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Asylum and "Credible Fear" Issues in U.S. Immigration Policy

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Summary

Foreign nationals seeking asylum must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion. Foreign nationals arriving or present in the United States may apply for asylum affirmatively with the United States Citizenship and Immigration Services (USCIS) in the Department of Homeland Security after arrival into the country, or they may seek asylum defensively before a Department of Justice Executive Office for Immigration Review (EOIR) immigration judge during removal proceedings.

Asylum claims ebbed and flowed in the 1980s and peaked in FY1996. Since FY997, affirmative asylum cases decreased by 79% and defensive asylum claims dropped by 53% by FY2009. Asylum seekers from the People's Republic of China (PRC) dominated both the affirmative and defensive asylum caseload in FY2009. Five of the top 10 source countries of asylum seekers were Western Hemisphere nations in FY2009: Haiti, Mexico, Guatemala, El Salvador, and Colombia. Ethiopia was the only African nation that was a top source country for asylum seekers in FY2009. Despite the general decrease in asylum cases since the enactment of the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) in 1996, data analysis of six selected countries (the PRC, Colombia, El Salvador, Ethiopia, Haiti, and Mexico) suggests that conditions in the source countries are likely the driving force behind asylum seekers.

Roughly 30% of all asylum cases that worked through USCIS and EOIR in recent years have been approved. Affirmative asylum cases approved by USCIS more than doubled from 13,532 in FY1996 to 31,202 in FY2002, and then fell to the lowest point over the 14-year period—9,614—in FY2009. The number of defensive asylum cases that EOIR judges have approved has risen by 99% from FY1996 through FY2009. The PRC led in the number of asylum cases approved by USCIS and EOIR over the decade of FY2000-FY2009.

Despite national data trends that appeared to be consistent, approval rates for asylum seekers differ strikingly across regions and jurisdictions. For example, a study of 290 asylum officers who decided at least 100 cases from the PRC from FY1999 through FY2005 found that the approval rate of PRC claimants spanned from zero to over 90% during this period. In a separate study, the U.S. Government Accountability Office (GAO) analyzed asylum decisions from 19 immigration courts that handled almost 90% of the cases from October 1994 through April 2007 and found that "significant variation existed."

Those advocating revisions of asylum policy have divergent perspectives. Some assert that asylum has become an alternative pathway for immigration rather than humanitarian protection. Others argue that—given the religious, ethnic, and political violence in various countries around the world—it has become more difficult to differentiate the *persecuted* from the *persecutors*. Some express concern that U.S. sympathies for the asylum seekers caught up in the democratic political uprisings in Libya and other parts of the Middle East, northern Africa, and south Asia could inadvertently facilitate the entry of terrorists. Others maintain that current law does not offer adequate protections for people fleeing human rights violations or gender-based abuses that occur around the world. Some cite the disparities in asylum approvals rates and urge broad-based administrative reforms. At the crux of the issue is the extent to which an asylum policy forged during the Cold War is adapting to the competing priorities and turbulence of the 21st century.

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Overview of Current Policy

Introduction

The United States has long held to the principle that it will not return a foreign national to a country where his life or freedom would be threatened.[1] This principle is embodied in several provisions of the Immigration and Nationality Act (INA), most notably in provisions defining refugees and asylees.[2] Foreign nationals seeking asylum must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion.[3]

Foreign nationals arriving or present in the United States may apply for asylum with the United States Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS) after arrival into the country, or they may seek asylum before a Department of Justice Executive Office for Immigration Review (EOIR) immigration judge during removal proceedings. Foreign nationals arriving at a U.S. port of entry who lack proper immigration documents or who engage in fraud or misrepresentation are placed in expedited removal; however, if they express a fear of persecution, they receive a "credible fear" hearing with a USCIS asylum officer and—if found credible—they are referred to an EOIR immigration judge for a hearing.[4]

The INA makes it clear that the Attorney General and Secretary of Homeland Security can exercise discretion in the granting of asylum. Foreign nationals who participated in the persecution of other people are excluded from receiving asylum. The law states other conditions for mandatory denials of asylum claims, including when the alien has been convicted of a serious crime and is a danger to the community; the alien has been firmly resettled in another country; or there are reasonable grounds for regarding the alien as a danger to national security.[5] The INA, moreover, has specific grounds for exclusion of all aliens that include criminal and terrorist grounds.[6]

This report opens with an overview of current policy, discussing the threshold of what constitutes asylum and the procedures for obtaining it. The second portion of the report identifies the top sending countries and includes a time series analysis of six selected source countries for asylum

[1] The term "foreign national" is synonymous with "alien," which is the term the Immigration and Nationality Act §101(a)(3) defines as a person who is not a citizen or national of the United States.

[2] Refugees are aliens displaced abroad and their cases are considered overseas. For a full discussion of U.S. refugee admissions and policy, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

[3] INA §208; 8 U.S.C. §1158.

[4] Distinct from asylum law and policy, aliens claiming relief from removal due to torture may be treated separately under regulations implementing the United Nations Convention Against Torture. For a full legal analysis of this convention, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia.

[5] INA §208(b)(2); 8 U.S.C. §1158.

[6] CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia; and CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

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seekers.[7] The third section of the report analyzes asylum approvals by country of origin. The report rounds out with a discussion of selected legislative policy issues.

Recent History of U.S. Asylum Policy

In 1968, the United States became party to the 1967 United Nations Protocol Relating to the Status of Refugees (hereafter referred to as the U.N. Refugee Protocol), agreeing to the principle of *nonrefoulement*. *Nonrefoulement* means that an alien will not be returned to a country where his life or freedom would be threatened, and it is embodied in several provisions of U.S. immigration law.[8] The U.N. Refugee Protocol does not require that a signatory accept refugees, but it does ensure that signatory nations afford certain rights and protections to aliens who meet the definition of refugee. At the time the United States signed the U.N. Refugee Protocol, Congress and the Administration thought that there was no need to amend the INA, assuming that the provisions to withhold deportation[9] would be adequate. In 1974, the former Immigration and Naturalization Service (INS)[10] issued its first asylum regulations.[11] The Refugee Act of 1980 codified the U.N. Refugee Protocol's definition of a refugee in the INA and included provisions for asylum in INA §208. The law defined asylees as aliens in the United States or at a port of entry who meet the definition of a refugee.

As **Figure 1** illustrates, asylum claims spiked immediately after passage of the Refugee Act in 1980, when over 120,000 Cubans and about 25,000 Haitians set sail for Florida. Known as the Mariel Boatlift, this mass exodus of asylum seekers put the new law to the test.[12] In the 1980s, political violence and civil wars in Central America prompted mass migration of asylum seekers from El Salvador, Guatemala, and Nicaragua. Asylum cases filed with the INS surpassed 100,000 for the first time in 1988. The Tiananmen Square massacre of Chinese protesters in 1989 symbolized events that triggered asylum seekers from China, who contributed, along with conditions in Central America, to the second spike depicted in **Figure 1**.

[7] Each of the six selected countries were among the major source countries of asylum seekers from FY1997 through FY2009.

[8] §208 of INA (8 U.S.C. §1158); §241(b)(3) of INA (8 U.S.C. §1231); and §101(a) of INA (8 U.S.C. §1101(a)(42)).

[9] Now known as withholding of removal, it prohibits an alien's removal to the country where his or her life or freedom would be threatened, but it allows removal to a third country where his or her life or freedom would not be threatened. The law states that aliens must establish that it is more likely than not that their life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion in the proposed country of removal. INA §241(b)(3).

[10] Prior to the enactment of the Homeland Security Act of 2002 (P.L. 107-296), most federal responsibilities and functions pertaining to immigration were handled by the Immigration and Naturalization Service (INS) in the U.S. Department of Justice. P.L. 107-296 abolished the INS and transferred its various immigration components to several new agencies within the newly created Department of Homeland Security.

[11] CFR 8, §108

[12] In 1981, then-Attorney General William French Smith opined that most Cuban asylum seekers were permitted to forego the asylum process because of the Cuban Adjustment Act of 1966, and this legal analysis has stood. For further background on Cuban asylees and refugees, see CRS Report R40566, *Cuban Migration to the United States: Policy and Trends*, by Ruth Ellen Wasem.

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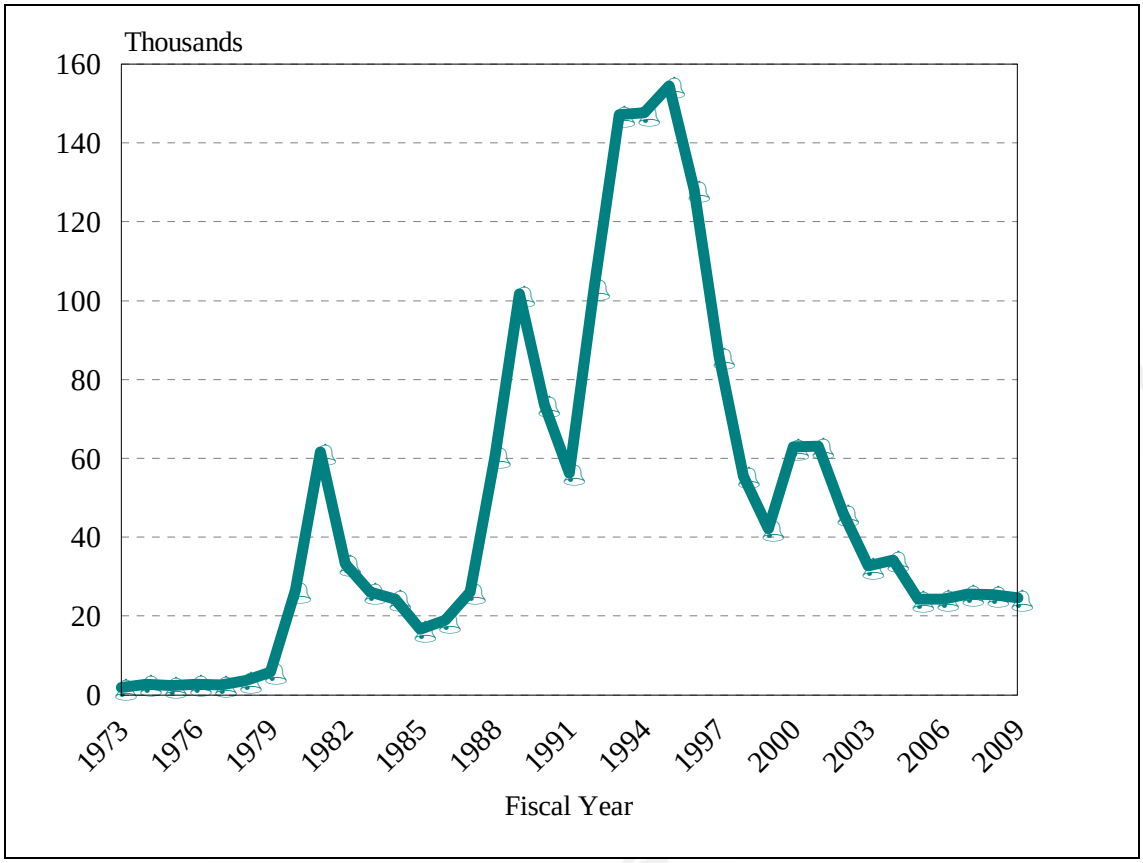
Figure 1. Asylum Cases Filed with INS/USCIS
FY1973-FY2009



Source: CRS presentation of data from the DHS Office of Immigration Statistics.

The December 1991 military coup d'etat deposing Haiti's first democratically elected president, Jean Bertrand Aristide, led thousands of Haitians to flee by boat to the United States in FY1992. The following year, 285 Chinese came ashore in New York on the "Golden Venture" and a total of 683 Chinese came ashore in three different ocean-going vessels along the coast of California in the summer of 1993.[13] Asylum claims with the INS peaked at 149,566 in FY1995 (**Figure 1**). Almost half of those cases, however, resulted from the 1990 settlement of the American Baptist Church (ABC) case that allowed Salvadorans and Guatemalans living in the United States who had not obtained asylum in the past to apply for asylum.[14] By the end of FY1995, there were 457,670 asylum cases in the backlog, as the INS asylum corps was unable to keep pace.

The Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA, P.L. 104-208) of 1996 made substantial changes to the asylum process, most notably by establishing summary exclusion provisions (now known as expedited removal), adding time limits on filing claims, and limiting judicial review in certain circumstances. IIRIRA also added a provision enabling refugees or

[13] CRS Report 93-727, *Chinese Migration to the United States: Trends and Issues*, by Ruth Ellen Wasem. (Archived, available upon request)

[14] For a full discussion, see CRS Report 97-810, *Central American Asylum Seekers: Impact Of 1996 Immigration Law*, by Ruth Ellen Wasem. (Archived, available upon request)

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asylees to request asylum on the basis of persecution resulting from resistance to coercive population control policies.[15] Asylum claims with the INS dropped in the years following the passage of IIRIRA, as **Figure 1** depicts. It remains difficult to assess the extent to which the IIRIRA revisions to asylum policy affected this decline.

The Real ID Act of 2005 (P.L. 109-13) further revised asylum law. Foremost, it established expressed standards of proof for asylum seekers, including that the applicant's race, religion, nationality, social group, or political opinion was or will be one of the central motives for his or her persecution. It also required that the asylum seeker provide evidence which corroborates otherwise credible testimony; such evidence must be provided unless the applicant cannot reasonably obtain it.[16]

Standards for Asylum

Because "fear" is a subjective state of mind, assessing the merits of an asylum case rests in large part on the credibility of the claim and the likelihood that persecution would occur if the alien is returned home. These two distinct concepts—the credibility of the claim, or "credible fear," and the likelihood that persecution would occur, or "well-founded fear"—are fundamental to establishing the standards for asylum. A third dimension that overlays these concepts is the matter of "mixed motives" for persecuting the alien. Each of these standards are discussed below.

