



Asylum in the Trump Era

The Quiet Dismantling of National and International Norms

By Anneliese Hermann | June 13, 2018

Recently, a group of Central American migrants, organized by the nonprofit Pueblo Sin Fronteras, garnered attention for traveling through Mexico toward the U.S. border in order to petition for asylum.¹ Many of these individuals were fleeing for their lives, escaping threats including brutal gang violence, domestic abuse, extortion, rampant political unrest, sexual abuse, and transgender discrimination.² The caravan, though widely covered in the media, is not the only means by which asylum-seekers attempt to reach the United States; others travel alone or in smaller groups. In recent years, many individuals from the Northern Triangle countries of Central America—Guatemala, Honduras, and El Salvador—have left their homes to seek asylum in the United States.³ International law enshrines the right of such individuals to seek refuge in other countries,⁴ and U.S. law confirms that those escaping persecution are eligible to apply for asylum protections.⁵ Without going through Congress to change laws, the Trump administration is taking steps on its own to drastically reshape the asylum process.

The administration is not only making it harder for individuals to apply for and receive asylum, but it is also calling into question whether applicants can access the protections from violence, torture, and threat—to which international and domestic law entitles them. In short, the asylum process is becoming another casualty in the Trump administration's relentless attack on the rights of immigrants and refugees.

This issue brief presents some major challenges that asylum-seekers may confront as they navigate the U.S. immigration system under Trump. It focuses first on the administration's stricter eligibility standards, before exploring asylum-seekers' increased detention periods and decreased opportunity to make their case in immigration courts. Finally, the brief looks at how these policies are tearing immigrant families apart and considers what's next for asylum seekers in the Trump era.

Redefining fear in the application process

For people who request asylum at or near a U.S. border, one of the first hurdles to receiving protection and avoiding expedited removal from the United States is establishing a “credible fear” of persecution.⁶ To pass this screening test, an asylum applicant must demonstrate to a trained asylum officer that there is a significant possibility that the applicant could show in an immigration court hearing a well-founded fear of persecution based on a statutorily protected ground.⁷

In January 2017, President Trump signed executive order 13767, which instructed the secretary of homeland security to revise this process.⁸ In response, the Asylum Division of USCIS released new lesson plans for use in training asylum officers to recognize legitimate fear.⁹ Among other things, the new lesson plans create a higher standard for establishing fear in interviews.¹⁰ These changes could bar applicants with legitimate claims from accessing a full hearing in immigration court. Applicants who are dealing with language barriers, complex situations, and traumatized applicants would be especially vulnerable to losing their right to a full hearing.¹¹ Without a hearing to establish the facts of a case, even a small error on a form could sabotage a valid asylum claim.

A Department of Homeland Security (DHS) memo explaining the changes states that the goal is to prevent abuse of the system.¹² This follows from the administration’s belief that individuals who pass a credible fear screening but ultimately fail to receive asylum must have been gaming the system in the first place. But this represents a serious distortion of the purpose of the credible fear process—it was designed not to identify perfect asylum claims but rather to weed out frivolous claims in order to ensure that the United States does not violate its legal obligations by returning bona fide asylum seekers to face persecution abroad—and it ignores the structural obstacles that prevent even legitimate asylum seekers from succeeding in their claims, such as overdeterrence and underrepresentation. Perhaps unsurprisingly, Human Rights First reports that following the change in lesson plans, the percentage of cases in which asylum officers found applicants to have a credible fear for their safety dropped from 78 percent in February 2017 to 68 percent in June 2017.¹³ Despite this overall trend, however, 205 of the 216 caravan members mentioned above who received credible fear interviews as of June 3, 2018, were found to possess credible fear.¹⁴ This finding likely emphasizes the severity of the dangers they face in their home countries. Overall, the Trump administration’s efforts to raise the credible fear standard are expected to result in legitimate claims being denied in the early stages of the asylum process, even before asylum-seekers have the chance to make a full case for their lives.

