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Madison Cherry

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Variation & Subjectivity in the Immigration Court System and its Impact on Northern Triangle  
Country Asylum Seekers

by

Madison Cherry

Karen Stolley  
Adviser

Spanish & Portuguese

Karen Stolley  
Adviser

Allison Burdette  
Committee Member

Lisa Dillman  
Committee Member

Wesley Longhofer  
Committee Member

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An abstract of  
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Abstract

## Variation & Subjectivity in the Immigration Court System and its Impact on Northern Triangle Country Asylum Seekers

By Madison Cherry

In my thesis, I argue that subjectivity is one of the most significant drivers of variation in asylum grant rate, and in doing so I highlight the inequities that applicants face. I will focus on factors that impact asylum grant rate within immigration courts and discuss how this variation impacts Central American applicants from the Northern Triangle countries (El Salvador, Guatemala, Honduras). My research will explore the differences between the immigration courts located in Atlanta and Philadelphia through a side-by-side comparison. The purpose of my thesis is to identify the factors that lead to the wide variation in grant rate amongst immigration courts and propose actionable solutions to better standardize the process. In 2019, there was a record number of 79.5 million forcibly displaced people worldwide. Among those individuals, 26 million were categorized as refugees and 4.2 million were categorized as asylum seekers (“Global Trends: Forced Displacement in 2019”). When granted asylum, an asylum seeker is then categorized as an asylee. An asylee meets the definition of refugee and requests asylum from inside the United States or a port of entry (“Refugees and Asylum”). In 2019, the United States received a total of 307,704 asylum applications. Of those applications, almost 50% or 102,793 were from the Northern Triangle countries. Across the US, asylum grant rate varies dramatically amongst the eight principal asylum offices and 63 immigration courts that are tasked with approving asylum requests. My findings indicate that subjectivity, by which I mean administrative or judicial discretion, is a key factor in causing variation at every stage of the immigration process. Therefore, my call to action includes ways to best combat this subjectivity as well as proposed solutions to the structural inefficiencies in the immigration system.

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## Introduction

There is currently significant variation in asylum grant rate amongst immigration courts, and the purpose of my thesis is to understand why. How can an asylum seeker's chance of asylum vary so immensely based on which court or judge they're assigned? What factors are causing this variation and how do these factors impact Northern Triangle asylum applicants? What actions can be taken to combat this variation in grant rate? My findings suggest that discretion is present at every level of the asylum process which leads to subjectivity playing a significant role in the variation in asylum grant rate in immigration court. In order to ensure equal opportunity for each asylum applicant, actionable reform is necessary to reduce the subjectivity and better standardize the asylum system.

Chapters one and two of my thesis will provide background information on both the asylum process and why Northern Triangle asylum seekers are fleeing their home countries. In chapter one, I will provide a foundational understanding for current events in the Northern Triangle countries to explain what migration drivers are at play as well as how the United States has handled migration from the Northern Triangle countries which include El Salvador, Guatemala, and Honduras. Chapter two will break down the *refugee* and *asylee* processes as well as clarify the differences between them. I'll also go into depth on the discretion involved in credible fear interviews.

Chapters three and four will both concentrate on the factors that cause variation in asylum grant rate. A comparison of the Atlanta and Philadelphia immigration courts in chapter three will focus on understanding how grant rate compares between the courts after isolating

nationality and cross-comparing attorney representation. Chapter four will then further discuss factors known to impact variation in grant rate to determine which factors have the largest impact.

I will conclude in chapter five by giving actionable recommendations based on my research on how I believe subjectivity can best be combatted in the US asylum system. I will suggest US policy alternatives with a focus on how to directly combat the issues causing migration from the Northern Triangle countries. Finally, my epilogue will look to the future of immigration policy and address the presidential change that occurred as I was writing my thesis. The Biden Administration has already released a number executive orders that will positively impact Northern Triangle asylum seekers as well as all refugees entering the country.



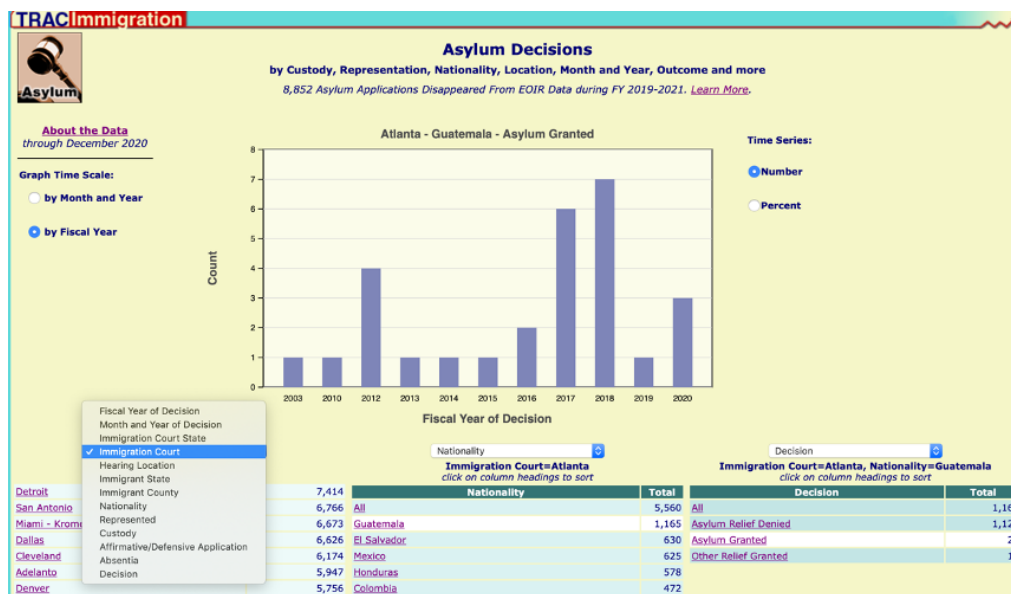
## Methods

The data used in Chapter 3 is from Syracuse University's Transactional Records Access Clearinghouse (TRAC). This data platform obtains data through the Freedom of Information Act and publishes it online with open access for the public. It is one of the few tools that researchers can use to analyze court data and estimate asylum grant rates due to the severe lack of public data published by the Executive Office for Immigration Review (EOIR). The asylum case data on this platform only includes asylum cases in which asylum was granted, denied, or in which other relief was granted in court. The platform does not include other closures -- cases that were abandoned, not adjudicated, or withdrawn, and administrative closures that do not result in a final order. Therefore, my analysis will not include cases heard in each of these courts in which other closures or administrative closures occurred.

TRAC's platform includes an asylum data tool that researchers can use to filter by up to three variables, including: Fiscal Year of Decision, Month and Year of Decision, Immigration Court State, Immigration Court, Hearing Location, Immigrant County, Nationality, Represented, Custody, Affirmative/ Defensive Application, Absentia, Decision (See Figure below). In my analysis, I used this tool to calculate the grant rate percentage for each nationality (Immigration Court-Nationality-Decision) as well as the attorney representation percentage for each nationality (Immigration Court-Nationality-Represented) in both the Atlanta and Philadelphia courts. I also calculated the national asylum grant rate for Guatemalans, Hondurans, and Salvadorans from 2015-2020 (Immigration Court (All)-Nationality-Decision). Any statement in my analysis that claims an "average" grant rate for a certain nationality from 2015-2020 was

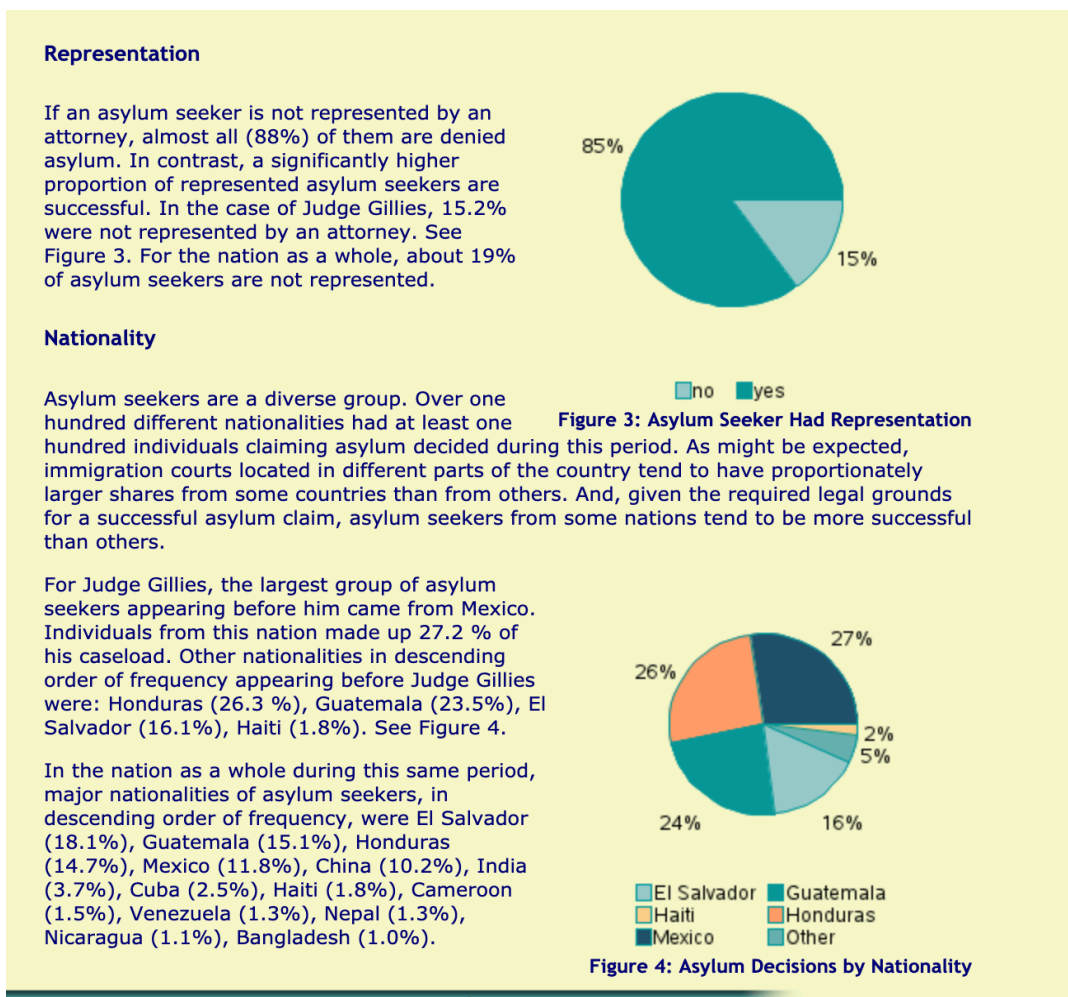
made by adding all the individuals from that nationality that were granted asylum in those six years and dividing by the total number of applicants from that nationality from 2015-2020.

The terms defined in chapter two will include both *affirmative* and *defensive* asylum applicants in the immigration courts. The majority of asylum cases are considered defensive and are filed in response to the Department of Homeland Security (DHS) initiating removal proceedings. However, if an applicant first goes through the affirmative process and is denied asylum, the USCIS will later refer that application to immigration court where it is still considered an affirmative application in this data set. There is such a miniscule number of affirmative applicants from Northern Triangle countries in both the Atlanta and Philadelphia courts that the grant rates presented are almost entirely from individuals that have entered into the defensive process after removal proceedings were initiated by DHS. The graphs in chapter three that highlight grant rate and attorney representation were all created based on TRAC's data.



(TRAC-Syracuse University)

My research also uses TRAC's data to compare individual immigration judges between the Philadelphia and Atlanta courts. The data includes information on judges' number of decisions made, grant rate, representation, and the average percent of each nationality that makes up their caseload (2015-2020).



(TRAC-Syracuse University)

At the beginning of each chapter, I have included an epigraph that highlights the voices of the refugees and asylees within the immigration system. My purpose in doing this is to emphasize the importance of the human element that lies behind the numbers and statistics

discussed in my research. When I talk about subjectivity impacting asylum grant rate in immigration court, I want to my reader to constantly think about how the numbers represent real people fleeing persecution.

## **Chapter One Reasons for Fleeing: Emigration from Northern Triangle Countries & US**

### **Response at the Border**

*“I am afraid the gang will beat me, rape my daughter to hurt me, cut us in pieces and kill us.”-  
Carlos, Baptist preacher from El Salvador<sup>1</sup>*

In chapter one, I will provide context to the migration crisis occurring in Central America. Questions I will answer include: Why are individuals fleeing the Northern Triangle countries? How many of these individuals are seeking asylum in the US? How has the United States responded to the influx of migrants under the Trump administration? Additionally, I will briefly discuss the major actions taken against immigration from the Northern Triangle countries under Trump’s “zero tolerance” policies.

### **An Overview of the Northern Triangle Countries: El Salvador, Guatemala, & Honduras**

El Salvador, Guatemala, and Honduras, located in Central America, make up what are known as the Northern Triangle countries. They derive their name from the fact that all three countries share a border tripoint. Despite individual differences, we often hear these countries grouped together as the “Northern Triangle countries” because of the shared economic and social challenges they face, including immense poverty, violence, and government corruption. These challenges explain why the United States has seen the largest influx of asylum applicants from El Salvador, Guatemala, and Honduras in comparison to all other countries.

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<sup>1</sup> Jordan, Miriam. “In Court Without a Lawyer: The Consequences of Trump’s ‘Remain in Mexico’ Plan.” *The New York Times*

The asylum process is divided into two parts in which asylum seekers apply for asylum, the affirmative and defensive. The following chapter will discuss the differences between these two processes in detail but for now only a base understanding is needed. If an applicant is denied asylum through the affirmative process, the individual is sent to a Department of Justice immigration court and the applicant enters the defensive asylum process. The two additional ways to enter into the defensive process include 1) an immigrant seeks asylum at a port of entry or 2) an immigrant overstays their visa or enters without inspection at the border and is placed in removal proceedings.<sup>2</sup> The most important take away from this chapter is appreciating the magnitude of the numbers of immigrants seeking asylum from the Northern Triangle countries and understanding why they're fleeing.

In 2019, almost 50% of the 210,752 defensive asylum applications were from the Northern Triangle countries (102,793 applications)(See Appendix, Exhibit 3). Although, the number of defensive applications has risen steadily in recent years, there was a drastic increase in applications in 2019. For example, the number of defensive asylum cases received in 2018 from Guatemala and Honduras was 26,965 and 22,014. In 2019 those numbers rose to 41,365 and 31,649, respectively (See Appendix, Exhibit 3).<sup>3</sup> When thinking about why the number of

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<sup>2</sup> A port of entry includes US airports and borders

<sup>3</sup> On September 9<sup>th</sup>, 2019 the United States ended Temporary Protective status (TPS) for Salvadorans giving them 18 months to either leave the country or seek lawful residency. Salvadorans received TPS in 2001 after two earthquakes severely devastated the country (Torbaty, 2018).

CLOSE THIS SPACE

El Salvador was the only Northern Triangle country in which the number of defensive applications decreased slightly from 32,233 in 2018 to 29,779 in 2019 (Baugh, 2019). The most likely reason for this small drop in defensive applications from El Salvador is that TPS ended in 2019.

defensive cases has increased, I believe the answer is that migration drivers causing individuals to flee the region have continued to worsen.

Contrary to what we see in the defensive process, the number of affirmative asylum cases filed by individuals from the Northern Triangle countries has declined. In 2019, there were 9,684 affirmative applications filed from Guatemala, 5,951 from El Salvador and 5,609 from Honduras (Baugh, 2019)(See Appendix, Exhibit 2). Guatemala experienced a 5% decrease in affirmative applications from 2018 to 2019 while El Salvador and Honduras saw a 35% and 9% decrease, respectively. These numbers show significantly fewer individuals from the Northern Triangle countries going through the affirmative asylum process as compared to the defensive process.

An asylum seeker is eligible to apply for the affirmative process within one year of having entered the United States, regardless of how the individual entered the country. The overall reduced number of applications suggests that far fewer migrants from the Northern Triangle countries are entering the United States to begin with and thus fewer are eligible to apply through the affirmative process. Instead, we see that the majority are physically present at the US-Mexico border and entering the defensive process there.

The reason we see the majority of asylum applicants enter the defensive process by claiming asylum at the physical border is because they don't have the opportunity to go through the affirmative process. Although any noncitizen can file for asylum through the affirmative process within a year of entering the US, it is most typical for those who are on a valid visa to apply.

Perhaps another reason we see a higher number of defensive applications is because a larger percentage of individuals from the Northern Triangle countries are granted asylum through the defensive process than affirmative. This may explain why, despite efforts by the Trump administration to deter asylum seekers at the US-Mexico border, many continue to try. For example, the percentages of individuals granted asylum affirmatively in 2019 from Guatemala, El Salvador and Honduras were 3.8%, 3.3%, and 1.9%, respectively (See Appendix, Exhibit 2 and 5). These affirmative asylum grant rates are extremely low considering the average national grant rate for affirmative cases in 2019 was 28.5% (See Appendix, Exhibit 2 and 5). In contrast, the percent of asylum seekers granted asylum defensively in 2019 from Guatemala, El Salvador and Honduras was 8.2%, 12.3%, and 6.8% (Baugh, 2019)(See Appendix, Exhibit 3 and 6). Although these numbers are low, they are close to the average national grant rate for defensive cases in 2019, which was 9% (Baugh, 2019) )(See Appendix, Exhibit 3 and 6). These finding suggest that perhaps higher grant rates in the defensive process have led to the increase in defensive applications.

### **Reasons for Fleeing**

Having noted the number of asylum seekers seeking asylum from the Northern Triangle countries, I will now look into reasons why these individuals are fleeing their home countries. Although each of the Northern Triangle countries has its own specific set of migration drivers, there is much overlap in why individuals are leaving the region. El Salvador, Guatemala and Honduras are all currently battling poor socioeconomic conditions, natural disasters, climate



change, gang-related violence, and challenges to governance. The combined effect of these inter-related factors has continued to fuel emigration from the region.

