THE ASYLUMIST

The Cato Institute on the Asylum Reform and Border Protection Act

David Bier

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The Asylum Reform and Border Protection Act (H.R. 391) would undermine the individual rights of people fleeing persecution and violence to seek asylum in the United States. The bill would obliterate the current asylum standards for people seeking asylum at the border, and now require such asylum seekers to prove their claims to an impossible degree immediately upon their arrival at the border—without access to the documents or witnesses that they would need to do so. The government would then promptly deport without a hearing before an immigration judge those who fail this unattainable requirement, possibly to endure violence or persecution.

The authors claim that this radical change is necessary due to an unprecedented surge of asylum applicants. In the 1990s, however, a similar surge of asylum seekers arrived in the United States, and Congress adopted much less severe reforms than those proposed in this bill. Even assuming that the applicants are submitting asylum applications for the sole purpose of gaining entrance to the United States, the bill does nothing to address the underlying cause of the problem: the lack of a legal alternative to migrate. As long as legal immigration remains impossible for lesser-skilled workers and their family members, unauthorized immigration of various kinds will continue to present a challenge.

Asylum rule change will result in denials of legitimate claims

Current law requires that asylum seekers at the border assert a "credible fear" of persecution. Asylum officers determine credibility based on whether there is a "significant possibility" that, if they allow the person to apply, an immigration judge would find that the fear is "well-founded," a higher standard of proof. The credible fear interview screens out only the claims that obviously have "no possibility, or only a minimal or mere possibility, of success," as U.S. Citizenship and Immigration Services (USCIS) puts it. If the USCIS asylum officer rejects the claim as not credible, the applicant may ask an immigration judge to review the determination the next day but is not granted a full hearing. Customs and Border Protection removes those who fail to assert or fail to articulate a credible fear.

H.R. 391 would impose a much higher standard simply to apply for asylum in the United States. In addition to demonstrating that they had significant possibility of successfully proving their claim to an immigration judge, it would require applicants to prove that it is "more probable than not" that their claims are true—a preponderance of the evidence standard. This standard eviscerates the lower bar that Congress established. The committee simply cannot expect that asylum seekers who may have had to sneak out of their country of origin in the dead of night or swim across rivers to escape persecution will have sufficient evidence the moment they arrive in the United States to meet this burden.

In 2016, a group of Syrian Christians who traveled thousands of miles across multiple continents and then up through Mexico to get to the United States arrived at the border to apply for asylum. Thankfully, they met the credible fear standard and were not deported, which enabled them to hire an attorney to help them lay out their claim, but this new standard could endanger anyone who follows their path. An inability to provide sufficient evidence of their religion, nationality, residence, or fear would result in deportation immediately after presenting themselves at the border.

The authors imply that requiring them to prove their statements are true is not the same as requiring them to prove their entire asylum case, but this is a distinction without a difference. Asylum applicants must state a "credible fear" of persecution. Those statements would then be subject to the much more stringent standard. Of course the government should demand the truth from all applicants, but this is a question of the standard by which asylum officers should use to weed truth from falsehood. It is virtually impossible that, by words alone, asylum seekers could prove that it is "more probable than not" that their statements are true.

The committee should consider this fact: in 2016, immigration judges reversed nearly 30 percent of all denials of credible fear that came to them on appeal. This means that even under the current law, asylum officers make errors that would reject people with credible claims of persecution. If Congress requires an even greater burden, many more such errors will occur, but faced with the higher evidentiary requirement, immigration judges will have little choice but to ratify them.

