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## The Persecution of Asylum Seekers

Juan Gonzalez-Martinez

### INTRODUCTION

Asylum seekers are fleeing some of the worst conditions on the planet, often from places where the United States had a direct impact in bringing about said conditions.<sup>1</sup> Yet political actors and movements in the United States have been increasingly vocal about their scrutiny and disdain of recently arrived refugees.<sup>2</sup> This is despite various government agencies' extensive asylum process, where every facet of an applicant's existence is meticulously to prove the veracity of the asylum claim and their background to ensure asylees pose no potential risk.<sup>3</sup> Asylum seekers continue to seek safe haven in the United States despite the uphill battle and persecution they face in applying.

People fleeing zones of conflict from all over the globe submit thousands of applications for asylum each year. During the 2019 fiscal year, there were 213,335 new individual filings for asylum, and that is only those who were able to obtain the resources to submit a filing.<sup>4</sup> There are likely thousands more who would apply for asylum if given the opportunity. An alarming trend that has taken root is the number of the pending filings, meaning no action has been taken on those applications, for asylum that has consistently increased during the last decade.<sup>5</sup> According to the most recent numbers from the Department of Justice (DOJ) and the Executive Office for Immigration Review (EOIR), over half a million applications were still pending at the end of June 2020.<sup>6</sup>

There are several factors that affect the current state of asylum policy in the United States, from the political climate becoming increasingly hostile to

<sup>1</sup> Rebecca Gordon, *The Current Migrant Crisis Was Created by US Foreign Policy, Not Trump*, *The Nation* (Aug. 16, 2019).

<sup>2</sup> Hannah Hartig, *Republicans turn more negative toward refugees as number admitted to U.S. plummets*, Pew Research Center (May 24, 2018). <https://www.pewresearch.org/fact-tank/2018/05/24/republicans-turn-more-negative-toward-refugees-as-number-admitted-to-u-s-plummets/>.

<sup>3</sup> *Refugee Processing and Security Screening*, U.S. Citizenship and Immigration Services (Jun. 3, 2020). <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees/refugee-processing-and-security-screening>.

<sup>4</sup> *Report to Congress on Proposed Refugee Admissions for Fiscal Year 2021*, U.S. Department of State (2021), <https://www.state.gov/reports/report-to-congress-on-proposed-refugee-admissions-for-fy-2021/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

immigrants in recent years to foreign policy decisions made during the past decades. While the Trump administration has advocated for more stringent asylum policies, prior to his administration, refugee seekers still had an incredibly difficult journey before and, if they were lucky, after being approved for asylum.<sup>7</sup> Pair current asylum policies with climate change, which will likely cause an increase in the number of refugees seeking asylum, and there is the potential for more inhumane situations to arise.<sup>8</sup> With no substantial change in our approach to asylum law, we will likely have increasingly dire outcomes for people seeking safety; however, there are possible, tangible solutions. Asylum experts and others that work closely with this issue emphasize the necessity to expand the asylum categories and clamor for more resources to help people. I was also able to get a first-hand account by speaking with someone who has worked in a refugee camp and worked closely with groups once in the U.S. to support refugees.

#### HISTORY OF ASYLUM POLICY

American legislators began crafting refugee policy, as we recognize it today, in the wake of World War II after the realization that failures in the lead up to the war were unacceptable. One example of how harmful a lack of cognizable asylum policy can be was the American failure to take in German Jews aboard the MS St. Louis as it sailed along the East Coast in 1939.<sup>9</sup> Thus, Congress passed the first major refugee bill in 1948, granting admission to hundreds of thousands of European refugees.<sup>10</sup> It is important to recognize that politics and foreign policy played a major role in shaping America's refugee policy 70 years ago, just as it does today.<sup>11</sup> Assistance and meeting refugees' needs were a secondary concern as exemplified by the gradual creation of asylum law depending on foreign policy necessities.<sup>12</sup>

During the early formation of asylum law, U.S. legislators allocated asylum grants as needed, based on foreign policy and political calculations, creat-

<sup>7</sup> Telephone Interview with Natalie Gallagher, Activist & Organizer, (Nov. 1, 2021).

