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Policy Brief: Timing Considerations for Effective Representation in Asylum Cases

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Making the asylum process “more efficient” is a common refrain within both the administration and Congress. The current asylum process is backlogged, and it can take years to adjudicate an asylum application. U.S. Citizenship and Immigration Services (USCIS) faces a backlog of 470,786 affirmative asylum cases and the immigration court has over 1.82 million open removal cases (this number includes other forms of relief beyond asylum).¹ Given these backlogs, it is understandable why mandating processing times is appealing. However, mandating processing times does not engage with the complexity of asylum practice or the existing barriers within the immigration system, particularly as it relates to detention. As a result, fast-track policies create unrealistic timelines where access to effective representation is one of the first casualties.

Policies that mandate processing times tread into territory that imperils our nation’s commitment to due process by creating inflexible timelines that on a practical level do not allow meaningful access to counsel. This policy brief lays out how fast-tracked timelines result in lower representation rates and how day-to-day issues create unavoidable delays which compound existing access to legal counsel concerns for asylum seekers.

- **Access to counsel is a key component of ensuring due process exists.** Courts have repeatedly held that it is a violation of due process to deny respondents sufficient time to obtain counsel.² In light of this requirement, Executive Office for Immigration Review (EOIR) has long provided in policy that immigration judges should grant “at least one continuance” to obtain counsel.³
- **Fast-tracked timelines result in lower representation rates.** Two recent attempts to fast track immigration proceedings, “Dedicated Dockets” and the asylum processing rule clearly demonstrate that access to counsel is significantly limited in fast-tracked proceedings.

¹ American Immigration Council, “Fact Sheet: Asylum in the United States, Aug. 16, 2022, <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.

² See *Hernandez Lara v. Barr*, 962 F.3d 45, 55 (1st Cir. 2020) (violation of right to counsel where immigration judge denied continuance 14 business days after the time respondent became aware her prior counsel on a bond hearing would not be representing her); *Rios-Berrios v. I.N.S.*, 776 F.2d 859 (9th Cir. 1985) (violation of right to counsel where immigration judge granted two continuances of 24 hours each and proceeded without counsel 10 days after the Order to Show Cause was issued); *Castaneda-Delgado v. Immig. and Naturalization Serv.*, 525 F.2d 1295, 1300 (7th Cir. 1975) (violation of right to counsel where immigration judge only granted a single continuance of two business days, even where initial hearing occurred 15 days after Order to Show Cause); *Jiang v. Houseman*, 904 F. Supp. 971 (D. Minn. 1995) (overturning removal order on collateral attack after finding that a denial of a continuance 23 days after the Order to Show Cause was a violation of the right to counsel).

³ EOIR Operating Policies and Procedures Memorandum 17-01, *Continuances* (July 31, 2017) (“it remains general policy that at least one continuance should be granted” to obtain counsel); OPPM 13-01, *Continuances and Administrative Closure* (March 7, 2013) (“absent good cause shown, no more than two continuances should be granted ... for the purpose of obtaining legal representation”); but see *Matter of CASTRO-TUM*, 27 I&N Dec. 271 (A.G. 2018).

- The “Dedicated Docket,” places certain families who crossed between ports of entry into fast-tracked removal proceedings where an immigration judge generally is expected to issue a decision within 300 days of the master calendar hearing.⁴
 - According to a January 2022 TRAC report, seven months into the Dedicated Docket initiative, only 15.5% of asylum seekers had counsel to represent them in their proceedings, compared to 91.1% of asylum seekers whose cases were decided over the same period, but who were not in fast-tracked proceedings.⁵ EOIR statistics from October 2022 state that represented cases make up 56% of pending dedicated docket cases.⁶
 - A total of 1,557 asylum seekers on the Dedicated Docket have received deportation orders. Of these, only 75 – just 4.7 percent – had representation. By contrast, since the start of the Dedicated Docket program just 13 people—all represented—have been granted asylum or another form of lawful relief from deportation.⁷
- Similarly, the new interim asylum processing rule⁸ created significantly expedited timelines for every step of the asylum process. An asylum applicant can go from a credible fear interview to an asylum merits interview before an asylum officer within a month. If unsuccessful, they then have their final merits hearing before an immigration judge less than five months later.⁹ The rule also sets abbreviated timelines for submitting additional evidence, and significantly limits continuances.¹⁰ USCIS stated on stakeholder calls that continuance to find an attorney or attorney preparation is not sufficient to grant a continuance in advance of the asylum merits interview.¹¹
 - **The available data from the first quarter of the pilot program implementing the asylum processing rule demonstrates the impact these timelines have on the ability for an asylum seeker to access counsel.**
 - According to an analysis by Human Rights First of DHS data, “[t]he vast majority of asylum seekers processed under the APR to date have been unable to secure legal representation for AMIs (92.5 percent unrepresented in completed cases) or the preceding credible fear process (99.1 percent unrepresented in completed cases).”¹²

⁴ U.S. Dep’t of Just., *DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings* (May 28, 2021), <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

⁵ TRAC Immigration, *Unrepresented Families Seeking Asylum on “Dedicated Docket” Ordered Deported by Immigration Courts*, (Jan. 13, 2022) [hereinafter TRAC report], <https://trac.syr.edu/immigration/reports/674/#f4>.

⁶ Executive Office for Immigration Review, “Adjudication Statistics: Dedicated Docket Representation Rates,” Oct. 3, 2022, <https://www.justice.gov/eoir/page/file/1508521/download>.