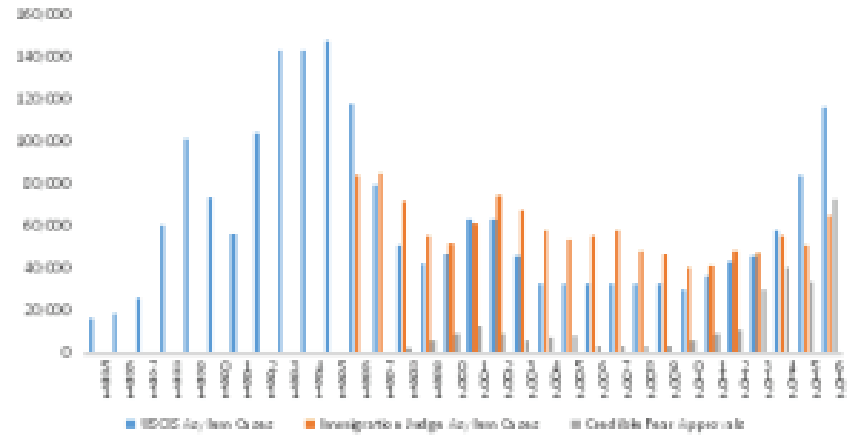
Here is another sign that the truth is not enough: asylum applicants with attorneys were half as likely to have their asylum denied by immigration judges in 2016 as those without attorneys. Indeed, 90 percent of all applicants without counsel lose their case, while a majority with counsel win theirs. This demonstrates that people need more than just honesty—they also need to understand what evidence is relevant to their case and need help to gather documents, witnesses, and other evidence to support their claim.

For these reasons, Congress never intended the credible fear interview as a rigorous adversarial process because it wanted to give people who could credibly articulate a fear of persecution an opportunity to apply. It knew that while some people without legitimate claims would be able to apply, the lower standard of proof would protect vulnerable people from exclusion. As Senator Alan Simpson, the sponsor of the 1996 bill that created the credible fear process, said, "it is a significantly lesser fear standard than we use for any other provision." Indeed, during the debate over the compromise version of the bill, proponents of the legislation touted that the fact that they had dropped "the more probable than not" language in the original version.

Asylum surge is not unprecedented

People can either apply for asylum "affirmatively" to USCIS on their own or they can apply "defensively" after they come into the custody of the U.S. government somehow, such as at the border or airport, to an immigration judge, which would include the credible fear process. If USCIS denies an "affirmative" applicant who is in the country illegally, the government places them in removal proceedings before an immigration judge where they can present their claim again.

Figure 1
Asylum Applications Received and Credible Fear Claims Approved, 1985-2016

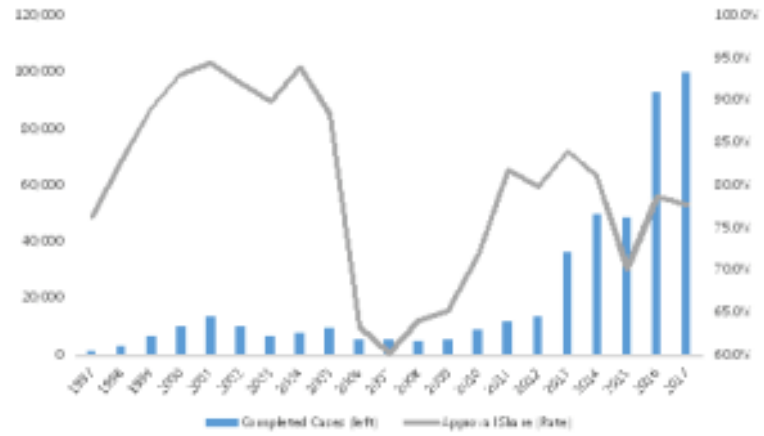


Sources: Department of Justice; Department of Homeland Security, and U.S. Citizenship and Immigration Services

Reviewing the data on asylum claims, two facts become clear: total asylum claims peaked in the 1990s, and a substantial majority of claims are affirmative—that is, done voluntarily, not through the credible fear process or through removal proceedings. Although credible fear claims—a process that was first created in 1997—have increased dramatically, the overall number of asylum claims has still not reached the highs of the early 1990s. Unfortunately, the immigration courts have not published the number of cases that they received before 1996, but as Figure 1 shows, the United States has experienced similar surges of asylum seekers to 2016.

It is noteworthy that in the midst of the surge in the 1990s, Congress did not adopt the draconian approach that this bill would require. Rather, it created the credible fear process that the bill would essentially eliminate. The authors of the legislation, however, argue that the Obama administration turned the credible fear process into a rubber stamp, allowing applicants to enter regardless of the credibility of their claims. But again a look at the numbers undermines this narrative. As Figure 2 highlights, the Obama administration denied an average of about 25 percent of all asylum seekers from 2009 to 2016.

