



Fraud in the “Credible Fear” Process

Threats to the Integrity of the Asylum System

By Andrew R. Arthur

Since the 2016 presidential campaign, significant attention has been focused on refugees to the United States and the potential dangers that they may pose. Scarce attention has been directed to aliens in expedited removal proceedings with “credible fear” claims, even though they may pose a greater risk to the United States than potential refugees.

Unlike refugees, who are screened before coming to the United States and can be denied refugee status before they enter this country, aliens who enter illegally and claim a “credible fear” of persecution have not been screened before physically entering the United States; as explained below, the process for screening those individuals after they enter the United States is vulnerable to fraud and abuse.

This report examines the incidence of fraud in the asylum application process generally, and the credible fear process specifically, and identifies some of the factors that facilitate that fraud. Asylum is an immigration benefit that allows those who receive it to remain in the United States, work, receive public benefits, and become legal permanent residents and eventually citizens. Because of the low evidentiary burden for receiving asylum, and the difficulty that U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE) attorneys, and immigration judges face in effectively identifying fraud in the asylum application process, asylum can be readily abused by aliens who are not legally eligible for that benefit. Fraud in the asylum process is particularly problematic because it undermines the immigration enforcement system, delays the receipt of protection and public benefits by legitimate asylum seekers, and is susceptible to exploitation by terrorists.

Among the findings:

- Expedited removal is intended to facilitate the removal of aliens who entered illegally or through fraud, and who are apprehended at entry or who have been in the United States for a limited period of time. If an alien successfully asserts a credible fear, however, the alien will likely remain in the United States indefinitely.
- The number of asylum applications received by U.S. Citizenship and Immigration Services (USCIS) has increased significantly in recent years, from 56,912 in FY 2014,¹ to 84,236 in FY 2015,² to 115,888 in FY 2016.³
- In addition to the increase in asylum applications, the number of credible fear cases handled by USCIS increased more than eightfold between FY 2009 and FY 2015.
- The evidentiary burdens for aliens seeking asylum and withholding of removal are lower than for aliens seeking other immigration benefits. In fact, “[t]he testimony of [an] applicant [for asylum and withholding of removal] may be sufficient to sustain the applicant’s burden without corroboration.”
- Although there have been a significant number of high-profile cases involving multiple cases of asylum fraud in recent years, the Department of Homeland Security (DHS) has not completed an assessment of the extent of fraud in the asylum context.
- Aliens with ties to terrorist organizations have attempted to enter illegally and claim asylum fraudulently. Hundreds of aliens to whom the terrorist bar to asylum may apply have been found to have a credible fear.

Andrew R. Arthur is a resident fellow in law and policy at the Center for Immigration Studies.

Introduction

An alien who is seeking to enter and remain in the United States may pursue many different immigration benefits. Family-based visas are available to those with qualifying relatives, and employment-based visas may be pursued by those with needed skills. If an alien has neither an employer nor a family member to file a petition, the alien could pursue a diversity visa through the visa lottery.

For many seeking to enter the United States without a visa, however, an asylum application is the benefit they choose.

An applicant for asylum has the burden to demonstrate that he or she is eligible for that protection.⁴ To satisfy that burden, the applicant must prove that he or she is a refugee.⁵

A “refugee” is a person outside of his or her country of nationality or habitual residence who is “unable or unwilling” to return to that country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁶ Unlike true “refugees”, who must claim that status outside of the United States, an alien must be physically present in the United States or seeking entry into this country at a port of entry in order to apply for asylum.⁷

Much attention has been directed to the issue of refugees from countries of concern, and the potential danger that such individuals may pose to the United States, since the start of the 2016 presidential campaign. Those concerns are legitimate. As Director of National Intelligence James Clapper told a security industry conference in September 2015: “I don’t, obviously, put it past the likes of ISIL to infiltrate operatives among these refugees, so that’s a huge concern of ours.”⁸ Further, as FBI Director James Comey noted, although the refugee screening process has “improved dramatically” since “a number of people who were of serious concern” slipped through the screening of Iraq War refugees, refugees from Syria will be even harder to check because, unlike in Iraq, the United States government has not been collecting information on the local population in that country.⁹ “If we don’t know much about somebody, there won’t be anything in our data,” Comey stated, adding: “I can’t sit here and offer anybody an absolute assurance that there’s no risk associated with this.”¹⁰

Stated succinctly, the vetting process for any given refugee will only be as good as the background information against which that refugee’s claim can be compared. For example, if an applicant claims to have been born in Somalia during that country’s decades-long civil war when there was no functioning government, the applicant will likely have no birth certificate and few if any verifiable documents to establish identity.¹¹ If a Syrian applicant were to offer a document issued in an area of that country currently occupied by ISIS, the validity of the document could not be independently verified.¹²

That said, at least there is a screening process in place for refugees before they come to the United States, and potential refugees can be prevented from entering by denying them travel documents to come to the United States. In the credible fear process, however, the alien is not screened before entering the United States, and there are significant weaknesses and vulnerabilities in verifying the alien’s identity and screening his or her claim for fraud after the alien enters this country.¹³

The Asylum Process and Credible Fear

There are two different processes by which an alien may file for asylum: the affirmative asylum process and the defensive asylum process.¹⁴ An alien physically present in the United States may obtain asylum through the affirmative asylum process regardless of how the alien arrived in the United States, or the alien’s current immigration status.¹⁵ An affirmative asylum application is filed with USCIS, which then schedules a non-adversarial interview (that is, an interview without confrontation by a government attorney) by an asylum officer; if the asylum officer denies the application, the alien can renew the application in removal proceedings before an immigration judge.¹⁶

A defensive application for asylum is filed when an alien is seeking asylum as a defense against removal from the United States.¹⁷ For asylum processing to be defensive, the alien must be in removal proceedings in immigration court.¹⁸ Before an alien can file such an application, the immigration judge must have found that the alien is removable for entry without inspection or on some other ground.¹⁹ Those proceedings are adversarial, and the United States is represented by an attorney from ICE.²⁰

Fraud in the Asylum Process Generally

Fraud in the asylum process is not a “victimless crime”. As the Government Accountability Office (GAO) has noted: “[Granting asylum to an individual with a fraudulent claim jeopardizes the integrity of the asylum system by enabling the individual to remain in the United States, apply for certain federal benefits, and pursue a path to citizenship.”²¹ In addition, fraudulent asylum applications delay the consideration of other, more meritorious applications, and impede the granting of benefits to aliens who are in legitimate need of protection. Even more seriously, as discussed below, terrorists have also exploited the asylum system through fraud to remain in the United States and do harm to the American people.

