Reimagining Affirmative Asylum

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In 2022, the Biden Administration finalized regulations that overhauled procedures for asylum claims for the first time since 1996. These regulations transferred the duty to decide asylum claims in expedited removal from immigration courts to the Asylum Office. While advocates criticized the proposal for its extreme procedural deficiencies, they supported its basic premise: Expanding the jurisdiction of the Asylum Office would be a positive development for asylum seekers.

This Article argues the Asylum Office has failed policymakers' original vision for the asylum system, asylum seekers, and its own asylum officers (AOs) and that any expansion of the office, in its current form, is unwise. In the 1990s, policymakers settled upon the current asylum adjudication system for cost-saving and efficiency reasons. They believed that the Asylum Office would quickly grant meritorious asylum cases and refer frivolous or complicated cases to immigration court for further adjudication. They imagined affirmative grant rates would climb because quick adjudications by AOs and other features of the new system would discourage the filing of frivolous applications. Speedy grants at the Asylum Office would save money by reserving immigration judge (IJ) time for difficult cases. Creating a professional corps of AOs would also increase the quality and consistency of decision-making in the asylum system.

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This Article argues that each of these important assumptions has not panned out. The Asylum Office fails to grant many meritorious cases: In recent years, IJs granted asylum to between 76 and 83 percent of asylum seekers whom AOs had referred to removal proceedings. Grant rates across offices continue to deviate significantly, and the startling differences between office grant rates are growing. AOs face extraordinary pressure to adjudicate cases quickly. As a result, AOs are often very confrontational during interviews of asylum seekers, even though regulations require them to be "non-adversarial." Former AOs further admitted to the author that they were more likely to refer an asylum seeker to removal proceedings simply because referring is faster than granting and they are evaluated on the speed at which they adjudicate cases. Given these failures, advocates and scholars should reimagine our affirmative asylum system. This Article begins that reimagination.

"It was so stressful that as soon I got into the elevator, I just started bawling like a kid . . . I was just crying like a little kid."[1]

— Gustavo, an asylum seeker from Venezuela, describing his asylum interview. The Asylum Officer did not grant him asylum and instead referred him to removal proceedings. He was granted asylum five years later by an immigration judge.

1. LUBABA AHMED, TORREY CRIM & NAZANIN RAFSANJANI, SAFE HARBOR CLINIC, BROOKLYN L. SCH., A FIEFDOM ON LONG ISLAND: AN INVESTIGATION INTO THE CULTURE AND PRACTICES OF THE NEW YORK ASYLUM OFFICE 24 (Faiza W. Sayed ed., 2023). Gustavo is a pseudonym. *Id.* at 10 n.8.

> "'You're . . . kidding me?' That literally is what [the judge] said when we were in court . . . 'I have to waste time out of everyone's life and hear this case?' The judge granted the case in five minutes. We had judges many times say, why in the world am I getting these cases?"[2]
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> — An immigration attorney describing an immigration judge's reaction upon reviewing a case referred by the Asylum Office.

> "My enduring resentment about my entire experience at the asylum office is how cynical it made me about the system in its entirety . . . it really just undermined a lot of my faith in the rule of law . . . and in the legitimacy of American institutions."[3]
>
> — Former Asylum Officer.

PROLOGUE

In 2016, I began working for the federal government as a Refugee Officer (RO). ROs adjudicate applications from noncitizens who have applied for resettlement in the United States as refugees but currently live outside of the country. The RO's counterpart is the Asylum Officer (AO). AOs adjudicate applications of noncitizens who are already within the United States or at a U.S. border and have affirmatively applied for asylum while not in removal proceedings. I became an RO after working as an immigration attorney at nonprofit legal service providers. I was intimately aware of the Asylum Office's deficiencies[4]: the supposedly "non-adversarial" interviews that often felt more like interrogations, the frustration of not being able to advocate for clients like one could in immigration court, and the Asylum Office's bewildering refusal to grant legitimate asylum claims. I was also familiar with the Asylum Office's training, which included written lesson plans that generally accurately covered asylum law and other important topics, like interviewing trauma survivors in a sensitive, non-adversarial manner.

During the first several weeks of training, ROs and AOs are trained alongside one another. I remember expecting some secret to be revealed that would help explain why asylum interviews were so different from how they were conveyed in the written training lesson plans. But no secret was ever revealed. The training, while relatively basic for someone who had practiced asylum law, was surprisingly fine. I concluded that something must happen after—when AOs begin interviewing asylum seekers and adjudicating cases—that could explain what was going on.

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2. *Id.* at 52.
3. *Id.* at 41.
4. As used in this Article, the term "Asylum Office" refers to the affirmative asylum program within U.S. Citizenship & Immigration Services, including the headquarters (HQ) in Washington, D.C. and the collection of Asylum Offices across the country that HQ oversees.

I returned to Washington, D.C. for the second half of RO training. The first session opened with a video of a mock refugee interview. The applicant was Kurdish and from Iraq. They had not suffered any harm themself while living in Iraq but spoke generally about fear of returning because of their Kurdish background and knowledge of how Kurds had been harmed by the Iraqi government and others. When the video ended, the trainer asked us to raise our hands if we thought the applicant met the standard for refugee status. No one raised their hand. Based on my experience, an applicant who suffered no direct harm and spoke so generally of their fear of harm would never be granted asylum by the Asylum Office. The trainer was unsurprised but quickly told us that this applicant *would* be granted refugee status. The harms Kurds faced in Iraq were well documented, and this applicant was a member of the group.

Several months later, I went on my first refugee "circuit ride" to northern Thailand to adjudicate claims from Burmese ethnic minorities residing in a refugee camp.[5] Most of the applicants were ethnically Karen and had been living in the refugee camp for years (many had been born in the camp and had never set foot in Burma). During their interviews, applicants spoke of their fear of returning to Burma because the Burmese army had committed atrocities against the Karen people. While the applicants themselves had not been harmed, some knew people who had been harmed, and all were generally aware of how their community had suffered. I interviewed four to six applicants a day, working as quickly as I could because of our long, winding drive down the mountain each day. I approved all but one application, and my supervisor signed off on each decision. While I was exhausted by the end of my four-week circuit ride, I was proud of my work.

But in 2017, all refugee processing was halted by Executive Order 13769, better known as the "Muslim Ban."[6] The Refugee Affairs Division (RAD)[7] scrambled to find other work for ROs to do and eventually loaned us to the Asylum Office to conduct credible fear interviews and help with administrative work. I was detailed to the Los Angeles Asylum Office. Three experiences from my time there stand out in my mind:

First, I bumped into an AO in the hallway. I recognized them from training and asked how things were going. Without hesitation, the AO told me that they hated their job. They were on their way to the waiting room to call an applicant

5. In 1989, the military government of Burma changed the country's name to "Myanmar." However, to date, the U.S. government continues to refer to the country as "Burma." *See* Bureau of E. Asian & Pac. Affs., *U.S. Relations with Burma*, U.S. DEP'T OF STATE (June 3, 2024), https://www.state.gov/u-s-relations-with-burma/ [https://perma.cc/UB67-H3L9]. During my time as an RO, I referred to the country as "Burma" because I was an employee of the U.S. government.

6. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8979 (Feb. 1, 2017).

7. This division has since been renamed the "International and Refugee Affairs Division" or IRAD. *See* Organization Chart, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/document/charts/USCIS-Org-Chart%201.pdf [https://perma.cc/DP6H-YZ9B].

for an asylum interview—their third interview of the day—and were frazzled. The AO spoke about how stressed they were because of the relentless pace of the work. The AO had been at the Asylum Office for less than a year and had already decided that they would leave.

Second, in the lunchroom I met another AO who told me they were leaving the Asylum Office to work at a field office where they would adjudicate straightforward immigration applications, such as naturalization applications. When I inquired about their reasons for leaving, the AO ranted about fraud. They claimed that many applicants they had interviewed repeated the same story, and they were sick of adjudicating claims from people abusing the system.

Lastly, after weeks of asking my supervisor, I was finally informed that I could join an asylum interview during my last week at the office. The interview was with a young woman from Central America. After the interview, I asked the AO if they thought that they would grant the request. The AO confessed that interviewing young people from Central America was usually difficult because they had trouble articulating how their persecution was related to a protected ground (e.g., race, religion, political opinion, etc.). The AO felt terrible when they were forced to refer asylum seekers to removal proceedings, but, in this case, they thought they had elicited enough testimony to grant. The AO really hoped their supervisor would agree.

Since entering academia, I have been reflecting on my experiences practicing before the Asylum Office as an attorney and working as an RO. As I tried to make sense of my two very different experiences, the following questions arose: What was the original vision for the affirmative asylum adjudication system? Has the Asylum Office lived up to that vision? What accounts for the Asylum Office's failures that I regularly witness as an attorney? What reforms could save the Asylum Office? Could the Asylum Office learn any lessons from the Refugee Division? This Article attempts to tackle these questions and more.

INTRODUCTION

In 2022, the Biden Administration implemented "the most sweeping change to the [asylum] process in a quarter-century," aimed at reducing the burden on backlogged immigration courts by vastly expanding the jurisdiction of AOs.[8] The regulations transferred the duty to decide asylum applications filed by asylum seekers in expedited removal from the Immigration Court to the Asylum Office and limited the role of immigration judges (IJs) in reviewing these decisions.[9] The Administration received thousands of public comments on

8. Eileen Sullivan, *Biden Administration Prepares Sweeping Change to Asylum Process*, N.Y. TIMES (Mar. 24, 2022), https://www.nytimes.com/2022/03/24/us/politics/us-asylum-changes.html [https://perma.cc/8K6Y-X8FM].

9. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18081–82 (Mar. 29, 2022) (to be codified at 8 C.F.R. pts. 1003, 1208, 1235, 1240).

the proposed regulations, including many from leading immigrants' rights organizations.[10] Advocates highlighted extreme procedural deficiencies in the proposal, including expedited timelines that would make it impossible for asylum seekers to obtain representation and for attorneys to provide ethical representation.[11] However, many advocates supported the basic premise of the proposal: Expanding the Asylum Office's jurisdiction would be a positive development for asylum seekers. Because of the "non-adversarial" nature of AO interviews, advocates agreed that the Asylum Office was more suitable for deciding asylum cases than Immigration Court, where traumatized asylum seekers are subject to cross-examination by government attorneys.[12]

Drawing on the history of the affirmative asylum program and over forty in-depth interviews with individuals intimately involved in asylum adjudications, including former AOs, senior officials, immigration attorneys, and asylum seekers, this Article argues that the Asylum Office has failed policymakers' original vision for our affirmative asylum system and that it would be unwise to support any expansion of its jurisdiction, at least in its current form. Instead, advocates and scholars should reimagine our affirmative asylum system. This Article provides starting points for that reimagination.

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10. *See* Public Comments on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, REGULATIONS.GOV, https://www.regulations.gov/document/USCIS-2021-0012-0001/comment?sortBy=postedDate&sortDirection=desc [https://perma.cc/M4D6-TQLT] (showing 5,235 comments received on the proposed rule).

11. *See id.*

12. *See, e.g.*, Am. Immigr. Laws. Ass'n & Am. Immigr. Council, Joint Comment Letter on Proposed Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 2–3 (Oct. 19, 2021), https://www.regulations.gov/comment/USCIS-2021-0012-4824 [https://perma.cc/8G4L-WCUG] ("We support the proposal for USCIS to have initial jurisdiction over these applications for protection. The non-adversarial process before USCIS is appropriate for processing claims of individuals, many of whom have suffered substantial trauma prior to their arrival in the United States."); Ctr. for Gender & Refugee Stud., Comment Letter on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 10–11 (May 26, 2022), https://www.regulations.gov/comment/USCIS-2021-0012-5326 [https://perma.cc/6FGD-EK56] (describing "Asylum Officers will conduct credible fear interviews" as one of the positive changes proposed by the Departments); Pangea Legal Servs., Comment Letter on Proposed Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 9 (Oct. 19, 2021), https://www.regulations.gov/comment/USCIS-2021-0012-4719 [https://perma.cc/5725-NB7Z] ("In sum, we do not object in theory to the rule's change that would allow asylum seekers to have the opportunity to present their cases in a non-adversarial interview as a first step. In fact, we believe that a non-adversarial process is appropriate and necessary for asylum seekers, many of whom have suffered traumatic experiences in their home country that are painful to recount, especially in an adversarial environment."); Cent. Am. Res. Ctr. of N. Cal., Comment Letter on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 2 (May 31, 2022), https://www.regulations.gov/comment/USCIS-2021-0012-5309 [https://perma.cc/A36D-JVP3] ("Moreover, we commend how the rule gives respondents -- many of whom will inevitably be unrepresented -- a chance to make their case at the Asylum Office, before needing to bring their case to immigration court, with its adversarial setting and more complicated procedural requirements.").

To effectively reimagine our affirmative asylum system, the historical proposals and reforms that led to the current system must first be examined. Notably, the Refugee Act of 1980 revolutionized the United States' approach to protecting forced migrants both outside and within the country (or at a border). The Act discarded political considerations in noncitizen protection determinations and instead adopted a neutral definition for the term "refugee."[13] Because the Act primarily focused on reforming the overseas refugee adjudication system, the development of procedures for asylum adjudications was left to the relevant executive branch agencies.

After years of debate and two rounds of reform, the agencies settled upon the current bifurcated asylum adjudication system in the 1990s. Under it, the Asylum Office adjudicates all affirmative asylum applications—that is, applications filed by noncitizens proactively (or "affirmatively") to seek asylum when they are not in removal proceedings.[14] These asylum seekers are interviewed by AOs through a "non-adversarial" process, where there is no opposing counsel and where they may be represented by attorneys who play a limited role.[15] Asylum seekers not granted asylum by the AO are referred to immigration court where they may reapply for asylum as a "defense" to removal in formal adversarial proceedings before an IJ.[16] IJs provide de novo review of the asylum application.[17]

Although many reformers wished to eliminate this "two bites at the apple" system, policymakers in the 1990s decided to keep the bifurcated adjudication system with major reforms for cost-saving and efficiency reasons.[18] They believed that the reformed Asylum Office would quickly grant meritorious affirmative asylum claims and refer frivolous or complicated cases to immigration court for further adjudication.[19] They imagined that affirmative asylum grant rates would climb because quick adjudications and other features of the new adjudication system, such as delayed issuance of work authorization and mandatory referrals to immigration court, would discourage the filing of frivolous applications.[20] Speedy grants at the Asylum Office would save money

13. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 43–64 (1981).

14. DEBORAH E. ANKER & JEFFREY S. CHASE, LAW OF ASYLUM IN THE UNITED STATES §§ 1:3 n.7, 1:8 (2024 ed. 2024).

15. *Id.* §§ 1:3, 2:19–2:20.

16. *Id.* § 3:44.

17. *Id.*

18. David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 727, 741–54 (1995) (citation omitted); Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 4 AM. U. J. INT'L. L. & POL'Y 43, 63–76 (1994); *see also infra* Part I.C (summarizing major reforms made to the bifurcated asylum system during the 1990s).

19. Martin, *supra* note 18, at 746–47.

20. *Id.* at 746–47, 753–54.

by reserving IJ time for difficult cases.[21] Creating a professional corps of AOs would also increase the accuracy, consistency, and fairness of decision-making in the affirmative asylum system.

This Article demonstrates that each of these assumptions has not panned out. Statistics reveal that the Asylum Office refers far too many meritorious asylum cases to immigration court, casting doubts on the policymakers' efficiency and cost-saving assumptions. In recent years, IJs have ultimately granted asylum to between 76 and 83 percent of asylum seekers whom AOs have referred to removal proceedings.[22] Additionally, rather than a consistent system, grant rates across offices also continue to deviate significantly. In 2007, Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag published the influential "refugee roulette" study in which they demonstrated that a grant of asylum depends less on the strength of the asylum seeker's claim and more on the adjudicator assigned to their application.[23] The latest statistics show that these differences persist and, in fact, are growing. For example, in fiscal year (FY) 2023, while the San Francisco Asylum Office granted around 62 percent of applications, the New York Asylum Office granted a mere 6 percent of its applications.[24]

While policymakers believed the Asylum Office would grant meritorious asylum cases quickly,[25] as of the end of FY 2023, the Asylum Office faces a historic backlog of more than one million cases.[26] Human Rights First (HRF), a leading nonprofit serving asylum seekers, estimates that its clients stuck in the backlog have been waiting over six years on average for an interview.[27] Desperate asylum seekers have filed mandamus actions in federal district court, an option not available to all, to force the Asylum Office to schedule interviews, contributing to the recent explosive growth of mandamus actions against the U.S. Citizenship and Immigration Services (USCIS).[28]

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21. *Id.* at 746. IJ adjudications are more expensive both because they involve participation by an attorney representing the government and because IJs are paid much more than AOs.

22. *See infra* Part III.B.

23. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007).

24. *See infra* Table 1.

25. *See* Beyer, *supra* note 18, at 48–49.

26. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-24-36, USCIS FACES CHALLENGES MEETING STATUTORY TIMELINES AND REDUCING ITS BACKLOG OF AFFIRMATIVE ASYLUM CLAIMS 1 (2024).

27. Cora Wright, *Asylum Office Delays Continue to Cause Harm*, HUM. RTS. FIRST (Oct. 3, 2022), https://humanrightsfirst.org/library/barriers-and-backlog-asylum-office-delays-continue-to-cause-harm/ [https://perma.cc/7TXB-6RWV].

28. *Immigration Processing Delays Prompt Record Number of Mandamus Lawsuits in Federal Court*, TRAC IMMIGR. (May 15, 2023), https://tracreports.org/reports/717/ [https://perma.cc/8TRV-JJSQ]; *e.g.*, *Asylum Case Expedited Through Mandamus*, MILLERLAWDC, PLLC (Oct. 27, 2022), https://millerlawdc.com/asylum-case-expedited-through-mandamus/ [https://perma.cc/VGB8-MYK2] (showing that an asylum seeker, who was waiting for more than five years, received an asylum interview once their attorney filed mandamus); *Asylum Interview Granted After Filing of a Federal Court Mandamus Complaint*, WILDES & WEINBERG, P.C., https://www.wildeslaw.com/immigration-

Policymakers' emphasis on speed and efficiency *has* trickled down to the Asylum Office but in ways that harm asylum seekers, AOs, and the asylum system. AOs face extraordinary pressure to interview and adjudicate cases quickly. As a result, former AOs admitted in interviews that they were more likely to refer an asylum seeker to removal proceedings simply because referring is faster than granting requests. Moreover, AOs are evaluated on the speed at which they interview and adjudicate cases. AOs further explained that the easiest way to quickly refer an asylum seeker was by laying a credibility trap—essentially getting the asylum seeker to contradict themselves on the record and then using that contradiction to find them not credible.

Policymakers also believed that preserving asylum seekers' ability to go before the Asylum Office was worthy because non-adversarial interviews are less traumatic for asylum seekers who have suffered grave harm. Yet, our interviews with immigration attorneys, asylum seekers, and AOs revealed that AOs are often very confrontational during these interviews. Further, because attorneys are permitted only a limited role at asylum interviews, they cannot fully advocate for their clients. In fact, AOs are trained to maintain "control" of interviews and advised that they may exercise their discretion to limit even permitted attorney participation.[29] This limiting of the attorney's role is particularly troubling because advocates regularly question AOs' understanding of basic asylum law,[30] accusations that former AOs have also corroborated in interviews.

The Asylum Office's failure to timely grant asylum to legitimate asylum seekers has real consequences for asylum seekers, attorneys, AOs, and the asylum system. An asylum seeker referred to immigration court may wait years for their day in court before an IJ. This delay leaves family members, who asylum seekers were forced to leave behind, in danger. It also leads to prolonged family separation because asylum seekers can only file petitions to reunify with their

resources/latest-immigration-news/asylum-interview-granted-after-filing-of-a-federal-court-mandamus-complaint/ [https://perma.cc/A7DD-A9KV] (showing that an asylum seeker, waiting for two years, received an asylum interview after their attorney filed mandamus).

29. REFUGEE, ASYLUM, AND INT'L OPERATIONS DIRECTORATE (RAIO), U.S. CITIZENSHIP & IMMIGR. SERVS., LESSON PLAN: INTERVIEWING – INTRODUCTION TO THE NON-ADVERSARIAL INTERVIEW 22–23 (2024), https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Intro_to_the_NonAdversarial_Interview_LP_RAIO.pdf [https://perma.cc/9GWN-X9AG].

30. *See, e.g.*, Letter from Am. Gateways, Black All. for Just Immigr., Florence Immigrant & Refugee Rts. Project, Immigr. Equal., Immigrant Legal Res. Ctr, Nat'l Immigr. Project, Refugee & Immigrant Ctr. for Educ. & Legal Servs., S. Poverty L. Ctr., Texas A&M Univ. Sch. of L. – Legal Clinics & Univ. of San Francisco – Immigr. & Deportation Def. Clinic & Migration Stud. Program to Peter Mina, Acting Dir., DHS Off. of C.R. & C.L., Joseph V. Cuffari, DHS Off. of Inspector Gen. (Apr. 27, 2022), https://immigrationequality.org/wp-content/uploads/2022/04/2022_27April-CFI-complaint-1.pdf [https://perma.cc/Y8FM-EV62] (showing a complaint filed by advocates in part because of the Houston Asylum Office's failure to apply the correct legal standard when adjudicating credible fear interviews).

spouse and children after they have been granted asylum.[31] Delays can compound mental health disorders that asylum seekers commonly suffer from and delay recovery.[32] They can harm asylum seekers' access to legal representation and educational opportunities, have negative economic consequences, and delay asylum seeker integration.[33] The Asylum Office's failure also negatively impacts the mental health of immigration attorneys who already suffer from burnout and secondary traumatic stress at high rates.[34] AOs interviewed for this Article described suffering from moral injuries,[35] resulting from their participation in an adjudication system that they believe undermines the rule of law and their own moral convictions. Finally, the Asylum Office's failure to timely grant asylum at the first stage of the process undermines confidence in the asylum system and further burdens the already overstrained immigration courts, where more than three million cases now pend.[36] Given these harms, instead of supporting the expansion of the Asylum Office's jurisdiction as it currently operates, advocates and scholars should work to reimagine our affirmative asylum adjudication system.

This work builds upon and expands two areas of scholarship. First, this Article sheds light on the way that asylum adjudications are conducted by low-level administrative adjudicators (or "street-level state bureaucrats"[37]) in ways that defy asylum law and regulations as written. Inés Valdez, Mat Coleman, and Amna A. Akbar call this phenomenon the "paralegal" or "the messy everyday terrain of lawmaking which is not officially captured in, nor necessarily guided by, legislative documents and/or legal text."[38] The authors define paralegality as:

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31. ANIKA ADES & KENNJI KIZUKA, HUM. RTS. FIRST, PROTECTION POSTPONED: ASYLUM OFFICE BACKLOGS CAUSE SUFFERING, SEPARATE FAMILIES, AND UNDERMINE INTEGRATION 5–6 (2021), https://humanrightsfirst.org/wp-content/uploads/2022/09/ProtectionPostponed.pdf [https://perma.cc/JT5T-AJXR] (discussing harms resulting from delays in Asylum Office interviews).

32. *Id.* at 6–7.

33. *Id.* at 7–11.

34. *See generally* Lindsay M. Harris & Hillary Mellinger, *Asylum Attorney Burnout and Secondary Trauma*, 56 WAKE FOREST L. REV. 733 (2021) (finding high levels of burnout and secondary traumatic stress among immigration attorneys due to the traumatic structure of asylum law).

35. A moral injury occurs when an individual "[i]n traumatic or unusually stressful circumstances . . . perpetrate[s], fail[s] to prevent, or witness[es] events that contradict deeply held moral beliefs." Sonya B. Norman & Shira Maguen, *Moral Injury*, U.S. DEP'T OF VETERANS AFFS., https://www.ptsd.va.gov/professional/treat/cooccurring/moral_injury.asp [https://perma.cc/6A3E-CSVE].

36. *Immigration Court Backlog*, TRAC IMMIGR., https://tracreports.org/phptools/immigration/backlog/ [https://perma.cc/YK7G-NJQJ].