<sup>8</sup> *Climate Change and Disaster Displacement*, The UN Refugee Agency, <https://www.unhcr.org/en-us/climate-change-and-disasters.html>.

<sup>9</sup> David W. Haines., *Safe Haven?: A History of Refugees in America*, Lynne Rienner Publishers. ProQuest Ebook Central, (2010).

<sup>10</sup> *Refugee Timeline*, U.S. Citizenship and Immigration Services (July 28, 2020) <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/refugee-timeline>.

<sup>11</sup> *Supra* note 8.

<sup>12</sup> *Id.*

ing an ad hoc process as opposed to setting up an actual asylum system.<sup>13</sup> For decades, American legislators shaped refugee policies around taking in refugees from Communist countries due to the Cold War and anti-communist sentiment.<sup>14</sup> The Office of Refugee Resettlement lists that as of November of 2020, the United States has resettled more than three million refugees since 1975, with 77% being from the former Soviet Union or countries that had adopted or were under the process of adopting communism.<sup>15</sup> It would take years before the U.S. enacted what could be considered an actual asylum system or process.

American lawmakers did not lack for frameworks or concepts from which to draw ideas for creating an American asylum system. The United Nations Refugee Convention laid out a groundwork for asylum law in 1951, which many nations would use to craft their own asylum policies.<sup>16</sup> The United States, however, refused to sign on to the original 1951 UN Refugee Convention, demonstrating the hesitancy which the U.S. harbored towards refugee admission.<sup>17</sup> In 1952, putting on display the adverse desire to have an expansive refugee policy, U.S. legislators would enact the McCarran-Walter Act, otherwise known as the Immigration and Nationality Act (INA of 1952) which restricted immigration and contained no refugee policy.<sup>18</sup> Refugee policy would be done piecemeal by American legislators in order to avoid committing the U.S. to taking in more refugees than policymakers deemed desirable or necessary.<sup>19</sup> The United States ultimately signed on to the UN Refugee Convention, in effect, in 1968 by signing on to the UN 1967 Protocol Relating to the Status of Refugees.<sup>20</sup> In addition, the United States formally adopted the UN definition of a refugee with the Refugee Act of 1980.<sup>21</sup>

<sup>13</sup> *Refugee Timeline*, U.S. Citizenship and Immigration Services (June 3, 2020), <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/refugee-timeline>.

<sup>14</sup> *Supra* note 8.

<sup>15</sup> *Office of Refugee Resettlement: History*, U.S. Department of Health & Human Services (Nov. 3, 2020), <https://www.acf.hhs.gov/orr/about/history>.

<sup>16</sup> Naomi S. Stern, *Evian's Legacy: The Holocaust, the United Nations Refugee Convention, and Post-War Refugee Legislation in the United States*, 19 GEO. IMMIGR. L.J. 313 (2004).

<sup>17</sup> *Id.*

<sup>18</sup> *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, Office of the Historian, <https://history.state.gov/milestones/1945-1952/immigration-act>.

<sup>19</sup> *Supra* note 8.

<sup>20</sup> U.S. Citizenship and Immigration Services (Jul. 28, 2020), *supra* note 12.

<sup>21</sup> *The Refugee Act*, U.S. Department of Health & Human Services (Aug. 29, 2012), <https://www.acf.hhs.gov/orr/policy-guidance/refugee-act>.

