FORTHCOMING *in* 66 HOWARD LAW JOURNAL (2023)

THE NEW BORDER ASYLUM ADJUDICATION SYSTEM: SPEED, FAIRNESS, AND THE REPRESENTATION PROBLEM

Philip G. Schrag, Jaya Ramji-Nogales, and Andrew I. Schoenholtz[*]

In 2022, the Biden administration implemented what the New York Times has described as potentially "the most sweeping change to the asylum process in a quarter-century." This new adjudication system creates unrealistically short deadlines for asylum seekers who arrive over the southern border, the vast majority of whom are people of color. Rather than providing a fair opportunity for those seeking safety to explain and corroborate their persecution claims, the new system imposes unreasonably speedy time frames to enable swift adjudications. Asylum seekers must obtain representation very quickly even though the government does not fund counsel and not enough lawyers offer free or low-cost representation. Moreover, the immigration statute requires that asylum seekers must corroborate their claims with extrinsic evidence if the adjudicator thinks that such evidence is available – a nearly impossible task in the time frames provided by the new rule. As a result, the new rule clashes with every state's Rules of Professional Conduct 1.1 and 1.3, imposing duties of competence and diligence in every case that a lawyer undertakes. It will be extremely difficult for lawyers to provide competent and diligent representation under the new, excessively short deadlines. For immigration lawyers, the new rule exacerbates a challenge that they share with public defenders and other lawyers working within dysfunctional systems: how to provide even the most basic level of procedural due process for their clients, most of whom are people of color.

This article begins by describing the regular asylum process. It then summarizes the history of expedited removal, a screening system that limits access to that process for asylum seekers who arrive at the southern U.S. border without visas. It then explains and assesses the Biden administration's first and second versions of the new asylum rule, highlighting the major flaw that will make the current version an unfairly formidable hurdle for asylum seekers subject to it. The article concludes by setting out a way for the Biden administration to create a more fair, accurate and efficient border asylum adjudication system and ensure that the U.S. can comply with domestic and international refugee law.

---

[*] Philip G. Schrag is the Delaney Family Professor of Public Interest Law at Georgetown University Law Center. Jaya Ramji-Nogales is the I. Herman Stern Research Professor and Associate Dean for Research at Temple University Beasley School of Law. Andrew I. Schoenholtz is Professor from Practice at Georgetown University Law Center. The authors would like to thank Ahilan Arulanantham, Pooja Dadhania, Kate Evans, Lindsay Harris, Laila Hlass, Talia Inlender, Karen Musalo, Shruti Rana, Sarah Rogerson, Becky Sharpless, Faiza Sayed, and David Thronson for thoughtful comments on this article at an early stage. Many thanks to our Deans, Rachel Rebouché and William Treanor, for generous research funding that enabled us to complete this article.

I. Introduction

This article describes and critiques the Biden administration's new border asylum adjudication system, which some experts have described as "the most sweeping change to the asylum process

in a quarter-century."[1] The U.S. asylum system has long been a site of contestation over whether populations of color fleeing violence in their home countries should receive legal protection in the form of humanitarian immigration status.[2] This new system, which severely limits the time frame for the asylum process, is the most recent in a series of modern efforts that have impeded access for migrants of color, particularly Central Americans and Haitians.

The statute that created the U.S. asylum system, the Refugee Act of 1980, did not set out procedures for the Executive branch to follow in establishing the asylum system. Responding to Indochinese protection seekers, the drafters primarily focused on the process for admitting refugees who would be resettled in the United States from overseas. It afforded asylum seekers who arrived on their own in the United States the right to seek protection but was silent about procedures for adjudicating their claims. This gap became a concern during the 1980s when asylum seekers from Central America began arriving at the southern border in large numbers. Both Congress and the Executive implemented increasingly harsh laws and policies that restricted access to the regular asylum system.

This article provides a history of the laws and policies that have limited access to asylum through screening processes at the southern border. It begins with a description of the regular asylum system as a point of comparison for expedited processes. The article next explains the expedited removal process that was created by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). This process included a screening interview to determine whether arriving migrants had a plausible claim for asylum. In order to avoid returning refugees to persecution, Congress set a low bar for individuals eligible for this screening process. However, in recent years, the "credible fear" standard has been applied more strictly.

Since it began, the expedited removal process has been criticized by scholars for prioritizing speed over fairness and accuracy.[3] Other scholars have raised concerns with the ways in which

---

[1] Eileen Sullivan, *U.S. to Begin Allowing Migrants to Apply for Asylum Under a New System,* N.Y. TIMES (May 26, 2022), https://www.nytimes.com/2022/05/26/us/politics/asylum-system.html?smid=url-share

[2] *See, e.g.,* ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES, AND PHILIP G. SCHRAG, THE END OF ASYLUM (2021). In principle, asylum is available equally to people from any country in which they are persecuted. In practice, the overwhelming majority of applicants and of people granted asylum are people of color. For example, in FY 2019, 46,508 individuals were granted asylum, but only 3860 of them (eight percent) came from countries in which the majority of the population would be classified as white (including former Soviet bloc countries and the Balkan countries); even some of those individuals may have been people of color. DHS Yearbook of Immigration Statistics 2020, Tables 17 and 19.

[3] For an early critique of expedited removal's excessive emphasis on speed, *see* Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum Systems*, 81 IOWA L. REV. 671, 693-94 (1996) (highlighting the concern that less time for preparation amplified the risk of error, as asylum seekers were far less able to locate and retain counsel, obtain documentary evidence in support of their claims, and identify and secure witnesses to testify on their behalf). For more recent arguments that expedited removal favors speed over fairness, *see* Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5.1 COLUM. J. RACE & L. 1 (2014); Daniel Kanstoom, *Expedited Removal and Due Process: "A Testing Crucible of Basic Principle" in the Time of Trump*, 75 WASH. & LEE L. REV. 1323, 1341 (2018). For concerns about the accuracy of excessively speedy hearings, *see* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 230-31 (2017). Scholars have raised

expedited removal "effectively block[s] access to the immigration courts."[4] The nadir came with the Trump administration, which created even more expedited processes to screen out asylum seekers and enforced expedited removal in a draconian fashion.[5]

This article then offers a detailed examination of the new border asylum adjudication process created by the Biden administration, criticizing its prioritization of speed over fairness. It walks carefully through the first and second versions of the rule, describing both the positive aspects of these changes and the problems with each iteration of the rule. The article focuses on a serious flaw in the current version of the rule, namely the short period of time in which asylum seekers who present themselves or are apprehended at the southern U.S. border must find counsel and meet arduous evidentiary standards. Asylum seekers may be required to present their case before an asylum officer in as little as three weeks after a preliminary interview at which the government decides whether they have a credible asylum claim. Moreover, asylum seekers must submit any documentary evidence supporting their claim to the asylum office by mail ten days before that interview. If their case is sent to immigration court, which the government expects will happen in 85% of cases, the asylum seeker has at most an additional 70 days to submit further evidence.

The unrealistic time constraints laid out in the new border asylum adjudication rule present at least three major challenges. The article discusses the obstacles for the asylum seeker to secure a lawyer within the short time frame set out by the rule. It also outlines the difficulties for the asylum seeker and their lawyer of obtaining evidence to corroborate their claim within the tight deadlines of the rule. Finally, it walks through the ethical problem for asylum lawyers who may be unable to prepare an asylum claim and thus unable to represent an asylum seeker competently and diligently within the time constraints of the rule. The article ends with proposals to establish a border asylum process that is both efficient and fair.

II. The Origins of the U.S. Asylum System and Expedited Removal

Though our nation's commitment to refugee protection has been severely tested in recent years, the United States has been a destination for individuals fleeing religious and political persecution since its founding. The contemporary U.S. legal framework for asylum developed after World

---

many other concerns with the process. *See, e.g.,* Stephen Manning and Kari Hong, *Getting it Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 699-701 (2018) (criticizing the lack of access to counsel); Lindsay Harris, *Withholding Protection*, 50 COLUM. H. RTS. L. REV. 1, 22-37 (2019) (exposing the failures of CBP officers to accurately undertake the first step of the process and raising concerns with the frequency of telephonic hearings); Michele Pistone and John J. Hoeffner, *Rules Are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIG. L.J. 167 (2006) (describing severe implementation problems); Jill Family, *A Broader View of the Immigration Adjudication Problem,* 23 GEO. IMMIG. L.J. 595, 624-27 (2009) (decrying the lack of administrative and judicial review available to asylum seekers whose credible fear finding is negative).

[4] Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48 (2020).

[5] *See* Schoenholtz et al. *supra* n. 2

War II. In 1951, the UN Convention Relating to the Status of Refugees laid the foundation of the contemporary international refugee law framework.[6] The United States bound itself to uphold the legal obligations set out in that treaty by ratifying the 1967 UN Protocol Relating to the Status of Refugees, which incorporated the refugee definition and mandatory protections of the Refugee Convention.[7] More than a decade later, Congress passed the Refugee Act of 1980, which adopted the Convention's definition of a refugee as domestic law: an individual who was unwilling or unable to return to their home country because of their well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.[8] Another decade passed before the executive issued regulations to systematize the asylum process.[9]

A. Creating the Asylum Adjudication System

Although the 1980 Act provided that refugees could seek asylum in the United States, it did little to establish procedures for adjudicating claims. The Act focused on refugee admissions from overseas, which, at that time, was the mechanism through which most individuals seeking protection had arrived. Soon after the passage of the Act, the asylum process became another main avenue for seeking protection; the vast gaps in the statute's provisions on asylum procedures would subsequently prove problematic.[10]

In 1980, the situation of the Indochinese refugees had been foremost on the minds of the drafters, who were focused on ensuring that Congress played a role in deciding which and how many refugees could enter the United States.[11] Much of the 1980 Act was devoted to creating a formal resettlement process through which individuals located abroad who met the definition of a refugee could be brought to the United States for protection. At that time, the United States was

---

[6] United Nations Convention Relating to the Status of Refugees, adopted July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, at Art. 1(A) (entered into force Apr. 22, 1954), https://www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx

[7] United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, at Art. I (1-2) (entered into force Oct. 4, 1967; for the United States, Nov. 1, 1968) ("The States Parties to the present Protocol undertake to apply Articles 2 through 34 inclusive of the Convention to refugees hereinafter defined").

[8] Pub. L. No. 96–212, 94 Stat. 102 (1980); 8 U.S.C. §§ 1101(a)(42); 1158. The Immigration and Nationality Act of 1952 authorized the Attorney General to offer withholding of removal to individuals subject to physical persecution under a clear probability standard. This provision was amended in 1965 to align more closely with the Refugee Convention's categories. Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17:2 J. L. REFORM 243, 244, 247 (1984). "Although the right of asylum has been regarded as an historic tenet of American political policy, it has not been set forth in any statutory provision." Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. of the Judiciary, 96th Cong., 1st Sess., at 186 (1979); Edward M. Kennedy, Refugee Act of 1980, 15 Int'l Migration Rev. 141, 150 (1981): "For the first time, the new Act establishes a clearly defined asylum provision in United States immigration law."

[9] 55 Fed. Reg. 30,674-88 (July 27, 1990), codified in 8 CFR, Section 208. The regulations are now found in 8 C.F,R. Sections 208 (pertaining to the Department of Homeland Security) and 1208 (pertaining to the Department of Justice).

[10] David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1252-53 (1990).

[11] Schoenholtz et al, supra n. 2, at 8-9 (2021).

rarely a country of first asylum;[12] as a result, the drafters provided far less guidance on the asylum adjudication system than they did on the overseas refugee resettlement process. Though the Act set out for the first time a statutory basis for the U.S. asylum process, it delegated to the Attorney General the creation of a procedure to adjudicate the claims of asylum seekers who requested protection inside or at the borders of the United States.[13]

In 1980, Cuban and Haitian asylum seekers fleeing political oppression and violence in their home countries began arriving by boat in the United States in large numbers. The existing asylum process was ill-equipped to manage so many applications, as the Refugee Act did not contemplate such arrivals. As thousands of Central Americans fled civil wars in their homelands in the 1980s, the asylum system faced increasing numbers of asylum seekers at the southern border.[14] Political pressure mounted to establish an adjudication system that functioned more effectively than the temporary regime then in place.[15] Professor David Martin noted in 1990 that the asylum system's "inability to cope effectively with growing numbers of asylum seekers . . . threatens [its] foundation."[16]

It took ten years for the Attorney General to promulgate a final rule establishing a formal asylum adjudication process.[17] Beginning in 1990, the Immigration and Naturalization Service (INS) created the Asylum Officer Corps, a group of asylum officers who underwent extensive professional training before adjudicating asylum claims.[18] This corps and its procedures remain in place. These asylum officers adjudicate affirmative asylum claims, that is, those filed by applicants who have not previously been apprehended by immigration authorities.[19] Asylum officers conduct non-adversarial interviews in which they are responsible for eliciting relevant information from the asylum seeker.[20] Although faced with a backlog within just a few years, the Asylum Office was guided by its dual goals of fairness and speed.[21]

---

[12] Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report,* 4(4) INT'L J. REFUGEE L. 455, 459 (1992).

[13] 8 U.S.C. §208(d)(1). Before the Refugee Act, there was no statutory authority governing the process of asylum adjudication. The first regulations governing what we would now label withholding of removal, issued in 1953, provided for a non-adversarial interview by an immigration officer. Martin, *supra* n. 5 at 1294. Regulations promulgated in 1962 created procedures for applicants to seek withholding of removal before a special inquiry officer, the predecessor to today's immigration judges. *Id.* New regulations codified in 1974 directed applicants within the United States or at an airport or seaport to apply for asylum to the INS District Director, who was required to seek advice from the State Department on every asylum claim. Beyer, *supra* n. 7 at 455-56 n. 1, 458.

[14] Martin, *supra* n. 10 at 1251; Helton, *supra* n. 8 at 261.

[15] Beyer, *supra* n. 12 at 466-67.

[16] Martin, *supra* n. 10 at 1257, 1366-67.

[17] 55 Fed. Reg. 30,674-88 (July 27, 1990), codified in 8 CFR, Section 208.

[18] Beyer, *supra* n. 12 at 457, 471-72.

[19] They also adjudicate asylum claims made by unaccompanied children who have been apprehended by immigration authorities. 8 U.S.C.A. § 1158(b)(3)(C).

[20] 8 C.F.R. §208.9(b).

[21] Beyer, *supra* n. 12 at 484-85; Martin, *supra* n. 5 at 1322.

The rule also required INS to establish an internal documentation center to provide officers with current and reliable information about human rights conditions in applicants' countries of origin.[22] Drawing from sources such as Amnesty International, Freedom House, the Library of Congress, and Human Rights Watch as well as news media, this Resource Information Center (RIC) created country profiles, alerts, and information packets.[23] RIC staff also collaborated with their counterparts at the Canadian Immigration and Refugee Board Documentation Centre to share information resources.[24]

Until very recently, as described in Section V, infra, all defensive claimants (non-citizens who applied for asylum after being placed in removal proceedings) except unaccompanied minors have had their asylum claims heard in immigration court. In 1980, any non-citizen arriving at a port of entry, whether or not in possession of valid immigration documents, had the right to a hearing in immigration court to determine whether they should be granted asylum or ordered deported to their own countries.[25] In 1987, the Department of Justice proposed a final asylum rule that would allocate adjudication authority for all asylum claims to asylum officers, whose final decisions would bind immigration judges in the related removal (deportation) hearings.[26] But refugee advocates opposed the rule. They were concerned that asylum officers would lack independence from the executive branch's immigration enforcement and foreign policy priorities and would not have sufficient training to perform their jobs professionally.[27] The proposed rule was not adopted. These concerns led to the creation of an asylum system in which immigration judges retain jurisdiction over asylum claims filed as a defense to removal.

B. The U.S. Asylum Adjudication System

For affirmative asylum seekers, those who request asylum before they have been apprehended, the first step of the process is to file what is known as Form I-589 with United States Citizenship and Immigration Services (USCIS).[28] This twelve-page form involves fourteen pages of instructions; in most cases, a successful application requires substantial supplemental information. After the application is filed, USCIS first sends the asylum seeker an appointment

---

[22] Beyer, *supra* n. 12 at 457, 460-61, 472-74; 8 C.F.R. §208.1(b).
[23] *Id.* at 474.
[24] *Id.* at 473.
[25] Alison Siskin and Ruth Ellen Wasem, *Immigration Policy on Expedited Removal of Aliens*, CONG. RES. SERV. 3 (Sept. 30, 2005), https://perma.cc/J4QE-2JU4 Denials of asylum could be appealed to an administrative Board of Immigration Appeals, 8 C.F.R. Sec. 1003.1 and then to a U.S. Court of Appeals. 8 U.S.C. Sec. 1252(a)(1).
[26] PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 30 (1999). At the time, removal hearings were known as exclusion or deportation hearings.
[27] Martin, *supra* n. 10 at 1321-22.
[28] U.S. Citizenship and Immigration Services, *I-589, Application for Asylum and Withholding of Removal*, https://www.uscis.gov/i-589. In 2003, the Homeland Security Act abolished the INS and reassigned most of its immigration functions to the new Department of Homeland Security (DHS). The asylum officers were transferred to United States Citizenship and Immigration Services (USCIS) within DHS, while the immigration judges remained in the Executive Office for Immigration Review (EOIR) in the Department of Justice.

for fingerprinting.[29] Then USCIS sends notice of an interview, which is scheduled at the regional Asylum Office for the catchment area where the applicant resides.[30] The Asylum Officer conducts a non-adversarial interview; the asylum seeker may have a lawyer present, but it is the job of the asylum officer to elicit all information relevant to the asylum claim. Asylum officers generally conduct two interviews per day,[31] but the rate of new affirmative applications has frequently challenged the capacity of USCIS to adjudicate them in a timely manner. As of December 31, 2021, there was a backlog of over 430,000 affirmative asylum cases at USCIS.[32]

Both asylum seekers who are unsuccessful at the asylum office and those who are apprehended before filing for asylum can plead their cases in immigration court, asserting claims for protection, including asylum, withholding of removal, and/or relief under the Convention Against Torture, as defenses to being ordered removed from the United States. DHS officials initiate a removal proceeding by serving a Notice to Appear (NTA), the equivalent of a summons, on the non-citizen and then filing it in immigration court.[33] Approximately 600 immigration judges serve in 68 immigration courts across the nation;[34] DHS generally assigns non-citizens to immigration courts based on the location of apprehension or detention.[35] By July 2022 the immigration court system had an astonishingly large backlog of more than 1.7 million pending cases, and the wait time for a hearing in immigration court was nearly four and a half years.[36]

Unlike asylum office interviews, immigration court hearings are adversarial proceedings similar to non-jury trials. In immigration court, the government is represented by a regional Assistant Chief Counsel (ACC) employed by U.S. Immigration and Customs Enforcement (ICE), a Department of Homeland Security (DHS) agency. An ACC usually contests the asylum claim, often by focusing on any inconsistencies in the application and/or testimony, material or otherwise, and asking challenging questions on cross-examination. Immigration court hearings where the asylum seeker is represented often take three or four hours, as asylum seekers may testify in languages other than English, requiring interpretation supplied by the court. Non-citizens may present documentary or oral testimony from fact witnesses who can vouch for the specific factual claims as well as the testimony of expert witnesses who can corroborate their medical and psychological claims and relevant human rights abuses in their country of origin. Immigration

---

[29] U.S. Citizenship and Immigration Services, https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process#:~:text=Workload%20priorities%20related%20to%20border,the%20priority%20order%20listed%20above.

[30] *Id.*

[31] U.S. Citizenship and Immigration Services Ombudsman, *Annual Report 2022* 49 (June 30, 2022). https://www.dhs.gov/sites/default/files/2022-06/CIS_Ombudsman_2022_Annual_Report_0.pdf.

[32] Id. at 8, 42-53

[33] United States Department of Justice, *Commencement of Removal Proceedings,* https://www.justice.gov/eoir/eoir-policy-manual/4/2.