37. Talia Shiff, *A Sociology of Discordance: Negotiating Schemas of Deservingness and Codified Law in U.S. Asylum Status Determinations*, 127 AM. J. SOCIO. 337, 349 (2021). Sociologist Talia Shiff "conceptualize[s] asylum officers as street-level state bureaucrats: lower-level public employees charged with interpreting and enforcing often ambiguous law while interacting with the individuals subject to the said policy." *Id.*

38. Inés Valdez, Mat Coleman & Amna Akbar, *Missing in Action: Practice, Paralegality, and the Nature of Immigration Enforcement* 10 (The Ohio St. Univ., Moritz Coll. of L., Working Paper No. 373, 2016), http://dx.doi.org/10.2139/ssrn.2881944 [https://perma.cc/CYL8-QURZ].

> actions undertaken by someone (or a collective) charged with implementing the law, but who is not charged with writing law, whether court decisions or legislative text. As such, the term designates an activity that . . . operates alongside the law, sometimes in contradiction of it . . . but which circulates without a precise or settled textual legal anchor and/or author.[39]

Second, this Article contributes to the dearth of scholarship critically analyzing the affirmative asylum system. During the debates of the 1990s, scholars and government officials offered their vision for a new affirmative asylum system.[40] Since administrators overhauled the Asylum Office, only a few scholars have studied how the reformed affirmative asylum system operates. For example, sociologist Talia Shiff has studied how AOs negotiate situations where codified asylum law conflicts with their belief of a given asylum seekers' moral deservingness for immigration relief. Shiff also observes how AOs apply the ambiguous "particular social group" ground of asylum.[41] Other scholars have similarly studied discrete aspects of affirmative asylum adjudication. This scholarship includes an empirical study of the Asylum Office's application of the one-year filing deadline;[42] another study exploring when AOs exercise their discretion to provide interpreters and how interpreters can impact asylum interviews;[43] and a case study examining the Boston Asylum Office's unusually

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39. *Id.*

40. *See, e.g.*, David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1338–76 (1990). *See generally* Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT'L J. REFUGEE L. 455, 467–83 (1992) [hereinafter Beyer, *Establishing the Asylum Corps*] (explaining the establishment and operation of the United States Asylum Office Corps in 1990); Martin, *supra* note 18, at 745–54 (explaining substantive changes to asylum policy resulting from the 1994 asylum reforms); Beyer, *supra* note 18, at 66–76 (reviewing reforms proposed for the asylum system in the 1990s); GREGG A. BEYER, STRIKING A BALANCE: THE 1995 ASYLUM REFORMS "A WALK DOWN ANOTHER STREET" 6–12 (2000) [hereinafter BEYER, STRIKING A BALANCE], https://web.archive.org/web/20041026133656/http://uscis.gov/graphics/services/asylum/Beyer.pdf [https://perma.cc/J8DS-RZ6B] (explaining reforms made to asylum law throughout the 1990s).

41. Shiff, *supra* note 37, at 361–64. *See generally* Talia Shiff, *Regulating Organizational Ambiguity: Unsettled Screening Categories and the Making of US Asylum Policy*, 48 J. ETHNIC & MIGRATION STUD. 1802 (2022).

42. Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales & James P. Dombach, *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 765 (2010) (concluding that the one-year filing deadline for asylum applications should be repealed).

43. Hillary Mellinger, *Interpretation at the Asylum Office*, 44 L. & POL'Y 230, 230–54, 247–48 (2022) (concluding based on twenty-eight attorney interviews that AOs inconsistently exercised their discretion to provide interpreters to asylum seekers in exceptional circumstances); *see also* Pooja R. Dadhania, *Language Access and Due Process in Asylum Interviews*, 97 DENV. L. REV. 707, 710–11 (2020) (arguing that because the Asylum Office does not provide interpreters during asylum interviews, instead requiring asylum seekers to supply their own, the Office violates the procedural due process rights of limited English-proficient asylum seekers); Grace Benton, Note, *"Speak Anglish:" Language Access and Due Process in Asylum Proceedings*, 34 GEO. IMMIGR. L.J. 453, 454–55 (2020) (arguing that language access in asylum proceedings can and should be framed as a due process issue).

low asylum grant rates.[44] Published in 2014, the most comprehensive study of the affirmative asylum system provides an empirical analysis of AO asylum decisions over a fourteen-year period.[45] Even so, no scholar has evaluated whether the reformed affirmative asylum system has lived up to policymakers' goals. This Article fills that void.

This Article proceeds as follows: Part I traces the history of the United States' efforts to protect forced migrants, including the proposals and reform efforts that ultimately led to the development of the current asylum adjudication system. Part II details the Biden Administration's proposal to expand the jurisdiction of the Asylum Office, analyzes early data on the results of the newly created process, describes advocates' and scholars' critiques of the new process, and summarizes the current paths available to seek asylum. Part III discusses how the Asylum Office has failed to meet the expectations of the policymakers who reformed the asylum system, describes how these failures harm all stakeholders, and presents theories for why the Asylum Office has failed.

Part IV begins the reimagination of the Asylum Office. I argue that AOs should not be diverted to border work but should at all times remain focused on adjudicating affirmative asylum claims. To provide the new system with a fresh start, I suggest ways to clear the backlog of currently pending affirmative asylum claims. I argue that the United States should adopt a framework for group-based asylum claims, and adjudicate more claims based on paper applications. To ensure adjudications are faithful to the law and consistent across offices and interviews are conducted in a truly non-adversarial manner, I recommend hiring more qualified adjudicators and inviting the United Nations High Commissioner for Refugees (UNHCR) to monitor adjudications. Further, for the new system to work, increasing legal representation for asylum seekers is crucial. Finally, to protect the politically fragile asylum system, I argue for creating new pathways for legal migration. If these reforms are implemented, the Asylum Office may one day become the "credible system that can adjudicate cases in a fair and expeditious fashion," as its creators and advocates hoped and believed it could be.[46]

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44. REFUGEE & HUM. RTS. CLINIC, UNIV. OF ME. SCH. OF L., IMMIGRANT LEGAL ADVOC. PROJECT, ACLU OF ME. & BASILEUS ZENO, LIVES IN LIMBO: HOW THE BOSTON ASYLUM OFFICE FAILS ASYLUM SEEKERS 3–4 (2022), https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf [https://perma.cc/CFJ3-VXDN]. The authors of this report subsequently published a related law review article that describes the systemic failures with the affirmative asylum system. *See generally* Anna R. Welch & Sara P. Cressey, *Dropping the Veil: How an Investigation into One Asylum Office Reveals Systemic Failures Within the U.S. Affirmative Asylum System*, 57 LOY. L.A. L. REV. 1 (2024).

45. *See generally* ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY (2014).

46. Beyer, *Establishing the Asylum Corps*, *supra* note 40, at 484.

I.
A BRIEF HISTORY OF THE UNITED STATES' OVERSEAS REFUGEE AND DOMESTIC ASYLUM PROGRAMS

The United States' current refugee and domestic asylum programs can be traced back to post-World War II, when the U.S. government began attempting to resettle overseas refugees on a systematic level. Because federal immigration law did not incorporate a permanent immigration category for refugees, protection was first offered through ad hoc legislation for refugees, usually on the basis of national origin or political ideology, and then increasingly through the Attorney General's power to "parole"[47] noncitizens into the United States.[48] Even after Congress created a permanent admission category for refugees in 1965, presidents continued to resort to the parole power to admit refugees because of the category's inadequacies.[49]

Because presidential administrations did not always consult with Congress prior to the launch of parole programs, Congress increasingly wished to reform the law to provide clearer standards and procedures for refugee admissions and to give itself a greater role in the process.[50] In 1980, Congress passed the Refugee Act, which to this day is the basis of the United States' overseas refugee and domestic asylum programs.[51] For the first time, the Act adopted a neutral definition for the term "refugee" based on the 1951 U.N. Convention Relating to the Status of Refugees.[52] A "refugee" is a noncitizen who is outside of their country of nationality and "who is unable or unwilling to return to, and is unable or unwilling to avail [themself] of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[53] Applicants applying for resettlement through the overseas refugee program must meet this "refugee" definition and be "of special humanitarian concern to the

47. Parole allows a noncitizen to enter, reenter, or remain in the United States for a fixed and generally brief period of time. KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., LSB11102, HUMANITARIAN PAROLE AUTHORITY: A LEGAL OVERVIEW AND RECENT DEVELOPMENTS 1–2 (2024). Unlike refugee and asylum status, parole does not lead to lawful permanent residence. *See* Marcia Orellana, *The Myth of "Right Way"—the Right to Asylum, Humanitarian Parole, and Refugee Resettlement*, FRIENDS COMM. ON NAT'L LEGIS. (May 5, 2023), https://www.fcnl.org/updates/2023-05/myth-right-way-right-asylum-humanitarian-parole-and-refugee-resettlement [https://perma.cc/4RRP-EUQH].

48. Immigration and Nationality Act (INA) § 212(d)(5), 8 U.S.C. § 1182(d)(5); Anker & Posner, *supra* note 13, at 13–17. The definition of a refugee contained geographical and ideological limitations that limited refugees to those individuals fleeing communist dominated countries and the Middle East, and additionally, only 10,200 noncitizens could enter the United States each year as refugees. Act of Oct. 3, 1965, Pub. L. No. 89-236, sec. 3, § 203(a)(7), 79 Stat. 911, 913 (codified as amended at 8 U.S.C. § 1153(a)(7)) (repealed 1980); Anker & Posner, *supra* note 13, at 17.

49. Anker & Posner, *supra* note 13, at 17–19.

50. *Id.* at 25–26.

51. For a detailed discussion of how the Refugee Act of 1980 came to be, see *id.* at 20–64.

52. *Id.* at 11.

53. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

United States."[54] The special humanitarian concern language was adopted "to emphasize that the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States."[55]

A. Initial Efforts to Formalize and Codify Asylum Procedures

Protections for migrants seeking asylum within the United States or at a border received far less attention from the government until 1970, when public and official uproar followed the U.S. Coast Guard's denial of asylum to a Lithuanian seaman.[56] As a result, the Immigration and Naturalization Service (INS) initiated a review of its existing asylum procedures. The subsequent regulations issued by the INS in 1974 were the first to describe the procedures for noncitizens within the United States to apply for asylum.[57]

As described above, Congress passed the historic Refugee Act in 1980. While most of the Act concerned the overseas refugee program, the Act created the first statutory basis for asylum by adding Section 208 to the Immigration and Nationality Act (INA). This provision allows the Attorney General, in their discretion, to grant asylum to noncitizens physically within the United States or at a border or port of entry if they meet the same definition of "refugee" that refugee applicants are expected to meet.[58] Because Congress was primarily preoccupied with reforming the refugee program, the creation of procedures to govern asylum adjudications was left entirely to the Attorney General.[59]

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54. INA § 207(a)(3), 8 U.S.C. § 1157(a)(3).

55. H.R. REP. NO. 96-608, at 13 (1979).

56. On November 23, 1970, Simas Kudirka, a radio operator from Lithuania working aboard a Soviet fishing ship off the coast of New England, attempted to defect by jumping ten feet onto the Vigilant, a U.S. Coast Guard cutter. *Lithuanian Sailor Freed by Soviet Arrives in U.S.*, N.Y. TIMES (Nov. 6, 1974), https://timesmachine.nytimes.com/timesmachine/1974/11/06/87604882.html [https://perma.cc/LM96-WPNU]. Kudirka requested political asylum. After consulting with superiors, the captain of the Vigilant denied Kudirka's request and permitted Soviet sailors to board the ship to remove him. *Id.* Official and public condemnation quickly followed:

> Television news programs reported the President of the United States was outraged . . . . Secretary of State William P. Rogers was reported to have said . . . that it was unbelievable to him that the commander of a Coast Guard vessel permitted Soviet crewmen of a fishing boat to board his ship and forcibly take off a Lithuanian defector. Demonstrations to protest the denial of political asylum to Kudirka occurred in New York, Boston, Philadelphia, Cleveland, and Chicago.

Clyde R. Mann, *Asylum Denied: The Vigilant Incident*, 23 NAVAL WAR COLL. REV. 4, 21 (1971) (footnote omitted).

57. DAVID A. MARTIN, T. ALEXANDER ALEINIKOFF, HIROSHI MOTOMURA & MARYELLEN FULLERTON, FORCED MIGRATION LAW AND POLICY 95 (2d. ed. 2013); *see* Asylum, 39 Fed. Reg. 41832, 41832 (Dec. 3, 1974) (to be codified at 8 C.F.R. pt. 108). These regulations required asylum seekers to initiate an application by submitting the newly created Form I-589 to the INS district director. *Id.* Applicants had to appear in person before an immigration officer prior to the adjudication of their application, the granting or denying of which was at the district director's discretion. *Id.* District directors issued written decisions from which there was no opportunity for appeal. *Id.*

58. INA § 208(a)(1), (b)(1)(A), 8 U.S.C. § 1158(a)(1), (b)(1)(A).

59. *See* Anker & Posner, *supra* note 13, at 64–66.

However, it took a decade for the Attorney General to publish final regulations as mandated by the Refugee Act.[60]

Interim regulations published by the INS in 1980 allowed district offices to adjudicate asylum claims for noncitizens who were not in removal proceedings in immigration court. From the beginning, district offices developed significantly varying practices in the type of examiner assigned to asylum interviews and in the length and thoroughness of interviews. Offices with heavy asylum caseloads, such as New York, assigned more experienced examiners who worked only on asylum cases during their rotation.[61] Offices with smaller asylum caseloads used examiners who were not necessarily trained in adjudicating asylum applications and devoted only a portion of their time to conducting asylum interviews.[62] Interviews varied considerably in length, ranging from a mere fifteen minutes to "nearly an hour."[63] Most interviews focused on filling gaps in the application form, but interviews varied in thoroughness.[64] Some interviewers focused only on technical issues, such as clarifying the applicant's manner of entry, while others attempted to flesh out the persecution claim.[65] Officers annotated any new information obtained during the interview directly on the application form and sometimes attached "a few sentences of interview notes."[66]

Following the interview, the annotated application form, the examiner's interview notes (if any), and any evidence submitted by the asylum seeker were forwarded to the Department of State (DOS) for comments.[67] After DOS' views were received, the asylum seeker was either granted asylum or received a Notice of Intent to Deny (NOID), which provided the applicant an opportunity to respond.[68] Asylum seekers who were denied asylum by a district office and who were placed in removal proceedings could renew their claims before the IJ.[69] Unlike interviews in district offices, hearings in immigration court were adversarial, generally involving direct examination by the asylum seeker's counsel and cross-examination by an INS trial attorney.[70]

B. The Long Saga to Establish a Professional Asylum Officer Corps

Not long after the passage of the Refugee Act, the United States' nascent asylum adjudication system ran into serious problems. Large-scale migration of

60. *Final Asylum Regulations Finally Published*, 67 INTERPRETER RELEASES 817, 817 (1990).
61. Martin, *supra* note 40, at 1299–300.
62. *Id.* at 1300.
63. *Id.* at 1301.
64. *Id.* at 1300–01.
65. *Id.* at 1301.
66. *Id.*
67. *Id.* at 1302–03.
68. *Id.* at 1303.
69. *Id.* at 1305–06.
70. *Id.* at 1307–08.

Haitian, Cuban, and Central American asylum seekers created a backlog of asylum claims that the INS was not prepared to handle.[71] In response to this perceived "asylum crisis," stemming from the backlog, various actors began to review the asylum system and suggest reforms.[72] Recommendations focused on changing asylum adjudicators, reconsidering the "two bites at the apple" system, and strengthening the ability of the government to remove those who were denied asylum. The following sections summarize the major proposals and reforms that ultimately led to the current asylum adjudication system.

1. The 1983 INS Internal Study

In March 1982, the INS Acting Commissioner requested a Special Assistant to study asylum adjudications and suggest ways to reduce the backlog.[73] The resulting report found numerous issues with asylum adjudications at the district offices, including a lack of uniformity in procedures and decisions nationwide, insufficient training of INS examiners, long delays in completing cases, and a lack of monitoring of the quality of decisions.[74] The report made four "critical" recommendations to improve asylum adjudications: (1) prioritizing completion of pending asylum cases in district offices, (2) establishing and training an AO corps, (3) publishing the final asylum regulations, and (4) developing a monitoring system designed to track uniformity and consistency in asylum adjudications nationwide while also providing feedback.[75]

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71. Beyer, *Establishing the Asylum Corps*, *supra* note 40, at 459; Martin, *supra* note 40, at 1250–52.

72. Beyer, *Establishing the Asylum Corps*, *supra* note 40, at 460.

73. IMMIGR. & NATURALIZATION SERV., ASYLUM ADJUDICATIONS: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE 1 (1982); Beyer, *Establishing the Asylum Corps*, *supra* note 40, at 461–62.

74. IMMIGR. & NATURALIZATION SERV., *supra* note 73, at ii. At the time, less than 2 percent of INS examiners had been trained on asylum adjudications, and the training was minimal, totaling less than three hours of the basic officer training course. *Id.* at 32. The typical INS examiner adjudicating asylum cases was also "someone who has been at INS less than 5 years, has a B.A. degree . . . (usually in business, education, or public administration), and has not traveled extensively or lived outside the United States." *Id.* at 33. The report further observed in a footnote that: "[a]lthough the Refugee Act abolished the country of national origin test for refugee/asylee status, for foreign policy or other reasons the criterion may still be overriding." *Id.* at 59 n*. For example, for a Salvadoran asylum seeker to receive a positive advisory opinion, they must present a "textbook" asylum case, while Polish asylum seekers routinely received positive letters despite not showing an individualized fear of persecution. *Id.*

75. *Id.* at iii. The proposal to create an asylum officer corps was not entirely new; it was proposed by the Select Commission on Immigration and Refugee Policy in 1981 and was included in an immigration reform bill sent to Congress by the Reagan Administration later that year. *See generally* Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 53 Fed. Reg. 11300 (proposed Apr. 6, 1988) (to be codified at 8 C.F.R. pts. 3, 208, 236, 242, 253). Nevertheless, "a system involving specialized asylum adjudicators housed outside the INS district offices met strong internal resistance, both from district directors and from others who rejected the idea that asylum was sufficiently different to require its own custom-designed system for adjudication." Martin, *supra* note 18, at 729.

2. The Proposed Asylum Rules

In August 1987, the Department of Justice (DOJ) published a proposed final asylum rule "intended to enhance uniformity and efficiency" in asylum adjudications.[76] The rule proposed the creation of a professional corps of AOs, working within INS, who would have exclusive jurisdiction over asylum and withholding of removal claims.[77] Decisions would not be directly appealable, and applicants would not be allowed to renew their claims before an IJ in subsequent removal proceedings.[78] IJs would be bound by the AO's decision, which they would incorporate into their final decision on removal.[79] However, the entire removal decision, including the AO's asylum determination, could be appealed to the Board of Immigration Appeals (BIA).[80] If an applicant raised an asylum claim for the first time in immigration court, the proceedings would be adjourned to permit an AO to decide the protection claim.[81]

The proposal to remove IJs from asylum adjudications "touched off a storm of controversy."[82] Advocates argued that the proposal "raise[d] basic due process questions" because AOs would be located within the INS, the agency also charged with immigration enforcement.[83] The advocates were victorious: "On the very day that the notice-and-comment period ended, the Deputy Attorney General issued a public statement promising to restore a role for the immigration judges."[84] A revised rule, proposed in April 1988, did just that.[85] The proposal to create an AO corps was retained because INS examiners "have not all received specialized training and most divide their attention between asylum and other applications."[86] However, AOs were given limited, rather than exclusive, jurisdiction over asylum and withholding claims.[87] AOs would adjudicate affirmative applications filed by those not in removal proceedings.[88] IJs would

76. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 52 Fed. Reg. 32552, 32552 (proposed Aug. 28, 1987) (to be codified at 8 C.F.R. pts. 3, 208, 236, 242, 253).

77. *Id.*

78. *Id.*

79. *Id.* at 32553.

80. *Id.*

81. Martin, *supra* note 40, at 1321.

82. *Id.*

83. Arthur C. Helton, *The Proposed Asylum Rules: An Analysis*, 64 INTERPRETER RELEASES 1070, 1072–73 (1987). As summarized by Arthur Helton, "[t]o give exclusive jurisdiction over asylum determinations to the INS without recourse to a hearing before a neutral arbiter, particularly with no guarantee of counsel, is simply incompatible with due process." *Id.* at 1073.

84. Martin, *supra* note 18, at 730.

85. *See* Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 53 Fed. Reg. 11300, 11300–10 (proposed Apr. 6, 1988) (to be codified at 40 C.F.R. pts. 3, 208, 236, 242, 253).

86. *Id.* at 11301.

87. *Id.*

88. *Id.* at 11300.

retain jurisdiction to decide defensive asylum claims filed by noncitizens in removal proceedings.[89]

3. The Final Asylum Rule

On July 27, 1990, the Attorney General published the final asylum rule.[90] The background section of the rule summarized the decade-long effort to promulgate a comprehensive asylum policy and procedure. The rule highlighted two guiding principles for that policy: "[a] fundamental belief that the granting of asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration process; and a recognition of the essential need for an orderly and fair system for the adjudication of asylum claims."[91]

To achieve this system, the regulations created a specialized corps of professional AOs who were delegated the authority to adjudicate affirmative claims of asylum and withholding for all noncitizens who were not in removal proceedings.[92] These asylum adjudications would remain within the INS, but AOs would be housed separately from INS's enforcement functions, and AOs would deal only with asylum and withholding cases.[93]

89. *Id.* While these regulations were pending, the Administrative Conference of the United States (ACUS) studied the current asylum procedures and made its own proposal in 1989. Recommendations and Statement of the Administrative Conference Regarding Administrative Practice and Procedure, 54 Fed. Reg. 28964, 28970–72 (to be codified at 1 C.F.R. pts. 302, 305, 310). ACUS recommended the creation of an Asylum Board located within EOIR and with an adjudication division, an appellate division, and a documentation center. *Id.* at 28971–72. Under the proposal, the Asylum Board would utilize a single, unified procedure to consider all claims for asylum and for withholding of removal. *Id.* at 28971. The adjudicators would be recruited from attorneys "familiar with international relations and refugee affairs and who are sensitive to the difficulties of cross-culture communication." *Id.* The adjudicators would receive the salary, benefits, and guarantees of adjudicative independence equivalent to IJs. *Id.* During the proceedings, adjudicators would be responsible for most questioning of the asylum seeker. *Id.* The asylum seeker's representative would be given a "reasonable and adequate opportunity" to ask follow-up questions of the asylum seeker and to present witnesses and other relevant information. *Id.* There would be no opposing party in the proceedings. *Id.* The appellate division would be responsible not only for deciding appeals of denied claims but also for monitoring both granted and denied cases to "foster consistency, fairness, and political neutrality." *Id.* at 28927.

90. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674, 30674–88 (July 27, 1990) (to be codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, 253); *Final Asylum Regulations Finally Published*, *supra* note 60, at 817.

91. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. at 30675.

