

AMERICA'S INSANE ASYLUM POLICY THREATENS NATIONAL SECURITY

An NPG Forum Paper
by Edwin S. Rubenstein

Cuban baseball players. A Russian ballet dancer. Joseph Stalin's daughter, Svetlana. These are the kind of people, fearing persecution in their homelands, who were traditionally granted asylum in the United States. They came here for a concert tour, a gala performance, an exhibition game, or a political conference, before seeking refuge. Exhibit A: Martina Navratilova, the Czech tennis player, who defected during the 1975 U.S. Open.

The U.S. has always been a safe haven for individuals fleeing persecution in their home countries. In recent years, however, asylum has become a mass movement, available to any alien claiming persecution on account of race, religion, sexual identity, nationality, or political opinion. More than 20,000 people were granted asylum status in 2016; a backlog of 700,000 applications await action in Federal immigration courts.

The world is suffering the worst refugee crisis since World War II. There are now 65.4 million refugees and displaced people in the world, according to the United Nations.¹ Every one of them is a potential asylee. Under U.S. immigration law a refugee is someone who requests protection while still overseas, while an asylee seeks protection when in the U.S. The difference between refugee and asylee is purely a matter of location.

Like refugees, asylees are eligible for food stamps, Social Security disability payments (SSI), cash welfare (TANF), and Medicaid upon entering the country.² Legal immigrants must wait at least five-years before accessing these federal benefits.

Violence in Central America – it has some of the highest murder rates in the world – has pushed tens of thousands of people to seek asylum at the U.S. border. A caravan of 1,500 asylum seekers organized by a U.S.-based open borders group riveted the nation in May 2018 as it progressed through Mexico.

Lost in the caravan-related tweets, news reports, – and outrage – is that there is almost nothing U.S. immigration officials could do about it. The law is the law, and the

current asylum law is fatally flawed. Illegal aliens entering at a designated border crossing are legally eligible to request asylum. People who sneak in illegally are eligible also. Many turn themselves in to the nearest Border Patrol officer in order to start this process.

Obtaining a grant of asylum is not easy. It can involve multiple interviews with immigration officials, hiring pricey lawyers, and court appearances. The process can take years to complete. Ultimately, less than 10% of applicants are actually granted asylum. But merely requesting asylum is usually enough to keep them here and happy.

The scam is well known: Turn yourself into a U.S. official, ask for asylum, then disappear into the country while you await your day in court. That day often never comes: immigration courts are overwhelmed with asylum applicants. If your claim is ultimately rejected, life goes on as before. More than 900,000 illegal aliens in the U.S. today have ignored a final deportation order.³ Meanwhile, asylees can obtain a Social Security number, a Green Card, and enroll their children in U.S. public schools.

A litany of administrative, legal, and political missteps has enabled this behavior.

“CREDIBLE FEAR” FRAUD

Once they are processed at a port of entry, migrants requesting asylum are transferred to a detention facility where they must pass a “credible fear” of return screening with an officer of the Immigration and Citizenship Service.⁴ Credible fear is a fairly low legal standard, almost in the eye – or the ear – of the beholder. IDs are not required. In fact, little or no evidence beyond the testimony of the asylum seeker is needed to “prove” a claim, and DHS is generally restricted from acquiring information from outside the government.⁵

The U.S.-Mexican border spans 1,934 miles, yet there are only about 360 asylum officers stationed at eight asylum offices in the U.S. – none of them directly on the border.⁶ The distance between immigration officers and illegal aliens often makes a face-to-face interview impossible. Many interviews are conducted via telephone, in Spanish,

through interpreters, making it impossible to size up an interviewee's demeanor or vocal inflection when making a credible fear judgement.

The initial screening is a bit of a joke. Not surprisingly, more than three-quarters of those interviewed pass the credible fear test. A far more complex and insidious fraud starts after the credible fear interview, when the asylee submits a formal application. That's when immigration lawyers get involved. In recent years a number of these practitioners have been charged with filing fraudulent applications for their clients. The fraud is often massive.