[34] United States Department of Justice, *Office of the Chief Immigration Judge*, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios

[35] U.S. DOJ, *supra* n. 33.

[36] Executive Office for Immigration Review, *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (July 15, 2022), https://www.justice.gov/eoir/page/file/1242166/download

judge decisions in affirmative asylum cases are *de novo*, meaning that they are not a review of the asylum officer's decision but rather a fresh examination of the claim.[37] The judge makes a decision based on only the documentary evidence and testimony admitted in immigration court, and generally does not consider the asylum officer's denial.

Both the applicant and the government can appeal the immigration judge's decision to the Board of Immigration Appeals (BIA), the administrative appellate body within EOIR that sets nationwide precedent in immigration law. The BIA, which is currently comprised of twenty-three Appellate Immigration Judges, decides the vast majority of cases on paper, rarely hearing oral argument.[38] An Attorney General (AG) who does not agree with the BIA's decision may overturn it.[39] The asylum seeker can appeal a negative decision by the BIA or the AG to the federal court of appeals in which their asylum case is heard. Petitions for certiorari in asylum cases are rarely granted by the U.S. Supreme Court, so the federal court of appeals is generally the end of the road for asylum appeals.

Through this process, asylum adjudicators determine whether applicants meet the definition of a refugee, namely that they are "unable or unwilling" to return to their country due to "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[40] Political opinion can be complicated to define, involving determinations of both actual political beliefs as well as political opinions imputed to victims by their persecutors; assessments of whether persecution for multiple reasons can be attributed to political opinion; questions about whether neutrality constitutes a political opinion; and shifting caselaw around whether feminism and opposition to corruption can be considered the expression of a political opinion.[41]

The particular social group ground is the most complex, with numerous circuit splits and administrative law contests over its scope. The seminal BIA decision on particular social group, *Matter of Acosta*, defines it as one shared by individuals with a "common immutable characteristic" that includes at least sex, color, and kinship ties.[42] In recent years, the Board added two more elements to the *Acosta* definition: particularity and social distinction.[43] Those additional

---

[37] 8 C.F.R. Sec. 1240.17(i)(1).

[38] United States Department of Justice, *Board of Immigration Appeals*, https://www.justice.gov/eoir/board-of-immigration-appeals.

[39] This is a power that Attorneys General rarely exercised until the Trump administration, but Trump's first three Attorneys General overturned 17 BIA precedents (many of them asylum cases) that had favored immigrants. Alison Peck, THE ACCIDENTAL HISTORY OF THE IMMIGRATION COURTS 9, 14-26 (Univ. of Calif. Press 2021)

[40] 8 U.S.C. §1101(a)(42)(A).

[41] *See, e.g., Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996) (analyzing imputed political opinion and mixed motives); *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984) (neutrality as a political opinion); *Hernandez-Chacon v. Barr* (9th Cir. 2020) (feminism as a political opinion); *Castro v. Holder*, 597 F.3d 93 (2d Cir. 2010) (opposition to corruption as a political opinion).

[42] *Matter of Acosta*, 19 I. & N. Dec. 211, 232 (BIA 1985).

[43] *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014). The "social distinction" requirement imposed on applicants the burden of showing that the "social group" being asserted was recognized as a group within the nation or at least

elements provoked extensive litigation in the federal courts of appeals, and are still the source of substantial confusion even among experts in asylum law.[44] In recent years, the Attorney General, the BIA, and federal courts of appeals have been at odds over whether women fleeing domestic violence, LGBTQ+ individuals, family members, individuals who refuse to join gangs, and gang informants, among others, can constitute a particular social group.[45]

In addition to the complexities of the substantive standard for asylum, adjudicators must examine claims for protection under the Convention Against Torture, subject to a separate set of regulatory and caselaw definitions. Immigration judges and asylum officers must determine whether the one-year filing deadline applies to the claim, and if so, whether an exception to the deadline is warranted.[46] While some exceptions are laid out in the regulations, that list is intentionally illustrative not exhaustive, meaning adjudicators have the authority to issue an exception for a reason not enumerated in the regulation.

Immigration judges and asylum officers must also make challenging decisions about whether the applicant is credible, and if not, whether the corroboration provided is sufficient.[47] Adjudicators must also assess the applicability of statutory bars to asylum, including whether the applicant persecuted others; has been convicted of a particularly serious crime; committed a serious nonpolitical crime outside the United States; may be regarded as a danger to the security of the United States; has engaged in terrorist activity broadly defined; or is firmly resettled outside of the United States.[48] Of course, each of these bars is defined through caselaw and other statutory or regulatory provisions. The language of the terrorism bar offers one example of the complexity of the asylum adjudication process; it excludes from asylum a non-citizen:

> described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney

---

the region in which the victim had resided. The Board specified that social distinction could be proved through, "[e]vidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like." Id.

[44] *Id.* at 228-29.

[45] SCHOENHOLTZ ET AL., *supra* n. 2 at 32-36. *See also Id.* (refusal to join a gang); *Bringas-Rodrigues v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (sexual orientation and identity [sic]); *Perez-Vasquez v. Garland*, 4 F.4th 213 (4th Cir. 2021) (nuclear family); *Matter of H-L-S-A-*, 28 I&N Dec. 228 (BIA 2021) (gang informant as "prosecutorial witness"). *See also* Center for Gender and Refugee Studies, *Matter of A-B-*, https://cgrs.uchastings.edu/our-work/matter-b-0; National Immigrant Justice Center, *Particular Social Group & Asylum After Matter Of A-B- & Matter Of L-E-A-: Information And Resources*, https://immigrantjustice.org/for-attorneys/legal-resources/topic/particular-social-group-asylum-after-matter-b-matter-l-e.

[46] This deadline, imposed by Congress in 1996, precludes the government from considering most applications for asylum that were filed more than a year after the applicant entered the United States. For an empirical study of its effects, see Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales and James Dombach, *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WILLIAM & MARY L. REV. 651 (2010).

[47] See Section V, infra, for a detailed discussion of the corroboration requirement.

[48] 8 U.S.C.A. § 1158(b)(1)(B)(2)(a).

> General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.[49]

In short, asylum adjudication is a complicated process involving a complex statute, detailed and numerous regulations, extensive caselaw that is not always a model of clarity, and the testimony of individuals fleeing serious harm who are often not able to express themselves fully in English and whose cultural mores may differ substantially from those of the adjudicator.

C. Expedited Removal's Predecessors

Almost as soon as the ink had dried on the Refugee Act, large numbers of asylum seekers began arriving in the United States, fleeing serious political violence in Central America, Cuba and Haiti. In response, the INS created "summary exclusion" policies designed to differentiate quickly between those who fit within the refugee definition and those who did not. INS intended these policies to act as deterrents.[50]

By December 1988, more than two thousand asylum seekers, largely Central Americans, were applying for protection in South Texas each week. In deterrence mode, INS began deciding asylum cases within one day of application and detaining hundreds who were not granted asylum.[51] This policy was enjoined after three weeks.[52]

Following a September 1991 coup, the U.S. Coast Guard interdicted Haitians fleeing by sea. INS screened most of them on a ship docked at the U.S. Naval Base in Guantanamo Bay, Cuba. The substantive standard for this screening was whether the individual had a "credible fear" of persecution in Haiti. Under this standard, asylum officers undertook a two-step determination of whether it was more likely than not that the applicant's testimony was true, and if so, whether there was a significant possibility that the applicant would be granted asylum.[53] Asylum seekers who could meet this standard were sent to the United States and placed in the asylum adjudication process; those who could not were returned to Haiti. The following year, President George H.W. Bush directed the Coast Guard to return all Haitians interdicted on the high seas, regardless of their eligibility for asylum, to Haiti.[54] In 1993, the U.S. Supreme Court upheld this policy as compliant with domestic and international law.[55]

---

[49] 8 U.S.C.A. § 1158(b)(1)(B)(2)(a)(v).
[50] Siskin and Wasem, *supra* n. 25 at 3.
[51] Martin, *supra* n. 10 at 1251-52. In 1992, INS implemented an asylum screening process at the airports; it was not successful and was terminated. Schrag, *supra* n. 266 at 34.
[52] Peter Appelbome, *Judge Halts Rule Stranding Aliens in Rio Grande Valley*, N.Y. TIMES (Jan. 10, 1989).
[53] Bo Cooper, *Procedures for Expedited Removal and Asylum Screening Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1501, 1505-6 (1997).
[54] *Id.* at 1506-7.
[55] The Supreme Court decision is Sale v. Haitian Council, 509 U.S. 155 (1993). For a more detailed description of the evolution of the expedited removal proposal from a bill in Congress in the early 1990s to its enactment in 1996, and of the process through which the regulations implementing it were negotiated, see Philip G. Schrag, A Well-founded Fear: The Congressional Battle to Save Political Asylum in America (Routledge 2000).

The credible fear standard for certain "expedited" cases resurfaced in bills before Congress, and finally became codified in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[56] One bill, introduced in July 1993, aimed to apply expedited exclusion procedures to all non-citizens encountered by federal authorities who had false papers or no papers.[57] In mid-1994, however, the Clinton Administration offered a new bill that envisioned expedited removal as a mechanism to be utilized only in situations of mass influx.[58] In other words, it would not be implemented during normal operations at or near the border. The "expedited removal" section of the law that became IIRIRA was far broader in scope than the administration's proposal. It authorized the Attorney General to apply its special adjudication provisions to anyone who sought to enter the United States without proper documentation; to anyone apprehended near the border who had entered the United States without being inspected by an immigration officer; and to those uninspected migrants who were apprehended in the interior who could not prove that they had already been present in the United States for two years.[59] In order to ensure that the U.S. complied with its international and domestic laws regarding the protection of refugees, the new statute provided an exception to immediate removal for people fleeing persecution.

III. Expedited Removal Adjudication Procedures, 1997-2021

In 1997, the Clinton Administration implemented the expedited removal procedures established by IIRIRA.[60] The purpose of expedited removal was to identify undocumented migrants who did not have a plausible claim to asylum and deport them quickly. Unless they indicate an intention to apply for asylum, a U.S. Customs and Border Protection (CBP) officer can

---

[56] Div. C of Pub. L. 104-208, 110 Stat. 3009-546, enacted Sept. 30, 1996.

[57] David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 677 (2000).

[58] *Id.*

[59] The Attorney General's special adjudication provisions are described in Section II, infra. The Trump administration was the first to expand expedited removal to its statutory limits in 2019. The federal district court for the District of Columbia enjoined the expansion in September 2019, but the federal court of appeals for the District of Columbia reversed that injunction in June 2020. *Make the Road New York v. McAleenan,* Case 1:19-cv-02369-KBJ (D.D.C. Sept. 27, 2019), https://perma.cc/XXU9-C298; *Make the Road New York v. Wolf*, Case No. 19-5298 (D.C. Cir. June 23, 2020), https://perma.cc/59RA-CS5S. In 2022, the Biden administration rescinded the expansion, returning the scope of expedited removal to anyone who entered without inspection and is apprehended within 100 miles of the border within 14 days of entry.

[60] As explained above, the provisions of this Act apply to a foreign national who arrives in the United States without a required visa. Unaccompanied migrant children (UACs) are not subject to expedited removal; a statute requires that they be placed into regular removal proceedings. 8 U.S.C. § 1232(a)(5)(D) (created by Section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, § 235, 122 Stat. 5044, 5077 (2008)). The TVPRA also provided that USCIS has initial jurisdiction over UAC asylum applications, including those applications for UACs in removal proceedings. TVPRA § 235(d)(7)(B), *codified* at 8 U.S.C. § 1158(b)(3)(C).

order individuals removed without any hearing or review, a process that takes about 90 minutes.[61] An expedited removal carries with it a five-year bar to future legal entry.[62]

If a non-citizen in expedited removal expresses a fear of persecution or an intent to apply for asylum, the statute requires that the CBP officer refer them for an interview by an asylum officer from USCIS.[63] At that point, the CBP officer generally transfers custody of the asylum seeker to ICE, which detains them.[64] An asylum officer undertakes a screening interview to determine whether the applicant's story is credible, and if so, whether there is a "significant possibility" that they could qualify for asylum.[65] A non-citizen who passes this "credible fear" screening test, which is by design a "low screening standard,"[66] is given a chance to prove to an immigration judge that they qualify for asylum.[67] ICE is authorized to keep the asylum seeker in jail for months until an immigration court hearing is held but may in its discretion "parole" them into the United States, on their own recognizance or subject to conditions such as wearing an ankle monitor and reporting periodically to an ICE official.

The few applicants lucky enough to retain attorneys can receive information and advice before the interview to help them understand what aspects of their histories are relevant to the credible fear determination, but they are not allowed to be represented by counsel during the interview.[68]

---

[61] 8 U.S.C. Sec. 1225(b)(1)(A); Randy Capps, Faye Hipsman, & Doris Meissner, Migration Policy Institute, *Advances in U.S.-Mexico Border enforcement: A Review of the Consequence Delivery System* 3 (2017), https://perma.cc/28XM-HSAR.

[62] 8 U.S.C. Sec. 1182(a)(9)(a)(i).

[63] 8 U.S.C. Sec. 1225(b)(1)(A)(ii).

[64] 8 U.S.C. Sec. 1225(b)(1)(B)(iii)(IV).

[65] Individuals who had committed certain crimes or who sought to re-enter the United States are barred from receiving asylum but if they can prove that it is more likely than not that their life or freedom would be in jeopardy if they were removed to their home countries, they may receive the lesser protection of "withholding of removal." At least through the middle of 2022, such migrants were also interviewed by asylum officers during the expedited removal process but were required to meet a higher burden of "reasonable" fear rather than "credible" fear. 8 C.F.R. Sec. 208.31.

[66] Statement of Sen. Orrin Hatch, the floor manager of the IIRIRA legislation in the Senate. 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch). *See* also Bo Cooper, *Procedures for Expedited Removal and Asylum Screenings under the Illegal Immigration Reform and Responsibility Act of 1996*, 29 Conn. L. Rev. 1501, 1506, 1523 (1997) (INS Commissioner McNary explained to Congress that INS applied this standard to Haitians prior to the enactment of the expedited removal law in a way "to ensure that no genuine refugee is repatriated"; following enactment, the "INS's training materials indicate resolve by the agency to set the screening standard low").

[67] 8 U.S.C. Sec. 1225(b)(1)(B)(iii)(III). Before June 2022, this was the process for all non-citizens who were found to have credible fear. As described in Section V, infra, the Biden administration changed the procedure for some non-citizens who passed the credible fear screening test.

[68] Migrants who are barred by statute from receiving asylum (such as those who had previously been deported) might later be granted withholding of removal by an immigration judge. The asylum officer would screen these individuals using a more strict "reasonable fear" standard, and, like those who failed to demonstrate credible fear, those who failed this test are subject to deportation.

An asylum seeker who fails the screening test may appeal the decision immediately to an immigration judge, again without representation by counsel. The immigration judge's decision is final. If the judge upholds a negative credible fear decision, the applicant cannot appeal to a federal court. Instead, they are quickly removed, either directly across the U.S.-Mexico border or on an "ICE Air" repatriation flight.[69]

Below we examine each of the three adjudications critical to the expedited removal process. Then we briefly describe changes to the expedited removal process implemented during the Trump administration.

A. The First Decision: Expedited Removal Adjudications by CBP Officers

In the first step of expedited removal, CBP officers apprehend a noncitizen at a port of entry or, for those who entered without inspection, near the border. If the noncitizen does not have valid admission documents or uses fraud or misrepresents a material fact to gain admission, the officer completes an inadmissibility determination.[70] The CBP Officer makes this decision by asking a series of questions to the applicant for admission.[71]

The regulation requires that the CBP officer read a notice regarding asylum to the applicant:

> U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.[72]

The regulations also require that the CBP Officer record the response to four "fear" questions:

---

[69] See Immigration and Customs Enforcement, "ICE Air Operations prioritizes safety and security for its passengers: Removing Non-US citizens who are in the country illegally is a core responsibility in support of the agency's mission," https://perma.cc/EN3X-GSM9.

[70] For helpful descriptions and analyses of the expedited removal and credible fear processes, *see* Lindsay M. Harris, *Withholding Protection*, 50.3 Col. H.R. L. Rev., 1, 19-37 (2019); Stephen Manning and Kari Hong, "Getting it Righted: Access to Counsel in Rapid Removals," 101 Marquette L. Rev. 673, 682-687 (2018); Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black holes Created by Expedited Removal and Reinstatement*, 96 Wash. U. L. Rev. 337, 349-356 (2017); Daniel Kanstroom, *Expedited Removal and Due Process: 'A Testing Crucible of Basic Principle' in the Time of Trump*, 75 Wash. & Lee Law Rev. 1323, 1328-1343 (2018).

[71] 8 CFR Sec. 235.3(b)(2)(i) sets out the procedure discussed here.

[72] This language is found in Form I-867A.

> Why did you leave your home country or country of last residence?
>
> Do you have any fear or concern about being returned to your home country or being removed from the United States?
>
> Would you be harmed if you are returned to your home country or country of last residence?
>
> Do you have any questions or is there anything else you would like to add?[73]

As research shows, some CBP officers ask the required questions to ascertain whether or not the foreign national might be a refugee, but others do not ask those mandatory questions. In 2005, the United States Commission on International Religious Freedom, established by Congress, found that:

> In more than half of the interviews observed . . ., OFO officers failed to read the required information advising the non-citizen to ask for protection without delay if s/he feared return. At least one of the four required fear questions was asked approximately 95 percent of the time, but in 86.5 percent of the cases where a fear question was not asked, the record inaccurately indicated that it had been asked, and answered. And in 72 percent of the cases, asylum seekers were not allowed to review and correct the form before signing, as required. Thus, USCIRF found that, although they resemble verbatim transcripts, the I-867 sworn statements were neither verbatim nor reliable, often indicating that information was conveyed when in fact it was not and sometimes including answers to questions that never were asked. [74]

The examining officer is charged with creating a record of questions asked and answered, writing them out as if the "Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act" were a transcript, even though it is not one. As research has shown,[75] officers do not always accurately report the answers on Form I-867AB. In addition, the applicant may not understand the questions, whether asked in English or via an interpreter. Nonetheless, she is required to initial each page of the completed form and sign the last page of this "record," which is written in English.

Following the examination, the CBP Officer writes up the "findings" and decision regarding expedited removal, which are then reviewed by the CBP Officer's supervisor. That

---

[73] These questions are found in Form I-867B.

[74] U.S. Comm'n on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* 6 (2005); U.S. Comm'n on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 7, 19 (2015). Office of Field Operations (OFO) officers are CBP inspectors at the ports of entry.

[75] U.S. Comm'n on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* 6 (2005); U.S. Comm'n on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 7, 19 (2015).

review does not involve meeting with the applicant or asking her any additional questions. The supervisor—who is an enforcement official in the same agency rather than an impartial factfinder—is often asked to authorize a removal order. After the supervisor approves the order, the examining officer completes a "Notice and Order of Expedited Removal,"[76] and serves notice of the finding of removability and the removal order on the applicant, who must read and sign the Notice and Order form.

B. The Second Decision: Asylum Officer Credible Fear Screenings and Determinations

If the CBP officer asks the fear questions and the applicant indicates such a fear or an intent to seek asylum, the officer forwards the Notice and Order of Expedited Removal to the USCIS asylum office. An asylum officer then conducts a credible fear screening within a week or two of the CBP adjudication. The asylum officer is charged with eliciting relevant information regarding a credible fear of persecution in this non-adversarial, private interview. [77]

The regulations permit the asylum seeker to present evidence and to consult with "a person or persons" of their own choosing prior to the interview, as long as such consultations do not unreasonably delay the process.[78] Such consultations are not always possible, because volunteers or consultants paid by nongovernmental organizations are not able to staff all of the ICE detention centers.[79] A consulted person may attend the interview and may be permitted—at the discretion of the asylum officer—to make a statement at the end of the interview.