Credible Fear

The INA states that "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 §208."[17] Integral to expedited removal, which is discussed below, the credible fear concept also functions as a pre-screening standard that is broader—and the burden of proof easier to meet—than the well-founded fear of persecution standard required to obtain asylum.

Well-Founded Fear

The standards for "well-founded fear" have evolved over the years and been guided significantly by judicial decisions, including a notable U.S. Supreme Court case.[18] The regulations specify that an asylum seeker has a well-founded fear of persecution if

[15] This coercive family planning provision was added by §601. It states

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

[16] CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

[17] INA §235(b)(1)(B)(v); 8 U.S.C. §1225.

[18] *INS v. Cardoza-Fonseca*, 480 U.S.C. 421 (No. 85-782, March 9, 1987).

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> (A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;
>
> (B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and
>
> (C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.[19]

The regulations also state that an asylum seeker "does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country.... "[20]

In evaluating whether the asylum seeker has sustained the burden of proving that he or she has a well-founded fear of persecution, the regulations state that the asylum officer or immigration judge shall not require the alien to provide evidence that there is a reasonable possibility he or she would be individually singled out for persecution if

> (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.[21]

Mixed Motives

The intent of the persecutor is subjective and may stem from mixed or multiple motives. The courts have ruled that the persecution may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied.[22] A 1997 Board of Immigration Appeals (BIA) decision concluded "an applicant for asylum need not show conclusively why persecution occurred in the past or is likely to occur in the future, [but must] produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or imputed protected ground."[23] Generally, the asylum seeker must demonstrate in mixed motive cases that even though his/her persecutors were motivated for a non-cognizable

[19] 8 C.F.R. §208.13(b)(2).

[20] Ibid.

[21] 8 C.F.R. §208.13(b)(2).

[22] For example, the Indian police's desire to obtain information regarding terrorist activities in the Sikh cases was seen as the main motive for torturing a Sikh named Surinder Pal Singh when he was initially denied asylum. The court did not dispute the facts: "The Indian police learned of the apparent support of the Singh family for the separatists and arrested Singh on June 15, 1989. Despite Singh's assurances that he did not support the separatists, the police interrogated and beat Singh for two-and-a-half hours, until he lost consciousness. The police then revived him with water and resumed the beatings. They kept Singh detained for two days." The court ruled Singh had shown past persecution. *Harpinder Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995).

[23] Matter of T-M-B-, 21 I. & N. Dec. 775, 777 (B.I.A. 1997).

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reason, one of the persecutor's central motives was the asylum seeker's race, religion, nationality, social group, or political opinion.[24]

Process of Requesting Asylum

An applicant for asylum begins the process either in the United States, if he or she is already present, or at a port of entry while seeking admission. This process differs from a potential refugee who begins a separate process wholly outside of the United States.[25] Depending on whether or not the applicant is currently in removal proceedings, two avenues exist to seek asylum: "affirmative applications" and "defensive applications." The affirmative and defensive applications follow different procedural paths but draw on the same legal standards. In both processes, the burden of proof is on the asylum seeker to establish that he or she meets the refugee definition specified in the INA.

Affirmative Claims

An asylum seeker who is in the United States and not involved in any removal proceedings files an I-589, the asylum application form, with the USCIS. The USCIS schedules a non-adversarial interview with a member of the Asylum Officer Corps. There are eight asylum offices located throughout the country. The asylum officers either grant asylum to successful applicants or refer to the immigration judges those applicants who fail to meet the definition. The asylum officers make their determinations regarding the affirmative applications based upon the application form, the information received during the interview, and other information related to the specific case (e.g., information about country conditions). If the asylum officer approves the application and the alien passes the identification and background checks, then the foreign national is granted asylum status.

There has been a 79% decrease in affirmative asylum cases filed since the enactment of IIRIRA in 1996, falling from 116,877 in FY1996 to 24,550 in FY2009, with a modest rebound in FY2000 and FY2001. As **Figure 2** depicts, the number of asylum cases approved more than doubled from 13,532 in FY1996 to 31,202 in FY2002, and then fell to the lowest point over the 14-year period—9,614—in FY2009. This decline in cases approved represents a 29% change over the period.

[24] Acts directed at women such as female genital mutilation (FMG), rape by military or police forces, "honor killings," or domestic violence are especially problematic, because the woman must demonstrate that the abuse was based on race, religion, nationality, membership in a particular social group, or political opinion. Although the Guatemalan woman who fled to the United States because of repeated abuse by her husband (*Matter of R-A-, Int*. Dec. 3403, BIA 1999, A.G. 2001) was ultimately granted asylum in 2009, her case did not necessarily set a precedent for other women seeking asylum from domestic violence. For legal brief, see Joe D. Whitley, U.S. Department of Homeland Security General Counsel, Victor Cerda, DHS Customs and Immigration Enforcement Acting Principal Legal Advisor, and Dea Carpenter, DHS Citizenship and Immigration Services Acting Principal Legal Advisor, to U.S. Attorney General, February 19, 2004, http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf.

[25] For a full discussion of U.S. refugee admissions and policy, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

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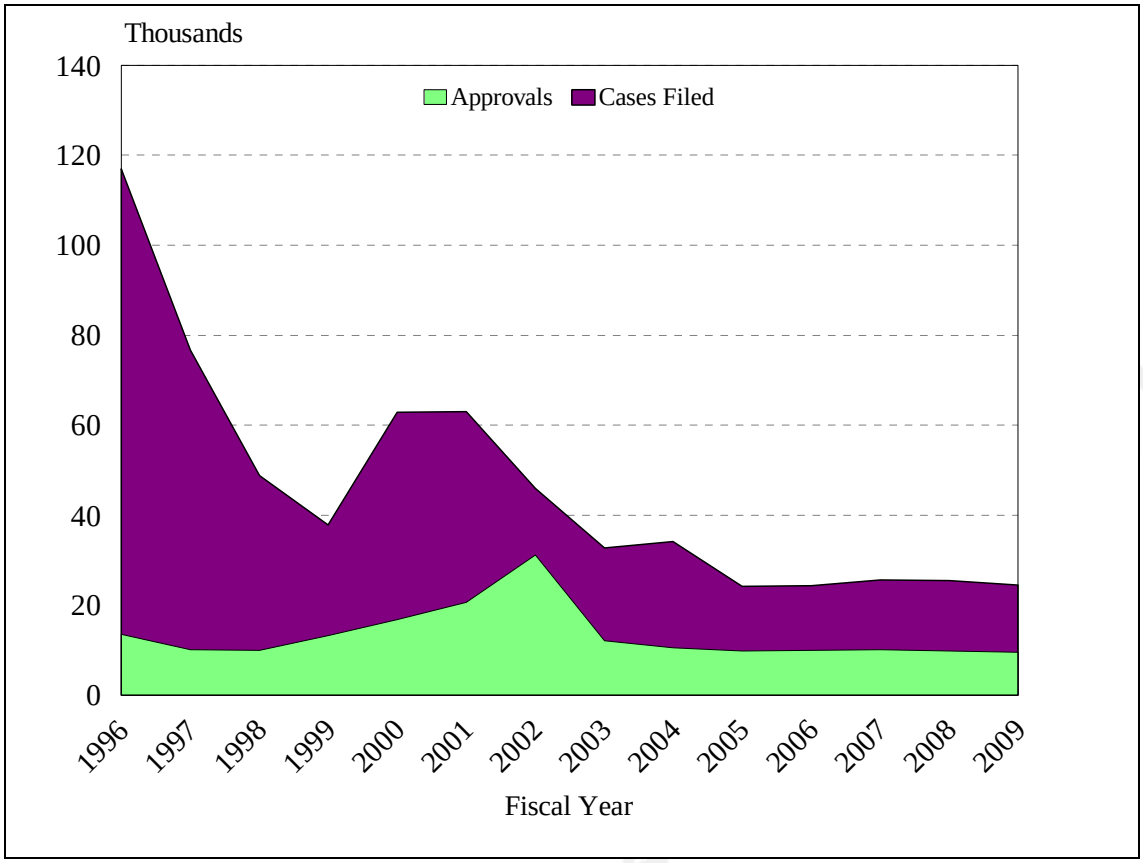
Figure 2. Affirmative Asylum Cases Filed and Approved
FY1996-FY2009



Source: CRS presentation of data from the USCIS Directorate of Refugee, Asylum, and International Operations.

Notes: Data represent cases not individuals.

The asylum officer does not technically deny asylum claims; rather, the asylum applications of aliens who are not granted asylum by asylum officers are referred to EOIR immigration judges for formal proceedings. In some respects, these applicants/aliens are allowed a "second bite at the apple."[26] Asylum applicants in the affirmative process are not subject to the mandatory detention requirements while their applications are being adjudicated, though there is broader authority under the INA to detain aliens for other grounds.[27]

Defensive Claims

Defensive applications for asylum are raised when a foreign national is in removal proceedings and asserts claim for asylum as a defense to his/her removal. EOIR's immigration judges and the

[26] This expression is sometimes used in the context of asylum law. For example, see "Judge Denies Class Certification for PRC Nationals Denied Asylum," *Interpreter Releases*, vol. 71, no. 4 (January 24, 1994).

[27] INA §287(a).

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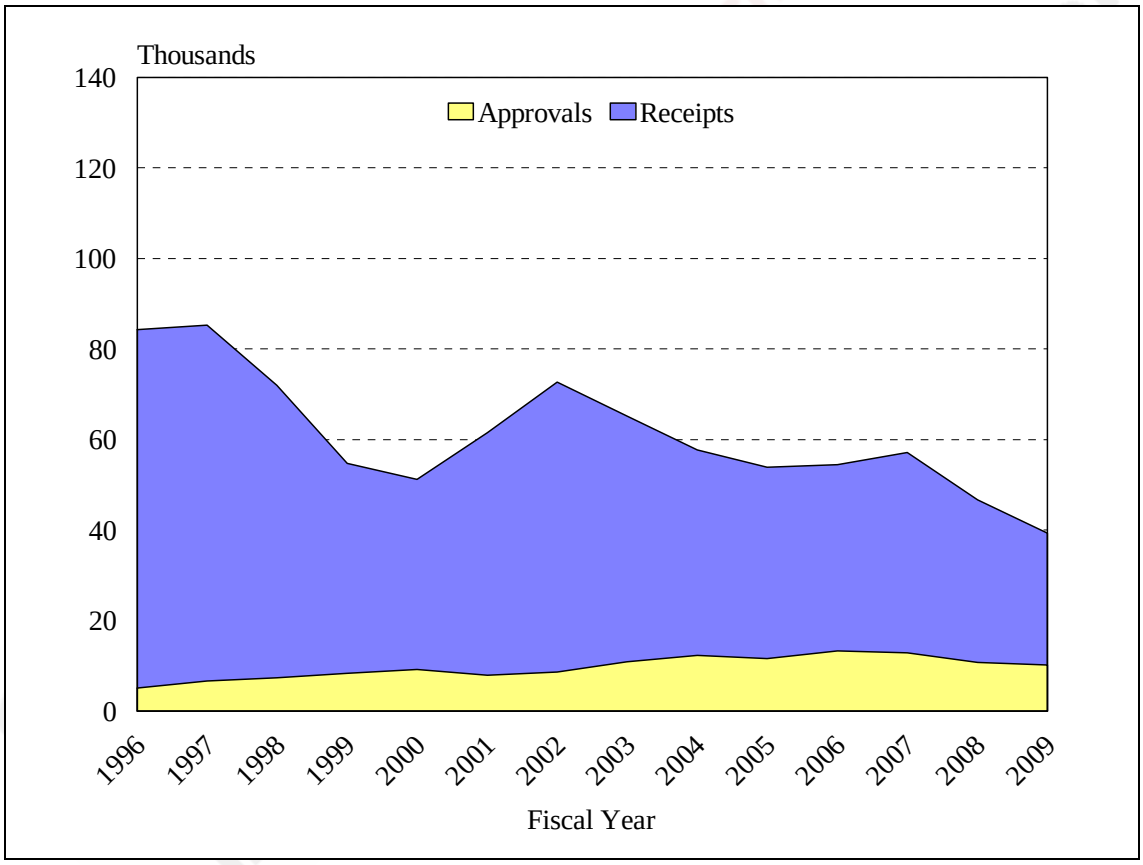
BIA, entities in DOJ separate from the USCIS, have exclusive control over such claims and are under the authority of the Attorney General.[28] Generally, the alien raises the issue of asylum during the beginning of the removal process. The matter is then litigated in immigration court, using formal procedures such as the presentation of evidence and direct and cross examination. If the alien fails to raise the issue at the beginning of the process, the claim for asylum may be raised only after a successful motion to reopen is filed with the court. The immigration judge's ultimate decision regarding both the applicant's/alien's removal and asylum application is appealable to the BIA. Applicants/aliens seeking asylum via the defensive application method may be detained until an immigration judge rules on their application. The applicant/alien is not detained due to their asylum claim, but rather because of the broader authority in the INA to detain aliens.[29]

Figure 3. Defensive Asylum Cases Filed and Approved

FY1996-FY2009



Source: CRS presentation of data from the Office of Planning, Analysis and Technology in the Executive Office for Immigration Review.

Notes: Data represent cases not individuals.

[28] For background on the role and structure of EOIR and BIA, see CRS Report RL33410, *Immigration Litigation Reform*, by Margaret Mikyung Lee.

[29] INA §287(a).

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Defensive asylum claims made during EOIR proceedings started at a lower level in FY1996 (84,293) than affirmative USCIS claims (116,877). Since that time, defensive asylum claims have dropped by 53%, to 39,279 in FY2009. The number of asylum cases that EOIR judges have approved, however, has risen by 99% over this 14-year period. EOIR approved 5,131 in FY1996 and 10,186 in FY2009, as shown in **Figure 3**.

