear interview has already elicited enough information to grant asylum,[209] then asylum should be granted without requiring repeated effort by a different official. Likewise, if an asylum officer conducting a credible fear interview can already see that the applicant can easily pass the threshold to be allowed into the regular system, it may be more efficient for that officer to spend a small amount of additional time to collect enough information to issue a final grant of asylum. The alternative would be to pass the case onward toward years of delay and duplicated efforts.[210] The current U.S. system, where strong asylum claims are interviewed once for the credible fear process and then again for a full adjudication, is inefficient; it forces government officials to do the same work twice. Moreover, it requires the work of many more people than should be needed—an immigration judge, a government attorney, likely an interpreter, court staff, not to mention counsel for the asylum-seeker if they can find one.

An expedited approval system need not abbreviate in any way the identity, criminal record, and security checks that are already routine for asylum-seekers.

208. *See, e.g.*, Kagan, *supra* note 113, at 1136.
209. *See supra* Section I.C.
210. *See supra* Section I.D (discussing the costs of delayed immigration procedures).

But it would seek to shorten the time and effort spent on assessing the merits of the refugee claim. Procedurally, it could lead to situations in which a person is found to be prima facie eligible but must wait for security screening for a final decision. But that delay does not add any additional steps. Asylum-seekers could be given prima facie approvals—a mechanism already used with other visas[211]—with the final approvals, permits, and paperwork issued after final checks are completed. Helpfully, there are several examples internationally that can assist the United States in developing such a system. And there are examples in American immigration adjudication for other immigration programs. In the following short sections, I will aim to highlight comparative models in other countries that might serve as models for the United States, as well as existing mechanisms in other parts of the U.S. immigration system that aim for a similar kind of streamlining.

### B. INTERNATIONAL EXAMPLES

The U.N. High Commissioner for Refugees has noted the potential for a "manifestly well-founded" procedure to make asylum processing more fair and efficient. The concept and the label are clearly borrowed from the better known and far more widespread manifestly unfounded procedures. In a glossary document, UNHCR defines the concept this way:

> An asylum claim that on its face meets the criteria for the granting of refugee status laid down in the 1951 Convention or any other criteria justifying the granting of asylum. This may be because the individual falls into the category of people for which a presumption of inclusion applies, for which a prima facie approach applies, or because of particular facts arising in the individual's application for international protection. Such claims may be given priority processing or be subjected to accelerated procedures.[212]

UNHCR has noted the potential for this kind of procedure repeatedly in advice to the European Union and certain European governments. A UNHCR discussion paper for the European Union stresses, repeatedly, that procedures for well-founded claims should be paired with those for unfounded ones.[213] It advises that:

> For both manifestly well-founded and manifestly unfounded applications, elements of the assessment can be simplified, including through the use of:
>
> i. Pre-populated legal analyses;
>
> ii. Pre-populated country of origin analyses;
>
> iii. Caseload specific assessment forms;

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211. *See, e.g.*, 8 C.F.R. § 204.2(c)(6)(i) (providing prima facie determination of visa petition filed by spouse of abusive citizen or lawful permanent resident).

212. U.N. HIGH COMM'N FOR REFUGEES, *supra* note 50.

213. U.N. HIGH COMM'R FOR REFUGEES, FAIR AND FAST: UNHCR DISCUSSION PAPER ON ACCELERATED AND SIMPLIFIED PROCEDURES IN THE EUROPEAN UNION, *supra* note 32, at 2–3.

iv. Simplified interviews for manifestly well-founded claims.[214]

The European Union began examining the potential for a manifestly well-founded procedure to adapt to rising application numbers in 2015–2016.[215] However, UNHCR criticized a longstanding tendency to accelerate only denials:

> Accelerated procedures have traditionally been primarily used within the EU for manifestly unfounded claims and continue to be widely regarded as part of a broader arsenal of measures that seek to maintain the integrity of the asylum system by deterring abusive claims. Although the Asylum Procedures Directive and the Regulation Proposal provide that Member States may decide to prioritize an application which is "likely to be well-founded" or an application lodged by a vulnerable person or in need of special procedural guarantees, particularly in the case of unaccompanied children, an analysis of current methodologies used in EU Member States established that this provision has not been as widely used as Article 31.8, which provides, *inter alia*, for the possibility to accelerate the asylum procedure in cases that are regarded as manifestly unfounded.[216]

After 2016, some countries in Europe appear to have shifted: "At this time, Germany, Greece, Italy, the Netherlands, Sweden and Switzerland have adopted distinct case processing modalities, including accelerated and/or simplified procedures, for manifestly well-founded claims."[217] A separate UNHCR document indicates that Spain had also implemented a manifestly well-founded procedure.[218]

UNHCR included a recommendation for accelerating manifestly well-founded procedures in recommendations for the United Kingdom.[219] In those recommendations, UNHCR suggested sorting asylum claims into four tracks: manifestly unfounded, "manifestly founded," "less complex claims"—meaning those that are "capable of a quick decision if a limited number of precedent facts are found"—and "more complex or atypical cases."[220] Denmark appears to have created something like this; the Danish system sorts asylum claims on the merits into one of three procedures: manifestly unfounded, manifestly well-founded, and another simply called the "normal procedure."[221]

The best example of a country implementing a manifestly well-founded procedure may be Canada. Canada's Immigration and Refugee Board has two different

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214. *Id*. at 2.

215. *Id*. at 3.

216. *Id*. at 5 (internal footnotes omitted).

217. *Id*. at 6 (internal footnote omitted).

218. U.N. High Comm'r for Refugees, UNHCR Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures, at ¶ 10, n.14 (2010), https://www.unhcr.org/in/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.unhcr.org%2Fin%2Fsites%2Fen-in%2Ffiles%2Flegacy-pdf%2F4deccc639.pdf [https://perma.cc/W7XT-YD3H].

219. U.N. HIGH COMM'R FOR REFUGEES, UNHCR'S GUIDE TO ASYLUM REFORM IN THE UNITED KINGDOM, *supra* note 32, at ¶ 10.

220. *Id*. at ¶ 15.

221. Bendixen, *supra* note 32.

abbreviated procedures for "Less Complex Claims" through which a person can more quickly be granted asylum.[222] In one version, a person can be granted asylum based on file review only, without an interview.[223] Selection for this is based, in part, on whether applicants come from countries that are known to produce generally valid asylum claims.[224] Asylum-seekers whose cases are selected for this process receive a notification and an opportunity submit any additional written evidence.[225] The procedure indicates clearly that it is meant to accelerate asylum grants. It states: "If the member determines that it is not appropriate to make a positive decision based on the evidence in the file, the claim will proceed to its scheduled hearing, or if no hearing is then scheduled, one will be scheduled."[226]

The other Canadian accelerated procedure is for a "short-hearing process."[227] Similar to the file-review process, applicants receive written notice that their cases have been selected.[228] The short-hearing process differs in that it can lead to a denial.[229] Its main criteria is the expectation that "claims selected for the short-hearing process . . . be completed within two hours," although there is the potential to schedule a continuation if necessary.[230]

### C. USCIS ADJUDICATION

Although an expedited approval process for asylum would be novel for the American system, it is a well-established means of adjudicating other immigration applications in the United States. In fact, it is the norm for many immigration applications to be adjudicated on the paper application only, without a personal interview.[231] Asylum processing is really the exception, because USCIS has not sought the obvious advantages of being able to quickly approve facially strong cases. In many affirmative visa applications to USCIS, the normal process is to mail in a paper application with documentation. In the first instance, USCIS typically approves the applications on paper or issues a written request for evidence.[232] This is true for humanitarian-related visa applications,

222. *Procedures for Implementing the Instructions Governing the Streaming of Less Complex Claims at the RPD*, IMMIGR. & REFUGEE BD. OF CAN. (Jan. 31, 2019), https://irb.gc.ca/en/legal-policy/procedures/Pages/procedures-less-complex-claims-rpd.aspx [https://perma.cc/Y4XQ-6AJ8].