Due to its surreptitious nature, it is impossible to measure the extent of fraud in the asylum process. As Denise N. Slavin, then-vice president of the National Association of Immigration Judges, told the *New York Times* in 2011, however: “Fraud in immigration asylum is a huge issue and a major problem.”²² In perhaps the most substantive attempt to examine asylum fraud, USCIS’s Fraud Detection and National Security Directorate (FDNS) partially completed an asylum-based Benefits Fraud and Compliance Assessment (BFCA).²³ That BFCA was described in depth by Louis D. Crocetti, Jr., former associate director of FDNS, during testimony before the House Committee on the Judiciary’s Subcommittee on Immigration and Border Security in February 2014.²⁴

The asylum-based BFCA Program was designed “[t]o determine the scope and types of fraud, and the application and utility of existing fraud detection methods” and “[t]o identify weaknesses and vulnerabilities, and propose/undertake corrective action.”²⁵ It consisted of a “random sampling of [239 out of 8,555] pending and completed (approved/referred) [affirmative asylum applications filed] with USCIS between May 1 and October 31, 2005.”²⁶ Of those 239 cases, 29 (or 12 percent) were determined to be fraudulent; 12 of those 29 cases had already been granted.²⁷ While 72 (or 30 percent) of the cases did not contain any “fraud indicators” (that is, inconsistencies, derogatory, or negative information), 138 (or 58 percent) “exhibited possible indicators of fraud,” not counting 27 additional cases (for a total of 69 percent) that had been referred because of fraud indicators for overseas verification requests, which had not been completed.²⁸

Significantly, in recent years, a number of immigration practitioners have been charged in high-profile cases in connection with the filing of fraudulent asylum applications:

- In May 2016, for example, an immigration lawyer in suburban Chicago “was convicted by a federal jury of falsifying paperwork in a bid to help clients win asylum in the United States on bogus claims of torture and religious persecution.”²⁹
- In April 2014, two lawyers and an office worker in New York were found guilty of conspiracy to commit immigration fraud.³⁰ The three were arrested in a December 2012 FBI sweep that targeted lawyers and staffers suspected of coaching Chinese immigrants on how to lie about their past to be eligible for asylum.³¹
- In a December 2015 report, the GAO noted that: “As of March 2014, a joint fraud investigation led by the U.S. Attorney’s Office for the Southern District of New York, the Federal Bureau of Investigation (FBI), the New York City Police Department, and USCIS, known as Operation Fiction Writer, resulted in charges against 30 defendants, including 8 attorneys, for their alleged participation in immigration fraud schemes in New York City. According to discussions with USCIS officials and a FBI press release, allegations regarding these defendants generally involved the preparation of fraudulent asylum applications that often followed one of three fact patterns: (1) forced abortions performed pursuant to China’s family planning policy; (2) persecution based on the applicant’s belief in Christianity; or (3) political or ideological persecution, typically for membership in China’s Democratic Party or followers of Falun Gong. Attorneys and preparers charged in Operation Fiction Writer filed 5,773 affirmative asylum applications with USCIS, and USCIS granted asylum to 829 of those affirmative asylum applicants. According to EOIR data, 3,709 individuals who were connected to attorneys and preparers convicted in Operation Fiction Writer were granted asylum in immigration court; this includes both affirmative asylum claims referred from USCIS as well as defensive asylum claims.”³²
- In June 2010, three California lawyers and two office workers were convicted “of charges related to a scheme to defraud [USCIS] by filing hundreds of false asylum claims between 2000 and 2004.”³³

- Most significantly, in April 2005, “the leader of [a] Fairfax-based immigration fraud ring ... pleaded guilty to falsifying documents for more than 1,900 Indonesians who are in the United States illegally.”³⁴ According to press reports, the case involved hundreds of aliens who “were coached to tell asylum officers or immigration judges false stories of beatings or rapes they endured in Indonesia at the hands of Muslims because they were either ethnic Chinese or Christians.”³⁵

Credible Fear

A credible fear request is a precondition to filing a defensive asylum application for an alien in expedited removal proceedings under section 235(b) of the Immigration and Nationality Act (INA). That section of the INA allows immigration officers — rather than judges — to order the deportation of aliens who have failed to establish that they have been in the United States continuously for two years and who have been charged with inadmissibility under section 212(a)(6)(c) (fraud or misrepresentation) and/or section 212(a)(7) (no documentation) of the INA. DHS has expanded its use of expedited removal over the years.³⁶

The most common instance in which DHS uses expedited removal is when it apprehends (1) an alien seeking admission without a proper entry document at a port of entry; or (2) an alien who is attempting to enter or who has entered illegally along the border. If the alien asserts a fear of persecution, the arresting officer will refer the alien to an asylum officer for a “credible fear interview.”³⁷ If the asylum officer determines that the alien has a credible fear, the alien is placed in removal proceedings before an immigration judge, where the alien can file his or her application for asylum.³⁸

Under section 235(b)(1)(B)(v) of the INA, “the term ‘credible fear of persecution’ means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.”