- A joint FBI-NYPD investigation charged 30 lawyers and preparers with filing 5,773 fraudulent asylum applications in 2014.⁷ Defendants in the case fabricated stories about forced abortions in China, persecution based on the applicant's belief in Christianity, and political persecution for membership in China's Democratic Party. According to DOJ data, more than half – 3,709 – of the applicants were granted asylum.⁸
- In 2005 the leader of a Fairfax-based immigration ring pleaded guilty to falsifying documents of more than 1,900 Indonesians in the U.S. illegally. According to press reports, the case involved hundreds of aliens who “were coached to tell asylum officers or immigration judges false stories of beatings or rapes they endured in Indonesia at the hands of Muslims because they were either ethnic Chinese or Christians.”⁹
- In June 2010, three California lawyers were convicted “of charges related to a scheme to defraud [USCIS] by filing hundreds of false asylum claims.”¹⁰

The writing skills and deviousness of immigration lawyers involved in these scams undoubtedly contributed to their high success rate. Equally important: the workload and sheer exhaustion of the immigration judges tasked with reading their stuff. (See below.)

Immigration lawyers have plenty of competition – from smugglers, for example. Andrew H. Arthur, a former immigration judge and the current resident fellow at the Center for Immigration Studies, gives details:

“Anecdotally, there is significant fraud in the credible fear process, much of which originates from, or is abetted by, the smugglers on which many aliens entering illegally and claiming credible fear rely. Two cases exemplify this problem: one involving convicted alien smuggler Rakhi Gauchan, and the other involving

Ahmed Dhakane, who plead guilty to two counts of making false statements on his application for asylum.”¹¹

“Gauchan, a native of Nepal, had ‘run smuggling rings for 11 years in Europe and Asia’ before relocating to Mexico City.¹² According to the Christian Science Monitor, Gauchan (who ‘told an undercover informant that in Mexico her operation smuggled about 10 individuals per month into the’ United States): [C]harged up to \$40,000 for someone living in India and \$3,000 to \$4,000 for someone who had already made it to Mexico, according to court documents...”¹³

“Ms. Gauchon would instruct her clients to turn themselves in to US officials and apply for asylum. She also provided a critique of their ‘life story’ and offered suggestions of how to make the story more compelling to boost their chances of being granted US asylum.”¹⁴

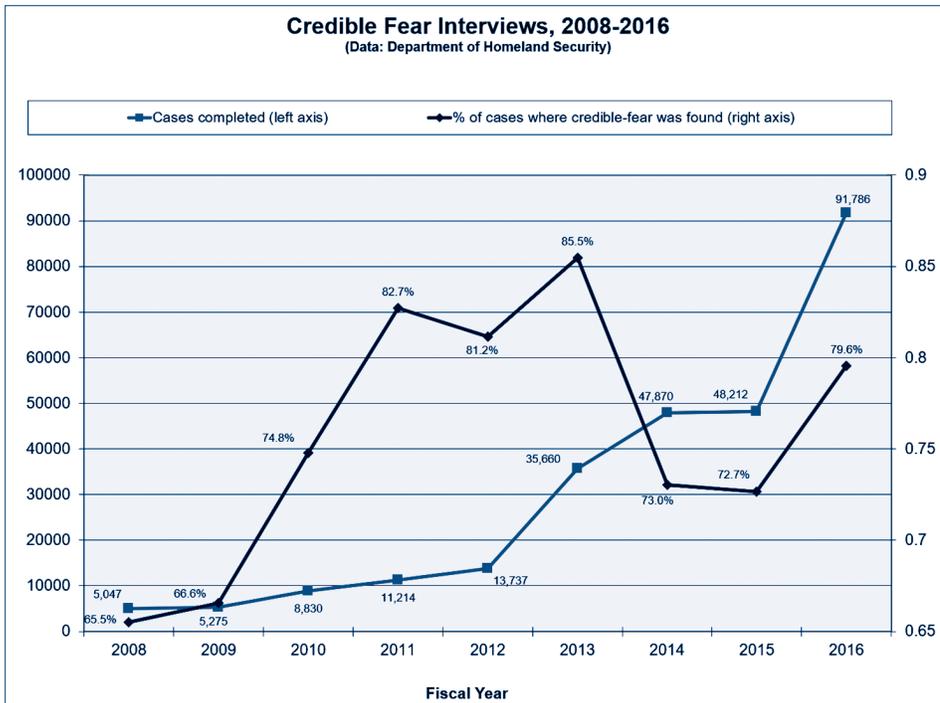
Dhakane, on the other hand, “...ran a human smuggling operation based in Brazil that specialized in migrants from Somalia and other parts of East Africa.”¹⁵ As the *Christian Science Monitor* reported: **“In his Brazilian smuggling operation, Dhakane provided false passports and other forged travel documents. In addition, according to his federal court file, he bribed Brazilian immigration officials and instructed his customers how to make false asylum claims once they arrived in the [United States].”¹⁶**