Figure 2
Credible Fear of Persecution Claims, FY 1997 to 2017

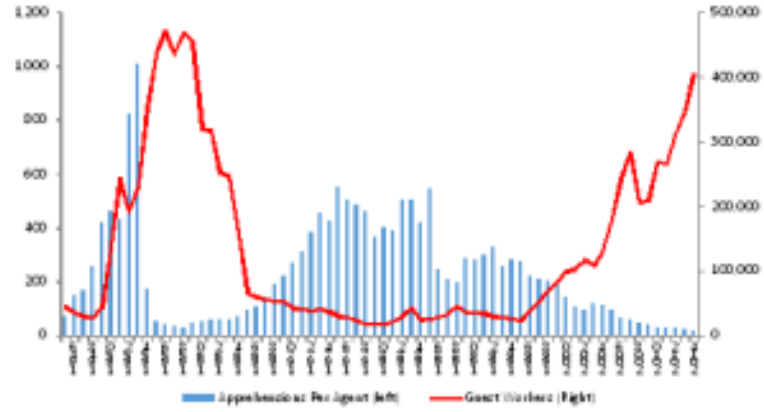


Sources: Rempell (1997-2008); USCIS (2009-2016)

Despite fluctuations of up to 35 percentage points during this time, there is simply no relationship at all between the rate of approval and the number of claims being made. Factors other than the approval rate must be driving the number of applications. Some of these claims are undoubtedly invalid or even fraudulent, but given that a majority of claims by individuals with representation in immigration court win their asylum claims, it is obvious that the credible fear process has protected many people from deportation to persecution abroad.

If fraudulent claims are a concern, Congress can best address it in the same way that it has successfully addressed other aspects of illegal immigration from Mexico: through an expansion of legal immigration. During the 1950s and again recently in the 2000s, Congress expanded the availability of low-skilled guest worker visas, which led to a great reduction in the rate of illegal immigration. Figure 3 presents the number of guest workers entering each year and the number of people each border agent apprehended each year—the best available measure of illegal immigration. It shows that the period of high illegal immigration occurred almost exclusively during the period of restrictive immigration.

Figure 3
Guest Worker Entries and Apprehensions of Illegal Aliens per Border Patrol Agent, 1946-2015



Sources: Border Patrol; Immigration and Naturalization Service; Department of Homeland Security

Most guest workers today are Mexicans. This is largely due to the fact that the current guest worker programs are limited to

seasonal temporary jobs and Mexico is closer to the United States, which makes trips to and from the United States easier. By comparison, most asylum seekers are from Central America. Assuming that a significant portion of these asylum seekers are either reuniting with illegal residents already in the United States or are seeking illegal residence themselves, these seasonal programs are unavailable to them.

Congress should create a temporary work visa program for low-skilled workers in year-round jobs, similar to the H-1B visa for high-skilled workers. This would cut down on asylum fraud and illegal immigration without the downsides that this bill presents.

Joseph Stalin and Mao Zedong had their five-year plans. Nikita Khrushchev had his seven-year plan. And now President Trump has a 101-year plan. That's how long it will take to deport the country's 11 million undocumented residents if current trends continue.

The most recent statistics on case completions in Immigration Court show that the Trump Administration has issued an average of 8,996 removal (deportation) orders per month between February and June 2017 (and 11,000,000 divided by 8,996 cases/month = 1,222.8 months, or 101.9 years). That's up from 6,913 during the same period last year, but still well-below the peak period during the early days of the Obama Administration, when courts were issuing 13,500 removal orders each month.

Of course, the Trump Administration has indicated that it wants to ramp up deportations, and to that end, the Executive Office for Immigration Review or EOIR–the office that oversees the nation's Immigration Courts–plans to hire more Immigration Judges ("IJs"). Indeed, Jefferson Beauregard Sessions, the Attorney General (at least for now) announced that EOIR would hire 50 more judges this year and 75 next year.

Assuming EOIR can find 125 new IJs, and also assuming that no currently-serving judges retire (a big assumption given that something like 50% of our country's IJs are eligible to retire), then EOIR will go from 250 IJs to 375. So instead of 101 years to deport the nation's 11 million undocumented residents, it will only take 68 years (assuming that no new people enter the U.S. illegally or overstay their visas, and assuming my math is correct–more big assumptions).