While the bulk of the credible fear claims nationally between October 2014 and September 2015 were made by aliens from Central America and Mexico, 80 were made by Syrian nationals, 191 by Pakistani nationals, and 776 by Somali nationals.³⁹ Many of the aliens who have come to the United States from outside the Western Hemisphere followed identified smuggling routes from South America.⁴⁰ Aliens making this trek are often arrested in third countries along the way, before being released by local authorities under so-called “catch, rest, and release” policies, to continue along their route.⁴¹

Notably, several of the countries that are transited by aliens in expedited removal before they arrive in the United States (including Colombia,⁴² Costa Rica,⁴³ and Mexico⁴⁴) provide for the granting of asylum to third-country nationals. As the State Department has noted with respect to Colombia:

*The government reported a continuing rise in the smuggling of migrants from outside the region through Colombia en route to the United States and Canada. According to UNHCR and Colombian migration officials, most of the undocumented migrants were Cubans and Haitians, followed by Africans and Asians, and most entered through Ecuador, Venezuela, and Brazil. While the government generally provided access to the asylum process for such persons who requested international protection, many abandoned their applications and continued on the migration route.*⁴⁵

Aliens found to have credible fear are often released from custody before their asylum claims are heard in immigration court.⁴⁶ This is significant from a fraud standpoint because, as discussed below, a finding of credible fear can be made without the alien presenting any corroborating evidence, or even identity documents.

Susceptibility of the Credible Fear Process to Fraud

Anecdotally, there is significant fraud in the credible fear process, much of which originates from, or is abetted by, the smugglers on which many aliens entering illegally and claiming credible fear rely. Two cases exemplify this problem: one involving convicted alien smuggler Rakhi Gauchan, and the other involving Ahmed Dhakane, who plead guilty to two counts of making false statements on his application for asylum.⁴⁷

Gauchan, a native of Nepal, had “run smuggling rings for 11 years in Europe and Asia” before relocating to Mexico City.⁴⁸ According to the *Christian Science Monitor*, Gauchan (who “told an undercover informant that in Mexico her operation smuggled about 10 individuals per month into the” United States⁴⁹):

[C]harged up to \$40,000 for someone living in India and \$3,000 to \$4,000 for someone who had already made it to Mexico, according to court documents.

Ms. Gauchan would instruct her clients to turn themselves in to US officials and apply for asylum. She also provided a critique of their “life story” and offered suggestions of how to make the story more compelling to boost their chances of being granted US asylum.⁵⁰

Dhakane, on the other hand, “ran a human smuggling operation based in Brazil that specialized in migrants from Somalia and other parts of East Africa.”⁵¹ As the *Christian Science Monitor* reported:

In his Brazilian smuggling operation, Dhakane provided false passports and other forged travel documents. In addition, according to his federal court file, he bribed Brazilian immigration officials and instructed his customers how to make false asylum claims once they arrived in the [United States].⁵²

“At least five of [Dhakane’s] clients were supporters or members of Al Shabab or associated Somali terror groups,” including one nicknamed “Al Qaeda” who came to California.⁵³

Resource Constraints

The credible fear process is vulnerable to such fraud for a number of reasons, the main one being a failure by the government to allocate sufficient resources.

There are 328 ports of entry in the United States,⁵⁴ and the U.S.-Mexican border spans 1,954 miles.⁵⁵ There are, however, only about 360 asylum officers stationed at eight asylum offices in the United States: in Arlington, Va.; Chicago, Ill.; Houston, Texas; Miami, Fla.; Newark, N.J.; New York, N.Y.; Los Angeles, Calif.; and San Francisco, Calif.⁵⁶ The relatively small number of asylum officers limits the amount of time that any given asylum officer can spend on any given credible fear claim, a problem exacerbated by a recent increase in credible fear claims, discussed below.

The asylum officers are assisted by officers from FDNS in identifying fraud. USCIS created FDNS in 2004 “to help ensure immigration benefits are not granted to individuals who pose a threat to national security or public safety or who seek to defraud the immigration system.”⁵⁷ FDNS officers “are tasked with conducting background checks to resolve national security ‘hits’ and fraud concerns, which arise when asylum officers conduct required background checks of asylum applicants; addressing fraud-related leads provided by asylum officers and other sources; and liaising with law enforcement entities, such as [ICE Homeland Security Investigations], to provide logistical support in law enforcement and national security matters.”⁵⁸ According to GAO, as of FY 2015, USCIS had deployed only 35 FDNS immigration officers and four supervisory immigration officers to work across all eight asylum offices.⁵⁹

The immigration courts, which receive aliens’ claims after they have been found to have a credible fear, face similar resource limitations. As of February 2017, there were 542,411 cases pending before 302 immigration judges, or just less than 1,800 cases per judge.⁶⁰ Each judge, however, has just about six hours per week to prepare for the week’s docket; the rest of the time is spent on the bench hearing cases. Given the fact that each judge could be assigned eight or more asylum cases (any one of which could have hundreds of pages of background evidence) each week, the ability for any given judge to have full familiarity with any given case is limited. This problem is compounded by the fact that many claims, particularly claims from the same country, can have similar facts.

Identifying fraud in the asylum process requires the immigration judges to be familiar with the record in each case, so as to identify the discrepancies and inconsistencies in the record that are indicative of fraud. Given the limited number of immigration judges, and the large caseload that each is assigned, this is often impossible.⁶¹

The limited number of judges also means that there are significant backlogs between the time that applications are filed and the time that hearings are held on those applications. As noted, aliens in credible fear proceedings are subject to mandatory detention during the credible fear process, and also if found to have a credible fear.⁶² ICE has only limited detention space,⁶³ however, and aliens are often released before the detained court judge can hear their asylum claims and sent to a non-detained court. If an asylum applicant is released, years can pass before the applicant’s claim is heard.⁶⁴ This gives an alien in expedited removal proceedings even more reason to make a fraudulent credible fear claim, because if that claim is successful, the alien can remain in the United States for a significant period of time before even having a hearing on his or her asylum

claim, allowing the alien to work (which is usually the goal of an illegal entrant), build up equities, or become eligible for another immigration benefit.