At that interview, the asylum seeker must show a "significant possibility" that she can prove eligibility for asylum. Asylum officers are tasked with summarizing in writing the answers asylum seekers give to questions that probe such issues as why they left their countries, what harms they suffered there, and how they fled.[80] The officer also creates a short summary—again, not a verbatim record--of the material facts and must read that summary to the asylum seeker. The officer's "notes must reflect that the applicant was asked to explain any inconsistencies or lack of detail on material issues and that the applicant was given every opportunity to establish a credible fear." A supervisor reviews the asylum officer's record of the interview.[81]

---

[76] Form I-860.

[77] 8 U.S.C. Sec. 1225(b)(1)(B)(i); 8 C.F.R. Sec. 208.30(d).

[78] 8 C.F.R. Sec. 208.30(d)(4).

[79] There appears to be no published information on how frequently migrants who are scheduled to have credible fear interviews are able to have individual prior consultation with legal representatives, either in person or telephonically. Similarly, there appears to be no published information on how frequently consultants attend credible fear interviews.

[80] See Form I-870, the USCIS Record of Determination/Credible Fear Worksheet.

[81] 8 C.F.R. Sec. 298.30(e)(8).

Until late 2019, most applicants screened for credible fear met the "significant possibility" standard, and were referred by asylum officers to immigration court for hearings on their asylum claims in regular removal proceedings.[82] Critics have argued that both the Obama and Trump administrations tightened the requirements to meet the "significant possibility" standard in order to exclude families from northern Central America who were seeking asylum at the U.S. border in response to extraordinary levels of violence in those countries.[83]

C. The Third Decision: Immigration Judge Review of Negative Credible Fear Determinations

When an asylum officer makes a negative credible fear determination, the asylum seeker can ask an immigration judge to "review" that decision. An applicant who chooses not to request review is immediately removed. If an applicant requests review, the immigration judge receives the interview notes written by the asylum officer, the summary of material facts, and any other materials on which the determination was based.[84] The immigration judge can decide to conduct the review by telephone or videoconference, whether or not the asylum seeker agrees to a remote hearing.[85] In either case, the noncitizen testifies under oath or affirmation.[86] Under the statute,

---

[82] Cong. Research Svc., *Immigration: U.S. Asylum Policy*, Rpt. R45539, Feb. 19, 2019 at 38, Table B-3. From FY 2016 through FY 2020, 83 percent of completed credible fear interviews resulted in positive findings of credible fear, but in FY 2020, the rate for completed cases was only 44 percent. Dep'ts of Homeland Security and Justice, Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal and CAT Protection Claims by Asylum Officers, 97 Fed. Reg. 18078, 18200, Table 3. During the Biden administration, the percentage of asylum seekers in the expedited removal process who received positive findings of credible was higher than during the last year of the Trump administration but did not reach the higher levels of earlier years. During most months of 2022, fewer than 60 percent of applicants in the expedited removal process were found to have credible fear, compared with an average of 89 percent in the years 2016-2018. Compare USCIS, Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions, https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions with data linked from Dept. of Homeland Security, Credible Fear Cases Completed and Referrals for Credible Fear Interview, https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview.

[83] *See*, e.g., Sara Campos & Joan Friedland, American Immigration Council, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*, 3-4 (May 2014); Andrew I. Schoenholtz, Jaya Ramji-Nogales, & Philip G. Schrag, THE END OF ASYLUM, 48-52 (Georgetown University Press 2021). In addition to heightening the legal standard, as explained in THE END OF ASYLUM, the Trump administration tried to impose corroboration requirements and assigned CBP agents to conduct credible fear interviews, which until 2019 were only conducted by Asylum Officers specially trained in asylum law.

[84] 8 C.F.R. 1003.42(a).

[85] 8 C.F.R. Sec. 1003.25(c). For a thoughtful empirical critique of remote immigration hearings, *see* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NORTHWESTERN L. REV. 933 (2015).

[86] 8 C.F.R. 1003.42(c).

this review should take place within twenty-four hours to seven days of the supervisory asylum officer's approval of the asylum officer's negative credible fear determination.[87]

The regulations state that the asylum seeker may consult with "a person or persons" of her own choosing prior to the review but is silent on any role that lawyers may play at the review itself.[88] Immigration judges are authorized to make *de novo* decisions as to whether the asylum seeker meets the "significant possibility" standard based on their credibility, their statements, other evidence, and any applicable bars to asylum.[89]

There is no judicial review of the immigration judge's credible fear decision. If the immigration judge confirms the negative credible fear determination, then the asylum seeker is removed from the country. If the immigration judge overturns the asylum officer's decision, then the asylum seeker may pursue the claim for protection before another immigration judge in a regular removal hearing.

D. Early Proposals to Expedite Asylum Grants

In the early 2000s, INS drafted regulations that would enable asylum officers to grant asylum at the credible fear interview to applicants who met the "well-founded fear" standard.[90] The rationale for those regulations was that asylum officers often elicit evidence sufficient for a grant of asylum at the credible fear stage.

Asylum advocates were not uniformly in favor of this proposal.[91] While the potential to minimize the detention of asylum seekers in expedited removal was appealing, advocates worried about negative inferences that immigration judges might draw against asylum seekers who are not granted asylum at the credible fear interview. This concern was compounded by the likelihood that this change could transform the credible fear interview into a far more involved proceeding, which could disadvantage many applicants due to the dearth of representation, as well as understandable hesitance to discuss any traumatic experiences so soon after arrival.[92]

In 2005, in a report critiquing DHS's administration of the credible fear process, the United States Commission on International Religious Freedom (USCIRF) recommended that, during credible fear determinations, asylum officers should be able to grant asylum to individuals with

---

[87] 8 U.S.C. Sec. 1225(b)(1)(B)(3)(III).

[88] 8 C.F.R. 1003.42(c).

[89] For those noncitizens who are barred from asylum, the Immigration Judge makes determinations as to whether the person can show a "reasonable possibility" of persecution or torture, which requires a higher degree of proof.

[90] Karen Musalo et al., *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal,* 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 20 (2001).

[91] *Id.* at 21.

[92] *Id.*

strong claims.[93] USCIRF also found that asylum seekers in expedited removal proceedings who were represented by an attorney at subsequent immigration court hearings on the merits of their claims had far higher success rates than unrepresented applicants.[94]

Five years later, the Association's Commission on Immigration Reform recommended a different path for the asylum officer adjudication of merits claims for asylum seekers in expedited removal proceedings. This proposal suggested that asylum seekers who received positive credible fear determinations should be required to appear in immigration court. Once in court, immigration judges would have the discretion to transfer asylum claims temporarily to USCIS for resolution by asylum officers. Once the asylum officer had adjudicated the case, the immigration court could reassert jurisdiction and grant asylum. In other words, the Commission's proposal left the authority to terminate the removal case in the hands of the immigration judges while the asylum officers assessed the merits claims.[95]

In 2016, USCIRF issued a study that reiterated its recommendation that asylum officers should be authorized to grant asylum at the credible fear stage.[96] USCIRF acknowledged concerns presented in the Department of Homeland Security's official response to its 2005 report, namely that "allowing asylum officers to grant asylum after the credible fear interview could deprive applicants of the time and resources to develop a well-documented asylum claim or obtain legal counsel to assist them."[97]

E. The Trump Administration's Expedited Forms of Expedited Removal

From its earliest months in office, the Trump administration decried the high proportion of asylum seekers who established a credible fear.[98] It also pursued many harsh strategies to restrict access to asylum at the border.[99] One of its efforts was the creation of an extremely expedited

---

[93] U.S. Comm'n on Int'l Relig. Freedom (USCIRF), *Report on Asylum Seekers in Expedited Removal: Vol. I: Findings and Recommendations* 10 (Feb. 2005), https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf.

[94] *Id.* at 59.

[95] ABA Comm'n on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases*, 1-62 to I-63 (2010).

[96] U.S. Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* (2016), https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf.

[97] *Id.* at 54.

[98] Attorney General Sessions, "Remarks to the Executive Office for Immigration Review), Oct. 12, 2017, https://perma.cc/KZU4-8AQM.

[99] At the behest of White House Senior Advisor Stephen Miller and Attorney General Sessions, CBP forcibly separated families as an exceptionally cruel deterrence effort. CBP also pushed back and metered noncitizens who presented themselves at ports of entry and forced asylum seekers to await their hearings in dangerous border towns in Mexico under Trump's "Migrant Protection Protocols." The Trump administration also tried to bar asylum to those who entered without inspection elsewhere along the southern border, and successfully barred asylum for those who had transited other countries unless they could show that they applied for and were denied asylum in Mexico or another country that they passed through. ICE removed certain noncitizens to Guatemala via an Asylum Cooperative Agreement even though Guatemala did not have a functioning asylum system. The Attorney General reversed legal precedent to restrict asylum claims from those who fled domestic violence and gang violence.

version of expedited removal, which it called Prompt Asylum Claims Review (PACR). In this process, credible fear interviews were conducted within 48 hours after non-citizens were apprehended, while they were still in CBP custody at the border.[100] Only a fortunate few were able to connect telephonically with an attorney before the interview. Finding such lawyers soon after arrival in the United States and while detained was incredibly difficult. Asylum seekers had limited access to phone communication while in CBP detention. Due to the challenges of connecting with their clients and failures to provide attorneys with timely notice of the interview date, it was rarely possible for these lawyers to participate in telephonic interviews.[101] Among individuals subject to PACR, most were swiftly removed. Fewer than 20% were determined to have credible fear, compared with 78% of credible fear interviewees during the Bush and Obama administrations.[102]

In March 2020, using the COVID-19 pandemic as justification, the Trump administration created an expulsion program under a health statute (Title 42) regulated by the Centers for Disease Control and Prevention (CDC) never before used to deport immigrants at the border.[103] This proved to be speedier than any previous expedited removal process since it did not involve any examination of the noncitizen's credible fear of return—CBP deported foreign nationals on average in 96 minutes.[104] Using this health statute to very quickly deport asylum seekers without any consideration of their asylum claims, the Trump administration expelled over 440,000 applicants.

IV. Creating a New Border Asylum System

Schoenholtz et al, supra n. 2, at 33-36, 52-75. For a thorough review of how the family separation policy originated and was carried out, see Caitlin Dickerson, "We Need to Take Away Children," The Atlantic, Sept. 2022, https://perma.cc/Y469-BLDR.

[100] *See* First Amended Complaint For Declaratory And Injunctive Relief, *Las Americas v. Wolf*, Case No. 1:19-cv-03640 (D.D.C. December 5, 2019) (hereinafter "PACR Complaint"), at ¶ 70, https://perma.cc/QU52-4F3Q. PACR applied to non-Mexicans; a similar program called Humanitarian Asylum Review Process (HARP) was applied to Mexican asylum seekers.

[101] Plaintiffs' Statement of Undisputed Material Facts at ¶112-21, January 27, 2020, *in Las Americas v. Wolf*, *supra* n. 100.

[102] DHS, Office of Inspector General, "DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs," (DHS OIG PACR and HARP Report) p. 20, Table 4 (Jan. 25, 2021), https://perma.cc/97EV-DPQ8; Human Rights First, "Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees," 7 (June 2020), https://perma.cc/RQJ5-A7TR.

[103] *See* Schoenholtz et al, supra n. 2, 79-86.

[104] Nick Miroff, *Under Coronavirus Immigration Measures, U.S. Is Expelling Border-Crossers to Mexico in an Average of 96 Minutes*," *Washington Post* (Mar. 30, 2020).

The election of 2020 brought to power a new President—Joseph Biden—who had campaigned on a promise to "reassert America's commitment to asylum-seekers and refugees."[105] Two weeks after entering office, Biden issued an Executive Order requiring the DHS Secretary to "begin a review of procedures for individuals placed in expedited removal proceedings at the United States border" and within four months to report "recommendations for creating a more efficient and orderly process that facilitates timely adjudications and adherence to standards of fairness and due process."[106]

In its first months in office, the Biden administration followed up with several important reversals of Trump administration policies[107] that had imposed major barriers to asylum.[108] At the

---

[105] Biden-Harris, The Biden Plan for Securing our Values as a Nation of Immigrants, October 2016, https://perma.cc/WXE8-ANA5. This plan identified several changes that a Biden administration would make, including ending "the mismanagement of the asylum system, which fuels violence and chaos at the border" and "direct[ing] the necessary resources to ensure asylum applications are processed fairly and efficiently."

[106] Executive Order 14010, 86 Fed. Reg. 8267 (Feb. 10, 2021).

[107] For a description of Trump's changes to the asylum system, *see* Andrew I. Schoenholtz, Jaya Ramji-Nogales, and Philip G. Schrag, THE END OF ASYLUM (2022).

[108] Attorney General Merrick Garland restored legal precedent enabling survivors of domestic violence to win asylum. Matter of A- B-, 28 I & N Dec. 307 (A.G., 2021). The Biden administration killed an expansive rule, issued by the Trump administration after it lost the 2020 election, that as a practical matter would have ended the possibility of asylum for Central American and many other asylum-seekers. It killed the rule by deciding not to appeal the preliminary injunction against it. The main features of this rule, called by asylum advocates the "monster rule" or the "omnibus rule," are described in Schoenholtz et al, *supra* n. 2, at 87-97. Although the Biden administration did not appeal the preliminary injunction, neither did it agree to a permanent injunction, and at this writing the injunction is in force but the parties are trying to negotiate about its future. See Joint Status Report in Pangea Legal Services v. Dept. of Homeland Security, 20-cv-09253 (N. D. Cal. Jan. 31, 2022), https://perma.cc/8XZ9-QUCC. Detention centers for migrant families with children, which had operated since the Obama administration, see Philip G. Schrag, BABY JAILS: THE FIGHT TO END THE INCARCERATION OF REFUGEE CHILDREN IN AMERICA (2020). were transformed into detention centers for adults only. Andrea Castillo, Biden administration halts immigrant family detention for now, Los Angeles Times, Dec. 17, 2021. The new president suspended Trump's agreements that had enabled DHS to send applicants to Central America without considering their asylum claims. See John Ruwitch, Biden Moves to End Trump-Era Asylum Agreements With Central America Countries, NPR, Feb. 6, 2021. DHS ended the practice of "metering" and terminated rushed deportations under PACR and HARP. Memorandum from Troy A. Miller, Acting Commissioner, Customs and Border Patrol, to William A. Ferrara, Executive Assistant Commissioner, Office of Field Operations, Nov. 1, 2021, https://www.aila.org/File/DownloadEmbeddedFile/9069521; Paul Ingram, Biden ends 2 Trump programs designed to limit asylum-seekers, Tucson Sentinel, Feb. 3, 2021, https://perma.cc/P3Y6-3AYH. Biden ended the "Migrant Protection Protocols" through which the Trump administration had forced asylum seekers into Mexico to await their hearings—an effort that was temporarily stymied by a federal court's injunction that required DHS to continue implementing the Protocols. Dept. of Homeland Security, Termination of the Migrant Protection Protocols Program, June 1, 2021, https://perma.cc/U3QH-AVEP; Texas v. Biden, __ F. Supp. 3d __, 2021 U.S. Dist. LEXIS 152438 (N.D. Tex. 2021) (enjoining the suspension of the program), aff'd 20 F. 4th 928 (5th Cir. 2021); cert. granted sub nom Biden v. Texas, __ U.S. __, 212 L. Ed. 1 (2022), Biden v. Texas, __ U.S. __, 142 S. Ct. 2528 (2022) (reversing the district court's injunction).

border, however, little changed at first, due to Biden's continuing implementation of speedy removals under the authority of Title 42.

Notwithstanding Biden's continuation of the Title 42 program, the end of the Trump administration and many of its draconian policies contributed to increased migrant arrivals at the southern border.[109] The numbers of migrants apprehended at the southern border grew from a range of about 69,000 to 75,000 during the last months of the Trump administration to more than 169,000 in March 2021.[110] Despite widespread recognition that expulsions of asylum seekers without any kind of due process was unfair and violated the Refugee Act of 1980,[111] the Biden administration continued to rely on Title 42 to expel large numbers of these migrants.

In many cases, the Biden administration continued to rely on the Trump administration's expulsion policy. As the months passed, however, the Biden administration returned to the traditional Title 8 removal procedures alongside Title 42 expulsions.[112] In fact, by the fall of 2021, the administration was relying on traditional adjudication procedures (notwithstanding the long wait for immigration court adjudications in these cases) nearly as often as it expelled migrants under Title 42.[113] At least four factors account for this shift. First, two lawsuits threatened to curtail the expulsions program.[114] Second, valid critiques of the program from Democrats and advocates were of concern to the administration.[115] Third, individuals who were expelled under Title 42 had received no adjudications of their claims and were therefore subjected to no orders of removal. Unlike persons who left or were deported after their asylum claims were denied, they were free to try to re-enter the United States without any penalty for having been forced out, and

---

[109] See Claire Moses, The Scene at the Border, N.Y. Times, June 12, 2022 ("Biden promised a more welcoming America, and asylum seekers were hopeful he would deliver.").

[110] CBP, Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions FY2021, https://perma.cc/8L6E-3Z8N.

[111] See, e.g., Human Rights First, Ten Reasons to End the Title 42 Policy (March 11, 2022), https://perma.cc/RMP2-JA3Q.

[112] Title 8 of the United States Code is the immigration law; Title 42 pertains to public health.

[113] Customs and Border Protection, Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions FY 2021, https://perma.cc/BAH2-VWDK. The use of traditional procedures, including expedited removal, continued into FY 2022. Between October, 2021 and May, 2022, when DHS first started using the accelerated expedited removal procedure discussed in Part V below, it applied the traditional procedures to more than 701,000 migrants. Customs and Border Protection, Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions 2022, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (visited Sept. 6, 2022).

[114] P.J.E.S. v. Wolf, 502 F. Supp. 492 (D.D.C., 2020) enjoined its application to unaccompanied minors, and Huisha-Huisha v. Mayorkas, 27 F. 4th 718 (D. C. Cir. 2022) upheld an injunction, first entered in September, 2021, but stayed until the appeals court affirmed it in March, 2022, preventing the administration from expelling migrants under Title 42 without interviewing them and adjudicating any claims they had that would probably suffer persecution or torture if returned to their home countries. The need to adjudicate those claims made summary expulsions impossible.

[115] See, e.g., Human Rights First, supra n. 111.

many of them made repeated attempts.[116] Fourth, some countries refused to accept the return of expelled migrants.[117]

As of April 2022, the Biden administration had removed over 1.6 million asylum seekers under Title 42.[118] But that month, the CDC Director issued a Public Health Determination terminating the Title 42 Order, which was scheduled to be implemented starting on May 23, 2022.[119] Litigation by several states challenging the termination put that change on hold.[120]

Beginning in Biden's first months in office, Republicans claimed that the significant increase in border crossings was evidence that the new president had lost control over the southern border.[121] Moreover, delays in immigration court decision-making dragged out asylum decisions for years. During the summer of 2021, the administration announced a plan to "streamline" the adjudication process so that it could more quickly adjudicate claims and remove those who did not win asylum.[122]

---

[116] During the first quarter of FY 2022, "the recidivism rates of single adults from El Salvador, Guatemala, and Honduras processed under Title 42 was 49%." Declaration of Blas Nunez-Neto, Assistant Secretary for Border and Immigration Policy of Homeland Security, filed in Arizona v. Centers for Disease Control, Civ. Act. 6:22-cv-00885 (Apr. 22, 2022).

[117] Eileen Sullivan, "One Million Migrants Admitted Into U.S. During Biden's Tenure," N. Y. Times, Sept. 6, 2022.

[118] U.S. Customs and Border Protection, "Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions" for Fiscal Years, 2020, 2021 and 2022, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics.

[119] Director of the Center for Disease Control and Prevention, Department of Health and Human Services, "Public Health Determination and Order Regarding the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists," April 1, 2022.