92. *Id.* at 30676. AOs were selected from "a wide variety of relevant backgrounds and experiences," including the Peace Corps. Beyer, *Establishing the Asylum Corps*, *supra* note 40, at 468, 471. In contrast, the directors and supervisory AOs of the new Asylum Offices, who would be responsible for the daily supervision of the AOs, were selected "exclusively" from the ranks of existing INS staff because it was believed that "considerable INS administrative experience was required for the management" of the new offices. *Id.* at 468. In addition, the director of the new asylum division at INS Headquarters was also selected from within INS. *Id.* The director would be responsible for supervision of the Asylum Office directors and for policy development. *Id.*

93. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. at 30676. Initially, seven Asylum Offices were established around the United States at locations where the most asylum applications were expected to be filed. Beyer, *Establishing the Asylum Corps*, *supra*

To aid AOs in adjudicating cases, AOs would receive specialized training in international relations and international law.[94] They would also receive ongoing training "concerning the persecution of persons in other countries" and "other information relevant to asylum determinations."[95]

AOs would conduct interviews "in a nonadversarial manner."[96] During the interview, AOs would administer oaths, present and receive evidence, and question the applicant and any witnesses to "elicit all relevant and useful information bearing on the applicant's eligibility."[97] The applicant had the right to representation at the interview.[98] After the completion of the interview, the applicant's counsel had "an opportunity to make a statement or comment on the evidence presented."[99] The AO could limit the length of the statement or instead require that it be in writing.[100]

Adverse decisions had to include reasons for denial and assess the applicant's credibility.[101] Applicants did not have a right to appeal an AO decision; however, they could file a motion to reconsider.[102] They could also renew their application for asylum or withholding before an IJ if they were placed in removal proceedings after the denial of their asylum claim.[103] At the time, referrals to immigration court were not mandatory.[104] IJs retained jurisdiction to decide asylum and withholding claims for noncitizens in removal proceedings. IJs would provide de novo consideration of any asylum or withholding claims previously adjudicated by an AO.[105]

The Asylum Offices officially opened in April 1991 with two goals: "'compassion' through the prompt approval of meritorious cases and 'control' by discouraging spurious or abusive claims."[106] The key to meeting these two

note 40, at 469. The offices were located in Arlington, Chicago, Houston, Los Angeles, Miami, Newark, and San Francisco. *Id.* These offices would serve as the "home bases" of the new Asylum Officer corps. *Id.* AOs would occasionally travel to interview asylum applicants in other locations. *Id.*

94. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. at 30676.

95. *Id.* at 30680.

96. *Id.* at 30682.

97. *Id.*

98. *Id.* at 30677.

99. *Id.*

100. *Id.*

101. *Id.* at 30678.

102. *Id.*

103. *Id.*

104. *See id.* ("An applicant may nonetheless renew an asylum or withholding application before an Immigration Judge in exclusion or deportation proceedings and, if such proceedings do not commence within 30 days of an Asylum Officer's denial, the applicant may request the District Director, in writing, that such proceedings commence, which shall be done promptly by the District Director absent exceptional circumstances.").

105. *Id.* at 30681.

106. Beyer, *supra* note 18, at 44.

goals was viewed as "a focus on quality, which includes elements of consistency and productivity."[107]

By establishing these procedures, the asylum program hoped to achieve a system where the "same asylum applicant should participate in roughly the same interview process, with roughly the same final results, regardless of which Asylum Officer . . . does the interviewing, or in which Asylum Office the interview is held."[108] In addition, to ensure that cases were decided in a speedy and efficient manner, each Asylum Office was given a monthly target of case completions. AOs were expected to complete twelve cases per week.[109] This target assumed that an average asylum case would take only three hours to complete—"15 minutes for file review and preparation prior to the interview; 45 minutes for the interview; 60 minutes to draft case analysis and documentation, and make a preliminary assessment; and 60 minutes to complete all other steps."[110]

C. Reforms to Boost Productivity and Speed at the Asylum Office

Despite a "promising" new design supported by advocates and officials, the Asylum Office faced a daunting challenge and was neither sufficiently funded nor staffed to overcome it.[111] Not only did the Office face a backlog of one hundred thousand pending cases, but just a few months before the Asylum Offices officially opened, the government agreed to settle a class action lawsuit that alleged discrimination against Salvadoran and Guatemalan asylum seekers.[112] Under the terms of the settlement, class members would be allowed to re-interview for asylum.[113] The agreement "dropped several hundred thousand potential new claims on an untested system that had not yet found its sea legs."[114] The INS did not budget additional staff to compensate for these claims.[115]

To make matters worse, AOs were diverted from adjudicating affirmative cases during the Haitian migration crisis that followed the country's September 1991 coup. AOs were required to pre-screen Haitian asylum seekers interdicted at sea and held at Guantanamo Bay.[116] At the height of the crisis, almost 50 percent of the AO corps was being rotated through Guantanamo every month.[117]

107. Beyer, *Establishing the Asylum Corps*, *supra* note 40, at 474–75.
108. *Id.* at 477.
109. *Id.* at 476.
110. *Id.* at 476 n.119.
111. *See* Martin, *supra* note 18, at 731.
112. *Id.* at 731–32.
113. *Id.* at 732.
114. *Id.*
115. *Id.* at 731–32.
116. Beyer, *supra* note 18, at 50; Beyer, *Establishing the Asylum Corps*, *supra* note 40, at 480.
117. BEYER, STRIKING A BALANCE, *supra* note 40, at 9.

Because of these issues, "the backlog of asylum claims grew even faster than before, as did public concern over . . . abuses of the asylum system."[118] Due to the backlog, asylum seekers could remain in the country for years before their asylum application was finally adjudicated.[119] While asylum seekers waited, they could apply for employment authorization.[120] Critics believed that the asylum system was being abused by noncitizens who were merely looking for a way to enter the country and work here legally. Because applications were not adjudicated for years, the backlog incentivized this behavior.[121]

By 1993, the backlog reached three hundred thousand cases.[122] In the previous fiscal year, the Asylum Office was able to interview a mere 37 percent of new applications but was not able to adjudicate backlogged cases at all.[123] As a result, "many observers inside and outside government concluded that the asylum programme was on the verge of complete collapse."[124]

In response to this second affirmative "asylum crisis,"[125] President Clinton directed the DOJ to prepare a formal proposal to administratively reform the asylum system.[126] The administration considered four proposals, which emerged from meetings between policymakers and stakeholders. The first two options involved creating a one-bite system while the third option involved significantly increasing the current system's funding.[127] The fourth option ultimately succeeded and became the basis of proposed regulations published by the DOJ on March 30, 1994.[128] The proposal involved an "integrated" adjudication system that would "preserve the best of the functions currently being performed by AOs and IJs."[129]

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118. Beyer, *supra* note 18, at 44.

119. *Id.* at 51–52.

120. *Id.* at 52.

121. *See id.* at 69–70; Martin, *supra* note 18, at 735–37.

122. Martin, *supra* note 18, at 733.

123. *Id.*

124. Beyer, *Establishing the Asylum Corps*, *supra* note 40, at 481.

125. Martin, *supra* note 18, at 738. For a detailed inside look into the making of this reform proposal, see *id.* at 741–54.

126. Beyer, *supra* note 18, at 53–54.

127. Martin, *supra* note 18, at 744. The three proposals not chosen were: (1) exclusive adjudication by the Asylum Office, (2) exclusive adjudication by IJs, and (3) retention of the existing adjudication system, with some modification, but a primary focus on providing adequate resources. Beyer, *supra* note 18, at 63–66. Option one involved AOs (in many proposals, converted into "asylum judges") interviewing all asylum applicants through non-adversarial proceedings. *Id.* at 63–64. AO decisions would be appealable only to the BIA. *Id.* at 64. This option was rejected by the administration because it "did not offer significant reform." *Id.* Option two involved creating a new category of IJs ("Asylum Hearing Officers") who would decide asylum claims for all asylum seekers in adversarial proceedings in immigration court. *See id.* This option failed because some opponents felt that IJ adjudications were both slower and more expensive while others believed that the adversarial system did not elicit enough information. *Id.* at 65. Option three, which just involved adding additional funding and staff to the current system, received some support, but policymakers ultimately agreed that structural reform was crucial to tackling the current realities and perceived abuses of the asylum system. *Id.* at 66.

128. *Id.*

129. Martin, *supra* note 18, at 744; *see* Beyer, *supra* note 18, at 65–66.

Although the selection of this option, over a one-bite system, was surprising to many, it was ultimately a cost-saving analysis that put it ahead of the others. Policymakers concluded that a one-bite system would have to involve adjudications by IJs because AOs could neither adjudicate asylum seeker claims for non-protection related relief nor issue removal orders.[130] But IJ adjudication is much more expensive than AO adjudication because the former involves the participation of a government attorney, and IJs are paid much more than AOs.[131] Therefore, whether the one-bite system was more cost effective overall depended on "the expected percentage of affirmative asylum claims that would be granted."[132] Statistics at the time documented a "steady grant rate of between twenty and thirty percent by the Asylum Office," and policymakers believed "that rate should increase if other features of the system eventually could deter the filing of weak claims."[133] Ultimately, policymakers believed that "[k]eeping good claims away from immigration court—providing for speedy grants at the asylum offices—might well save money and reserve IJ time for more complicated cases."[134]

Given policymakers' aims, the proposed rule focused on speeding up adjudications at the AO stage, deterring frivolous asylum claims, and promptly removing those whose claims failed and who had no other defense to removal.[135] The rule proposed seven key reforms to achieve these goals:

> First, "to allow [AOs] to address a greater volume of applications and to concentrate their efforts on approving meritorious claims," instead of granting or denying asylum applications, AOs would grant meritorious cases and *automatically* refer most other cases to immigration court for further adjudication by serving the applicant with a charging document that initiated removal proceedings.[136] AOs would no longer issue NOIDs or prepare lengthy denial letters for most applicants that they did not intend to grant asylum.[137] This would save significant AO time because referral letters would simply involve checking off the general reason for referral on a form letter.[138] Presumably, the increased risk of being placed in removal proceedings, which was previously only discretionary if the AO did not grant asylum, would deter frivolous asylum claims.

130. Martin, *supra* note 18, at 746.

131. *Id.*

132. *Id.*

133. *Id.* at 746–47.

134. *Id.* at 746.

135. Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 14779, 14779–89 (proposed Mar. 30, 1994) (to be codified at 8 C.F.R. pts. 103, 208, 236, 242, 274a).

136. *Id.* at 14780; Beyer, *supra* note 18, at 69.

137. Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. at 14780. In rare instances, AOs would deny a case only when they did not believe a grant was warranted *and* when the asylum seeker held other valid immigration status. *Id.*

138. Martin, *supra* note 18, at 747–48.

Second, AOs would no longer be required to conduct an interview in all cases.[139] This amendment was intended "to allow speedy referral of manifestly unfounded or abusive claims when such flaws were evident from the written filing."[140]

Third, for all cases referred to immigration court, AOs would be required to forward to the IJ the asylum seeker's original asylum application.[141] This change was "intended to encourage the filing of complete and responsive applications in the first instance and to discourage applicants from filing claims before IJs that differ from the claims they filed before Asylum Officers."[142] IJs would continue to consider asylum claims reasserted in removal proceedings de novo, but now judges would have the benefit of the original asylum filing. This would also allow for quicker scheduling of hearings because IJs would not have to wait for the asylum seeker to file a new application.[143]

Fourth, in most cases, AOs would no longer decide withholding claims. IJs would consider withholding claims during subsequent removal proceedings.[144] Under existing regulations, AOs considered withholding claims only if they intended to deny the asylum application.[145] Because AOs would no longer deny claims, there was no reason for them to consider withholding claims.[146]

Fifth, to deter frivolous applications, the issuance of employment authorization to asylum seekers with pending applications was further delayed. Asylum seekers would now be able to seek employment authorization only after one hundred and fifty days had elapsed since they applied for asylum.[147] The INS could issue work authorization only once one hundred and eighty days had elapsed from the application date.[148] The Asylum Office aimed to adjudicate claims within sixty days of filing so legitimate asylum seekers would receive work authorization well before that time.[149]

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139. Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. at 14780.

140. Martin, *supra* note 18, at 752–53.

141. Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. at 14780.

142. *Id.*

143. Martin, *supra* note 18, at 748.

144. Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. at 14787.

145. *Id.* at 14781.

146. *Id.*

147. *Id.* at 14785.

148. *See id.*; Martin, *supra* note 18, at 752–53. In 1989, regulations mandated that INS issue work authorization within sixty days to anyone who filed a "non-frivolous" asylum application. 8 C.F.R. §§ 274a.12(c)(8), 274a.13(d) (1989). A few years later, regulations extended this mandate to ninety days. 8 C.F.R § 274a.13(d) (1992).

149. Martin, *supra* note 18, at 754.

Sixth, for the first time, a $130 filing fee was imposed for asylum applications to partially cover the costs of the new system.[150]

Seventh, to ensure speedy adjudications and removals, the INS and the Executive Office of Immigration Review (EOIR) received significant funding to hire new staff at the Asylum Office and immigration court[151]

The final asylum rule published in December 1994 retained many of the changes initially proposed; however, two key reforms were dropped: discretionary interviews and the filing fee.[152] The rule reverted to mandatory interviews for all affirmative applications.[153] The DOJ was convinced that direct referrals to immigration court without an interview could harm many asylum seekers who were unable to fully articulate their claims in writing due to language barriers, lack of legal knowledge, or reliance on unscrupulous preparers.[154] The filing fee was also dropped because the DOJ realized that adjudicating fee waivers—which many asylum seekers would file because the rule further delayed employment authorization—would take up significant resources and because advocates stressed that a filing fee was inconsistent with the humanitarian nature of asylum.[155]

D. Development of Expedited Removal and Credible Fear Interviews

The final major procedural reform occurred in 1996, when the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) created an expedited removal process.[156] Under this process, inspecting officers are permitted to order certain noncitizens removed, without a hearing or review of the decision, if the officer determines that the noncitizen is undocumented or has obtained documents or admission through fraud or willful misrepresentation.[157] But if the noncitizen indicates an intention to apply for asylum or claims a fear of persecution, an AO interviews the noncitizen to determine if they have a credible fear of persecution (known as a credible fear interview (CFI)).[158] A "credible fear of persecution" is defined as "a significant possibility" that the noncitizen may be able to establish asylum eligibility.[159] The standard was

150. Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 14779, 14784 (proposed Mar. 30, 1994) (to be codified at 8 C.F.R. pts. 103, 208, 236, 242, 274a).

151. Martin, *supra* note 18, at 751–52.

152. Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 62284, 62285–87 (Dec. 5, 1994) (to be codified at 8 C.F.R. pts. 208, 236, 242, 274a, 299).

153. *Id.* at 62285.

154. *Id.* at 62291.

155. *Id.* at 62286–87.

156. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302, 110 Stat. 3009, 579–84.

157. *Id.*

158. Immigration and Nationality Act § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A).

159. INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v).

"intended to be a low screening standard for admission into the usual full asylum process."[160] Noncitizens who receive positive credible fear determinations are allowed to remain in the country to seek asylum before an IJ in removal proceedings. The next Part describes the Biden Administration's 2021 proposal to expand AO jurisdiction by allowing officers to retain cases after a positive credible fear determination and presents data on the new asylum process's outcomes thus far.

II.
ASYLUM PROCEDURES TODAY

After 1996, procedures for asylum applications remained relatively unchanged, though the agencies involved changed due to the Homeland Security Act's dissolution of the INS and restructuring of immigration functions. The newly created Department of Homeland Security (DHS) took over all immigration enforcement—including border protection, detention, and removal—and benefits-granting functions.[161] However, EOIR, which houses the immigration courts and BIA, remained within DOJ.[162]

This Part will outline (A) the Biden Administration's 2021 proposed and final rules, which create a new path for asylum seekers to seek asylum in expedited removal; (B) the reaction of advocates and scholars to the new process and the initial results of the process; and (C) the current paths to seek asylum.

A. The Biden Administration's Proposal

Following the creation of the expedited removal process in 1996, successive presidential administrations continued their attempts to deter asylum seekers from seeking safety in the United States and to speed up and ensure

160. 142 CONG. REC. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Orrin Hatch). Over the years, USCIS has subtly changed the AO lesson plan on credible fear to make it harder for asylum seekers to pass the interview. *See* CATH. LEGAL IMMIGR. NETWORK & AM. IMMIGR. LAWS. ASS'N, CREDIBLE FEAR LESSON PLANS COMPARISON CHART (2019), https://www.aila.org/library/updated-credible-fear-lesson-plans-comparison [https://perma.cc/H6RC-2D8K]. In February 2024, the Biden Administration proposed legislation that would have raised the credible fear standard from a "significant possibility" to a "reasonable possibility" in order to establish asylum eligibility. *See* Border Act of 2024, S. 4361, 118th Cong. § 202 (2024). Advocates warned that raising the standard would lead to forced returns of asylum seekers who had legitimate persecution claims under international legal standards. HUM. RTS. FIRST, RAISING THE CREDIBLE FEAR SCREENING STANDARD WILL ENDANGER LIVES BUT WON'T FIX THE BORDER 1 (2024), https://humanrightsfirst.org/wp-content/uploads/2024/03/Raising-the-Credible-Fear-Screening-Standard-fact-sheet.pdf [https://perma.cc/LJ24-LQ3B]. The proposed legislation ultimately failed to garner support from Republicans. *See* Stephen Groves, Rebecca Santana & Mary Clare Jalonick, *Border Bill Fails Senate Test Vote as Democrats Seek to Underscore Republican Resistance*, ASSOCIATED PRESS (May 23, 2024), https://apnews.com/article/border-immigration-senate-vote-924f48912eecf1dc544dc648d757c3fe [https://perma.cc/9DR8-ULMR].

161. 1 SHANE DIZON & POOJA DADHANIA, IMMIGRATION LAW SERVICE §§ 1:184, 1:186 (2d ed. 2008).

162. *About the Office*, EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/about-office [https://perma.cc/MNX5-ZSWJ].

removals. In response to large numbers of Central American minors and families seeking asylum, the Obama Administration revived and massively expanded the practice of family detention[163] and began subtly changing the AO lesson plan on conducting CFIs to make it harder for asylum seekers to receive positive determinations.[164] The Trump Administration took an even more draconian approach by, among other things, separating families seeking asylum, changing substantive asylum law through precedential Attorney General opinions, creating new bars to asylum, and forcing asylum seekers to remain in Mexico.[165] President Biden curtailed access to asylum by creating an entirely new path for asylum seekers that advocates argued sacrificed process in favor of expedience.

In August 2021, the DHS and DOJ proposed regulations that overhauled asylum claim procedures for the first time since the creation of expedited removal.[166] The departments explained that the regulations intended to reduce the strain on backlogged immigration courts by "replacing the current [asylum] system, within the confines of the law, with a better and more efficient one that will adjudicate protection claims fairly and expeditiously."[167]

The proposal's opening summary described how asylum claims at the southwest border had "skyrocketed over the years" and how the current asylum system "has proven unable to keep pace, resulting in large backlogs and lengthy adjudication delays."[168] When the current system was put in place, "the vast majority of southwest border encounters involved single adults from Mexico and relatively few asylum claims were filed."[169] However, since the mid-2010s, the composition of noncitizens arriving at the southwest border, claiming asylum in large numbers, has consisted largely of families with children and unaccompanied minors from Central America and other western hemisphere states.[170] Thus, even though overall encounters at the southwest border have been lower than in the 1990s and 2000s, "the demands on the U.S. asylum system have increased sharply."[171]

Under Biden's proposal, the Asylum Office would continue to conduct CFIs of noncitizens in expedited removal who claimed a fear of return or

163. *See* Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html [https://perma.cc/ZE5X-42QA].

164. *See* CATH. LEGAL IMMIGR. NETWORK & AM. IMMIGR. LAWS. ASS'N, *supra* note 160.

165. *See generally* NAT'L IMMIGRANT JUST. CTR., A TIMELINE OF THE TRUMP ADMINISTRATION'S EFFORTS TO END ASYLUM (2021), https://immigrantjustice.org/sites/default/files/content-type/issue/documents/2020-11/11-3-2020-asylumtimeline.pdf [https://perma.cc/MZA7-TJDH].

166. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906, 46906 (proposed Aug. 20, 2021) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235).

167. *Id.* at 46907.

168. *Id.*

169. *Id.* at 46908.

170. *Id.*

171. *Id.*

intention to apply for asylum; however, noncitizens who received positive credible fear determinations would no longer be placed in removal proceedings to seek asylum before immigration court.[172] Instead, the Asylum Office would retain jurisdiction to decide the merits of the asylum and other protection claims.[173] The Asylum Office would provide the noncitizen a non-adversarial "hearing" at which the asylum seeker could be represented by counsel.[174] The hearing would take place within forty-five days of the positive credible fear determination.[175]

If the AO denied the asylum seeker relief, they would issue the noncitizen a removal order.[176] This removal order would be final unless the asylum seeker affirmatively appealed the decision to an IJ within thirty days.[177] Rather than a full evidentiary hearing, the IJ's review would be a limited paper review based on the record presented to the AO and any additional arguments raised by the asylum seeker or DHS.[178] Either party could submit a written motion to introduce additional testimony or evidence, but that evidence could only be submitted if it was not "duplicative" of what was already considered by the AO and was "necessary" to develop the factual record.[179] To further keep the proceedings "more streamlined" than regular removal proceedings, the IJ would not consider alternative forms of relief.[180] Either party could appeal the IJ's decision to the BIA.[181]

The administration received over five thousand public comments on the proposal, including many by leading immigrant rights organizations such as the American Immigration Lawyers Association (AILA), the Center for Gender and Refugee Studies (CGRS), and HRF.[182] Advocates criticized the proposal for its many procedural deficiencies, focusing particularly on the lack of a full evidentiary hearing by an IJ for applicants denied by the AO, limitations on submission of evidence during the IJ review process, and the fast pace of

172. *Id.* at 46916.
173. *Id.*
174. *Id.* at 46918.
175. *Id.* at 46910 n.26.
176. *Id.* at 46919. In support of their proposal for "hearings," which give AOs the authority to adjudicate substantive asylum claims during expedited removal, the Departments cited to past recommendations, by the U.S. Commission on International Religious Freedom, ACUS, and the Migration Policy Institute, to allow AOs to grant asylum in the expedited removal process. *Id.* at 46917–18; *see also* sources cited *supra* note 89 (presenting ACUS's original 1989 proposal to create an Asylum Board).
177. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. at 46919.
178. *Id.* at 46920.
179. *Id.*
180. *Id.* at 46919.
181. *Id.* at 46921.
182. *See* Public Comments on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, *supra* note 10.

adjudications, which would make it difficult for asylum seekers to obtain representation.[183]

The interim final rule (IFR) walked back many of the most criticized aspects of the proposed regulations.[184] The IFR kept the original proposal to allow the Asylum Office to retain jurisdiction over the determination of asylum seekers' protection claims, following a positive credible fear determination, but it renamed the AO-provided "hearing" an "asylum merits interview" (AMI).[185] The AMI would be scheduled between twenty-one and forty-five days after the noncitizen had been served their positive credible fear determination and would involve a non-adversarial interview aimed at determining if the asylum seeker is eligible for asylum or related protection.

If the AO did not grant asylum, they would not issue a removal order but would automatically refer the asylum seeker to removal proceedings in immigration court.[186] The proposed evidentiary limits during the IJ review process were dropped, so IJs would now provide a full evidentiary hearing.[187] However, the proceedings before the IJ would be "streamlined" and "expedited" in comparison to normal immigration court proceedings.[188] The Master Calendar Hearing (MCH) would take place within thirty to thirty-five days of referral.[189] The merits hearing would be held between sixty and sixty-five days of the MCH.[190] These changes were intended to "ensure efficient adjudication while preserving fairness."[191]

Advocates appreciated that the DHS and DOJ abandoned the most extreme aspects of the proposed amendments but took issue with the abbreviated procedures during the IJ review process. CGRS summarized advocates' concerns:

> [W]e note the Rule's repeated emphasis on speed necessarily comes at the expense of procedural safeguards critical to avoiding the risk of *refoulement*. While an efficient asylum process is beneficial to both applicants and the government, it must also be fair. . . . Efficiency requires that applicants be afforded sufficient opportunity to exercise their rights to obtain counsel and present evidence so that the adjudicator can make conclusions based upon a complete record. The Rule sets up a series of short, arbitrary timelines and restrictions on continuances in an attempt to conclude case adjudication within 90 days but fails to

183. *See, e.g.*, Am. Immigr. Laws. Ass'n & Am. Immigr. Council, *supra* note 12, at 12–17.

184. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18078 (Mar. 29, 2022) (to be codified at 8 C.F.R. pts. 1003, 1208, 1235, 1240).

185. *Id.* at 18081.

186. *Id.*

187. *Id.* at 18082.

188. *Id.*

189. *Id.* at 18100.