It should be noted that the Department of Justice's Executive Office for Immigration Review (EOIR, which includes the immigration courts) does have an antifraud officer, a position established in September 2007 by the Department of Justice through regulation.⁶⁵ That regulation states that the antifraud officer is to: (1) serve as a point of contact relating to concerns about fraud, particularly with respect to fraudulent applications or documents affecting multiple removal proceedings, applications for relief from removal, appeals, or other proceedings before EOIR; (2) coordinate with DHS and Department of Justice investigative authorities with respect to the identification of and response to fraud; and (3) notify EOIR's Disciplinary Counsel and other appropriate authorities as to instances of fraud, misrepresentation, or abuse related to an attorney or accredited representative.⁶⁶ This office, however, is under-resourced, with "one full-time fraud prevention counsel, who serves as the antifraud officer pursuant to EOIR's regulations, one part-time attorney, and several student interns."⁶⁷

The difficulty facing both USCIS and the immigration courts in identifying fraud in the credible fear process has been exacerbated by the significant increase in the number of expedited removal cases, and consequently of credible fear claims, over the past eight years.⁶⁸ Specifically, in FY 2009, USCIS completed 5,523 credible fear cases.⁶⁹ In FY 2015, the agency completed 47,928, almost 8.7 times as many as just six years before.⁷⁰ In FY 2016, USCIS received 94,048 credible fear cases, and issued 92,990 credible fear decisions.⁷¹ All told, in the fourth quarter of FY 2016, there were 194,986 asylum applications pending at USCIS.⁷² While 360 asylum officers, 35 FDNS officers, and 302 immigration judges may seem like a significant force in the abstract, the struggle that they face in identifying, let alone addressing, fraud in the credible fear process is clear from the sheer volume of cases that they each have to handle.

The failure of USCIS to dedicate more resources to its review of credible fear claims is particularly disturbing in light of the fact that, as of March 2015, the agency had accumulated a "reserve fund" of unexpended revenues of \$1.2 billion.⁷³

Not surprisingly, as the number of cases of aliens seeking credible fear has increased, so has the number of aliens found to have a credible fear. As Temple Law School Professor Jan Ting told the House Oversight Committee in March 2016: "The percentage of all referred cases where credible fear was found by asylum officers has fluctuated from year to year but the trend has been generally upwards from 64.15 percent in FY 2008 to 77.72 percent in the first quarter of FY 2016."⁷⁴ As noted, in FY 2016, USCIS issued 92,990 decisions in credible fear cases; in 73,078 of those cases, or 78.59 percent, credible fear was established.⁷⁵

Besides a lack of resources, other factors further complicate the task of identifying fraud in the credible fear process.

Limitations on the Government's Capability to Identify Fraud

Another factor that renders the asylum process generally, and the credible fear process in particular, vulnerable to fraud is the capability of USCIS and EOIR to identify fraud. In a December 2015 report, GAO reviewed the status of the asylum system.⁷⁶ With respect to the ability of FDNS and their counterparts at EOIR to assess and address fraud risks, GAO concluded:

USCIS and [EOIR] have limited capabilities to detect asylum fraud. First, while both USCIS and EOIR have mechanisms to investigate fraud in individual applications, neither agency has assessed fraud risks across the asylum process, in accordance with leading practices for managing fraud risks. ... Without regular assessments of fraud risks, USCIS and EOIR lack reasonable assurance that they have implemented controls to mitigate those risks. Second, USCIS's capability to identify patterns of fraud across asylum applications is hindered because USCIS relies on a paper-based system for asylum applications and does not electronically capture some key information that could be used to detect fraud, such as the applicant's written statement. Asylum officers and [FDNS] immigration officers told GAO that they can identify potential fraud by analyzing trends across asylum applications; however, they must rely on labor-intensive methods to do so. Identifying and implementing additional fraud detection tools could enable USCIS to detect fraud more effectively while using resources more efficiently. Third, FDNS has not established clear fraud detection responsibilities for its immigration officers in asylum offices; FDNS officers we spoke with at all eight asylum offices told GAO they have limited guidance with respect to fraud. FDNS standard operating procedures for fraud detection are intended to apply across USCIS, and therefore do not reflect the unique features of the asylum system. Developing asylum-specific guidance for fraud detection, in accordance with federal internal control standards, would better position FDNS officers to understand their roles and responsibilities in the asylum process.⁷⁷

With respect to its second finding, above, the GAO explains that the USCIS Refugee, Asylum, and Parole System (RAPS):

[D]oes not have the capability to detect fraud trends because, while it captures biographic data about an asylum applicant, it does not capture other key information that could be used to detect fraud. Such information could include the applicant's written statement, the reason for the applicant's claim, or the name of the applicant's interpreter. Asylum officers and FDNS immigration officers told us that they can identify potential fraud by manually analyzing trends across asylum applications they review. Because of USCIS's reliance on paper asylum applications, asylum officers and FDNS immigration officers use ad hoc, labor-intensive methods to detect such trends among asylum cases.⁷⁸

Even electronic filing of asylum applications would not address the problem of fraud in the credible fear process, however, because applicants for credible fear do not submit asylum applications to USCIS. Instead, during the credible fear interview, information about the claim is elicited by the asylum officer, who takes a statement from the applicant by asking questions related to the alien's alleged fear. The alien does not have to file an asylum application (Form I-589) until he or she is placed into removal proceedings before the immigration court. Unlike USCIS, the immigration court does not have an office similar to FDNS to review Forms I-589 after they have been filed to identify fraud. Rather, immigration judges are largely reliant on ICE attorneys and their own review of the record to flush out fraud.