The primary requirement American legislators created for an asylum seeker is that applicants must demonstrate they suffered “persecution or have a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>22</sup> This definition created by policymakers includes a large amount of people seeking asylum, but the parameters also exclude many more people who do not fall under the prescribed persecution categories.<sup>23</sup> For example, many people fleeing violence such as what occurs with people coming from Central America, without being specifically persecuted on account of the refugee categories outlined in the statute, and climate disasters around the world would not qualify under the current refugee law.<sup>24</sup> The Supreme Court of the United States (the Court) has also further limited asylum law by interpreting the statutes narrowly, further limiting the number of people who can qualify for asylum.<sup>25</sup> In *INS v. Elias-Zacarias*, the Court reversed a Court of Appeals decision that found that a Guatemalan native demonstrated a well-founded fear of persecution on account of political opinion for refusing to join guerrilla forces.<sup>26</sup>

The 1980 Refugee Act created a process where the president, with the consultation of Congress, determines the cap or a maximum of refugee slots that would be available for the following fiscal year.<sup>27</sup> This mechanism for setting a cap of refugees can and has led to volatility as exemplified by the Trump administration that reduced the cap to 18,000 for the 2020 fiscal year.<sup>28</sup> By reducing the cap space, the number of those on the waiting list increase. Those stuck waiting for their applications to be reviewed are in some instances in refugee camps due to the conditions in their home countries.<sup>29</sup> The conditions in refugee camps are also perilous, therefore quick review of asylum applications is important to minimize the danger of petitioners.<sup>30</sup> In

<sup>22</sup> *Id.*

<sup>23</sup> Elizabeth Hull, *United States Asylum Process: Problems and Proposals*, 16 IN Defense of the Alien, 114 (1993).

<sup>24</sup> *Id.*

<sup>25</sup> Anthony B. Beaudoin, *Freedom Denied: United States Policy of Turning Back Haitian Refugees on the High Seas as Upheld in Sale v. Haitian Centers Council, Inc.*, 15 WHITTIER L. REV. 537 (1994).

<sup>26</sup> *I.N.S. v. Elias-Zacarias*, 502 U.S. 478 (1992).

<sup>27</sup> Carolyn Patty Blum, *Half Open Door: U.S. Refugee Law and the Stevic Case*, *The*, 31 FED. B. NEWS & J. 198 (1984).

<sup>28</sup> Kristina Cooke and Mica Rosenberg, *Trump plans to slash U.S. refugee admissions to new low*, Reuters (Oct. 1, 2020), <https://www.reuters.com/article/us-usa-immigration-refugees/trump-plans-to-slash-u-s-refugee-admissions-to-new-low-idUSKBN26M4QO>.

<sup>29</sup> *Supra* note 7.

<sup>30</sup> *Id.*

the final fiscal year of the Obama administration the cap was 110,000 refugees.<sup>31</sup> The Biden administration has announced plans to increase the limit of refugee slots for the next fiscal year, 2022, to 125,000 and revised the 2021 cap to 62,500, but it has taken activist pressure to secure these increases. These shifts in the refugee cap further demonstrate the role that politics and foreign policy plays in asylum policy decisions.<sup>32</sup> The Trump administration's policies were a factor in causing the previously mentioned increase in the number of pending cases, over half a million, waiting for a decision, however, the root of the problem is the asylum system itself.<sup>33</sup>

American legislators were slow to craft asylum law originally and once the asylum system was created, it was narrowly defined and thus left many populations lacking an avenue for asylum. There are solutions that can address the asylum process in way that helps people seeking refuge, what is missing currently is the political will to implement them.

#### REMAKING OUR ASYLUM SYSTEM

Remaking the American asylum system will require major legislative changes and a complete shift of the narrative surrounding asylees. First, asylum requirements themselves should be reworked to an expanded model from the current narrow statutory definition in place. Second, asylum law should undergo changes that will make it resistant to potential arbitrary changes due to electoral outcomes. Finally, the changes made should center the humanity of the people seeking asylum and helping them should be the main priority.

As mentioned, the current definition of asylee requires a person to demonstrate they are being persecuted based on religion, race, nationality, political opinion, or membership in a particular social group.<sup>34</sup> This narrow definition excludes many people who demonstrate true fear for their safety based on conditions they have no control over, such as violence or climate disasters.<sup>35</sup> The

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<sup>31</sup> *Id.*

<sup>32</sup> Michael D. Shear, *The Biden administration will raise the cap on refugee admissions to 125,000*, N.Y. Times (Sep. 20, 2021).