Its susceptibility to fraud has attracted terrorists to the asylum system. Ramzi Yousef and Ahmad Ajaj, plotters of the first World Trade Center bombing, **“concocted bogus political asylum stories when they arrived”** to remain in the United States in 1992.¹⁷

Post 9/11 anti-terrorism measures have not squelched the asylum-terrorist pipeline. Information disclosed to Congress indicates that 399 aliens barred from asylum due to suspected terrorist activity nevertheless passed their credible fear screening tests in FY2014, and another 299 did so in the first four months of FY2015.¹⁸

In 2017 the *Christian Science Monitor* highlighted 10 terrorists apprehended while attempting to enter the U.S. from Mexico.¹⁹ One was the above mentioned smuggler, Ahmed Dhakane. As part of a ruse he forced one of his clients, a Somali juvenile, to pose as his wife, kept her locked away, and according to court documents, repeatedly raped her.

The documents explain that “[Dhakane] stated that it would better his asylum chances if he had a pregnant wife.”²⁰ He was sentenced to 10 years in prison after pleading guilty to two counts of making false statements on his application for US asylum.



CATCH AND RELEASE

In 2009 the Obama Administration began to allow aliens who passed their credible fear interview to be released from detention while their cases play out in court. Prior to that time, only aliens with medical emergencies or those needed for law enforcement purposes were absolved from detention.²¹ Known as “catch and release,” the Obama policy amounted to a parole for illegal aliens who passed their credible fear interview.

The results are exactly what you would expect: Credible fear cases soared, while the share of those deemed meritorious declined.

Here are the shocking statistics: In 2009, DHS conducted a little more than 5,000 credible fear reviews. By 2016 that number increased to 91,786. The increase has been especially pronounced at the border, where these claims went from approximately 3,000 cases in 2009 to more than 69,000 in 2016.²² As seen in the graphic, the percentage of credible fear claims deemed legitimate by immigration officials peaked at 85.5% in 2013, the year before the Central American surge, fell to 73.0% in 2014, and has remained below 80% since then.

Credible fear screenings are the first step in a lengthy process. An honest asylum seeker will follow up with an asylum application, a process requiring documentation and references to be successful. Most do not follow through. Andrew Arthur notes that “...half of those that pass that screening – the very people who say they came here seeking asylum – never even file an asylum application

once they are in the United States. This suggests that they knew their asylum claims lacked merit, and that their claim of credible fear was simply a ruse to enter the country illegally.”²³

Most of the no-shows are economic migrants, fleeing poverty in their home country. Poverty is not persecution, and fear of poverty is not a valid pretext for asylum in the U.S. Yet they are released into the interior, and those that apply for asylum are eligible for a work permit after 150 days.²⁴ In most cases applicants wait several years before their cases are adjudicated before an immigration judge.

These employment loopholes enabled U.S. employers to hire 403,000 foreign nationals with pending asylum claims in FY2017.²⁵ That figure exceeds

the annual influx of agricultural guest workers, the inflow of science and technical workers admitted on H-1B visas, and the number of H-2B non-agricultural visas issued in a year.²⁶ Asylees compete with unskilled American workers for minimum wage jobs and are eligible for emergency medical care and federal tax subsidies such as the Earned Income Tax Credit. If their asylum claims are rejected they lose their work permits, but a driver’s license and SSN enable them to keep their jobs despite their illegal alien status in the U.S.

CONGRESSIONAL CRACK DOWN

Congress has taken aim at asylee fraud. The Goodlatte Bill (H.R. 4760) proposed tighter “credible fear” standards and larger penalties for fraud and frivolous claims made in asylum applications.²⁷ The bill also required that: 1. audio or visual recordings be made of all CF interviews and be available for use as evidence in any future legal proceedings; 2. a competent interpreter, not affiliated with the government of the asylee’s country, be used when the immigration officer does not speak the alien’s language; and 3. asylees who return home voluntarily be immediately stripped of their asylee status.²⁸

Unfortunately, the House defeated Congressman Goodlatte’s bill in June 2018.