[120] *State of Louisiana et al. v. Centers for Disease and Prevention et al.*, Case No. 6:22-CV-00885 (May 20, 2022) (issuing a preliminary injunction preventing the termination of the CDC's Title 42 orders).

[121] See, e.g., Sean Sullivan and Nick Miroff, *Biden faces growing political threat from border upheaval*, WASH. POST (Mar. 15, 2021) (House Minority Leader Kevin McCarthy stated that "There's no other way to claim it than a Biden border crisis,"); Nicholas Fandos and Zolan Kanno-Youngs, *House Tackles Biden's Immigration Plans Amid Migrant Influx*, N.Y. TIMES (Mar. 15, 2021, updated Apr. 10, 2021) ("Sensing a political opening, Republicans have moved quickly in recent days to reprise some of the most pointed attacks of the Trump presidency based on the deteriorating situation on the border, where thousands of unaccompanied children and teenagers are in U.S. custody."); Republican National Committee, Biden's Out of Control Border Crisis, Oct. 22, 2021, https://gop.com/research/bidens-out-of-control-border-crisis-rsr/ (visited Sept. 8, 2022). The Biden administration tried to fend off this criticism by publicly discouraging Central Americans and other migrants from trying to come to the United States. It dispatched Vice President Kamala Harris to Guatemala to advise intending migrants from northern Central America that "if you come to our border you will be turned back. Do not come. Do not come. The United States will continue to enforce our laws and secure our borders." Lauren Egan, Harris, in Guatemala, warns potential migrants: 'Do not come,' NBC News, June 7, 2021. The Vice President almost certainly knew that commands from political leaders would not discourage people who desperately sought to escape violence, very serious economic hardship often related to natural disasters and climate change events, and, in many cases, persecution.

[122] "Streamlining" to shorten the time needed to adjudicate asylum cases was intended not only to deal with the criticism that the border was "out of control", see text at supra n.121, but also to enable the administration to "move away from" the Title 42 expulsion policy. Hamid Aleaziz, *Biden Is Planning To Make Big Changes To How The US*

As described in more detail above, actors ranging from INS to the ABA Commission on Immigration Reform to the US Commission on International Religious Freedom had, in earlier years, offered ideas for adjudicating defensive asylum claims more efficiently and at lower expense than in removal hearings in immigration court.[123] In 2018, experts affiliated with the Migration Policy Institute (MPI), a non-profit research center, resuscitated the suggestion that asylum officers should adjudicate most or all asylum claims. They suggested that the breakdown in the immigration court system "could be significantly mitigated by authorizing asylum officers to decide not only credible fear but also the full merits of border asylum cases, thereby reducing the stream of cases being added to the courts' overburdened dockets and shortening the time it takes to reach a decision."[124] Their suggestion received scant attention during the Trump administration, but MPI repackaged the recommendation in a short report in February 2021, just as the Biden administration sought a way to process asylum cases more quickly.[125]

The devil, of course, lay in the details of a new adjudication system, but the MPI report had suggested no details, saying only that its proposal would require "a regulatory change."[126] It did warn, however, that "An asylum system that is more timely must also be fair," and that legal representation was the key to fairness. It acknowledged that "representation is the single most important factor in determining case outcomes—asylum seekers are at least three times more likely to win relief when represented."[127] But it stopped short of suggesting that asylum seekers who could not afford legal counsel be provided with legal assistance at government expense.

Handles Asylum-Seekers At The Border, BUZZFEED NEWS (May 28, 2021), https://www.buzzfeednews.com/article/hamedaleaziz/biden-new-asylum-process-plan.

[123] *See* text at n. *95, supra.* One of the authors was a member of the ABA Commission on Immigration Reform when these proposals were advanced.

[124] Doris Meissner, Faye Hipsman and T. Alexander Aleinikoff, The U.S. Asylum System in Crisis: Charting a Way Forward 26, Migration Policy Inst., https://perma.cc/W3P8-TQ9L (2018)

[125] Doris Meissner and Sarah Pierce, Biden Administration Is Making Quick Progress on Asylum, but a Long, Complicated Road Lies Ahead, Migration Policy Inst., https://perma.cc/Y6AA-869X (2021).

[126] Meissner et al., The U.S. Asylum System in Crisis, supra n 124, at 26.

[127] Meissner and Pierce, supra n. 125.

The administration saw value in the idea of having asylum officers make the initial merits decision in border asylum cases, but as early as March 2021, senior White House officials became mired in disagreements on how to balance speed with fairness. In July 2021, about 200,000 migrants were taken into custody near the border, the highest monthly total in more than twenty years.[128] The President, his chief of staff and other top advisors insisted on finding ways to deter border crossings, concerned about "the intensifying attacks from Republicans characterizing him as an open-borders president." [129] They insisted that other senior officials, those who had been appointed to positions responsible for making immigration policy, find ways to process claims faster and swiftly deport migrants who did not win asylum. Those senior immigration policy officials, committed to seeking a fair and humanitarian system for adjudicating asylum claims, pushed back for months, and six of them finally left in frustration.[130]

The internal battles left the administration with no "clear plan" for addressing the influx of migrants at the southern border.[131] Finally, in August 2021, it latched onto a version of the idea most recently advanced by MPI for a streamlined asylum adjudication system, and it issued a proposed regulation to implement it.[132] Its initial regulatory proposal, which we will call Rule 1.0, included some desirable features, but it was deeply flawed.

V. Rule 1.0: Curtailed Adjudication

In their explanation of Rule 1.0 in the Federal Register, the Departments of Homeland Security and Justice acknowledged that the overwhelmed asylum adjudication system, with its immense backlogs and long delays, was "in desperate need of repair." The purpose of the plan was to replace

---

[128] U.S. Customs and Border Protection, Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions FY 2021, https://perma.cc/6SLF-ZFUU.

[129] Zolan Kanno-Youngs, Michael D. Shear and Eileen Sullivan, Disagreement and Delay: How Infighting Over the Border Divided the White House, N.Y. Times, April 9, 2022.

[130] Zolan Kanno-Youngs, Michael D. Shear and Eileen Sullivan, Disagreement and Delay: How Infighting Over the Border Divided the White House, N.Y. Times, April 9, 2022 (describing "furious debates" over dismantling the Trump administration's restrictive border policies). The six departing officials included the deputy director for immigration of the Domestic Policy Council and the director for border management at the National Security Council. Jaya Ramji-Nogales, *How an Internal State Department Memo Exposes "Title 42" Expulsions of Refugees as Violations of Law*, JUST SECURITY (Oct. 5, 2021), https://www.justsecurity.org/78476/how-an-internal-state-department-memo-exposes-title-42-expulsions-of-refugees-as-violations-of-law/

[131] Nick Miroff and Sean Sullivan, As immigration heats up, Biden struggles for a clear plan, Wash. Post, July 17, 2021.

[132] Depts. of Homeland Security and Justice, "Notice of proposed rulemaking, Re: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers" [hereafter NPRM], 86 Fed. Reg. 46906, Aug. 20, 2021. It its proposal for changing the adjudication system, the administration quoted with approval from the MPI's 2018 report. Id., text at n. 52.

the current system with one that "will adjudicate protection claims fairly and expeditiously" with "ample procedural safeguards" for individuals found to have a credible fear of persecution.[133] The main change was to assign all asylum adjudications, in the first instance, to asylum officers rather than to the vastly overbooked immigration courts, with a possible "appeal" to the immigration court for a non-citizen denied asylum by the asylum office.

The basic idea of having asylum claims heard first by asylum officers was sound with respect to speed and cost, because at least in principle, an asylum officer adjudication was less expensive for the government and could be accomplished more quickly than an immigration court hearing. The adjudication would be less costly because non-adversarial asylum office adjudications require only a single officer's time (plus a review of the officer's recommendation by a supervisor), while an immigration hearing is adversarial, involving both an immigration judge and an attorney from ICE who cross-examines the non-citizen. Immigration judges and ICE attorneys are paid much more than asylum officers, which also increases the cost of this more formal adjudication.[134] Also, in immigration court, interpreters are provided at government expense; in contrast, under Rule 1.0, as in affirmative asylum interviews by asylum officers, asylum applicants had to supply an interpreter at no expense to the government.[135] The adjudication could be more quickly completed because, although the asylum offices had a backlog of 400,000 pending cases when it proposed Rule 1.0,[136] that backlog was much smaller than the 1.6 million case backlog in the immigration court (resulting in an average case completion time of nearly four years.[137] DHS anticipated hiring 800 new asylum officers to adjudicate the cases that would otherwise go to immigration court.[138]

Rule 1.0 had a few other positive attributes. It recognized the reality that DHS lacked detention space for the large number of people claiming asylum who were waiting for credible fear interviews, so it authorized the agency to parole individuals out of detention before it could make

---

[133] NPRM, text preceding n. 2.

[134] In 2021, asylum officers were paid between $66,829 and $86,881, depending on length of services, while immigration judges were paid a weighted average of $155,809. NPRM at n. 91 and accompanying text. The median pay for an ICE attorney was $141,929. Glassdoor, Salary Details for Assistant Chief Counsel, at US Immigration and Customs Enforcement (Oct. 21, 2021), https://www.glassdoor.com/Salary/US-Immigration-and-Customs-Enforcement-Assistant-Chief -Counsel-Salaries-E41364_D_KO39.62.htm.

[135] Proposed regulation 8 C.F.R. Sec. 208.9, NPRM. at 46942. This feature was eliminated in Rule 2.0, described in the next section. It is in line with affirmative asylum interviews, at which applicants must supply their own interpreters. 8 C.F.R. Sec. 208.9(g)(1).

[136] NPRM at n. 60.

[137] NPRM, text at n. 20.

[138] NPRM, text accompanying n. 60. The economic feasibility of hiring 800 new asylum officers plus supporting staff, at a likely cost of $413 million, was not clear, however. Unlike immigration judges, asylum officers are not paid from general revenues from taxpayers, but from fees assessed on persons seeking other immigration benefits such as naturalization. See NPRM at Table 8 and text preceding n. 61. It was not evident that as a political matter, DHS could raise fees on other benefits to the extent necessary to fund the new system.

a credible fear determination when "detention is unavailable or impracticable."[139] It deemed a positive credible fear determination to be an application for asylum (subject to later augmentation by the applicant). For those in the new process under Rule 1.0, this solved a long-standing problem with the filing deadline for asylum applications. In 1996, Congress had passed a law barring asylum (with two exceptions) for persons who applied more than a year after entering the United States. Many individuals eligible for asylum had no knowledge of the asylum process, let alone the one-year deadline, and obtaining information about the asylum process was particularly difficult for non-citizens who did not speak English and did not have computer access.[140] Others missed the deadline because of the difficulty of completing the application form in English or because they paid unscrupulous individuals who promised to file applications for them but did not do so in time.[141] Many applicants therefore were denied asylum for reasons unrelated to the merits of their claims.[142] Under Rule 1.0, their applications would automatically be considered timely, because the credible fear determinations would be made soon after their entry.

Another positive feature of the Rule 1.0 proposal was its simplification of the standard to be applied in screening interviews. Previously, persons who were eligible to be considered for asylum would only have to show "credible" fear, meaning a significant possibility that they could win asylum at a later stage of the process. Persons eligible only for the more restrictive "withholding of removal" would have to demonstrate "reasonable" fear, which meant showing that they had a "reasonable" rather than a "significant" possibility of success, an apparently higher standard of proof. The proposal collapsed these standards into the standard for "credible" fear, defined as a "significant possibility" of success in a later adjudication.[143] The proposal also specified that certain bars to grants of asylum, such as a bar to asylum for a person who had been "firmly resettled" in another country before coming to the United States, would not be imposed during the

---

[139] Proposed amendment to 8 C.F.R. Sec. 235.3, NPRM at 46946. DHS abandoned this explicit feature of the proposed rule when it issued its interim final rule (discussed as Plan 2 in the next section, but at that point it amended its regulation to make parole permissible, on a case-by-case basis, for persons who receive positive credible fear determinations and are scheduled for Merits Interviews by asylum officers. 8 C.F.R. Sec. 235.3 (c)(2).

[140] USCIS maintains a website with some basic information in Spanish (but no other languages) about the asylum process, but the application form and its detailed instructions, linked from that website, are available only in English. See I-589, Solicitud de Asilo y de Supension de Remocion, https://perma.cc/GSD8-8MPT.

[141] Some of these persons call themselves "notarios," a term used in Latin America to denote a class of lawyers. They are not actually U.S. licensed lawyers, and they thereby deceive Spanish-speaking non-citizens who think that they are getting legal advice from licensed, professional advocates. See Jean C. Han, The Good Notario, Exploring Limited Licensure for Non-Attorney Immigration Practitioners, 64 Villanova L. Rev. 165, 170 (2019).

[142] For a detailed analysis, *see* ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES, and PHILIP G. SCHRAG, LIVES IN THE BALANCE (NYU PRESS 2014), at 73, 82-96 (finding that 18 percent of all affirmative asylum applicants from FY 1998 through June 2009 were rejected because of the deadline and that nationals of certain countries were disproportionately affected).

[143] Proposed amendment to 8 C.F.R. Sec. 208.30, explained at 86 Fed. Reg. 46914.

initial credible fear screening. These bars would be imposed only after detailed analysis during a full adjudication on the merits.[144]

All these reforms that would have made the adjudication process more efficient and fairer were, however, overshadowed by two other provisions of Rule 1.0 that would have been extremely unfair to non-citizens who were not granted asylum by the asylum office. The first significant flaw concerns review of the asylum officer decision by an immigration judge. Affirmative asylum applicants[145] who are not successful before the asylum office are not immediately deported. They are "referred" to immigration court for a *de novo* hearing on their asylum claim. They do not have to request such a hearing. Although this second proceeding is adversarial and the applicant is subject to cross-examination by an ICE lawyer, the immigration judge to whom their case is assigned must hear their oral testimony and must consider any new documentary evidence they provide. Only an immigration judge can issue a removal order.

Similarly, before Rule 1.0, a person found to have credible fear would have a full opportunity to present documentary and oral evidence to an immigration judge. The judge could not summarily decide to dispense with a hearing or to refuse to consider proffered documentary evidence.[146] In contrast, under Rule 1.0, asylum officers who did not grant asylum to individuals found to have credible fear would themselves issue removal orders.[147] Such an order would be final unless that applicant formally appealed the decision, thereby requesting that an immigration judge review the asylum officer's denial. This would restrict review in a major way because many pro se asylum applicants, especially those with limited education, little understanding of American court procedures, and perhaps limited literacy, would not understand the appeals process or the requirement that an appeal be filed within 30 days.[148] Many of these individuals would lose the right to appeal simply because they did not understand what was required of them.[149]

The second flaw pertained to a curtailment of the right to present to the immigration judge new oral or written evidence; that is, evidence that had not been presented to the asylum officer. Unlike

---

[144] Proposed amendment to 8 C.F.R. Sec. 208.30, 86 Fed. Reg. 46914.

[145] This term refers to individuals who applied for asylum without first having been apprehended by ICE or CBP. See text at supra n. 28.

[146] 8 U.S.C. Sec. 1229(a)(4)(b), providing the right of respondents in immigration court to "present evidence in the alien's own behalf" and Immigration Court Practice Manual Sec. 4.16(d).

[147] Proposed amendment to 8 C.F.R. Sec. 208.14, explained at 86 Fed. Reg. 46919.

[148] Nothing in the proposed regulation required an official to provide an explanation of the right to appeal in the applicant's own language or read it aloud to an illiterate applicant.

[149] The Departments accurately summarized comments critical of the appeal requirement at Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, Interim final rule with request for comments [hereafter IFR], 87 Fed. Reg. 18078, 18155-56 (March 29, 2022). References to the "IFR" pertain to the Departments' 137-page explanation of the IFR in the Federal Register, at 87 Fed. Reg. 18078-18215. References to the interim final rule itself, which begins at page 18215, cite the codified section or subsection of the rule itself rather than the IFR.

immigration court review of affirmative asylum claims,[150] the proposed immigration court hearing was not *de novo*.[151] The immigration judge would have been empowered by the plan to rely only on any documents that the asylum applicant had given to the asylum office, and on a transcript of the conversation between the applicant and the asylum officer. The judge could refuse to read documents that were introduced after the asylum officer's interview with the applicant, and could refuse to hear testimony from the applicant, if the judge decided that the documents or testimony would be "duplicative" of the evidence considered by the asylum officer and not "necessary" to develop the factual record.[152]

The Departments that proposed Rule 1.0 indicated their expectation that a refusal by judges to accept documentation or testimony would be the norm, not a rare exception. The explanation accompanying the rule noted that "The Departments expect that the IJ [immigration judge] would be able to complete the de novo review solely on the basis of the record before the asylum officer."[153]

What was wrong with that procedure? It would have given the judge the power to decide not to allow additional evidence to be considered, even if the applicant wanted to present such evidence, and it would have encouraged the judge to refuse to hold evidentiary hearings. That power could have defeated the whole purpose of a review, which has always been necessary for more accurate decisions: in affirmative asylum cases from FY 2012 through 2016, immigration judges granted asylum in 72% to 83% of the cases where asylum officers had not granted asylum.[154]

Why do judges disagree with such a high percentage of denials by asylum officers? In some cases, immigration judges may interpret the law differently from the asylum officer who referred a case. But based on our own experience with immigration court cases[155] and that of other advocates,[156] much of the difference is attributable to the fact that asylum applicants are often not represented by counsel in asylum office interviews and only manage to get lawyers when their cases are referred to immigration court. In fact, in FY 2006-09, apparently the latest period for

---

[150] U.S. Department of Justice, Executive Office for Immigration Review, Fact Sheet: Asylum and Withholding of Removal Relief Convention Against Torture Protections 3 (Jan. 15, 2009), https://perma.cc/7BPK-YKDG

[151] The proposal deemed the review by the judge to be "*de novo*," NPRM at 46911. But as explained in the text, this was not the reality imposed by the rule.

[152] Proposed amendment to 8 C.F.R. Sec. 1003.48(e), NPRM at 46946-47.

[153] NPRM at 46920.

[154] Dept. of Justice, Executive Office for Immigration Review, FY 2016 Statistics Yearbook, p. K3, Fig. 17. We are grateful to former Immigration Judge Jeffrey Chase for pointing this out.

[155] All of us have supervised clinic students or represented clients in immigration clinics, some for more than 25 years.

[156] For some specific examples of cases in which immigration judges granted asylum after erroneous denials by asylum officers, see Human Rights First, First Comment on Department of Homeland Security & Department of Justice Executive Office for Immigration Review, "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers" at 8 (on file with the authors).

which such statistics are available,[157] only 58 percent of asylum seekers who were interviewed by asylum officers in affirmative cases were represented at that stage of the process.[158] Competent lawyers approach asylum cases very differently than *pro se* applicants; they investigate the cases thoroughly and obtain witness statements, evidentiary records such as arrest warrants and medical documents from the applicants' countries, and expert opinions, all of which may be necessary to persuade a judge of the bona fides of a case.

Public critique of these features of Rule 1.0 in more than 5000 formal comments to the two agencies[159] was withering. Human Rights First, one of the nation's leading organizations providing legal representation for asylum applicants, wrote that "limiting evidence permitted to be filed in immigration court is an outrageous barrier to due process." In particular, it explained that asylum applicants may need to establish the cumulative harm of a series of incidents of persecution. An immigration judge who has not heard an applicant testify about such a pattern of abuse might reject this additional new evidence as merely "duplicative."[160] Oral evidence also assists immigration judges in making one of the most important decisions in asylum cases—credibility.