The Northern Triangle countries are among some of the poorest in the Western Hemisphere and have been subjected to extreme economic inequality since the colonial period. In the Western Highlands of Guatemala for example, approximately 76% of the population lives in poverty and 27% live in extreme poverty (US Agency for International Development). In addition to a lack of economic opportunity, there has been a large increase in labor supply. The current under-25 populations in El Salvador, Guatemala, and Honduras are 47%, 56%, and 52%, respectively (Meyer and Taft-Morales, 2019). To put this in perspective, the labor supply in the Northern Triangle countries increased by 353,000 people in 2017 while only 35,000 jobs were created (Meyer and Taft-Morales, 2019). With so few employment opportunities, many citizens flee northward in hopes of finding better economic opportunity.

Economic hardship also arises from the aftereffects of frequent natural disasters coupled with climate change in the Northern Triangle. According to the World Risk Index, El Salvador and Guatemala are ranked among the top 15 countries in the world most at risk for natural disasters (Meyer and Taft-Morales, 2019). This ranking stems from the country's frequent exposure to hurricanes, volcanic eruptions, and earthquakes. These recurrent natural disasters paired with the weak response capacity present in the Northern Triangle put these countries at an even higher risk.

Paired with catastrophic natural disasters, the climate change present in the region also takes a toll on inhabitants. The Northern Triangle countries are home to the Central American

Dry Corridor. This ecological region encompasses 58% of el Salvador, 38% of Guatemala, and 21% of Honduras and is vulnerable to climate change and irregular rainfall. (Meyer and Taft-Morales, 2019). Repeated droughts since 2014 have devastated the agricultural community, leading to levels of food insecurity not previously seen in the Northern Triangle countries. In 2018, a delayed rainy season in the Dry Corridor ruined up to 70% of the first harvest and up to 50% of the second. The following year in 2019, the El Niño phenomenon was responsible for the destruction of over half of farmers' crops in the Dry Corridor, which resulted in 1.4 million left in need of food assistance (Meyer and Taft-Morales, 2019).<sup>4</sup> It is estimated that climate change will continue to increase temperatures and reduce precipitation in the region. By 2100, it is estimated that annual rainfall will decrease 10%-50% and crop yields will decrease 30-87%. Temperatures are also likely to increase by 1.6°C to 4°C by 2100 (Sigelmann, 2019).

An additional migration driver is the gang-related violence and crime that is heightened from the lack of economic opportunity in the region. Approximately 25% of residents from the Northern Triangle countries have reported being victims of crime in the past year (Sigelmann, 2019). Gang violence has continued to be a compelling reason for migrants to seek asylum in the United States. In the 2000s, homicide rose rapidly as the region became the primary corridor for South American narcotics bound for the United States. The two most prominent gangs, Mara Salvatrucha (MS-13) and 18<sup>th</sup> Street (M-18), have engaged in turf wars to control drug trafficking routes controlled by the Mexican drug cartels. Due to the paucity of employment opportunities, youth in this region are often susceptible to recruitment by gangs

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<sup>4</sup> El Niño is a band of warm ocean water that irregularly occurs and brings warm, nutrient-poor water to the region.

or narco-traffickers. Many residents flee out of fear for their lives, having received death threats to businesses and family members. Others are attempting to protect their young daughters from sexual violence and “rape taxes” set by gangs (Sigelmann, 2019).<sup>5</sup>

These terrible crimes inflicted upon residents also highlight the government’s inability to protect citizens and prosecute crimes. Regional civil wars occurred in Guatemala, Honduras, and El Salvador from the 1970s-1990s, weakening governmental structures. Since this time, low tax collections and lack of political will have all led to underfunded state institutions. There is little funding for social services, which has contributed to an endless cycle of poverty, social instability, and low educational attainment for many. Additionally, governmental leaders in the region have proven time and time again to be corrupt through their embezzlement of state funds and acceptance of bribes. These issues in turn have continued to fuel gang violence in the region which, as we have seen, drives the migration of those who live in fear to seek asylum.

Although gang violence is a severe problem for the Northern Triangle countries and a compelling migration driver, it is not recognized by the US Department of Justice (DOJ) as grounds for asylum. As noted earlier, an asylee must first meet the definition of a refugee which is defined as an individual who has suffered persecution or has a credible fear of persecution based on race, religion, nationality, social group, or public opinion. The DOJ has consistently ruled that gang-based violence does not fall under their interpretation of belonging to a “particular social group.” However, considering the United States currently accepts domestic violence claims through the recognition of both gender and nationality based social

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<sup>5</sup> A “rape tax” is an amount of money a gang forces a family to pay to avoid sexual harm to their daughter(s).

groups, it seems reasonable that gang-based violence should also be grounds for asylum. Masetta-Alvarez emphasizes this point saying “domestic-violence-asylum claims and many gang-based-asylum claims share social-group characteristics and contain the same underlying human-rights violations, yet the United States continues to reject gang-based-asylum claims under its social group analysis” (2018).

An additional way in which immigration judges have denied gang violence as grounds for asylum is through the applicant’s inability to prove that the government of the country in which they were being persecuted was “unwilling or unable” to assist in the prosecution of gangs (Masetta-Alvarez, 2018). Immigration judges are well aware that the governments of Northern Triangle countries lack the ability to persecute and control gangs in the region. It would be next to impossible for an individual to prove that the government is “unwilling or unable” to help persecute gangs.

It seems plausible that the reason why the Board of Immigration Appeals has set a precedent of denying gang-based asylum claims in the United States is because of the overwhelming number of individuals that would then qualify for asylum. The resources it would take to move all of these asylum seekers through immigration court would be impossible with the current system in place. There is currently an average backlog of over 2,000 cases per immigration judge, meaning that the immigration court system already lacks by a large measure the number of judges currently needed to hear the pending cases (National Immigration Forum). Therefore, one might speculate that in order to manage this already enormous

backlog, the DOJ keeps a narrow interpretation of who meets the definition of an asylee in regards to what it means to be involved in a particular “social group” (Masetta-Alvarez, 2018).

The reasons residents are emigrating from Northern Triangle amplify the severity of one another and have led to a never-before-seen number of asylum seekers at the US-Mexico border. This large influx of immigrants at the border has caused much debate in the United States on the best way to handle the situation. For many, the wellbeing of these migrants is top of mind, while others care more about border security.

### **Immigration Actions of the Trump Administration**

As we will discuss further in the following chapter, the sitting US president has great deal of influence in both US immigration policy and its enforcement. While the president can't dictate the amount of asylum seekers allowed entry, he can take measures to make the immigration process much more difficult on asylum seekers at various points in their journey.

The Trump administration has taken a strict stance on immigration, enacting many policies that reflect the president's zero-tolerance outlook. The “zero-tolerance” policy created under his administration charges all migrants thought to have crossed the border illegally with the federal crime of irregular entry (Kandel, 2019). Trump also supported the nationwide enforcement of the expedited removal process. In the past, the expedited removal process only

applied to those undocumented individuals within 100 miles of the border.<sup>6</sup> However, this can now be enforced by DHS anywhere within the United States (Hong, 2018).

Trump's administration also pushed through the Migrant Protection Protocol (MPP), whereby certain individuals attempting to enter the United States at the US-Mexico border either illegally or without proper documentation may be returned to Mexico and forced to wait outside of the United States during their immigration proceedings. In the first five months of the MPP being instituted, over 55,000 immigrants were deported to Mexico, many stranded for months ("Assessment of the Migrant Protection Protocols", 2019). However, in the epilogue I will discuss changes in the works for 2021.

Additionally, Trump's administration was the first in which the act of "metering" at the border has been standardized. This has been used by past administrations but never consistently. Metering is when there is a set number of individuals who are able to request asylum each day. Asylum seekers are added to a waitlist with thousands of individuals and typically stranded in Mexico until it's their turn to request asylum (Slack and Martínez, 2020). Other actions taken by the Trump administration include revoking Temporary Protective Status from nearly 200,000 Salvadorans, cutting millions in aid to Central America, and separating minors from their families at the border (Kohn, Passel, and Bialik, 2019).

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<sup>6</sup> "As of July 23, 2019, expedited removal may be applied to individuals who are undocumented, or who have committed fraud or misrepresentation, and who are encountered within the entire United States and who have not been physically present in the United States for two years prior to apprehension." (American Immigration Council)

Trump has also entered into Third Country Agreements with each one of the Northern Triangle Countries which the administration calls “Asylum Cooperative Agreements.” These agreements give the United States the ability to send asylum seekers back to the Northern Triangle countries if they passed through on their journey and did not make an asylum claim in El Salvador, Guatemala, or Honduras (Hackman, 2019). These agreements were put into effect because the Trump administration stated it would no longer provide aid to the Northern Triangle countries unless an asylum deal was made (“US Signs Asylum Deal with Honduras”, 2019). The worsening migration drivers forcing immigrants out of the Northern Triangle countries paired with many immigration barriers the Trump administration has instituted have led to a severe humanitarian crisis.

Migrants are now being sent back to the region they’re fleeing, seeking asylum. Guatemala is being hit hardest, as both Hondurans and Salvadorans must travel through the country on their way to the United States. There have been many protests by Guatemalans who claim that the country doesn’t even have the resources necessary to take care of its own citizens. In 2018, Guatemala had the largest rise in recorded murders of activists who supported indigenous and ecological rights (McVicar, 2019). The country also has one of the highest inequality rates in Latin America according to the World Bank assessment.

All three Northern Triangle countries -- El Salvador, Guatemala, and Honduras -- are unsafe for asylum seekers fleeing persecution and they simply do not have the ability to handle a large influx of asylum cases. In fact, these countries don’t even have the resources necessary to care for their own citizens which is why many flee to seek refuge elsewhere. Therefore, they

are certainly unable to provide the support needed to those entering the country in need of refuge.

The combination of factors leading to the migration of individuals from the Northern Triangle countries coupled with the US's inadequate response has created a perfect storm. The Trump administration's strict policy changes did not decrease the number of asylum applicants as many continue to flee the worsening conditions of the region. Having an understanding of what drives Northern Triangle asylum seekers to flee their home countries is crucial when discussing the US immigration system at large. In the following chapter, I will look at the differences between a refugee and an asylee while going into more detail on the affirmative and defensive asylum processes. Chapter two will also emphasize the role of the sitting president in regards to immigration decisions.



## Chapter Two United States Immigration Overview: A Breakdown of the Refugee and Asylum

### Processes

*“People [in the United States] hear things about Central Americans and they think that we come here to start trouble or to bring that delinquency here and it’s not true. We come [to the United States] to protect our families and to overcome the obstacles to have a better life. I truly hope that some kind of legal option can become available to help people who are trying to get away from threats and violence, like my family. Because we need it now more than ever.”-Rosa, Honduran migrant denied asylum<sup>7</sup>*

Chapter two will provide a general overview of the immigration process. I will divide this chapter into two sections, one describing the immigration process for refugees and the other for asylees. I will first clarify who meets the definition of a refugee, as this will be consistently referred back to in the thesis. Then, I will discuss the three ways an individual can seek refuge in the US while also highlighting the associated “priority” of the refugee based on which avenue they take. I will then break down both the affirmative and defensive asylum processes. A detailed explanation of both the refugee and asylum processes will also shed light on the moments when subjectivity, that is discretion by individuals, is involved in the process.<sup>8</sup>

### US Refugee Definition

Understanding US immigration involves understanding both the individuals involved and the process they must undergo. Some people navigate this process successfully, while many

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<sup>7</sup> Cantor, Guillermo, and Tory Johnson. “Detained, Deceived, and Deported.” *American Immigration Council*

<sup>8</sup> When using the term “discretion”, I am referring to the definition of “acting on one’s own authority or judgment” or “the power of making free choices unconstrained by external agencies” *Vocabulary.com*

more do not. The outcome depends on a complex intersection of policies and practices which consists of both objective and subjective factors that I will explore in what follows.

A refugee is an individual forced to flee their country to seek safety. United States law follows international law in defining a refugee as an individual who has suffered persecution or has a credible fear of persecution based on race, religion, nationality, social group, or public opinion.<sup>9</sup> These individuals must be of special humanitarian concern to the United States, not yet firmly resettled in another country, and eligible to petition for entry to the United States. Additionally, US law states that the definition of a refugee excludes individuals who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion” (Immigration and Nationality Act 101(a)(42)).

Refugees, then, seek refuge in the United States from outside the country and there is a cap on the number of refugees permitted entry each year. This cap is determined by the sitting president in consultation with Congress and is known as the “refugee ceiling” (“Factsheet: U.S. Refugee Resettlement”). In addition to determining the refugee cap, the sitting president also proposes the maximum number of refugees to be accepted from each area of humanitarian

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<sup>9</sup> The 1951 Refugee Convention, otherwise known as the Geneva Convention, is a United Nations treaty that establishes the international definition of a refugee. Article 1(A)(2) of the 1951 Convention defines a refugee as “an individual who is outside his or her country of nationality or habitual residence who is unable or unwilling to return due to a well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group.” This treaty also outlined the rights of individuals granted asylum and the responsibilities of the countries that grant asylum.

concern (See Appendix, Exhibit 1). In 2021 for example, Trump recommended a refugee ceiling of 15,000 and then indicated that only 1,000 individuals who are nationals or habitual residents of El Salvador, Guatemala, and Honduras could be permitted entry as refugees (“Report to Congress on Proposed Refugee Admissions 2021”).

In addition to setting the refugee ceiling and allocation of refugees accepted from each area of humanitarian concern, the president can also identify “high-risk” countries. Citizens of “high-risk” countries as decided by the president cannot be considered for refugee status unless they meet additional strict criteria. This historically means that individuals from specific countries are flagged as unable to enter the United States.

For example, in January 2017, Trump issued Executive Order 13769, “Protecting the Nation from Foreign Terrorist Entry into the United States”. This executive order, often referred to as the “Muslim Ban,” suspended entry of individuals from the following seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. This executive order also prevented the entry of Syrian refugees into the country until the president determined that “sufficient changes have [had] been made to the USRAP [United States Refugee Admissions Program] to ensure that admission of Syrian refugees is [was] consistent with the national interest.”<sup>10</sup>

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<sup>10</sup> The United States Refugee Admissions Program (USRAP) is an “interagency effort involving a number of governmental and non-governmental partners both overseas and in the United States” (USCIS). The agencies included in the USRAP include Department of State/Population, Refugees and Migration (PRM), United Nations High Commissioner for Refugees (UNHCR), Resettlement Support Centers (RSC), Department of Homeland Security (DHS), Department of Health and Human Services/Office of Refugee Resettlement (ORR), International Organization for Migration (IOM) and Non-Governmental Organizations which provide resettlement assistance to refugees.

After making this statement, President Trump suspended USRAP for a period of 120 days to revise procedures and conducted a review of USRAP to determine what actions were needed to ensure that individuals seeking admission as refugees did not pose a security threat to the United States. Soon after, increased security vetting measures were implemented, such as additional screening for individuals from high-risk countries (“Refugee Security Screening Fact Sheet”, 2018).

One of the US Codes which allowed President Trump to implement the “Muslim Ban” was US Code 1182 which states that “whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.” This statement doesn’t give any criteria that must be met for the president to suspend entry which demonstrates that the discretion of an individual can largely influence immigration. President Trump was able to ban all individuals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen under the principle that he believed them to be “detrimental to the interests of the United States.”

The "Muslim Ban" reflects just one of the many avenues the sitting president can take to control immigration. Because of the president’s discretion in the refugee process, the number of refugees permitted to enter the United States in any given year can vary considerably. In 2016, the final year of the Obama administration, 85,000 refugees were permitted to enter the country. From 2016 to 2020, President Trump continued to lower the refugee ceiling until it fell

to 18,000 in 2020, and then issued orders to decrease that number to 15,000 in 2021 (“Factsheet: U.S. Refugee Resettlement”).

As noted earlier, the existence of a refugee ceiling does not mean the United States is required to accept the maximum number of refugees permitted. For example, in 2018 the ceiling was set at 40,000, but the United States only accepted 22,491 refugees (“An Overview of U.S. Refugee Law and Policy”). Due to the emergence of the COVID-19 pandemic and the continued repercussions of the afore-mentioned travel bans, there was an additional significant decrease in the number of refugees admitted to the United States in 2020, with the total accepted being 11,814 when there was an 18,000-refugee ceiling.

For those attempting to achieve refugee status, there are three processes through which individuals can seek refuge in the US. These processes are categorized by the Department of State with a tiered prioritization system.

Priority one individuals are those referred through the United Nations Higher Commission for Refugees (UNHCR). Refugee applicants must first be evaluated by the UNHCR to determine if they qualify as a refugee. The applicant is put through a screening process and must have their biographic information collected by one of seven Overseas Resettlement Support Centers.<sup>11</sup> After the UNHCR approves the applicant as a refugee, the individual is then

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<sup>11</sup> Resettlement Support Centers (RSC) – Under cooperative agreement with the Department of State, RSCs consist of international organizations or non-governmental organizations that carry out administrative and processing functions, such as file preparation and storage, data collection and out-processing activities (USCIS).

CLOSE SPACE

Overseas Resettlement Support Centers are located in Africa, Vienna, Thailand, Russia, Jordan, India, and Turkey. “The USRAP’s overseas non-governmental partners are Resettlement Support Centers (RSCs), which operate under cooperative agreements with DOS DHS? WHY QUESTION. MARK? and carry out administrative and processing

referred to the United States. The average vetting time from that referral to the refugee arriving in the United States is two years.

All refugee applications are reviewed by the United States Citizenship and Immigration Services (USCIS), which falls within the DHS. Vetting also continues across other government agencies, including the FBI and CIA. After application review, the Department of State and the Department of Health and Human Services (HHS) provide conditionally accepted refugees with a loan to travel to the US, which must be paid back in full within four years (“An Overview of U.S. Refugee Law and Policy”). Before arrival, refugees are assigned a living location in the United States and a corresponding Resettlement Support Center. After the refugee’s identity is verified at the airport upon entry, they must then continue through additional screening processes such as in-person interviews with USCIS and a health screening to prevent the spread of infectious diseases. Once approved, refugees receive immediate employment authorization and a one-time lump sum of \$2,175 per refugee to help them get started (Mathema and Carratala, 2020). After three months in the US, Health and Human Services (HHS) helps refugees gain access to limited cash and medical assistance. Additionally, short-term assistance with language, employment, and social services is also provided, along with a select few longer-term immigration services (“Factsheet: U.S. Refugee Resettlement”).