Evidentiary Limitations

Evidentiary limitations, unique to the credible fear process, render that process further susceptible to fraud.

Asylum claimants generally, and credible fear applicants in particular, often lack necessary documents, including identity documents, to support their claims. Recognizing the difficulty that aliens legitimately fleeing persecution may face in assembling proof of their claims, Congress established a special evidentiary standard that applies only to aliens seeking asylum and withholding of removal. Specifically, section 208(b)(1)(B)(ii) of the INA states:

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence. (Emphasis added.)⁷⁹

Asylum cases in which aliens are unable to provide documentary support for their claims present a particular challenge for asylum officers and judges because the fact finder is largely dependent on credible testimony in determining whether to grant or deny relief, making credibility a key issue.

The credible fear procedures, however, hinder asylum officers in making credibility determinations. Aliens in expedited removal are subject to mandatory detention until they are found to have a credible fear.⁸⁰ Because of the large number of cases and the lack of detention space along the border, many aliens subject to expedited removal are sent to detention facilities throughout the country. Due to the distance between these facilities and the asylum offices, many of the credible fear interviews occur by telephone. Most of the aliens in these proceedings do not speak English, requiring the asylum officers to employ interpreters, many of whom also appear telephonically. From experience, it is difficult enough to identify deception when hearing testimony in a courtroom through an interpreter; this task becomes all the more difficult when the finder of fact cannot also assess demeanor.⁸¹

Verification of credible fear claims is also hobbled by the regulation governing the confidentiality of asylum information, found at 8 C.F.R. § 208.6. That regulation states:

Disclosure to third parties.

*(a) Information contained in or pertaining to any asylum application, **records pertaining to any credible fear determination** conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, **shall not be disclosed** without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.*

(b) The confidentiality of other records kept by the Service and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure. The Service will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

(c) This section shall not apply to any disclosure to:

(1) Any United States Government official or contractor having a need to examine information in connection with:

(i) The adjudication of asylum applications;

(ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;

(iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under § 1208.30 or § 1208.31;

(iv) The defense of any legal action of which the asylum application, credible fear determination, or reasonable fear determination is a part; or

(v) Any United States Government investigation concerning any criminal or civil matter; or

(2) Any Federal, State, or local court in the United States considering any legal action:

(i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under § 1208.30 or § 1208.31; or

(ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part. (Emphasis added).

Thus, information “pertaining to any credible fear determination ... and records pertaining to any reasonable fear determination conducted” cannot “be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.” Discretion to disclose asylum information, however, is rarely given. When it is, such disclosure risks a claim by the applicant that even if there were no fear of persecution before the disclosure, there is now, because the alien’s home country knows that the alien, in applying for asylum, is placing that country in a bad light.

This regulation hinders any attempt by ICE or other government agency to verify with the alien’s home government information provided during the credible fear process, or to use that information to determine whether the alien poses a terrorism risk. This is in part why, even when credible fear claimants do provide supporting documentation, USCIS rarely forwards those documents for overseas verification.⁸² In fact, from FY 2010 to FY 2014, asylum offices submitted only 111 requests to either USCIS or State Department consular officers for such verification.⁸³ Documents commonly submitted in connection with asylum claims, such as foreign police reports and medical records, can provide strong extrinsic support for such claims; they are rarely, however, familiar or self-authenticating, and many can be forged.⁸⁴

While immigration judges and asylum officers can attempt to bridge the evidentiary gap themselves by submitting background evidence for the record, such submissions can subject them to complaints about their impartiality. In addition, if an immigration judge has questions about the validity of a claim, the judge can, by regulation, request comments about the claim from the State Department.⁸⁵ This is a complicated and time-consuming process, however, and for that reason is not often used.

Credible Fear Fraud Poses a National Security Risk

Given its susceptibility to fraud, the credible fear process is particularly vulnerable to exploitation by individuals or groups seeking to do harm to the United States, by traffickers seeking to bring victims to the United States, and by economic migrants seeking employment opportunities.

With respect to the national security risk of fraud, as the 9/11 Commission's "Terrorist Travel" monograph makes clear: "A number of terrorists [have] ... abused the asylum system."⁸⁶ For example, Ramzi Yousef and Ahmad Ajaj, plotters of the first World Trade Center bombing, "concocted bogus political asylum stories when they arrived" to remain in the United States in 1992.⁸⁷

More recently, in April 2011, Ahmed Dhakane (referenced above), a Somali national, received 10 years in federal prison "after admitting to making false statements under penalty of perjury on his application for asylum."⁸⁸ According to a press release from the FBI relating to his sentencing: "On March 28, 2008, Dhakane surrendered to U.S. Customs and Border Protection agents near Brownsville, Texas. He was being held in an immigration detention facility located in Pearsall, Texas, when he allegedly made the false statements to federal authorities. On November 2, 2010, Dhakane pleaded guilty to two counts of making false statements in regards to immigration matter."⁸⁹ That press release further states that:

*According to court records, on October 28, 2008, Dhakane falsely omitted on an application for asylum that from a time prior to September 11, 2001, until January 2003, he was a member of or was associated with al-Barakat and Al-Ittihad Al-Islami (AIAI). Both organizations have been designated by the Department of Treasury pursuant to Executive Order 13224 as a Specially Designated Global Terrorist (SDGT). Dhakane also provided false information concerning his entry into the United States when he claimed to authorities that he and his wife traveled from Somalia to Mexico via Russia, Cuba, Costa Rica, and Guatemala when, in fact, from June 2006 until March 2008, he resided in Brazil, where he participated in and later ran a large-scale human smuggling enterprise, knowing that such disclosure to authorities would prevent him from receiving asylum in the United States.*⁹⁰

As noted above, while in Brazil, "according to his federal court file, he bribed Brazilian immigration officials and instructed his customers how to make false asylum claims once they arrived in the" United States; among his customers were "supporters or members of Al Shabab or associated Somali terror groups."⁹¹ In the course of his fraudulent claim:

*Dhakane also provided false information to authorities concerning his traveling companion, a minor female he claimed to be his wife whom he married in Mogadishu, Somalia. As it turns out, that individual was a smuggling client Dhakane first met in Brazil, was never married to Dhakane, and someone whom he repeatedly raped and eventually impregnated prior to coming to the United States. Dhakane also threatened to have her murdered if she told authorities about the rapes or that she was not married to Dhakane.*⁹²

Apparently, he believed that he would be more likely to receive asylum "if he had a pregnant wife."⁹³

Similarly, on July 25, 2013, "Abdullahi Omar Fidse, a citizen of Somalia, was sentenced to eight years in federal prison after admitting to making false statements under penalty of perjury during a terrorism investigation."⁹⁴ As reported by the FBI:

According to court records, on June 24, 2008, Fidse and 25-year-old Deka Abdalla Sheikh, who was serving as Fidse's English interpreter, arrived at the Hidalgo, Texas, Port of Entry without any identification and claimed asylum based upon Fidse's father being murdered by "al Qaeda" in the father's store in Mogadishu, Somalia, while in the presence of Fidse. Fidse was placed in an Immigration Detention Facility located in Pearsall, Texas, while his asylum claim was investigated.

Recorded conversations between Fidse and Sheikh during Fidse's detention revealed that prior to arriving in Hidalgo, the defendants admittedly planned to provide false testimony to authorities about how they first met, that they were married, and that they had lived together for three years. Furthermore, they discussed hand signals to be used to communicate during hearings in an effort to ensure that their individual testimony would match.

Fidse's stories changed over the course of his detention, including who was responsible for his father's death. Fidse initially told Customs and Border Protection officers that al Qaeda killed his father while they lived in Somalia. He subsequently told an Immigration Court judge that the Islamic Courts were responsible for his father's death. In truth, his father had

died of natural causes years before and Fidse actually had lived in Kenya since he was in grade school. Because of Fidse's credibility and his inability to get his story straight on who killed his father, on March 31, 2009, the Immigration Court denied Fidse's asylum request.

The previously mentioned recordings also revealed discussions Fidse had with an undercover source in which Fidse professed his support for violent, radical Jihad; the killing of non-Muslims; and his adoration for Osama Bin Laden. While still in custody, Fidse also made recorded comments that he purchased an armed vehicle and weapons to be used by terrorists. Fidse told an undercover source how he bought a vehicle and armed it for an al Shabaab squad and that the vehicle was ultimately destroyed while fighting the Ethiopian defense forces supporting the Somalia Transitional Government. Fidse also told the undercover source that "we are terrorists."⁹⁵

In addition to these cases, information disclosed to Congress indicates that 299 aliens to whom the terrorism bar to asylum eligibility may apply⁹⁶ were found to have a credible fear in the first four months of FY 2015, and that 399 aliens to whom the terrorism bar to asylum eligibility may apply were found to have a credible fear in FY 2014.⁹⁷ While the nature and circumstances of those terrorism allegations are not clear, these facts, as well as the cases detailed above, raise additional concerns that other individuals who have connections to terrorist activity or organizations have attempted to seek asylum through the credible-fear process.

Conclusion

As recent events have shown, it is necessary for the United States government to screen individuals who are seeking to enter the United States closely for terrorist ties or other foreign affiliations that suggest they could pose a danger to the United States. Refugees are not the only class of alien seeking entry who could pose such a danger, however.

Aliens attempting to enter the United States through the credible fear process have not been screened before arriving in the United States. Many of these aliens come to the United States without documents, and arrive from countries in which there is significant terrorist activity. This process has been fraudulently abused by aliens who pose a danger to the national security. The credible fear claims of all aliens should be thoroughly vetted, and appropriate resources must be directed to the review of the asylum applications filed by those individuals, to ensure that they are not able, through fraud, to enter the United States and do harm to the American people.

USCIS and EOIR should comply thoroughly with the recommendations of GAO in its December 2015 report on fraud risks, and in particular, should conduct regular fraud risk assessments across all asylum claims. The draft asylum Benefits Fraud and Compliance Assessment, described by former Associate Director of FDNS Don Crocetti in his February 2014 testimony before the House Subcommittee on Immigration and Border Security, should be replicated and completed immediately to place DHS and EOIR in a position to identify aliens seeking entry through fraud.

Finally, the U.S. government, in connection with its global partners, must disrupt the smuggling organizations that are funneling illegal entrants to the United States.

End Notes

¹ [“Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status 2014”](#), U.S. Citizenship and Immigration Services, 2014.

² [“Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status 2015”](#), U.S. Citizenship and Immigration Services, 2015.

³ [“Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status 2016”](#), U.S. Citizenship and Immigration Services, 2016.

⁴ 8 C.F.R. § 1208.13(a).

⁵ See Section 208(b) of the Immigration and Nationality Act (INA).

⁶ See Section 101(a)(42) of the INA.

⁷ See [“Obtaining Asylum in the United States”](#), U.S. Citizenship and Immigration Services, last updated October 19, 2015.

⁸ Jerry Markon, [“Senior Obama officials have warned of challenges in screening refugees from Syria”](#), *The Washington Post*, (November 17, 2015).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See [“The World Factbook: Somalia”](#), Central Intelligence Agency, undated.

¹² See [“Islamic State and the crisis in Iraq and Syria in maps”](#), BBC, January 20, 2017.

¹³ To compare the vetting process for refugee processing with the vetting process for the asylum process, compare [“Infographic: The Screening Process for Refugee Entry into the United States”](#), The White House, November 20, 2015, with [“Vetting, Security and Fraud Screening in Asylum Process”](#), Human Rights First, December 4, 2015. Further, there have been cases in which aliens in refugee camps have effectively bypassed the refugee screening system by entering or attempting to enter the United States illegally and claiming credible fear.