The Center for Gender and Refugee Studies (CGRS) emphasized the fact that victims of trauma and torture "commonly use avoidance as a coping mechanism," causing them to be reluctant to share the details of their persecution with asylum officers. They are often unable to speak about or recall details of the harms they have survived until they have processed their trauma over a period of weeks or months with mental health counselors or advocates who take a trauma-informed approach. For the most severely traumatized applicants, denials of full hearings would increase the risk that they would be denied asylum and deported. The Center also pointed out that the Rule 1.0 provided no guidance as to what constituted "duplicative" evidence, which would lead to "inconsistent outcomes from courtroom to courtroom" and make judicial review of rejections of

---

[157] The annual reports by DHS on asylum statistics do not show the proportion of affirmative asylum applicants who were represented.

[158] Schoenholtz et al., LIVES IN THE BALANCE, supra n. 142, at 25, fig. 2-11. According to government statistics, more than 90 percent of asylum applicants in completed cases had representation in immigration court in 2022. Executive Office for Immigration Review, Current Representation Rates, July 15, 2022, https://perma.cc/5JQ2-F9D6. This may overstate the representation rate because the government determines a migrant to be represented if a representative files a notice stating that they are representing the asylum applicant, even if the representative misses some of the court appearances.

[159] The department received 1347 comments through "mass mailing campaigns" and 3790 "unique submissions." Depts. of Homeland Security and Justice, Procedures for Credible Fear Screening and Consideration Asylum, Withholding of Removal and CAT Protection Claims by Asylum Officers [hereafter Interim Final Rule], 87 Fed. Reg. 18078, 18109 (March 29, 2022).

[160] Human Rights First, supra n. 156 at 11. The organization also cited cases decided by federal courts of appeals to the effect that limiting apparently "duplicative" testimony violated due process because credibility determinations may depend on such testimony. Id.

evidence "virtually impossible."[161] In addition, it pointed out that the curtailed review procedure was inconsistent with the statute that created the expedited removal procedure; the authors and sponsors of that statute and the conference committee report had all stated that persons who received positive credible fear determinations would receive "full" and "normal" hearings in immigration court.[162]

The National Immigrant Justice Center emphasized the greater comfort of trauma victims when questioned during direct testimony by their own representatives in immigration court than when questioned by asylum officers. It provided an example:

> 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 his declaration with harrowing details, only to receive a denial. During his de novo hearing, the immigration judge relied on the record 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 his story while questioned by his trusted attorney and promptly won asylum.[163]

The United Nations High Commissioner for Refugees (UNHCR) questioned whether the immigration judge's unilateral authority to decide not to admit further evidence would comply with international law, specifically the Protocol relating to the Status of Refugees. UNHCR insisted that "procedures to adjudicate individuals' claims for protection must uphold key due process safeguards." It suggested that "pro se asylum-seekers, especially those in vulnerable situations, may lack the language, technical, or other skills needed to establish, in writing via prehearing statements or briefs, that additional testimony or documentation they wish to submit to the immigration judge is not duplicative of that provided to the asylum officer."[164]

To their credit, the departments acknowledged the validity of these critiques.[165] In its next iteration, the Interim Final Rule and Proposed Final Rule, which we call Rule 2.0, they abandoned

---

[161] Center for Gender and Refugee Studies, "Re: Request for Comments: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 31-35," linked from Regulations.gov

[162] Id at 29.

[163] National Immigrant Justice Center, "Re: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers" 24-25, linked from Regulations.gov.

[164] Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services) 27-29, linked from Regulations.gov.

[165] "The Departments believe that providing streamlined [immigration court] hearings addresses nearly all of the commenters' concerns and requests on this topic. Applicants will not be required to affirmatively request review by an IJ, and applicants will not be referred to the limited IJ proceedings proposed in the NPRM." IFR at 16156. In other

their plan to allow immigration judges to exclude additional evidence. But Rule 2.0 introduced a new and equally unfair shortcut of due process protections for asylum applicants: an unrealistic set of deadlines for submission of evidence.

VI. Rule 2.0: Streamlined Adjudication

Unlike Rule 1.0, Rule 2.0 was not merely a new *proposal*; it was embodied in an "Interim Final Regulation" (IFR), effective May 31, 2022.[166] Even though it was markedly different from Rule 1.0, the government implemented Rule 2.0 without first receiving comments or critiques by individuals or organizations.[167] Thus the Departments of Homeland Security and Justice lacked the benefit of knowing stakeholders' views on the rule before it become law. By August 2022, DHS had not only committed itself to using the new procedures but was applying them to some migrants who were apprehended at the border, found to have credible fear, and planned to relocate

---

words, the government was proposing "streamlined" hearings to replace the limited IJ proceedings contemplated by the NPRM. At the "streamlined" hearings, the immigration judges are directed to consider all of the evidence as they do in regular asylum hearings. The term "streamlined" refers to the speed of the new process.

[166] Less than a month after the Departments issued Rule 2.0, and before it even took effect, the Attorneys General of Arizona and 19 other states sued to invalidate it and requested a federal district court to enjoin it while the case was pending. Arizona v. Garland, Case 22-cv-1130 (W.D. La.). The complaint and other documents can be read without charge through recap, https://free.law/recap. The suit is based on several different legal theories, chief among them the assertion that assigning asylum applications by persons in expedited removal for adjudication by DHS asylum officers rather than DOJ immigration judges violates the Immigration and Nationality Act. The plaintiffs assert that 8 U.S.C. Sec. 1229a(a)(3) provides that unless otherwise provided [by Congress] a proceeding in immigration court is to be the "sole and exclusive" procedure for determining whether a noncitizen may be admitted or removed from the United States, and that the only exception through which Congress permitted asylum officers to make that determination for inadmissible individuals is 8 U.S.C. Sec 1225(b)(3)(c) (which applies only to unaccompanied children). Complaint paras 135-138. The administration's view is that the expedited removal provisions of the Act, Sec. 1225(b), creates special processes for noncitizens in these proceedings and is an additional legislative exception to the usual procedure of requiring non-citizens who file defensive asylum applications to have their claims adjudicated only in removal proceedings. Sec. 1225 IFR at 18163-64 (noting that Sec. 1225 states that persons found to have credible fear are only required to have their asylum applications given "further consideration," without specifying the agency that must provide that consideration. After the Supreme Court held in Garland v. Gonzalez, __ U.S. __, 142 S. Ct. 2057 (2022) that district courts could not enjoin the operations of provisions of the immigration laws as applied to a class of persons, plaintiffs withdrew their request for a preliminary injunction in favor of seeking vacatur of the interim final rule (Rule 2.0 in this article) and a declaration that the rule was not valid. See order of the court, July 21, 2022.

[167] The government must usually publish proposed rules for notice and comment before making them effective. However, in this case, even though Rule 2.0 was radically different from Rule 1.0, the government did not seek public comments on the mechanics of Rule 2.0 before issuing it as an "Interim Final Rule." According to the Office of the Federal Register, "When an agency finds that it has good cause to issue a final rule without first publishing a proposed rule, it often characterizes the rule as an 'interim final rule,' or 'interim rule.' This type of rule becomes effective immediately upon publication. In most cases, the agency stipulates that it will alter the interim rule if warranted by public comments. If the agency decides not to make changes to the interim rule, it generally will publish a brief final rule in the Federal Register confirming that decision." Office of the Federal Register, A Guide to the Rulemaking Process, https://perma.cc/PZH2-SNKK.

to one of six metropolitan areas: Boston, Los Angeles, Miami, New York, Newark, or San Francisco.[168] The Department sought suggestions from the public for changes in the Interim Final Regulation, to be embodied in a final regulation, even while it was applying that regulation to hundreds or thousands of asylum seekers.[169]

In this section, we first explain the system established by Rule 2.0. Then we review its positive features. Next we turn to the flaw that makes the system, on balance, extremely unfair to asylum applicants. As we explain, this flaw consists of the excessively short time periods for securing counsel and obtaining corroborating evidence. The two following subsections elaborate the problem in greater detail, exploring the collision between the time frame for adjudication under Rule 2.0 and statutory corroboration standards, as well as the ethical challenges for lawyers who consider accepting representation of asylum seekers subjected to the new procedure. The final subsection recounts the failures of prior attempts to accelerate the asylum adjudication process even more than the expedited removal system that was in effect from 1997 until 2022.

A. The Contents of Rule 2.0

Rule 2.0 eliminates both the requirement that the applicant "appeal" a negative decision by an asylum officer and the ability of immigration judges to summarily reject additional evidence by deeming such evidence unnecessary. Like out-of-status affirmative applicants who were not granted asylum by DHS, the applicants in the new expedited removal system are "referred" to immigration court for removal hearings without having to request a new hearing. The judge in the removal proceedings does not have the authority to refuse to consider evidence that the judge thought unnecessary. The Departments recognized the validity of the concerns expressed by commentators on Rule 1.0 that the curtailed process proposed by the NPRM would enable judges to "rubber-stamp" denials. They stated that their new plan will "ameliorate commentators'

---

[168] DHS announced a "phased manner" of implementing the procedures, through which it would try to apply them to "a few hundred" persons a month who planned to go to those cities. DHS, Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule (May 26, 2022), https://perma.cc/9JK7-294V. The phased approach was necessary because DHS currently lacks sufficient resources to apply the rule to all migrants who pass the credible fear test. IFR at 18185. In addition, at the time it created Rule 2.0, it had a backlog of more than 430,000 affirmative cases that it had not adjudicated. USCIS Ombudsman, supra n. 31, at 42. This backlog was twice as large as in 2016. Eric Katz, The Biden Administration Begins Shifting Asylum Determinations to Federal Officers, Government Executive, June 1, 2022, https://perma.cc/V286-H8A4. DHS will have to hire 800 new asylum officers to conduct interviews, and funding for these officers (and office space and support staff) would have to come from imposing higher fees for other immigration benefits. IFR at 18114; USCIS is funded almost entirely from user fees rather than the general tax base. Id. at 18187. When the Departments issued the new plan, the asylum office had 621 vacancies among an authorized complement of 1022 asylum officers. USCIS Ombudsman, supra n. 31, at 44 n. 266. It was not clear whether the anticipated hiring of 800 new officers referred to 800 more officers in addition to filling those vacancies, or whether USCIS would merely fill the vacancies and add 179 additional officers.

[169] Two of the authors of this article submitted comments. The comment period closed on May 31, 2022. 87 Fed. Reg. 18078.

concerns,"[170] because judges will have to hold a full hearing in every case unless they *grant* asylum based on the record from the asylum officer.[171]

Rule 2.0, however, replaces the curtailed immigration court hearings with "streamlined" procedures that move cases through the adjudication system on an excessively speedy timetable.[172] Below we describe the Rule 2.0 procedures. Then we discuss the positive features as well as the major problems of the new system.

Pursuant to Rule 2.0, the asylum officer adjudication is scheduled to take place within weeks of the moment at which the applicant, still in ICE detention, receives notice of a positive credible fear determination. Within a few days of the positive determination, after ICE identifies a sponsor for the applicant, the applicant is released on parole.[173] The credible fear determination, with its accompanying (non-verbatim) summary of the asylum officer's questions and the applicant's answers, is sent to the regional asylum office closest to the applicant's intended destination after release from a border facility. That asylum office schedules a full merits interview on the application no sooner than 21 days and no later than 45 days after the credible fear determination is served on the asylum applicant.[174]

Rule 2.0 allows asylum applicants to submit additional documentation to the asylum office and directs the asylum officer to consider that evidence.[175] This is a sensible approach given that, in most cases, the credible fear determination will have been based solely on the statements of the applicant at the credible fear interview. Few applicants carry with them any corroborating documentation such as witness affidavits, arrest warrants, or medical records, much less notes from

---

[170] IFR at 18162.

[171] Such a grant is authorized by 8 C.F.R. Sec. 1240.17(f)(4)(ii).

[172] Inevitably, giving calendar priority to expedited removal cases referred from the asylum office would push all other non-detained asylum applicants even further to the back of the queue for immigration court hearings. It was therefore difficult to discern whether the new procedure would accomplish the government's goal of reducing the immigration court backlog.

[173] Nothing in the regulations promulgated under the IFR preclude DHS from applying Rule 2.0 to detained applicants. At least at first, the Biden administration released on parole all migrants that it selected for the process, giving some or all of them "alternatives to detention" (usually ankle bracelet monitors). Dep't. of Homeland Security, "Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule," May 26, 2022, https://perma.cc/9JK7-294V. Of course, under Rule 2.0, DHS could potentially continue to detain asylum seekers through the full asylum interview, with asylum officers conducting merits interviews by videoconference from their offices, just as videoconferenced hearings are often held by immigration judges for respondents in detention. Videoconferenced immigration court hearings are criticized in Ingrid V. Eagly, Remote Adjudication in Immigration, 109 Northwestern L. Rev. 933 (2015); Aaron Haas, Videoconferencing in Immigration Court Hearings, 5 Pierce L. Rev. 59 (2006). Our critique of Rule 2.0 applies with even greater force if DHS were to begin applying it to detained applicants, because their access to counsel and to corroborating evidence is far more limited than the very limited access for non-detained applicants.

[174] 8 C.F.R. Sec. 209.9(a)(1).

[175] 8 C.F.R. Sec. 208.9(e).

their torturers.[176] Many are robbed of their possessions and documents while traveling through Central America and Mexico on the way to the United States.

The additional evidence that an applicant wants the asylum officer to consider, however, must be submitted "no later than 7 calendar days" before the interview, or 10 calendar days if the submission is made by mail.[177] On the appointed day, the asylum officer holds an asylum merits interview[178] with the applicant in person at the regional office closest to the applicant's new destination.[179] The asylum officer reviews the credible fear interview summary and any evidence the applicant has submitted before the oral interview. At the interview, the asylum officer asks questions of the applicant to determine their eligibility for asylum, and whether, in light of the testimony and the documentation, the applicant should receive asylum as a matter of discretion.[180] At the end of the interview, an unrepresented applicant may make a statement, and an applicant's representative, if there is one, may ask follow-up questions and make a statement.[181]

If the asylum officer grants asylum, the case is concluded. If the asylum officer denies the application, the applicant remains subject to removal and is referred to immigration court for what the agencies term "streamlined"[182] or "limited"[183] proceedings.[184] As is the case with affirmative

---

[176] See Virgil Wiebe, Serena Parker, Erin Corcoran and Anna Marie Gallagher, *Asking for a Note From Your Torturer, Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Claims*, 1-10 Immigration Briefings 1 (2001).

[177] 8 C.F.R. Sec. 208.4(b)(2)). An asylum officer "may" grant the applicant a "brief extension" for the submission of evidence. However, no extension could be granted if it would result in a decision being issued more than 60 days after the credible fear determination. 8 C.F.R. Sec. 208.9(e)(2).

[178] IFR at 18096. This term distinguishes the proceeding from the earlier credible fear interview.

[179] Some who commented on the NPRM had objected to initial adjudications in asylum offices because for many noncitizens, the asylum offices are much less accessible than immigration courts. There are 71 immigration courts spread across the country. Dep't. of Justice, EOIR Immigration Court Listing, https://www.justice.gov/eoir/eoir-immigration-court-listing (last visited June 14, 2022). But there are only ten asylum office locations. See USCIS, Find a USCIS Office, https://www.uscis.gov/about-us/find-a-uscis-office (last visited June 14, 2012). The Departments replied to this criticism by saying that "Unfortunately, because USCIS has limited asylum offices and office space, it would be impossible to always ensure an applicant only has to travel two hours or less to appear at an interview." IFR at 18143.

[180] 8 U.S.C. Sec. 1158((b)(1)(a); 8 C.F.R. Sec. 208.9(b).

[181] 8 C.F.R. Sec. 208.9(d)(1). The requirement that counsel must wait until the end of the interview to ask "follow-up" questions reverses the normal order of evidentiary proceedings, in which direct examination is followed by cross-examination. This reversal arguably makes an asylum interview lengthier than it would be if representatives who have prepared the claim and are very familiar with their clients' narratives could speak at the start and lay out the facts for an adjudicator who, having to conduct 16 interviews every two weeks, will have had limited time to study the case before the interview begins. The weekly workload of an asylum officer is reported in USCIS Ombudsman, supra n. 31, at 49.

[182] IFR at 18154.

[183] IFR at 18155.

[184] Unlike persons in expedited removal proceedings, some affirmative applicants apply and have asylum officer interviews while still in status (e.g., while present in the U.S. with student visas). They are not referred for removal

asylum cases,[185] the referral to immigration court is triggered by service on the applicant of a "Notice to Appear" (NTA), the equivalent of a summons. The NTA is also filed with the court.[186] An immigration judge is required to hold a scheduling hearing, known as a master calendar hearing, between 30 to 35 days after the NTA is served.[187] No later than this date, DHS must file with the court and provide the applicant with a record of proceedings, including the credible fear summary, all evidence that the applicant submitted to the asylum office, a verbatim transcript of the asylum officer's interview of the applicant, and the asylum officer's decision.[188]

At the master calendar hearing, the immigration judge advises the applicant, now termed a "respondent" in the court proceedings, of various rights and then sets a "status conference" within the next 30 to 35 days.[189] One purpose of the status conference is to clarify what facts and legal issues are contested.[190] Asylum seekers must state whether they will testify orally, identify any witnesses they will call to testify and, importantly, "provide any additional documentation in

---

hearings because they continue to be in lawful status even though asylum was denied. But expedited removal is applied only to people who entered without visas and therefore have no lawful status. 8 U.S.C. Sec. 1225(b)(1)(A). Therefore, all persons who are not granted asylum by an asylum officer under the new process are undocumented and are referred.

[185] See text at supra n. 33.

[186] 8 C.F.R. Secs. 209(c)(1), 1240.17(b).

[187] An applicant who does not appear for this scheduling hearing is ordered removed in absentia. 8 C.F.R. Sec. 1240.17(d).

[188] Memorandum from David L. Neal, Director of the Executive Office for Immigration Review, *The Asylum Procedures Rule* 3 (Aug. 26, 2022), https://perma.cc/YG6V-BT8K. It is not clear that the asylum office will have sufficient resources to make verbatim transcripts of interviews with applicants within thirty or thirty-five days. Asylum office interviews, at least for affirmative applicants, often last for several hours. See American Gateways, Preparing for Your Affirmative Asylum Interview (2022), https://perma.cc/4G8Q-BCZ9 ("Asylum interviews can be very long, more than three hours in many cases."); Refugee and Human Rights Clinic at the University of Maine School of Law et al., Lives in Limbo: How the Boston Asylum Office Fails Asylum Seekers 16 (2022), https://perma.cc/6RES-SNN6 (interviews in the Boston asylum office typically lasted for three to four hours). Several asylum office interviews observed by one of the authors of this article lasted more than six hours. The transcript requirement for asylum office interviews is new, originating in the IFR, but transcripts have long been required when immigration court cases are appealed to the Board of Immigration Appeals. In the experience of the authors, all of whom have supervised students in clinics, it takes several months for companies that transcribe immigration court hearings to produce the transcripts, and they sometimes are of poor quality.

[189] 8 C.F.R. Sec. 1240.17(f)(1). At the master calendar hearing, the immigration judge explains the charges and allegations contained in the NTA and the applicant admits or denies the charges, indicates any applications for relief from removal (such as asylum), and designates a country of removal. Regulations also require that the immigration judge explain to the applicant that they have a right to counsel at their own expense, provide information about free and low-cost legal service providers in the area, advise the applicant of the right to present evidence in support of their claim and contest the government's evidence, and inform the applicant of their right to appeal to the BIA. At the master calendar hearing, the judge sets deadlines for filing relevant documents and schedules an individual hearing to adjudicate the asylum application. 8 C.F.R. § 1240.10.