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *See id.*

229. *See id.*

230. *Id.*

231. *See, e.g.*, *Policy Manual: Chapter 4 – Adjudication*, U.S. CITIZENSHIP & IMMIGR., SERVS., https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-4 [https://perma.cc/66XC-QE84] (last updated Mar. 6, 2025) (For special immigrant juveniles, "USCIS generally does not require an interview if the record contains sufficient information and evidence to approve the petition without an in-person assessment.").

232. *See, e.g.*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., POLICY MEMORANDUM: REQUESTS FOR EVIDENCE AND NOTICES OF INTENT TO DENY, PM-602-0085 2 (2013).

such as applications for U visas for crime victims,[233] T visas for trafficking victims,[234] and self-petitions for domestic violence survivors under the Violence Against Women Act,[235] among others.

USCIS can also choose, as a matter of discretion, to waive personal interviews by an immigration officer in adjustment-of-status cases, when people apply for lawful permanent residence.[236] The USCIS Policy Manual states that a personal interview is the default: "All adjustment of status applicants must be interviewed by an officer unless the interview is waived by USCIS."[237] But it also lists several categories of cases where waiving the interview is likely to be prudent. They include both cases that are ripe for easy approval as well as easy denials: "Applicants who are clearly ineligible"; unmarried children of U.S. citizens; parents of U.S. citizens; and unmarried children of lawful residents.[238]

However, the policy also states that "if USCIS determines that an interview of an applicant in any other category [would be unnecessary], then USCIS may waive the interview."[239] In 2022, the UNLV Immigration Clinic, which I direct, had several marriage-based adjustment applications granted without interview.

These processes of USCIS adjudication are not thought of as analogous to credible fear interviews because they generally do not operate in the context of a border regime under stress.[240] They typically involve applicants mailing applications to government processing centers located in the interior of the country, and mailing back decisions. But they show that the U.S. immigration system has already embraced a key idea: that is, not every case requires the same level of adjudicative effort. That has obvious advantages in reducing the processing times, which I discussed *supra*.[241] What is especially interesting about these USCIS procedures is that they embrace the idea of faster approvals and somewhat slower denials. That is, in a typical application USCIS will grant, or send a request for evidence or notice of intent to deny, to which the applicant could then respond.[242]

233. *See National Engagement – U Visa and Bona Fide Determination Process – Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/records/electronic-reading-room/national-engagement-u-visa-and-bona-fide-determination-process-frequently-asked-questions [https://perma.cc/QBF6-7EJQ] (last updated Sept. 23, 2021).

234. *See Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/victims-of-human-trafficking-t-nonimmigrant-status [https://perma.cc/S2N4-VGWB] (last updated Sept. 11, 2024).

235. *See Abused Spouses, Children and Parents*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/abused-spouses-children-and-parents [https://perma.cc/7GG2-JKSE] (last updated Nov. 25, 2024).

236. *Policy Manual: Chapter 5 – Interview Guidelines*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-5 [https://perma.cc/S2QB-VMUK] (last updated Dec. 20, 2024).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Cf. supra* Section I.B (discussing the backlog of asylum applications).

241. *See supra* Section I.D.

242. *See, e.g.*, *supra* notes 232–35 and accompanying text.

## IV. HOW AN EXPEDITED ASYLUM APPROVAL SYSTEM MIGHT WORK

In this Part, I will outline two places in which expedited approvals could be easily added to the existing asylum system. One is to allow streamlined approvals after a mostly paper review of an affirmative asylum application that is submitted to USCIS. The other is to allow immediate, streamlined asylum grants after credible fear interviews—interviews that right now are biased toward streamlined denials.