Reshaping immigration courts

Even if asylum seekers establish credible fear in an interview with an asylum officer, they may be deported before receiving a full evidentiary hearing in front of an immigration judge. In March 2018, Attorney General Jeff Sessions vacated a 2014 precedential

decision by the Board of Immigration Appeals (BIA), which decides matters of law and interpretation in immigration cases.¹⁵ The BIA decision, *Matter of E-F-H-L-*, 27 I&N Dec. 226, entitled petitioners to a hearing before a judge to present evidence and clear up any errors or misunderstandings that occurred in earlier steps of the process.¹⁶ By vacating this decision, Sessions may have signaled to immigration judges that they are permitted to order asylum-seekers deported without affording them a court hearing in which to make their best possible case. Without a court hearing—including the opportunity to provide testimony on their own behalf— asylum-seekers risk speedy deportation due to trivial misunderstandings.¹⁷

Moreover, in April 2018, the Department of Justice (DOJ) ratcheted up pressure on the asylum process by requiring immigration judges to decide at least 700 cases a year, or roughly three cases per day.¹⁸ Judges facing these new, ambitious annual case completion quotas could feel pressured into making decisions without giving applicants sufficient time to obtain counsel or secure necessary evidence. When it comes to adjudicating asylum applications, increasing the risk of judicial errors means increasing the risk of deporting people to countries where they face harm or even death. The recent steps taken by Sessions and the DOJ combine to reshape the immigration court process for asylum seekers so that it favors speedy decisions over meaningful due process under the law.

Prolonging detention

There is often considerable lagtime between when an asylum officer determines an asylum-seeker has a credible fear of persecution and when that asylum-seeker receives a final decision on those merits in immigration court. During this time, many asylum-seekers are now held in immigration detention, where they can be at risk of physical abuse,¹⁹ substandard medical care,²⁰ illegal strip searches,²¹ and sexual abuse, particularly of LGBT people.²² Their detention during this waiting period can last months, or even years.²³ In 2009, DHS issued an Asylum Parole Directive stating that asylum seekers should be paroled if their identity is established, they do not pose a danger to the community, and they are not a flight risk.²⁴ While adherence to this directive was inconsistent in the years before the Trump administration—with parole grant rates dipping from 80 percent in 2012 to 47 percent in the first nine months of 2015²⁵—current rates of detention are unprecedented. In March 2018, the American Civil Liberties Union (ACLU) filed a class action lawsuit challenging the detention practices of five Immigration and Customs Enforcement (ICE) field offices: Detroit; El Paso, Texas; Los Angeles; Newark, New Jersey; and Philadelphia.²⁶ From 2010 to 2013, ICE personnel in those field offices granted parole to asylum seekers who established a credible fear of persecution in roughly 89 percent of cases.²⁷ According to the lawsuit, however, that figure has dropped to 4 percent since Trump took office.²⁸

Freedom from detention is often critical to success in the asylum process, allowing applicants to gather evidence and documentation, secure translations of key documents, and earn money to pay for counsel in court proceedings. Nine out of ten asylum applicants without the benefit of counsel lose their cases,²⁹ compared with roughly half of those who have legal advice.³⁰ Again, the consequences are steep: Losing a case could mean that an asylum seeker is deported to face harm or even death in their home country.

Prolonged detention can be a dramatic experience for individuals who are fleeing traumatic persecution. Yet even asylum-seekers who are granted bond are often unable to pay. Faced with long-term detention at the Adelanto Detention Center in California, Isaac Lopez and Julio Bajarones engaged in a hunger strike that led to their solitary confinement.³¹ Both Lopez and Bajarones fled cartel violence in El Salvador to claim asylum in the United States, only to find themselves unable to pay a bond, as they were prevented from gainful employment during the period of their detention.³²

Under the Trump administration, many more asylum seekers are being held in detention for lengthy periods of time. From January 20, 2017, to the end of May 2017, for example, there were at least 805 cases of asylum-seekers arbitrarily denied bond at 37 detention centers across the country.³³

Tearing families apart

In a perhaps more visceral demonstration of its unforgiving approach to the plight of people seeking protection, the Trump administration has recently begun systematically separating families at the border, including families going through the asylum process.³⁴ The DHS and DOJ explain the move as the result of their new “zero tolerance” policy of referring any adult crossing the border illegally for any reason to criminal prosecution, leading to children being removed from their parents or guardians.³⁵ Just three years ago, however, the DHS Office of Inspector General condemned the practice of prosecuting asylum seekers for crossing the border between official ports of entry, noting that this “may violate U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968.”³⁶