[190] In many removal cases in immigration court, the main issue is the credibility of the applicant, as tested through direct and cross examination. To the extent that ICE attorneys continue to want to hear direct testimony and challenge it through cross-examination, clarifying what facts and law are in dispute will not make immigration court hearings much less time-consuming or more efficient.

support" of their asylum application."[191] The ICE attorney must indicate whether the government concedes that asylum should be granted. If the government does not concede, it must identify any witnesses it will call and explain what elements of the respondent's claim it is contesting and why.[192] The government may, however, delay that explanation until 15 days before a hearing on the merits of the case,[193] and it may later retract its intention to concede part or all of the case.[194]

Unless the immigration judge can grant asylum on the basis of the record made in the asylum office without reviewing additional evidence or hearing testimony,[195] the rule directs the judge to set a hearing on the merits of the claim approximately 60 days after the initial scheduling hearing (in other words, approximately 30 days after the status conference).[196]

B. Rule 2.0's Improvements

Several features of Rule 2.0 could improve asylum adjudication compared to the regular asylum system. To begin with, the most basic change—to provide primary adjudication in the asylum office rather than the immigration court—is *in principle* a very good one, because the formal procedures (including adversarial cross-examination) of the immigration court can intimidate applicants, delay grants of asylum for years due to the backlog of over 1.7 million cases in the immigration courts, and cost them more money if they have to pay for representation.[197]

Certain other aspects of Rule 2.0 are also improvements both for the applicants and the immigration court. The system is fairer in important ways. The more extensive and systematic use of parole to release asylum applicants from detention is beneficial not only because freedom is inherently preferable to incarceration for all humans, but also because non-detained applicants are much better able to prepare their claims. Non-detained asylum applicants are much more likely to secure counsel, and competent counsel provide the immigration judge and the ICE attorney with evidence and legal analysis that makes for a more efficient, accurate, and fair process.

In addition, the system is potentially speedier. At the immigration court stage, requiring an ICE attorney to explain the reasons for taking issue with any element of the applicant's case is a novel improvement in the adjudication system. This innovation could obviate the need for many hours of merits hearings if ICE has no substantive reason to challenge the applicant. The current system incentivizes ICE attorneys to spend hours of court time fishing for inconsistencies or other reasons to challenge the application for asylum during a protracted cross-examination. The

---

[191] 8 C.F.R Sec. 1240.17(f)(2)(i)(A).

[192] 8 C.F. R. Sec. 1240.17(f)(2)(ii).

[193] 8 C.F.R. Sec. 1240.17(f)(3).

[194] 8 C.F.R. Sec 1240.17(f)(2(C).

[195] Such a grant is permitted by 8 C.F.R. Sec. 1240.17(f)(4)(ii).

[196] 8 C.F.R. Sec. 1240.17(f)(2). In some cases, the merits hearing might be held up to 70 days after the scheduling hearing. 8 C.F.R. Sec. 1240.17(f)(2).

[197] Executive Office for Immigration Review, *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (July 15, 2022), https://www.justice.gov/eoir/page/file/1242166/download

advantage of requiring the government to state its concerns could be undercut, however, if judges allow ICE attorneys merely to say, without further explanation, that they don't believe an applicant or want to cross-examine the applicant to test credibility.

The provision of Rule 2.0 allowing judges to grant (but not deny) asylum on the basis of the written record, without taking oral testimony, is also a worthwhile feature in that it can avoid unnecessary hearings. In addition, asylum officers adjudicating cases under Rule 2.0 may find that an applicant does not qualify for asylum but is eligible for protection through withholding of removal and domestic laws implementing the United Nations Convention Against Torture.[198] The immigration judge must confirm such a finding and allow the applicant to remain unless the ICE lawyer proves that the applicant is ineligible for that relief by offering evidence that was not available to the asylum officer.[199]

Rule 2.0 also makes some desirable changes in the procedures for *all* credible fear interviews. In the supplementary information published with the rule, DHS indicated that it would collapse the standard for initial approval into a single "credible fear" determination, abolishing the higher "reasonable fear" standard for certain non-citizens seeking protection.[200] DHS suggested that it planned to make this change through a later rulemaking procedure.[201] Rule 2.0 also restores a previous practice of not considering statutory bars to asylum at the credible fear interview, leaving those complex legal issues to be resolved during determinations of the merits of the case. It also creates a formal process through which a non-citizen could request reconsideration of a flawed negative credible fear determination even after it had been affirmed by an immigration judge.[202]

Finally, Rule 2.0 also introduces an efficiency in cases in which an asylum applicant is eligible for humanitarian relief other than asylum, perhaps because of a disqualifying prior expedited removal. The plan provides that an asylum officer may determine that the applicant is eligible for either "withholding of removal" (which imposes a high burden of proof and confers fewer benefits than asylum) or protection under the domestic regulations implementing the UN Convention Against Torture (which protects applicants from deportation to countries where they will more likely than not be tortured by, or with the consent or acquiescence of, the government).

---

[198] 8 C.F.R. §§1208.16-1208.18; Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Pub. L. 105–277, 112 Stat. 2681, Div. G, § 2242 (Oct. 21, 1997).

[199] 8 C.F.R. Sec. 1240.17(f)(4)(ii) (provision for grants of asylum without holding a merits hearing); 8 C.F.R. Sec. 1240.17(f)(4)(i)(2) (procedure for endorsing asylum office findings of eligibility for withholding of removal and protection under the Convention Against Torture).

[200] IFR at 18091-92.

[201] IFR at 18091 n.18.

[202] 8 C.F.R. Sec 208.30(g)(1). This opportunity is limited, however, by a rule that a request for reconsideration has to be made within 7 days after the immigration judge's ruling, and that only one request for reconsideration can be made by the non-citizen. Id. An informal version of the request for reconsideration process was previously in place at some detention centers.

Although the case will then be referred to an immigration judge, the judge must grant that relief unless DHS demonstrates that the non-citizen is ineligible for it.[203]

C. Rule 2.0's Grievous Flaw

Notwithstanding these important improvements in the asylum adjudication system, Rule 2.0 contains a grievous flaw that outweighs all of those changes: the unrealistic timetable for providing evidence in advance of adjudication. This flaw applies with brutal force to the first proceeding – the merits interview at the asylum office, but it also presents a very serious problem for asylum-seekers at the second stage – the immigration court hearing.

The rule requires the asylum office to schedule the interview between 21 and 45 days after the positive credible fear determination is delivered to the asylum seeker.[204] The asylum seeker must supply supporting evidence seven days before the interview, or ten days if by mail.[205] Because there are only ten asylum offices for the entire country and few asylum seekers will have cars or drivers' licenses, most will need to provide evidence by mail. This means, for example, that an asylum seeker's interview might be scheduled 21 days after they receive a positive credible fear determination. That applicant will have only eleven days in which to collect and mail the evidence unless DHS grants an extension. If the applicant is released from detention two days after the credible fear determination,[206] the time available will be only nine days, and if the first two days after release are spent on a cross-country bus to the asylum-seeker's ultimate destination, that time will be seven days or fewer.

Most asylum applicants will not prevail in their merits interviews, in part because they will not be able to gather sufficient corroborating evidence in time, as explained below. In fact, DHS made clear in the proposed rule itself that it expects that only 15% of the asylum-seekers processed through Rule 2.0 will succeed in a merits interview.[207] Applicants will then be referred to immigration court.

---

[203] 8 C.F.R. Secs. 208.16(a), 1240.17(i)(2). The judge must also re-adjudicate the asylum claim. Id.

[204] See text at n. 174, supra.

[205] See text at n. 177, supra.

[206] Migrants are not released from detention until DHS confirms that they have a sponsor with whom they can stay, and onward transportation. Sometimes sponsors such as friends or relatives named by an asylum seeker are hard to reach by telephone, delaying the process. In addition, nobody is released on weekends, at least not from the Pearsall, Texas detention center, the first one at which DHS decided to put asylum seekers into the new process. E-mail to Philip Schrag from Sara Ramey, Migrant Center for Human Rights, June 17, 2022.

[207] IFR at 18191 (discussing the expected reduction in the immigration court's caseload as a result of the new plan).

If an asylum officer decides that an asylum-seeker in the new process does not merit a grant of asylum, they must refer the case to the immigration court. This referral could happen as soon as a week after a merits interview. The court must schedule a master calendar hearing within 30 to 35 days of that referral and a status hearing 30 to 35 days after that. The asylum seeker must submit any additional corroborating evidence "at the status conference."[208] In other words, an asylum seeker would have about sixty more days in which to obtain corroborating evidence after being referred to immigration court. (That asylum seeker would previously have had at least seven days for collection of evidence during the asylum office stage.)

What is wrong with 7-day and 60-day evidentiary deadlines in asylum cases?[209] They fail to account for three important factors:

- many applicants will not find legal representation, especially for the asylum office interview, which is a problem because represented cases are prepared more effectively, benefiting both the adjudicator and the applicant;
- the 2005 REAL ID Act imposes significant corroboration requirements (which the Departments did not mention in their justification of Rule 2.0); and
- for those who do manage to obtain lawyers, ethics rules impose a duty on lawyers to provide competent representation to each individual client, a standard that is nearly impossible to meet under Rule 2.0 because of the combination of the corroboration requirements and the short deadlines.

D. The Challenge of Securing a Lawyer

Scant public data exist on the degree to which asylum applicants were represented in asylum office interviews since FY 2009.[210] The most recent study of representation in that forum is our book, *Lives in the Balance*, which covers Fiscal Years 1996 through a partial Fiscal Year 2009.[211] In those years, representation ranged from 29.7 percent (FY 1996-98) to a high of 58.1 percent in FY 2006-2009.[212] In other words, even in the period with the highest rate of representation, more than 40% of the asylum applicants were unrepresented.

---

[208] 8 C.F.R. 1240.17(f)(2)(i)(A)(iii). If DHS informs the court that it is opposing the application and files information and arguments in opposition to the asylum applicant's evidence, the applicant may file rebuttal documents five days before the scheduled merits hearing. 8 C.F.R. Sec. 1240.17(f)(2).

[209] As explained above, these deadlines could be slightly longer.

[210] The Department of Homeland Security's annual yearbooks and Refugees and Asylees Flow Reports do not include this information. See, e.g., Department of Homeland Security, Yearbook of Immigration Statistics 2020, https://www.dhs.gov/immigration-statistics/yearbook/2020; FY 2020 Refugees and Asylees Annual Flow Report https://www.dhs.gov/sites/default/files/2022-03/22_0308_plcy_refugees_and_asylees_fy2020_1.pdf.

[211] See Schoenholtz et al, LIVES IN THE BALANCE, supra n. 142.

[212] Id. at 25, Fig. 2-11.

Two factors suggest that asylum applicants in the Rule 2.0 procedure would be much less frequently represented by legal counsel than these figures suggest. First, our study long predated Rule 2.0; the only asylum-seekers in our study were affirmative applicants—those who entered with visas or had not entered with visas but had never been apprehended by DHS. Those individuals had at least one full year to obtain counsel, rather than only a few days.[213] That year—plus the fact that DHS and DOJ had long backlogs providing more time before adjudication—allowed many initially indigent asylum applicants time to save money for legal fees while working in the United States.[214] Second, the number of people who need legal representation in asylum cases has escalated sharply over the years, while the supply of pro bono lawyers has not kept pace. In FY 2010, there were about 34,000 affirmative asylum applications filed with USCIS,[215] but by FY 2020, that number had grown to more than 93,000.[216] The rate of increase in credible fear cases was much greater. In FY 2010, immigration courts decided only 2,659 asylum cases that had originated with credible fear claims, but by FY 2021, that number had increased to 17,090.[217]

During the years of our prior study, DHS granted asylum to represented asylum seekers 50 percent of the time, compared with 42 percent of the time for unrepresented applicants. The relative advantage of represented asylum seekers diminished over time, perhaps because of better training of asylum officers.[218] Importantly, representation made much more of a difference for applicants who had crossed the border without visas than for those who had arrived with visas. (Rule 2.0, of course, applies only to individuals in expedited removal proceedings, none of whom arrived with visas.) In our prior study, pro se applicants without visas won asylum at a rate of 32 percent, while represented applicants without visas succeeded at the higher rate of 43 percent.[219]

In immigration court proceedings, representation is even more critical to fair outcomes. Between 2007 and 2012, asylum seekers who were released from detention and were represented obtained relief from the court at a rate of 48 percent, compared with 14 percent of such asylum seekers who are unrepresented.[220]

---

[213] 8 U.S.C. Sec. 1158(a)(2)(B).

[214] See David Hausman and Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court,* 84 FORDHAM L. REV. 1823, 1827 (2016).

[215] Government Accountability Office, ASYLUM: Additional Actions Needed to Assess and Address Fraud Risks 23 (2015), https://perma.cc/Q37P-LX6G

[216] DHS, Office of Immigration Statistics, Fiscal Year 2020 Refugees and Asylees Annual Flow Report 16 (2022), https://perma.cc/3L26-ZAAQ.

[217] EOIR, Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim (2022), https://perma.cc/NGF4-LRGG.

[218] Schoenholtz et al., supra n. 142, at 135.

[219] Schoenholtz et al., supra n. 142 at 137.

[220] Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev 1, 51, fig. 15 (2015), https://bit.ly/3stYw55. This study looked at all forms of relief in immigration court, not just asylum. For detained applicants, the contrast is as stark. Id. (pro se detained migrants who applied for relief from removal obtained it in 23 percent of cases, compared with a 48 percent success rate for detained, represented migrants.

Finding counsel in just a few days or even in several weeks or months is exceedingly difficult if not impossible for asylum seekers subjected to Rule 2.0. The first days or weeks of a recently arrived asylum seeker are often consumed with adjusting to life with a sponsoring relative, obtaining food and medical care, and recovering from trauma inflicted both by persecutors and by a harrowing journey to the United States, during which many have suffered violent extortion and other serious harms. The American Immigration Lawyers Association and the American Immigration Council noted that asylum seekers who recently arrived in the United States (which will include all those subject to Rule 2.0) "often have added vulnerabilities, including trauma, language barriers, and a lack of familiarity with the U.S. legal system."[221]

Once settled, an asylum applicant who begins to search for an attorney may be shocked to find out how difficult that is. Indigent asylum seekers, who face deportation unless they prevail in their claims, do not have the constitutional right to court-appointed counsel or public defender service that is afforded to indigent criminal defendants. Newly arrived asylum seekers do not have work authorization, but many private attorneys charge $10,000 to handle an asylum case.[222] Many asylum applicants will be unable to afford to pay for a private attorney and will seek pro bono representation. But except in a few locations such as the New York City area, with its vibrant Immigrant Justice Corps and New York Immigrant Family Unity Project,[223] pro bono resources are scarce and waiting lists are long. "Only a smattering of PILOs [public interest law organizations]" exist in the poorer and less populated areas of the country.[224]

Even in large cities, service organizations that assist asylum seekers are overburdened and have long waiting lists for service. Asylum seekers who call the Georgetown Law clinic that two of

---

But representation also made a huge difference in whether a detained migrant ever applied for relief such as asylum. Only 3 percent of pro se detained migrants sought relief, compared to 32 percent of represented detained migrants. Relief such as asylum is rarely if ever granted to a person who does not apply for it. As of this writing, DHS has not applied the Plan to any detained asylum seekers.

[221] Amer. Immig. Lawyers Ass'n and Amer. Immig. Council, Comments on the Interim Final Rule 4 (May 26, 2022), https://perma.cc/R7P5-VG3G.

[222] Id. at 7.

[223] Immigrant Justice Corps, About IJC, https://justicecorps.org/about/. The Corps was founded by the late Second Circuit Judge Robert Katzmann. It reports that it through its lawyers, it "has delivered a 90% success rate in completed cases [not all of them asylum cases]." Id. The New York Immigrant Family Unity Project "provides free, high-quality legal representation to every low-income immigrant facing deportation in the City of New York, as well as to detained New Yorkers facing deportation in the nearby immigration courts in New Jersey." https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/.

[224] Nadia Almasalkhi, "Immigrants lack access to legal representation," https://perma.cc/6NT8-RADJ. See also map of legal services providers at p. 2 (showing very few providers in rural areas, particularly in the non-coastal western United States).

this article's authors direct have often tried several other providers in the Washington DC area and been told that their intake was closed.[225] Our clinic, too, must often turn them away.

Human Rights First, a leading asylum nonprofit, describes the delays that clients encounter even when the organization has found that they deserve representation:

> Human Rights First has a two-step case acceptance process for asylum cases, which involves a preliminary screening and a more detailed, hours-long intake interview. The availability of "intake" interview slots is very limited, as it is at many legal services organizations, by the small number of staff members. Once Human Rights First accepts a case for pro bono representation, it places the case with a law firm, legal clinic, or volunteer attorney and provides mentorship for the duration of the case. Law firms, clinics, and volunteers require additional time to review case materials and check for conflicts before accepting a case. Each of these steps—the screening, intake, and case placement—may take weeks or longer to complete, and the entire process takes a minimum of two months.[226]

E. The Challenge of Obtaining Corroborating Evidence

Securing a lawyer is only the first hurdle in meeting Rule 2.0's deadlines. A lawyer for an asylum seeker will rarely be able to meet the 7-to-9-day and 60-day deadlines for submitting evidence. To enable the client to prevail, however, the lawyer will have to meet the evidentiary requirement for corroborating evidence imposed by the REAL ID Act of 2005, which is applicable both to merits interviews in the asylum office and to merits hearings in immigration court. That Act provides:

> Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.[227]

---

[225] As an example, the Georgetown Law clinic recently received an urgent message from the Latin American Youth Center, requesting the clinic's representation of a potential client. The message said, "My team and I have been contacting countless organizations that supposedly help immigrants and refugees with legal services, but have been turned away by all of them because they aren't taking any new clients right now. We are starting to become concerned that we won't be able to find one in time as her court date is just around the corner." E-mail to Isabella Lajara, Center for Applied Legal Studies, from Lila Duvall, Latin American Youth Ctr., June 22, 2022.

[226] Comment of Human Rights First on the IFR 6, https://perma.cc/GVA4-YYKB.

[227] 8 U.S.C. Sec. 1158(b)(1)(B)(ii). The statute codified the corroboration requirement that had already been imposed by several circuits. See Tesfaye v. Att'y General, 183 Fed. Appx. 241 (3d Cir. 2006); Diabate v. Att'y General, 206 Fed. Appx. 166 (3d Cir. 2006).

Regardless of whether applicant testifies credibly, an adjudicator may deny the application simply because the applicant did not supply sufficient corroboration.[228]

While generalized reports about persecution of particular groups in a country is available on the internet, more particularized evidence about the harm suffered by and/or faced by an individual applicant is more time-consuming to locate. First, it may take time for asylum applicants, many of whom have survived trauma, to be able to discuss with their new lawyers the harms they have suffered and their fear of returning to a country from which they fled. Four to six meetings with asylum clients, over a period of weeks, may be needed to uncover their full story.[229] Additional time may be necessary if the client does not speak English or another language for which free interpretation can be found with relative ease, for then a lawyer must locate interpreters and the client must come to trust the interpreter as well as the lawyer.

To meet the corroboration requirement of the REAL ID Act, an attorney for an asylum applicant must obtain persuasive evidence or be able to persuade an adjudicator why obtaining it is not possible. The corroborating evidence that adjudicators often expect includes, to begin with, statements from any eyewitnesses to the persecution, such as family members who saw the arrests of victims of persecution, took food to them in prison, paid bail or bribed guards to release them, and doctors who treated them after release. This process takes weeks. To start, witnesses may not initially trust the applicant's lawyer, and language barriers and time zone differences may interfere with communications. Communication is often impeded or slowed because witnesses who remain in the asylum applicant's home country may have been threatened with harm. Their safety could be jeopardized by interception of communications with the asylum seeker's lawyer. Methods such as encrypted communications systems must be arranged to circumvent interception from

---

[228] Sanchez-Thomas v. Garland, 2022 U.S. App. LEXIS 18183 (5th Cir. 2022); Singh v. Holder, 602 F. 3d 982 (9th Cir. 2010) (also holding that the adjudicator need not inform the applicant of the perceived need for corroboration on a particular issue), aff'd en banc on other grounds, Singh v. Holder, 439 Fed. Appx. 665 (9th Cir 2011) (en banc); Aden v. Holder, 589 F. 3d 1040 (9th Cir. 2009); Zhi Fang Ou v. Atty. General, 260 Fed. Appx. 526 (3d Cir. 2008); Kaitov v. Holder, 483 Fed. Appx 476 (10th Cir. 2012); Anyambu v. Garland, 2022 U.S. App LEXIS 12083 (5th Cir. 2022) ("The lack of corroboration was enough, standing alone, to support the BIA's decision that she was not eligible for relief"). A smattering of court of appeals cases reveals very little about the frequency with which asylum officers and immigration judges deny asylum claims because of a lack of corroboration. Because of the expense of appealing, only a very small percentage of denials reach the federal appellate courts. Board of Immigration Appeals decisions in asylum cases are very rarely published. Immigration judge decisions are usually oral, and even those few that are written are available only to the applicants and their attorneys, who have no incentive to make denials public. Asylum officers deciding affirmative cases have issued only a private decision granting or denying asylum or referring the case to immigration court, with no public opinion. Conversely, just as lack of corroboration can doom a claim based on past persecution, solid corroboration can also enable success, at least in the Fourth Circuit, for an applicant who, because of memory problems, the passage of time, or simple confusion, introduces some inconsistencies during oral testimony to an asylum officer or immigration judge. *Camara v. Ashcroft*, 378 F. 3d 361 (4th Cir. 2004).