Our current asylum regulations allow for an asylum application to be granted when there is a "pattern or practice . . . of persecution of a group of persons similarly situated" in an applicant's country of origin.[243] USCIS can use this rule to expedite approvals of strong asylum claims by taking note in advance of groups of asylum-seekers for whom there is strong evidence of a "pattern or practice" of persecution. To use paradigmatic examples: USCIS can take note in advance that there is a pattern or practice of persecuting Jews in Nazi Germany, or women in Taliban-ruled Afghanistan. Asylum officers need not spend time or effort reevaluating this question in each case. Nor should extensive time be taken to document blow-by-blow how each individual has experienced persecution. The pattern of persecution is already enough.[244]

An expedited asylum approval system could be established by the Department of Homeland Security without any action by Congress, with one key limitation: that is, an interview must be conducted. The reason for this is the Real ID Act, which suggests strongly that DHS must conduct an interview before approving an asylum application. The statute says that an asylum-seeker's burden of proof may be met by "*testimony* . . . if the applicant satisfies the trier of fact that the applicant's testimony is credible."[245] The Act further states that credibility of the testimony should be evaluated by, among other things, "the demeanor, candor, or responsiveness of the applicant."[246] In theory, one could argue that "testimony" could be in writing in some cases, but that would not be the most natural reading of the statutory text. The statute says "testimony," not "declaration" or "statement," which are words used elsewhere in the U.S. Code to refer to written statements.[247] Moreover, the Real ID Act calls for evaluation of "demeanor" and for assessment of "consistency between the applicant's or witness's written *and oral statements*."[248] The most natural reading of the statute is that Congress assumed there must be an oral interview to generate "testimony."

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243. 8 C.F.R. § 1208.13(b)(2)(iii).

244. The current regulation states that the applicant "establishes" the pattern or practice. *Id.* But this should be understood as a burden of persuasion, not a burden of production. That is, assessment of the asylum case need not depend on the evidence that the applicant submits alone. Nothing prevents USCIS, through its own expertise, from developing evidence applicable to many similarly situated applicants that a pattern and practice of persecution exists.

245. 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added).

246. *Id.* § 1158(b)(1)(B)(iii).

247. *See, e.g.*, 28 U.S.C. § 1746; 18 U.S.C. § 1623.

248. 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added).

It would be useful for Congress to consider giving the Asylum Office flexibility to define a class of asylum applications that are so obviously credible and eligible based on the written applications that they could be screened and granted without an interview. When people initiate asylum applications by mailing in written applications, the Asylum Office should be permitted to grant asylum based on a written application alone, without a full interview, if the evidence submitted clearly establishes eligibility.[249] The person could still be called to a USCIS office, for more routine security and identity checks, but without further burdening the Asylum Office. The Asylum Office should also be able to issue a written Request for Evidence as an interim step in lieu of a full interview.

However, since congressional action is unlikely at present, I will not explore this possibility further here. Instead, I will focus on the flexibility that DHS has already been given by Congress. While an interview eliciting live testimony is likely required, Congress has not prescribed how many interviews must be conducted, nor how extensive those interviews must be. Congress has said only that the "trier of fact determines" whether an asylum application is sufficiently corroborated and credible.[250] Beyond the specific mandates of the Real ID Act, Congress delegated the authority to DHS to establish procedures to adjudicate asylum applications.[251]

Within this statutory framework, developing an expedited approval system requires DHS to free itself from two unnecessary rigidities that are built into the current and longstanding system.

First, while an interview must always be conducted, granting asylum need not always require a fully comprehensive interview covering every aspect of an asylum-seeker's life. That is standard practice now,[252] but it need not be. In other words, when either the written application or the profile of the asylum-seeker indicates a high likelihood of eligibility, an asylum officer should narrow the scope of the interview to a central element of the claim. The narrowed interview should be used to clarify any essential fact not already established, and to provide enough basis to have screened for negative credibility factors as the Real ID Act requires.[253] If any problems or negative factors arise, the applicant should get the full comprehensive assessment. But the Asylum Office should be able to grant asylum based on abbreviated interviews when no negative factors are present.[254]

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249. *See, e.g.*, *supra* notes 232–35 and accompanying text.