<sup>33</sup> *Report to Congress on Proposed Refugee Admissions for Fiscal Year 2021*, U.S. Department of State, <https://www.state.gov/reports/report-to-congress-on-proposed-refugee-admissions-for-fy-2021/>.

<sup>34</sup> Kaitlin L. Locascio, *The Modern Refugee: Crafting a New Asylum Policy to Address the Realities of Today's Refugee Oppressors*, 17 LOY. J. PUB. INT. L. 27 (2015).

<sup>35</sup> *Id.*

narrow definition is what causes those that review asylum applications to reject the majority.<sup>36</sup>

Expanding the definition of asylee to include, in addition to what is currently listed, those who can demonstrate a fear for their safety based on conflict in their home country, climate disasters, and sexual or gender identity-based violence will encapsulate many of those who are currently excluded.<sup>37</sup> A process can also be created for situations that may fall outside of any parameters that can be set. Meaning, judges and asylum processors can be granted discretion to make judgments on whether people can demonstrate a fear for their safety based on other grounds.

An important change needed in asylum law is eliminating its arbitrary nature.<sup>38</sup> American legislators should at least eliminate the ability for presidents to drastically reduce asylum slots from one fiscal year to the next to avoid the situation that arose under the Trump administration.<sup>39</sup> Ideally, Congress would remove the cap set on asylum seekers in its entirety. If an applicant for asylum can meet the statutory requirements for establishing a credible fear for their safety, they should be granted refuge and should not be barred or made to wait because of arbitrary maximums.

Finally, the people seeking asylum and those assisting them should be the center of any asylum policy changes. Politics and foreign policy shifts cannot be separated entirely from asylum policy, however, a system can be created where the status quo is helping people seeking refuge and any other policy or political goals are secondary. There are many individuals who make their life's mission to help refugees, but without systemic change, applicants will still be at the mercy of political outcomes in many instances. Those with direct experiences in helping refugees mention that while community and helping at the small scale is important, centering the humanity of refugees in our asylum policy will have a massive impact.<sup>40</sup> The changes described above are examples of focusing asylum around helping people as opposed to political trends or foreign policy preferences.

The argument that expanding asylum will inevitably lead to more numbers of people being admitted are correct; more people will be granted refuge which should be the goal, everyone who is seeking safe haven should be offered

<sup>36</sup> Regina Germain, *Seeking Refuge: The U.S. Asylum Process*, 35 COLO. LAW. 71 (2006).

<sup>37</sup> Trevor R. Larkin, *Sex and Gender Violence in Asylum Law: Expanding Protection beyond Domestic Violence*, 9 Drexel L. Rev. 227 (2016).

<sup>38</sup> *Supra* note 28.

<sup>39</sup> *Id.*

<sup>40</sup> *Supra* note 7.

it. This is where the shifting of the narrative surrounding asylum becomes crucial. Opponents to these policy changes argue that there is a potential danger in allowing greater number of refugees into the United States. This argument falls apart once one examines the review process for asylum seekers, which includes various forms of review from multiple government agencies.<sup>41</sup> An asylum seeker's history and connections are thoroughly reviewed multiple times, minimizing any potential danger.<sup>42</sup>

### CONCLUSION

With climate change creating volatile conditions all over the globe, it is imperative that we expand asylum law to include more people seeking refuge from dangerous and violent conditions. In addition, legislators must create an asylum system that is resistant to political or foreign policy cycles that come with election cycles. Our asylum system can be crafted however we deem fit, and it is time that we center helping people seeking refuge.

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<sup>41</sup> *Refugee Processing and Security Screening*, U.S. Citizenship and Immigration Services (June 3, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees/refugee-processing-and-security-screening>.

<sup>42</sup> *Id.*