Additionally, the administration has even been separating families when they have followed the Trump administration’s guidance to request asylum at an official port of entry.³⁷ That was the case earlier this year when DHS removed a 7-year-old Congolese girl from the custody of her mother even after the mother established a credible fear of persecution. There are other documented cases of family separation at ports of entry, including an 18-month-old toddler taken from his Honduran mother as they attempted to flee government persecution and a blind 6-year-old girl removed from her mother’s custody for weeks.³⁸ When requesting asylum, both families presented documentation verifying the biological relationship between mother and child and followed appropriate legal channels.³⁹ Separating children from their parents in this

manner causes emotional and physical stress to children and the people who care for them.⁴⁰ In the days after the administration first announced its “zero tolerance” policy, a Honduran man named Marco Antonio Muñoz, 39, entered the country with his wife and 3-year-old son to request asylum.⁴¹ U.S. Border Patrol agents forcibly removed his son from his arms and later transferred the distraught father to a nearby jail, where he was placed in an isolation cell. Mr. Muñoz later died by suicide in that cell.⁴²

The Trump administration’s criminalization of immigration and immigrants is circular; it paints asylum-seekers and other immigrants as criminals in order to justify changes to policy and law that further prevent them from accessing legal status. All these new policies and practices make it even more difficult for legitimate asylum-seekers to make their claims, while subjecting them to the horrors of family separation and prolonged detention in subpar conditions.

What’s next for asylum applicants in the Trump era?

On Monday, Attorney General Sessions overruled the decision of the BIA in *Matter of A-B*,⁴³ a crucial case that established the legal basis for asylum claims by victims of domestic violence.⁴⁴ The move is a devastating blow to those fleeing violent partners in Central American countries where authorities are either unwilling or unable to offer protection.⁴⁵ Women, children, and other individuals looking to escape abuse, beatings, rape, and murder could find themselves without recourse, returned to their home countries because of new and potentially insurmountable obstacles to their claim to asylum.⁴⁶ In his opinion reversing the earlier precedent, Sessions significantly narrowed the availability of asylum for people fleeing persecution by non-state actors—a decision that will generally preclude protection for, among others, victims of gang violence and LGBTQ victims. The decision is widely expected to prove deadly for many asylum seekers, including those from Central America currently requesting protection.⁴⁷

Meanwhile, Trump administration officials are trying to negotiate an agreement with their Mexican counterparts to generally prevent people who passed through Mexico from receiving asylum in the United States.⁴⁸ The so-called Safe Third Country Agreement would be premised on the notion that such asylum seekers could find permanent safety in Mexico notwithstanding the fact that migrants traveling through Mexico are regularly kidnapped, trafficked, and assaulted and face the threat of deportation without having a meaningful adjudication of their request for asylum.⁴⁹

This administration’s actions will continue to affect asylum-seekers in the United States for years to come. Demonstrating respect for international and national norms would do much to usher in a more humanitarian approach to asylum—one that includes alternatives to detention and a nuanced and culturally sensitive understanding of fear. Such an approach would also help preserve immigrant families—and give persecuted and vulnerable populations their deserved day in court.

Anneliese Hermann is an intern with the Immigration Policy team at the Center for American Progress.

Acknowledgements

The author would like to thank Tom Jawetz, Philip E. Wolgin, and Silva Mathema from the Center for American Progress for reviewing this brief and providing invaluable edits and suggestions.