[229] Survey of asylum advocates conducted by the American Immigration Lawyers Ass'n (hereafter AILA survey)., May and June 2022, on file with the authors.

governments such as those of Iran, Cuba, Russia, China, and others, and the witnesses must be convinced of the security of the encryption technology.

If a witness is willing to speak to an applicant's lawyer, the statement of that witness must still be drafted by the lawyer, sent to the witness (possibly in translation into the language understood by the witness), corrected by the witness, sent back to the lawyer, returned to the witness for signature under oath, and again returned to the lawyer. This back-and-forth is often a weeks-long process, and it must be repeated for each witness.

Obtaining documentary evidence of the asylum seeker's past persecution or risk of future harm also requires a considerable amount of time and effort. Such evidence may consist of arrest warrants or medical records corroborating physical injuries that the perpetrator inflicted on the applicant. Arrest records or bail receipts may be difficult for relatives to retrieve from officials or elsewhere. Medical records may be in the possession of clinics or hospitals that must be cajoled to release them to someone other than the asylum seeker. Complaints that a victim of domestic violence made to a local police station may be equally hard to obtain, requiring many patient communications. Sometimes it is necessary to locate a person such as local clergy who will act as a go-between.

Expert testimony is an important factor in preparing a successful asylum case. This testimony generally takes two forms: medical or psychological evaluations, and targeted country conditions information. An indigent, uninsured applicant who needs a medical examination will have to find a pro bono physician or psychologist for an examination and written report. The examination may require not only physical contact with a doctor or dentist who has experience in evaluating scars or tooth damage but also physical tests (such as x-rays to corroborate claims of broken bones) or cognitive tests to assess brain damage, severe depression, or post-traumatic stress disorder. Multiple visits to the doctor or psychologist may be necessary for a full evaluation. The few physicians willing to perform such examinations or to administer such tests without charging a fee have long waiting lists, and it may take months to get an appointment. Even after an examination occurs, these medical personnel are so busy that it may be weeks before they produce written reports with enough detail to satisfy an asylum adjudicator.

Expert testimony may be needed to describe past harms or explain the risk of persecution for a particular group of individuals. Human rights country conditions reports published by the US State Department and various NGOs often do not provide sufficient detail to corroborate the asylum seeker's claim. In order to confirm a local or specialized practice, asylum seekers must locate an expert anthropologist, historian, sociologist, or political scientist, or a journalist who has substantial expertise in a particular society. Professors and other expert witnesses have full time jobs; providing expert declarations, usually pro bono, is a time-consuming extra duty that is challenging to fit into those busy schedules. Many country conditions experts receive far more

requests than they are able to fulfill.[230] It can take weeks for a pro bono expert to study the case and provide a sworn statement to support an asylum applicant.

F. The Ethical Challenge for Asylum Lawyers

An asylum case is often a life or death matter, because the forced return to a home country of a person threatened with persecution can in fact lead to that person's demise.[231] An immigration judge famously suggested that asylum cases were "death penalty cases heard in traffic court settings."[232] A lawyer who considers representing an asylum seeker within the tight deadlines of Rule 2.0 will want to provide first-rate representation to the client, compiling as much corroborating information as possible rather than relying only on published human rights reports. Such a lawyer will also want to act consistently with two rules of professional conduct that are pertinent to the quality of representation. One requires that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Another insists that a lawyer act with reasonable diligence in representing a client.[233]

These rules prohibit lawyers from providing second-rate service to any client. They have been fleshed out in a formal opinion of the American Bar Association.[234] Rule 1.1 requires attorneys to turn down cases that they would have to handle in less than a competent way. Rules 1.1 and 1.3 require lawyers to "adequately investigate and prepare cases" and to "control workload so each matter can be handled competently." The opinion states that "If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation."[235]

EOIR has reinforced the obligation of immigration lawyers to provide "effective" representation to clients who handle cases in immigration court. It may impose sanctions ranging

---

[230] The Washington Office on Latin America, for example, which is a leading authority on country conditions in the Northern Triangle of Central America, regularly receives far more requests for expert testimony in asylum cases than it can fulfill.

[231] See, e.g., Maria Sacchetti, Death is Waiting for Him, Wash. Post, Dec. 6, 2018; Sara Stillman, When Deportation is a Death Sentence, The New Yorker, Jan. 8, 2018; Human Rights Watch, Deported to Danger (2020), https://perma.cc/JJ2J-4DM2 (138 Salvadoran asylum seekers deported by the U.S. were killed).

[232] Immigration Judge Dana Leigh Marks, CNN, June 26, 2014, https://perma.cc/5N5E-5WS2

[233] Amer. Bar Ass'n, Model Rule of Prof'l Conduct 1.1, 1.3. Every state's highest court has adopted these rules or a close version of them. Amer. Bar Ass'n, CPR Policy Implementation Comm, Variations of the ABA Model Rules of Professional Conduct, Rule 1.1 (July 12, 2021), https://perma.cc/X6KR-D4PW, Model Rule 1.3, https://perma.cc/TKS9-D5LZ.

[234] Amer. Bar Ass'n, Formal Op. 06-441 (2006), https://perma.cc/HH6G-QHEX.

[235] *Id.* The duty to provide competent representation to each client, and to turn down new clients if competent and diligent representation can't be afforded to each one, extends even to public defenders whose jobs are to represent indigent criminal defendants with constitutional rights to representation, who will remain jailed without trial if not represented.

from censure to disbarment from appearing in immigration proceedings on a lawyer who "fails to provide competent representation to a client," defined to include "thoroughness, and preparation reasonably necessary for the representation."[236] EOIR can also impose sanctions on a lawyer who is determined to have provided the ineffective assistance of counsel.[237]

Given the duty to provide competent and diligent representation and the burdens of collecting the corroboration required by the REAL ID Act, lawyers will likely be reluctant to accept many cases from asylum applicants who are subject to the unrealistic deadlines of Rule 2.0. Reluctance to represent those clients is precisely what a recent survey suggested.[238] In June 2022, the American Immigration Lawyers Association (AILA) asked its members who handled asylum cases about their handling of expedited removal cases in the past, before Rule 2.0, and what they expected to do after Rule 2.0 took effect.[239] Several survey respondents who have been accepting a substantial number of clients in expedited removal proceedings stated that because of the short timelines, they would accept fewer than half as many clients once the new rule was being applied to their client populations. Some said that they would not accept any such cases.[240] Many of them reported that they would have a hard time meeting the new deadlines. They estimated that it took at least four months for clients who had received positive credible fear determinations to contact them and for them to agree to the representation. Most of the lawyers who responded to the survey reported that it took at least four months, and in some cases, up to eight months, to collect the necessary corroborating evidence. Most reported that they met at least four times with their clients before the merits hearing.[241]

One of the asylum lawyers commented that "the system is already difficult enough but the timeline makes representation nearly impossible at scale." Another said that "Expecting those fleeing violence to have all their paperwork with them at the border is contrary to our long-established practices, ignorant of the realities facing refugees, and contradictory to Due Process." A third wrote:

> The timeline makes it almost impossible for people to get attorneys unless they are pro bono because the clients usually don't have the resources to pay for representation on such a short timeline and then pro bono resources are already excessively strained without taking into consideration the number of cases that will be on an expedited timeline. The timeline almost guarantees people without a straightforward case won't be granted relief because they don't have attorneys able to flush out the details necessary.

---

[236] 8 C.F.R. Sec. 1003.102(o).
[237] 8 C.F.R. Sec. 1003.102(k).
[238] AILA survey of asylum advocates, *supra* n. 229
[239] 32 lawyers provided responses to the survey. The results of the survey are not a representative sample of all asylum lawyers or even of all asylum lawyers who are members of AILA. They provide helpful insights but are not statistically robust.
[240] AILA survey of asylum advocates, *supra* n. 229
[241] AILA survey of asylum advocates, *supra* n. 229

Another explained:

> Asylum applicants are going through trauma, abuse, and extreme poverty. Working with survivors requires training on mental health issues that impact trauma exposed people. It takes months and several sessions to gain the trust of your client for them to tell their story. That is something that is impossible to do in a few hours or days. Asylum applicants need to speak to someone who knows their language [and] body language[,] and cultural differences can be lost in translation.

The interplay between the unrealistic deadlines of Rule 2.0, the REAL ID Act's corroboration requirements (which apply to both pro se and represented asylum applicants), the ethical obligations of competent and diligent representation, and the already existing dearth of pro bono immigration lawyers will lead to less representation for asylum seekers on whom the new deadlines are imposed. As a result, asylum will be granted at lower rates because testimony alone will not meet the statutory burden of proof.

The Departments themselves seem aware that speeding asylum seekers toward deportation will require a sacrifice in fairness. In their justification for Rule 2.0, the Departments began by writing that its purpose was to "increase the promptness, efficiency, *and fairness*" of the adjudication process.[242] But in response to a comment from the public to the proposed Rule 1.0 to the effect that at least 90 days should be allowed between the credible fear determination and the merits interview in the asylum office,[243] the Departments retreated from claiming that its goals equally included fairness for applicants. They wrote that "to allow applicants [subject to Rule 2.0] a similar amount of time [to that given to affirmative asylum applicants] would undermine the *basic purpose* of this rule: To more expeditiously determine whether an individual is eligible or ineligible for asylum."[244]

G. Previous Experiments with Rapid Asylum Adjudication

Up to this point, our analysis has focused primarily on why Rule 2.0 will undermine the fairness of the asylum adjudication system. But it is also worth noting that our concerns are not merely based on research, practice and the AILA survey. Rapid adjudication schemes, sometimes called "rocket dockets," have been attempted in the past by three different administrations. In each case, they were either abandoned or have produced results that are dramatically unjust.

Though the Biden administration is the first to establish an accelerated court docket as part of the expedited removal system, Democratic and Republican administrations alike have created "rocket dockets" to speed the processing of asylum claims in the regular immigration court

---

[242] IFR at 18098 (emphasis added).

[243] IFR at 18142.

[244] IFR at 18143 (emphasis added).

removal system.[245] In 2014, the Obama administration announced a policy of "prioritizing" asylum cases filed by unaccompanied children and families with children in the immigration courts.[246] EOIR mandated that within twenty-eight days after a child or family was summoned by a DHS official to immigration court, immigration judges had to schedule a master calendar hearing.[247] At master calendar hearings in ordinary immigration court cases, applicants commonly request continuances in order to secure legal counsel.

In the Obama rocket docket for children and families, however, the Chief Immigration Judge discouraged the use of continuances, leaving asylum applicants only weeks rather than the months generally needed to retain a low-cost or pro bono immigration attorney.[248] David Hausman and Jayashri Srikantiah conducted an empirical study of the impact of continuances on representation. They determined that "increasing the time between the first and second hearing from one to two months *doubled* children and families' chances of finding a lawyer."[249] They explain that asylum seekers need time to save money to pay for an attorney, and that even with sufficient funds, overworked immigration lawyers can rarely take on cases immediately.[250] An empirical study by TRAC found that 70% of families in this rocket docket never obtained

---

[245] In addition, as described above, the Trump administration accelerated expedited removals at the border without access to the court system through two programs called PACR and HARP. See supra text at fns x-x.

[246] Juan P. Osuna, Director, Executive Office for Immigration Review, *Statement Before the Senate Committee on Homeland Security and Governmental Affairs: Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border* 3 (July 9, 2014), https://www.hsdl.org/?view&did=756197.

[247] Memorandum from Chief Immigration Judge Brian M. O'Leary to All Immigration Judges, *Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of New Priorities* (Sept. 10, 2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/09/30/Docketing-Practices-Related-to-UACs-Sept2014.pdf; Memorandum from Chief Immigration Judge Brian M. O'Leary to All Immigration Judges, *Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of New Priorities* (Mar. 24, 2015), https://www.justice.gov/eoir/pages/attachments/2015/03/26/docketing-practices-related-to-uacs-and-awcatd-march2015.pdf; Sarah Pierce, *As the Trump Administration Seeks to Remove Families, Due-Process Questions over Rocket Dockets Abound*, MIGRATION POLICY INST. (July 2019), https://www.migrationpolicy.org/news/due-process-questions-rocket-dockets-family-migrants.

[248] Safia Samee Ali, *Obama's 'Rocket Docket' Immigration Hearings Violate Due Process, Experts Say,* NBC NEWS (Oct. 27, 2016), https://www.nbcnews.com/news/us-news/obama-s-rocket-docket-immigration-hearings-violate-due-process-experts-n672636; Rory Carroll, *Migrant courts' quick fix for recently arrived children brings new problems*, THE GUARDIAN (Aug. 8, 2014), https://www.theguardian.com/world/2014/aug/08/migrant-courts-quick-fix-recently-arrived-children-new-problems?wpisrc=nl-wonkbk&wpmm=1; John Fritze, *Immigration court speeds review of cases involving children*, BALTIMORE SUN (Aug. 20, 2014) https://www.baltimoresun.com/maryland/bs-md-immigration-rocket-docket-20140820-story.html; Kirk Semple, *Advocates in New York Scramble as Child Deportation Cases Are Accelerated*, N.Y. TIMES (Aug. 4, 2014), https://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html?_r=1.

[249] David Hausman and Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court,* 84 FORDHAM L. REV. 1823, 1825, 1828 (2016).

[250] *Id.* at 1827.

representation.[251] 81% of those unrepresented families were ordered removed *in absentia*, compared to 8% of represented families.[252] Only 6.5% of the unrepresented families managed to file an asylum claim, and 3.8% were granted asylum. In contrast, 70% of the represented families applied for asylum, and 40% received asylum.[253]

Though the Trump administration rescinded Obama's rocket docket in January 2017,[254] it created a new accelerated docket in the fall of 2018.[255] By July 2019, of 17,000 families whose cases were placed on that rocket docket, 80% had been ordered removed *in absentia*.[256] This *in absentia* removal rate was far higher than the 51% rate under the Obama administration's accelerated docket. Moreover, only one percent of families in the Trump rocket docket received relief from removal in contrast to nine percent in the Obama accelerated docket.[257]

Despite this grim history and substantial outcry from immigration lawyers,[258] the Biden administration launched a new "Dedicated Docket" for families who DHS placed in alternatives to detention after they crossed the southern border without inspection.[259] Beginning in May 2021, this third rocket docket was implemented in ten cities,[260] with the stated goal of obtaining a decision in removal proceedings within 300 days of the master calendar hearing.[261] This time frame is five times longer than the 60-day period from a master calendar hearing to a merits hearing in immigration court under Rule 2.0.

---

[251] TRAC Immigration, *With the Immigration Court's Rocket Docket Many Unrepresented Families Quickly Ordered Deported* (Oct. 18, 2016), https://trac.syr.edu/immigration/reports/441/.
[252] Pierce, *supra* n. **Error! Bookmark not defined.**.
[253] TRAC, *supra* n. **Error! Bookmark not defined.**.
[254] Memorandum from Chief Immigration Judge MaryBeth Keller to All Immigration Judges, Court Administrators, and Immigration Court Staff, *Case Processing Priorities* (Jan. 31, 2017), https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf.
[255] This docket provided that cases of "family units" (adults released from detention with their children) should be adjiudicated within one year. Memorandum from James McHenry, EOIR Director, to "All of EOIR", Nov. 16, 2018, https://perma.cc/XAD3-3JEW
[256] Sarah Pierce*, As the Trump Administration Seeks to Remove Families, Due-Process Questions over Rocket Dockets Abound*, MIGRATION POLICY INSTITUTE, July, 2019, https://perma.cc/V22Y-WMKW
[257] *Id.*
[258] Letter from Legal Service Providers Serving Immigration Courts in Ten Cities Named in May 28Announcement to Attorney General Garland, DHS Secretary Mayorkas, and Domestic Policy Council Director Susan Rice (June 21, 2021), https://www.nwirp.org/uploads/2021/06/Letter_to_DOJ_DHS_WH_re_Dedicated_Dockets.pdf.
[259] Alternatives to detention include release into the community with ankle monitors or obligations to report periodically to ICE.
[260] The ten cities are: Denver, Detroit, El Paso, Los Angeles, Miami, Newark, New York City, San Diego, San Francisco, and Seattle.
[261] Department of Justice, Office of Public Affairs, *DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings* (May 28, 2021), https://perma.cc/6KMX-TYR7; Memorandum from Jean King, EOIR Acting Director to All EOIR, *Establishes a dedicated docket for certain individuals in removal proceedings* (May 28, 2021), https://www.justice.gov/eoir/book/file/1399361/download.

In May 2022, the Center for Immigration Law and Policy at UCLA School of Law issued a blistering report on the early results of this accelerated docket.[262] The study highlights recurring problems found in prior rocket dockets, including lack of access to counsel and *in absentia* removals caused by rapid scheduling and unexpectedly moving up hearing dates by months.[263] The outcomes have been dire: through February 2022, 99.1% of cases resulted in removal, with the majority of removal orders issued *in absentia* and nearly half entered against children, most of whom were under seven years of age.[264]

With Rule 2.0, the Departments of Homeland Security and Justice have once again missed the mark. Yet there are ways to balance promptness, efficiency and fairness that will not necessarily result in the U.S. violation of its statutory and international legal obligations by returning refugees to countries of persecution. We next turn to the best ways to improve this new border asylum system.

VII. Toward Rule 3.0: Proposals for a Fair and Efficient Border Asylum System

As a creature of the administrative state, the U.S. asylum process has long sought to balance efficiency and fairness. Given the high stakes of asylum adjudication, in which a wrong decision can return a human to serious harm, the system was designed to examine individual claims carefully. Subsequent legal and humanitarian developments placed substantial pressure on this system. In the decades since the Refugee Act was passed, Congress and the courts have implemented more onerous evidentiary standards, and many more asylum seekers than the drafters anticipated have sought protection at the southern border of the United States. Congress and the executive branch have repeatedly failed to provide the resources necessary to respond to these challenges; as a result, asylum adjudicators have long struggled to perform their duties effectively.[265] Enter the Trump administration, which made a concerted effort to destroy the

---

[262] Immigrants' Rights Policy Clinic, Center for Immigration Law and Policy, UCLA School of Law, *The Biden Administration's Dedicated Docket: Inside Los Angeles' Accelerated Court Hearings for Families Seeking Asylum* (May 2022), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf.

[263] The study found that only thirty percent of immigrants in the dedicated docket were represented, in contrast to sixty-seven percent of those on the regular docket in Los Angeles. *Id.* at 8. Moreover, "Attorneys reported that their clients' merits hearings have been rescheduled without warning for months earlier than their original date, leaving the attorneys with far less time to prepare the case than they had planned." *Id.* at 13.