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functions, such as file preparation and storage, data collection, and out-processing activities. Neither the RSCs nor any other nongovernmental partner to the USRAP has any authority to make refugee eligibility or security determinations or to grant refugee status or admission to the United States.” (USCIS)

Priority two individuals can seek refuge in the United States if they've been selected by the Department of State as a group of "special concern." These individuals have access to the refugee program by "virtue of their circumstances and apparent need for resettlement" and are allowed a "reduced evidentiary standard for establishing a well-founded fear of persecution" (US Department of State, 2021). As of 2021, groups of special concern include certain persons that fall under the Lautenberg and Specter Amendments. These amendments protect religious minority members from Iran, Russia, Tajikistan, Turkmenistan, and Uzbekistan.<sup>12</sup>

Priority three individuals are the relatives of refugees already residing in the United States. Relatives include parents, spouses, or unmarried children under the age of 21 ("An Overview of U.S. Refugee Law and Policy"). In this case, the relative files an Affidavit of Relationship or a Family Reunification petition which is processed through the Department of Homeland Security (DHS). There are specific family relationships and nationalities eligible for consideration under USRAP which vary from year to year and are outlined in the Presidential Report to Congress on Proposed Refugee Admissions. As of 2021, El Salvador, Guatemala, and Honduras all qualify to file an Affidavit of Relationship.<sup>13</sup> Within this process, a family member works as a "sponsor" for a refugee coming to the US. Being approved does not guarantee

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<sup>12</sup> In 2018, there were significantly more groups of "special concern" including the following: Iraqis associated with the US, Bhutanese in Nepal, Congolese in Rwanda & Tanzania, Sudanese Darfuris in Eastern Chad, and Cubans who fit specific criteria.

<sup>13</sup> The Proposed Refugee Admissions for 2021 submitted by President Trump indicated the following nationalities are permitted to file an Affidavit of Relationship: Afghanistan, Burundi, Central African Republic, Cuba, Democratic People's Republic of Korea (DPRK), Democratic Republic of Congo (DRC), El Salvador, Eritrea, Ethiopia, Guatemala, Honduras, Iran, Iraq, Mali, Somalia, South Sudan, Sudan, and Syria

permission for the refugee to come to US. It is simply a pre-requisite that initiates proceedings with USCIS to file an application for a green card, and the individual seeking refuge must interview with the DHS and pay for a DNA test to prove their relationship.

Family reunification is yet another area where the sitting president exercises a fair amount of discretion in terms which nationalities qualify to apply. How is it decided what nationalities deserve to be reunited with their families and those who don't, whether or not a group is of "special concern," or if certain individuals classify as "high risk"? There is inevitable discretion at play in these classifications because these decisions made by the president don't call for specific criteria to be met. On the contrary, the president is given full right to make what he believes to be the best decision.

Now that I've discussed the refugee process in detail, I will transition to an overview of the asylum system. I will first begin by pointing out the differences between the refugee and asylum systems before explaining the affirmative and defensive asylum processes.

### **Refugees and Asylees**

In order to be an asylee, one must first meet the definition of a refugee. Again, a refugee is an individual who has suffered persecution or has a credible fear of persecution based on race, religion, nationality, social group, or public opinion. The geographical location of the person seeking entry to the United States determines whether they are considered a refugee or an asylee; it also determines the process through which they apply for either refugee status or asylum. There is a clear distinction between the refugee and asylum processes with regard to the geographical location of the applicant. Refugees seek refuge from outside of the



United States while asylum seekers are refugees seeking asylum from inside the US or at a port of entry. Ports of entry include the US physical border and US airports.

One can apply for asylum regardless of country of origin or current immigration status, but there are important differences between the processes that refugees and asylum seekers must follow. For example, immigrants who are granted refugee status *must* apply for a permanent residence card after one year after entering the US. Asylees *may* apply after one year of being granted asylum but they are not required to. A lawful permanent resident or green card holder is someone who can legally work and reside in the US. Both refugees and asylees must have lived in the United States for at least one year when applying for permanent residence. After five years of permanent residence, both asylees and refugees are eligible to apply for citizenship (“USCIS Welcomes Refugees and Asylees”).

An additional and potentially significant difference between the refugee and asylum processes is the fact that there is no pre-determined cap on the number of asylum grants as there is for refugees. That being said, attaining asylum is an extremely difficult process involving a number of different steps. Within the asylum application process, an asylum seeker will either go through the affirmative or defensive process which I will discuss in detail in the following section.

### **Affirmative and Defensive Asylum Processes**

An immigrant seeks asylum through either the affirmative or defensive asylum processes. I discussed the difference between these two briefly in chapter one, but to recap briefly, an applicant who is already located in the United States applies through the affirmative

process. If they are denied affirmatively, the individual enters the defensive asylum process and goes to immigration court. The two additional ways to enter into the defensive process include 1) an immigrant seeks asylum at a port of entry or 2) an immigrant overstays their visa or enters without inspection at the border and is placed in removal proceedings.

### *The Affirmative Process*

Affirmative processes are handled by USCIS asylum offices, while defensive processes are handled in immigration court under the Executive Office for Immigration Review (EOIR). In the affirmative process, applicants are interviewed by an USCIS officer at an asylum office to determine if, first, they meet the definition of a refugee and second, have a credible fear of returning to their home country.

The asylum office to which an asylum seeker is assigned depends on where the applicant lives. The USCIS asylum offices are located in the following cities: Arlington, Chicago, Houston, Los Angeles, Miami, Newark, New York, and San Francisco. There are also two sub-offices located in New Orleans and Boston.

In order to go through the affirmative asylum process, an asylum seeker must be physically present in the United States and must apply within one year of having entered the United States. How the asylum seeker entered the United States does not impact whether or not they can apply for asylum: individuals who entered on a legal visa as well as those immigrants who entered illegally but without getting caught are able to apply (USCIS). So long as the asylum seeker who is here illegally has not yet been placed in removal proceedings by Immigration and Customs Enforcement (ICE), they are permitted to apply through the

affirmative process.<sup>14</sup> However, if an asylum seeker who is here illegally is apprehended at a port of entry or detained afterwards by ICE, they are not eligible to file an affirmative application with the USCIS.

Asylum seekers who are eligible to apply through the affirmative process begin by filing an application under Form I- 589 *Application for Asylum and for Withholding of Removal* to the USCIS. They are then called in to undergo a background check. If the applicant is between the ages of 14 and 79, they must visit an Application Support Center (ASC) to have their biometrics taken as well as undergo an identity verification and security clearing process (“Quinquennial Report on Asylum Decision Trends and Factors”). Once these procedures have been completed, they receive a date, location, and time for their asylum interview with the USCIS.

The interview takes place at an asylum office to which the applicant is assigned based on their current residence (as mentioned previously, there are eight asylum offices and two sub offices). In the interview process, applicants are allowed to have an attorney present; however, they are not provided one; if an asylum seeker wants to be represented during the interview process, they must pay for it. The same thing goes for interpreters as well. If the asylum applicant does not speak fluent English, they need to provide their own interpreter.

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<sup>14</sup> If an asylum seeker manages to enter the United States unlawfully using false documentation, they are still able to apply for asylum and go through the affirmative process so long as the DHS hasn't begun removal proceedings against them. You said this in the body Individuals who have illegally entered have a year to apply for asylum as long as they're not placed in removal proceedings and will go through the affirmative asylum process. This means that if they're not granted asylum affirmatively, they still have another opportunity to receive asylum through the defensive process (Johnson, 2007). make sure you're not repeating this in the body of the text when you talk about the defensive process.

Interviews are typically two hours long but sometimes more. Applicants are asked questions relating to how they learned about asylum, the information on their asylum form, their journey to the US, and their claim for asylum. Most questions asked are centered around the individual's claim to asylum and may sometimes be asked in a variety of ways in order to determine whether the answers are consistent. Example questions include the following: *What is the reason you're fleeing your home country? Are you still in danger now? How do you know this? Have you or your family members continued to receive any threats since you left your country? Do you fear you will be subjected to torture, imprisonment or detention if you were to return to your native country?* During this interview, the USCIS officer is trying to determine if the applicant has credible fear and whether or not they meet the definition of a refugee.

Once asylum applicants have finished their interview, the USCIS submits a written assessment on the applicant to the Refugees, Asylum, and Parole System (RAPS). This assessment determines if the applicant meets the legal definition of refugee and whether or not they are subject to any bar from an asylum grant. Asylum applicants hear back about two weeks later with a decision.

### *The Defensive Process*

In the defensive process, asylum seekers now have removal proceedings filed against them and they must defend their claim for asylum in immigration court. An immigration judge then decides if the immigrant is removable from the country and whether or not they qualify for any relief from removal. Asylum is one example of relief from removal; however, there are many different forms including voluntary departure, cancellation of removal, and adjustment of

status. The immigration court in which an applicant is assigned depends on where they live or where the immigrant was detained. Nationwide there are 520 immigration judges and 63 immigration courts (EOIR). There is also a Board of Immigration Appeals (BIA) that reviews appealed cases from immigration judges and DHS decisions.

According to the Department of Justice's website, the BIA "is the highest administrative body for interpreting and applying immigration laws. It is authorized 23 Appellate Immigration Judges, including a Chief Appellate Immigration Judge and one or two Deputy Chief Appellate Immigration Judges." Typically, the BIA conducts a "paper review" of cases and therefore the judges don't conduct courtroom proceeding except on rare occasion. The decisions made by the BIA are binding to all immigration judges and HHS officers unless modified or overruled by the Attorney General or a federal court. The BIA has the power to set certain orders as precedent, which is then published and applied to immigration courts nationwide.

As mentioned previously, being denied asylum in the affirmative process is one way to end up in the defensive process in immigration court. If denied asylum affirmatively, the applicant then receives a notice to appear (NTA) in immigration court and has the opportunity to have their case heard de novo.

Both "arriving" asylum seekers attempting to seek asylum legally at the border without adequate entry documents and asylum seekers caught attempting to illegally enter the United States are placed in the expedited removal process (Johnson, 2007). While in the expedited removal process, an asylum seeker has the opportunity to express fear of returning to their home country and state that they would like to apply for asylum. The individual is then obliged

to partake in what is known as a credible fear interview with a USCIS asylum officer, in which the officer XYZ. The officer then determines if the individual has a “significant possibility” of being granted asylum. If it is determined that they do, the asylum seeker will have the opportunity to have their case heard in immigration court through the defensive process (“Fact Sheet: US Asylum Process”). If the officer does not recommend that the individual to be placed in the defensive process, the applicant can appeal the decision and seek the review of an immigration judge.

The credible fear interview is similar to the interview an asylum seeker would undergo in the affirmative process. The asylum officer is attempting to determine if the immigrant’s stated fear of persecution matches them to the definition of a refugee, in other words, if their fear stems from persecution on the basis of race, religion, nationality, political opinion, or because the person belongs to a specific social group. I will go into more depth on the credible fear interview and the discretion involved in this area of the asylum process later in this chapter but want to emphasize the structure of the asylum process beforehand.

Once an asylum seeker is placed in removal proceedings, either by being denied asylum affirmatively or after passing their credible fear interview, the asylum seeker will receive a notice to appear in immigration court (“Quinquennial Report on Asylum Decision Trends and Factors”). A NTA is initiated by the DHS to begin removal proceedings and the charging document assigns the defendant with one of the EOIR’s immigration court based on the individual’s location (“Executive Office for Immigration Review: An Agency Guide”).

To clarify, all asylum seekers in the defensive process are required to appear in court regardless of how they entered the defensive process. This means that applicants who were denied asylum in the affirmative process, those who requested asylum at the border, as well as those who attempted to enter the illegally and were caught, all receive an NTA.

When an asylum applicant shows up for their court date, their case is then heard de novo before an immigration judge. The proceeding occurs with two parties, the asylum seeker (and their attorney, if they have representation) and an attorney from Immigration and Customs Enforcement (ICE).

During the immigration hearing, an asylum seeker (or their attorney) has the opportunity to present their defense and demonstrate why they deserve relief from removal. Witness testimonies are allowed, as well as accompanying documents to support one's case. Most likely, a cross-examination will occur where the defendant is asked questions by both the government attorney and judge. If the asylum seeker has an attorney, they will likely ask them questions in front of the court as well to help build their case.

A final decision is made regarding the asylum seeker's immigration status; however, the judge's decision can be appealed by either party. If the USCIS finds the asylum applicant eligible for asylum after the interview, an approval notice is issued. At that point, the principal applicant is allowed to claim their spouse and any children under the age of 21 who are physically located in the United States as dependents. If the individual is not deemed eligible for asylum or any other forms of relief for removal, they are removed from the United States (EOIR).

When discussing the structure of the defensive process, I mentioned that while awaiting trial asylum seekers are often held in detention. I find it important here to go into more detail on detention centers since Northern Triangle asylum seekers often make up the nationalities most frequently detained in these facilities. In fact, immigrants from the Northern Triangle countries made up 46% of the detainee population in 2018 (Ryo and Peacock, 2018).

### **Detention in the Defensive Process**

When we discuss asylum seekers, we are talking about people who have actively been persecuted and are often in fear of lives. They have left everything behind them to flee their homes in hopes of protection and a better life. Upon making it to the US border, these individuals are detained as though they're criminals and the "detention facility" they're held in often looks and feels much like a private prison.

Currently, defensive asylum seekers who arrive at a port of entry and claim fear of persecution are subjected to mandatory detention by US asylum policy. Additionally, individuals caught attempting to cross the border illegally are also placed in detention by the DHS. These individuals remain in detention while awaiting their credible fear interview, which can take anywhere from days to a few months (Johnson, 2007). During this period, the asylum seeker must remain in detention.

Detention centers are institutions run by ICE that detain immigrants as their cases move through the defensive asylum process. The number of non-citizen detainees is greater in the United States than any other country in the world (Cole, 2012). In 2019, over half a million immigrants were placed in detention and over 60% of these detainees were held in for-profit



prisons (Eisen, 2018). This means that even individuals who did not cross the border illegally but seek asylum at a port of entry are at times held in prisons alongside criminals. Not only is it unethical to hold asylum seekers fleeing persecution in a private prison, but as I will discuss later on, being held in detention can negatively impact an asylum seeker's chances of being granted asylum due to a lack of resources available to help build their asylum case.

Once an asylum seeker passes their credible fear interview and has the opportunity to have their case heard in immigration court, they will often still have to wait in detention until their hearing. The average wait time in 2019 for non-citizen cases to be adjudicated was 705 days, almost two years (Esthimer, 2019). Some immigrants are able to be released on bail or parole while awaiting trial, however there are strict criteria they must meet.

Not only does the United States hold immigrants in detention who requested asylum legally at an official border point, an ICE officer or immigration judge can also require them to pay bond for release. In this case, either the ICE officer or immigration judge conducts a “risk classification assessment” of the individual where it’s determined how likely they are to appear in court based on the immigrant’s community or family ties, how the individual entered the US, how long they’ve been in the country, and whether they’re viewed as a danger to the community. The bond can then be decided to be a monetary amount, with the minimum bond being \$1500, or a non-monetary amount, where the asylum seeker is given an electronic monitoring device upon release. (“Parole v Bond in the Asylum System”, 2018).

In addition to bond, there is also the option for an asylum seeker to be released on parole by an ICE officer. ICE officers review cases to determine parole eligibility. Migrants

arriving from the US-Mexico border are automatically reviewed for parole, but there is no guarantee that it will be granted. Requirements to be released on parole include the following: 1) passing one's credible fear interview; 2) possessing sufficient identity documents; 3) providing the name and residence of a family/friend the asylum seeker can stay with until trial ("Options for Release from Detention for Asylum Seekers"). The parole decision made by the officer is final and cannot be appealed to an immigration judge.

In the process of granting bond and parole, we again see individual discretion involved in the asylum process. The "risk classification assessment" determines if an asylum seeker qualifies for bond and is a judgment call made entirely made by the interviewer. An immigration judge or ICE officer can determine if an individual has presented sufficient evidence of a family support network and deny bond. Parole is ultimately determined by whether or not a single ICE officer believes an asylum seeker has adequately met specific criteria. The eligibility for parole also requires one to have passed their credible fear interview, which poses another set of bias circumstances.

### **Credible Fear**

The issue of the credible fear interviews has come up numerous times in the context of the Defensive process. To explain further, credible fear interviews are held for individuals who are subject to removal proceedings and who inform Customs and Border Patrol (CBP) that they wish to apply for asylum because they fear persecution or torture, or for other reasons fear returning to their home country (USCIS). According to the USCIS, "An individual will be found to have a credible fear of persecution if he or she establishes that there is a 'significant possibility'

that he or she could establish in a full hearing before an Immigration Judge that he or she has been persecuted or has a well-founded fear of persecution or harm on account of his or her race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her country.”

The fact that the applicant must demonstrate the “significant possibility” that they can make a case before an immigration judge and prove “credible fear” of persecution demonstrates the inherent discretion the interviewer making asylum decisions. The personal opinion of the asylum officer determines whether or not the applicant has the opportunity to have their case heard in court. If the asylum officer doesn’t believe the individual has demonstrated a “credible fear” or the “significant possibility” they could make a case in court, then they are sent back to their home country to face the same circumstances they were fleeing.

The credible fear interviews which take place in the defensive process are similar to the USCIS interviews asylum seekers undergo in the affirmative process. When assigned an interview with an USCIS asylum office, the officer determines if an applicant meets the definition of a refugee and has a credible fear of returning to their home country. Thus, this interview has the same thread of discretion woven into the process.

Discretion is present throughout every facet of the immigration system including both the refugee and asylum processes. In a previous discussion of refugees, I called attention to certain groups of refugees that are deemed to be of “special concern” for the US. How is it decided which groups fall into this category? Similarly, how is it decided by the president which

countries are of such “high risk” that its citizens are banned from entering the US? I also discussed how the sitting president determines the refugee ceiling, the number of refugees permitted entry from each designated area of humanitarian concern, as well as what nationalities are eligible to apply for Family Petitions. These decisions emphasize not only the discretion involved in the refugee process but also the power and substantial impact the president has on controlling immigration.

Within the asylum process, the aforementioned credible fear interviews are a clear example of discretion, and the effects can be observed through the extreme variation in asylum grant rate among immigration offices.<sup>15</sup> While my research will focus on variation in asylum grant rate amongst immigration courts, it is important that I discuss the occurrence of this variation within the affirmative process as well.