But frankly, I'm doubtful that 68 years–or even 101 years–is realistic. It's partly that more people are entering the population of "illegals" all the time, and so even as the government chips away at the 11,000,000 figure, more people are joining that club, so to speak. Worse, from the federal government's point of view, there is not enough of a national consensus to deport so many people, and there is significant legal resistance to Mr. Trump's immigration agenda.

In addition to all this, there is the Trump Administration's modus operandi, which is best characterized as malevolence tempered by incompetence. One statistic buried in the recent deportation numbers illustrates this point. In March 2017, judges issued 10,110 removal orders. A few months later, in June, judges issued 8,919 removal orders.

This means that the number of deportation orders dropped by 1,191 or about 11.8%. How can this be? In a word: Incompetence (I suppose if I wanted to be more generous—which I don't—I could say, Inexperience). The Trump Administration has no idea how to run the government and their failure in the immigration realm is but one example.

There are at least a couple ways the Administration's incompetence has manifested itself at EOIR.

One is in the distribution of judges. It makes sense to send IJs where they are needed. But that's not exactly what is happening. Maybe it's just opening night jitters for the new leadership at EOIR. Maybe they'll find their feet and get organized. But so far, it seems EOIR is sending judges to the border, where they are underutilized. While this may have the appearance of action (which may be good enough for this Administration), the effect—as revealed in the statistical data—is that fewer people are actually being deported.

As I wrote previously, the new Acting Director of EOIR has essentially no management experience, and it's still unclear whether he is receiving the support he needs, or whether his leadership team has the institutional memory to navigate the EOIR bureaucracy. Perhaps this is part of the reason for the inefficient use of judicial resources.

Another reason may be that shifting judges around is not as easy as moving pieces on a chess board. The IJs have families, homes, and ties to their communities. Not to mention a union to protect them (or try to protect them) from management. And it doesn't help that many Immigration Courts are located in places that you wouldn't really want to live, if you had a choice. So getting judges to where you need them, and keeping them there for long enough to make a difference, is not so easy.

A second way the Trump Administration has sabotaged itself is related to prosecutorial discretion or PD. In the pre-Trump era, DHS attorneys (the "prosecutors" in Immigration Court) had discretion to administratively close cases that were not a priority. This allowed DHS to focus on people who they wanted to deport: Criminals, human rights abusers, people perceived as a threat to national security. In other words, "Bad Hombres." Now, PD is essentially gone. By the end of the Obama Administration, 2,400 cases per month were being closed through PD. Since President Trump came to office, the average is less than 100 PD cases per month. The result was predictable: DHS can't prioritize cases and IJs are having a harder time managing their dockets. In essence, if everyone is a deportation priority, no one is a deportation priority.

Perhaps the Trump Administration hopes to "fix" these problems by making it easier to deport people. The Administration has floated the idea of reducing due process protections for non-citizens. Specifically, they are considering expanding the use of expedited removal, which is a way to bypass Immigration Courts for certain aliens who have been in the U.S. for less than 90 days. But most of the 11 million undocumented immigrants have been here much longer than that, and so they would not be affected. Also, expansion of expedited removal would presumably trigger legal challenges, which may make it difficult to implement.

Another "fix" is to prevent people from coming here in the first place. Build the wall. Deny visas to people overseas. Scare potential immigrants so they stay away. Illegally turn away asylum seekers at the border. Certainly, all this will reduce the number of people coming to America. But the cost will be high. Foreign tourists, students, and business people add many billions to our economy. Foreign scholars, scientists, artists, and other immigrants contribute to our country's strength. Whether the U.S. is willing to forfeit the benefits of the global economy in order to restrict some people from coming or staying here unlawfully, I do not know. But the forces driving migration are powerful, and so I have real doubts that Mr. Trump's efforts will have

more than a marginal impact, especially over the long run. And even if he could stop the flow entirely, it still leaves 11 million people who are already here.

There is an obvious alternative to Mr. Trump's plan. Instead of wasting billions of dollars, harming our economy, and ripping millions of families apart, why not move towards a broad legalization for those who are here? Focus on deporting criminals and other "bad hombres," and leave hard-working immigrants in peace. Sadly, this is not the path we are on. And so, sometime in 2118, perhaps our country will finally say adieu to its last undocumented resident.