Another way to discourage abuse would be to turn asylees back at the border and direct them to undergo credible fear interviews at our consulates in Mexico. At that venue immigration officers can ask asylees if they

requested asylum in countries traversed before reaching the U.S. border. Failure to adequately explain a refusal should weigh heavily in the pass/fail decision rendered by U.S. consulate officials.

While these initiatives can reduce the “supply” of asylees, they do not address the larger problem: the insatiable demand for cheap foreign workers by U.S. employers. Mandatory e-verify would be a good first step in this regard.

Absent such reforms, catch and release will remain a big windfall for asylees seeking jobs and a big problem for U.S. workers trying to hold on to their jobs.

THE “UNACCOMPANIED ALIEN CHILD” LOOPHOLE

At one time children as young as four were shackled and held in detention and even solitary confinement alongside adult refugees and asylees. By the 1990s this Dickensian horror was mitigated: alien children were supervised by the Immigration and Naturalization Service, which acted as both prison guard and parent.²⁹ The special “unaccompanied alien child” (UAC) designation first appeared in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. Named for a 19th-century British abolitionist, this law was designed to protect UACs from exploitation by sex traffickers, drug smugglers, and other forced labor entrepreneurs.³⁰

The Wilberforce law treats children from different countries differently. Minors from Mexico or Canada, countries contiguous with the United States, are turned back at the border unless it is deemed dangerous to do so. Those from other nations must be transferred within 72 hours to the Office of Refugee Resettlement at the Department of Health and Human Services (HHS).

No provision was made for parents, but the Wilberforce law requires that UACs be placed in the “**least restrictive setting**” that is in their best physical and emotional interest. This stipulation is widely interpreted as requiring that children be turned over to sponsors, usually parents or other family members, already living in the U.S. The law only refers to checking the sponsors’ immigration status, not acting upon it. “**This is the loophole HHS uses to place children with designated sponsors illegally in the United States.**”³¹

Initial UAC caseloads handled by the Office of Refugee Resettlement averaged 7,000 to 8,000 a year.³² Some were

Illegal Alien Children Crossing the Southwest Border at Legal Border Crossings, 2017-2018 (October 1 to April 30 of each year)

	2017	2018	Increase	
			Number	%
Unaccompanied Alien Children	5,339	5,551	212	4%
Family Units	20,860	29,926	9,066	43%

Family units represent the number of illegal aliens (either a child under 18 or a parent) entering with a family member. Data Source: Border Patrol.
<https://www.cbp.gov/newsroom/stats/fofo-sw-border-inadmissibles>

placed in foster homes, others with illegal alien family members (including parents) already in the country. Then came 2014, when Central American countries descended into a whirlwind of murder and gang related violence. The refugee agency saw its incoming population rise to more than 40,000 a year, swelled by Honduran, Salvadorian, and Guatemalan children.

The tsunami overwhelmed the capacity of available sponsors. A decision was made to allow entire family units – children and their illegal alien parents – to apply for asylum. What started as an emergency expedient has morphed into the largest source of UACs:

In the first six months of FY2018 the number of families entering with illegal alien children grew by 43%, while the number of genuinely unaccompanied children rose by 4%. The tilt towards family units has persisted since 2014.

No issue has spawned more controversy than the separation of children in family units from their parents. Most reasonable people, on either side of the immigration issue, believe these kids are better off with parents regardless of immigration status. The devil is in the details. HHS lacks procedures to verify the existence of a family relationship or track the progress of children released to adult sponsors. Congressional reports find HHS officers placing children with individuals who may themselves be traffickers, forcing them to work instead of attending school, and failing to ensure that they appear for scheduled court appearances. In 2017 federal agencies lost track of nearly 1,500 children they placed with sponsors.³³

The problem boils down to motivation: why are Central American parents hell bent on entering the U.S. with children in tow? Andrew Arthur, in congressional testimony, states that “...it [the Wilberforce law] encourages people to bring their own children (or children whom they claim to be their own) when they make the perilous journey to the United States, thinking