190. *Id.*

191. *Id.* at 18082.

account for individual circumstances of applicants seeking asylum.[192]

Scholars similarly criticized the IFR, writing that the rule's unrealistic deadlines, combined with existing asylum law corroboration requirements, made it impossible for lawyers to provide competent and diligent representation to asylum seekers, thereby violating their ethical duties as lawyers.[193]

Despite criticizing procedural aspects of the proposal, many advocates supported expanding the jurisdiction of the Asylum Office. Because AO interviews are "non-adversarial," advocates agreed that the Asylum Office is the better forum for deciding asylum cases than immigration court.[194] For example, although the leading bar association for immigration lawyers expressed "strong reservations" about the Administration's overall proposed regulatory changes, it supported the proposal to expand the Asylum Office's jurisdiction because the "non-adversarial process . . . is appropriate for processing claims of individuals, many of whom have suffered substantial trauma prior to their arrival in the United States."[195]

B. Implementation and Results of Asylum Merits Interviews

DHS initiated a phased implementation process for the AMIs in May 2022.[196] Initially, only asylum seekers who met the following two criteria were included: those who (1) received a positive credible fear determination while detained at the South Texas ICE Processing Center and the Houston Contract Detention Facility and (2) indicated an intent to reside in or near Boston, Chicago, Los Angeles, Miami, New York, Newark, or San Francisco.[197] DHS later began conducting CFIs at other detention centers in Texas and California for potential referrals for AMIs and added New Orleans and Washington, D.C. as destination cities.[198] In October 2023, DHS began referring certain families

192. Ctr. for Gender & Refugee Stud., *supra* note 12, at 24.

193. Philip G. Schrag, Jaya Ramji-Nogales & Andrew I. Schoenholtz, *The New Border Asylum Adjudication System: Speed, Fairness, and the Representation Problem*, 66 HOW. L.J. 571, 617–18 (2023).

194. *See, e.g.*, Am. Immigr. Laws. Ass'n & Am. Immigr. Council, *supra* note 12, at 2–3; Ctr. For Gender & Refugee Stud., *supra* note 12, at 13; Pangea Legal Servs., *supra* note 12, at 13; Cent. Am. Res. Ctr. of N. Cal., *supra* note 12, at 2.

195. Am. Immigr. Laws. Ass'n & Am. Immigr. Council, *supra* note 12, at 3.

196. *Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, U.S. DEP'T OF HOMELAND SEC. (May 26, 2022), https://www.dhs.gov/news/2022/05/26/fact-sheet-implementation-credible-fear-and-asylum-processing-interim-final-rule [https://perma.cc/83TU-GLQH].

197. REBECCA GENDELMAN, HUM. RTS. FIRST, ASYLUM PROCESSING RULE AT ONE YEAR: URGENT FIXES NEEDED TO PROVIDE FAIR, EFFICIENT AND HUMANE ADJUDICATIONS 8 (2023), https://humanrightsfirst.org/wp-content/uploads/2023/06/Asylum_Processing_Rule_One_Year_Report_June-2023.pdf [https://perma.cc/4VPU-SZ6H].

198. *Id.*

who were not detained and who already resided in one of the destination cities to the AMI program.[199]

The majority of AMIs have been conducted by AOs working at Asylum Offices in Newark, New York, Miami, and San Francisco.[200] According to the latest DHS data on the AMI process (through April 2023), AOs have granted asylum to 23 percent of asylum seekers, referred 43 percent to removal proceedings, and closed 33 percent of cases for administrative reasons.[201] One percent of cases remain pending.[202]

In June 2023, HRF published a report analyzing the AMI process after one year.[203] The report found numerous issues with the process that caused AOs to fail to grant asylum to legitimate asylum seekers.[204] In one case, a young Afro-Colombian woman sought asylum because she was attacked and received death threats because of her race and cooperation with the police.[205] The AO, who was not familiar with the record (perhaps because of the expedited timelines), found her not credible and referred her to immigration court.[206] The asylum seeker was demoralized by her AMI experience and almost withdrew her asylum claim.[207] HRF was able to represent her in immigration court, where the IJ granted asylum after recognizing how trauma impacted the asylum seeker's testimony.[208]

C. A Summary of Paths to Seek Asylum

There are currently four paths for noncitizens to seek asylum: (1) affirmative, (2) defensive, (3) defensive originating in expedited removal, and (4) expedited. AOs play a role in all paths with exception to the defensive one.

1. The Affirmative Process

Noncitizens who are not in removal proceedings can apply for asylum proactively ("affirmatively") by filing an application with the Asylum Office.[209] These noncitizens receive a non-adversarial interview with an AO at the office

199. *Asylum Processing Rule Cohort Reports*, OFF. OF HOMELAND SEC. STAT. (Dec. 6, 2024), https://www.dhs.gov/immigration-statistics/special-reports/asylum-processing-rule-report [https://perma.cc/P6CC-GV3X].

200. GENDELMAN, *supra* note 197, at 8; *see Asylum Processing Rule Cohort Reports*, *supra* note 199.

201. *See Asylum Processing Rule Cohort Reports*, *supra* note 199 (demonstrating that out of 1,820 AMI cases between June 2022 and April 2023, 420 were granted asylum, 780 were referred to an IJ, six hundred were administratively closed, and twenty remained pending).

202. *See id.* (finding that, as of April 2023, twenty AMI cases out of 1,820 are pending completion).

203. *See generally* GENDELMAN, *supra* note 197.

204. *Id.* at 3–5.

205. *Id.* at 13.

206. *Id.*

207. *Id.*

208. *Id.* at 13–14.

209. *See* ANKER & CHASE, *supra* note 14, § 1:8.

with jurisdiction over their application.[210] The noncitizen may be represented, and there is no opposing counsel.[211]

Affirmative claims are scheduled on a last in, first out ("LIFO") basis under which the Asylum Office gives precedence to newer applications over older ones.[212] The Office attempts to schedule newly filed applications within twenty-one days or less.[213] Applicants who are not scheduled within twenty-one days are placed in the affirmative backlog and generally wait years for their interview.[214]

Noncitizens who are not granted asylum by the AO and do not have other valid immigration status at the time of the decision (most applicants) receive a charging document that initiates removal proceedings.[215] The AO forwards the application, all evidence submitted by the noncitizen, and the charging document to the immigration court.[216]

The noncitizen may now seek asylum as a defense to removal before an IJ in adversarial proceedings where the government is represented by a trial attorney. Generally, in immigration court, the noncitizen's representative conducts direct examination of the noncitizen and witnesses, and the trial attorney conducts cross examination.[217] Both parties may make closing arguments.[218] The IJ provides de novo review of the claim.[219] If the IJ denies asylum, the noncitizen may appeal the decision to the BIA, then the federal circuit court, and even the Supreme Court.[220]

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210. 8 C.F.R. § 208.9(a)–(b) (2024). There are currently eleven Asylum Offices: Arlington, Virginia; Bethpage (Long Island), New York; Boston, Massachusetts; Chicago, Illinois; Houston, Texas; Miami, Florida; Newark, New Jersey; New Orleans, Louisiana; San Francisco, California; Tampa, Florida; and Tustin (Los Angeles), California. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., ASYLUM APPLICATION PROCESSING: FISCAL YEAR 2022 REPORT TO CONGRESS 2 (2023), https://www.dhs.gov/sites/default/files/2023-08/23_0717_uscis_asylum_application_processing.pdf [https://perma.cc/46YU-M2WC]. AOs go on circuit rides to other USCIS offices to conduct asylum interviews for those applicants who live far from a principal Asylum Office. *Id.*

211. *See* 8 C.F.R. § 208.9(b).

212. *USCIS to Take Action to Address Asylum Backlog*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 31, 2018) https://www.uscis.gov/archive/uscis-to-take-action-to-address-asylum-backlog [https://perma.cc/DDQ5-G5W3].

213. *Id.*

214. ADES & KIZUKA, *supra* note 31, at 1–2.

215. 8 C.F.R. § 208.14(c)(1) (2024).

216. ASYLUM DIV., U.S. CITIZENSHIP & IMMIGR. SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 80 (2025), https://www.uscis.gov/sites/default/files/document/guides/AAPM.pdf [https://perma.cc/D47T-SMWC].

217. EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., IMMIGRATION COURT PRACTICE MANUAL § 4.16(d) (2020), https://www.justice.gov/eoir/foialibrary/icpm01122021/dl [https://perma.cc/WB3T-98JD].

218. *Id.*

219. EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS 3 (2009).

220. 8 U.S.C. § 1252; 8 C.F.R. §§ 1003.1(b), 1003.38(a) (2024); ANKER & CHASE, *supra* note 14, § 1:10.

Noncitizens who maintain their lawful immigration status at the time of the AO's decision and are not granted asylum will first receive a NOID, which they have an opportunity to respond to.[221] If the AO is satisfied by their response, they will receive asylum.[222] If not, the AO will deny asylum but not place them in removal proceedings.[223]

2. The Defensive Process Under INA § 240

Noncitizens who did not apply for asylum affirmatively may apply for the first time after removal proceedings are initiated against them under INA § 240.[224] These noncitizens do not have access to the Asylum Office and may only seek asylum as a defense to removal before the IJ.[225] The defensive asylum process starts with an MCH, where the noncitizen pleads to the charges in the charging document and files the asylum application.[226] The IJ then schedules an individual hearing where, just as described above for noncitizens referred to proceedings by the AO, the IJ will conduct an adversarial hearing on the claim.[227]

3. The Defensive Process Originating in Expedited Removal

All noncitizens in expedited removal who claim a fear of persecution or indicate an intention to apply for asylum are initially referred to an AO for a

221. ASYLUM DIV., *supra* note 216, at 70.

222. *Id.* at 71.

223. *Id.*

224. *See* 8 C.F.R. § 1208.2(b) (2024).

225. The one exception to this rule is for unaccompanied children. Unaccompanied children who are in removal proceedings are permitted to seek asylum before the Asylum Office. *Minor Children Applying for Asylum by Themselves*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves [https://perma.cc/6GDR-BT7Y].

226. EXEC. OFF. FOR IMMIGR. REV., *supra* note 217, § 4.15. The MCH is a brief initial appearance in immigration court where the IJ takes pleadings, advises the respondent of their rights and consequences of failing to appear, sets deadlines for filing applications, and schedules merits hearings to adjudicate applications for relief from removal (e.g., asylum). *Id.*

227. *Id.* § 4.16. In May 2023, the Biden Administration published final regulations making noncitizens at the southern border ineligible for asylum if they: (1) traveled through a country other than their country of citizenship and (2) failed to first seek asylum or other protection in those countries of passage. AM. IMMIGR. COUNCIL, CBP ONE: AN OVERVIEW 2 (2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/cbp_one_an_overview_0.pdf [https://perma.cc/HQC6-4JMR]. However, this bar would not apply if the noncitizen made an appointment for processing through the CBP One mobile application ("CBP One app"). *Id.* In January 2025, the Trump Administration shut down the CBP One app, cutting off access to asylum for asylum seekers at the southern border in expedited removal. Elliott Davis, Jr., *Explainer: The CBP One App, and Why Trump Killed It*, U.S. NEWS & WORLD REP. (Jan. 24, 2025), https://www.usnews.com/news/national-news/articles/2025-01-24/what-is-the-cbp-one-app-and-why-did-trump-kill-it [https://perma.cc/728N-VAGF]. The legality of this action is currently being litigated. Rebecca Santana, *ACLU Sues Trump Administration for Shutting Down Southern Border Asylum Access*, PBS NEWS (Feb. 3, 2025), https://www.pbs.org/newshour/politics/aclu-sues-trump-administration-for-shutting-down-southern-border-asylum-access [https://perma.cc/VUJ6-3GEW].

CFI.[228] Noncitizens who receive a negative credible fear determination from their CFI may seek review of the AO's finding before an IJ.[229] If the IJ concurs with the AO's finding, the expedited removal order is enforced.[230] The noncitizen may also file a request for reconsideration with the Asylum Office, but the IJ's decision is not reviewable by the BIA or an Article III court.[231] Most noncitizens who receive a positive credible fear determination or whose negative determination is overturned by an IJ will be placed in removal proceedings under INA § 240, where they can seek asylum through the defensive process described above.[232]

4. The Expedited Process

Currently, a small number of noncitizens who receive a positive credible fear determination are not placed in removal proceedings under INA § 240 but are instead selected to go through the newly created expedited asylum process. These noncitizens receive a non-adversarial AMI with an AO within twenty-one to forty-five days after they are served with the positive determination.[233] AMIs and non-adversarial interviews by AOs in the affirmative process are conducted in a similar manner with exception to the following major changes: (1) AMIs have an expedited timeline and are scheduled between twenty-one to forty-five days after the noncitizen has been served with the positive credible fear determination, (2) during AMIs, the Asylum Office provides an interpreter for asylum seekers who require one, (3) if the AO determines the asylum seeker is not eligible for asylum, they will then consider eligibility for withholding of removal or protection under the Convention Against Torture, and (4) after the AMI, the Asylum Office prepares a verbatim transcript of the interview to be used during the IJ review process.[234]

If the AO does not grant asylum, they automatically refer the asylum seeker to removal proceedings in immigration court.[235] The proceedings before the IJ are conducted like immigration court proceedings under INA § 240, but they occur at a faster pace with the MCH taking place within thirty to thirty-five days of referral and the merits hearing within sixty to sixty-five days of the MCH. [236]

228. *See* 8 C.F.R. §§ 208.2(a)(2), 208.30(b) (2024).
229. *See id.* §§ 208.2(b), 208.30(g).
230. *See id.* § 208.30(g)(1)(i).
231. *See id.*; *id.* § 1003.42(f)(2).
232. *See id.* § 208.30(f).
233. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18081 (Mar. 29, 2022) (to be codified at 8 C.F.R. pts. 1003, 1208, 1235, 1240).
234. *See id.* at 18086 ("With limited exception, these amendments generally provide that the same procedures applicable to affirmative asylum interviews will also apply to interviews under this rule, such as the right to have counsel present, 8 C.F.R. 208.9(b), at no expense to the Government.").
235. *Id.*
236. *Id.* at 18100.

The next Part highlights the Asylum Office's many failures in conducting affirmative asylum interviews, which also illuminate why its jurisdiction should not have been expanded.

III.
THE FAILURE OF THE ASYLUM OFFICE

This Part documents how policymakers' vision for the asylum adjudication system, described in Part I.B–C, has failed and describes the negative impact of these failures on asylum seekers, attorneys, AOs, and the asylum system more broadly. In addition, it also presents theories as to *why* the Asylum Office has failed.

This Part draws on interviews that my students and I conducted with eleven former AOs (including former senior officials in the Asylum Division), twenty-two immigration attorneys, an IJ, and seven asylum seekers. Eight of the former AOs worked at the New York Asylum Office for anywhere between one year and over a decade. The remaining three AOs worked at the Newark and San Francisco offices. Most of the attorneys interviewed primarily practice in the New York area, and the asylum seekers all received interviews at the New York Office.

I chose the New York Asylum Office as the primary case study for this Article for three reasons. First, the New York Office was selected to participate in the AMI process.[237] Thus, qualitative data from that Office will also reflect on the merits of the AMI process. Second, the New York Office is consistently one of the most productive offices in terms of the number of interviews conducted and decisions rendered.[238] Third, as described in detail below, the Office presents the starkest example of the problems with the affirmative asylum system today.

This Article also draws on empirical and qualitative assessments of the affirmative asylum system by asylum advocates. In particular, this Article examines work by advocates critiquing the Boston and the Houston asylum offices.[239] Finally, this Article draws on publicly available sources that evaluate the various asylum offices.[240]

237. U.S. DEP'T OF HOMELAND SEC., *Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, *supra* note 196.

238. *See, e.g.*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., AFFIRMATIVE ASYLUM STATISTICS: SEPTEMBER 2019, https://www.uscis.gov/sites/default/files/document/data/PEDAffirmativeAsylumStatisticsFY2019.pdf [https://perma.cc/7SVB-NA3B] (showing that the New York Asylum Office is most often the office that interviews and completes the most cases).

239. *See, e.g.*, REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44 (studying why the Boston Asylum Office grants so few asylum cases).

240. In particular, I examined Glassdoor reviews of the Asylum Offices that were posted by current and former AOs.

A. The Banality of Evil: The Culture of the Asylum Office[241]

Policymakers believed that creating a professional corps of AOs would resolve the issues that advocates and administrators raised about the INS examiners who previously adjudicated asylum applications.[242] Because AOs would receive specialized training and focus solely on asylum adjudications, policymakers believed that they would more often reach fair and correct outcomes.[243] However, in our interviews, former AOs described referring asylum seekers to immigration court simply because it was faster than granting claims. Former AOs also shared how they were evaluated on the speed at which they interviewed and adjudicated cases.[244] Significantly, this was true even when the asylum seeker had a valid claim to asylum and even if the AOs had come to the job with good intentions, often from humanitarian backgrounds.[245]

AOs at the New York Asylum Office interview applicants Monday through Thursday.[246] On Fridays, they write their decisions and conduct re-interviews if needed.[247] The New York Asylum Office does not preassign cases.[248] AOs receive their cases on the day of the interview. While the asylum seeker and their attorney sit in the waiting room, the AOs must familiarize themselves with sometimes massive filings, run security checks, and prepare paperwork.[249] AOs

241. This Section, and the ones that follow, demonstrate how Bijal Shah's theory of "administrative subordination" applies to the affirmative asylum system. Accounts of discrimination or bias in the administrative state are often "understood to be the result of individualized bureaucratic discrimination." Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603, 1606 (2024). However, Shah argues that administrative injuries, such as those committed by the immigration system against noncitizens, are more than just "the result of bureaucratic bias alone." Rather, "*[i]nstitutional systems* . . . have led to problematic administrative policies and outcomes." *Id.* at 1608. Administrative agencies prioritize institutional interests, such as efficiency, cost-saving, reducing burdens, and preserving resources, "as a matter of discretion, with the understanding that doing so is beneficial to administration." *Id.* at 1610. However, these same interests can harm marginalized communities. *Id.* at 1612. Shah "refers to the interplay between bureaucratic institutional priorities and harm to minorities as 'administrative subordination'" and provides examples of how this phenomenon happens in the administration of immigration law. *Id.* at 1613. For example, ICE uses arrest records for efficiency and cost-saving to determine who to place in removal proceedings "even if the targeted noncitizens were never convicted of a crime, because arrest records serve as inexpensive and accessible proxies for immigration data that would be more difficult and expensive to identify with greater precision." *Id.* at 1614. Similarly, in this Part, I show how institutional goals of the Asylum Office—such as efficiency, cost-saving, fraud detection and national security—have been applied on the ground by AOs in ways that harm asylum seekers. *See infra* Part III.A–H.

242. *See, e.g.*, IMMIGR. & NATURALIZATION SERVS., *supra* note 73, at ii–iii, 32–33.

243. Martin, *supra* note 18, at 727–31; BEYER, STRIKING A BALANCE, *supra* note 40, at 3–8; Beyer, *Establishing the Asylum Corps*, *supra* note 40, at 466–67.

244. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 32–38.

245. *Id.* at 33–34, 42.

246. *Id.* at 28.

247. *Id.*

248. *Id.*

249. *Id.*

also do not know in advance how many applicants they will interview on a given day.[250]

On top of the stress created by this uncertainty, AOs described being pressured by management to move through interviews and write decisions as quickly as possible.[251] AOs who could not keep up were regularly fired and walked out of the office.[252] As a result, interview days "[were] filled with unpredictability, panic, and intense pressure."[253] To keep up, AOs described routinely skipping or working through lunch and taking sick days to catch up.[254] Similarly, a study of the Boston Asylum Office found that many former AOs "felt as though they needed to rush through parts of their preparations and interviews or cut corners to adequately do their jobs."[255]

Granting asylum requires an AO to make several findings, including that the applicant was harmed or fears future harm; that the harm rises to the level of "persecution" and was on account of a protected ground; and that no bars to asylum apply.[256] To refer to immigration court, the AO need only show that one of these requirements has not been met.[257] An AO summarized, "It's definitely easier to refer. There's less work that you have to do . . . if you're going to refer, you really only need to go through . . . the element that knocks it out."[258] Another former AO explained to advocates studying the Boston Asylum Office that

> It's always easier to refer a case. You want to give a good record of evidence. But, all things being equal, no interview is perfect. And the less you develop the record, the more injurious the record. . . . [There are] a lot of shortcuts if you want to refer.[259]

Former AOs further explained that granting asylum also takes longer because supervisors often sent grants back for further justification or asked the AO to re-interview the applicant.[260] AOs described this as a way for supervisors to punish them for trying to grant. "It was a 'punishment' to have your cases sent back," one former officer explained, because it meant less time to write decisions for other cases. "If you fall behind in submitting your assessments, you have to have more check ins with your supervisor . . . that's part of the punishment."[261]

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250. *Id.*
251. *Id.* at 28–29.
252. *Id.* at 29, 42, 45.
253. *Id.* at 28.
254. *Id.* at 29.
255. REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44, at 18.
256. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 33.
257. *Id.*
258. *Id.*
259. REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44, at 10 (alterations in original).
260. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 33.
261. *Id.* (alteration in original). A report on the Boston Asylum Office also found that "many AOs are hesitant to write an asylum decision that they believe their [supervisor] may disagree with . . . because . . . doing so can create substantially increased workloads." REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44, at 12. If the supervisor does not agree with the AO's decision, they "may require the AO to further substantiate their decision by re-interviewing the asylum seeker, conducting

Other AOs described how when they tried to grant asylum, despite the pressure to refer, supervisors punished them with negative performance reviews.[262] One former AO described a time when they strongly believed that an applicant should be granted asylum.[263] When their supervisor disagreed, the AO tried to seek the help of higher ups.[264] "After that I got nine cases returned to me. I had never had cases returned to me. But because I disagreed about this case, I felt like I was being punished. I was evaluated around that time and there was a lot of bogus stuff in the evaluation and this came right after a decision where I wanted to grant someone."[265] AOs working at other asylum offices have similarly "indicated that they were often hesitant or unwilling to disagree with their [supervisor] out of fear that they might receive a negative mark on their [performance review]."[266]

In contrast, supervisors readily accepted AO decisions referring asylum seekers to immigration court. One AO explained, "You never have to make a case for a referral beyond the minimum . . . but there's so much pressure for going way above and beyond the legal standard to establish a grant."[267]

In light of these pressures, one AO rationalized their decision to simply refer cases as follows: "I'm going to have to really, really, really fight with the supervisor to be able to have a hope of granting this and then they might not even let me do that. I don't have time to fight with them. And so, a lot of times I just referred [cases] because it was easier."[268] Another former AO explained to advocates studying the Boston Asylum Office that "You cannot fight for every case or you'll seem combative and insubordinate so you have to make decisions which cases you are willing to go against the grain and which ones you fall in line."[269]

B. Passing the Buck: Letting the Courts Figure It Out

Although policymakers expected that the Asylum Office would quickly grant meritorious asylum cases and only refer complicated or frivolous cases, the Asylum Office refers a staggering number of meritorious asylum seekers to immigration court. This trend started in earnest in 2006. Prior to 2006, immigration courts granted asylum to around 44 percent of asylum seekers referred by the Asylum Office.[270] Starting in 2006, immigration courts granted

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further fact investigation, or researching more country conditions. . . . Accordingly, disagreement with [a supervisor] can be fatal to an AO being able to keep up with their workload." *Id.*

262. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 33.

263. *Id.* at 34.

264. *Id.*

265. *Id.*

266. REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44, at 13.

267. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 33.

268. *Id.* at 42.

269. REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44, at 13.

270. *See Asylum Grant Rates Climb Under Biden*, TRAC IMMIGR. (Nov. 10, 2021), https://tracreports.org/immigration/reports/667/ [https://perma.cc/HZ3P-DKRB].