250. 8 U.S.C. § 1158(b)(1)(B)(ii).

251. *Id.* § 1158(b)(1)(A), (d)(1), (d)(5).

252. *See, e.g.*, *Sample Direct Examination Questions*, IMMIGR. JUST. CAMPAIGN, https://immigrationjustice.us/get-trained/asylum/preparing-individual-hearing/sample-direct-examination-questions [https://perma.cc/3HBX-3TMN] (last visited Mar. 31, 2025) (providing example questions often asked during asylum interviews).

253. *See* 8 U.S.C. § 1158(b)(1)(B)(iii).

254. In addition to allowing for far shorter interviews, applications that are screened for this expedited treatment should be able to have their interviews conducted remotely by video (Zoom or the equivalent) to reduce the burdens of travel to regional Asylum Offices. If problems surface, the applicant can be referred for an in-person interview.

The goal here is to allow an asylum officer to process many more strong cases in a day's work. By contrast, the present expectation of fully comprehensive interviews in all cases means that a single asylum officer might need a full day to complete the interviews for just one asylum application, especially if there are dependent family members included.[255]

Second, the Asylum Office should be able to grant asylum after the first credible fear interview. This is, after all, an interview, which satisfied the requirements of the Real ID Act.[256] Although the credible fear standard is lower than the burden of proof to grant asylum,[257] a trained asylum officer should be able to identify not only when an applicant passes the credible fear threshold but also when the applicant is highly likely to be fully eligible for asylum. When an asylum officer can see this, and has already interviewed the applicant, it is wasteful for the government and harmful for refugees to simply pass the case on to an already backlogged system where it will languish for years. In addition to permitting asylum officers to grant asylum immediately after a credible fear interview, asylum officers should be trained to go slightly beyond what is necessary for a positive credible fear determination if doing so would likely permit an immediate asylum grant. In other words, if an asylum officer believes that an extra twenty minutes of questions would elicit enough information to immediately grant asylum rather than pass the case onward, it is well worth it to spend those twenty minutes. But by not spending that moderate extra time at the first interview, another government employee (or several) might end up spending many hours, if not a full day or more of work later on.[258]

Recently, the federal government has taken a tentative half-step toward an expedited asylum approval process. Under new regulations, after a newly arrived asylum-seeker passes the credible fear interview, the asylum office can refer the person to the Asylum Office for a merits interview rather than to immigration court for an adversarial hearing on the asylum claim.[259] This measure is intended to ease burdens on the extremely backlogged U.S. Immigration Court system.[260] That is a welcome sign of flexibility on the part of DHS, but it is also a half-measure. It transfers the burden of adjudication from one backlogged agency (the immigration courts) to another backlogged agency (the asylum office).[261] It does not mitigate the requirement for a full interview for all asylum-seekers, and it does

255. *Cf. supra* Section I.D (discussing the consistent failure to filter issues during asylum hearings).

256. See *supra* Section I.C for a description of the credible fear interviews.

257. *See supra* notes 122–25 and accompanying text.

258. *See* 8 U.S.C. § 1225(b)(1)(B)(ii).

259. 8 C.F.R. §§ 208.2, 208.9; *see Questions and Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening [https://perma.cc/SNH6-BA5G] (last updated Sept. 12, 2023).

260. *Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, U.S. DHS, https://www.dhs.gov/news/2022/05/26/fact-sheet-implementation-credible-fear-and-asylum-processing-interim-final-rule [https://perma.cc/K2YS-GGTG] (last updated June 9, 2022).

261. *See supra* Section I.B (discussing the asylum office's backlog).

not create balance whereby officials can grant asylum as quickly and as easily as denying it. It maintains an unbalanced system in which the only way for the government to resolve an asylum case rapidly is to deny it.