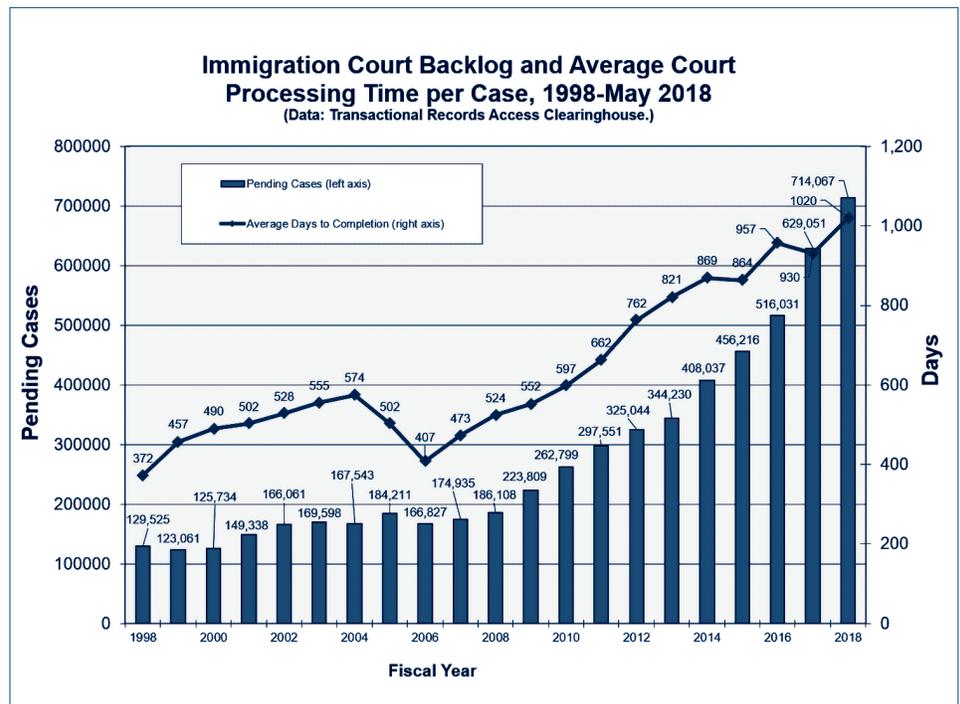
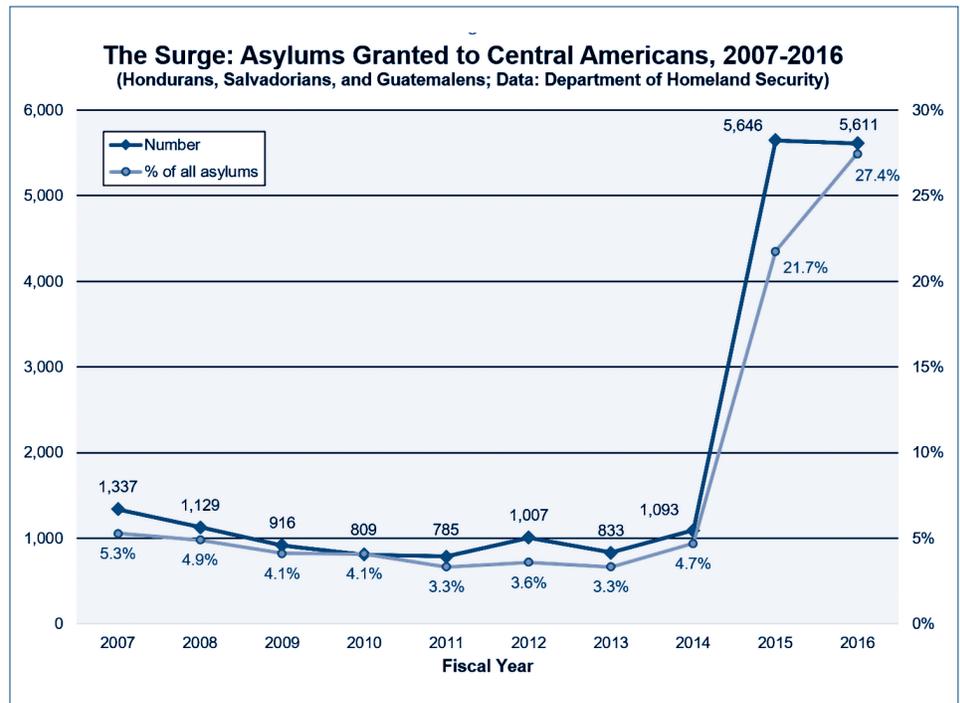
that it will make it more likely that they (the parents or purported parents) are more likely to be released if they travel with children.”³⁴