For example, the average grant rate for the San Francisco asylum office is 70% while for the New York asylum office it is 20% (“Quinquennial Report on Asylum Decision Trends and Factors”). It is understandable that there are many factors that impact asylum grant rate from one court location to another, including the circumstances of the asylum seeker’s case and the nationalities seen most frequently at a particular asylum office. However, this statistic which demonstrates a large difference in grant rate between two asylum offices is alarming and raises

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<sup>15</sup> I often use the term “discretion” when discussing the asylum process. Discretion can be observed in every facet of the asylum process from the credible fear interviews to the sitting president determining who is of “special status” or “high risk” and amongst immigration judges in court. As I move into discussing the variation in the immigration court system, I will refer to the “discretion” of the immigration judges as “subjectivity” as I have contextual evidence to support this claim. I will primarily focus on how subjectivity impacts variation in asylum grant rates amongst immigration courts. However, when highlighting the discretion involved generally in the affirmative asylum process, I am careful not to use the terms “subjectivity” or “personal bias” as it is difficult to prove.

questions of impartiality and ethics. The asylum office location in which an applicant is scheduled to interview should not have an impact on their case outcome, yet it appears that interviewing at one office versus another can significantly affect an applicant's chances of asylum.

In the following chapters, I will explore this same issue with regards to an applicant's chances of asylum based on which immigration court and judge they are assigned. Issues of subjectivity will arise, which I will argue are the main drivers for variation in asylum grant rates among immigration courts.

The purpose of this chapter has been to provide context for the immigration process in regards to seeking refuge or asylum in the United States. We first looked at an overview of the refugee and asylum processes while highlighting the differences between the two. Main takeaways from this section include the fact that an asylum seeker must first meet the definition of a refugee and prove a well-founded fear of persecution. However, although asylees meet the definition of a refugee, they enter into the immigration system through a completely different process. While refugees are pre-approved through the refugee program before entering the US, asylum seekers apply when they are already present in the United States or at a port of entry.

I then discussed the two facets of the asylum system which are the affirmative and defensive processes. In the affirmative process, asylum seekers interview with an USCIS asylum officer at one of the eight principal asylum offices. In the defensive process, asylum seekers

undergo a credible fear interview and if they pass, have their case heard before an immigration judge.

Within the affirmative and defensive processes, I called attention to what I believe to be structural inefficiencies that make the system inherently unfair. In the affirmative process an asylum seeker who manages to enter the United States unlawfully using false documentation is still able to apply for asylum through the affirmative process so long as the DHS hasn't begun removal proceedings against them. This means that if they're not granted asylum affirmatively, they still have another opportunity to receive asylum through the defensive process (Johnson, 2007). This incentivizes immigrants to attempt to enter the United States illegally because if they do so successfully they in essence get two chances at asylum.

Those who are caught attempting to illegally cross the border and express fear of persecution upon returning home are placed in the same removal proceedings as those asylum seekers who legally seek asylum at a port of entry. In the defensive process, both categories of individuals are placed in detention centers while they await their credible fear interviews. Given how the asylum system is structured, why wouldn't immigrants attempt to first enter illegally? If they don't get caught, they have a chance to apply affirmatively for asylum; and if they do, they can express fear of persecution and end up in the same position as someone who might have waited months stranded in Tijuana in the hopes of applying for asylum at the border.

Having addressed the structural inefficiencies and resulting inequities in the asylum process, I turn now to the problem of subjectivity. Subjectivity in the immigration system will become ever more present when I direct my research to the variation in asylum grant rate

present among immigration courts. Chapter three will present a comparative analysis of the Atlanta and Philadelphia immigration courts to highlight the differences between them. My research will work to better understand how being assigned to one court over the other can impact the chances of being granted asylum for a resident of the Northern Triangle countries. The question the following chapter will address is: What is happening when we observe asylum seekers of the same nationality and similar attorney representation experience drastically different grant rates in different courts?

### Chapter Three A Comparison of the Atlanta and Philadelphia Immigration Courts

*“In America I had to find a lawyer and go to court and convince them why I have to stay in America. I wasn’t allowed to speak on the trial. They took all my files and just left me; I don’t know why.”-Alberto, Guatemalan migrant<sup>16</sup>*

Variation exists in the asylum grant rate both between immigration courts and between individual judges at those courts. The purpose of this chapter is to better understand why such variation exists and in what ways this variation impacts asylum seekers from the Northern Triangle countries. I’ll do this by isolating the nationality of the asylum seekers between the Atlanta and Philadelphia courts and directly comparing attorney representation and grant rates for Guatemalans, Hondurans, and Salvadorans in both.

For this comparison, I found it most insightful to compare grant rate between the courts to attorney representation because it has been found to be the factor that has the largest impact on grant rate (GAO, 2016). Focusing on the relationship between these two variables will allow me to better understand how attorney representation amongst Guatemalans, Salvadorans, and Hondurans compares to asylum grant rate between courts. However, I do want to acknowledge that each asylum case has its own set of factors and circumstances. There is an array of variables that affect asylum grant rate and in the following chapter, I will go into more detail on those.

#### Background Information on the Atlanta and Philadelphia Courts

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<sup>16</sup> Margolies, Elliot. “Build Bridges Not Walls.” *Made Into America* FINISH THIS FOOTNOTE? PAGE NUMBER?



I chose to compare the Atlanta and Philadelphia courts because they are similar in many ways aside from their grant rate. In this data set, both Philadelphia and Atlanta have a total of 7 judges whose rulings can be compared. Although not all of the judges included in the data have served on the courts for the full five-year period, at the very minimum, each judge included in this analysis has heard over 100 cases with the average sample size per judge being 373 in Atlanta and 411 in Philadelphia. The total number of cases heard by Atlanta immigration judges in this time period is 2,612 and 2,879 in Philadelphia (TRAC, Syracuse University). Additionally, both courts saw a similar number of Northern Triangle asylum seekers in from 2015-2020. Despite these similarities between the courts, Philadelphia's immigration court had an average grant rate for Northern Triangle asylum seekers of 30.5% from 2015-2020 while Atlanta's average grant rate over that period of time was 2.3% (TRAC, Syracuse University).<sup>17</sup>

### **Attorney Representation**

On a national level, approximately 81% of asylum seekers are not represented by an attorney during their hearing. When an asylum seeker is not represented by an attorney, roughly 88% are denied asylum (TRAC-Syracuse University). Among those who are represented, a significantly higher number are successful. Asylum seekers are responsible for securing their own attorneys in immigration court and are often required to pay for their own attorney representation in court. Depending on location, some courts have more resources available to

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<sup>17</sup> As mentioned in the methods section, these percentages were calculated out of the sum of the cases where asylum was granted, denied, or in which other relief was granted in court. This analysis will not include cases heard in each of these courts in which other closures or administrative closures occurred. Other closures include cases that were abandoned, not adjudicated, or withdrawn and administrative closures do not result in a final order.

asylum seekers and more attorneys willing to take on pro bono cases. Northern Triangle asylum seekers are disproportionately affected in court because many are fleeing poor socioeconomic conditions and therefore cannot afford an attorney. In the following chapter, I will discuss in more detail how detention, geography, and nationality impact attorney representation and case outcome.

### **US Defensive Asylum Cases & Northern Triangle Country Applicants**

In 2019, the leading nationalities for defensive asylum cases received in the United States were the following: Guatemala (19.6%), Honduras (15%), Mexico (14.4%), El Salvador (14.1%), Venezuela (5.5%), India (5.2%), and China (3.2%) (DOJ, 2019) (See Appendix, Table 6b).

<sup>18</sup> Those individuals who were actually granted asylum defensively can be broken down by nationality in 2019 as follows: China (18.3%), El Salvador (12.3%), India (10.2%), Guatemala (8.2%), Honduras (6.8%), and Mexico (4.3%) (See Appendix, Table 9). The percentages listed indicate the percent each nationality made up of the total number of defensive asylum grants. To put these percentages in perspective for the Northern Triangle countries, this means that Guatemalan asylum seekers made up 19.6% of defensive immigration court cases and 8.2% of the total defensive asylum grants that year (2,315/18,865). Honduran asylum cases made up 15% of national immigration caseloads and 6.8% of total defensive grants in 2019

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<sup>18</sup> As a reminder, we are focusing on the defensive process here which can be entered in the following three ways 1) an applicant is denied asylum through the affirmative process and the individual is sent to immigration court 2) an immigrant seeks asylum at a port of entry or 3) an immigrant overstays their visa or enters without inspection at the border and is placed in removal proceedings

(1,544/18,865). Finally, Salvadoran asylum seekers made up 14.1% of immigration hearings and accounted for 12.3% of total defensive grants (1,297/18,865) (DOJ, 2019).

When looking at these numbers, one might conclude that asylum seekers from the Northern Triangle countries fare well in the defensive process because Guatemala, Honduras, and El Salvador are listed in the top five countries with the highest number of individuals granted asylum defensively in 2019. What these numbers don't show, however, is the large number of individuals who apply for asylum and are rejected. I will be therefore be focusing on grant rate and relative numbers to compare asylum cases between the Atlanta and Philadelphia courts.<sup>19</sup>

In 2019, the Department of Justice received 41,365 Guatemalan defensive cases and 1,544 Guatemalans were granted asylum that year (3.7%). In the same year Hondurans had 31,649 defensive cases filed and 1,544 Hondurans were granted asylum (4.9%); El Salvador had 29,779 defensive cases filed and 2,315 individuals granted asylum defensively (7.7%) (DOJ, 2019). I show these numbers to demonstrate the magnitude of defensive asylum applicants from the Northern Triangle countries in comparison to the number that are actually being admitted each year. Breaking down these numbers also reveals that other nationalities' fare much better in the defensive process. For example, 6,838 Chinese asylum seekers filed for asylum through the defensive process in 2019 and 3,451 (50%) were granted that year (DOJ,

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<sup>19</sup> Because the courts are dealing with different sample sizes of asylum applicants from each nationality, I will mainly focus on comparing percentages over absolute numbers to make for a better comparison between the courts. When making comparisons on grant rate and attorney representation between Philadelphia and Atlanta, one can see that the percent comparisons are more meaningful in later years when we see a similar number of applicants but a large difference in grants.

2019).<sup>20</sup> Another example is the 11,019 asylum seekers from India who applied defensively in 2019 and 1,921 or 17% were admitted (DOJ, 2019).

In the following section, I will directly compare attorney representation amongst Guatemalans, Hondurans, and Salvadorans between the two courts while also looking at the yearly grant rate for asylum seekers in Atlanta and Philadelphia. Since attorney representation has been found to be the factor that has the largest impact on grant rate, I will look for a possible relationship between representation and grant rate amongst each nationality in both courts (GAO, 2016). In this comparison, my goal is not to prove that attorney representation impacts grant rate. Rather, I'm hoping to develop an understanding of how attorney representation differs for each nationality between the two courts and cross compare the grant rate. This will allow us to develop a better picture of how asylum seekers of the same nationality compare in terms of attorney representation and grant rate between courts.

### **Guatemalan Asylum Seekers**

Guatemalan asylum cases make up the largest percent of caseloads in both the Atlanta and Philadelphia immigration courts (2015-2020). From 2015 to 2020, the average grant rate for Guatemalans was 30.1% (236/784) in Philadelphia's court and 2.3% (20/866) in Atlanta (TRAC, Syracuse University). In comparison, the average asylum grant rate amongst all

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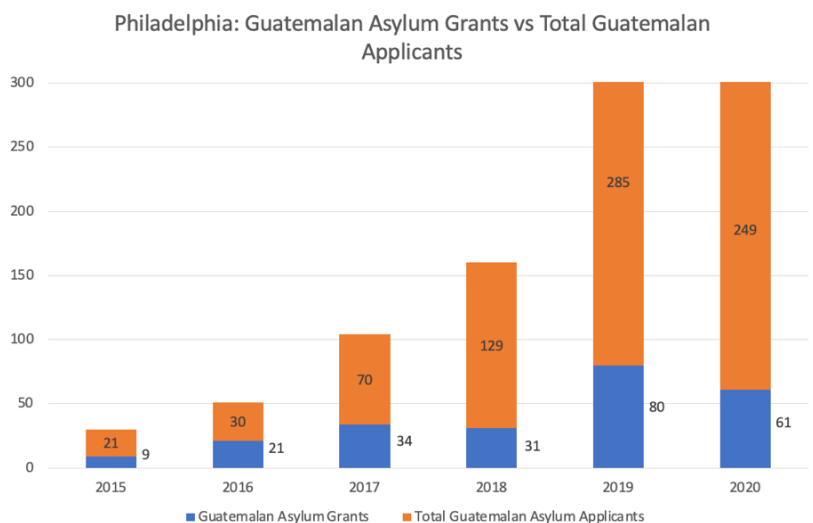
<sup>20</sup> It is important to note that there is immense backlog in asylum cases. In fact, in 2019 immigration courts had a total of 1,086,828 pending cases (EOIR, 2021; See Appendix Figure 2). Because of this backlog, not all defensive cases filed in 2019 were heard and decided that same year. This means that the 1,544 Guatemalans granted asylum in 2019 would not necessarily have all come from the 41,365 that applied that year.

immigration courts for Guatemalans was 17.5% from 2015-2020, therefore, Philadelphia was on the high side of the national grant rate and Atlanta the lower (TRAC, Syracuse University).

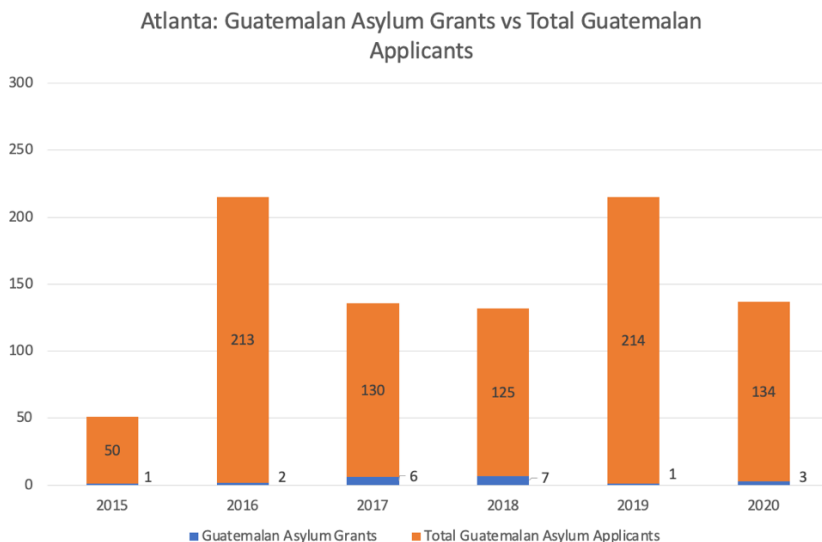
Figure 1 Exhibit A shows that there have consistently been a large number of Guatemalan asylum seekers in the Atlanta court over the past six years. However, since 2018, there have been even more Guatemalan cases in Philadelphia. As the number of Guatemalan cases has increased in Philadelphia, it appears that the grant rate has gone down (Figure 2, Exhibit B). Even so, Philadelphia’s grant rate for Guatemalans has still consistently been higher than Atlanta’s grant rate each year. In 2019 for example, the Atlanta court had 214 Guatemalan cases and Philadelphia had 285. In Atlanta, one Guatemalan asylum seeker was granted asylum resulting in a .47% grant rate for the year (Figure 2, Exhibit A). In comparison, Philadelphia granted asylum to 80 Guatemalans resulting in a 28.07% grant rate (Figure 2, Exhibit B).

**Figure 1:**

**Exhibit A:**



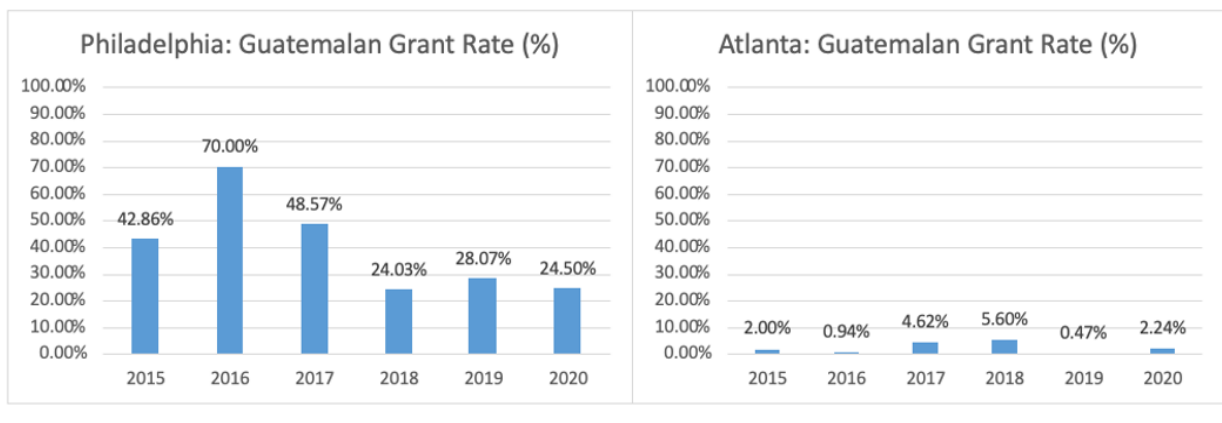
**Exhibit B:**



**Figure 2:**

**Exhibit A:**

**Exhibit B:**



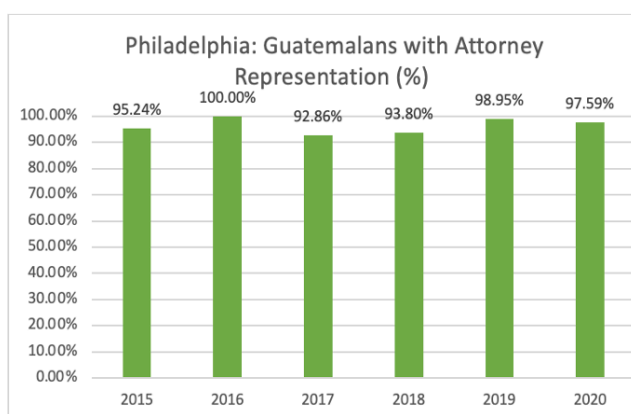
Guatemalan attorney representation has remained high in Philadelphia’s court over the past six years, with the average representation for Guatemalans being 97% (389/404) from 2015-2020 (Figure 2, Exhibit A). In contrast, the Atlanta court has seen lower representation for this nationality, averaging 78.3% (678/866) during this period (Figure 3, Exhibit B). With such a

large difference in the number of Guatemalan asylum seekers represented between the two courts, it appears as though this could be a significant factor affecting the grant rate for Guatemalan asylum seekers.