Expedited Removal Claims

DHS' Customs and Border Protection (CBP) officer must summarily exclude a foreign national arriving without proper documentation, unless the alien expresses a fear of persecution if repatriated. Absent a stated fear, the CBP officer is allowed to exclude aliens without proper documentation from the United States without placing them in removal proceedings.[30] This procedure is known as expedited removal.[31] According to DHS immigration policy and procedures, CBP inspectors, as well as other DHS immigration officers, are required to ask each individual who may be subject to expedited removal the following series of "protection questions" to identify anyone who is afraid of return:

- Why did you leave your home country or country of last residence?
- Do you have any fear or concern about being returned to your home country or being removed from the United States?
- Would you be harmed if you were returned to your home country or country of last residence?
- Do you have any questions or is there anything else you would like to add?

If the foreign national expresses a fear of return, the alien is supposed to be detained by Immigration and Customs Enforcement (ICE) and interviewed by a USCIS asylum officer. The asylum officer then makes the "credible fear" determination of the alien's claim. Those found to have a "credible fear" are referred to an EOIR immigration judge, which places the asylum seeker on the defensive path to asylum. If the USCIS asylum officer finds that an alien does not have a credible fear, the alien may request that an EOIR immigration judge review that finding.[32]

[30] Executive Office for Immigration Review, *Asylum and Withholding of Removal Relief*, U.S. Department of Justice, Fact Sheet, January 15, 2009, http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf.

[31] CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

[32] The immigration judge's credible fear review must be done within 24 hours whenever possible, but no later than seven days after the initial determination by an asylum officer, and is limited strictly to whether an alien has a credible fear of persecution or torture. Executive Office for Immigration Review, *Asylum and Withholding of Removal Relief*, U.S. Department of Justice, Fact Sheet, January 15, 2009.

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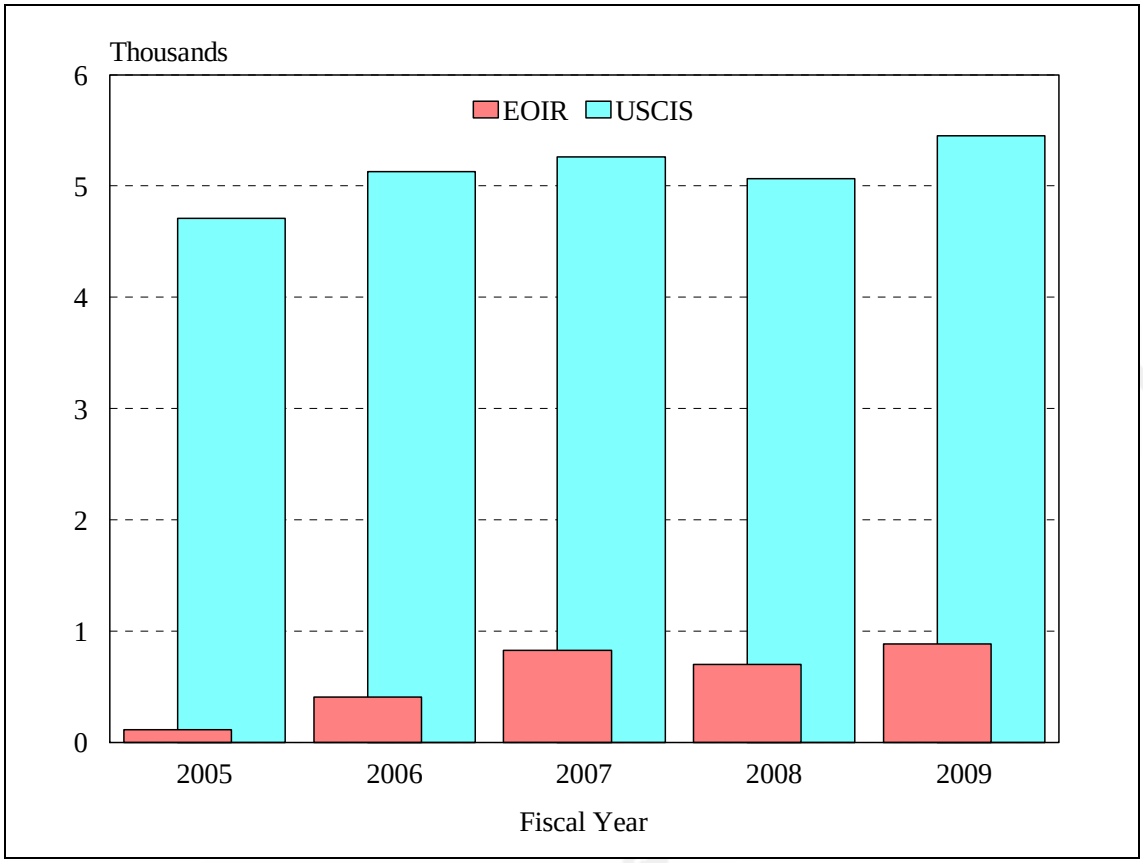
Figure 4. "Credible Fear" Claims Received by USCIS and EOIR

FY2005-FY2009



Source: CRS presentation of USCIS Refugees, Asylum and Parole System data.

Notes: Data represent cases not individuals.

The number of "credible fear" claims that USCIS has considered has steadily increased from 4,712 in FY2005 to 5,454 in FY2009—a 16% increase. The number of "credible fear" reviews by EOIR is much lower overall than it is for USCIS, as one would expect. Nonetheless, EOIR numbers have seen a notable rise from 114 in FY2005 to 887 in FY2009. Consistent time series data on "credible fear" claims are not available before FY2005.

Aliens Arriving by Sea

On November 13, 2002, the former INS published a notice clarifying that certain aliens arriving by sea who are not admitted or paroled into the United States are to be placed in expedited removal proceedings and detained (subject to humanitarian parole).[33] This notice concluded that illegal mass migration by sea threatened national security because it diverts the U.S. Coast Guard and other resources from their homeland security duties.[34] The Attorney General expanded on

[33] "Parole" is a term in immigration law which means that the alien has been granted temporary permission to be present in the United States. Parole does not constitute formal admission to the United States and parolees are required to leave when the terms of their parole expire, or, if otherwise eligible, to be admitted in a lawful status.

[34] 67 *Federal Register* 68923-68926, November 13, 2002.

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this rationale in his April 17, 2003, ruling that instructs EOIR immigration judges to consider "national security interests implicated by the encouragement of further unlawful mass migrations ..." in making bond determinations regarding release from detention of unauthorized migrants who arrive in "the United States by sea seeking to evade inspection."[35] The case involved a Haitian who had come ashore in Biscayne Bay, FL, on October 29, 2002, and had been released on bond by an immigration judge. The BIA had upheld his release, but the Attorney General vacated the BIA decision.[36]

Background Checks

All foreign nationals seeking asylum are subject to multiple background checks in the terrorist, immigration, and law enforcement databases. Those who enter the country legally on nonimmigrant visas are screened by the consular officers at the Department of State when they apply for a visa, and all foreign nationals are inspected by CBP officers at ports of entry.[37] Those who enter the country illegally are screened by the U.S. Border Patrol or the ICE agents when they are apprehended.[38] When aliens formally request asylum, they are sent to the nearest USCIS-authorized fingerprint site. They have all 10 fingers scanned and are subject to a full background check by the Federal Bureau of Investigation (FBI).[39]

Victims of Torture

Distinct from asylum law and policy, aliens claiming relief from removal due to torture may be treated separately under regulations implementing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter, Torture Convention). Article 3 of the Torture Convention prohibits the return of any person to a country where there are "substantial grounds" for believing that he or she would be in danger of being tortured. The alien must meet the three elements necessary to establish torture:

1. the torture must involve the infliction of severe pain or suffering, either physical or mental;
2. the torture must be intentionally inflicted; and
3. the torture must be committed by or at the acquiescence of a public official or person acting in an official capacity.

Generally, an applicant for non-removal under Article 3 has the burden of proving that it is more likely than not that he would be tortured if removed to the proposed country. If credible, the applicant's testimony may be sufficient to sustain this burden without additional corroboration.[40]

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[35] 23 I&N Dec. 572 (A.G. 2003).

[36] CRS Report RS21349, *U.S. Immigration Policy on Haitian Migrants*, by Ruth Ellen Wasem.

[37] For more information and analysis of alien screening and background checks, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by Michael John Garcia and Ruth Ellen Wasem; and CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem.

[38] CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Chad C. Haddal.

[39] For more information, see U.S. Citizenship and Immigration Services, *Affirmative Asylum Procedures Manual*, February 2003, pp. 93-144.

[40] 8 C.F.R. §208.16(c)(2).

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In assessing whether it is "more likely than not" that an applicant would be tortured if removed to the proposed country, all evidence relevant to the possibility of future torture is required to be considered. However, if a diplomatic assurance (deemed sufficiently reliable by the Attorney General or Secretary of State) that the alien will not be tortured is obtained from the government of the country to which the alien would be repatriated, the alien's claim for protection will not be considered further and the alien may be removed.[41]

Source Countries for Asylum Seekers

For many years, most foreign nationals who sought asylum in the United States were from the Western Hemisphere, notably Central America and the Caribbean. From October 1981 through March 1991, for example, Salvadoran and Nicaraguan asylum applicants totaled over 252,000 and made up half of all foreign nationals who applied for asylum with the INS.[42] In FY1995, more than three-fourths of asylum cases filed annually came from the Western Hemisphere.[43]

In FY1999, the People's Republic of China (PRC) moved to the top of the source countries for affirmative asylum claims, with 4,209 new cases. Somalia followed as a leading source country with 3,125 cases in FY1999. As the overall number of asylum seekers fell in the late 1990s, the shrinking numbers from Central America contributed to the decline. Simultaneously, the number of asylum seekers from the PRC began rising and reached 10,522 affirmative cases in FY2002. The PRC remained the leading source country throughout the 2000s.

Top 10 Source Countries in FY2009

Asylum seekers from the PRC dominated both the affirmative and defensive asylum caseloads in FY2009, as **Figure 5** shows. They comprised 36% of the 24,550 affirmative cases filed with USCIS and 24% of the 39,279 defensive cases filed with EOIR. Five of the top 10 source countries of asylum seekers were Western Hemisphere nations in FY2009. The five were Haiti, Mexico, Guatemala, El Salvador, and Colombia. Ethiopia was the only African nation that was a top 10 source country for asylum seekers in FY2009.

[41] 8 C.F.R. §208.18(c) and §1208(c). For a full legal analysis of the Torture Convention, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia.

[42] CRS Report 93-233, *Asylum Seekers: Haitians In Comparative Context*, by Ruth Ellen Wasem, (Archived, available on request).

[43] CRS Report 94-314, *Asylum Facts And Issues*, by Ruth Ellen Wasem, (Archived, available on request).

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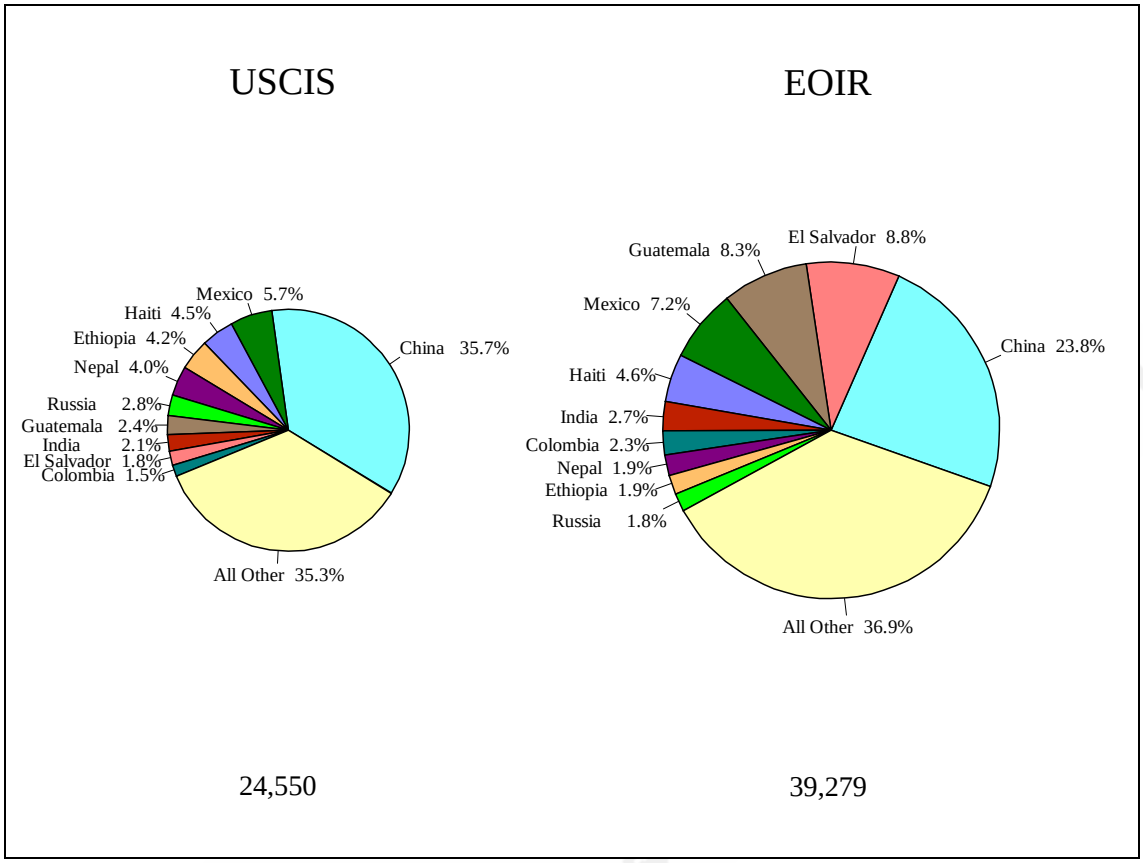
Figure 5. Top 10 Source Countries of Asylum Seekers

FY2009



Source: CRS presentation of data from the USCIS Directorate of Refugee, Asylum, and International Operations and the Office of Planning, Analysis and Technology in the Executive Office for Immigration Review.