Even unaccompanied children are not what they appear to be: “The [Wilberforce Law] ... was a well-intentioned attempt to protect immigrant children from exploitation, but it actually applies to very few of the more than 200,000 unaccompanied minors that have crossed the southwest border from ...Central America since 2013. Most of these kids are not victims of trafficking, but came to the United States voluntarily with the assistance of a human smuggler, and with the intent of being reunited with a parent or family member.”³⁵

Citing a Border Patrol intel report, Arthur reports that “...something like 90 percent of the UACs and family arrivals interviewed said they were coming because they heard they would be released with a ‘permiso’ which is the slang for Notice to Appear in immigration court, which is de facto permission to stay pending the conclusion of deportation proceedings. This has resulted in a massive advertising campaign throughout Central America attempting to stem the migration north by saying that their hopes for admission to the United States based on this interpretation of the law are risky.”³⁶

But the damage is done. Wilberforce plus “catch and release” provides an irresistible incentive for illegal alien border crossers to use their children as cover or, if already here, to have them smuggled into the country.

Credible-fear? Hardly. These folks are not fleeing persecution, they are running toward something wonderful: a free pass to the U.S. We are the ones who should be fearful.



ASYLUM SYSTEM OVERWHELMED

The U.S. remains committed to the noble goal of protecting people fleeing persecution. However, the current asylum system appears increasingly ineffective in meeting that goal. While an increasing number of aliens are seeking asylum, fewer are judged to have legitimate claims. As a result, the number of individuals actually granted asylum fell from 28,010 in FY2012 to 20,455 in FY2016.³⁷

Ironically, the most difficult cases to adjudicate – those from Central America – were granted asylum in record numbers over this period:

Asylums granted to Central Americans rose 7-fold between 2013 and 2016, as their share of all asylums zoomed from 3.6% to 27.4%.

The immigration court system coped with the surge by reassigning immigration judges from run of the mill asylee cases – say, an adult male traveling solo - to the complexities of family units and unaccompanied children. These new priorities forced judges to suspend work on cases where court dates had already been scheduled. As seen in the caravan situation, asylum claims overwhelmed the ability of immigration authorities to process or even keep track of individuals:

As of May 2018, immigration courts were facing a case backlog – cases pending from previous years that were open at that date – of 714,067. In FY2013 – the year before the Central American surge – the backlog was 344,230. The average time for completion of pending cases in May 2018 was 721 days, up from 438 at the start of FY2008.

While asylum cases are not the only cases heard in immigration courts, they are a major contributor to the problem.

Struggling to manage the current case backlog are 334 immigration judges. (IJs)³⁸ Do the math: that works out to 2,140 cases per judge. This absurdly high figure may be an understatement, as it reflects only currently active cases. Missing from the tally are 330,000 cases that are on “**administrative closure**.”³⁹ Immigration judges close cases primarily because they feel the evidence is not sufficient to resolve the case on its merits.⁴⁰ These cases can be re-opened; meanwhile, the defendants remain in the country – a dangerous state of affairs. In August 2018 AG

Sessions enacted reforms that will sharply reduce the number of closures granted.⁴¹

A good IJ agonizes over each case. A 2009 study found “**many immigration judges adjudicating cases of asylum seekers are suffering from significant symptoms of secondary traumatic stress and job burnout, which, according to the researchers, may shape their judicial decision-making processes.**”⁴² Secondary Traumatic Stress Disorder is trauma that affects people who work with traumatized individuals, and may be as debilitating as PTSD itself. As it relates to IJs, the syndrome is also described as “**compassion fatigue.**”⁴³

Too much compassion fatigue trauma among immigration judges? That is dangerous for the judges – and the country.

MEXICO: A PROBLEM, OR A POTENTIAL SOLUTION?