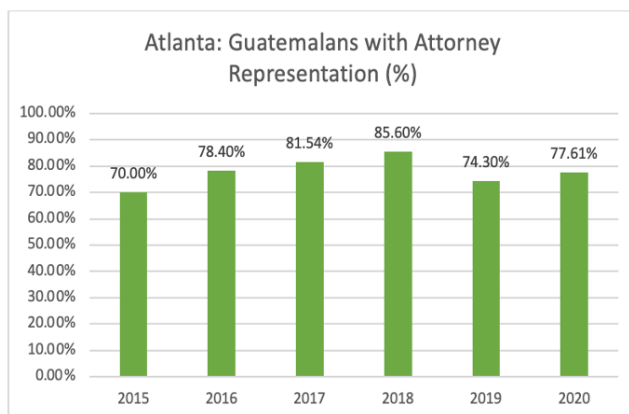
Similar differences can be seen when looking at the data for Honduran and Salvadoran asylum seekers; however, I will highlight some specific years that stand out in the data.

**Figure 3:**

**Exhibit A:**



**Exhibit B:**



### Honduran Asylum Seekers

Atlanta has seen about 100 more Honduran asylum seekers from 2015-2020 than Philadelphia. Over this time period, Hondurans have made up about 19% of the Atlanta court's caseload and 14% of Philadelphia's. The average grant rate over these six years for Hondurans in Philadelphia's court is 30.2% (104/404) (2015-2020). For the Atlanta court, the grant rate remains low for Hondurans, at an average of 3% (15/502) during this time frame. This means that the grant rate for Hondurans is about .7 percentage points or 30% larger than

Guatemalans in Atlanta on average (2015-2020).<sup>21</sup> Looking at the data more recently, we see that the grant rate for Hondurans did decrease in Philadelphia as the number of Honduran cases increased (Figure 5 Exhibit B). This is similar to what we saw in Philadelphia's court with the rise of Guatemalan cases as well. The average grant rate from 2019-2020 was 19.4% in Philadelphia and .48% in Atlanta. In this case, both courts have lowered their grant rates for Hondurans in recent years yet there are significant differences between them.

By looking at the data from 2019-2020, we realize that even though the grant rate for Hondurans did decrease in Philadelphia as the number of Honduran cases increased, it is still far higher than Atlanta's grant rate. We'll now shift our attention to see if a significant gap in attorney representation exists between the two courts, as we saw in the case of Guatemalan attorney representation previously discussed.

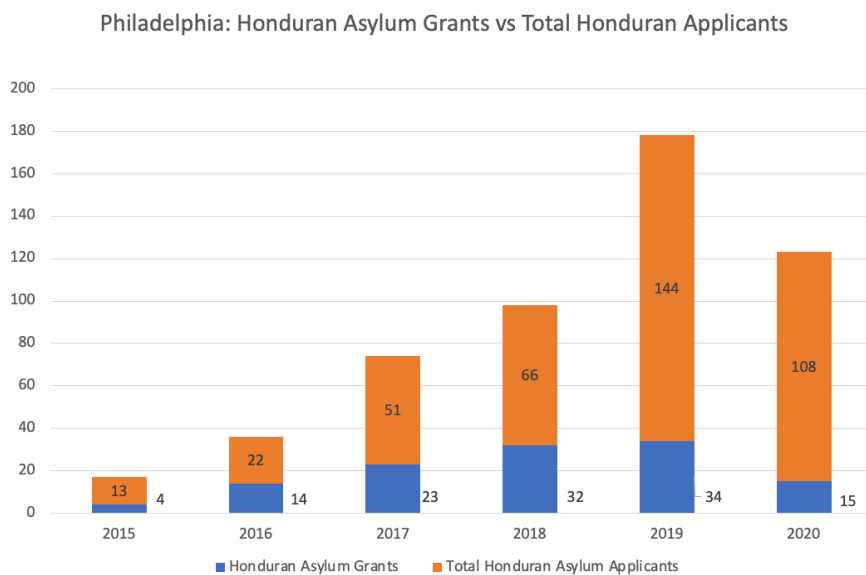
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<sup>21</sup>  $(3-2.3)/2.3*100=30.4\%$



Figure 4

## Exhibit A:



## Exhibit B:

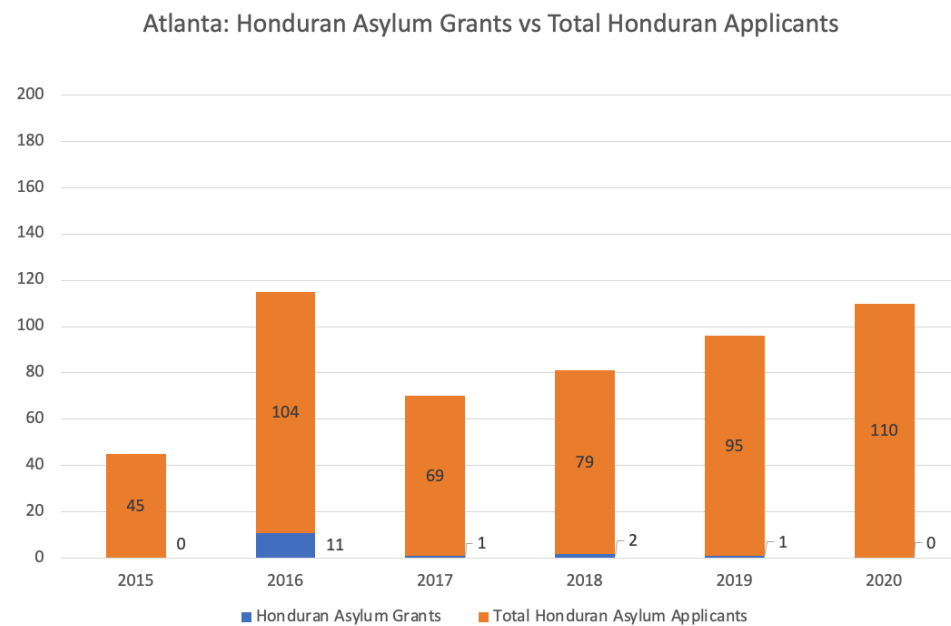
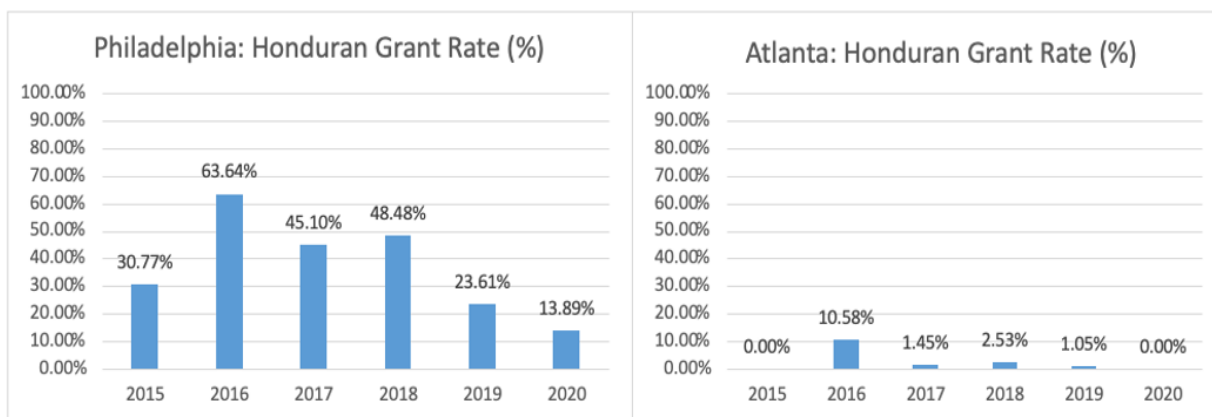


Figure 5

Exhibit A:

Exhibit B:



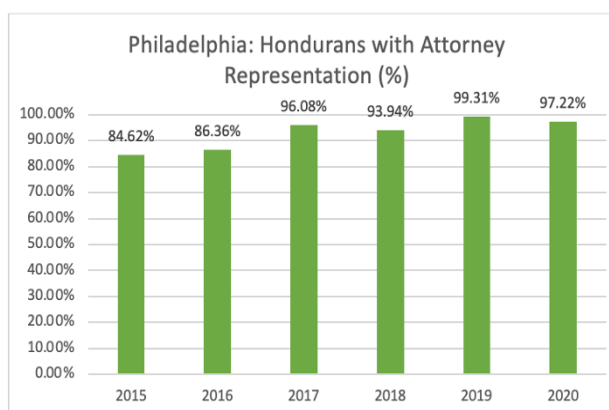
Philadelphia's average representation rate from 2015-2020 was 96.3% (389/404), in comparison to Atlanta's at 85.9% (431/502). This is a much smaller gap in representation for Hondurans when compared to Guatemalan attorney representation between the courts. However, even with more representation for Hondurans in Atlanta's court, we still see a similar gap in grant rate. In 2017, 51 Hondurans went through Philadelphia's court system and 69 Hondurans through Atlanta's. That year, 23 Hondurans were granted asylum in Philadelphia and 1 Honduran was granted asylum in Atlanta. This made for a 45.1% grant rate that year in Philadelphia and a 1.45% grant rate in Atlanta.

Interestingly, in that same year, the Atlanta court had a larger percent representation of Honduran asylum seekers, at 98.6% (68/69), than Philadelphia, at 96% (49/51) representation (Figure 6 Exhibit A and B). Regardless of similar representation for Hondurans between the courts in 2017, Atlanta's grant rate is still significantly lower than Philadelphia's. This

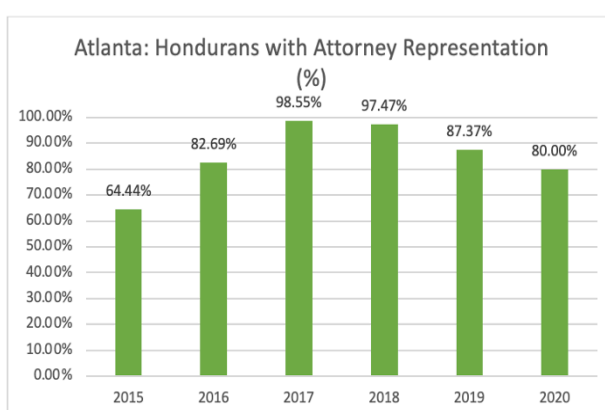
demonstrates that attorney representation is necessary but perhaps not sufficient for attaining asylum. Now, we will see how Salvadoran case outcomes compare.

**Figure 6**

**Exhibit A:**



**Exhibit B:**



### Salvadoran Asylum Seekers

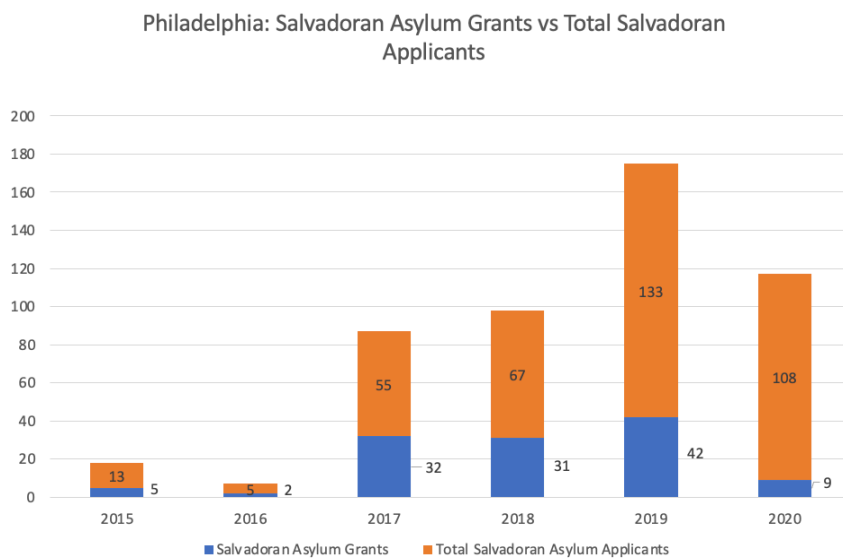
As we saw with both Honduran and Guatemalan asylum seekers, the number of Salvadoran asylum seekers was originally higher in Atlanta. In 2016, there were only 5 cases of Salvadoran asylum seekers in Philadelphia and 112 in Atlanta (Figure 7, Exhibits A and B). However, the number of Salvadoran asylum seekers continued to increase in Philadelphia's court and surpassed Atlanta in 2019. In 2019, 133 Salvadorans went through Philadelphia's court and 84 Salvadorans went through Atlanta's court (Figure 7 Exhibit A). That same year, the grant rate for Salvadorans in Philadelphia was 31.6% and a total of 42 Salvadorans were granted asylum (Figure 8 Exhibit A). In Atlanta, the grant rate was 1.19% in 2019 and one asylum seeker from El Salvador was granted asylum (Figure 8 Exhibit B).

Over the past six years, generally a small number of Salvadorans have been granted asylum in Atlanta. The number of Salvadorans who were granted asylum from 2015-2020 in Atlanta is as follows: zero in 2015, one in 2016, three in 2017, one in 2018, one in 2019, and two in 2020. The small number of Salvadoran grants equates to an average asylum grant rate of 1.6% from 2015-2020. This is even lower than the average grant for Guatemalans and Hondurans in Atlanta's court (2.3% and 3%). In comparison, Philadelphia's average grant rate for Salvadorans from 2015-2020 was 31.8%. However, this grant rate has decreased in most recent years. If we take the average grant rate for Salvadoran cases in Philadelphia from 2019-2020 is 21.2%. As the number of Salvadoran cases has risen in Philadelphia, there has been a decline in grant rate, while during the same period, the average asylum grant rate in Atlanta is slightly higher in recent years at 2%.

We have seen a continued trend in Philadelphia's court where more asylum applications from the Northern Triangle countries have led to a lower approval rate; however, this does not appear to be the case in Atlanta. Atlanta's grant rate has remained low for all Northern Triangle country asylum seekers regardless of the increase in applicants in recent years.

Figure 7

## Exhibit A:



## Exhibit B:

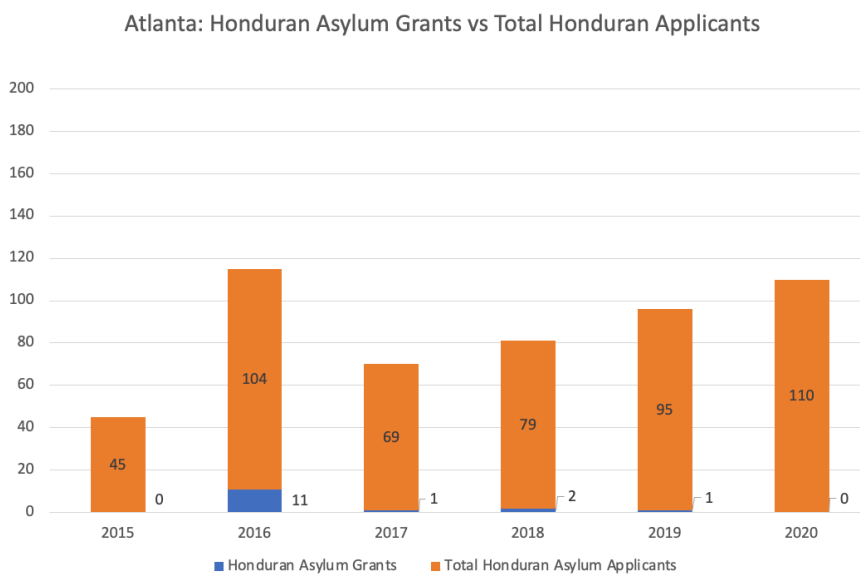
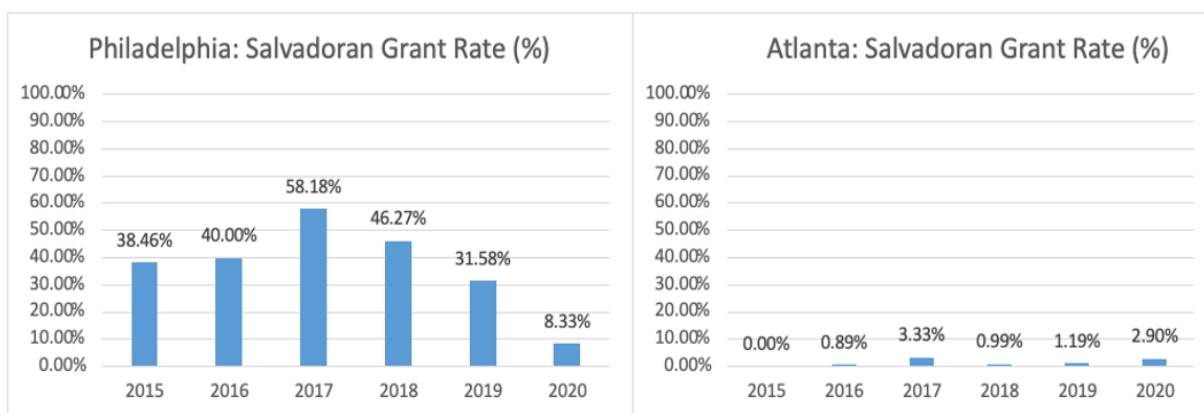


Figure 8

Exhibit A:

Exhibit B:



As we can see in Figure 8, there is a large gap between the two courts' yearly grant rate for Salvadoran asylum seekers. In 2016, only 5 Salvadoran asylum seekers went through Philadelphia's court and 112 Salvadorans went through Atlanta's. Over the next few years, the number of Salvadoran cases rose in Philadelphia and began to decline in Atlanta starting in 2018. In 2019, Philadelphia had a 31.6% grant rate (42/133) while Atlanta's was 1.19% (1/84).