The border act that was proposed in early February 2024 took these measures a step farther. It would have provided that "if an alien demonstrates, by clear and convincing evidence, that the alien is eligible for asylum" the asylum officer, subject to certain procedures, "may grant an application for such relief or protection submitted by such alien without referring the alien to protection merits removal proceedings."[262]

Thus, this bill would have established a manifestly well-founded procedure by statute, if it had been enacted. The Department of Homeland Security should not wait for Congress. It should establish a similar procedure by regulation.

These two options—grants after streamlined interview, and grants after credible fear interviews—would be the key procedural changes that DHS could implement by regulation. But these procedural mechanisms do not explain, substantively, how clearly eligible asylum applications should be identified. To identify asylum cases that are ripe for streamlined approval, two broad criteria would be relevant: *written documentation* and *applicant profile*.

*Written documentation* would include materials that asylum-seekers submit with their I-589 applications. That includes signed declarations, corroborated documents, photography, identity papers, other written witness statements, and country-conditions evidence.[263] An applicant who submits a highly detailed written testimony might be a good candidate for an interview that focuses on only a few issues, sufficient to detect if there are any warning signs about credibility. The Real ID Act states that an application should offer "specific facts sufficient to demonstrate that the applicant is a refugee" but does not state that all of these facts must be elicited at the interview.[264] Likewise, if the applicant has submitted strong corroborating documentation, the Asylum Office need not spend as much time in an interview comprehensively assessing credibility on every factual matter.

*Applicant profile* means defining certain categories of asylum-seekers who are known to likely have valid refugee claims because of known human rights problems in their countries. This is related to group-based refugee recognition but need not be as automatic as a full-fledged group-based system. These profiles should be continually reviewed and adjusted by the Asylum Office, in part by monitoring the asylum grant rates of its own officers and the immigration courts. Nationality would be a main factor in defining the profile, but in most cases profiles should be conceptualized as a nationality-plus framework, meaning the asylum-seeker's nationality plus one or two other factors. Consider the following possibilities.

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262. H.R. 815, 118th Cong. § 235B(c) (2024).
263. *See supra* notes 56–59 and accompanying text.
264. *See* 8 U.S.C. § 1158(b)(1)(B)(ii).

In fiscal year 2022, Venezuelans had a 77% asylum grant rate in immigration court.[265] Venezuelans were also one of the largest nationality groups applying for asylum, constituting nearly a quarter of affirmative applications.[266] These facts should illustrate both the potential and the value of developing a streamlined mechanism to approve many Venezuelan applications. But such a system need not screen in all Venezuelans based only on nationality. The "plus-factor" would be defined by known human rights problems in the country. For instance, the State Department says that "[t]he Maduro regime used the judiciary to intimidate and prosecute individuals critical of regime policies or actions" and reported large numbers of arrests of people involved in political opposition.[267] Thus, Venezuelan nationality plus a claim of political-opposition activity might be sufficient to divert an asylum application for a streamlined interview. That interview might focus only on asking the applicant about their political history. To be clear, such an asylum-seeker might have a very long story to tell, complete with arrests, hiding, traumatic events, and a harrowing escape. But if an asylum-seeker can provide a coherent account of their initial political involvement with specificity, there would be no need to spend the time interviewing them about every part of their story. That would be especially so if they have documentary corroboration or submitted a detailed written testimony. If the asylum officer already has enough in the first forty-five minutes of an interview, there is no need to spend government resources beyond that.

Or consider a somewhat more challenging example: Nicaraguans. Nicaraguan asylum cases are approved in immigration court at a lower rate than Venezuelans: 39% in fiscal year 2022.[268] But still, it may be possible to identify plus-factors with Nicaraguans that would permit streamlined grants. Which Nicaraguans are most likely to fall in that 39%? The State Department reports that in Nicaragua "[p]olice routinely surrounded, surveilled, and threatened meetings of political parties and civil society organizations" and reported widespread arrests and harassment of people involved in political opposition.[269] Thus, it might be possible to profile a category defined by Nicaraguan plus political activity for streamlined processing.