Before reaching the southwestern border the Central American caravan spent weeks trapesing through Mexico. Not a soul had a U.S. visa. In fact, there is no evidence that any caravan members had a visa to enter Mexico either. They faced two choices: enter the U.S. illegally and request asylum, or do so at a port of entry.

The Trump Administration floated a third possibility: Instead of applying for asylum in the U.S., Kirstjen Nielson, the Secretary of Homeland Security, urged the Central Americans to seek protection in Mexico.⁴⁴ While pro-immigration groups dismissed Nielson’s proposal as unrealistic, data and Mexican law say otherwise.

A small, but rapidly increasing number of migrants from Honduras, El Salvador, Guatemala, and other countries, have sought asylum in Mexico. In 2016 nearly 8,800 people applied for asylum in Mexico, almost seven-times as many as in 2013.⁴⁵ And the trend is accelerating: The U.S. State Department, in its 2017 Human Rights Report for Mexico, notes: “**The government and press reports noted a marked increase in refugee and asylum applications during the previous year. UNHCR projected the [Mexican] National Refugee Commission (COMAR) would receive 20,000 asylum claims by the end of the year, compared with 8,788 in 2016.**”⁴⁶

Asylum laws in both Mexico and the U.S. are broadly based on the United Nations Refugee Convention of 1951. In 2011 Mexico expanded its list of individuals eligible for asylum to include people fleeing “**...generalized violence, foreign aggression, internal conflict or major human rights violations.**”⁴⁷ In other words, the same kind

of domestic violence that AG Jeff Sessions says is *not* a valid pretext for asylum in the U.S. is acceptable under Mexican law.

In addition, **“In 2016 Mexico added protections** in its Constitution saying that anyone entering the country has the right to request asylum.”⁴⁸

Bottom line: the legal grounds for asylum in Mexico are more generous than those in the U.S.

If Mexico is so receptive to asylum seekers, why didn't the Hondurans, Salvadorians, and Guatemalans seek asylum there instead of crossing into the U.S.? **“Simply put,”** answers former immigration judge Andrew Arthur, **“there is no requirement for them to do so under U.S. law.”**⁴⁹

Canada also has liberal asylum laws, but Canada is subject to a different set of asylum regulations than Mexico. Under the Canada-U.S. Safe Third Country Agreement, **“refugee claimants are required to request refugee protection in the first safe country they arrive in, unless they qualify for an exception to the Agreement.”**⁵⁰ The agreement stipulates that if an illegal alien enters the U.S. and attempts to enter Canada without applying for asylum here, Canada can send the alien back to the U.S. And vice-versa: the U.S. can halt illegals entering from Canada who have not applied for asylum there.

The arrangement, known as a **“safe third country”** agreement, is designed to ensure that grants of asylum go to individuals fleeing persecution, not to those seeking better jobs or living standards. The Canada-U.S. agreement has been in effect since December 29, 2004.⁵¹ Had such an agreement been signed with Mexico, American officials could have stopped the caravan at the border, forcing them to seek protection in Mexico. It would have significantly reduced, if not completely halted, the influx of Central America asylum seekers.

The push for a U.S.-Mexico safe third country agreement is not the exclusive domain of Republicans. Obama administration officials reportedly brought up the idea in negotiations with their Mexican counterparts. With 82% of Mexican exports going to the U.S., the Trump administration has plenty of leverage to use on immigration issues.⁵² The recent election of a new Mexican president could change U.S.-Mexican immigration policy in surprising ways.

POPULATION IMPLICATIONS

Over the past few years an average of 25,000 individuals per year have been granted asylum. That figure

is trivial alongside the average influx of 1 million legal immigrants per year. Asylum grants, however, are the tip of a much larger iceberg. Nearly 180,000 individuals apply for asylum each year, and the backlog of asylum cases awaiting court hearings stands at 714,000. From 2010 to 2016, while the total foreign-born population rose 9%, the asylum backlog more than doubled.

Compared to legal immigrants, asylees are on a fast track to citizenship. Two years after being granted asylum they can petition to have immediate family members – spouses, children, and parents – join them as legal immigrants via the chain migration process. Legal immigrants must wait five-years for that privilege.

The inescapable conclusion: under current immigration laws asylees are on track to become the fastest growing segment of the foreign-born population.

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