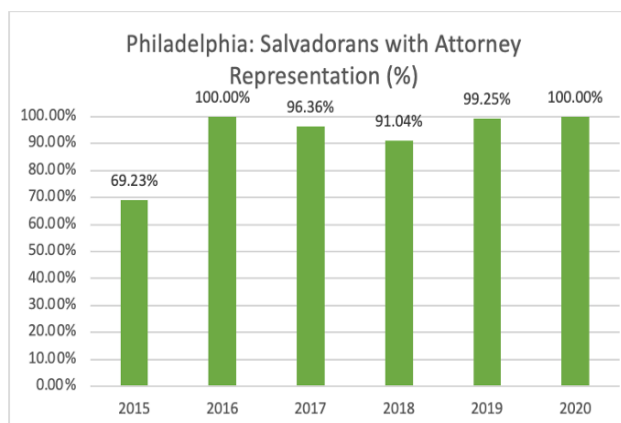
We will now turn to data to analyze attorney representation between the courts for Salvadoran asylum seekers. In this example, we again see that the Philadelphia court has a larger percent representation for Salvadoran asylum seekers than Atlanta. Interestingly, however, in the case of Salvadoran asylum seekers, although Philadelphia again has a greater percent of attorney representation, the difference is not as significant as the difference in attorney representation for Guatemalans and Hondurans between the courts. The average representation for Salvadorans in Philadelphia was 96.6% (368/381) (Figure 9, Exhibit A) and

the Atlanta court has an average representation for Salvadorans of 89.9% (454/505) from 2015-2020 (Figure 9, Exhibit B). The percentage of attorney representation is significantly closer between the two courts in the case of Salvadoran asylum seekers when compared to Honduran and Guatemalan asylum seekers, and yet there is still a similar variation in grant rate.

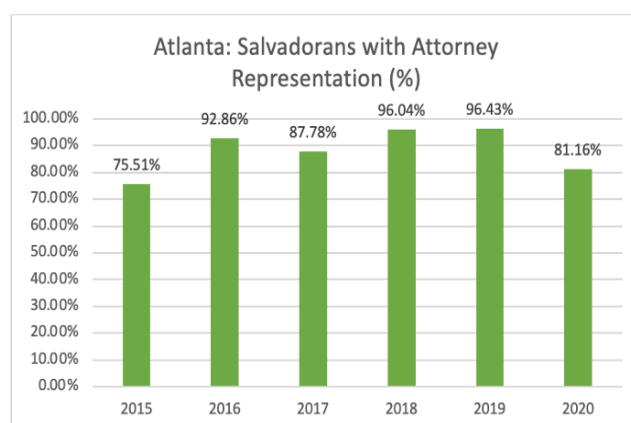
For example, in 2019 Philadelphia had a representation rate for Salvadoran asylum seekers of 99.3% (132/133) while Atlanta's representation rate was 96.4% (81/84). This same year, Philadelphia's average grant rate was 31.6% (42/133) while Atlanta's was 1.19% (1/84) (Figure 9, Exhibit A and B).

**Figure 9**

**Exhibit A:**



**Exhibit B:**



In the initial side-by-side of analysis of Guatemalan asylum seekers in Philadelphia and Atlanta, a difference in attorney representation suggested itself as the reason for significant variation in the percentage of cases granted. However, comparative research on Honduran and Salvadoran attorney representation undercuts the conclusion that it is the most impactful

factor for the variation in grant rate. In the case of Honduran representation, we highlighted 2017 when Atlanta had an average 98.6% (68/69) attorney representation for Honduran cases and yet their grant rate was 1.45% (1/69) (Figure 6 Exhibit A and B). We also saw Guatemalans had a 2.3% (20/866) average grant rate in the Atlanta court from (2015-2020) with 78.3% (678/866) representation during that time period. This shows that while Salvadorans had much higher average representation in Atlanta from 2015-2020, they still had a lower grant rate than Guatemalans and Hondurans (2015-2020).

Overall, the comparisons drawn between the Atlanta and Philadelphia courts show a shocking degree of variation. Even after filtering the court data based on the nationality of the asylum seeker, it is clear that the Atlanta immigration court continues to grant asylum to a miniscule number of individuals when compared to the Philadelphia court, which is similar in size and caseload. When we compare individuals of the same nationality between two courts, similar percentage of case outcome results would be expected. But even when there are a similar number of asylum seekers of the same nationality going through the two courts, there is still immense variation in grant rate.

This has led me to hypothesize that judicial subjectivity in the immigration court system may be a factor. This means that the case outcome for an asylum seeker from the Northern Triangle countries can vary not only based on the court to which their case is assigned but also on the individual judge who hears the case. To conclude this chapter, a side-by-side comparative analysis of two judges within the same court will be helpful.



## Variation Amongst Immigration Judges within Philadelphia's Court

In my comparison of the Atlanta and Philadelphia courts, I have consistently looked at each court's grant rate, which is simply an average based on the collected grant decisions of all immigration judges on the court. Looking at this average grant rate allows for a better understanding of how the court as a whole grants asylum. However, by focusing on the grant rate of individual judges, we can develop a more holistic idea of the variation in grant rate amongst judges in the same court. We can also focus on one judge's grant decisions and directly compare those decisions with another judge.

The two immigration judges I'll be comparing in this example are Judge Mary Lee and Judge Charles Honeyman. These two judges have both the highest and lowest grant rates on Philadelphia's court. From 2015-2020, Judge Mary Lee had the lowest average grant rate in Philadelphia's court at 17.5%. She heard 291 cases and had an average of 95% attorney representation in her courtroom. Her caseload by most frequent nationalities over this time period was Guatemala (23%) Honduras (19.9%), El Salvador (16.5%), Brazil (13.1%), and Mexico (6.2%).

Judge Charles Honeyman had the highest average grant rate on the court at 60.3% (2015-2020). He heard approximately 100 more cases in this period than Judge Lee, with a total of 395 court grants or denials.<sup>22</sup> The most frequent nationalities in Judge Honeyman's courtroom were Guatemala (23.8%), El Salvador (11.4%), Honduras (7.8%), China (7.6%), and

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<sup>22</sup> These totals do not include other closures or administrative closures that occurred

Mexico (5.8%). On average, the asylum seekers in Judge Honeyman's courtroom were represented 90% of the time, which is similar to the representation rate of Judge Mary Lee.

It appears that attorney representation was not a significant factor in the variation between these two judges, considering that Justice Lee had a higher percent representation (95%) in her courtroom on average than Justice Honeyman (90%). No available data breaks down the grant rate based on nationality for each individual judge. However, we can compare the percent of each nationality that appeared most frequently in front of each judge. Justice Lee saw approximately the same number of Salvadorans and Mexicans, approximately 40% fewer Guatemalans, and twice as many Hondurans in her courtroom.<sup>23</sup> Additionally, Justice Lee had 13.1% Brazilian asylum seekers who nationally have even lower asylum grant rates than Northern Triangle country immigrants. Justice Honeyman also saw an average of 7.6% Chinese cases (2015-2020), which is the nationality with the highest national defensive grant rate, while Justice Lee had no Chinese asylum seekers.

One might assume that one reason for the variation between these two Philadelphia judges is the nationality of the asylum seekers who made up the majority of their cases. Justice Lee had a higher percentage of asylum seekers from the Northern Triangle countries than Justice Honeyman; Justice Lee also heard a number of cases by Brazilian asylum seekers who typically have lower asylum grant rates in court. At the same time, there may be additional

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<sup>23</sup> **Lee:** Guatemalans:67, Salvadorans:48, Hondurans:58, Mexicans:18

**Honeyman:** Guatemalans:94, Salvadorans:45, Hondurans:30, Mexicans:23

factors that contributed to the variation between the judges' decisions which I will focus on in the following chapter.

Even with an established understanding that the nationality of the asylum seekers in both Lee and Honeyman's courtrooms leads to variation between grant rate, the difference in the two justices' grant rates is startling. This disparity, I believe, highlights the role of judicial subjectivity in the courts and problematizes what we can learn by merely looking at the difference between the courts' grant rates. Certainly, there will always be subjectivity involved in immigration hearings, as each judge has their own opinion on the validity of the asylum claims made within their courtroom and each case is different. However, a problem arises in the immigration court system when individuals from the Northern Triangle countries with similar cases for asylum experience different outcomes based on which court or judge they're assigned.

This chapter highlighted the fact that although access to attorney representation has proven to be vital in order to attain asylum, unequal access to representation is a persistent challenge for asylum seekers. The data presented outlines that Atlanta attorney representation for Northern Triangle applicants, on average, was lower from 2015-2020 at 83% in comparison to Philadelphia at 96%. This demonstrates a clear discrepancy in access to attorney representation between courts.

In the few years that Atlanta had a higher attorney representation than Philadelphia, the grant rate was still vastly lower in Atlanta. This means that not only does the Atlanta court

offer fewer resources for attorney representation, but also suggests that there must be other factors at play that result in a lower grant rate for asylum seekers in that court.

Variation in representation between courts itself is not sufficient in explaining the variation in grant rates. By this I mean that an asylum seeker must have an attorney to have a chance of gaining asylum; however, this does not guarantee the individual asylum as there are countless other factors that impact grant rate. Attorney representation is thus necessary but not sufficient in attaining asylum.

In the following chapter, I will explore other potential factors that affect variation in grant rate amongst immigration courts as well as discuss attorney representation in more detail. When looking at attorney representation, I'll focus on how detention, geography, and nationality impact access to attorney representation and case outcome.

## Chapter Four Causes of Variation in the Immigration Court System

*“I have been hiding ever since I got back. The fact is I can’t go back anymore to live in my mom’s house because she said they have been threatening my family. I can’t go back there because if I go back there my whole family is in danger, especially my kids.” - Andrea, Guatemalan migrant denied asylum and deported<sup>24</sup>*

The purpose of this chapter is to both look closer at the impact of attorney representation on grant rate and explore other possible factors that lead to variation among immigration judges. In chapter three, I analyzed attorney representation after isolating the nationality of asylum seekers between the Atlanta and Philadelphia courts. In doing this, I demonstrated that the asylum seekers in Atlanta’s court had lower representation than asylum seekers assigned to the Philadelphia court. In order to better understand access to representation, I’ll first begin by looking at the *National Study of Access to Counsel in Immigration Court* that discusses attorney representation in more detail. I’ll then transition to focus on other factors that are involved in variation.

An asylum case ending up in one court versus another should not have a significant impact on the decision outcome and on grant rates overall. However, all of the data points to the conclusion that this is unfortunately the case and has been for quite some time. In *Refugee Roulette: Disparities in Asylum Adjudication*, the authors found that a “Chinese asylum seeker heard before the Atlanta Immigration Court had a 7% chance of success on her asylum claim, as

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<sup>24</sup> Cantor, Guillermo, and Tory Johnson. “Detained, Deceived, and Deported.” *American Immigration Council*

compared to 47% nationwide. Moreover, if this same asylum seeker had presented her case 400 miles to the south, before the Orlando Immigration Court, she would have a 76% chance of winning asylum, over ten times the Atlanta grant rate” (Ramji-Nogales, Schoenholtz, and Schrag, 2007). Although this specific example focuses on Chinese asylum seekers, the variation in grant rates is similar for asylum seekers of other nationalities, including those from Northern Triangle countries.

The *National Study of Access to Counsel in Immigration Court* looks at immigration court data of over 1.2 million cases from 2007-2012. I will be focusing on this data set to build on my earlier conclusions about how attorney representation affects grant rate. During this six-year time period, 37% of all immigrants secured representation compared to only 14% of immigrants held in detention. For those that did attain representation, they were fifteen times more likely to be granted some form of relief and five and a half times more likely to gain relief from removal.<sup>25</sup> Additionally, ninety-five percent of immigrants who were granted relief between 2007 and 2012 were represented by counsel (Eagly and Shafer, 2015). Moving forward, I will focus on how detention, geography, and nationality impact access to attorney representation and case outcome.

In chapter two, I discussed the detention facilities run by ICE where defensive asylum seekers are held as they await their credible fear interviews. If an asylum seeker is not released on parole or bond, they also are required to wait in detention until their court hearing

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<sup>25</sup> Forms of relief from removal don't just include asylum; Some other examples include voluntary departure, cancellation of removal, adjustment of status, stay of removal, and administrative appeal (EOIR).

(Johnson, 2007). Whether or not an immigrant is required to remain in detention greatly impacts their chances of obtaining counsel in court. According to the national study, while 66% of non-detained respondents were represented, only 14% of those detained were able to access counsel (Eagly and Shafer, 2015). Those held in detention are faced with an extreme lack of resources and are often unable to afford bond or an attorney to represent them. Additionally, Eagly and Shafer found that detained immigrants were less likely than non-detained immigrants to be granted additional time before their hearing to acquire counsel (2015).

The majority of detention centers are located in rural areas far outside any metropolitan area. The inaccessible location of these detention centers as well as rural courts point to the importance of geography as a factor that impacts access to representation. Representation rates were found to vary dramatically across courts, with the rural areas and small cities having far less attorney representation for asylum seekers. This also plays a role in disproportionately affecting immigrants in detention because approximately one-third of detained cases are heard in rural locations (Eagly and Shafer, 2015). Even though a detained asylum seeker is permitted to have their attorney visit them in detention, it is often difficult to find an attorney who will take the time to travel to the area.

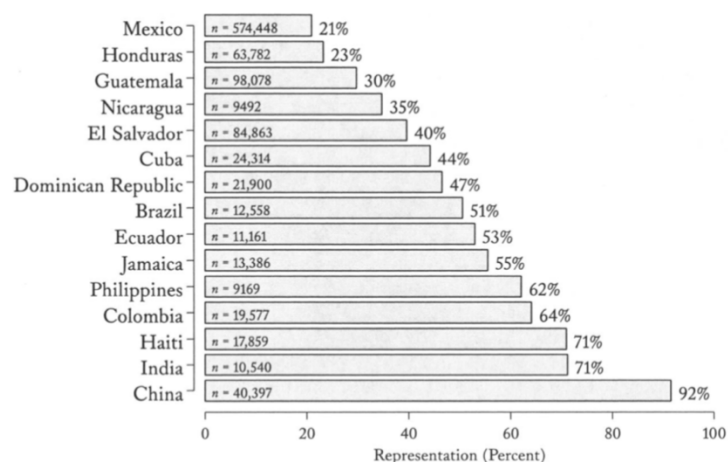
This creates a formidable barrier to accessing counsel because of the lack of available and willing attorneys. The majority of immigration attorneys have their practices in the same locations as high-volume courts, which are predominately in larger cities. This has left smaller cities with little to no representation. For example, the Lumpkin GA immigration court

completed 42,006 removal cases in the study's period from 2007-2012 and did not have a single practicing attorney (Eagly and Shafer, 2015).

In addition to detention and geography, the last factor analyzed in this study was the nationality of the immigrant represented in court. Nationality is correlated to different factors that contribute to the uneven distribution of attorney representation, including economic status, strength of social networks amongst immigrant communities, and detention. With regards to economic status, individuals of certain nationalities like those from Northern Triangle countries are often fleeing countries with little to no economic opportunity and therefore arrive in the United States with nothing. These asylum seekers are then unable to afford an attorney to better their chances in court. As seen in the figure below, the Northern Triangle countries were among the top 5 least represented nationalities in this study.

2015] *A National Study of Access to Counsel in Immigration Court* 45

Figure 12: Representation Rates Among Nationalities with Greatest Number of Cases Decided, 2007–2012



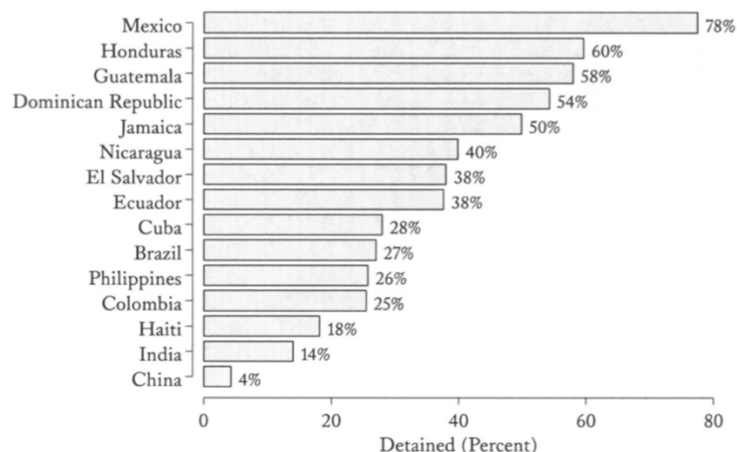
(*National Study of Access to Counsel in Immigration Court*, 2016)



Additionally, the strength of social networks amongst immigrant communities could be another reason we see some nationalities more represented than others. By social networks, I mean asylum seekers who have family or friends already present in the United States to help them navigate immigration court. This social network will have individuals who have been through the court system and can help connect the asylum applicant with attorney representation while also emphasizing its importance. Lastly, as I discussed in chapter two, an asylum seeker must provide the name and residence of a family/friend they can stay with until trial. Therefore, having a social network can also help get an asylum seeker out of detention and ensure a better shot at representation.

Certain nationalities are detained more often than others, which also leads to less opportunity for representation. Asylum seekers from Northern Triangle countries are among the nationalities with the highest detention rates, which begs the question of whether or not the Latino community is disproportionately targeted for immigration detention through racial profiling.

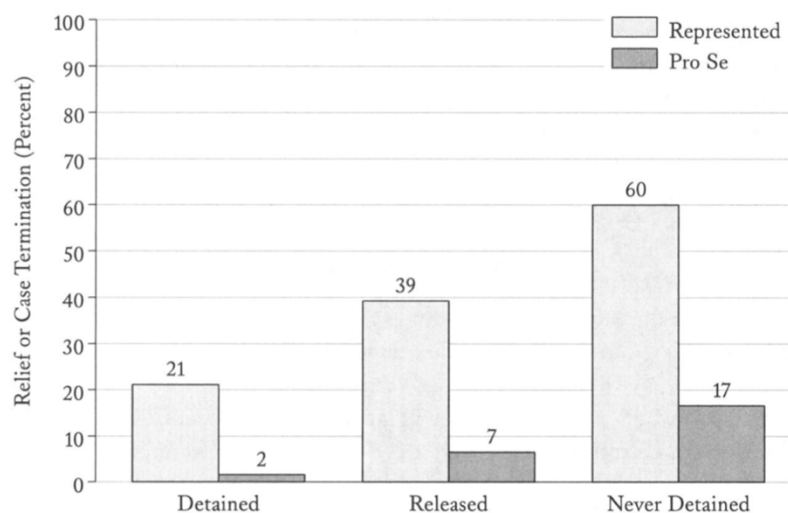
**Figure 13: Detention Rates Among Nationalities with Greatest Number of Cases Decided, 2007–2012**



*(National Study of Access to Counsel in Immigration Court, 2016)*

We've now discussed how detention, nationality, and geography all have an impact on attorney representation. In the figure below, the findings suggest that having an attorney present to help defendants navigate the complex court system increases the chances of not being removed. Of course, it's important to point out that there's always a possibility that immigration attorneys choose to represent those whose cases they believe they can win. Regardless, attorneys are proven to increase asylum seekers' chances of a successful case outcome.