51 percent of cases referred by the Asylum Office.[271] Grant rates for affirmative referrals rose again in 2008, reaching a high in 2016 when immigration courts granted 83 percent of affirmative asylum referrals.[272] The most recent statistics from TRAC Immigration reveal that IJs now grant 76 percent of affirmative referrals.[273]

These startling statistics suggest that AOs may be passing the burden of properly adjudicating asylum claims to IJs. This failure may be particularly egregious in the New York, Miami, Tampa, and Houston offices, which grant a tiny fraction of affirmative asylum applications.[274] In FY 2022, these offices granted asylum at a rate of 6 percent, 13 percent, 12 percent, and 16 percent respectively.[275] In contrast, during the same time, the San Francisco Office granted asylum at a rate of 40 percent, Arlington at 43 percent, Chicago at 29 percent, and Los Angeles at 29 percent.[276] A former AO who worked at the New York Asylum Office for over two decades confirmed that AOs regularly "pass the buck" to immigration courts. The AO explained to the author that there is "sort of an attitude to say, let the courts figure it out if it's all a lie."[277]

The theory that AOs are "passing the buck" to IJs is further supported by immigration advocates. HRF and many pro bono attorneys have "long observed" that the Asylum Office appears to categorically refer certain types of meritorious asylum claims, including claims: (1) where the asylum seeker has not suffered past persecution but has a well-founded fear of future persecution, (2) based on imputed political opinion, and (3) filed after the one-year filing deadline but where the asylum seeker qualifies for an exception.[278]

C. The Abandoned Non-Adversarial Mandate

Policymakers believed that preserving asylum seekers' ability to appear before the Asylum Office was valuable because non-adversarial interviews are

271. *See id.*

272. OFF. OF PLAN., ANALYSIS, & STAT., U.S. DEP'T OF JUST., FY 2016 STATISTICS YEARBOOK K3 (2017), https://www.justice.gov/eoir/page/file/fysb16/dl [https://perma.cc/FB2J-U3ZH]; *Asylum Grant Rates Climb Under Biden*, *supra* note 270.

273. *Speeding Up the Asylum Process Leads to Mixed Results*, TRAC IMMIGR. (Nov. 29, 2022), https://tracreports.org/reports/703/ [https://perma.cc/T26Z-DWHA].

274. *See infra* Table 1.

275. *Id.*

276. *Id.*

277. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 50.

278. Hum. Rts. First, Comment Letter on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 40 (Oct. 18, 2021), https://www.regulations.gov/comment/USCIS-2021-0012-1452 [https://perma.cc/5RTH-3TC2]; *see also* AM. IMMIGR. LAWS. ASS'N, HIGH-STAKES ASYLUM: HOW LONG AN ASYLUM CASE TAKES AND HOW WE CAN DO BETTER 18 (2023), https://www.aila.org/aila-files/91508EE0-B02C-4D8F-869C-78B697B68E56/23061202.pdf [https://perma.cc/N5VB-A4JE] ("Asylum attorneys also report [that] a significant number of [Asylum Offices] automatically referred asylum applications because of one-year filing deadline issues, despite potential exceptions to the one-year filing bar.").

less traumatic than adversarial removal proceedings.[279] AOs are instructed that they "must conduct the entire interview in a non-adversarial manner," and they receive detailed training on how to accomplish this.[280] AO training materials explain that "[a] non-adversarial interview requires a cooperative approach between you and the applicant."[281] Under this approach, "[w]hile the applicant must establish eligibility, you have a duty to fully and fairly develop the record."[282] AOs are taught that they are "a neutral decision-maker, not an advocate for either side."[283] AOs must therefore maintain a "neutral and professional demeanor" throughout the interview, even if the interviewee, attorney, or interpretation issues make that challenging. AOs must not allow their personal feelings to impact the quality of the interview or decision.[284] It is "inappropriate" for an AO "to interrogate or argue with any interviewee."[285] The non-adversarial mandate encompasses not only the manner of questioning "but also the tone and atmosphere in which [AOs] must conduct interviews."[286] AOs "should not tap the desk impatiently, ask a rapid series of leading questions, shake [their] head or laugh in disbelief, or roll [their] eyes."[287]

Similarly, AOs are instructed that "[y]ou and the representative are not adversaries," rather "you . . . share a cooperative role in developing and clarifying the merits of the interviewee's claim."[288] AOs are supposed to permit the representative to make a closing statement (although they have discretion to limit the length or request it in writing), comment on the evidence, and ask the asylum seeker additional questions.[289]

However, the immigration attorneys and asylum seekers we interviewed described Asylum Office interviews that resembled cross-examinations of hostile witnesses, with AOs raising their voice at asylum seekers, asking questions in a rapid-fire manner, not letting asylum seekers explain their answers, asking needlessly traumatizing or repetitive questions, and demanding "yes or no" answers.[290]

One attorney stated that interviews with AOs are "full of hostility, aggression and disbelief . . . there is a disconnect between what they believe they

279. *See* Martin, *supra* note 18, at 745–50.
280. RAIO DIRECTORATE, *supra* note 29, at 16. *See generally id.*
281. RAIO DIRECTORATE, U.S. CITIZENSHIP & IMMIGR. SERVS., RAIO COMBINED TRAINING COURSE: CREDIBILITY 11 (2016).
282. *Id.*
283. RAIO DIRECTORATE, *supra* note 29, at 14.
284. *Id.*
285. *Id.*
286. *Id.*
287. RAIO DIRECTORATE, *supra* note 281, at 38.
288. *Id.* at 23.
289. *Id.*
290. *See* AHMED, CRIM & RAFSANJANI, *supra* note 1, at 24–26.

are doing and what they're actually doing."[291] Another attorney shared a story of an AO who was

> just screaming at the client because [the AO] wanted a yes or no answer and the client didn't have a yes or no answer. Sometimes you don't have a yes or no. Clients feel like they need to explain themselves because this is their only opportunity. And the officer just kept saying that's not what I want to know! No! That's not what I want to know![292]

An asylum seeker explained how, in their interview, the AO "asked questions that repeated many times in different forms. [My attorney] had prepared me for this and I tried to answer as best I could. It did feel like the officer had the intention to confuse me."[293]

One attorney described a particularly egregious interaction with an AO. During their client's interview, the attorney noticed that the interpreter was struggling to keep up because the AO was speaking rapidly and asking complicated questions.[294] The attorney asked the officer to slow down, but the officer told the attorney that they were not allowed to speak.[295] When the attorney tried to clarify that they were trying to help the interpreter,[296] the officer threatened to call security, declaring, "This is my interview!"[297] Eventually, the attorney requested a supervisor to intervene, and the interview was rescheduled.[298] The attorney recalled that their client was in "floods of tears [and] completely hysterical."[299] The client said that "[they'd] never seen someone so abusive."[300]

Despite AO training materials calling for AOs and attorneys to share a "cooperative role," attorneys described how AOs treated them with the same hostility directed at asylum seekers. One attorney described how AOs "sit attorneys in a corner and tell you you're not allowed to speak . . . ."[301] Another explained that AOs "disdain attorneys" and "look at us like . . . some sort of like impediment to their job."[302]

An important role of the asylum interview is to help AOs determine whether the asylum seeker is credible.[303] Because of the difficulty of ascertaining credibility in asylum cases due to trauma, language barriers, and cultural

291. *Id.* at 24 (alteration in original).
292. *Id.*
293. *Id.* at 25.
294. *Id.* at 22.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *See* RAIO DIRECTORATE, *supra* note 281, at 34.

differences (among other things),[304] AOs receive detailed training on how to make accurate credibility decisions.[305] AOs are instructed that "a negative credibility finding should accurately describe significant material flaws in consistency, detail, and/or plausibility."[306] However, instead of taking this duty to heart, the AOs we interviewed admitted to gaming credibility determinations by using them as a way to quickly refer to immigration court.[307] "If you're under pressure for not meeting your numbers, you wanted credibility issues because they are the fastest cases to write up," one former officer explained.[308] Another AO admitted that by their third week interviewing asylum seekers, they "100%" began *searching* for credibility issues in testimony to quickly refer.[309] Yet another AO admitted that they "sort of started leaning into credibility, mostly because it was faster to write decisions."[310] Similarly, at the Boston Asylum Office, AOs focused on "minor discrepancies about peripheral matters" to quickly refer clients based on a lack of credibility.[311]

Immigration attorneys agreed that AOs "are really looking for a reason not to approve" and that they do this by "narrow[ing] in" on immaterial details even though their training on credibility specifically instructs them to consider only *material* inconsistencies.[312] One attorney shared a story in which an AO accused their client of lying because the client said that an event occurred on the night of December 31, but the supporting evidence said it occurred on the morning of January 1.[313] "It was like New Year's Eve, New Year's Day . . . a matter of a couple of hours," explained the attorney.[314] However, the AO found the discrepancy significant and implied that this minor inconsistency meant that the event may not have occurred at all. The AO argued, "If this date is important, you would remember exactly when it happened."[315] Another attorney described a case where their client had received a threatening letter by certified mail.[316] The AO demanded that the asylum seeker recite the certification number from memory:

> My client was so confused. [They were] like, I don't know. It was eight years ago. Had you interviewed me eight years ago when I applied for asylum, I still wouldn't know that answer . . . It was outrageous. In what

304. *See id.* at 40–46.
305. *See generally id.*
306. *Id.* at 15.
307. *See* AHMED, CRIM & RAFSANJANI, *supra* note 1, at 37–38.
308. *Id.* at 38.
309. Zoom Interview by Nazanin Rafsanjani with Unnamed Asylum Officer (Mar. 10, 2023).
310. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 38.
311. REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44, at 20–21.
312. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 37–38; *see* RAIO DIRECTORATE, *supra* note 281, at 15.
313. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 37–38.
314. *Id.* at 38.
315. *Id.*
316. *Id.* at 37.

> world would an American know that? I don't even know someone else's phone number, let alone a USPS registration number. The [AO] at multiple points said, why? Why is it that . . . you cannot tell me the number that I'm asking you for?[317]

Immigration attorneys familiar with the Boston Asylum Office have also reported that "AOs appear to be finding the easiest way to refer or deny cases" and that they do this by "focus[ing] on finding . . . immaterial inconsistences."[318]

Attorneys described how it is challenging to address inappropriate AO behavior because AOs play the role of both judge and jury. As one attorney explained:

> What's my duty to my client? . . . Like, do I try to stop this from happening because it's inflicting harm on my client? . . . But then, if I stop it, does that inflict more harm? Because the officer is going to punish me or my client for [interfering] and then won't grant the case? . . . So it [is] an impossible decision in that moment.[319]

D. Legally in over Their Heads

Immigration attorneys further reported that many AOs do not understand asylum or other basic immigration law, even though they receive specialized training.[320] Despite AOs' lack of knowledge, one attorney reported that, "They're resistant to having us explain the law to them and even to reading the memo we've submitted."[321] As a result, "it [is] a real struggle . . . to get the basic case across."[322] An attorney we interviewed described receiving a bewildering referral for a case where the AO found that the applicant had not suffered persecution, even though the applicant had lost the use of their hand because of the harm they suffered.[323] In another case, this attorney described an AO who did not seem to understand that there are legal exceptions to the one-year filing deadline for asylum.[324]

Another attorney described an interview where an AO repeatedly asked the client for proof that they had deferred action under the Deferred Action for Childhood Arrivals (DACA) program.[325] The asylum seeker presented the AO with their work permit that showed it was granted under the DACA category.[326]

317. *Id.* (second and fourth alterations in original).
318. REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44, at 10.
319. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 22 (alterations in original).
320. *Id.* at 34–35.
321. *Id.* at 34.
322. *Id.*
323. Zoom Interview by Lubaba Ahmed with Unnamed Immigration Attorney No. 1 (Sept. 10, 2022) (on file with author).
324. *See id.*
325. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 34.
326. *Id.*

Neither the AO nor their supervisor grasped that the work permit was legal proof that the asylum seeker had deferred action.[327]

Former AOs corroborated these attorney reports. One former AO explained that some AOs are not lawyers and struggle to make sense of asylum law. This AO was surprised when the New York Office hired them because they had no legal training, and, as an AO, felt "in over [their] head legally."[328] Another former AO stated bluntly, "Many asylum officers are not applying the right legal standard."[329]

According to advocates, AOs at the Houston Asylum Office regularly fail to apply the correct legal standards when conducting CFIs, resulting in bona fide asylum seekers being removed back to their home countries where they face harm.[330] Advocates have filed a complaint against the Houston Office with the DHS Office of Civil Rights and Civil Liberties (CRCL) based on AOs' "systemic deficiencies" in adjudicating CFIs.[331] CRCL retained the complaint and opened an investigation into the Houston Asylum Office.[332]

E. Refugee Roulette Redux: Inconsistent Grant Rates Across Offices

Policymakers believed that having a specially trained AO corps would lead to greater consistency in decisions. In reality, dramatic differences in office grant rates, which were first highlighted in the "refugee roulette" study,[333] persist to this day and appear to be growing. For example, in FY 2023, while the Arlington and San Francisco Asylum Offices granted applications at rates of 77 percent and 62 percent respectively, the New York Office granted a mere 6 percent of applications, and the Miami Asylum Office granted just 3 percent.[334]

327. *Id.*
328. *Id.*
329. *Id.* at 35.
330. Letter from Am. Gateways et al. to Peter Mina & Joseph V. Cuffari, *supra* note 30, at 12.
331. *Id.* at 1.
332. *See generally* Memorandum from Dana Salvano-Dunn, Compliance Branch Dir., Off. for C.R. & C.L., & Susan Mathias, Assistant Gen. Couns., Off. of the Gen. Couns., to Ur M. Jaddou, Dir., U.S. Citizenship & Immigr. Servs. & Ashley Tabaddor, Chief Couns., U.S. Citizenship & Immigr. Servs. (Aug. 22, 2022), https://www.dhs.gov/sites/default/files/2022-09/08.22.2022%20CRCL%20Retention%20Memo%20to%20USCIS%20-%20Houston%20Asylum%20CF%20RF_Redacted_508.pdf [https://perma.cc/D44N-6JZF].
333. Ramji-Nogales, Schoenholtz & Schrag, *supra* note 23, at 296.
334. *See infra* Table 1.

Table 1: Grant Rates Across Asylum Offices[335]

	FY 2012	FY 2016	FY 2018	FY 2022	FY 2023	FY 2024
Arlington	53.60%	37.69%	21.15%	42.77%	76.73%	23.05%
Boston	N/A	N/A	11.93%	20.20%	43.93%	19.09%
Chicago	33.37%	31.86%	31.18%	28.70%	26.04%	23.54%
Houston	21.05%	28.20%	20.32%	16.18%	70.21%	20.25%
L.A.	41.40%	36.95%	32.18%	28.69%	41.28%	17.89%
Miami	47.24%	30.13%	19.15%	12.82%	3.40%	0.71%
New Orleans	N/A	N/A	53.84%	24.00%	29.23%	12.30%
Newark	25.05%	31.51%	20.59%	17.86%	45.82%	21.78%
New York	17.11%	14.21%	8.15%	5.96%	6.16%	2.29%
San Francisco	61.97%	67.02%	42.36%	40.01%	62.34%	45.56%
Tampa	N/A	N/A	N/A	12.10%	10.10%	1.43%

F. Delayed Adjudications

Policymakers believed that the reformed adjudication system would lead to swift grants for legitimate asylum seekers and removals of those with non-meritorious claims. For example, policymakers adopted a policy requiring asylum seekers to wait 180 days before receiving employment authorization, despite concerns that asylum seekers would be unable to support themselves. But policymakers assumed that applicants with meritorious claims would not go without work for that whole period because the Asylum Office was "working hard to assure that all new claimants [were] interviewed and receive[d] a decision within sixty days of the time they file[d] their affirmative applications."[336] In other words, policymakers believed that "[a]pplicants with good claims

335. The figures on this table were calculated by totaling the monthly asylum case load data released by USCIS on its website. *See, e.g.*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., AFFIRMATIVE ASYLUM STATISTICS: JANUARY 2012 (2012), https://www.uscis.gov/sites/default/files/document/data/Affirmative_Asylum_Jan2012.pdf [https://perma.cc/MZT2-XRGJ]; U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., ASYLUM FISCAL YEAR 2022 TO DATE STATS, https://www.uscis.gov/sites/default/files/document/data/AsylumFiscalYear2022ToDateStats.xlsx [https://perma.cc/Z9HS-57RF]. The FY 2024 percentages only represent data through July of 2024.

336. Martin, *supra* note 18, at 754. The Asylum Office is also statutorily required to adjudicate cases within 180 days "in the absence of exceptional circumstances." Immigration and Nationality Act § 208, 8 U.S.C. § 1158(d)(5)(A)(iii). Applications from Afghans paroled into the country through the Operation Allies Welcome program must be completed within 150 days. Afghanistan Supplemental Appropriations Act, Pub. L. No. 117-43, sec. 2502, § (c)(2), 135 Stat. 344 (2021).

should . . . find it possible to be granted asylum promptly . . . . The claimants deprived of work authorization for that full period [would] therefore be those who were unable to persuade an asylum officer—and generally also an immigration judge—of the merits of their cases."[337]

Despite policymakers' hopes, the reality is that the affirmative asylum system is increasingly inefficient. The backlog of affirmative asylum cases continues to grow rapidly and has recently reached a historic high.[338] At the end of FY 2022, the Asylum Office had 572,022 pending cases.[339] By the third quarter of FY 2024, the Asylum Office backlog grew to 1,252,235 cases.[340] Thus, "not only is the Asylum Office failing to make progress on the backlog, the situation is getting worse at an unprecedented rate."[341]

As a result, asylum seekers are waiting years for Asylum Office decisions. A recent report by the Office of the Inspector General of DHS disclosed the true extent of the problem: 77 percent of affirmative asylum seekers wait more than 180 days to receive a decision on their case.[342] In total, 398,217 applicants have been waiting for at least two years, 114,777 applicants have been waiting two to four years, 93,973 have been waiting four to six years, 149,387 six to eight years, 26,105 eight to ten years, and 3,781 applicants have been waiting more than ten years.[343] HRF estimates that their clients stuck in the backlog have been waiting, on average, six years for an interview.[344] The delays are so extreme that desperate asylum seekers have been filing mandamus actions in federal court to force the Asylum Office to schedule interviews, contributing to the recent explosive growth of mandamus actions against USCIS.[345] Because of the delays in

337. Martin, *supra* note 18, at 754.

338. Jason Dzubow, *Affirmative Asylum Backlog Grows at Unprecedented Rate*, ASYLUMIST (Apr. 5, 2023), https://www.asylumist.com/2023/04/05/affirmative-asylum-backlog-grows-at-unprecedented-rate/ [https://perma.cc/F8TU-HZ39].

339. Declaration of John L. Lafferty ¶ 34, Chart 2, [Redacted] v. Donis, Case No. [Redacted] (E.D. Va. Sept. 6, 2024) (available at https://www.lexisnexis.com/community/amp-insights/132/uscis-affirmative-asylum-case-backlog-1-252-235-cases) [https://perma.cc/U6XF-CUWJ] (showing total annual affirmative asylum case filings, completions, and backlog). In pending litigation in federal district court in Alexandria, Virginia, USCIS Asylum Division Chief John L. Lafferty provided this sworn declaration dated July 26, 2024. Although the plaintiff's name and case number were redacted by the court, the declaration is publicly available through LexisNexis.

340. *Id.*

341. Dzubow, *supra* note 338.

342. OFF. OF INSPECTOR GEN., *supra* note 26, at 5.

343. *Id.* at 6.

344. Wright, *supra* note 27.

345. *See* TRAC IMMIGR., *supra* note 28. Many courts have denied mandamus actions because they "have recognized the immense backlog with which USCIS must deal and have noted that granting relief to a particular plaintiff simply allows [them] to 'leapfrog[] other asylum applicants, and undermin[e] USCIS's reasons for implementing the LIFO system.'" Youssef Mohamed, Comment, *Here's Your Number, Now Please Wait in Line: The Asylum Backlog, Federal Court Litigation, and Artificial Intelligence in Agency Adjudication*, 89 U. CHI. L. REV. 2013, 2030 (2022) (alteration in original) (quoting Yu Liu v. Wolf, 19 Civ. 410, 2020 WL 2836426, at *9 (S.D.N.Y. May 30, 2020)). However, USCIS does sometimes agree to schedule asylum interviews in response to mandamus actions. *See, e.g.*, MILLERLAWDC, *supra* note 28 (granting an asylum interview after the attorney filed

adjudicating affirmative asylum claims, most asylum seekers (even those with meritorious claims) are waiting the full 180 days to receive work authorization, contrary to policymakers' beliefs.[346]

The growth of the backlog may be partially self-inflicted because the Asylum Office is taking longer to adjudicate cases. In 2022, AOs took over five hours to adjudicate an asylum application, compared to four hours in 2019.[347] Even four hours is longer than an asylum adjudication should take. When the Asylum Office was reformed in the 1990s, AOs were expected to adjudicate cases in three hours.[348] These days, the interview itself can be longer than that.[349] Attorneys we spoke to described interviews that stretched as long as four or six hours.[350] Because of the length of interviews, AOs usually interview a maximum of three asylum seekers a day.[351]

In 2018, the Asylum Office also switched to a scheduling system that prioritizes interviewing newly filed cases over older cases.[352] This scheduling system contributes to the backlog as applicants with older cases now face longer waits for interviews.

A few factors contributing to the backlog are out of the Asylum Office's hands. First, USCIS was forced to focus on processing other cases, including CFIs, certain Afghan applications, AMIs, and interviews for asylum seekers who had filed mandamus actions because of DHS priorities, statutory deadlines, and

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mandamus for an asylum seeker who waited for five years); WILDES & WEINBERG, P.C., *supra* note 28 (granting an asylum interview after an attorney filed mandamus for an asylum seeker who waited for two years); *Afghan People Seeking Asylum Reach Landmark Settlement with U.S. Government in Class Action*, NAT'L IMMIGRANT JUST. CTR. (Sept. 11, 2023), https://immigrantjustice.org/press-releases/afghan-people-seeking-asylum-reach-landmark-settlement-us-government-class-action [https://perma.cc/5EKB-2KWJ] (describing a settlement agreement with the U.S. government after the filing of a lawsuit seeking a nationwide injunction on behalf of Afghan asylum seekers who were still waiting for decisions nearly two years after they first arrived in the country). For an argument about why federal court mandamus litigation is not the best way to resolve delayed affirmative asylum interviews, see Mohamed, *supra* note 345, at 2030–39, 2043–53 (arguing that courts are not competent to decide "whether an agency's prioritization of tasks and allocation of resources are 'correct' or 'reasonable'" and that mandamus actions raise serious separation of powers issues; instead, the author proposes an AI solution to provide particularly vulnerable asylum seekers with a way to expedite their asylum interviews).

346. OFF. OF INSPECTOR GEN., *supra* note 26, at 5. In 2023, the delayed issuance of work authorization to asylum seekers caused a financial strain on cities across the country as they received an influx of asylum seekers needing shelter, food, and other necessities. Muzaffar Chishti, Julia Gelatt & Colleen Putzel-Kavanaugh, *New York and Other U.S. Cities Struggle with High Costs of Migrant Arrivals*, MIGRATION POL'Y INST. (Sept. 27, 2023), https://www.migrationpolicy.org/article/cities-struggle-migrant-arrivals-new-york [https://perma.cc/3TXK-S57C].

347. David J. Bier, *USCIS Adjudicators Have Grown Less Efficient for 82% of Forms*, CATO INST.: CATO AT LIBERTY (Jan. 4, 2023), https://www.cato.org/blog/uscis-adjudicators-grew-less-efficient-82-forms [https://perma.cc/2W3D-F4FT].

348. Beyer, *Establishing the Asylum Corps*, *supra* note 40, at 476.

349. *See, e.g.*, AHMED, CRIM & RAFSANJANI, *supra* note 1, at 19.

350. *Id.*

351. *Id.* at 28.

352. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 212.

federal litigation.[353] For example, from FY 2016 to 2019, "89 percent of [AOs] were temporarily reassigned from adjudicating affirmative asylum" to conducting credible fear and other interviews for asylum seekers in expedited removal.[354] Even in June 2023, 90 percent of AOs worked on credible fear processing while only 3 percent worked on affirmative cases.[355] Second, USCIS is primarily fee-funded, and the agency did not generate sufficient fees from other applications to hire enough staff to adjudicate asylum claims in a timely matter.[356] Third, for FY 2023, Congress failed to give USCIS any funding for backlog reduction efforts.[357]

G. The Impact of the Asylum Office's Failure

The Asylum Office's failure to grant meritorious asylum claims not only defies policymakers' expectations, but it has real consequences—emotional, financial, and moral—for all stakeholders involved. This Section describes the harms to asylum seekers, asylum attorneys, AOs, and the overall legitimacy of the U.S. asylum system.