Critically, these applicant profiles would not mandate immediate asylum grants. They would be used simply for an initial differentiation, aimed at overall efficiency. If an applicant were to be initially identified for possible streamlined

265. *Speeding Up the Asylum Process Leads to Mixed Results*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Nov. 29, 2022), https://trac.syr.edu/reports/703 [https://perma.cc/M745-W4WA].

266. U.S. CITIZENSHIP & IMMIGR. SERVS., I-589 AFFIRMATIVE ASYLUM SUMMARY OVERVIEW FY 2022 Q1 (OCT 1, 2021 – DEC 31, 2021) 1 (2022), https://www.uscis.gov/sites/default/files/document/data/Asylum_Division_Quarterly_Statistics_Report_FY22_Q1_V4.pdf [https://perma.cc/HT43-W74D].

267. *See* U.S. DEP'T OF STATE, VENEZUELA 2021 HUMAN RIGHTS REPORT 16 (2021), https://www.state.gov/wp-content/uploads/2022/02/313615_VENEZUELA-2021-HUMAN-RIGHTS-REPORT.pdf [https://perma.cc/KGM8-9HVU].

268. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *supra* note 265.

269. *See* U.S. DEP'T OF STATE, NICARAGUA 2023 HUMAN RIGHTS REPORT 29, 34–35 (2023), https://www.state.gov/wp-content/uploads/2024/02/528267-NICARAGUA-2023-HUMAN-RIGHTS-REPORT.pdf [https://perma.cc/HN9P-5RUN].

interviewing and approval, the asylum office would be free to reverse course and to re-track the case for a full comprehensive interview. That might be warranted, for instance, if the applicant is vague or contradictory in initial questioning on central elements of the case, or if a possibly fraudulent document were included. The goal is not to rigidly accept every case, but to reduce the workload and speed processing in the aggregate, while simultaneously allowing some refugees to obtain a secure asylum status faster than they otherwise might.

## CONCLUSION

Asylum systems cannot be understood only by looking at who they accept or deny. They are not only about whether their criteria are lenient or strict. They are also defined by time and efficiency. A generous asylum system that operates slowly can very easily come under stress and may even collapse in crisis—especially when that system is effectively the only mechanism by which many migrants can realistically claim a legal right to remain. Fully relieving that structural stress would require opening up new avenues of legal migration so the asylum system need not bear the entire burden. But it also requires more attention to be paid to efficient adjudication.

Creating an expedited asylum-approval mechanism in the United States should be part of a wide array of measures that need to be taken to address the crisis at the border and in the asylum system. The creation of such a mechanism would achieve balance so that asylum officers would not feel pressure to deny claims through the credible fear process simply so that more cases can be denied quickly. As the American asylum system struggles under the pressure of overwhelming numbers, it is essential that this weight not tilt the scales toward denial. The tendency of governments has been to deny more people, faster, under this pressure. This instinct must be resisted, and it must be balanced by an equally robust capacity to grant asylum faster when possible.

Expedited approvals are just as conceptually viable as expedited denials. Doubt can certainly be, and has been, raised about both. Speed risks a process that is less thorough, meaning less facts and complexity are considered as carefully as they should be. For denials, that raises the danger that a person in genuine danger will not receive protection. For approvals, speed raises the danger that someone with a weak claim will slip through. But only the expedited removals risk errors that might lead to death and bodily harm. If governments can do that, they should be able to do the inverse as well. The viability of asylum for the persecuted is threatened when governments search endlessly for ever-faster ways to deny protection. But the viability of asylum is also undermined when granting protection always requires extensive time and government resources. But asylum need not always be so hard. When easy asylum cases arrive, we should have a system that can recognize them, and grant them. Let us spend adjudication resources only where they are needed.