Figure 14: Successful Case Outcomes (Termination or Relief) in Removal Cases, by Detention and Representation Status, 2007–2012<sup>170</sup>



*(National Study of Access to Counsel in Immigration Court, 2016)*

Based on these findings, I believe the government should provide attorney representation for asylum seekers in court. The regression analysis conducted in this study showed that the odds of being granted asylum were fifteen times greater for immigrants that had representation as compared to those without. For those defendants that did not secure representation from 2007-2012, only 2% prevailed in their cases (Eagly and Shafer, 2015).

Government-appointed representation would provide equal access to counsel, assist with current case backlog and level the playing field. No individual's economic status should determine their case outcome because they weren't able to afford an attorney. Those without the economic means to secure representation are fifteen times less likely to be granted asylum than those who can afford representation. This is why government appointed representation is needed to ensure a fair trial for all asylum applicants.

In regards to case backlog, immigration attorneys would greatly assist in increasing the speed at which cases are heard. In 2011, immigration judges surveyed in this study almost unanimously agreed that they're able to adjudicate cases "more efficiently and quickly" when the respondent "has a competent lawyer" (Eagly and Shafer, 2015). As discussed previously, there is currently an average backlog of over 2,000 cases per immigration judge (National Immigration Forum). The immigration system is in desperate need of more resources to adjudicate cases quickly, and court-appointed attorneys would greatly help in alleviating the backlog.

### **Factors that Affect Variation**

While attorney representation is often the most discussed factor in asylum grant rate variation, there are additional factors that most certainly make a difference. In chapter three, we compared individuals of the same nationality and similar attorney representation rates between Atlanta and Philadelphia and found that there was a large gap in variation. So, what other factors could be relevant?

The US Government Accountability Office (GAO) conducted a study titled *Variation Exists in Outcomes of Applications Across Immigration Courts and Judges*. The objectives of this study were the following: 1) Describe the extent of variation in the outcomes of completed asylum application over time and across immigration courts and judges 2) Discuss the factors associated with variability and in the outcomes of completed asylum applications 3) Examine the extent to which the Executive Office for Immigration Review (EOIR) has taken action to facilitate access to legal resources, including representation, for asylum applicants. (GAO,

2016). The GAO looked at EOIR data from 1995-2014 of both affirmative and defensive cases to identify the factors affecting variation.<sup>26</sup> As it turns out, the factors that GAO identified in affecting variation were somewhat different for affirmative and defensive asylum applicants in court. In order to ensure these factors were statistically significant, GAO held constant certain factors like whether or not applicant was represented by counsel, applicant nationality, and judge gender that could affect findings.

For affirmative asylum applicants in court the following factors were identified as affecting case outcome: attorney representation, the date of affirmative asylum application, the presidential administration under which the judge is appointed, judges' years of experience, and whether the asylum seeker had dependents. Represented affirmative applicants were found to be granted asylum at a rate of 3.1 times higher; those who applied for asylum within one year were granted asylum at a rate of 2.4 times higher than those who applied later; and applicants with dependents were granted asylum 1.7 times more than those without dependents. The presidential administration under which the judge was appointed also turns out to be relevant: judges appointed during the administrations of George H.W. Bush, Reagan, Carter, Nixon, and Johnson were generally more likely to grant asylum than those judges appointed during the administrations of Presidents Clinton, George W. Bush, and Obama. This could have to do with the large influx of immigrants in recent years that has most heavily impacted particular presidential administrations. Finally, a judge's years of experience was a

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<sup>26</sup> When we discuss affirmative cases in immigration court, we are referring to cases in which the immigrant applied through the affirmative process and was denied by an asylum officer. The asylum seeker is now in the defensive process but is still categorized as an affirmative asylum applicant in court.

factor found to affect grant rate for affirmative applicants. GAO identified that judges with more experience were less likely to grant asylum. In fact, 7 years more experience led to being 28% less likely to grant asylum.

The factors that affect affirmative applicants align to some degree, although not entirely, with those affecting defensive asylum applicants. Attorney representation, whether or not the applicant had dependents, the date of the defensive application, and judge gender were all factors found to affect defensive applicants. However, unlike affirmative applicants, the presidential administration under which the judge is appointed and their years of experience were not found to be statistically significant factors in affecting case outcomes. The GAO statistics demonstrated a 1.8 times higher chance of being granted asylum with representation as well as a 1.7 times higher chance if the defensive applicant had dependents. If the defensive applicant applied for asylum within one year of entering the US, they had a 5 times higher chance at being granted asylum. This was stated to be “substantially larger than the association for affirmative applications made during the same time, and the difference is statistically distinguishable from zero” (GAO, 2016). However, judge gender was found to be statistically significant in affecting case outcome for defensive asylum seekers, with female judges granting asylum at a rate of 1.4 times higher than male judges in immigration court.

So far we have discussed many factors that impact case outcome including attorney representation, nationality, the date of affirmative asylum application, the presidential administration under which the judge is appointed, the judge’s years of experience, judge gender, and whether the asylum seeker had dependents. A combination of all of these factors

is at play within the immigration system and all contribute to the variation in grant rate we see amongst both courts and individual justices. However, it is also important to acknowledge here that there are additional factors that could impact this variation for which we have no data. GAO's study pointed out a lack of data regarding the gender of the asylum seeker, whether or not they're a juvenile, key characteristics in regard to claim of persecution, and the underlying merits of each individual asylum claim.

This raises the additional factor of judicial subjectivity. How do we know the extent to which a justice's personal views on immigration impact their decisions? Could judges subconsciously make asylum grant decisions that preference approval for individuals of certain nationalities or genders?

The GAO study looked into estimated asylum grant rate across courts (see below). In this analysis, GAO held the following various characteristics constant: applicant country of nationality, applicant language, attorney representation, whether the applicant had dependents, whether the applicant had applied for asylum within one year of entering the US, whether the applicant was detained, judge gender, judge years of experience, presidential administration under which judge was appointed, circuit court, and court and judge asylum caseload. The results give a range of potential asylum grant rate between two courts, one on the high end and the other on the low end for grant rate. For an affirmative asylum applicant, there was a 29-percentage point range between Court A and Court B, with court A having a 19% grant rate and Court B 48%. As for defensive asylum applicants, there was a 38-percentage point range with Court A at 18% and Court B at 56% (See Table 3 below). With so many factors

held constant that could potentially impact asylum grant rate, why do we still see such a large variation in grant rate between immigration courts?

	<b>Court A</b>	<b>Court B</b>	<b>Range of potential asylum grant rate<sup>a</sup></b>
Applicant X (affirmative asylum)	19%	48%	29 percentage points
Applicant Y (defensive asylum)	18%	56%	38 percentage points

Source: GAO analysis of Executive Office for Immigration Review data. | GAO-17-72

Note: We held the following characteristics constant: applicant country of nationality, applicant language, whether the applicant was represented by counsel, whether the applicant had dependents, whether the applicant sought asylum within one year of entry into the United States, whether the applicant was ever detained (defensive asylum only), judge gender, judge years of experience, presidential administration under which judges were appointed, circuit court, and court and judge asylum caseload.

<sup>a</sup>We would expect the asylum grant rate to fall within this range 95 percent of the time if a court heard an asylum claim having the same, average characteristics we measured. See appendix III for more details on this estimate.

*(GAO analysis of EOIR data, 2016)*

I can state confidently that there is significant subjectivity involved in the decisions of these immigration justices with many having varying personal opinions on immigration as a whole. To be sure, there is discretion involved in every courtroom decision; however, these statistics demonstrate the need for intervention to better standardize asylum grant rate.

In chapter three, we saw many examples where individuals of the same nationality and similar attorney representation experienced vastly different yearly grant rates between the Atlanta and Philadelphia courts. We also compared justices in Philadelphia's court who experienced a similar percent of both attorney representation and individuals of the same nationalities in their court room yet they had an immense difference in grant rate. While some of the other factors we discussed, such as a judge's years of experience or gender, could come into play in these cases, it seems reasonable to assume that with such a large gap in asylum grant rate, subjectivity is at play.



## **A Call for Internal Reform**

I discussed many factors from GAO's study that affect grant rate variation yet are difficult to control.<sup>27</sup> While we can make judges aware that these factors have been proven to impact grant rate variation, there is little we can do to truly change their impact on grant rate.

However, there are other factors that impact grant rate variation where we can develop actionable reform including: government appointed attorney representation, standardized judicial training, and the disbursement of educational resources to asylum seekers. I'll address each of these as I conclude this chapter.

### *Government Appointed Representation*

There should be government-appointed counsel in immigration court. Asylum seekers assigned an immigration court in a rural area with no practicing attorneys as well as those applicants detained should not have to suffer from a lack of resources. It should be a priority of the US EOIR to adjudicate fair trials where asylum seekers can present their cases in full. This solution will take a huge weight off immigration judges who are already extremely backlogged with cases. Additionally, if the government provided counsel specifically for immigrants unable to afford representation, the EOIR wouldn't have to continue hiring as many full-time immigration justices to take on the case backlog. In summary, providing representation would be both the most ethical and financially beneficial.

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<sup>27</sup> Examples include the presidential administration under which the judge is appointed, judge gender, judge years of experience, and whether or not the asylum seeker has dependents

### *Yearly Justice Review & Standardized Training*

In addition to government appointed attorneys, the subjectivity amongst immigration judges could be addressed through yearly reviews of justices' asylum decisions and a formalized training program. Currently, when justices grant asylum at a much higher or lower rate than the other justices on the same court, nothing is done to address this matter. We simply accept that some judges on the same court have average grant rates that differ by 40-50%. I believe there should be an end-of-year review where immigration judges' asylum decisions are analyzed in comparison to both those justices serving on their court and nationally. The judges should see this data as well so they can better understand where they stand in comparison. These year-end studies would be a great way to facilitate conversation amongst courts as well as highlight justices who are consistently granting asylum far outside the average grant rate of justices with similar caseloads.

Standardized training for immigration judges with workshops organized around case examples would complement the yearly review process. These workshops would allow justices to see their colleagues think through various asylum claims and learn from each other. Having justices participate in yearly discussions on how their decisions compare to other justices as well as implementing a standardized training would help create more consistency in asylum grant rate. This training should also include an unconscious bias training to mitigate internal biases that may lead to favoring individuals based on certain characteristics like nationality or gender. Finally, immigration justices should be educated on the many factors that affect asylum

grant rate. Better understanding these factors will lead to more consistency in grant rate decisions.

### *Resources for Asylum Applicants*

Navigating the US legal system is complex and being tasked with that as an immigrant proves to be even more difficult. When an asylum seeker files an asylum claim, they should be sent information immediately that emphasizes the importance of attorney representation and helps connect them resources securing representation. It is vital that these resources be given to asylum seekers who are detained as well. There are significant disparities in attorney representation between those asylum seekers who were detained and those who weren't.<sup>28</sup>

In addition to emphasizing attorney representation, resources given to asylum seekers should also highlight the positive impact on grant rate success that filing for asylum within one year of entering the country has. While providing this information after the filing isn't helpful, perhaps if more members of immigrant communities were made aware that defensive asylum seekers who filed within a year had a five times better chance of being granted asylum, more would apply within that time frame (Eagly and Shafer, 2015).

Perhaps the most important point that I'd like to make about access to resources is that these resources must be available in the applicant's native language. Regardless of the asylum seeker's ability to speak English, it is important that the information be translated so there is no

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<sup>28</sup> . As discussed previously in this chapter, 37% of all immigrants secured representation compared to only 14% of detained from 2007-2012 (Eagly and Shafer, 2015).

confusion. The amount of legal jargon and complex vocabulary involved in discussing these processes leaves much room for misinterpretation and decreases the likelihood of a successful outcome.

In this chapter, I have proposed solutions that responded to the grant rate variation in immigration court. In the following chapter, I will conclude with a call to action that encapsulates my findings as a whole and suggests ways to reduce subjectivity in the immigration process.

## Chapter Five Conclusion: A Call to Action

*“As a mother the only thing I really want is for my children to be safe and happy. As their mother, I’d give anything to give them the opportunity to not be struggling through life here, to not be in danger here. I’m not the one that matters. Even if it means I have to be here alone, because we don’t have the resources for us all to make that journey again”-Ana, Guatemala migrant<sup>29</sup>*

I was driven to write this thesis after noticing immense variation in asylum grant rate in the immigration court system. I was determined to identify the reasons causing variation and develop actionable solutions to ensure Northern Triangle asylum seekers have an equal chance at asylum. Throughout my research, I recognized that subjectivity, structural inefficiencies, and unequal access to resources in the immigration system negatively impact Northern Triangle asylum seekers at every stage of the asylum process. I believe the best way to address these issues is, first, for the United States to reflect on how current immigration policies are externally impacting asylum seekers attempting to enter the US. Second, I believe the United States should shift its focus to the immigration courts and prioritize reducing, to the degree possible, the role of subjectivity currently present. Third, I propose that attention be given to the structural inefficiencies present in the asylum system. Finally, I support the increase of equal access to case resources such as translation and interpretation, and representation. In addition to these recommendations, returning to and building on discussions in previous chapters, I close with a call to action.

The first set of actions has to do with US immigration policy. Current measures in place to deter immigration, such as metering, Migrant Protection Protocol, and the Safe Third

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<sup>29</sup> Cantor, Guillermo, and Tory Johnson. “Detained, Deceived, and Deported.” *American Immigration Council*

Countries Agreements, should all be eliminated. These actions both wrongly deter many asylum seekers and also incentivize migrants who travel to the US-Mexico border to attempt illegal entry. Migrants know there is a high likelihood they'll be stranded in Mexico for months, either because of metering or as they wait in Mexico for their case to be heard in the United States because of MPP. Because of this, it's much more likely they will attempt to enter illegally (Sigelmann, 2019). Instead of making the asylum process more difficult for asylum applicants and incentivizing illegal entry, the United States should develop a more rational incentive structure and build out a better border infrastructure to manage the influx of asylum applicants. Investing in better infrastructure and labor supply at ports of entry along the US-Mexico border is the best way to incentivize legal entry as well as give asylum seekers facing persecution in their home countries the chance for their cases to be heard.

A commitment to increasing staffing levels is imperative. Currently, there is a 4,000-person staffing shortage for Customs Border Patrol (CBP) and \$5 billion in infrastructure needs. Eliminating long wait times and reforming harsh immigration policies will encourage legal entry. Additionally, over 80% of hard drugs seized at the border were at ports of entry, which means that investment in labor supply and infrastructure will also help keep drug smuggling down while better managing migration flows (Sigelmann, 2019).

In addition to actions aimed at increasing capacity to accept asylum seekers at the border, the United States should financially invest in the core problem areas leading to the large influx of migration from the Northern Triangle countries and prioritize increasing financial assistance for their sustainable development. The United States needs to directly target the

problems leading to migration, such as climate change, scarce economic opportunity and gang violence, in order to see long-lasting results. By anchoring potential migrants to their communities and helping fund the resources to give them a sustainable future, the United States can both alleviate tension at the border and help residents of the Northern Triangle countries prosper.

Investments in climate-resilient agriculture production as well as economic development programs that help increase the number of jobs in the region are all sustainable ways to provide a lasting impact. The Trump administration cut out targeted financial aid of this kind, despite the fact that it had proved to be beneficial in the past. One example is a program called Climate, Nature, and Communities of Guatemala that was founded in 2014 and USAID-financed. When the Trump administration shut the program down in 2017, it was showing promising results of helping rural Guatemalans respond to climate change through reforestation, water conservation, and crop diversification (Sigelmann, 2019).

Factors such as gang violence, climate change, and low economic opportunity are all contributing to migration from this region. Although the United States doesn't yet recognize these as grounds for asylum, we must acknowledge that there is a grave humanitarian crisis occurring. Residents of the Northern Triangle countries are fleeing to the United States in hopes of safety and economic opportunity. However, these migrants have all been met with the "zero tolerance" perspective that the Trump administration has established in the immigration process.

Although there are numerous policy recommendations to be explored, some alternative options include investing in labor supply and infrastructure at ports of entry as well as increasing sustainable financial assistance in the Northern Triangle countries. These options will provide long-term solutions that will help both benefit Central American immigrants as well as the environment while alleviating stress at US-Mexico border.

### **Reducing Subjectivity in the Asylum Process**

Subjectivity plays a large role in negatively impacting grant rate for Northern Triangle asylum applicants because there are numerous points in the process when judges or immigration officials must make a judgement call. Although it is impossible to eliminate the moments of interpretation and discretion completely, as they are an inherent part of the judicial process, the United States should attempt to better standardize the asylum process so an asylum applicant doesn't experience radically different case outcomes based on which court or judge they're assigned. I believe the best way to address this subjectivity in the immigration system is through the following two solutions: 1. Involve multiple asylum officers in credible fear interviews 2. Conduct a yearly immigration judge review and standardized training.

In chapter two, I discussed the asylum interviews that take place in both the affirmative and defensive process. Within both processes, an asylum officer determines if the asylum applicant has a credible fear of persecution and decides whether or not they meet the definition of a refugee. This life-changing decision is then left up to one asylum officer and whether or not they believe the applicant expressed credible fear. It is understandable that part of this process will be subjective because much of the time there isn't much evidence of the



circumstances in which the asylum seeker is fleeing, and therefore an interview is the only way to determine whether or not the asylum seeker qualifies for asylum. However, the vague language used to guide the decision of the asylum officer gives them complete power to make whatever decision they think best in a situation. These interpretations can be dangerous because if the asylum officer makes the wrong decision and sends the applicant back to their home country, they could be putting that individual at risk of a life threatening situation. This is why I believe multiple asylum officers should have a part in interviewing asylum applicants. The officers can then work together to better assess the asylum applicant's situation and apply their training together to reach a decision.