1. Asylum Seekers Experience Emotional and Financial Stress

The Asylum Office's failure to grant legitimate asylum claims results in many negative consequences for asylum seekers, such as family separation, prolonged emotional trauma, financial burdens, and delayed education. Asylum seekers who are referred to immigration court wait years for their day in court before an IJ (sometimes after already waiting years for their affirmative asylum interview). For example, Gustavo spent five years in proceedings before he was granted asylum by an IJ.[358] This delay leads to prolonged family separation because many asylum seekers are forced to leave their families behind, and they cannot petition to bring over family members until they receive a grant of asylum and all appeals by DHS have been decided.[359] While they wait to be reunited in the United States, family members may live in danger.[360] Asylum seekers

353. OFF. OF INSPECTOR GEN., *supra* note 26, at 20. Because asylum seekers are detained during expedited removal, DHS considers CFIs to be "high priority." *Id.* at 20 n.20. As described in Part II.C.4, AMIs must be scheduled within twenty-one to forty-five days of the credible fear determination. *See supra* text accompanying note 233. Adjudications for Afghans paroled into the country through the Operation Allies Welcome program must be completed within 150 days. *See* Afghanistan Supplemental Appropriations Act, Pub. L. No. 117-43, sec. 2502, § (c)(2), 135 Stat. 344 (2021).

354. ADES & KIZUKA, *supra* note 31, at 1.

355. OFF. OF INSPECTOR GEN., *supra* note 26, at 9.

356. *Id.* at 4–5.

357. Dzubow, *supra* note 338.

358. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 56.

359. ADES & KIZUKA, *supra* note 31, at 5.

360. *See, e.g.*, *id.* at 6 (discussing the harms that result from delays in Asylum Office interviews); Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT'L L.J. 61, 102 (2009) ("[I]n many asylum cases, family members remaining in their home country are in danger themselves, either on independent grounds or because of their relationship to the asylum seeker.").

commonly suffer from mental health disorders, such as post-traumatic stress disorder (PTSD), major depressive disorder, and anxiety. Moreover, the stress of family separation and prolonged waits for relief may hinder their recovery from these disorders.[361] For instance, one asylum seeker, who waited years for their decision, described the wait as akin to "living behind bars."[362]

Finally, the delay can lead to serious educational and economic consequences. A referral to immigration court can delay asylum seekers from pursuing educational opportunities because financial aid is generally not available until they receive asylee status.[363] To work legally while their cases are pending, asylum seekers must apply for and receive work authorization.[364] As discussed above, USCIS cannot issue an initial work permit until 180 days have passed since the asylum seeker filed their application.[365] The asylum seeker must also regularly renew their work authorization.[366] USCIS can take months or even over a year to process a renewal application, and a lapse in authorization can mean the loss of employment.[367] The USCIS case processing webpage states that the renewal process for asylum seekers currently takes ten months.[368]

2. Asylum Attorneys Suffer from Burnout and Secondary Traumatic Stress

The Asylum Office's failure to grant asylum negatively impacts asylum attorneys by increasing their workload and prolonging their exposure to an asylum seeker's trauma, leading to high levels of secondary traumatic stress and burnout. When the Asylum Office refers an asylum seeker to immigration court,

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361. ADES & KIZUKA, *supra* note 31, at 6–7; Settlage, *supra* note 360, at 102–03.

362. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 55.

363. *See, e.g.*, *Eligibility for Non-U.S. Citizens*, FED. STUDENT AID, https://studentaid.gov/understand-aid/eligibility/requirements/non-us-citizens [https://perma.cc/JYS6-LLLT] (showing that federal financial aid is not available until an asylum seeker is granted asylum).

364. *See Work Permits*, ASYLUM SEEKER ADVOC. PROJECT, https://help.asylumadvocacy.org/work-permits/ [https://perma.cc/4EUP-RCJ6].

365. *See supra* text accompanying note 148.

366. *See* ASYLUM SEEKER ADVOC. PROJECT, *supra* note 364.

367. *See, e.g.*, Kate Goettel, *Failure to Reauthorize Employment Harms Asylum Seekers and the U.S. Economy*, IMMIGR. IMPACT (Nov. 12, 2021), https://immigrationimpact.com/2021/11/12/employment-delays-asylum-seekers-economy/ [https://perma.cc/9LN2-NAR9] (describing how a medical doctor and other asylum seekers have lost employment due to delays in the work permit renewal process, despite timely filing renewal applications).

368. *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://egov.uscis.gov/processing-times/ [https://perma.cc/CAY7-85JR]. In September 2023, USCIS responded to the delays in processing by announcing that it will grant initial and renewed work permits for asylum applicants for five years. "The increased validity period will reduce the frequency with which noncitizens must file for [sic] to renew their work authorization . . . . [and] reduce the associated [USCIS] workload and processing times . . . ." *Fact Sheet: The Biden-Harris Administration Takes New Actions to Increase Border Enforcement and Accelerate Processing for Work Authorizations, While Continuing to Call on Congress to Act*, U.S. DEP'T OF HOMELAND SEC. (Sept. 20, 2023), https://www.dhs.gov/news/2023/09/20/fact-sheet-biden-harris-administration-takes-new-actions-increase-border [https://perma.cc/N6FM-NVWM].

attorneys may first spend time drafting a request for reconsideration. If that fails, attorneys must attend court hearings, build an updated evidentiary submission for the court to reflect factual and legal changes in the applicant's claim, prepare the asylum seeker and witnesses to testify, and help the asylum seeker renew their work permit.

This added workload and prolonged exposure to an asylum seeker's trauma also negatively affects the mental health of asylum attorneys. A recent survey found that asylum attorneys suffer from "much higher self-reported symptoms of burnout and secondary traumatic stress than previously surveyed populations, including immigration judges, social workers, hospital doctors, nurses, and prison wardens."[369] Asylum attorneys of color and female-identifying asylum attorneys reported higher symptoms of burnout and secondary traumatic stress than other asylum attorneys.[370]

3. Asylum Officers Experience Moral, Financial, and Health Problems Leading to High Turnover at the Asylum Office

In our interviews, AOs reported feeling shame, guilt, and resentment about their time working within a system that they ultimately came to see as unjust and where they were forced to make decisions that they could not morally justify.[371] One officer labeled these feelings as "moral injury,"[372] which occurs when an individual "[i]n traumatic or unusually stressful circumstances . . . perpetrate[s], fail[s] to prevent, or witness[es] events that contradict deeply held moral beliefs and expectations."[373]

AOs further described health consequences due to the intense workload and regularly listening to asylum seekers' accounts of harm.[374] AOs reported receiving no help from management to cope with this trauma.[375] Some AOs quit their jobs due to the working conditions.[376] Others described being fired before reaching their one-year mark or being denied promotions because they took the time to grant legitimate claims.[377]

One officer spoke about how they saw AOs with good intentions ultimately adopt the negative attitude of the New York Asylum Office towards asylum claims.[378] This AO did not want that to happen to them, so they took another job even though it had a substantial pay cut.[379] The AO explained:

369. Harris & Mellinger, *supra* note 34, at 734, 767–72.
370. *Id.* at 736–37.
371. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 41–43.
372. *Id.* at 42.
373. Norman & Maguen, *supra* note 35.
374. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 42–43.
375. *Id.*
376. *Id.* at 42.
377. *Id.*
378. *Id.*
379. *Id.* at 42, 45.

> I had to leave because the job was going to change me and I was not going to change the job. I did as much as I could behind the scenes. I realized I was just a cog in the machine. The mindset there could have seeped in and changed the way I view asylum and I didn't want that . . . There were too many days that I was going to the car and crying at the end of the day.[380]

Due to the "toxic" work culture, AOs described high turnover at the Asylum Office.[381] One officer explained that it was "rare" for a person to have a career at the New York Asylum Office.[382] The high rate of turnover is not unique to the New York Asylum Office, though it may be particularly aggravated there.[383] Reviews of the Asylum Office on Glassdoor, a popular website where people anonymously review current and former jobs, confirm that the New York Asylum Office's issues, which contribute to its high attrition rate, may be systemic to the broader affirmative asylum system.[384] AOs on Glassdoor reported overworking due to "imaginary quotas,"[385] fearing for their jobs because of the "unrealistic" workload,[386] suffering from serious health consequences (including "lasting and profound psychological harm"),[387] enduring poor management, and experiencing a 40 to 50 percent attrition rate.[388] Overall, the Asylum Office has a 2.9 out of five rating on Glassdoor based on 102 reviews.[389] An AO in Arlington wrote:

> Working here is like working at an Amazon factory . . . . It's absolutely frowned upon to take a lunch or break because that's cutting into time that you could be interviewing . . . . You will be so burned out, you might have a mental breakdown . . . . [Arlington] might be one of the

380. *Id.* at 42 (alteration in original).

381. *Id.* at 45.

382. *Id.*

383. *U.S. Citizenship and Immigration Services Asylum Officer Reviews*, GLASSDOOR, https://www.glassdoor.com/Reviews/US-Citizenship-and-Immigration-Services-Asylum-Officer-Reviews-EI_IE41353.0,39_KO40,54.htm [https://perma.cc/R9MS-4SRM] (also on file with author).

384. *Id.*

385. *Only Take This Job if You Really Care About the Mission – Asylum Officer US Citizenship and Immigration Service Employee Review*, Review of *US Citizenship and Immigration Services*, GLASSDOOR (Nov. 26, 2022), https://www.glassdoor.com/Reviews/Employee-Review-US-Citizenship-and-Immigration-Services-E41353-RVW71402617.htm [https://perma.cc/F9AA-QPJN].

386. *Ok – Asylum Officer US Citizenship and Immigration Service Employee Review*, Review of *US Citizenship and Immigration Services*, GLASSDOOR (Apr. 18, 2023), https://www.glassdoor.com/Reviews/Employee-Review-US-Citizenship-and-Immigration-Services-E41353-RVW75623848.htm [https://perma.cc/9E5F-QHX7].

387. *Don't Do It. Just Don't. – Asylum Officer US Citizenship and Immigration Service Employee Review*, Review of *US Citizenship and Immigration Services*, GLASSDOOR (May 11, 2022), https://www.glassdoor.com/Reviews/Employee-Review-US-Citizenship-and-Immigration-Services-E41353-RVW63994900.htm [https://perma.cc/S6R6-YXNE].

388. *Good Intro Fed Job, Otherwise Stay Away – Asylum Officer US Citizenship and Immigration Service Employee Review*, Review of *US Citizenship and Immigration Services*, GLASSDOOR (Feb. 15, 2022), https://www.glassdoor.com/Reviews/Employee-Review-US-Citizenship-and-Immigration-Services-E41353-RVW59701770.htm [https://perma.cc/78VP-ACD4].

389. *U.S. Citizenship and Immigration Services Asylum Officer Reviews*, *supra* note 383.

> 'better' offices but it all sucks the same.[390]

An AO based in Houston wrote:

> After hearing hours of stories and sometimes lies about persecution you'll have secondary trauma and think everyone is lying to you. Most officers are good officers just burnt out and stressed from too many interviews in one day to not enough time to do a quality interview . . . . This is not a humanitarian organization but is numbers based quantity driven [sic] . . . . Upper management only pretends to listen.[391]

4. The Legitimacy of the Asylum System Is At Risk

The Asylum Office's failure to grant legitimate asylum cases further strains the already overburdened immigration courts.[392] One immigration attorney shared an IJ's reaction to a clearly grantable case that was referred to court from the New York Asylum Office:

> 'You're . . . kidding me?' That literally is what [the judge] said when we were in court . . . 'I have to waste time out of everyone's life and hear this case?' The judge granted the case in five minutes. We had judges many times say, why in the world am I getting these cases?[393]

Finally, and perhaps most importantly, the failure of the Asylum Office undermines the legitimacy of the entire asylum system. As one former AO summarized, "My enduring resentment about my entire experience at the asylum office is how cynical it made me about the system in its entirety . . . it really just undermined a lot of my faith in the rule of law . . . and in the legitimacy of American institutions."[394]

H. Theorizing the Roots of the Asylum Office's Failure

Based on our interviews, AOs at the New York Asylum Office refer even legitimate asylum cases because time pressures and supervisors' preferences incentivize them to do so. However, a combination of factors likely contribute to why the Asylum Offices collectively fail to grant so many meritorious asylum claims. This Section lays out a few potential additional theories.

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390. *If You Read this Review – Do Not Work Here – Asylum Officer US Citizenship and Immigration Service Employee Review*, Review of *US Citizenship and Immigration Services*, GLASSDOOR (June 23, 2021), https://www.glassdoor.com/Reviews/Employee-Review-US-Citizenship-and-Immigration-Services-E41353-RVW48733020.htm [https://perma.cc/WFV4-MCQB].

391. *Secondary Trauma – Asylum Officer US Citizenship and Immigration Service Employee Review*, Review of *US Citizenship and Immigration Services*, GLASSDOOR (Sept. 4, 2022), https://www.glassdoor.com/Reviews/Employee-Review-US-Citizenship-and-Immigration-Services-E41353-RVW68699147.htm [https://perma.cc/AH3R-7GJA].

392. *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*, TRAC IMMIGR. (Dec. 18, 2023), https://tracreports.org/reports/734/ [https://perma.cc/RHD4-ML45].

393. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 52.

394. *Id.* at 41.

1. Fear of Asylum Fraud

Fear of asylum fraud is pervasive in the affirmative asylum system and may explain why the Asylum Office refers much more than it should.[395] This is evident from past reform efforts, each of which included new methods to deter fraud. These methods included delaying employment authorization, adding a one-year filing deadline, requiring the Asylum Office to refer to immigration court, and prioritizing recently filed applications over older cases. In 2004, USCIS created a unit, the Fraud Detection and National Security Directorate (FDNS), dedicated to rooting out fraud in the immigration system.[396] Each asylum office has its own FDNS presence.[397]

AOs interviewed by the author described how the New York Office leadership was obsessed with rooting out fraud.[398] One officer went as far as describing the fraud unit at the New York Asylum Office as being "on steroids."[399] Similarly, a former Asylum Officer interviewed by the New York

395. Like all benefit systems, fraud exists in the affirmative asylum system. The U.S. Attorney's Office has prosecuted individuals for helping people file frivolous asylum claims. *See, e.g.*, Press Release, U.S. Att'ys Off. S. Dist. of New York, Attorneys and Managers of Fraudulent Asylum Scheme Charged in Manhattan Federal Court (Feb. 18, 2021), https://www.justice.gov/usao-sdny/pr/attorneys-and-managers-fraudulent-asylum-scheme-charged-manhattan-federal-court [https://perma.cc/JAU2-TZYQ] (charging nine individuals for schemes to prepare and submit fraudulent asylum applications to the USCIS); Press Release, U.S. Att'ys Off. S. Dist. of New York, Brooklyn Attorneys Sentenced for Asylum Fraud Scheme (May 31, 2023), https://www.justice.gov/usao-sdny/pr/brooklyn-attorneys-sentenced-asylum-fraud-scheme [https://perma.cc/7CFS-A6JC] (sentencing two licensed immigration attorneys to prison for an asylum fraud scheme). In these instances, the noncitizens were clearly aware of the fraud. But in other cases, applicants are also defrauded. Under one scheme, known as the "10-Year Green Card/Visa Scam," attorneys or unauthorized practitioners inform noncitizens that they can receive work authorization because they have been in the United States for ten years or because they have a relative who is a U.S. citizen. Off. of the Gen. Couns., *Fraud and Abuse Prevention Program*, EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/fraud-and-abuse-prevention-program [https://perma.cc/Q88X-RWTS]; *Avoid Becoming the Victim of Immigration Fraud*, NYC MAYOR'S OFF. OF IMMIGRANT AFFS., https://www.nyc.gov/site/immigrants/legal-resources/avoid-fraud.page [https://perma.cc/28HH-TVPJ]. They ask the individual to sign a form but do not tell them that it is an asylum application. *Id.* When the noncitizen fails to appear at the asylum interview, they are placed in removal proceedings. In some cases, the attorney withdraws the asylum application and files for a form of relief known as cancellation of removal for non-permanent residents (which does require ten years of physical presence but also requires proof of "extreme, unusual, and exceptional hardship" to a qualifying family member, a difficult standard to meet). *Id.* Because of the prevalence of the scam, the DOJ's fraud and abuse prevention program warns noncitizens about it, and the Asylum Office reserves days (in some instances once every week) to interview (and usually quickly refer) applicants who have filed for asylum more than ten years after their arrival in the country. *Id.*; AHMED, CRIM & RAFSANJANI, *supra* note 1, at 28.

396. *Fraud Detection and National Security Directorate*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/organization/directorates-and-program-offices/fraud-detection-and-national-security-directorate [https://perma.cc/F359-HU8L].

397. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 210, at 16 ("Teams of USCIS FDNS personnel specializing in asylum workloads are stationed full-time at each asylum office . . . and Asylum Division headquarters to detect, deter, and investigate fraud, national security, and public safety issues administratively.").

398. *See* AHMED, CRIM & RAFSANJANI, *supra* note 1, at 49–50.

399. *Id.* at 50.

Times reported that, "[S]ince the office opened, 'New York had this hard-core fraud-finding background.'"[400]

The obsession with rooting out fraud can lead FDNS to claim fraud based on thin justifications that may lead to erroneous referrals. One AO described how FDNS believed that asylum seekers were gang members purely based on their country of nationality, age, and where they lived in the United States. "I remember even asking them, like, do you have any other basis for your suspicions? And no, solely . . . where they resided and where they were from."[401]

Another former AO confirmed that New York's low grant rate may be directly related to suspicions of fraud.[402] In 2012, a high-profile government fraud investigation, known as "Operation Fiction Writer," led to the prosecution of lawyers, paralegals, interpreters, and others in New York City who helped thousands of Chinese applicants fabricate asylum claims.[403] In fact, one AO explained that when they asked about the Office's low grant rate, a senior AO emailed them a news article about "Operation Fiction Writer" as an explanation.[404] This instance of documented fraud may make AOs and their supervisors wary of granting *any* case.

Immigration attorneys confirmed that some AOs are so focused on detecting fraud that they may fail to explore the substance of the asylum claim. One attorney explained, "[T]here's much more of a focus on fraud . . . The questions are a lot more about credibility and fraud than developing the claim. [This] can derail your interview."[405]

Similarly, research on the Boston Asylum Office "strongly suggests that [it] does not approach applications from certain countries with a neutral stance, but rather presumes they must be fraudulent or pose a security threat."[406] This may be because "the vast majority of the . . . employee trainings focus on fraud . . . . As one former AO explained, 'constantly hearing about fraud and credibility issues kind of puts you in the mindset of there being a lot of fraud.'"[407]

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400. Nina Agrawal, *New York Is the Toughest Place in the Country to Apply for Asylum*, N.Y. TIMES (June 5, 2024), https://www.nytimes.com/2024/06/05/nyregion/new-york-asylum.html [https://perma.cc/9ZBF-T4FJ].

401. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 50.

402. *Id.*

403. Kirk Semple, Joseph Goldstein & Jeffrey E. Singer, *Asylum Fraud in Chinatown: An Industry of Lies*, N.Y. TIMES (Feb. 22, 2014), https://www.nytimes.com/2014/02/23/nyregion/asylum-fraud-in-chinatown-industry-of-lies.html [https://perma.cc/VSW7-L2JF]; Ailsa Chang, *Thousands Could Be Deported as Government Targets Asylum Mills' Clients*, NPR: PLANET MONEY (Sept. 28, 2018), https://www.npr.org/sections/money/2018/09/28/652218318/thousands-could-be-deported-as-government-targets-asylum-mills-clients [https://perma.cc/FL9G-U7S4].

404. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 50.

405. *Id.* (alterations in original).

406. REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44, at 13.

407. *Id.* at 15. This study found that the Boston Asylum Office views applicants from Angola, Democratic Republic of Congo, Rwanda, and Burundi with suspicion. *See id.* at 14. Applicants from these countries had much lower grant rates at the Boston Asylum Office compared to the Newark Asylum Office. *Id.* This is significant because "prior to the creation of the Boston Asylum Office, the

2. Lower Representation Rates

AOs may fail to grant meritorious claims because of the lower representation rates at the Asylum Office, as compared to immigration courts.[408] Because of the complexity of asylum law, including demanding credibility and corroboration requirements, it seems unsurprising that represented asylum seekers would fare better.[409] There is little public data on representation rates at the Asylum Office after FY 2009. However, older data from FYs 2006–2009 reveals that the representation rate at the Asylum Office was 58 percent.[410] In comparison, the representation rate for affirmative cases referred to immigration court in FYs 2006–2009 was close to 90 percent, potentially explaining why so many affirmative cases referred to immigration court are ultimately granted.[411]

While representation rates may partially explain why the Asylum Office refers so many meritorious cases, it is important to remember that the affirmative system is meant to be pro se friendly. During training, AOs are reminded that they have an "affirmative duty to 'elicit all relevant and useful information bearing on the applicant's eligibility,'" particularly because asylum seekers themselves may not know what information is relevant for an asylum claim.[412] AOs are supposed to be adept at uncovering all information relevant for an asylum grant even if the applicant is unrepresented.[413]

Moreover, the Asylum Office's own delay in scheduling interviews likely contributes to the lack of representation at asylum interviews. A report by HRF on the challenges created by the affirmative asylum backlog found that the delay in scheduling asylum cases harms pro bono attorneys, law school clinics, and solo practitioners' ability to take on more cases.[414] The inability to take on cases is partially due to staffing challenges when cases drag on for years and because "delays in adjudicating the asylum application . . . increase the sheer volume of work required of advocates over the life of the asylum case."[415] In fact, 60 percent of pro bono professionals surveyed by HRF viewed delays in the asylum system as a negative factor in their firm's ability to take on asylum cases.[416]

Newark Asylum Office adjudicated affirmative asylum cases for the same geographical region and had a higher average grant rate than the Boston Asylum Office." *Id.*

408. Schrag, Ramji-Nogales & Schoenholtz, *supra* note 193, at 599.

409. *See* AM. IMMIGR. LAWS. ASS'N, *supra* note 278, at 7–11 (describing the many steps and complications involved in representing an asylum seeker).

410. SCHOENHOLTZ, SCHRAG & RAMJI-NOGALES, *supra* note 45, at 25.

411. *See* TRAC IMMIGR., *supra* note 270.

412. RAIO DIRECTORATE, U.S. CITIZENSHIP & IMMIGR. SERVS., LESSON PLAN: INTERVIEWING—ELICITING TESTIMONY 11–12 (2024) (quoting 8 C.F.R. § 208.9(b) (2024), https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Eliciting_Testimony_LP_RAIO.pdf [https://perma.cc/FXE4-6QAV].

413. *See generally id.* (describing techniques to elicit testimony in a non-adversarial manner).

414. ADES & KIZUKA, *supra* note 31, at 11.

415. *Id.*

416. *Id.*

The distance some attorneys must travel to the Asylum Offices, the delay on the day of the interview itself, and the length of asylum interviews also contribute to the lack of representation. Attorneys interviewed by the author reported that it is common to wait hours to be called for an asylum interview.[417] Some attorneys recalled waiting as long as six hours for interviews to begin.[418] Asylum seeker Gustavo reported waiting six-and-a-half hours.[419] One immigration attorney explained:

> [I]t's so unpalatable for an attorney to represent somebody [at the Asylum Office]. . . . [I]t's a huge investment of time to go to an asylum interview . . . . [I]t's an hour driving to get out to [the office]. Then you can wait there for 4 hours. You spend 2 hours in an interview and you have an hour drive back. . . . [S]o you have a shortage of qualified lawyers who are willing to do asylum interviews because clients just can't afford to pay for them.[420]

While this attorney traveled one hour, attorneys representing asylum seekers in states with no Asylum Office must travel even further distances. For example, the Chicago Asylum Office has jurisdiction over all affirmative asylum cases filed in Idaho, Montana, North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri, Wisconsin, Illinois, Michigan, Indiana, Kentucky, and Ohio.[421]

Finally, it is also important to consider that the limited role attorneys play at asylum interviews—compared to attorneys' role in immigration court—may factor into why so many meritorious asylum claims are referred. The Asylum Office itself describes the attorneys' role as "minimal," and AOs are reminded that "some actions that may be appropriate for attorneys in an adversarial setting may not be appropriate in the non-adversarial interview."[422] Attorneys do not conduct a direct examination of their client and should not interrupt the AO's questioning in general.[423] That said, attorneys can play some role in the interview. For example, attorneys can give a closing statement (although AOs may require them to submit it in writing), provide necessary clarification, or suggest lines of questioning.[424] However, attorneys interviewed by the author described being *completely* thwarted in their efforts to represent their client. One attorney stated simply, "They shut you down as an advocate."[425] Another

417. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 19.