Notes: Data represent cases not individuals.

As evident in **Figure 6**, "credible fear" claims are much smaller in overall numbers—5,454 in FY2009—than the affirmative and defensive asylum caseloads, and the top 10 source countries exhibit a somewhat different pattern as well. The PRC (18%) was still the leading source country, but El Salvador (17%) sent a comparable number of "credible fear" claimants in FY2009, as **Figure 6** illustrates. Indeed, more Western Hemisphere nations are among the top 10 source countries for "credible fear" claimants than among the EOIR and USCIS asylum caseloads. As discussed above, "credible fear" typically comes up when an alien arrives without proper documentation and is put into expedited removal proceedings. Those deemed to have a credible fear proceed to a defensive asylum hearing with EOIR.

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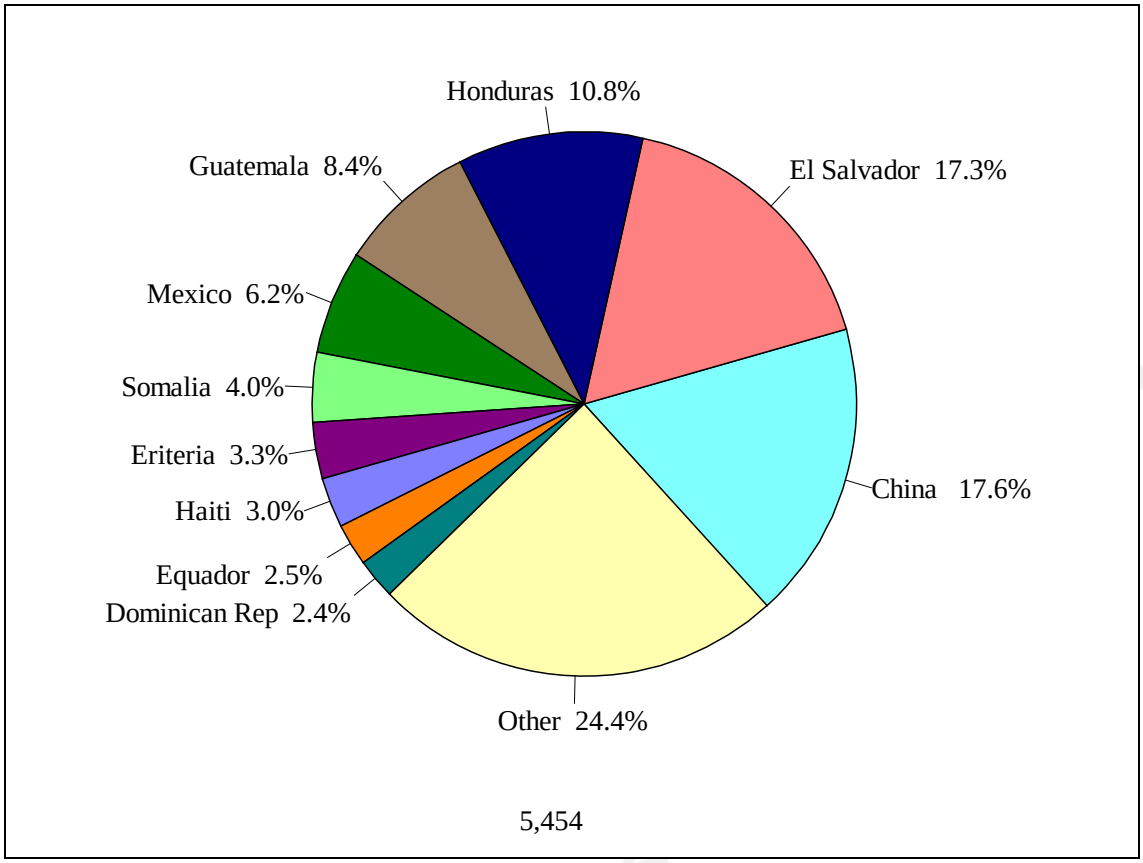
Figure 6. USCIS "Credible Fear" Claimants by Top 10 Countries of Origin
FY2009



Source: CRS presentation of USCIS Refugees, Asylum and Parole System data.

Notes: Data represent cases not individuals.

Trends for Six Selected Countries

Given the ebbs and flows of asylum seekers over time that **Figure 1**, **Figure 2**, and **Figure 3** depict, the representativeness for policy analysis of FY2009 data—or any single year's data—comes into question. One approach that refines the policy study is the analysis of a subset of source countries' trends in asylum seekers. This section of the report focuses on six major source countries: the PRC, Colombia, El Salvador, Ethiopia, Haiti, and Mexico. Each of the six selected countries were among the major source countries of asylum seekers from FY1997 through FY2009.

The analysis presents data on the three asylum gateways of affirmative, defensive, and "credible fear" claims for each of these source countries from FY1997 through FY2009. As noted above, time series data on "credible fear" claims were available only since FY2005. Bear in mind that EOIR defensive cases included many asylum claimants that first appeared as "credible fear" or affirmative cases with USCIS. As a consequence, defensive claims display an echo effect of the spikes and valleys in "credible fear" and affirmative cases.

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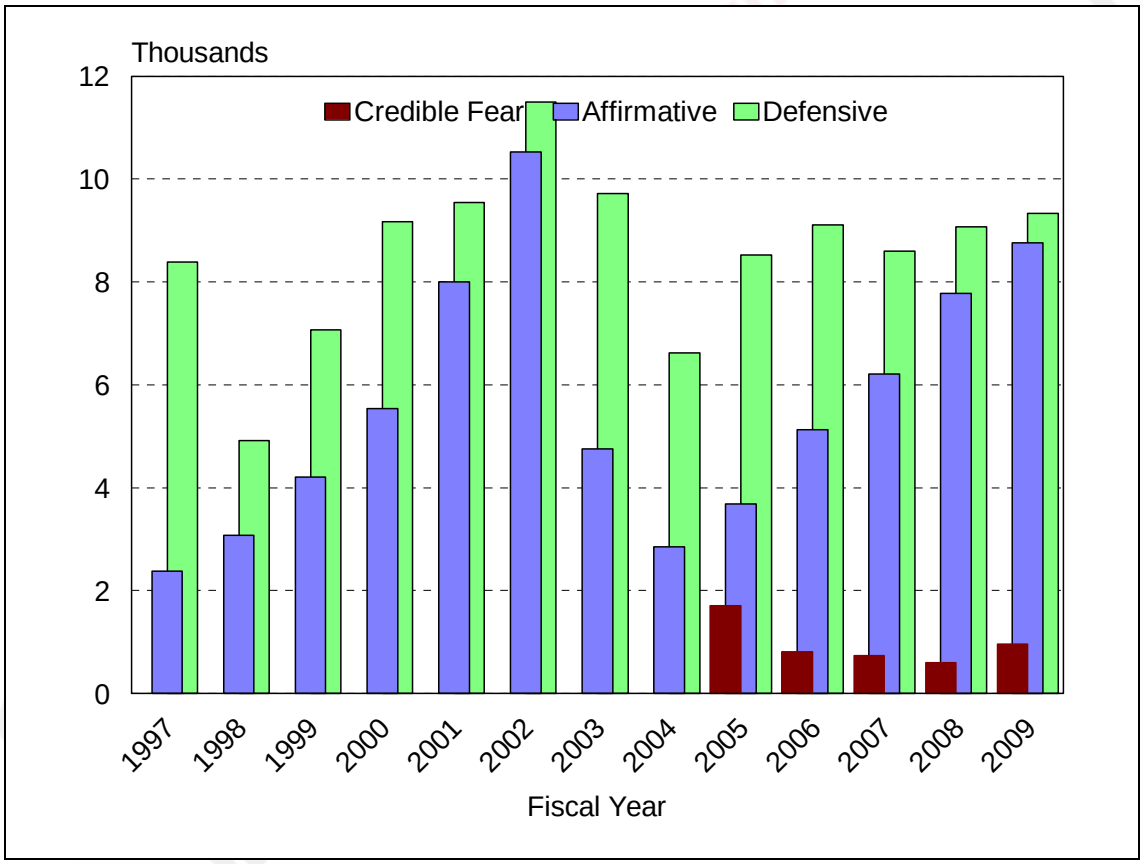
People's Republic of China[44]

PRC asylum cases peaked in FY2002 for both affirmative and defensive claims—10,522 and 11,499, respectively (**Figure 7**). The ebbs and flows of PRC asylum seekers over the 13-year period, however, exhibit different patterns depending on the asylum gateway. Affirmative claims rose by 268.4%, from 2,377 cases in FY1997 to 8,758 cases in FY2009. The 13-year average for affirmative claims was 5,607. In contrast, defensive claims increased by only 11.4%, from 8,381 cases in FY1997 to 9,336 cases in FY2009. However, the year-to-year fluctuations in defensive claims were substantial, going from a low of 4,913 in FY1998 to a high of 11,499 in FY2002. The 13-year average for defensive claims (8,581) was higher than the average for the affirmative claims. The "credible fear" claims dropped from a high of 1,711 in FY2005 to 602 in FY2008, and then rose to 962 in FY2009.

Figure 7. Asylum Seekers from China



Source: CRS presentation of data from the USCIS Directorate of Refugee, Asylum, and International Operations and the Office of Planning, Analysis and Technology in the Executive Office for Immigration Review.

Notes: Data represent cases not individuals.

[44] For background on country conditions, see CRS Report RL34729, *Human Rights in China: Trends and Policy Implications*, by Thomas Lum and Hannah Fischer.

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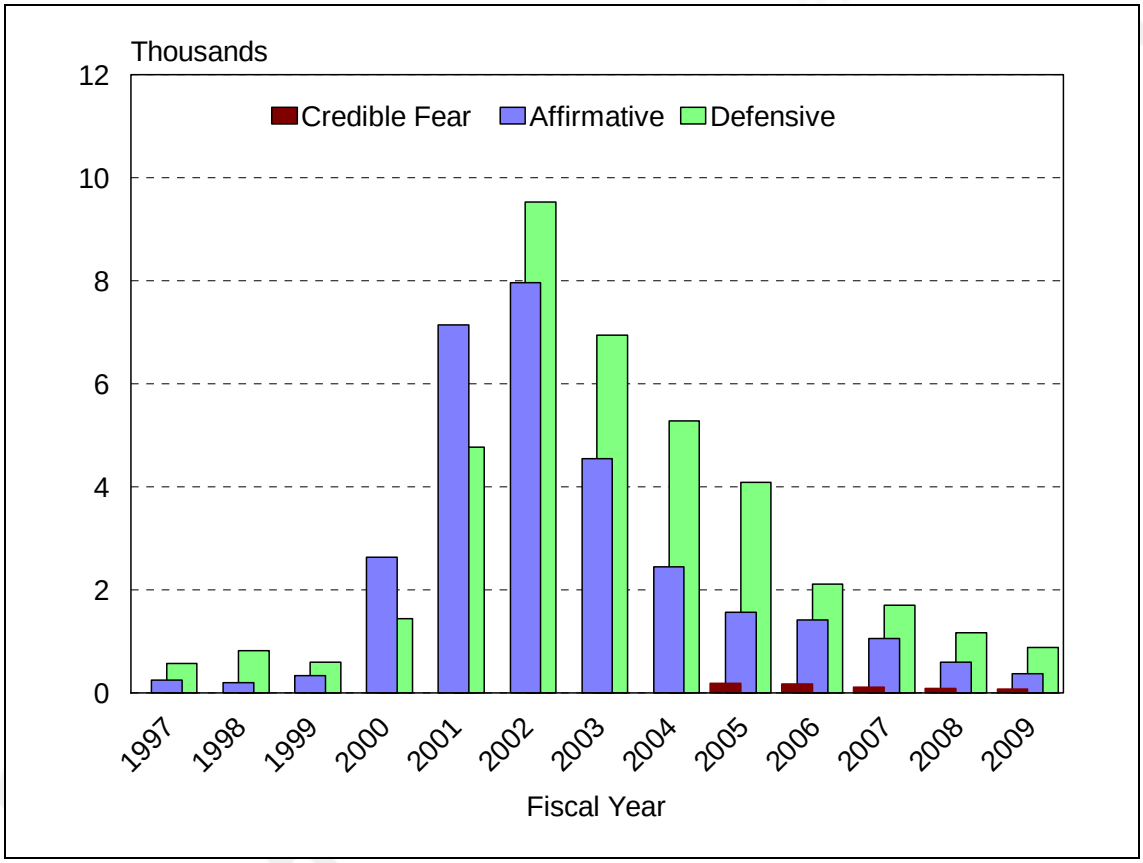
Colombia[45]

Colombian asylum cases exhibit a classic bell curve in **Figure 8**, peaking in FY2002 at 7,967 (affirmative) and 9,526 (defensive). Although both gateways of affirmative and defensive claims have decreased since FY2002, the overall trends of Colombian asylum seekers from FY1997 through FY2009 are up by 48.2% and 53.6%, respectively. The 13-year average for affirmative claims was 2,351, and for defensive claims it was 3,072. The "credible fear" claims have dipped by 54.6%, from 185 in FY2005 to 84 in FY2009.

Figure 8. Asylum Seekers from Colombia



Source: CRS presentation of data from the USCIS Directorate of Refugee, Asylum, and International Operations and the Office of Planning, Analysis and Technology in the Executive Office for Immigration Review.

Notes: Data represent cases not individuals.