¹⁴ See [“Obtaining Asylum in the United States”](#), U.S. Citizenship and Immigration Services, last updated October 19, 2015.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ [“Asylum: Additional Actions Needed to Assess and Address Fraud Risk”](#), GAO-16-50, Government Accountability Office, December 2015, at 1.

- ²² Sam Dolnick, [“Immigrants May Be Fed False Stories to Bolster Asylum Pleas”](#), *The New York Times*, July 11, 2001.
- ²³ Louis D. Crocetti, Jr. [“Asylum Fraud: Abusing America’s Compassion?”](#), testimony before the House Judiciary Committee Subcommittee on Immigration and Border Security, 113th Congress, 2014.
- ²⁴ *Id.*, at 4-7.
- ²⁵ *Id.*, at 3.
- ²⁶ *Id.*, at 5.
- ²⁷ *Id.*, at 6.
- ²⁸ *Id.*
- ²⁹ Jason Meisner, [“Local immigration lawyer convicted of fraud in winning asylum for Iraqis”](#), *Chicago Tribune*, May 9, 2016.
- ³⁰ Albert Samaha, [“Thirty People Have Been Convicted for Participating in Asylum Fraud Ring”](#), *Village Voice*, April 16, 2014.
- ³¹ *Id.*
- ³² [“Asylum: Additional Actions Needed to Assess and Address Fraud Risk”](#), GAO-16-50, Government Accountability Office, December 2015, at 1.
- ³³ [“Discovery Bay attorney sentenced for false asylum fraud”](#), Mercury News, September 24, 2010.
- ³⁴ [“ICE mulls fraud case”](#), *Washington Times*, April 28, 2005.
- ³⁵ *Id.*
- ³⁶ See [“Fact Sheet: A Primer on Expedited Removal”](#), American Immigration Council, February 3, 2017.
- ³⁷ See section 235(b)(1)(A)(ii) of the INA.
- ³⁸ 8 C.F.R. § 1235.6(a)(ii).
- ³⁹ William La Jeunesse, [“Immigrants from terror hubs claiming ‘credible fear’ to seek US asylum”](#), Fox News, March 22, 2016.
- ⁴⁰ See generally Todd Bensman, [“The Ultra-Marathoners of Human Smuggling: How to Combat the Dark Networks that Can Move Terrorists over American Land Borders”](#), *Homeland Security Affairs Journal*, Vol. XIII-2017, May 2016 (detailing smuggling routes).
- ⁴¹ *Id.*
- ⁴² See [“Country Reports on Human Rights Practices for 2016: Colombia”](#), U.S. Department of State, Bureau of Democracy, Human Rights and Labor, undated. (“The law provides for the granting of asylum or refugee status, and the government has established a system for providing protection to refugees.”)
- ⁴³ See [“Country Reports on Human Rights Practices for 2016: Costa Rica”](#), U.S. Department of State, Bureau of Democracy, Human Rights and Labor, undated. (“The law provides for the granting of asylum or refugee status, and the government has an established system for providing protection to refugees. The law requires authorities to process the claims within three months of receipt, but decisions took an average of 10 months.”)

⁴⁴ See [“Country Reports on Human Rights Practices for 2016: Mexico”](#), U.S. Department of State, Bureau of Democracy, Human Rights and Labor, undated. (“The government cooperated with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian organizations in providing protection and assistance to internally displaced persons, refugees, returning refugees, asylum seekers, stateless persons, or other persons of concern.”)

⁴⁵ See [“Country Reports on Human Rights Practices for 2016: Colombia”](#), U.S. Department of State, Bureau of Democracy, Human Rights and Labor, undated.

⁴⁶ See Seth Robbins and Alicia A. Caldwell, [“8 Syrian refugees turn themselves in at US-Mexico border, held by federal immigration agency”](#), *U.S. News and World Report*, November 19, 2015. available at:

⁴⁷ Warren Richey, [“Are terrorists crossing the US-Mexico border? Excerpts from the case file”](#), *Christian Science Monitor*, January 15, 2017.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ [“At Ports of Entry”](#), U.S. Customs and Border Protection, last published August 8, 2016.

⁵⁵ [“U.S.-Mexico Border: Fences and deaths”](#), *National Geographic*, undated.

⁵⁶ [“Asylum: Additional Actions Needed to Assess and Address Fraud Risk”](#), GAO-16-50, Government Accountability Office, December 2015, at 1.

⁵⁷ *Id.* at 29.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ [“Immigration Court Backlog Tool, Pending Cases and Length of Wait in Immigration Courts”](#), TRAC Immigration, through February 2017.

⁶¹ More judges alone, however, are not the answer. As a judge, I shared one law clerk with another judge, and that clerk’s primary responsibilities involved drafting proposed orders, reviewing motions, and researching the effects of various criminal convictions from various states on different grounds of removability, largely freeing me and my fellow judge to review applications for relief and the supporting evidence for those applications. I was also supported by a legal technician who kept the courtroom running, and a front office staff that ensured submissions were docketed and filed. Ideally, for each additional judge hired, there would also be an additional law clerk and technician, as well as support staff.

⁶² Sections 235(b)(1)(B)(ii) and (iii)(IV) of the INA.

⁶³ See [“ICE’s Release of Immigration Detainees”](#), OIG-14-116 (Revised), Department of Homeland Security, Office of Inspector General, August 2014.

⁶⁴ Julia Preston, [“Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle”](#), *The New York Times*, December 1, 2016.

⁶⁵ [“Asylum: Additional Actions Needed to Assess and Address Fraud Risk”](#), GAO-16-50, Government Accountability Office, December 2015, at 30.

⁶⁶ 8 C.F.R. § 1003.0(e)(2).

⁶⁷ [“Asylum: Additional Actions Needed to Assess and Address Fraud Risk”](#), GAO-16-50, Government Accountability Office, December 2015, p. 37.