418. *Id.*

419. *Id.*

420. Zoom Interview by Torrey Crim with Unnamed Immigration Attorney No. 2 (Nov. 9, 2022) (on file with author).

421. *USCIS Asylum Office Jurisdictions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 2022), https://www.uscis.gov/sites/default/files/document/charts/Asylum-Jurisdictions_July2022.pdf [https://perma.cc/3UHT-VGZP].

422. RAIO DIRECTORATE, *supra* note 29, at 13, 22.

423. *Id.* at 22–23.

424. *Id.* at 13, 26.

425. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 22.

elaborated, "They sit attorneys in a corner and tell you you're not allowed to speak."[426]

3. High Turnover and Lack of Legal Education Among AOs

The high turnover at the Asylum Office[427] may further explain why it refers too many meritorious asylum claims. As explained in Part III.A, supervisors pressure AOs to interview and decide cases quickly. Because referrals are easier to write than grants and require less detailed interviews, this pressure incentivizes AOs to refer. In particular, new AOs may refer more because they lack the experience and confidence to write a grant, and they may be worried about potential repercussions for taking the extra time to write a grant. This fear is not unwarranted. Many newly hired AOs spend the first year of their employment in a probationary period during which time they can be fired easily.[428] Because of high turnover at the Asylum Office, there are far fewer experienced AOs who are likely to go against the grain and grant cases, thus potentially explaining why the Asylum Office refers many meritorious claims.[429]

The educational background of AOs, many of whom are not lawyers,[430] may also explain why the Asylum Office fails to grant meritorious asylum cases. Asylum law is complex and constantly evolving. Applying it accurately is difficult, even for lawyers. AOs who lack law degrees may find it especially challenging to apply asylum law correctly. Indeed, one AO, who lacked a law degree, described being "in over [their] head legally" while adjudicating cases.[431]

The aforementioned theories are supported by an older empirical study of the affirmative asylum system, which found both that AO grant rates "increased steadily with experience" and that AOs with law degrees had a 12.5 percent higher grant rate.[432] However, in contrast, a recent report on the Boston Asylum Office suggested that grant rates decreased with experience: AOs explained that the longer they "stayed in the role, the more desensitized they became to the

426. *Id.*

427. *See supra* Part III.G.3.

428. *See Asylum Officer*, USAJOBS, https://www.usajobs.gov/GetJob/PrintPreview/770731000 [https://perma.cc/5YMQ-FBCH]; Drew Friedman, *What Are the Rules for Probationary Periods and Federal Employees?*, FED. NEWS NETWORK (Feb. 4, 2025), https://federalnewsnetwork.com/workforce-rightsgovernance/2025/02/what-are-the-rules-for-probationary-periods-and-federal-employees/ [https://perma.cc/W5C9-UC82].

429. *See, e.g.*, AHMED, CRIM & RAFSANJANI, *supra* note 1, at 45 (discussing high turnover at the New York Asylum Office); REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44, at 10 ("[T]he culture and pressures cause some AOs to burn out quickly, and the turnover with the AOs position is high."); U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-529, U.S. CITIZENSHIP AND IMMIGRATION SERVICES: ACTIONS NEEDED TO ADDRESS PENDING CASELOAD 33 (2021) (describing an average 45 percent yearly attrition rate during the years of 2016 to 2019 for RAIO).

430. SCHOENHOLTZ, SCHRAG & RAMJI-NOGALES, *supra* note 45, at 29 (finding that 59 percent of AOs had law degrees).

431. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 34.

432. SCHOENHOLTZ, SCHRAG & RAMJI-NOGALES, *supra* note 45, at 185, 189.

traumatic experiences of asylum seekers."[433] This led to "high levels of burnout and compassion fatigue" and negatively impacted AOs' credibility findings of asylum seekers.[434] But because the Boston study was based on interviews with only five AOs,[435] the results of the older empirical study are likely more authoritative.[436]

The next Part describes a reimagined affirmative asylum system that addresses the issues currently plaguing the Asylum Office, as described in Part III. To prevent the new system from becoming overwhelmed, the next Part also suggests the creation of alternative legal pathways to migration.

IV.
REIMAGINING AFFIRMATIVE ASYLUM

Part I addressed how policymakers in the 1990s attempted to reform the Asylum Office through mostly modest means. Under the reforms, AOs were intended to swiftly grant asylum to asylum seekers with legitimate claims through brief, trauma-informed interviews and to refer others with non-meritorious or complicated claims to immigration court for IJs to provide de novo review. Instead, as demonstrated in Part III, the Asylum Office has evolved into a backlogged, unjust adjudication system. After subjecting asylum seekers to often lengthy waits and confrontational interviews, AOs funnel them into removal proceedings simply because it is faster. As one of our interviewees, a former senior official in the Asylum Office, explained, "The whole point of the [asylum system] was to reduce the amount of people going to immigration courts. If people are just going to end up in immigration court anyway, what's the point of any of this?"[437]

The current leaders of the affirmative asylum system are aware that it is not functioning as intended. During a national meeting with stakeholders in June 2023, John Lafferty, the Chief of the Asylum Division at USCIS, explained:

> We are looking at all sorts of creative approaches to working through our backlog . . . . [W]e all acknowledge internally that business as usual is not going to allow us to tackle these things . . . . We certainly know

433. REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44, at 19.

434. *Id.*

435. *Id.* at 31 ("The authors conducted a total of 102 interviews: 78 interviews with asylees and asylum seekers, 19 interviews with immigration attorneys, and 5 interviews with former asylum officers and supervisory asylum officers.").

436. An AO interviewed by the American Immigration Lawyers Association presented a fourth theory for why the Asylum Office fails to grant meritorious asylum cases: "the narrow interpretation of asylum law that USCIS lays out for its asylum officers." AM. IMMIGR. LAWS. ASS'N, *supra* note 278, at 18. This AO explained, "I often knew that the headquarters interpretation conflicted with [circuit] law. Headquarters has a very narrow interpretation of nexus and recognizes fewer [particular social groups]. There were definitely cases that I had to deny that I thought would probably be granted by an immigration judge." *Id.* (first alteration in original). This is a viable theory but not one that our interviewees expressed to us.

437. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 51.

> that we are going to have to consider different approaches in order to try to work our way through the growing cases that we have in front of us if and when we get the chance to put all of our resources back on the affirmative processing and getting those cases adjudicated . . . .[438]

Despite promising "creative" and "different" approaches, Lafferty went on to describe vague reforms (e.g., "streamlining hand offs" between Immigration and Customs Enforcement and USCIS for CFIs) that do not address the deep foundational problems with the adjudication system.[439]

In theory, the Asylum Office could be a more asylum-seeker friendly forum that provides a lower cost, faster means of adjudicating asylum claims to the benefit of all stakeholders. But to save the affirmative asylum program, a bolder reimagination of the Asylum Office is needed. Part IV.A describes what a fair and efficient reimagined affirmative adjudication system may look like. Because the asylum system may again become overwhelmed (both politically and practically) if large numbers of migrants continue to arrive at the southern border, Part IV.B describes the creation of alternative legal pathways to migration to ease the burden on the asylum system.

A. A Reimagined Asylum System[440]

This Section describes seven reforms to create an affirmative asylum system that is efficient and fair. First, I argue that AOs should not be diverted to border work but should exclusively focus on adjudicating affirmative asylum claims. Second, to provide the new system with a fresh start, I suggest ways to clear the backlog of currently pending affirmative asylum claims. Third, to prevent a backlog from developing and AO attrition, the United States should adopt a framework for group-based asylum claims. Fourth, for applications that cannot be granted on paper, I suggest more brief interviews. Fifth and sixth, to ensure that adjudications are faithful to the law and consistent across offices and interviews are actually conducted in a non-adversarial manner, I recommend hiring more qualified adjudicators and inviting the UNHCR to monitor adjudications. Seventh, and finally, for a new system based on paper claims to work, I explain why increasing representation rates for asylum seekers is crucial.

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438. John Lafferty, Chief, Asylum Div., U.S. Citizenship & Immigr. Servs., Address at the Asylum Quarterly Stakeholder Engagement (June 13, 2023) (notes on file with author).

439. *Id.*

440. Other scholars have also suggested ways to reform the asylum system. Michael Kagan recently proposed establishing a process that would permit AOs to issue expedited approvals and not just expedited denials. *See* Michael Kagan, *A Faster Way to Yes: Re-Balancing American Asylum Procedures*, GEO. L.J. (forthcoming), https://ssrn.com/abstract=4753362 [https://perma.cc/H3UB-B926]. David Koelsch proposed adopting elements of the Canadian system for refugee claims under which AOs would initially screen applicants and refer them to one of four different processes—depending on whether the claim was very likely to be granted, had a good chance of being granted, required a full evidentiary hearing, or was potentially frivolous. *See* David C. Koelsch, *Follow the North Star: Canada as a Model to Increase the Independence, Integrity and Efficiency of the U.S. Immigration Adjudication System*, 25 GEO. IMMIGR. L.J. 763, 794–98 (2011).

1. Reserving AOs for Affirmative Asylum Applications

One of the reasons why the Asylum Office quickly needed reform in the 1990s was that AOs were diverted from adjudicating affirmative cases to pre-screen Haitian asylum seekers held at Guantanamo.[441] Today, AOs continue to be diverted to border work, but at much higher rates, leading to less time dedicated to adjudicating asylum applications.[442] This diversion must end so AOs can focus on proper asylum adjudications under the reimagined system. Lafferty acknowledged this when he said working through the affirmative backlog could only begin "if and when we get the chance to put all of our resources back on the affirmative processing."[443]

Under my reformed system, the expedited removal process would be modified. Noncitizens arriving at the border who express a fear of persecution would directly go into removal proceedings under INA § 240 before an IJ, rather than receiving a CFI with an AO. Over the years, the Asylum Office has subtly changed CFI training documents in ways that have made CFIs, which were intended to be low-threshold screenings, closer to full asylum adjudications.[444] Placing noncitizens directly in removal, where they would receive full exploration of their asylum claims, would be more just.

Alternatively, if CFIs are retained, different officers should conduct them so that AOs can focus on affirmative adjudications. For example, ROs can conduct CFIs between circuit rides or even as one of their circuit rides. Like AOs, ROs receive similar training on applying asylum law and conducting interviews in a non-adversarial manner. There is also precedent for granting ROs this authority. When I was an RO and refugee processing was shut down by the Muslim Ban, ROs were trained to conduct CFIs and detailed to the Asylum Offices.[445]

2. Clearing the Affirmative Backlog

For a new adjudication system to have even a chance of succeeding, it must begin with a fresh start. Therefore, an initial step in reforming the affirmative asylum system must involve swift resolution of the over one million pending cases before the Asylum Office. When Canada reformed its immigration and refugee adjudication system in 1989, it engaged in a backlog clearance effort.[446]

441. Beyer, *supra* note 18, at 50; Beyer, *Establishing the Asylum Corps*, *supra* note 40, at 480.

442. *See supra* Part III.F.

443. Lafferty, *supra* note 438.

444. For a detailed analysis of all changes made to the AO credible fear lesson plans, see generally CATH. LEGAL IMMIGR. NETWORK & AM. IMMIGR. LAWS. ASS'N, *supra* note 160.

445. During the first Trump Administration, CBP officers were briefly given authority to conduct CFIs. *See generally* A.B.-B. v. Morgan, 548 F. Supp. 3d 209 (D.D.C. 2020). The practice was preliminarily enjoined by the U.S. District Court for the District of Columbia. *Id.* at 222. I do not support returning to this practice because CBP officers do not receive the same training as AOs on applying asylum law or conducting non-adversarial interviews. *See id.* at 219–22.

446. Martin, *supra* note 40, at 1339–40.

In contrast, when the Asylum Office in the United States was established in 1990, it began with a backlog and could never catch up. Below, I describe two ways to clear the backlog so that this mistake is not repeated.

The first, but slower, option would involve AOs conducting a paper review of all affirmative cases that have been pending for one year or more. The paper review would result in either a grant of asylum for those with colorable asylum claims or referral to removal proceedings. Before these adjudications begin, asylum seekers would be permitted to submit additional evidence to support their asylum claims by a fixed date. Additionally, some noncitizens file for asylum, not because they want asylum, but to be referred to immigration court to seek cancellation of removal (a form of relief only an IJ can grant).[447] Thus, in this proposed option, noncitizens would be permitted to select immediate issuance of a charging document to initiate removal proceedings.[448] At the end of the review process, anyone not granted asylum or who did not elect to be placed in removal proceedings would be referred to immigration court where they could pursue asylum or any other immigration relief. But because of the due process concerns raised by waiving asylum interviews, I suggest a better option below.

The second, faster and preferred, option is to create an "asylum amnesty" for eligible asylum seekers with currently pending affirmative asylum applications. Eligible asylum seekers would include anyone who has been stuck in the affirmative backlog for one year or more. Under this amnesty, asylum seekers would be granted temporary legal status so long as they completed an amnesty application form by a certain date, paid a fee, and passed a background check. The fee would allow USCIS to hire sufficient staff to review the amnesty applications. After one year in this temporary status, asylum seekers would be eligible to apply for permanent residence. Any eligible asylum seeker who did not complete the amnesty application by the deadline or failed the background check would be automatically placed in removal proceedings before an IJ.

3. Allowing Group-Based Asylum Claims

Under my revised affirmative asylum system, the United States would adopt group-based asylum claims for certain groups and adjudicate their claims without an interview. Asylum regulations already provide a legal hook for group-based asylum claims. Under the current regulatory scheme for establishing asylum eligibility, asylum seekers may receive asylum if they establish that "there is a pattern or practice in [their] country of nationality . . . of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political

447. Declaration of John L. Lafferty, *supra* note 339, ¶ 53 ("[T]here is no mechanism to affirmatively apply for cancellation of removal as an immigration benefit.").

448. This proposal is similar to a practice that the Asylum Office began in 2018, which offered applicants the opportunity to waive their asylum interview and be placed directly in removal proceedings. *See id.* ¶ 55.

opinion."[449] The Asylum Office currently requires applicants with "pattern or practice" claims to undergo the same lengthy individual interviews as all other applicants. I suggest that the Asylum Office use the "pattern or practice" provision to establish group-based asylum claims that dispense with individual interviews.

Under this scheme, the leadership of the Asylum Division, with input from other stakeholders such as the U.S. State Department, the UNHCR, and NGOs, would officially designate certain groups as presumptively eligible for asylum because conditions in their country of origin establish that they face a "pattern or practice" of persecution based on a protected ground. Members of these groups would undergo an abbreviated asylum procedure in which they would need to submit proof of their group membership and pass a background check. While AOs would not conduct interviews, they could ask for more documentation to prove the group membership or clarify information in the background check.[450]

Afghan asylum claims are a recent example of how this proposal could make a major difference. The State Department's human rights report on Afghanistan and reports by human rights organizations have clearly documented the grave harm that many Afghans, particularly women, religious and ethnic minorities, journalists, and those associated with the United States, face after U.S. withdrawal from the country and the Taliban's takeover of the government.[451] Because of the grave danger Afghans face under Taliban leadership, the U.S. government evacuated certain Afghans upon its withdrawal.[452] Congress also required that the Asylum Office conduct asylum interviews for evacuated Afghans within forty-five days after their asylum application submissions and to issue final decisions within one hundred and fifty days.[453] As a result, the Asylum Office began prioritizing interviews for Afghan applicants, with some offices even exclusively interviewing Afghan applicants because of the sheer number of applications they received.[454] Unfortunately, after going through lengthy interviews to determine individual risk of harm, the

449. 8 C.F.R. § 1208.13(b)(2)(iii)(A) (2024).

450. To clear its asylum backlog, the United Kingdom recently replaced substantive interviews with a questionnaire for asylum seekers from countries with high grant rates. *See* Marley Morris, *The Asylum Backlog: Job Done?*, IPPR (Feb. 28, 2024), https://www.ippr.org/articles/the-asylum-backlog-job-done [https://perma.cc/AB86-QC7G]. Nationals of Afghanistan, Eritrea, Libya, Syria, and Yemen were included. *Id.* The process suggested in this Article is similar.

451. U.S. DEP'T OF STATE, AFGHANISTAN 2022 HUMAN RIGHTS REPORT (2022), https://www.state.gov/wp-content/uploads/2023/03/415610_AFGHANISTAN-2022-HUMAN-RIGHTS-REPORT.pdf [https://perma.cc/ZD5V-E5PU].

452. *Operation Allies Welcome*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/allieswelcome [https://perma.cc/JSC8-482P].

453. Afghanistan Supplemental Appropriations Act, Pub. L. No. 117-43, sec. 2502, § (c), 135 Stat. 344 (2021).

454. *Information for Afghan Nationals*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/information-for-afghan-nationals [https://perma.cc/4828-FCNE].

Asylum Office left thousands of these applicants in limbo.[455] The National Immigrant Justice Center (NIJC) eventually filed a successful class action lawsuit on behalf of these applicants to force USCIS to follow its mandate to adjudicate cases promptly.[456] USCIS has since approved 99 percent of the Afghan applications it has adjudicated.[457]

Under my group-based asylum scheme, the Asylum Office would instead designate Afghans—who are women, religious and ethnic minorities, journalists, or associated with the United States—as presumptively eligible for asylum based on their group-membership. Eligible Afghans would submit proof of their membership in one of these groups (e.g., a birth certificate or passport and documentation of their religious faith or ethnicity) and be granted asylum after an AO reviewed their paper application and background check.

While the United States has always relied on individual adjudication of asylum claims, group-based recognitions exist in other regions. According to the UNHCR, "[g]roup recognition most commonly takes place when there are readily apparent, objective circumstances in a country of origin which suggest that most individuals fleeing from that country are likely to be refugees."[458] But one need not look to other countries for guidance on group-based recognitions. The United States' refugee admissions program already has a group-based component, known as "[p]riority 2 (P-2)" group referrals.[459]

> [P-2] includes specific groups whose members are in need of resettlement as identified by the Department of State in consultation with USCIS, NGOs, UNHCR, and other experts. P-2 designations reflect that a group is of special humanitarian concern to the United States and that individual members of the group will likely qualify for admission as refugees under U.S. law.[460]

For example, one recent P-2 group included Cuban human rights activists, religious minorities, former political prisoners, and forced-labor conscripts.[461] Similarly, the United States awards Temporary Protected Status (TPS) on a group basis to eligible nationals; TPS provides temporary relief from removal to nationals of countries experiencing natural disasters or armed conflict, if they are present in the United States prior to the TPS designation.[462]

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455. *See* NAT'L IMMIGRANT JUST. CTR., *supra* note 345.

456. *See id.*

457. *See* Ashley Caudill-Mirillo, Deputy Chief, Asylum Div., U.S. Citizenship & Immigr. Servs., Address at the Asylum Quarterly Stakeholder Engagement (June 13, 2023) (notes on file with author).

458. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2022, at 28 n.79 (2023), https://www.unhcr.org/global-trends-report-2022 [https://perma.cc/RKT6-9DPR].

459. U.S. DEP'T OF STATE, U.S. DEP'T OF HOMELAND SEC. & U.S. DEP'T OF HEALTH & HUM. SERVS., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2022, at 13 (2021), https://www.state.gov/wp-content/uploads/2021/09/Proposed-Refugee-Admissions-for-FY22-Report-to-Congress.pdf [https://perma.cc/E89J-F9PN].

460. *Id.*

461. *Id.* at 14–15.

462. 8 U.S.C. § 1254a(a)(1).

Group-based adjudications have many benefits, including quicker adjudications and greater consistency in asylum decisions across Asylum Offices (a goal that has long been elusive). Group-based adjudications would further improve the working conditions of AOs by significantly simplifying adjudications and exposing AOs to less vicarious trauma. This should also address the current high rates of attrition among AOs, which likely contributes to their low asylum grant rates.

Not all asylum seekers will fall under the group-based designations. For example, noncitizens can seek asylum because of persecution based on their family membership. Because such persecution involves a small group, it would rarely come to the attention of U.S. officials or NGOs for group-based designation. Other individuals may flee during the early stages of their group's persecution, before human rights organizations have begun officially documenting the harm, making the group not yet be ripe for group designation. Some groups may have claims that involve evolving asylum law. These individuals would undergo a modified version of the traditional adjudication path, described below.

4. Conducting Speedy Adjudications via Paper Grants and Brief Interviews

Once the Asylum Office clears the backlog, it is important that a new backlog does not develop. Brief adjudications are key to accomplishing this. This will require three major changes to the way the Asylum Office currently operates: (1) paper grants without an interview, (2) shorter interviews in cases not appropriate for a paper grant, and (3) a revised decision write-up based on the RO decision form. With these changes, AOs will be able to complete adjudications—including reviewing the file, interviewing the applicant (if necessary), and rendering a decision—in three hours or less, as asylum program leaders had expected after prior reforms. I suggest one to one-and-a-half hours for the optional interview and one to one-and-a-half hours for file review, interview preparation (if necessary), and decision-writing.

When I was an RO interviewing refugee applicants in Thailand, I interviewed four to six applicants a day and rendered my decisions the same day. I was able to do this because interviews for these refugee applicants were straightforward and short. Immediately after the interview, I filled out a brief decision form that involved checking boxes and providing a few sentences of justification. Immediately after each adjudication, I gave a supervisor the interview notes, decision, and file to review while I went on to interview the next applicant. If I needed to ask the applicant additional or clarifying questions, a supervisor would let me know so that I could call the interviewee back that same day. By the end of the day, a supervisor had usually reviewed and approved all the day's adjudications.

In contrast, asylum interviews are much longer. Before even getting to the substance of the claim, AOs go over the entire I-589 form with the applicant and make updates or corrections.[463] This can take an hour because the AO is usually using an interpreter, and the form has many questions.[464] When it gets to the substance of the claim, AOs can spend a lot of time asking basic questions to uncover the claim, often because they did not have time to review the submission in depth. Finally, AO decisions take longer because the write-up is more involved than the RO decision form.

Affirmative asylum adjudications could be more efficient if they did not require interviews in all cases. This is not as radical an idea as it seems. USCIS adjudicates, without interviews, other humanitarian immigration applications, including T-Nonimmigrant Status for trafficking survivors and U-Nonimmigrant Status for victims of crime.[465] In immigration court, trial attorneys sometimes concede to a grant of asylum if, after reviewing the applicant's evidentiary submission and legal argument, they are satisfied that the applicant has established a claim.[466] In other cases, trial attorneys review the submission and have only a few questions about the claim, and the parties agree to narrow the testimony to those issues.[467] NIJC described how this adversarial system can ironically (and contrary to popular belief) be more asylum-seeker friendly:

> An NIJC attorney represented an unaccompanied child who had a five-hour [Asylum Office] interview, punctuated with one bathroom break. As customary [in the Asylum Office], the attorney was unable to direct questioning and the child was forced to repeat every aspect of [their] declaration with harrowing details, only to receive a denial. During [the child's] de novo hearing, the immigration judge relied on the record

463. *See* Am. Gateways, *Preparing for Your Affirmative Asylum Interview*, TEXASLAWHELP.ORG (Nov. 27, 2024), https://texaslawhelp.org/article/preparing-for-your-affirmative-asylum-interview [https://perma.cc/FL93-EMT7] ("The first part of the interview involves reviewing your application form (Form I-589) to make any updates your changes.").

464. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC., OMB NO. 1615-0067, USCIS FORM I-589: APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL (2023), https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf [https://perma.cc/YE9V-78M2].