[45] For background on country conditions, see CRS Report RL32250, *Colombia: Issues for Congress*, by June S. Beittel.

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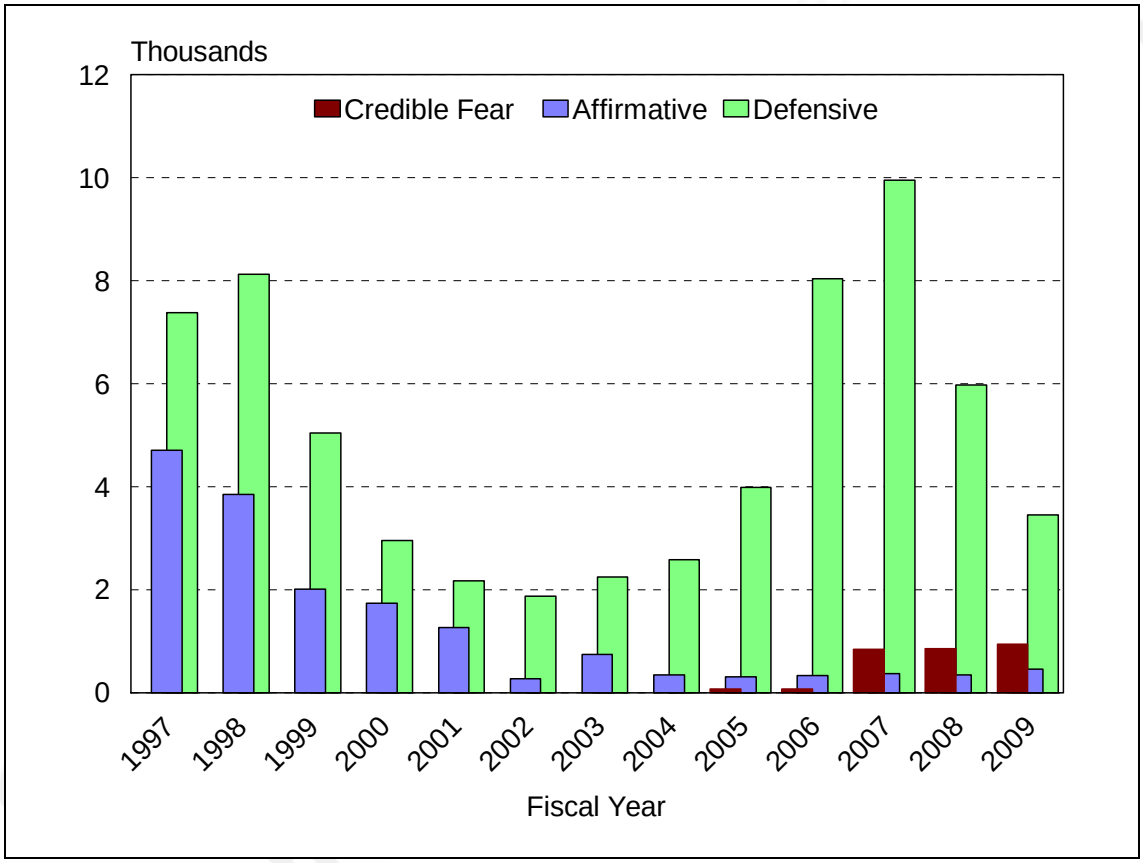
El Salvador[46]

Affirmative asylum claims from El Salvador have steadily declined by 90.4%, from a high of 4,706 in FY1997 to 453 in FY2009. The 13-year average of affirmative claims is 1,289. Salvadoran defensive claims exhibit more of a u-shaped distribution in **Figure 9**, with spikes of 8,126 in FY1998 and 9,955 in FY2007. The 13-year average of defensive claims is 4,908. Overall, defensive asylum claims are down by 53.2% for Salvadorans, despite peaking at 9,955 in FY2007. Furthermore, the number of "credible fear" claims during expedited removal has risen sharply from 73 in FY2005 to 945 in FY2009, and the number of these "credible fear" claims have surpassed the number of affirmative cases for FY2007 through FY2009.

Figure 9. Asylum Seekers from El Salvador



Source: CRS presentation of data from the USCIS Directorate of Refugee, Asylum, and International Operations and the Office of Planning, Analysis and Technology in the Executive Office for Immigration Review.

Notes: Data represent cases not individuals.

[46] For background on country conditions, see CRS Report RS21655, *El Salvador: Political, Economic, and Social Conditions and U.S. Relations*, by Clare Ribando Seelke.

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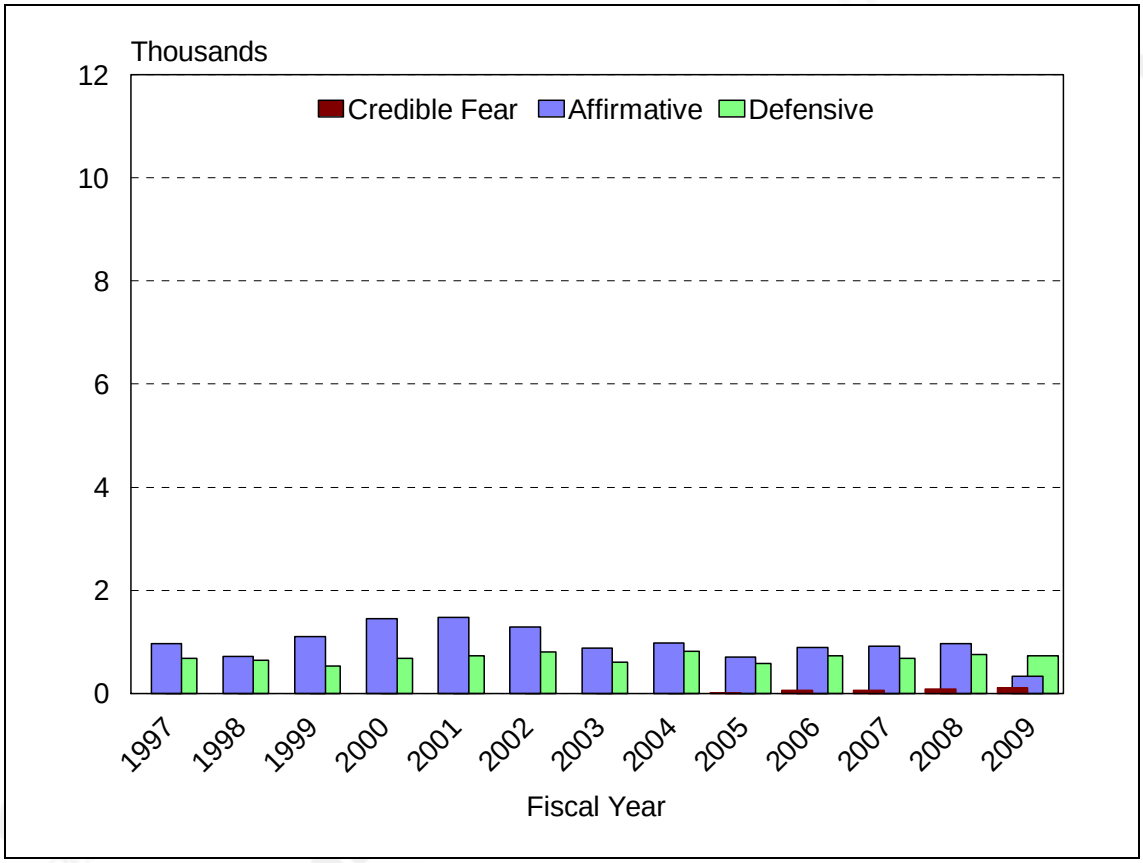
Ethiopia[47]

Asylum seekers from Ethiopia comprise the smallest number of cases among the six source countries studied. The 13-year average was 972 for affirmative claims and 689 for defensive claims, with only modest variations from year to year. Ethiopian asylum seekers were also noteworthy among the six source countries because each year from FY1997 through FY2009 they filed more affirmative cases than defensive cases (**Figure 10**). Although small, the number of Ethiopian "credible fear" claims during expedited removal has risen markedly from 13 in FY2005 to 107 in FY2009.

Figure 10. Asylum Seekers from Ethiopia



Source: CRS presentation of data from the USCIS Directorate of Refugee, Asylum, and International Operations and the Office of Planning, Analysis and Technology in the Executive Office for Immigration Review.

Notes: Data represent cases not individuals.

[47] For background on country conditions, see Bureau of African Affairs, *Background Note: Ethiopia*, U.S. Department of State, November 2010, http://www.state.gov/r/pa/ei/bgn/2859.htm.

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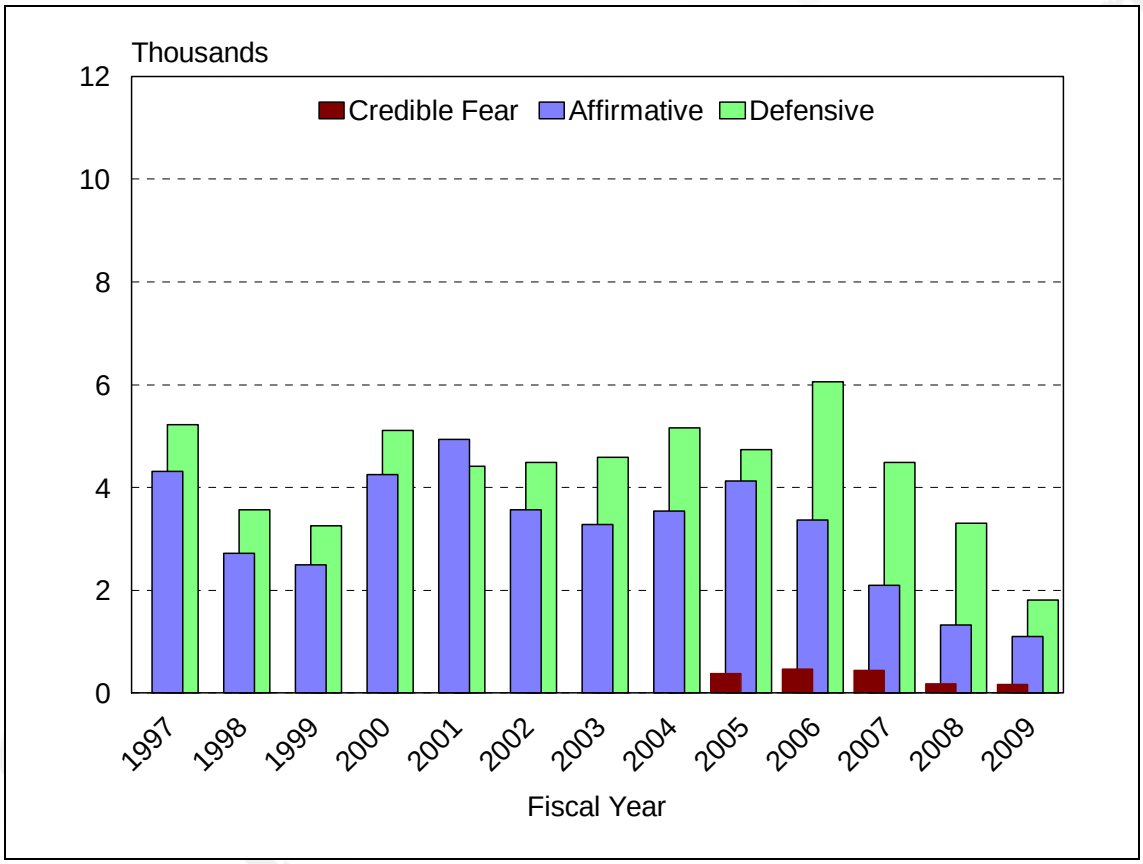
Haiti[48]

Many Haitians who flee Haiti are interdicted by the U.S. Coast Guard and do not appear among those who claim asylum in the United States.[49] The number of asylum seekers from Haiti who do reach the United States has not fluctuated greatly over the 13-year period. All three asylum gateways of affirmative, defensive, and "credible fear" claims, however, have each evidenced a drop since FY2006, when defensive claims peaked at 6,056. The 13-year average was 3,162 for affirmative claims and 4,324 for defensive claims. Affirmative claims hit 4,938 in FY2001 and surpassed the number of defensive claims that year, as **Figure 11** illustrates. Overall, the number of Haitian asylum seekers filing affirmative claims fell by 74.5%, defensive claims fell by 65.3%, and "credible fear" claims fell by 57.4%.

Figure 11. Asylum Seekers from Haiti



Source: CRS presentation of data from the USCIS Directorate of Refugee, Asylum, and International Operations and the Office of Planning, Analysis and Technology in the Executive Office for Immigration Review.

Notes: Data represent cases not individuals.

[48] For background on country conditions, see CRS Report R40507, *Haiti: Current Conditions and Congressional Concerns*, by Maureen Taft-Morales.

[49] Since FY1998, the Coast Guard had interdicted over 1,000 Haitians annually, reaching 1,782 in FY2009. For further discussion of Haitian interdiction, see CRS Report RS21349, *U.S. Immigration Policy on Haitian Migrants*, by Ruth Ellen Wasem.