Endnotes

- 1 Keegan Hamilton, "The Migrant Caravan Is Finding Out Claiming Asylum Under Trump Is A Total Nightmare," *Vice*, May 3, 2018, available at https://news.vice.com/en_us/article/vbx9n4/the-migrant-caravan-is-finding-out-claiming-asylum-under-trump-is-a-total-nightmare.
- 2 Silva Mathema, "They Are (Still) Refugees: People Continue to Flee Violence in Latin America" (Washington: Center for American Progress, 2018), available at <https://www.americanprogress.org/issues/immigration/reports/2018/06/01/451474/still-refugees-people-continue-flee-violence-latin-american-countries/>.
- 3 Nicole Goodkind, "What Is the Caravan of Immigrants Headed to the U.S.-Mexico Border and Why Is Trump So Angry About It?" *Newsweek*, April 2, 2018, available at <http://www.newsweek.com/mexico-caravan-immigration-trump-868814>.
- 4 United Nations General Assembly, "Universal Declaration of Human Rights" (1948).
- 5 *Immigration and Nationality Act: Act 208*, Public Law 82-414, 82nd Cong., 2 sess. (June 27, 1952)
- 6 U.S. Citizenship and Immigration Service, "Credible Fear FAQ," available at <https://www.uscis.gov/faq-page/credible-fear-faq#t12831n40220> (last accessed June 2018).
- 7 U.S. Citizenship and Immigration Service, "Questions and Answers: Credible Fear Screening," available at <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> (last accessed June 2018).
- 8 Executive Order no. 13,767, *82 FR 8799* (2017).
- 9 Catholic Legal Immigration Network, Inc., "USCIS Amends Credible Fear Lesson Plans," available at <https://cliniclegal.org/resources/uscis-amends-credible-fear-lesson-plans> (last accessed June 2018).
- 10 American Immigration Lawyers Association, "USCIS Executive Summary of Changes to the Credible Fear Lesson Plan," February 13, 2017, available at <http://www.aila.org/infonet/uscis-executive-summary-of-changes-to-the-credible>.
- 11 Katie Shepherd, "These Changes May Keep Asylum-Seekers from Getting their Day in Court," *Immigration Impact*, February 28, 2017, available at <http://immigrationimpact.com/2017/02/28/changes-may-keep-asylum-seekers-getting-day-court/>.
- 12 Alfonso Chardy, "Toughened asylum process for immigrants is part of efforts to prevent fraud, authorities say," *Miami Herald*, May 2, 2017, available at <http://www.miamiherald.com/news/local/immigration/article147492484.html>.
- 13 Human Rights First, "Credible Fear: A Screening Mechanism in Expedited Removal" (2018), available at https://www.humanrightsfirst.org/sites/default/files/Credible_Fear_Feb_2018.pdf.
- 14 Catherine E. Shoichet, "How one month reshaped the US immigration landscape," *CNN*, June 3, 2018, available at <https://www.cnn.com/2018/06/03/us/immigration-landscape-may/index.html>.
- 15 U.S. Department of Justice, "Matter of E-F-H-L, Respondent," Press Release, March 5, 2018, available at <https://www.justice.gov/eoir/page/file/1040936/download>.
- 16 *Ibid.*
- 17 Dara Lind, "Jeff Sessions is exerting unprecedented control over immigration courts—by ruling on cases himself," *Vox*, May 21, 2018, available at <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling>.
- 18 Tal Kopon, "Justice Department rolls out case quotas for immigration judges," *CNN*, April 2, 2018, available at <https://www.cnn.com/2018/04/02/politics/immigration-judges-quota/index.html>.
- 19 Freedom for Immigrants, "Physical Abuse at Etowah," available at <https://www.freedomforimmigrants.org/etowah> (last accessed June 2018).
- 20 Freedom for Immigrants, "Hudson County Correctional Facility: Substandard Medical Care," available at <https://www.freedomforimmigrants.org/hudson-county-correctional-facility> (last accessed June 2018).
- 21 Freedom for Immigrants, "Santa Ana City Jail: Illegal Strip Searches," available at <https://www.freedomforimmigrants.org/santa-ana-city-jail> (last accessed June 2018).
- 22 Sharita Gruberg, "ICE's Rejection of Its Own Rules Is Placing LGBT Immigrants at Severe Risk of Sexual Abuse," Center for American Progress, May 30, 2018, available at <https://www.americanprogress.org/issues/lgbt/news/2018/05/30/451294/ices-rejection-rules-placing-lgbt-immigrants-severe-risk-sexual-abuse/>.
- 23 Human Rights First, "Tilted Justice: Backlogs Grow While Fairness Shrinks in U.S. Immigration Courts" (2017), available at <https://www.humanrightsfirst.org/sites/default/files/hrf-tilted-justice-final%5B1%5D.pdf>.
- 24 U.S. Immigration and Customs Enforcement, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," Press Release, December 8, 2009, available at https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.
- 25 Human Rights First, "Lifeline on Lockdown: Increased U.S. Detention of Asylum-Seekers," August 16, 2016, available at <https://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers>.
- 26 Alan Gomez, "Asylum seekers sue Trump administration over prolonged detention," *USA Today*, March 15, 2018, available at <https://www.usatoday.com/story/news/nation/2018/03/15/asylum-seekers-sue-trump-administration-over-prolonged-detention/425572002/>.
- 27 *Ibid.*
- 28 *Ibid.*
- 29 TRAC Immigration, "Asylum Outcome Continues to Depend on Judge Assigned," available at <http://trac.syr.edu/immigration/reports/490/> (last accessed June 2018).
- 30 TRAC Immigration, "Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality," available at <http://trac.syr.edu/immigration/reports/448/> (last accessed June 2018).
- 31 Community Initiatives for Visiting Immigrants in Confinement, "Christine Fialho Speaks with CBS News San Francisco," YouTube, December 6, 2017, available at <https://www.youtube.com/watch?v=wpQgVYLJEE#action=share>.
- 32 *Ibid.*
- 33 Letter from Christine Fialho, co-founder and executive director of Community Initiative for Visiting Immigrants in Confinement, and 115 organizations, 23 legal representatives, and 69 faith leaders and other advocates to Thomas D. Homan and Claire Tricker-McNulty, May 31, 2017.
- 34 John Burnett, "To Curb Illegal Immigration, DHS Separating Families at the Border," *NPR*, February 27, 2018, available at <https://www.npr.org/2018/02/27/589079243/activists-outraged-that-u-s-border-agents-separate-immigrant-families>.
- 35 John Burnett and Richard Gonzales, "Homeland Security Secretary Defends Separating Families Who Cross Border Illegally," *NPR*, May 10, 2018, available at <https://www.npr.org/2018/05/10/609480137/homeland-security-secretary-defends-separating-families-of-illegal-border-crosse>.
- 36 Office of Inspector General, "Streamline: Measuring its Effect on Illegal Border Crossing," *OIG-15-95*, Report to the Secretary, Department of Homeland Security, May 2015.