In chapter three, my side-by-side comparison of the Atlanta and Philadelphia courts proved that even in years where attorney representation percentages were similar between the courts, Atlanta still lagged tremendously in grant rate. I also called attention to the GAO study of EOIR data in chapter four where over ten factors known to impact grant rate were held constant and yet the results still demonstrated a 38-percentage point range with Court A at 18% and Court B at 56% (*GAO analysis of EOIR data*, 2016). These observations led me to hypothesize that judicial subjectivity plays a role in immigration courts.

I have argued that the most effective way to combat this subjectivity is to conduct yearly judicial reviews of the immigration judges as well as require standardized training for all judges. A yearly review of each judge would allow both the court and the judge themselves to better understand how their decisions compare to both the judges on their court and nationally. By doing this, the judges that prove to be outliers with regards to their asylum grant

rate could be identified. Additionally, the standardized trainings would be a beneficial way to conduct case example workshops and encourage conversation amongst judges on how to go about various asylum claims. I believe the judges should also have to take part in an unconscious bias training to help combat judges making decisions they may not realize are motivated by their own personal beliefs or opinions.

### **Rethinking Structural Inefficiencies Present in the Asylum System**

There are structural inefficiencies in the immigration system that are unjust and in need of reform. First, the United States should not subject asylum seekers who legally request asylum at the border to the same expedited removal process and detention facilities as those who attempt illegal entry. Second, the Executive Office for Immigration Review needs to be disconnected from the Department of Justice to ensure that political association and influence do not affect immigration court outcomes. I'll elaborate my concerns by drawing on arguments made earlier in the thesis.

The setup of the current US immigration system encourages illegal immigration because if one attempts illegal entry and isn't caught, they effectively have two chances at asylum because they can first apply for the affirmative process. If an individual is caught attempting to illegally enter the United States and they claim fear of persecution, they then go through the same expedited removal process as someone who attempted legal entry. This means that if they pass their credible fear interview, they're in the same process they would've been had they entered the United States legally.

Thus, the structure of our current system treats those fleeing persecution and applying for asylum legally the same as those who attempt illegal entry. Additionally, those apprehended at the border after legally requesting asylum are held in detention. Even though these individuals did nothing wrong, they find themselves in detention facilities many times housed in private prisons alongside criminals as they await their credible fear interview and/or trial.

The United States must revise the expedited removal process so that it does not reward illegal entry and punish those who attempt to enter legally. I believe that those who legally request asylum should not be held in detention facilities at all. Asylum seekers can be monitored through tracking devices while awaiting trial, which would greatly decrease the amount of government dollars needed to upkeep detention facilities. Money saved could be reinvested in infrastructure needs at the border and the hiring more CBP officers. For those asylum seekers who do not have family or friends, temporary housing should be made available to immigrants so they are not held in detention or a private prison when no crime was committed. Furthermore, they should have access to attorney resources which are often not made available to those in detention facilities.

In addition to addressing issues related to expedited removal, I believe that there are structural issues that warrant attention such as the placement of the EOIR within the Department of Justice. There is an inherent conflict of interest in housing the EOIR, which is charged with judicial action, within the Department of Justice, which primarily focuses on law enforcement. Therefore, I believe the EOIR should be separated from the DOJ and established as an independent court. This would result in immigration judges making independent decisions

that are less predicated on politics than they may be currently. In chapter four, we saw that saw that one cause for variation in asylum grant rate was the presidential administration under which the immigration judge was appointed. This demonstrates that the DOJ and therefore the sitting president has too much political influence on the EOIR and the decisions of the immigration judges. The New York Bar published a *Report on the Independence of Immigration Courts* that discussed this issue:

The EOIR's lack of independence as a sub-agency of DOJ is apparent in the actions that the Trump administration has undertaken to reshape EOIR. Such actions have included hiring Immigration Court and Board of Immigration Appeals judges who appear to favor more restrictive immigration policies, issuing directives to IJs restricting their ability to control their own dockets and speeding up decisions at the expense of providing immigrants due process, using the power of the Attorney General to certify BIA decisions to himself with the purpose of establishing restrictive policies, and changing long-standing precedent to limit immigrants' access to humanitarian forms of relief. The inevitable and foreseeable result of these various actions is to tip the scales towards more and faster deportations, at the expense of due process.

The actions taken by the Trump administration would seem to indicate that that housing the EOIR within the DOJ results in a biased, inefficient immigration court system. Immigration judges should be permitted to reach independent asylum decisions without any associated political pressure. The sitting president has much power in regards to immigration reform through his control on refugee admissions and executive orders, but this power should not extend to the courtroom.

### **Increasing Equal Access to Resources in Immigration Court**

In order to ensure a fair trial for asylum seekers, government appointed attorney representation should be made available and better access to resources should be arranged. Providing attorneys for asylum seekers unable to afford their own would mitigate the immense grant rate variation in the courts. Attorneys would also assist with case backlog and alleviate pressures on immigration judges by helping them adjudicate cases more quickly.

In addition to providing counsel, it is vital that asylum seekers are provided with information that helps them better navigate the immigration system. Asylum seekers need to understand the importance of attorney representation and filing for asylum within one year of entering the United States for the affirmative process. If asylum seekers were given data that allowed them to better understand the various factors that could affect their chances at asylum, they could then take the steps necessary to build the best case for themselves. Additionally, all of this information and data needs to be provided in their native language so it is ensured the applicant fully understands the information and has an equal chance for a fair trial.

## Epilogue

As I conclude my research, the immigration system is changing. The Biden Administration has already released many executive orders that will positively impact Northern Triangle asylum seekers as well as all refugees entering the country. The President has also released proclamations on the topics of border funding and the reversing of discriminatory bans on United States entry.

I want to begin by highlight the following three executive orders as being the most relevant to my thesis: 1) Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border; 2) Executive Order on Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration; 3) Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans.

The first executive order directly impacts Northern Triangle asylum seekers by directing an interagency group to address the root causes for migration from El Salvador, Guatemala and Honduras. It also increases access to visa programs for individuals in the Northern Triangle. Finally, this executive order directs agencies to review whether to terminate expedited removal procedures, Migrant Protection Protocols, and all current rules and regulations impacting the adjudication of asylum claims to ensure they are consistent with international standards. For now, the DHS has suspended any new enrollments in MPP.

The second executive order describes the Biden Administration's support of the US Refugee Admissions Program, mentioning that it should be "rebuilt and expanded." This executive order discusses the different options for protection and resettlement of individuals displaced from climate change. It is possible that we'll see an increase in the number of Northern Triangle immigrants granted asylum under these terms in coming years due to the climate crisis in the region.

The final executive order, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, looks at barriers that impede access to immigration benefits and actions that fail to promote access to the immigration system. The President has assigned a task force to coordinate integration and inclusion efforts for immigrants including refugees.

In addition to the executive orders, Biden has also released proclamations to reform the immigration system.<sup>30</sup> Two that relate most directly to my research include the 1) Proclamation on Ending Discriminatory Bans on Entry to the United States and the 2) Proclamation on the Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction.

The first proclamation having to do with ending discriminatory bans relates to revoking the Trump administration's "Muslim Ban" or EO 13780 discussed in previous chapters. These

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<sup>30</sup> The difference between an executive order (EO) and a proclamation is that an EO is backed by the force of the law while proclamations are not. Proclamations function to promote national concern by demonstrating that the president attaches importance to the subject at hand. (Proclamations and Endorsements, 2008)

previously declared “high risk” groups will now be eligible for refuge in the US. The second proclamation listed revokes Proclamation 9844 which President Trump had previously used to allow for the diversion of funds to construct barriers at the border under his “emergency powers.” Under Biden’s proclamation, all border construction will be halted to the legal extent possible.<sup>31</sup>

Clearly, Biden has been busy, as all of these executive orders and proclamations have been released within his first two months in office. He has signaled from the very beginning of his presidency that immigration reform is a key area of concern. While the road to reform is long, Biden’s changes show a commitment to continued improvement of the system and an understanding of the human element involved in immigration decisions. Additionally, these changes by the President reflect my discussion in chapter two on the sitting President’s power over the immigration process. The stark contrast between the Biden and Trump administration demonstrate that this power can be used in very different ways.

Looking to the future, Biden’s proposed immigration bill focuses on both external and internal issues relating to immigration. Externally, the President’s plan aims to address root causes of migration from the Northern Triangle countries through financial assistance. Internally, Biden will focus on repairing the immigration court system and eliminating the one-year deadline to apply for asylum through the affirmative process.

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<sup>31</sup> Or in other words, without breaking any current contracts already in place from the Trump administration.



In reference to tackling the migration drivers in El Salvador, Guatemala, and Honduras, Biden's proposes a \$4 billion interagency plan in financial assistance to these countries. This proposed plan will work to reduce violence, poverty, and corruption. By addressing these issues, the United States can decrease the number of individuals fleeing their home countries and therefore reduce backlog at the border. Additionally, the bill looks to create "Designated Processing Centers throughout Central America to register and process displaced persons for refugee resettlement and other lawful migration avenues—either to the United States or other partner countries."

Addressing these external issues leading to migration from the Northern Triangle countries is as important as internally repairing the immigration court system. Some highlighted areas for reform that are related to my research for this project include the bill's proposed training expansion for immigration judges and funding for legal orientational program and counsel for "children, vulnerable individuals, and others when necessary to ensure the fair and efficient resolution of their claims." Biden's bill also calls for the elimination of the one-year deadline to apply for asylum through the affirmative process in hopes of reducing case backlog. It proposes the increase of visa protections so individuals can remain in the United States legally until they are able to apply. This will ensure that immigration judges have a longer amount of time to adjudicate cases, thus leading to an increased number of fair trials. These particular proposed changes are a step in the right direction to decreasing variation in asylum grant rate through judicial training and government funding of attorney representation.

While there are many changes needed to address both the subjectivity and variation in embedded in the immigration system, I am optimistic for future. Under the Biden administration, the United States has already seen many positive changes to both the refugee and asylee processes. I close by emphasizing the importance of listening to immigrants when making change. The epigraphs at the beginning of each chapter remind us that no one knows understands the immigration system better than the immigrants who have experienced it. Moving forward, we must prioritize their voices and learn from their experiences to create systemic change and experience a lasting, effective impact in the immigration system.

## Appendix

## Exhibit 1:

**PROPOSED FY 2021 ALLOCATIONS**

<i>Population of special humanitarian concern</i>	<i>Admit up to</i>
<p>Refugees who:</p> <p>have been persecuted or have a well-founded fear of persecution on account of religion; or</p> <p>who are within a category of aliens established under subsection (b) of Section 599D of Title V, P.L. 101-167, as amended (the Lautenberg and Specter Amendments).</p>	5,000
<p>Refugees who are within a category of aliens listed in Section 1243(a) of the Refugee Crisis in Iraq Act of 2007, Title XII, Div. A, P.L. 110-181, as amended.</p>	4,000
<p>Refugees who are nationals or habitual residents of El Salvador, Guatemala, or Honduras.</p>	1,000
<p>Other refugees in the following groups:</p> <p>Those referred to the USRAP by a U.S. embassy in any location.</p> <p>Those who will be admitted through a Form I-730 following-to-join petition or who gain access to the USRAP for family reunification through the P-3 process.</p> <p>Those currently located in Australia, Nauru, or Papua New Guinea who gain access to USRAP pursuant to an arrangement between the United States and Australia.</p> <p>Those who are nationals or habitual residents of Hong Kong, Venezuela, or Cuba.</p> <p>Those in the USRAP who were in "Ready for Departure" status as of September 30, 2019.</p>	5,000
<b><i>Total proposed refugee admissions in FY 2021</i></b>	<b>15,000</b>

("Report to Congress on Proposed Refugee Admissions 2021")

## Exhibit 2:

**Affirmative Asylum Cases Filed (USCIS) by Country of Nationality:****Fiscal Years 2017 to 2019**

(Ranked by 2019 country of nationality)

Country	2017		2018		2019	
	Number	Percent	Number	Percent	Number	Percent
Total . . . . .	139,917	100.0	106,128	100.0	96,952	100.0
Venezuela . . . . .	27,576	19.7	28,426	26.8	25,210	26.0
Guatemala . . . . .	12,185	8.7	10,192	9.6	9,684	10.0
China, People's Republic . . . . .	16,810	12.0	8,181	7.7	9,640	9.9
El Salvador . . . . .	11,941	8.5	9,140	8.6	5,951	6.1
Honduras . . . . .	7,005	5.0	6,143	5.8	5,609	5.8
Mexico . . . . .	11,931	8.5	6,618	6.2	4,588	4.7
Haiti . . . . .	3,872	2.8	2,958	2.8	3,278	3.4
India . . . . .	4,039	2.9	2,909	2.7	2,957	3.0
Colombia . . . . .	2,659	1.9	2,571	2.4	2,897	3.0
Nigeria . . . . .	2,238	1.6	3,325	3.1	2,760	2.8
All other countries, including unknown . .	39,661	28.3	25,665	24.2	24,378	25.1

Source: U.S. Department of Homeland Security.

## Exhibit 3:

**Defensive Asylum Cases Received (EOIR) by Country of Nationality:****Fiscal Years 2017 to 2019**

(Ranked by 2019 country of nationality)

Country	2017		2018		2019	
	Number	Percent	Number	Percent	Number	Percent
Total . . . . .	144,662	100.0	163,271	100.0	210,752	100.0
Guatemala . . . . .	23,935	16.5	26,965	16.5	41,365	19.6
Honduras . . . . .	21,269	14.7	22,014	13.5	31,649	15.0
Mexico . . . . .	22,473	15.5	24,752	15.2	30,357	14.4
El Salvador . . . . .	38,029	26.3	32,233	19.7	29,779	14.1
Venezuela . . . . .	418	0.3	5,246	3.2	11,623	5.5
India . . . . .	4,729	3.3	7,831	4.8	11,019	5.2
China, People's Republic . . . . .	6,309	4.4	8,091	5.0	6,838	3.2
Cuba . . . . .	584	0.4	1,154	0.7	5,491	2.6
Ecuador . . . . .	4,000	2.8	4,019	2.5	4,431	2.1
Nicaragua . . . . .	611	0.4	736	0.5	3,857	1.8
All other countries, including unknown . .	22,305	15.4	30,230	18.5	34,343	16.3

Source: U.S. Department of Justice.

## Exhibit 4:

**Individuals Granted Asylum Affirmatively or Defensively by Country of Nationality:  
Fiscal Years 2017 to 2019**

(Ranked by 2019 country of nationality)

Country	2017		2018		2019	
	Number	Percent	Number	Percent	Number	Percent
Total . . . . .	26,199	100.0	37,567	100.0	46,508	100.0
China, People's Republic . . . . .	5,550	21.2	6,794	18.1	7,478	16.1
Venezuela . . . . .	550	2.1	5,849	15.6	6,821	14.7
El Salvador . . . . .	3,453	13.2	2,919	7.8	3,212	6.9
Guatemala . . . . .	2,948	11.3	2,322	6.2	2,591	5.6
India . . . . .	671	2.6	1,301	3.5	2,259	4.9
Egypt . . . . .	1,154	4.4	1,566	4.2	2,301	4.9
Honduras . . . . .	2,040	7.8	1,998	5.3	1,819	3.9
Turkey . . . . .	28	0.1	501	1.3	1,799	3.9
Mexico . . . . .	1,028	3.9	1,344	3.6	1,593	3.4
Russia . . . . .	347	1.3	883	2.4	1,408	3.0
All other countries, including unknown .	8,430	32.2	12,090	32.2	15,227	32.7

Note: Data exclude follow-to-join asylees.

Source: U.S. Department of Homeland Security and U.S. Department of Justice.

## Exhibit 5:

**Individuals Granted Asylum Affirmatively by Country of Nationality:  
Fiscal Years 2017 to 2019**

(Ranked by 2019 country of nationality)

Country	2017		2018		2019	
	Number	Percent	Number	Percent	Number	Percent
Total . . . . .	15,639	100.0	24,382	100.0	27,643	100.0
Venezuela . . . . .	482	3.1	5,726	23.5	6,320	22.9
China, People's Republic . . . . .	2,822	18.0	3,747	15.4	4,027	14.6
Egypt . . . . .	1,014	6.5	1,402	5.8	2,156	7.8
Turkey . . . . .	15	0.1	475	1.9	1,739	6.3
Russia . . . . .	288	1.8	765	3.1	1,109	4.0
Guatemala . . . . .	1,998	12.8	1,307	5.4	1,047	3.8
El Salvador . . . . .	2,112	13.5	1,148	4.7	897	3.2
Mexico . . . . .	477	3.1	717	2.9	791	2.9
Nigeria . . . . .	123	0.8	461	1.9	785	2.8
Honduras . . . . .	1,085	6.9	817	3.4	532	1.9
All other countries, including unknown .	5,223	33.4	7,817	32.1	8,240	29.8

Note: Data exclude follow-to-join asylees.

Source: U.S. Department of Homeland Security.

## Exhibit 6:

**Individuals Granted Asylum Defensively by Country of Nationality:  
Fiscal Years 2017 to 2019**

(Ranked by 2019 country of nationality)

Country	2017		2018		2019	
	Number	Percent	Number	Percent	Number	Percent
Total . . . . .	10,560	100.0	13,185	100.0	18,865	100.0
China, People's Republic . . . . .	2,728	25.8	3,047	23.1	3,451	18.3
El Salvador . . . . .	1,341	12.7	1,771	13.4	2,315	12.3
India . . . . .	457	4.3	951	7.2	1,921	10.2
Guatemala . . . . .	950	9.0	1,015	7.7	1,544	8.2
Honduras . . . . .	955	9.0	1,181	9.0	1,287	6.8
Mexico . . . . .	551	5.2	627	4.8	802	4.3
Cuba . . . . .	62	0.6	161	1.2	710	3.8
Cameroon . . . . .	219	2.1	312	2.4	657	3.5
Nepal . . . . .	290	2.7	469	3.6	603	3.2
Venezuela . . . . .	68	0.6	123	0.9	501	2.7
All other countries, including unknown .	2,939	27.8	3,528	26.8	5,074	26.9

Note: Data exclude follow-to-join asylees.

Source: U.S. Department of Justice.

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