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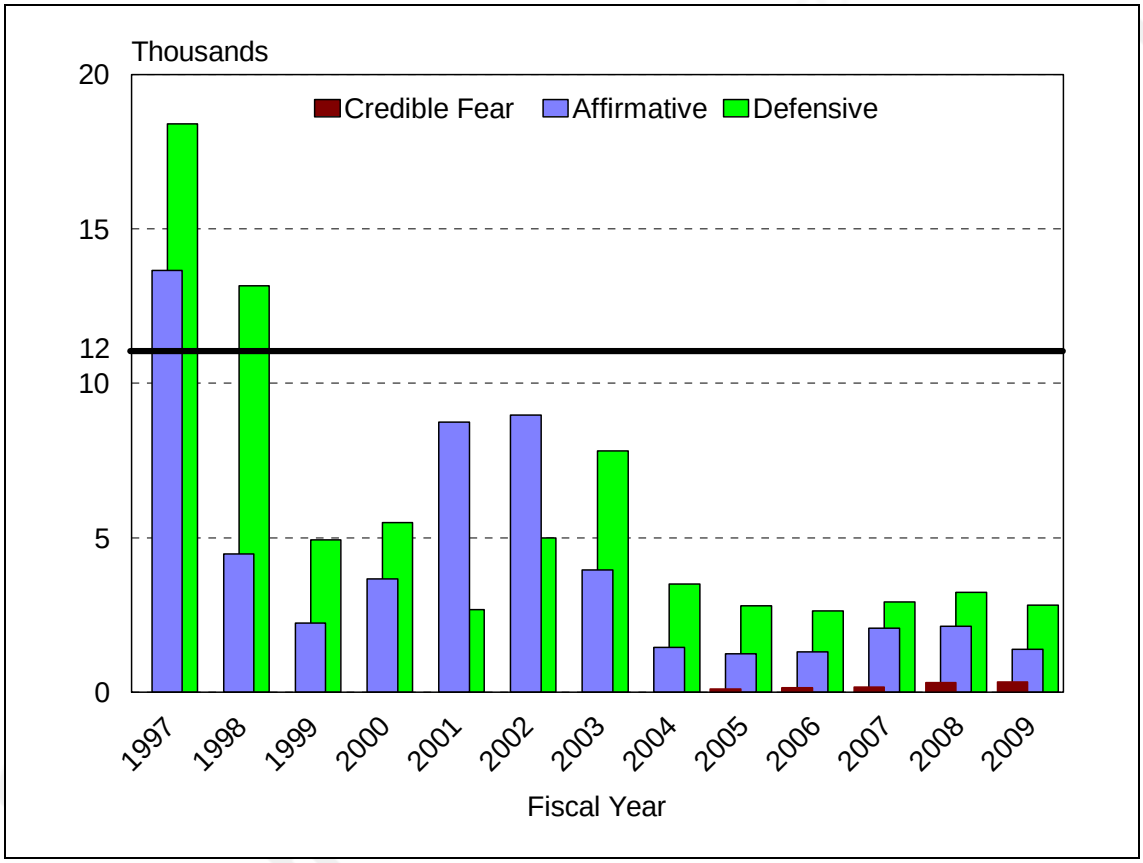
Mexico[50]

Asylum seekers from Mexico reached a 13-year high point in the late 1990s. As **Figure 12** shows, defensive claims reached 18,389 and affirmative claims hit 13,663 in FY1997. Mexican affirmative cases evidenced a moderate surge in FY2001 (8,747) and FY2002 (8,977), but the overall trend line has declined by 89.8% from FY1997 through FY2009. The number of defensive claims has decreased as well, by 84.7% from FY1997 through FY2009. The 13-year average was 4,258 for affirmative claims and 5,797 for defensive claims. Mexican "credible fear" claims during expedited removal have risen from 107 in FY2005 to 338 in FY2009, but they have not reach the numbers that the PRC and El Salvador claims have.

Figure 12. Asylum Seekers from Mexico



Source: CRS presentation of data from the USCIS Directorate of Refugee, Asylum, and International Operations and the Office of Planning, Analysis and Technology in the Executive Office for Immigration Review.

Notes: Data represent cases not individuals. The Y axis is larger—spanning to 20,000—in this figure than in the comparable figures, which have the Y axis set at 12,000.

[50] For background on country conditions, see CRS Report RL32724, *Mexico-U.S. Relations: Issues for Congress*, by Clare Ribando Seelke.

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The asylum patterns of these six selected source countries over the 13-year period varied considerably. Asylum seekers from Colombia, for example, were peaking in the early 2000s while the asylum seekers from El Salvador were dipping. Ethiopians and Haitians tracked steadily and revealed similar levels of affirmative versus defensive asylum claims (albeit Haiti's levels were higher overall). In contrast, Chinese, Salvadoran and Mexican levels of affirmative versus defensive asylum claims each yielded unique fluctuations over time. Regardless of the overall decrease in asylum cases since the enactment of IIRIRA in 1996, this data analysis suggests that conditions in the major source countries—whether economic, environmental, political, religious or social—were likely the driving force behind asylum seekers.[51]

Approvals of Asylum Cases

Country conditions lie at the core of the principle that the United States will not return a foreign national to a country where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. As discussed more fully above, individualized persecution or persecution resulting from group identity may form the basis of the asylum claim. In the individualized instance, if the asylum seeker demonstrates that there is a reasonable possibility of suffering such persecution as an individual if he or she were to return to that country; and he or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear; then the fear of persecution is deemed reasonable. In the group identity instance, if the asylum seeker establishes that there is a pattern or practice in his or her home country of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and establishes his or her own inclusion in and identification with such group of persons; then the fear of persecution is deemed reasonable.[52]

Analysis of Approvals by Country

Given the sheer number of asylum seekers from the PRC in FY2009, it is not particularly surprising that the PRC led in the number of asylum cases approved by USCIS and EOIR in FY2009 (**Figure 13**). Moreover, abuse of human rights in the PRC has been a principal area of concern in the United States for many years.[53] Presumably, PRC asylum seekers are also benefiting from the provision enabling aliens to claim asylum on the basis of persecution resulting from resistance to coercive population control policies, given the well-known population control policies of the PRC.

The portion of approved asylum cases from Haiti was consistent with its portion of asylum seekers in FY2009. Specifically, Haiti represented shares of asylum cases that USCIS and EOIR approved—4.8% and 4.0%, respectively (**Figure 13**)—that were comparable to the portion of asylum cased filed with USCIS and EOIR in FY2009—4.5% and 4.6%, respectively (**Figure 5**).

[51] For further background, see the "Country Reports on Human Rights Practices," which DOS submits annually to the U.S. Congress in compliance with §116(d) and §502B(b) of the Foreign Assistance Act of 1961, as amended, and §504 of the Trade Act of 1974, as amended. Reports from 1999 through 2009 are available at http://www.state.gov/g/drl/rls/hrrpt/.

[52] 8 C.F.R. §208.13(b)(2).

[53] CRS Report RL34729, *Human Rights in China: Trends and Policy Implications*, by Thomas Lum and Hannah Fischer.

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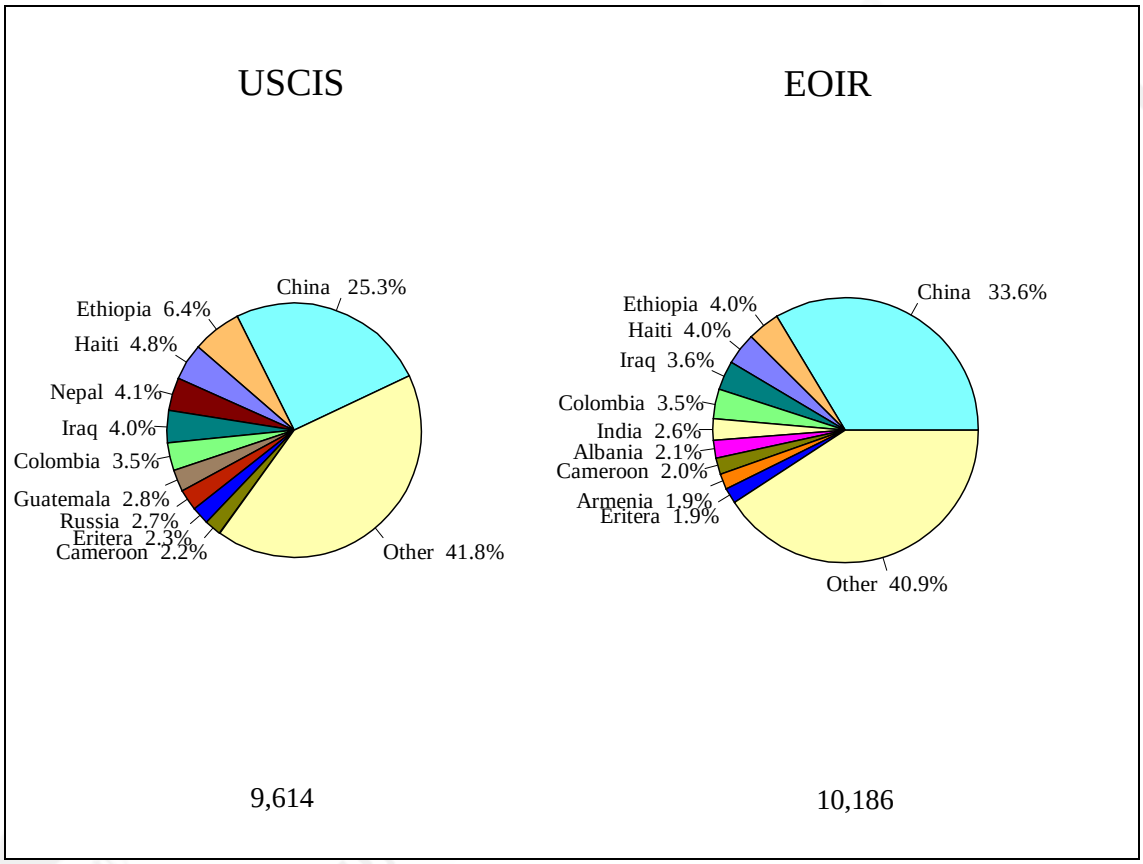
As noted above, the U.S. Coast Guard interdiction of Haitians has undoubtedly suppressed the number of asylum seekers from that nation.

Although the continent of Africa was not home to many of the asylum seekers from the top source countries discussed above, the African nations of Cameroon and Eritrea, as well as Ethiopia, appear in the top 10 source countries for asylum cases approved by USCIS and EOIR in FY2009 (**Figure 13**). [54]

Figure 13. Top 10 Source Countries of Asylum Cases Approved by USCIS and EOIR
FY2009



Source: CRS presentation of data from the DHS Office of Immigration Statistics.

Notes: Data represent cases not individuals.

The emergence of the African nations in the top source countries for approved asylum cases is revealed in **Table 1,** which presents the top 20 sources countries over the past decade for approved affirmative and defensive asylum cases. Ethiopia, Somalia, Cameroon, Liberia, Egypt, and Sudan were among those countries.

[54] Among the "other countries," the following had more than 100 but less than 200 approved cases in FY2009: Guinea, Venezuela, Egypt, Nepal, Somalia, Guatemala, Indonesia, former Soviet Union, Serbia and Montenegro, Russia, El Salvador, Sri Lanka, and Burma.

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Although they were not top 10 source countries for asylum seekers, Middle Eastern and South Asian nations do appear in the top 20 source countries over the past decade for approved affirmative and defensive asylum cases. Iran, Iraq, Indonesia, and Pakistan were top 20 source countries for those who received asylum from FY2000 through FY2009, as were Indonesia, India, and Burma. Iraq and India were the only ones among these countries (along with Nepal) to be among the top 10 in FY2009.

Several top sending countries were also among the decade's top 20 approved affirmative and defensive asylum cases: Colombia, Haiti, Guatemala, and, of course, the PRC. For year-by-year data on the top 20 source countries for approved asylum cases, see the **Appendix**.

Table 1. Top 20 Source Countries for Asylee Approvals, FY2000-FY2009

USCIS Affirmative		EOIR Defensive	
Country	**Decade Total, 2000-2009**	**Country**	**Decade Total, 2000-2009**
China, People's Republic	27,810	China, People's Republic	33,762
Colombia	26,543	Colombia	8,164
Haiti	13,036	Albania	4,929
Ethiopia	7,677	Haiti	4,880
Venezuela	5,664	India	4,211
Armenia	5,002	Ethiopia	2,863
Somalia	4,341	Russia	2,768
Cameroon	4,199	Indonesia	2,663
Iran	4,040	Armenia	2,401
Iraq	3,986	Egypt	2,205
Indonesia	3,982	Iraq	2,195
Russia	3,587	Cameroon	1,988
India	3,485	Guinea	1,981
Liberia	3,065	Somalia	1,817
Guatemala	2,986	Pakistan	1,603
Burma	2,975	Iran	1,558
Egypt	2,869	Guatemala	1,531
Pakistan	2,473	Mauritania	1,479
El Salvador	2,231	Venezuela	1,355
Sudan	2,025	Burma	1,278
All other	38,767	All other	29,826
Total	170,743	Total	115,457

Source: CRS presentation of data from the DHS Office of Immigration Statistics.

Notes: Data represent cases not individuals.