- 37 Derek Hawkins, "A mother and child fled Congo fearing death. ICE has held them separately for months, lawsuit says." *The Washington Post*, February 27, 2018, available at https://www.washingtonpost.com/news/morning-mix/wp/2018/02/27/mother-child-fled-congo-fearing-death-ice-has-held-them-separately-for-months-lawsuit-says/?noredirect=on&utm_term=.8392e1146420.
- 38 Human Rights First, "Asylum Seeking Families, Too, Are Being Separated," June 4, 2018, available at <https://www.humanrightsfirst.org/blog/asylum-seeking-families-too-are-being-separated>.
- 39 Ibid.
- 40 Miriam Jordan, "It's Horrendous: The Heartache of a Migrant Boy Taken from his Father," *The New York Times*, June 7, 2018, available at <https://www.nytimes.com/2018/06/07/us/children-immigration-borders-family-separation.html>; Trisha Koriath, "AAP: Homeland Security proposal to separate migrant families 'un-American,'" *American Academy of Pediatrics News*, March 23, 2018, available at <http://www.aappublications.org/news/2017/03/23/familyseparation032317>.
- 41 Nick Miroff, "A Family Was Separated at the Border, and this Distraught Father Took His Life," *The Washington Post*, June 9, 2018, available at https://www.washingtonpost.com/world/national-security/a-family-was-separated-at-the-border-and-this-distraught-father-took-his-own-life/2018/06/08/24e40b70-6b5d-11e8-9e38-24e693b38637_story.html?noredirect=on&utm_term=.feb6b791dfe4.
- 42 Ibid.
- 43 U.S. Department of Justice, "Matter of A-B-, Respondent," Press Release, June 11, 2018, available at <https://www.justice.gov/eoir/page/file/1070866/download>.
- 44 Joel Rose May, "This Salvadoran Woman is at the Center of the Attorney General's Asylum Crackdown," NPR, May 22, 2018, available at <https://www.npr.org/2018/05/22/611920968/this-salvadoran-woman-is-at-the-center-of-the-attorney-generals-asylum-crackdown>.
- 45 Ibid.
- 46 Ibid.
- 47 Dara Lind, "Jeff Sessions Just All But Slammed the Door on Survivors of Domestic Violence and Gang Violence," Vox, June 11, 2018, available at <https://www.vox.com/2018/6/11/17450374/sessions-asylum-domestic-gang-violence>.
- 48 Human Rights First, "Administration Attempts to Undermine Asylum by Negotiating 'Safe Third Country' Agreement with Mexico," May 17, 2018, available at <https://www.humanrightsfirst.org/press-release/administration-attempts-undermine-asylum-negotiating-safe-third-country-agreement>.
- 49 Human Rights First, "Dangerous Territory: Mexico Still Not Safe for Refugees," July 18, 2017, available at <https://www.humanrightsfirst.org/resource/dangerous-territory-mexico-still-not-safe-refugees> (2017).