[264] *Id.* at 14. A nationwide study found that seven months into the new program, 1,557 asylum seekers put into the program had been ordered deported, and only 4.7 percent of them had been represented by counsel. Only 15.5 percent of the asylum seekers in the program with cases still pending had lawyers. TRAC Immigration, Unrepresented Families Seeking Asylum on "Dedicated Docket" Ordered Deported by Immigration Courts (Jan 13, 2022), https://perma.cc/P4KG-HN9V.

[265] Jaya Ramji-Nogales et al., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM, (NYU Press 2009); Schoenholtz et al., LIVES IN THE BALANCE, *supra* n. 142.

asylum system, directing particular malice at migrants seeking to cross the southern border.[266] President Biden inherited a disastrous humanitarian situation at the southern border, as well as enormous backlogs in the immigration courts and the asylum offices.

The Biden administration has responded in a variety of ways; this article focuses on the new asylum adjudication system it has constructed for individuals apprehended at or near the southern border. Some aspects of the new asylum regulation respond effectively to long-standing challenges facing the asylum system, contributing to both fairness and efficiency, but the timetable for adjudication sacrifices accuracy and compassion at the altar of speed. It creates a significant obstacle to effective representation of asylum seekers and imposes an ethical dilemma on lawyers who undertake to represent asylum seekers in this new process.

The new rule includes several elements that hold the potential to create an asylum process that is more fair *and* more efficient. Advocates, government officials, policymakers, and scholars have long called for the asylum office to expand its jurisdiction beyond affirmative asylum applicants.[267] Asylum officers are more highly trained in asylum adjudication than immigration judges, and the non-adversarial asylum interview is more conducive to soliciting testimony from trauma survivors than the more formal and intimidating court setting. These elements of asylum officer adjudication that contribute to fairness and accuracy also make the process more efficient and less costly. Only one asylum officer is needed to adjudicate the claim, as compared to the greater expense in immigration court of an immigration judge as well as a government trial attorney. With a smaller backlog relative to the immigration courts, the asylum offices have the potential to adjudicate claims more quickly.[268] Moreover, in the new process, asylum seekers will be released from detention, increasing their ability to retain a lawyer. Representation can improve both efficiency and fairness, as lawyers can help asylum seekers locate and present the evidence that adjudicators need to decide their case accurately and narrow the issues.

Several other aspects of the new rule improve efficiency and fairness before and after the asylum officer interview. The rule frees asylum officers who interview asylum seekers at the border from having to apply two different standards, credible fear and reasonable fear, to different applicants. It explicitly eliminates the consideration of bars to asylum at the credible fear stage, ensuring that the first step in the process for asylum seekers at the border is a quick screening that weeds out only those claims that do not have a significant possibility of meeting the legal standards for asylum. It enables asylum officers to provide discretionary reconsideration of decisions by other asylum officers and immigration judges that asylum seekers lacked credible fear. Since Rule 2.0 deems positive credible fear determinations to be applications for asylum, applicants in the new system will no longer have to prepare the complex I-589 form and comply with its daunting

---

[266] Schoenholtz et al., THE END OF ASYLUM, *supra* n. 2.
[267] See text following n. 90, supra.
[268] Of course, immigration judge review of these decisions is still important as this potential may not be fully realized in practice, as suggested by the high rate at which immigration judges grant asylum in affirmative cases in which an asylum officer denied relief. See text at supra n. 154.

set of instructions.[269] That practice also ensures that migrants in the new process will not miss the one-year deadline for asylum applications.

If a claim is referred to immigration court, the rule requires a verbatim transcript of the asylum officer's interview, providing immigration judges with a more detailed and accurate record of the prior testimony and promoting both efficiency and fairness. The new rule also requires that, for cases in immigration court, the ICE Trial Attorney provide a description of the basis of their opposition to the asylum claim. If the government lawyer is unable to provide legitimate justifications for opposing the asylum application, this approach holds the potential to eliminate lengthy merits hearings that simply waste the court's resources.

Finally, two other important changes promise to save substantial time in immigration court. First, asylum officers can find that an applicant is eligible for withholding of removal and/or relief under the Convention Against Torture, enabling the immigration judge to simply agree with the officer's decision rather than requiring them to hear the full merits claim anew.[270] Second, immigration judges can grant an asylum claim without taking testimony, saving substantial time and in many cases increasing accuracy by deciding the case on the written record.[271]

Yet, as explained in detail in Section V, the new rule excessively favors speed at the expense of fairness. Scholars have demonstrated empirically that adjudicators forced to make decisions too quickly are more likely to come to inaccurate conclusions.[272] Prior rocket dockets for asylum seekers have led to horrifying results.[273]

The unreasonably short time frames mandated by the new rule place asylum seekers and their lawyers in an untenable position. The evidentiary requirements of the asylum adjudication system are difficult to meet. Applicants must testify about their most traumatic experiences. They must also provide corroborating evidence that is challenging and time-consuming to gather. This evidence must often be obtained from someone in the country from which an asylum seeker fled.[274] Even in a highly functional adjudicatory system, the current rules would be challenging to implement. In an asylum system that has not only received insufficient resources for decades but was specifically targeted for destruction between 2018 and 2021, it is unrealistic to demand that asylum seekers meet these high standards in such a short time frame.

---

[269] Memorandum from David L. Neal, Director of the Executive Office for Immigration Review, *The Asylum Procedures Rule* (Aug. 26, 2022), https://perma.cc/YG6V-BT8K; 8 CFR 208.3(a)(2), 1208.3(a)(2).

[270] See text preceding n. 199, supra.

[271] Id.

[272] *See, e.g.,* Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases,* 93 CORNELL L. REV. 1, 5, 35-36 (2007) (explaining that reliance on "intuition is generally more likely than deliberation to lead judges astray" and that "Judges facing cognitive overload due to heavy dockets or other on-the-job constraints are more likely to make intuitive rather than deliberative decisions because the former are speedier and easier."); *see also* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 190 (2011).

[273] *See* UCLA report, *supra* n. 262.

[274] See text following n. 229, supra.

The new rule traps asylum lawyers in an ethical and moral quandary. They cannot possibly explain the relevant law and legal process to their clients, collect the necessary documentation, and prepare testimony from their clients and fact and expert witnesses within the draconian time frames required by the regulation. A lawyer who represents an asylum seeker in this process must honor the ethical duties to represent that client competently and diligently, and to avoid providing "ineffective assistance."[275] The lawyer will not want to contribute a veneer of legitimacy to a process that cannot be implemented fairly. On the other hand, if lawyers decline to represent many asylum seekers in the new process, fewer applicants will have any hope of preparing viable asylum claims.

In short, while it is understandable that the Biden administration is eager to address the large backlog of asylum claims, the short timeframes of the new rule represent a step in the wrong direction. After more than forty years since the Refugee Act was passed, we are still relying on an adjudication system that was not designed to process large numbers of applicants efficiently. The rule takes important steps towards a new approach that can fairly and accurately process these claims, but it does not go far enough. Asylum officer adjudications at an earlier stage for asylum seekers arriving in large numbers at the southern border or by sea is a promising start. The Biden administration should take more steps to simplify the asylum process for these non-citizens, making it at the same time more efficient, fairer, and more accurate.

Efficient asylum adjudication is desirable for both asylum seekers and the government. Given the stakes of asylum claims, however, any time limits should begin by recognizing the complexity and nuance of asylum cases.[276] To that end, the new rule should include notifications and time frames that offer asylum seekers a realistic opportunity to present their claims. It should require that an asylum officer who finds that an applicant does have credible fear but has some reservations about the claim should briefly describe those reservations in writing so that the applicant can better prepare for the merits interview that will follow. The rule should require that when ICE releases an asylum seeker for a merits interview with an asylum officer, either ICE or USCIS should provide the asylum seeker with contact information for all pro bono legal services in the region in which the asylum seeker will be interviewed, as well as link to a website providing a list of all such services nationally, in case the applicant has to move and the interview is scheduled for a different office.[277]

Most importantly, the rule should also be amended to give asylum seekers sufficient time to secure counsel, and to give asylum seekers and their counsel adequate time to prepare their case. We suggest that, for most asylum seekers, five months should be sufficient time to take these steps,

---

[275] See text at notes 231-237, supra.
[276] USCIS Ombudsman Report, *supra* n 31 at 43.
[277] This recommendation would not be difficult to implement, because every immigration court already maintains a list of such providers in its region.

though asylum officers should be granted discretion to provide for exceptions for good cause shown. This initial time frame should be the centerpiece of Rule 3.0.

A new rule should set out safeguards to prevent *in absentia* removals at the master calendar stage.[278] Moreover, asylum seekers who are referred to immigration court for removal proceedings should be provided with sufficient time to prepare for the merits hearing before the immigration judge.[279] We think that it is reasonable for the initial master calendar hearing to be held 30 days after an asylum seeker is summoned to court, but a status conference only 30 days after that is too soon, particularly for individuals who have not found representation by the time the master calendar occurs. If they also lacked representation at the asylum office interview, they are unlikely to have collected the necessary corroborating documentation at a status conference only 30 days after the master calendar hearing.[280] Indeed, they will be lucky even to have found a legal representative by then. The status conference should therefore be moved later, to three or four months after the master calendar hearing. The time frames that we propose, at least five months until an asylum office merits interview, and at least another four to five months before corroboration must be filed with the immigration court, are still much shorter than the current expedited removal process, in which most asylum seekers wait nearly four years for an immigration court hearing.[281]

Efficiency and fairness can also be improved in other ways as well, such as by eliminating asylum officer tasks that are redundant or could be performed by a different government official. Currently, many credible fear interviews are lengthy, demanding substantial detail from the asylum seeker.[282] This process is then repeated before an asylum officer at the merits stage. We suggest that the new rule should be amended to ensure that credible fear interviews return to being short screening interviews that determine quickly whether an asylum seeker meets a relatively low bar. Alternatively, if the credible fear interview remains lengthy and detailed, and the asylum seeker makes a sufficiently persuasive claim at that early stage, asylum officers should be authorized to grant asylum at the credible fear stage, making the subsequent merits interview unnecessary. Either approach would save substantial time in the process by eliminating redundancies. The new rule should also outsource security checks to a different USCIS office that is not also adjudicating the merits of asylum case. When we interviewed asylum officers for an earlier study, we learned that security checks are very time-consuming, and the hours used for those checks are drawn from the time allocated to adjudicating the asylum case – a zero-sum game.[283] To increase efficiency, asylum officers should be focused solely on adjudication, and should be freed of tasks that can be performed by other officials.

---

[278] *See* UCLA report, *supra* n. 262.
[279] *See* CGRS Comment, *supra* n. 261.
[280] The corroborating documents must be filed at the status hearing. 8 C.F.R. Sec. 1240.17(f)(2)(i)(A)(*iii*).
[281] See text at n. 137, supra.
[282] USCIS Ombudsman Report, *supra* n 31 at 48.
[283] Schoenholtz et al., LIVES IN THE BALANCE, *supra* n 142

Substantively, there are at least two important steps that the new rule should take to make the process more efficient. As the State Department does for refugee resettlement, the asylum office should identify groups with *prima facie* asylum claims, meaning that there is reliable evidence that members of that group are targeted for persecution.[284] Those groups are selected based on characteristics such as nationality, race, ethnicity, religion, and/or gender identity.[285] USCIS Ombudsman Phyllis Coven suggests that this assessment might be performed through Global, the Asylum Division's case management system; while she acknowledges the limitations of that system, the data on which to base such a decision should be relatively straightforward to gather.[286] Once the group has been designated, the process can be simplified to focus only on identification and security checks.[287] This approach will make the process much speedier and smoother for these groups, though of course safeguards must be put into place to ensure that these designations do not decrease grant rates for applicants outside of these groups.

Adjudicators can also make decisions more quickly without sacrificing accuracy if DHS and DOJ provide them with more comprehensive, detailed, and reliable country conditions resources. Federal regulations require that USCIS work with the State Department to "compile and disseminate to asylum officers information concerning the persecution of persons in other countries" and that it "maintain a documentation center with information on human rights conditions."[288] As explained in the USCIS adjudicator training manual on country conditions information, these resources can help adjudicators to ask more specific and well-informed questions, to more effectively evaluate the factual basis for the claim, and to assess credibility.[289] The current Research Unit (formerly the Resource Information Center)[290] located in the Refugee, Asylum, and International Operations Directorate (RAIO) of USCIS is woefully understaffed, with only four researchers to cover all of the countries from which asylum seekers originate. Congress, DHS, and DOJ should devote substantial resources towards a well-resourced Country of Origin information center that could provide comprehensive training, detailed reports, and specific responses to questions from adjudicators. The Canadian Immigration and Refugee Board's

---

[284] *See* U.S. Dep'ts of State, Homeland Security, and Health and Human Services, *Report to Congress: Proposed Refugee Admissions for Fiscal Year 2022*, 12-16, https://www.state.gov/wp-content/uploads/2021/09/Proposed-Refugee-Admissions-for-FY22-Report-to-Congress.pdf.

[285] USCIS Ombudsman Report, *supra* n 31 at 45.

[286] USCIS Ombudsman Report, *supra* n 31, at 44-45. Much of this information is available from U.S. State Department reports, the Canadian government's reports (https://irb.gc.ca/en/country-information/Pages/index.aspx), and other public sources. Many of the other sources are linked from Georgetown University's CALS Asylum Case Research Guide, https://guides.ll.georgetown.edu/CALSAsylumLawResearchGuide/country-conditions.

[287] USCIS Ombudsman Report, *supra* n 31 at 45.

[288] 8 C.F.R. § 208.1(b) (emphasis added).

[289] REFUGEE, ASYLUM, & INT'L OPERATIONS DIRECTORATE (RAIO), U.S. CITIZENSHIP & IMMIGR. SERV., RAIO DIRECTORATE – OFFICER TRAINING: RESEARCHING & USING COUNTRY OF ORIGIN INFORMATION IN RAIO ADJUDICATIONS 10-19 (2019), *available at* https://www.uscis.gov/sites/default/files/document/foia/COI_LP_RAIO.pdf (hereinafter "RAIO COI TRAINING").

[290] See text at supra n. 23.

Research Directorate provides a useful example of how a research unit can effectively support adjudicators, enabling them to make substantive decisions more quickly and more accurately.[291]

In order to ensure more efficient and fair procedures, the Biden administration should minimize corroboration requirements if it continues to require the submission of evidence within a time frame that is unrealistically short. It should then instruct and train asylum officers not to demand the kind of corroboration that they expect in affirmative asylum applications, where asylum seekers have at least a year to prepare their cases. This training should be included in the Asylum Officer Basic Training Course and the RAIO Directorate Officer Training Course modules. The REAL ID Act requires asylum seekers to submit corroborating evidence "unless the applicant does not have the evidence *and cannot reasonably obtain the evidence*."[292] Asylum seekers who do not arrive at the border with corroborating documentation cannot reasonably be expected to obtain it in 11 to 35 days,[293] Therefore, the asylum office should not require the submission of evidence other than the testimony of the applicant and any documents that the applicant happened to possess. (Both the group-based status determination approach and a better resourced research unit could support such a step by filling in some gaps in the information provided by the applicant.) Specifically, asylum seekers placed in the speedier process established by the Biden administration's new rule should not be expected to provide declarations and documents from persons who are in other countries, medical and psychological examinations by U.S. doctors and psychologists, and expert witnesses on particular country conditions. DOJ should issue regulations requiring that in master calendar hearings, the immigration judge explain on the record what corroboration, if any, might reasonably be available to the applicant by the time of the status hearing and provide the applicant an opportunity to respond as to whether this expectation is reasonable. In any case, the regulation should allow the immigration judge to draw negative inferences only from corroboration they identified at the master calendar hearing; the absence of any other corroboration could not be weighed in the decision.

Finally, the Biden administration should take several steps to increase the fairness and accuracy of the new process. It should devote far more resources to supporting asylum seekers whose cases will be adjudicated, whether through the old or the new version of expedited removal, or through removal proceedings that are not expedited. Ideally, the government would pay for legal representation of indigent defensive asylum seekers, or at least those who have been found to have credible fear.[294] Short of comprehensive representation, the government should fund counsel for certain vulnerable groups such as unaccompanied minors. DHS and DOJ should also fund training by educational institutions and non-profits of non-lawyers such as accredited representatives, paralegals and volunteer community members to assist asylum seekers in this process. While this

[291] See Immigration and Refugee Board of Canada, "The Research Directorate and Country of Origin Information," https://perma.cc/NB55-9FD5.
[292] 8 U.S.C. Sec 1158 (b)(ii) (emphasis added).
[293] See text at note 177, supra
[294] Unlike affirmative applicants, defensive asylum seekers are involuntary litigants.

approach should decrease costs and demystify the legal process, safeguards must be put into place to ensure that unscrupulous individuals do not take advantage of applicants in the process.[295]

The government should provide asylum seekers in the new process with interview orientation and know-your-rights trainings before they are required to participate in credible fear interviews. Once they have been found to have credible fear of persecution, it should also enroll all asylum seekers in a case management program, reviving the Obama administration's highly successful family case management program, to help them adjust to life in the United States and prepare for their interviews.[296] These programs should be paid for by the government and run by non-profits. The government should provide tailored support for specific groups of asylum seekers. For example, it should provide trauma survivors with psychological assistance, and unaccompanied minors with a guardian to help them navigate the process.

On the adjudication side, as we have been proposing for years, the process should be professionalized through more resources devoted to careful hiring, thorough training, and comprehensive quality assurance.[297] The Biden administration must hire more asylum officers and immigration judges to ensure the success of the new process. It should expend sufficient resources to train these adjudicators in relevant country conditions information and legal standards, as well as regular trainings on credibility determinations and other important aspects of asylum adjudication. The government must provide free interpreters and written transcripts at every level of the process. Both of these expenditures are key to accuracy as well as to fairness and can also serve to speed the process along.

From its earliest days, the asylum adjudication system has failed to adequately manage applications from undocumented asylum seekers at the southern border. Congress did not create detailed asylum procedures in the Refugee Act of 1980. The asylum process established by previous regulations has not provided a fair and effective response to large numbers of asylum seekers fleeing deadly violence in their home countries. The Biden administration has the opportunity to create a new border asylum adjudication system that could be both fair and efficient. Rule 2.0 offers important steps in that direction, such as enabling asylum officers to grant claims and releasing asylum seekers from detention while their cases are pending so that they have an opportunity to find representation and present their claims to the adjudicators. The excessively

---

[295] Abuses of immigrants by "notaries" who pretend to be lawyers is significant. Jean C. Han, The Good Notario: Exploring Limited Licensure for Non-attorney Immigration Practitioners, 64 Villanova L. Rev. 165, 165 n. 3 and 171 (2019). State officials who investigate non-lawyers who are charged with the unauthorized practice of law singled out immigration fraud as the main area in which people are harmed by non-lawyer practitioners who have no right to represent clients. "In the typical case, an undocumented immigrant paid substantial sums and 'got nothing done.' Deborah L. Rhode and Lucy Buford Ricca, Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement, 82 Fordham L. Rev. 2587, 2595 (2014).

[296] The Family Case Management Program, and its closure by the Trump administration, is described in PHILIP G. SCHRAG, BABY JAILS: THE FIGHT TO END THE INCARCERATION OF REFUGEE CHILDREN IN AMERICA 219-20 (Univ. of Calif. Press 2020).

[297] *See, e.g.*, Ramji-Nogales et al., REFUGEE ROULETTE, *supra* n.265 at 109-112.

speedy time frames mandated by the rule, however, are nearly impossible to meet and will result in unfair outcomes—namely the rejection of many of those who are eligible for asylum under domestic and international law. An effective Rule 3.0 would increase fairness by providing reasonable time frames for persecution claims to be presented and corroborated. It would also enable more efficient adjudications by identifying groups that merit protection, significantly improving country conditions resources, implementing reasonable corroboration requirements, and shifting responsibility for completing security checks to officials other than asylum officers. By incorporating these key changes, the Biden administration could create a new border asylum adjudication system that is both efficient and fair.