465. *See Chapter 7—Adjudication*, U.S. CITIZENSHIP & IMMIGR. SERVS: POLICY MANUAL., https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-7 [https://perma.cc/AX89-87RE] ("USCIS generally does not require an interview if the record contains sufficient information and evidence to approve the application without an in-person assessment."); IMMIGRANT L. CTR. OF MINN., QUESTIONS AND ANSWERS FOR U VISA APPLICANTS 3 (2016), https://www.ilcm.org/wp-content/uploads/2016/01/U-visa-client-FAQ-English.pdf [https://perma.cc/5PGC-UQZE] ("You will *not* be personally interviewed on your U visa application.").

466. *See Immigration Court Proceedings*, IMMIGR. EQUAL.: ASYLUM MANUAL § 26.2.10, https://immigrationequality.org/asylum/asylum-manual/immigration-court-proceedings/ [https://perma.cc/MQV9-LGL4] ("Sometimes it's possible to obtain stipulations from ICE attorneys that clients are eligible for asylum or other relief . . . .").

467. *See, e.g.*, Nat'l Immigrant Just. Ctr., Comment Letter on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 24–25 (Oct. 19, 2021), https://www.regulations.gov/comment/USCIS-2021-0012-4849 [https://perma.cc/AX3H-A7QS] (describing an instance where the trial attorney and asylum attorney agreed to narrow the asylum seeker's testimony).

> submitted (including the same declaration), the parties stipulated to limit the issues, and counsel directed thirty-five minutes of testimony on salient aspects of the child's asylum claim. The child expressed greater comfort with telling [their] story while questioned by [their] trusted attorney and promptly won asylum.[468]

During the second round of asylum reform, advocates emphatically rejected a proposal to eliminate interviews in certain cases because it would have disposed of interviews in cases where asylum would not be granted.[469] Advocates objected because pro se applicants with meritorious asylum claims might complete the application form poorly, without an opportunity to explain their claim in an interview, and be erroneously referred to immigration court.[470] Here, I suggest eliminating interviews only when asylum *will* be granted.

Under my proposed reforms, to ensure familiarity with claims, AOs would receive files at least one week in advance and spend time reviewing the applicant's evidentiary submission so that they are thoroughly familiar with the claim. If the AO finds that the applicant has established asylum eligibility based on their paper submission, the AO would grant asylum without an interview. If the AO does not believe that the applicant has established asylum eligibility, the AO would conduct an efficient, non-adversarial interview without the lengthy introductory review of the I-589. Instead, asylum seekers would submit updates to the I-589 in writing in advance. During interviews, AOs would confirm that there are no further changes. The rest of the interviews would involve exploring issues in the claim that prevented the AO from issuing a paper grant. AOs would issue decisions on a simplified form modeled after the RO decision form.[471] AOs would then refer applicants not granted asylum to removal proceedings where IJs could reconsider the asylum application de novo.

5. Changing AO Qualifications

Asylum law is complex and constantly evolving, making it challenging for non-lawyers to properly apply the law. One of our AO interviewees described their surprise at being hired even though they lacked a law degree.[472] As an AO, they admitted feeling "in over [their] head legally," despite the training they had received.[473] Under the reformed system, the AO position would require a law degree and experience with immigration law (law school clinic or internship

468. *Id.*

469. *See* 59 Fed. Reg. 62,291–92.

470. *Id.*

471. The Asylum Office may already have a model to work from to create this new form. A former senior official in the Asylum Office explained to the author that the CFI decision form, used by AOs, was modeled after the RO write-up form. Zoom Interview with Unnamed Former Asylum Officer (Feb. 17, 2023) (notes on file with author).

472. AHMED, CRIM & RAFSANJANI, *supra* note 1, at 34.

473. *Id.*

experience would count).[474] Immigration law experience is key to ensuring that AOs obtain the necessary substantive knowledge to properly adjudicate claims. Practical experience with noncitizens would further help AOs understand the challenges asylum seekers face and lead to more reasonable credibility assessments and more realistic corroboration expectations.[475]

6. Promoting Transparency and Accountability

Very little transparency or accountability exists in the current affirmative asylum system. Asylum interviews are not recorded. AOs take their own notes during the interview, which the supervisor reviews as the record of the interview.[476] Only the asylum seeker's representative (and an interpreter, if needed) may be present during the interview.[477] Asylum seekers do not receive the AO's notes or the full decision write-up; rather, they receive a form letter with a generic reason for the referral (e.g., credibility or the failure to establish a well-founded fear, etc.).[478] Even if asylum seekers file a Freedom of Information Act (FOIA) request for their file, USCIS rarely provides the interview notes and redacts most of the decision write-up.[479] As a result, AOs can get away with conducting confrontational, aggressive interviews and referring asylum seekers for baseless credibility issues because it is faster than adjudicating the claim properly under the law.

To restore faith in the affirmative asylum system, non-adversarial interviews must be non-adversarial in practice, not just in name, and AOs must base their decisions on the law and the facts of the claim. To promote transparency and to ensure AO accountability, USCIS should allow a neutral party to observe asylum interviews in-person and review decisions to ensure that they comply with the law.[480] I suggest that the UNHCR be the neutral party. In

474. Other scholars have also recommended that AOs have law degrees. *See, e.g.*, Martin, *supra* note 40, at 1340 n.255; SCHOENHOLTZ, SCHRAG & RAMJI-NOGALES, *supra* note 45, at 197.

475. Unfortunately, it seems as if USCIS is moving in the opposite direction by lowering rather than increasing AO qualification requirements. Recent AO job postings now permit AOs to be hired at the GS-7 level. *See, e.g.*, *Asylum Officer*, USAJOBS, https://www.usajobs.gov/job/796376900# [https://perma.cc/7F9B-TX8A].

476. *See* RAIO DIRECTORATE, U.S. CITIZENSHIP & IMMIGR. SERVS., LESSON PLAN: INTERVIEWING – NOTE-TAKING 9 (2024), https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Note_Taking_LP_RAIO.pdf [https://perma.cc/57LR-GU47].

477. RAIO DIRECTORATE, *supra* note 29, at 13–14. Asylum seekers who are children or disabled may have a "trusted adult" or "trusted individual" accompany them to the interview. *Id.*

478. *See* RAIO DIRECTORATE, *supra* note 476, at 10.

479. *See, e.g.*, *id.*; REFUGEE & HUM. RTS. CLINIC ET AL., *supra* note 44, at 30 (explaining that in response to FOIA litigation, USCIS produced "heavily redacted" documents).

480. Another option is to record interviews and permit UNHCR to review the recorded interviews or transcripts. However, this would cost money for USCIS, while allowing UNHCR to observe in-person is free. Because USCIS already faces significant budgetary issues, recording and transcribing may be too cost prohibitive. Audio recordings and transcripts would also fail to capture certain important nuances, such as body language and facial expressions.

the 1970s, the State Department permitted the UNHCR to review all Haitian asylum applications.[481] There were "frequent calls for expanding this practice to cover all asylum cases,"[482] and the 1988 proposed asylum regulations, implementing the Refugee Act, would have given officials permission to disclose asylum applications to the UNHCR.[483] This would have allowed the UNHCR to monitor asylum adjudications, including observing interviews, just as the UNHCR monitors refugee determinations throughout the world.[484] However, to the dismay of advocates, this authority was mysteriously deleted in the final regulations.[485]

7. Increasing Representation Rates

For a system of paper grants to be efficient, asylum seekers must submit fully documented claims. To do that, most asylum seekers will need attorney assistance. Using research showing that noncitizens in removal proceedings have higher rates of success when they are represented,[486] advocates have successfully convinced both private funders and local governments to fund immigration public defender systems.[487] In New York, the state provides a lawyer to all detained, indigent noncitizens in removal proceedings.[488] Oregon has gone a step further, providing lawyers to all indigent noncitizens in removal proceedings.[489] While current data on representation rates at the Asylum Office is not available, most asylum seekers do obtain representation after they are referred and, unsurprisingly, these asylum seekers have high grant rates in immigration court.[490] Advocates should push for funding to increase representation in affirmative asylum claims by collecting data on rates of representation at the Asylum Office and using earlier studies on the success rates of represented noncitizens. This approach can convince funders of the merits of representation for all, even in affirmative cases.

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481. Martin, *supra* note 40, at 1319.

482. *Id.* at 1320.

483. *See* Arthur C. Helton, *Final Asylum Rules: Finally*, 67 INTERPRETER RELEASES 789, 791 (1990).

484. *Id.*

485. *Id.*

486. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 9, 57 (2015) (finding that immigrants in removal proceedings with attorneys were five-and-a-half times more likely to win relief than immigrants without attorneys).

487. *See, e.g.*, Nicole Narea, *New York Gave Every Detained Immigrant a Lawyer. It Could Serve as a National Model.*, VOX (June 9, 2021), https://www.vox.com/policy-and-politics/22463009/biden-new-york-immigrant-access-lawyer-court [https://perma.cc/M2PM-ETR7].

488. *Id.*

489. Press Release, Innovation L. Lab, Statewide Expansion of Oregon's Universal Representation Program for Immigrants Begins (Sept. 30, 2019), https://innovationlawlab.org/press-releases/equity-corps-statewide-expansion/ [https://perma.cc/RC9G-YTQH].

490. *See* TRAC IMMIGR., *supra* note 270. ("Today this means if asylum seekers go through the affirmative asylum process, receive a denial, and end up in Immigration Court, they nearly always have an attorney. Higher success rates for asylum seekers in decisions involving affirmative cases can be attributed in part to their higher representation rates.").

Increasing representation may not change the status quo if AOs do not let attorneys adequately represent their clients as many attorneys described in our interviews.[491] Asylum Office directors must also ensure that AOs do not sideline, but rather permit, attorneys to play a cooperative role in asylum interviews, as prescribed in AO training materials.[492]

B. Increasing Pathways for Alternative Legal Migration

For these reforms to be effective, the United States must also create alternative pathways for legal migration. This section proposes how this can be accomplished largely without the help of Congress.

When the Refugee Act created a pathway to asylum, most people did not realize that the United States would soon become a country of first asylum for migrants forced to flee their homes. As large numbers of asylum seekers suddenly began arriving, the affirmative asylum system was quickly overwhelmed, and the media became hyper-focused on the border and alleged abuses of the asylum system. In response, administrations began taking increasingly extreme measures to discourage migrants from coming to the United States, including developing an expedited removal process,[493] detaining families,[494] separating parents from children,[495] secretly raising the bar for passing a CFI,[496] shutting down access to asylum at the border by exploiting a public health measure,[497] and forcing migrants to wait in Mexico.[498] Although

491. *See* AHMED, CRIM & RAFSANJANI, *supra* note 1, at 22.

492. RAIO DIRECTORATE, *supra* note 29, at 21–23.

493. *See supra* Part I.D.

494. For example, in June 2014, the Obama Administration announced plans to revive and massively expand the policy of detaining immigrant families and children. *See Family Detention During Obama Administration*, AM. IMMIGR. LAWS. ASS'N (Oct. 12, 2016), https://www.aila.org/library/detention [https://perma.cc/96BJ-3KEB].

495. In April 2018, then Attorney General Sessions announced a "zero tolerance" policy for unlawful entry or reentry into the United States. Under the policy, adults who entered the country unlawfully were separated from their children and sent to DOJ for criminal prosecution. *See* EVALUATION & INSPECTIONS DIV., U.S. DEP'T OF JUST., 21-028, REVIEW OF THE DEPARTMENT OF JUSTICE'S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEPARTMENTS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES 1–2 (2021).

496. *See* 142 CONG. REC. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Orrin Hatch).

497. During the COVID-19 pandemic, the Trump Administration used an obscure public health law (§ 265 of Title 42) to turn away all migrants seeking entry at the southern border, including asylum seekers. *See generally* AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER (2022) https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border.pdf [https://perma.cc/YTL7-X7CH].

498. The Trump Administration established the Migrant Protection Protocols, also known as the "remain in Mexico" program, which required asylum seekers to wait in Mexico as U.S. immigration courts considered their asylum claims. *Migrant Protection Protocols (Trump Administration Archive)*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/archive/migrant-protection-protocols-trump-administration [https://perma.cc/2WT3-SPST].

hailed for solving the "border crisis,"[499] these measures have left the United States in the same position; today, migrants are still fleeing persecution and seeking safety in the United States in massive numbers, and the media continues to focus on the alleged crisis at the border.[500]

The unceasing media attention on the border and politicians' extreme proposals in response reveal the political fragility of asylum protections. Thus, to save the asylum system, reformers must also pay attention to reducing the number of people arriving at the border. But getting rid of due process at the border or curbing asylum protections is not the answer. The only way to reduce the number of migrants seeking asylum at the U.S. border, and, in turn, protecting the politically fragile asylum system, is to accept that the United States is a country of first asylum and to create other pathways for legal migration.[501] If more migrants can apply for lawful migration without leaving their homes, fewer will risk the dangerous and expensive journey here to apply for asylum once they arrive. This can be accomplished in two ways that do not require congressional action: (1) increasing refugee admissions through in-country refugee processing (particularly from Central America and the Caribbean) and (2) creating parole programs.

There is recent precedent for both increasing in-country refugee processing for certain regions and creating parole programs. In 2014, when large numbers of minors from Central America began arriving in the United States to flee gang violence, the Obama Administration eventually turned to the refugee program, creating the Central American Minors (CAM) program. CAM allowed certain U.S.-based parents or legal guardians to apply to bring their children from El Salvador, Guatemala, and Honduras to the United States as refugees or through

499. *See, e.g.*, Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/T2M4-NRQ4].

500. *See, e.g.*, Michael D. Shear, Hamed Aleaziz & Zolan Kanno-Youngs, *How the Border Crisis Shattered Biden's Immigration Hopes*, N.Y. TIMES (Jan. 30, 2024), https://www.nytimes.com/2024/01/30/us/politics/biden-border-crisis-immigration.html?searchResultPosition=2r.pdf [https://perma.cc/52U5-AKMR]. ("The number of people crossing into the United States has reached record levels, more than double than in the Trump years.").

501. Writing a mere year after the passage of the Refugee Act, Deborah Anker and Michael Posner recognized this issue and its solution: "The long-term character of the refugee problem in the Western Hemisphere cannot be ignored or under-emphasized. The influx in the last year of tens of thousands of Cubans, Haitians, Salvadorians and others . . . cannot be dismissed as an isolated or unique occurrence. As long as political, social and economic conditions create instability in these countries, people will leave and seek a better life . . . . Any solution to the problem of uncontrolled entry (mass first asylum) must include some provision for the admission of a certain number of people from refugee-producing countries." Anker & Posner, *supra* note 13, at 70–71.

parole.[502] Importantly, the program permitted in-country processing, so minors did not have to travel outside of their home countries to apply for safety.[503]

Furthermore, the Biden Administration created two parole programs that demonstrate the promise of my proposal. First, after the Russian invasion of Ukraine, the number of Ukrainians entering the United States through the southern border skyrocketed.[504] As a result, on April 27, 2022, DHS created the "Uniting for Ukraine" (U4U) program, which allowed Ukrainians to enter the United States and remain for two years on a grant of parole.[505] Second, on October 19, 2022, DHS created a parole program for Venezuelans, and on January 6, 2023, it merged that program with one for Cubans, Haitians, and Nicaraguans (known as the CHNV parole process).[506] These parole programs had simple requirements, such as having a financial sponsor with status in the United States and passing a background check.[507] After the creation of these programs, the number of Ukrainians encountered by CBP dropped by 99.9 percent, and entries by people from CNHV countries went down by 90 percent.[508]

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502. *See* MARK GREENBERG, STEPHANIE HEREDIA, KIRA MONIN, CELIA REYNOLDS & ESSEY WORKIE, MIGRATION POL'Y INST., RELAUNCHING THE CENTRAL AMERICAN MINORS PROGRAM 1 (2021), https://www.migrationpolicy.org/research/relaunching-central-american-minors-program [https://perma.cc/YRY3-PD34]. Prior to launching the CAM program, the Obama Administration first took the usual route of adopting extreme deterrent measures, including expanding family detention and creating "surge dockets" in immigration court to expedite removals of unaccompanied minors. ANDREW CRAYCROFT, IMMIGRANT LEGAL RES. CTR., THE CENTRAL AMERICAN MINORS (CAM) PROGRAM 1 (2023), https://www.ilrc.org/resources/central-american-minors-cam-program [https://perma.cc/AX7Z-4VBB].

503. *See id.* While promising, the CAM program's impact was limited during the Obama Administration because of implementation delays. *See* LACY BROEMEL & HANNAH FLAMM, INT'L REFUGEE ASSISTANCE PROJECT, MORE THAN WORDS: MAKING GOOD ON THE PROMISE OF THE CENTRAL AMERICAN MINORS REFUGEE AND PAROLE PROGRAM 4 (2022), https://refugeerights.org/wp-content/uploads/2022/09/CAM-Report-FINAL-v3.pdf [https://perma.cc/EAH4-DYUW]. In 2017 and 2018, President Trump shuttered the CAM program, but the Biden Administration later revived and expanded eligibility for the program. *See id.* In January 2025, President Trump suspended the U.S. refugee admissions program, which includes CAM. Exec. Order No. 14163, 90 Fed. Reg. 8459 (Jan. 20, 2025). Within ninety days of the EO, the Secretaries of DHS and DOS were directed to submit a report to the President "regarding whether the resumption of entry of refugees . . . would be in the interests of the United States." *Id.* at 8460.

504. Gil Guerra, *Uniting for Ukraine Has Been a Resounding Success. Here's What We've Learned*, NISKANEN CTR. (Feb. 7, 2023), https://www.niskanencenter.org/uniting-for-ukraine-has-been-a-resounding-success-heres-what-weve-learned/ [https://perma.cc/8HED-N3ZL].

505. *Uniting for Ukraine*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/ukraine [https://perma.cc/CL77-7UGM]. The Trump Administration has since canceled the program.

506. David J. Bier, *Parole Sponsorship Is a Revolution in Immigration Policy* 3 (Cato Inst., Briefing Paper No. 165, 2023), https://www.cato.org/briefing-paper/parole-sponsorship-revolution-immigration-policy#parole-sponsorships-effects-border-migration [https://perma.cc/D4KL-Z3RG].

507. *See Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/CHNV [https://perma.cc/S4QJ-Y7DL]. In January 2025, President Trump issued an executive order terminating all parole programs created under the Biden Administration. Exec. Order No. 14165, 90 Fed. Reg. 8467 (Jan. 20, 2025).

508. Bier, *supra* note 506, at 6–7.

While hugely successful, there were two major flaws of these parole programs. First, parole is, by nature, temporary. To remain permanently in the country, parolees will likely affirmatively apply for asylum after arriving or when their parole expires, further straining the affirmative asylum system. Increasing the number of refugee admissions is better because individuals admitted as refugees can adjust their status to lawful permanent resident after one year of physical presence in the United States and can eventually become citizens.[509] But despite large numbers of asylum seekers arriving from Central America and the Caribbean through the southern border, the allocation of refugees for the region has been low historically. For example, for FY 2022, the State Department only proposed an allocation of fifteen thousand refugees for this region.[510] The Biden Administration increased the proposed allocation to 35,000–50,000 for FY 2024—justified by the "historic, exponential growth in the regional program, commensurate with the need, our foreign policy priorities, and our responsibility to our own region."[511] This was a promising beginning, but it was not enough when you consider the popularity of the CHNV program.

Of course, not all individuals applying for the parole program would be eligible for refugee status, which has much stricter requirements, and some may choose to forgo applying for refugee status because resettlement can take years. There is a solution here too: Congress can create a pathway to permanent residence for parolees. There is ample historical precedent for this. For example, after the creation of parole programs for Hungarians, Cubans, and Vietnamese people, Congress passed legislation allowing each group to adjust their status.[512]

Second, a backlog developed for CHNV applications, defeating the effectiveness of the program to control border migration. Unlike U4U, the CHNV program had a monthly cap of thirty thousand parolees.[513] This monthly cap, combined with the popularity of the program and USCIS's lack of adjudicators, resulted in a backlog of 1.7 million applications.[514] Because USCIS decided to exempt both U4U and CHNV parole applications from fees, and U4U applicants from even the employment authorization fee, USCIS lost millions that

509. *Green Card for Refugees*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-refugees [https://perma.cc/Q5DE-JK6R].

510. U.S. DEP'T OF STATE ET AL., *supra* note 459, at 30.

511. U.S. DEP'T OF STATE, U.S. DEP'T OF HOMELAND SEC. & U.S. DEP'T OF HEALTH & HUM. SERVS., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2024, at 52 (2023), https://www.state.gov/wp-content/uploads/2023/11/FY-2024-USRAP-Report-to-Congress_FINAL-Accessible-11.02.2023.pdf [https://perma.cc/QMK7-UUF6].

512. *See Operation Safe Haven: The Hungarian Refugee Crisis of 1956*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/our-history/stories-from-the-archives/operation-safe-haven-the-hungarian-refugee-crisis-of-1956 [https://perma.cc/99AB-HZ27]; *Explainer: What We Can Learn from Prior Adjustment Acts and What They Mean for Afghan Resettlement*, NAT'L IMMIGR. F. (Nov. 10, 2021), https://immigrationforum.org/article/explainer-what-we-can-learn-from-prior-adjustment-acts-and-what-they-mean-for-afghan-resettlement/ [https://perma.cc/3G28-HFL7].

513. Bier, *supra* note 506, at 5.

514. *Id.* at 5–6.

it could have used to hire sufficient adjudicators to process applications promptly.[515] CHNV applicants faced about a five-year wait, and many applicants may have chosen to resort to seeking asylum through the southern border rather than waiting.[516]

My proposal involves improving upon the aforementioned programs, and resolving their issues, in several ways. First, refugee admissions from Central America and the Caribbean must truly match the need, so I recommend doubling the refugee figures set for the region for FY 2024. Second, parole programs should still be offered to permit people who do not meet the "refugee" definition to lawfully enter the country. Third, Congress must pass legislation to permit parolees to adjust their status to lawful permanent resident. Fourth, USCIS should charge a parole adjustment application fee and an employment authorization fee. These fees should be used to hire additional adjudicators, including ROs, so that long backlogs do not develop in the parole or refugee resettlement programs.

CONCLUSION

Every year the UNHCR issues a global trends report on forced migration that describes how the population of forced migrants, including asylum seekers, continues to grow at a relentless pace.[517] The latest report recorded the highest number of asylum seekers ever: 5.6 million people across the world sought asylum in 2023.[518] As usual, the United States was the highest recipient of new individual asylum applications.[519] In response to growing numbers of asylum seekers and the asylum system's inability to process applications quickly, administrations, whether Republican or Democrat, always turn to the same playbook: adopt increasingly cruel deterrent measures or gut asylum protections altogether.[520] In fact, in June 2024, President Biden shocked advocates by issuing a proclamation setting extreme restrictions on noncitizen entry at the southern border—in part because "our asylum system remains backlogged and cannot deliver timely decisions."[521] These measures, like the ones before them, will fail to prevent migrants from seeking safety in the United States. People fleeing to save their lives rarely consider nuances in the law before leaving their homes. Such measures only lead to the forced return of asylum seekers, who face grave harm when returned. The asylum system desperately needs creative and good faith approaches to reform. This Article has outlined a possible path forward for

515. *See id.*

516. *Id.*

517. *See, e.g.*, UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2023, at 2 (2024), https://www.unhcr.org/global-trends-report-2023 [https://perma.cc/W2T3-87RW].

518. *Id.* at 6–7.

519. The United States received 1.2 million new individual asylum claims, a 61 percent increase from the previous year. *Id.* at 34.

520. *See supra* Part IV.B.

521. Proclamation No. 10773, 89 Fed. Reg. 48487, 48489 (June 3, 2024).

the affirmative asylum system that focuses on clearing the backlog of pending asylum claims, adopting a framework for group-based claims, adjudicating more claims based on paper applications, hiring more qualified adjudicators, inviting the UNHCR to monitor adjudications to ensure appropriate interviews and consistency in adjudications, and, importantly, increasing other pathways for legal migration. The reforms suggested here are undoubtedly bold, but new and creative solutions are critical to save asylum in the United States.