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Approvals by Regional Office and Immigration Court

Research studies of the approval rates of cases filed by asylum seekers consistently reveal disparities by USCIS regional asylum offices and EOIR immigration courts. Fredric N. Tulsky of the *San Jose Mercury News* was a finalist for the Pulitzer Prize for investigative reporting in 2001 "for his illuminating reporting on the arbitrary and inconsistent administration of the federal system that grants political asylum."[55] In 2006, researchers at Syracuse University's Transactional Records Access Clearinghouse (TRAC) found "a surprising lack of consistency" among similarly situated asylum cases considered by EOIR from FY1994 to the early months of FY2005.[56] The *Stanford Law Review* published "Refugee Roulette: Disparities in Asylum Adjudication" in 2007, which analyzed decisions of USCIS asylum officers as well as EOIR immigration judges. [57]

Refugee Roulette

The example of asylum seekers from the PRC offers striking differences in the percentage of cases approved across regions and jurisdictions, despite national data trends that appeared consistent. A study of 290 asylum officers who decided at least 100 affirmative cases from the PRC from FY1999 through FY2005 found that the approval rate of PRC claimants spanned from zero to over 90% during this period. In one regional asylum office, the grant rates for affirmative applications from the PRC varied from zero to 68%. Sixty percent of the officers in that regional office deviated from their office's average PRC asylum approval rates by more than 50%.[58]

Nationwide, immigration judges granted asylum to 47% percent of defensive cases of PRC claimants from January 1, 2000, through August 31, 2004, but exhibited a pattern of variation similar to the USCIS asylum officers when the cases were broken down by court. The immigration court in Atlanta approved 7% of defensive PRC cases; however, the court in Orlando, FL, approved 76% of defensive cases from PRC claimants. The disparity continued if the applicant lost at the Board of Immigration Appeals and petitioned for review in the U.S. Court of Appeals. From FY2003 to FY2005, the Fourth Circuit did not remand a single case from the PRC (i.e., the court never decided in favor of the applicant), while the Ninth Circuit remanded in 37% of the PRC cases.[59]

The authors of this extensive study of affirmative and defensive decisions, "Refugee Roulette: Disparities in Asylum Adjudication," offered the following observations:

> Asylum seekers from three of these countries faced a grant rate in at least one court that was more than 50% below the national average, and applicants from four of these countries enjoyed a grant rate in at least one court that was more than 50% above the national average.... For one of these countries, China, the high grant rate and the low grant rate deviated by more than 50% from the national average.... Colombian asylum seekers also faced major disparities: those who appeared before the Orlando Immigration Court had a

[55] The Pulitzer Prizes, "2001 Finalists Journalism," press release, 2001, http://www.pulitzer.org/finalists/2001.

[56] Transactional Records Access Clearinghouse, *Immigration Judges: Asylum Seekers and the Role of the Immigration Court*, Syracuse University, July 2006, http://trac.syr.edu/immigration/reports/160/.

[57] Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Phillip G. Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," *Stanford Law Review*, vol. 60, no. 2 (November 2007).

[58] Ibid.

[59] Ibid.

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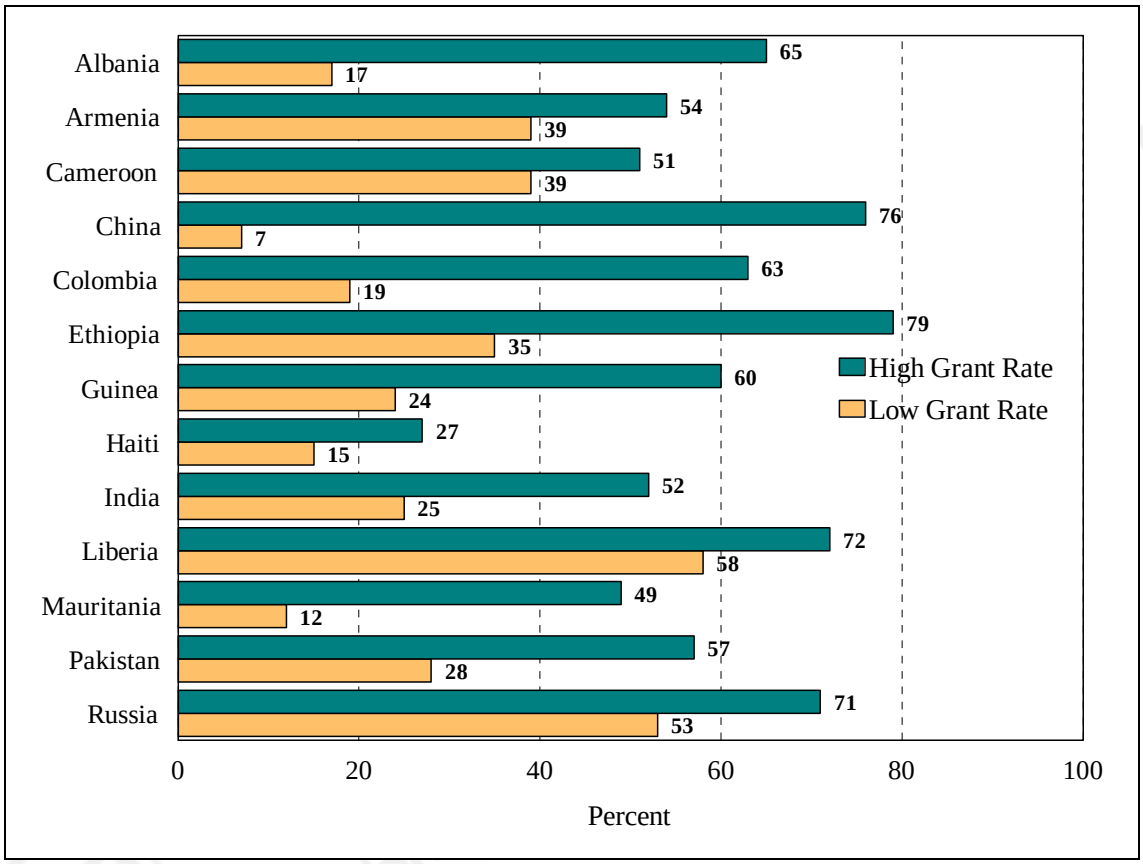
63% grant rate, while those heard by the Atlanta Immigration Court faced a grant rate of 19%. The average national grant rate for Colombian asylum seekers is 36%.[60]

Figure 14 presents the data for the asylee producing countries in the high-volume immigration courts from which these conclusions are drawn. [61]

Figure 14. High and Low Average Grant Rates for Asylum Seekers in High-Volume Immigration Courts

Asylum seekers from high asylum countries, January 2000 through August 2004



Source: CRS presentation of data from, "Refugee Roulette: Disparities in Asylum Adjudication," *Stanford Law Review*, vol. 60, no. 2 (November 2007).

Notes: "Refugee Roulette" authors excluded detained asylum seekers from their analysis. High-volume immigration courts in this study were located in Arlington, Atlanta, Baltimore, Boston, Chicago, Dallas, Detroit, Houston, Los Angeles, Memphis, Miami, Newark, New York City, Orlando, Philadelphia, San Diego, and San Francisco.

[60] Ibid.

[61] The authors of this study defined asylee producing countries as those that had at least five hundred asylum claims before the asylum offices or immigration courts in FY2004, and a national grant rate of at least 30% before either the asylum office or the immigration court. The authors stated that they excluded Mexicans from the database because they presumed the vast majority entered the affirmative asylum system for purposes other than to obtain asylum. Ibid.

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U.S. Government Accountability Office (GAO)

The U.S. Government Accountability Office (GAO) analyzed the disparity in asylum decisions as well and found that "significant variation existed." GAO performed multivariate statistical analyses on asylum cases from 19 immigration courts that handled almost 90% of the cases from October 1994 through April 2007. GAO identified nine factors that affected these outcomes:

> (1) filed affirmatively (originally with DHS at his/her own initiative) or defensively (with DOJ, if in removal proceedings); (2) applicant's nationality; (3) time period of the asylum decision; (4) representation; (5) applied within 1 year of entry to the United States; (6) claimed dependents on the application; (7) had ever been detained (defensive cases only); (8) gender of the immigration judge; and (9) length of experience as an immigration judge.[62]

GAO then statistically controlled for these nine factors and found disparities across immigration courts and judges: "For example, affirmative applicants in San Francisco were still 12 times more likely than those in Atlanta to be granted asylum. Further, in 14 of 19 immigration courts for affirmative cases, and 13 of 19 for defensive cases, applicants were at least 4 times more likely to be granted asylum if their cases were decided by the judge with the highest versus the lowest likelihood of granting asylum in that court."[63]

GAO also found that the grant rate for affirmative cases exceeded 50% for asylum seekers from countries such as Albania, the PRC, Ethiopia, Iran, Russia, Somalia, and the former Yugoslavia. In contrast, GAO found that the grant rate for affirmative cases was lower than 10% for asylum seekers from El Salvador, Guatemala, Honduras, and Mexico. In terms of defensive cases, GAO observed that about 50% of asylum seekers from Iran and Ethiopia were granted asylum and almost 60% of such cases from Somalia were granted asylum. However, this outcome occurred for 13% or less of the defensive asylum cases from El Salvador, Honduras, and Indonesia.[64] GAO also offered the following important caveat:

> Because data were not available on the facts, evidence, and testimony presented in each asylum case, nor on immigration judges' rationale for deciding whether to grant or deny a case, we could not measure the effect of case merits on case outcomes. However, the size of the disparities in asylum grant rates creates a perception of unfairness in the asylum adjudication process within the immigration court system.[65]

Transactional Records Access Clearinghouse (TRAC)

Researchers at Syracuse University's TRAC have been conducting analyses of the immigration courts for several years and were among the earliest to identify wide variations in asylum outcomes that were dependent on the immigration judge. "The typical judge-by-judge denial rate—half denied more and half denied less—was 65% . There were, however, eight judges who

[62] U.S. Government Accountability Office (GAO), *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*, GAO-08-940, September 2008, http://www.gao.gov/new.items/d08940.pdf.

[63] Ibid.

[64] Ibid.

[65] Ibid.

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denied asylum to nine out of ten of the applicants who came before them and two judges who granted asylum to nine out of ten of theirs."[66]

Most recently, analysis performed by TRAC has continued to find disparities in asylum approvals that are similar to their earlier research. TRAC's latest study of the FY2008-FY2010 period found that judge-to-judge disparities in asylum decisions have moderated since their earlier studies, but it concluded that the disparities remained substantial. In the New York immigration court, for example, one judge denied only 6% of the asylum cases, while another denied 70% of the asylum cases. The judge-to-judge range in the San Francisco immigration court was from 32% to 92%.[67]

Table 2. Selected Nationality and Court-by-Court Asylum Denial Rates

Courts with the largest disparities in denial rates, FY2008-FY2010

				Percentage Denial Rates		
Nationality	**Immigration Court**	**Decisions**	**Judges**	**Lowest**	**Highest**	**Range**
China	Los Angeles	854	12	16.7	74.4	57.7
	New York	9,110	27	4.0	73.9	69.9
	Newark	709	7	35.7	69.9	34.2
Colombia	Miami	541	7	40.2	88.2	48.0
	Orlando	742	5	41.2	88.1	46.9
El Salvador	Los Angeles	400	7	90.2	98.1	7.9
Ethiopia	Arlington	452	6	6.0	40.0	34.0
	Baltimore	357	5	17.4	44.4	27.1
Haiti	Miami	2,542	18	51.6	97.1	45.6
	Orlando	1,360	6	60.8	93.2	32.4
India	San Francisco	292	5	38.3	62.1	23.8
Iraq	San Diego	265	4	0.0	3.5	3.5
Venezuela	Miami	289	4	48.1	72.2	24.1
	Orlando	349	4	24.4	80.3	55.9

Source: Transactional Records Access Clearinghouse (TRAC), Syracuse University, 2010.

[66] Transactional Records Access Clearinghouse, *Immigration Judges: Asylum Seekers and the Role of the Immigration Court*, Syracuse University, July 2006, http://trac.syr.edu/immigration/reports/160/.

[67] Transactional Records Access Clearinghouse, *The Persistence of Disparity: Did Recent Reforms Help?*, Syracuse University, September 2, 2010, http://trac.syr.edu/immigration/reports/240/.

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Notes: In order to be included in this TRAC analysis, the court had to have at least four judges who made 50 or more asylum decisions in each time period.

The disparities were also evident when immigration court decisions were analyzed by the asylum seeker's country of origin. As **Table 2** indicates, TRAC analysis of decisions on PRC asylum seekers continued to show wide disparities in the New York court, ranging from 4% to 74% denial rates. The denial rates of Iraq asylum seekers were the lowest, spanning from zero to 4%, and their variation was also the lowest at 4%. In contrast, the denial rates of Salvadoran asylum seekers were the highest, spanning 90% to 98%, with only a 8% variation.[68]

Selected Issues

Although there are many who would revise U.S. asylum law, those advocating change have divergent perspectives. Some cite the seemingly inexplicable disparities in asylum approvals rates and urge broad-based administrative reforms. Others argue that given the religious, ethnic, and political violence in various countries around the world, it has become more difficult to differentiate the *persecuted* from the *persecutors*. Some express concern that U.S. sympathies for the asylum seekers caught up in the current political uprisings in the Middle East, northern Africa, and South Asia could inadvertently facilitate the entry of terrorists. Others maintain that current law does not offer adequate protections for people fleeing human rights violations or gender-based abuses that occur around the world. Some assert that asylum has become an alternative pathway for immigration rather than humanitarian protection provided in extraordinary cases. At the crux of the issue is the extent to which an asylum policy forged during the Cold War is adapting to the competing priorities and turbulence of the 21st century. Some of these issues are highlighted below.

U.S. National Interests

Some have asserted that U.S. asylum policy attracts asylum seekers who have weak or bogus claims and that additional safeguards are needed to curb abuses and protect U.S. national interests. One critic has concluded that the "U.S. asylum system has become the hole in the fence for millions of dubious claimants—and a major immigration magnet in itself." Others have maintained that migration "push" factors, such as rapid population growth, poverty, and political instability in the sending countries of asylum seekers, are factors over which the United States has little control. Some have warned of "the ongoing separation of asylum from any grounding in the national interest" and argued for a serious examination of the forces that propel asylum seekers.[69]

In contrast, others have asserted that the United States should re-calibrate asylum policy to provide more protections for asylum seekers, maintaining that it is in the United States' national interest to set an example. These proponents have expressed a desire for the United States to reaffirm its welcome to those who have fled persecution as well as its commitment to humanitarian efforts. They have argued that some of the statutory revisions in 1996 and 2005

[68] Ibid.

[69] David Simcox, *Humanitarian Immigration: Third World "Persecution" Swamps the West*, Negative Population Growth, NPG Forum Paper, 2004, http://www.npg.org/forum_series/spring04fp.html; and Don Barnett, *The Coming Conflict Over Asylum: Does America Need a New Asylum Policy?*, Center for Immigration Studies, March 2002, http://www.cis.org/articles/2002/back102.html.