⁶⁸ There are many reasons for this increase, including “word of mouth”, in which “[i]ndividuals learn about actual or allegedly successful ways to enter the United States and mimic the pattern that has been successful,” and changes in country conditions. See Scott Rempell, “Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge”, 18 *Chapman Law Review* 337 (2015). See also Julia Preston, [“Migrants Flow in South Texas, as Do Rumors”](#), *The New York Times*, June 17, 2014. (“Migrants have sent word back home that they received a ‘permit’ to remain at least temporarily in the United States, feeding rumors along migrant routes and spurring others to embark on the long journey.”)

⁶⁹ [“Credible Fear Workload Report Summary”](#), U.S. Citizenship and Immigration Services, May 5, 2016.

⁷⁰ *Id.*

⁷¹ [“Credible Fear Workload Report Summary, FY 2016 Total Caseload”](#), U.S. Citizenship and Immigration Services, undated.

⁷² [“Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status 2016”](#), U.S. Citizenship and Immigration Services, December 23, 2016.

⁷³ Jessica Vaughan, [“Senate Hearing Exposes Billion-Dollar Amnesty Slush Fund and Other USCIS Improprieties”](#), Center for Immigration Studies blog, March 6, 2015.

⁷⁴ [Testimony of Jan C. Ting](#), Professor of Law, Temple University Beasley School of Law, before the United States House of Representatives Committee on Oversight and Government Reform, Subcommittees on National Security and Government Operations, March 23, 2016.

⁷⁵ [“Credible Fear Workload Report Summary, FY 2016 Total Caseload”](#), U.S. Citizenship and Immigration Services, undated.

⁷⁶ [“Asylum: Additional Actions Needed to Assess and Address Fraud Risk”](#), GAO-16-50, Government Accountability Office, December 2015, “Highlights”.

⁷⁷ *Id.*

⁷⁸ *Id.*, at 45.

⁷⁹ This standard is incorporated by reference in the withholding of removal provisions at section 241(b)(3)(C) of the INA, which states: “SUSTAINING BURDEN OF PROOF; CREDIBILITY DETERMINATIONS- In determining whether an alien has demonstrated that the alien’s life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien’s burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 208(b)(1)(B).”

⁸⁰ Section 235(b)(1)(B)(iii)(IV) of the INA.

⁸¹ See, e.g., *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1078-79 (9th Cir. 1977): “Weight is given [to] the administrative law judge’s determinations of credibility for the obvious reason that he or she ‘sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records.’ ... All aspects of the witness’s demeanor — including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication — may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript, such as the Board or the Court of Appeals.” (Internal citation omitted.)

⁸² See [“Asylum: Additional Actions Needed to Assess and Address Fraud Risk”](#), GAO-16-50, Government Accountability Office, December 2015, at 44: “Asylum officers we interviewed in all eight asylum offices stated that they rarely use overseas verification, in part because they do not receive responses to their requests in a timely manner. In addition, asylum confidentiality restrictions limit the extent to which asylum officers can verify information overseas; USCIS and State Department personnel generally cannot share information contained in or pertaining to an asylum application outside the U.S. government in a manner that would disclose the fact that the individual applied for asylum in the United States. Furthermore, asylum officers told us that the outcome of asylum adjudications rarely hinges on the authenticity of a single document, so document verification may not change the outcome of a case.” This last rationale is somewhat questionable, however. See *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998): “Presentation by an asylum applicant of an identification document that is found to be counterfeit by forensic experts not only discredits the applicant’s claim as to the critical elements of identity and nationality, but, in the absence of an explanation or rebuttal, also indicates an overall lack of credibility regarding the entire claim.”

⁸³ *Id.*

⁸⁴ See, e.g., [“China Profile of Asylum Claims and Country Conditions”](#), U.S. Department of State, Office of Country Reports and Asylum Affairs, Bureau of Democracy, Human Rights and Labor, May 2007: “Documentation from China, particularly from Fujian Province, is subject to widespread fabrication and fraud. This includes documents that purportedly verify identities, personal histories, births and birth control measures, and notices from public security authorities. The existence of this fraud has been established by direct investigation by U.S. consular officers in China.”

⁸⁵ 8 C.F.R. § 1208.11.

⁸⁶ [“9/11 and Terrorist Travel, A Staff Report of the National Commission on Terrorist Attacks upon the United States”](#), August 21, 2004, at 106.

⁸⁷ *Id.*, at 50.

⁸⁸ [“Somalian Sentenced to Federal Prison for Making False Statements on Application for Asylum: Defendant Admitted to Making False Statements Concerning Participation in Terrorist Organizations”](#), press release, FBI San Antonio Division, April 28, 2011.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Warren Richey, [“Are terrorists crossing the US-Mexico border? Excerpts from the case file”](#), *Christian Science Monitor*, January 15, 2017.

⁹² [“Somalian Sentenced to Federal Prison for Making False Statements on Application for Asylum: Defendant Admitted to Making False Statements Concerning Participation in Terrorist Organizations”](#), press release, FBI San Antonio Division, April 28, 2011.

⁹³ Warren Richey, [“Are terrorists crossing the US-Mexico border? Excerpts from the case file”](#), *Christian Science Monitor*, January 15, 2017.

⁹⁴ [“Somalian Sentenced to Federal Prison for Making False Statements During a Terrorism Investigation”](#), FBI press release, San Antonio Div., July 25, 2013.

⁹⁵ *Id.*

⁹⁶ See section 208(b)(2)(A)(v) of the INA (asylum may not be granted to “an alien if the Attorney General determines that the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 212(a)(3)(B)(i) or section 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 212(a)(3)(B)(i) , the Attorney General determines, in the Attorney General’s discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.”).

⁹⁷ [Letter from Chaffetz, Goodlatte, DeSantis, and Gowdy to Johnson](#), May 20, 2015, at 1.