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created unnecessary barriers for genuine asylees and that these provisions can be reformed without making the United States more vulnerable to unauthorized migrants, criminals, or terrorists. [70]

Disparity in Decisions

The body of research that has revealed disparities in asylum decisions has led many to call for greater congressional oversight of the immigration courts. According to a number of observers, while the immigration courts have experienced a substantial increase in caseload, EOIR has not received a commensurate increase in resources. Some are pushing for an increase in funding for immigration judges and law clerks, which they assert would improve the quality of judicial hearings.[71]

Others, however, contend that the problems related to disparities in asylum decisions lie less in the funding shortages and more in the quality of immigration judges. Some are recommending higher recruitment standards for immigration judges and more training, particularly training in the culture of asylum seekers' homelands. [72] Some further recommend a requirement of written opinions in asylum cases. [73]

Still others maintain that the USCIS asylum officers also display disparate outcomes among similarly situated asylum cases, and that enhanced training and research support should be available for the asylum corps and the immigration judges. Establishing mechanisms to foster communication among asylum offices is offered as an option to improve consistency. A further recommendation is to consider cases in pairs or panels of three asylum offers.[74]

Despite concern over the disparate decisions, there is an argument that greater congressional oversight might politicize the process. Legislative intervention to promote more consistent decisions presumably might undermine the independence of the asylum adjudicators and immigration judges. Because none of the studies that documented the disparities had access to the case facts and evidence, the rationale for decisions remains unknown and thus may indeed be justified.

[70] U.S. Congress, Senate Committee on the Judiciary, *Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010*, 111th Cong., 2nd sess., May 19, 2010.

[71] For a discussion of these arguments, see Stephanie Potter, "Study eyes disparities in asylum outcomes," *Law Bulletin*, vol. 55, no. 77 (April 21, 2009).

[72] In a study of 96 immigration judges, researchers found that the occupational hazards of the immigration judges may include "compassion fatigue" and "secondary traumatic stress" and that immigration judges' burnout levels were higher than those suffered by hospital physicians and prison wardens. Stuart L. Lustig, M.D., MPH, Niranjan Karnik, M.D., PhD, and Kevin Delucchi, PhD, et al., "Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey," *Georgetown Immigration Law Journal*, vol. 23, no. 1 (Fall 2008).

[73] Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Phillip G. Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," *Stanford Law Review*, vol. 60, no. 2 (November 2007); and Stephanie Potter, "Study eyes disparities in asylum outcomes," *Law Bulletin*, vol. 55, no. 77 (April 21, 2009).

[74] Ibid.

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Access to Counsel

Immigration removal proceedings are civil in nature and, thus, do not entail the right to legal counsel that criminal proceedings do.[75] Foreign nationals can be represented by counsel when they appear in immigration court, but according to the statute, "at no expense to the Government." A list of available pro bono counsel must be provided to aliens in removal proceedings.

The issue of asylum seekers' access to counsel, especially during removal proceedings, has arisen in recent years. Many maintain that few can adequately represent themselves and that charitable and pro bono legal projects cannot afford to serve all asylum seekers. Some offer that providing legal counsel is an option for addressing the disparities in outcome.[76] Many cite the GAO study, which found that asylum seekers were three times as likely to obtain asylum if they had legal representation, to emphasize the need for legal counsel.[77] Some further argue that lack of counsel for a *bona fide* asylum seeker might result in deportation to a country where the person's life and liberty are threatened.[78]

Time Limit on Filing

Under current law, a foreign national has one year after the date of arrival to apply affirmatively for asylum, unless there are changed circumstances or extraordinary circumstances related to the delay in filing the application. Supporters of current law maintain that the one-year rule prevents abuses of the asylum system and cite the drop in asylum applicants after the 1996 revisions to the law that added the one-year rule. They point out that foreign nationals have the option of seeking asylum defensively during removal proceedings.[79]

Others have observed that many asylum seekers who fail to file within one year of arrival subsequently receive withholding of removal or relief under the United Nations Convention Against Torture. Since both of these forms of relief have a higher burden of proof than asylum, they assert such people would have qualified for asylum but for the one-year deadline. They advocate for a "good cause" exemption to the time rule.[80]

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[75] U.S. Department of Justice, *The Immigration Judge Benchbook*, Executive Office of Immigration Review, http://www.justice.gov/eoir/vll/benchbook/.

[76] Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Phillip G. Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," *Stanford Law Review*, vol. 60, no. 2 (November 2007); and Stephanie Potter, "Study eyes disparities in asylum outcomes," *Law Bulletin*, vol. 55, no. 77 (April 21, 2009).

[77] U.S. Government Accountability Office, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*, GAO-08-940, September 2008, http://www.gao.gov/new.items/d08940.pdf.

[78] Donald Kerwin, *Revisiting the Need for Appointed Counsel*, Migration Policy Institute, Insight, April 2005, http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

[79] These arguments were raised in support of the revisions that IIRIRA made to asylum in 1996 and are expressed in the testimony of Dan Stein, Executive Director of the Federation for American Immigration Reform; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, *An Overview Of Asylum Policy*, 107th Cong., 1st sess., May 3, 2001.

[80] U.S. Congress, Senate Committee on the Judiciary, *Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010*, 111th Cong., 2nd sess., May 19, 2010.

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Mandatory Detention

Opponents to the mandatory detention of asylum seekers in expedited removal usually cite the United Nations High Commissioner on Refugees, who maintains that detention of asylum seekers is "inherently undesirable."[81] Detention is psychologically damaging, some further argue, to an already fragile population that includes aliens who are escaping from imprisonment and torture in their countries. Asylum seekers are often detained with criminal aliens, a practice that many consider inappropriate and unwarranted. Some contend that Congress should provide for alternatives to detention (e.g., electronic monitoring) for asylum seekers in expedited removal. Others argue that the mandatory detention of asylum seekers provision should be deleted, maintaining that there is adequate authority in the INA to detain any alien who poses a criminal or national security risk.

Proponents for current law warn that releasing asylum seekers in expedited removal undermines the purpose of expedited removal and creates an avenue for bogus asylum seekers to enter the United States. They argue that mandatory detention of asylum seekers is an essential tool in maintaining immigration control and homeland security. Any loosening of these policies, they allege, would divert the CBP and ICE officers from their homeland security duties to track down wayward asylum seekers. Supporters of current law also contend that it sends a clear signal of deterrence to aliens who consider using asylum claims as a mechanism to enter illegally.[82]

Terrorist Infiltration and Material Support[83]

Some have long been concerned that terrorists would seek asylum in the United States, hoping to remain hidden among the hundreds of thousands of pending asylum cases. Critics point to asylum seekers from countries of "special concern" (i.e., Saudi Arabia, Syria, Iran, North Korea, China, Pakistan, Egypt, Lebanon, Jordan, Afghanistan, Yemen, and Somalia) as potential national security risks. Some argue further that because asylum is a discretionary form of immigration relief, national security risks should outweigh humanitarian concerns, and thus, asylum relief should be restricted and judicial review of asylum cases more limited.

Others point out that asylum seekers are subject to multiple national security screenings and that if an asylum seeker is a suspected or known terrorist, the law already bars alien terrorists from entering the United States. They argue that to the extent to which security risks had existed, those risks resulted more from the limits of intelligence data on terrorists in the past rather than the expansiveness of asylum policy.[84] Some further assert that asylees from countries of "special concern" may be beneficial to U.S. national security because they may have useful information that assists in the war on terrorism, much like the assistance provided by communist defectors during the Cold War. Opponents of limiting the judicial review of asylum cases contend that it

[81] Office of the United Nations High Commissioner for Refugees, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February 1999.

[82] For further analysis of detention policy, see CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Alison Siskin.

[83] For broader analysis, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

[84] For examples of this argument, see Muzaffar A. Chishti, Doris Meissner, and Demetrios G. Papademetriou, et al., *America's Challenge: Domestic Security, Civil Liberties and National Unity After September 11* , Migration Policy Institute, June 2003.

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would erode two traditional values of U.S. polity—the right to due process and freedom from repression and persecution.[85]

Some argue that the law should be amended to provide an exception for people who have been forced by terrorists to provide support.[86] The law states that an alien who commits an act that he "knows, or reasonably should know, affords material support" to a terrorist organization is inadmissible.[87] It makes no exception for instances where the alien has been coerced into providing support, and whether it should do so is an issue.[88]

Concluding Observations

Over the past decade, the United States has admitted or adjusted about 1 million foreign nationals to legal permanent resident (LPR) status each year, and annual asylee adjustments have ranged from 1% to 9% of the total. Overall, asylee adjustments comprised only 4% (411,972) of the 10.3 million LPRs admitted or adjusted from FY2000 through FY2009.[89] Unlike other facets of U.S. immigration policy, asylum issues are less about the number of foreign nationals involved and more about the qualities of the policies and the efficacy of the procedures. Asylum is an adjudication of a person based upon facts, evidence, beliefs, and circumstances that might be clear at some times yet nebulous at other times.

The policy tensions of asylum often pit the promotion of our humanitarian values against the prevention of fraudulent abuses; the protection of the persecuted against the security of our borders; and the obligations of our moral responsibilities internationally against the commitments of our social priorities domestically. The balance of these competing concerns may be shaken by a crisis in a neighboring nation or by larger world events. The U.S. Congress plays the key role in considering when and whether revision or re-calibration of asylum law and policies is warranted.

[85] U.S. Congress, Senate Committee on the Judiciary, *Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010*, 111th Cong., 2nd sess., May 19, 2010.

[86] Jason Dzubow, "A Short 'Wish List' for the Refugee Protection Act," *Immigration Law Daily*, May 31, 2010, http://blogs.ilw.com/politicalasylum/2010/05/index.html; and U.S. Congress, Senate Committee on the Judiciary, *Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010*, 111th Cong., 2nd sess., May 19, 2010.

[87] INA §212(a)(3)(B)(iv)(VI).

[88] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Human Rights and the Law, *The "Material Support" Bar: Denying Refuge to the Persecuted?*, 110th Cong., 1st sess., September 19, 2007.

[89] Randol Monger, *U.S. Legal Permanent Residents: 2009*, DHS Office of Immigration Statistics, Annual Flow Reports, April 2010, http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2009.pdf.

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Appendix. Approved Asylum Cases for Top 20 Countries, FY2000-FY2009

Table A-1. Number of Approved Affirmative Asylum Cases for Top 20 Source Countries, FY2000-FY2009

Country	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
China, People's Republic	3,409	4,937	5,789	2,411	926	2,237	1,546	1,824	2,040	2,691
Colombia	2,449	5,660	4,940	2,966	2,898	2,212	2,178	1,490	1,113	637
Haiti	782	1,230	999	1,166	1,779	2,282	2,425	1,055	726	592
Ethiopia	1,444	1,172	1,049	573	753	464	435	497	586	704
Venezuela	23	41	71	315	1,198	951	1,080	835	758	392
Armenia	1,155	1,448	975	467	250	160	154	202	105	86
Somalia	1,994	1,279	431	142	146	74	48	71	69	87
Cameroon	349	324	710	814	597	385	224	294	282	220
Iran	887	883	699	327	203	145	139	170	331	256
Iraq	397	645	563	325	161	192	179	392	588	544
Indonesia	938	610	474	207	100	97	428	567	385	176
Russia	632	552	392	287	233	236	228	287	373	367
India	694	863	1,058	275	142	70	51	75	103	154
Liberia	690	769	608	352	309	122	61	48	61	45
Guatemala	288	151	187	157	206	248	471	542	378	358
Burma	330	1,309	325	191	188	96	93	124	151	168
Egypt	471	471	490	242	143	142	175	193	234	308
Pakistan	378	431	503	272	182	122	91	132	162	200
El Salvador	160	160	76	91	120	181	500	417	319	207
Sudan	512	520	446	110	84	56	52	84	86	75
All other	5,262	5,705	5,163	3,671	3,676	2,992	2,362	3,025	3,245	3,666

Source: CRS presentation of data from the Department of Homeland Security (DHS), Office of Immigration Statistics.

Notes: Data represent cases not individuals. "Top 20" is determined by the total number of approved asylum cases for the entire period.

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Table A-2. Number of Approved Defensive Asylum Cases for Top 20 Source Countries, FY2000-FY2009

Country	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
China, People's Republic	2,500	2,677	3,113	3,601	3,419	3,014	4,061	4,540	3,419	3,418
Colombia	186	396	1,019	1,590	1,473	1,151	779	683	531	356
Albania	393	513	515	717	724	610	506	420	320	211
Haiti	205	369	479	566	535	653	570	587	510	406
India	514	506	494	595	452	311	450	357	272	260
Ethiopia	235	218	232	239	260	266	344	349	311	409
Russia	417	351	312	381	320	251	203	208	198	127
Indonesia	157	181	283	366	427	375	314	210	195	155
Armenia	85	203	323	412	305	268	289	179	141	196
Egypt	218	194	228	277	268	194	240	231	182	173
Iraq	82	188	280	197	115	94	191	276	408	364
Cameroon	89	135	116	186	273	263	359	203	161	203
Guinea	40	64	94	155	258	257	358	324	238	193
Somalia	410	354	236	149	89	88	115	109	100	167
Pakistan	178	155	180	227	164	140	178	140	142	99
Iran	171	232	210	212	203	143	118	108	70	91
Guatemala	187	140	113	162	177	140	160	134	163	155
Mauritania	98	90	118	181	220	193	218	173	94	94
Venezuela	D	5	24	35	59	153	279	315	294	191
Burma	81	124	126	118	138	166	163	129	125	108
All other	2,990	2,906	2482	3,010	3,143	3,027	3,457	3,132	2,869	2,810

Source: CRS presentation of data from the Department of Homeland Security (DHS), Office of Immigration Statistics.

Notes: Data represent cases not individuals. "Top 20" is determined by the total number of approved asylum cases for the entire period.

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