⁷ TRAC report.

⁸ Full title: “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers.”

⁹ Amy Grenier, “Fast Tracking Asylum at the Border will Undermine Due Process,” *Think Immigration*, May 23, 2022, <https://thinkimmigration.org/blog/2022/05/23/fast-tracking-asylum-at-the-border-will-undermine-due-process/>.

¹⁰ Victoria Neilson, “Biden’s Asylum Processing Rule – Three Months in, What Practitioners Need to Know,” *National Immigration Project of the National Lawyers Guild*, Sept. 2022, https://ninpnl.org/PDFs/2022_7Sept-FAQs-asylum-processing-rule.pdf.

¹¹ *Id.*

¹² Rebecca Gendelman, “Rushed Timelines, Inadequate Access to Legal Representation Impede Meaningful Opportunity to Seek Asylum Under New Asylum Processing Rule,” *Human Rights First*, Oct. 21, 2022, <https://humanrightsfirst.org/library/rushed-timelines-inadequate-access-to-legal-representation-impede-meaningful-opportunity-to-seek-asylum-under-new-asylum-processing-rule/>.

- This data also demonstrates that asylum seekers are scheduled for their asylum merits interview “only weeks after being released from detention, with median times ranging from 33 to 35 days after receiving a positive credible fear determination, leaving virtually no time to secure counsel.”¹³
- **These timelines fail to consider everyday delays in communication.** Many of these delays are exacerbated by the government’s own policies and our reliance on custodial detention, that add time beyond the asylum seeker’s control.
 - **Communication is often limited to U.S. Postal Service (USPS) mail, which consumes much of the time windows mandated in these expedited processes.** Attorneys report detention centers limiting the way in which an asylum seeker can send documents to their attorneys, usually leaving USPS mail as the only option. Similarly, the only option to submit a Request for Reconsideration (RFR) to USCIS under the new asylum processing rule is through USPS mail, despite a 7-day deadline.¹⁴
 - Detained migrants must submit mail through the intermediary of U.S. Immigration Customs Enforcement’s (ICE), which will add at least 1-3 days to the processing time, depending on weekends and holidays.¹⁵ In reality, ICE facilities continuously delay deliveries of legal mail. A recent report by the American Civil Liberties Union (ACLU) found that “11 [ICE] facilities delayed deliveries of legal mail had caused them to continuously request extensions for deadlines from the court, to miss key filing deadlines, or that they had observed pro se detained immigrants missing deadlines because of difficulties with the mail system.”¹⁶
 - USPS reports an average mail delivery time of 2.7 days.¹⁷
 - The San Antonio-based nonprofit Migrant Center for Human Rights (Migrant Center), which works with clients in the asylum processing rule pilot program, tracked the length of time it took for an asylum seeker to get a copy of their credible fear interview (CFI) transcript to their office. From the date of the IJ concurrence with the denial, which begins the 7-day timeframe for RFRs, the median time for a transcript to arrive was 13 days, with some taking 30 days or more, well exceeding the 7-day deadline.¹⁸
 - **Translation adds additional delays,** as USCIS only accepts paperwork in English, and it is incumbent on the asylum seeker or their attorney to have any documents translated.¹⁹

¹³ *Id.*

¹⁴ Migrant Center for Human Rights, “Preliminary Report: New Asylum Processing Rule Rollout at Pearsall,” Sept. 22, 2022, <https://us19.campaign-archive.com/?u=97142b004075f9b960d2ec4fa&id=670224dc59>. [hereafter “Migrant Center Preliminary Report”].

¹⁵ U.S. Immigration and Customs Enforcement, “ICE/DRO Detention Standard,” Dec. 2, 2008, https://www.ice.gov/doclib/dro/detention-standards/doc/correspondence_and_other_mail.doc (stating “[o]utgoing correspondence shall be delivered to the postal service no later than the day after it is received by facility staff or placed by the detainee in a designated mail depository, excluding weekends and holidays.”)

¹⁶ American Civil Liberties Union, *No Fighting Chance: ICE’s Denial of Access to Counsel in U.S. Immigration Detention Centers*, 2022, <https://www.aclu.org/report/no-fighting-chance-ices-denial-access-counsel-us-immigration-detention-centers?redirect=report/no-fighting-chance> [hereafter “ACLU Report”] at 8.

¹⁷ USPS, “Average USPS Mail Delivery Time Nationally Since January: 2.7 Days,” Feb. 17, 2022, <https://about.usps.com/newsroom/national-releases/2022/0217-average-usps-mail-delivery-time-nationally-since-jan.htm>.

¹⁸ Migrant Center Preliminary Report.

¹⁹ USCIS, “Policy Manual: Chapter 6-Evidence,” Oct. 19, 2022, <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6>.

A professional translation service would add at least 24 hours to processing.²⁰ This is assuming the asylum seeker can afford the cost of professional translation and can access their online services. While ICE personnel have access to professional language interpretation lines, they are not available for use by detained people.

- **Communication between agencies adds further delays.** The Migrant Center reports that “[a]sylum seekers are not receiving copies of their [CFI] decisions for weeks as USCIS is emailing them [to ICE] and ICE is not providing them.”²¹ Without the copy of a decision in a language they can understand, the asylum seeker cannot begin to prepare a request for reconsideration or other form of appeal.
- **It takes time to effectively represent an asylum seeker before the immigration court.** AILA’s national Asylum & Refugee Committee, composed of many of the leading asylum experts across the country, estimated that “representing an asylum seeker in immigration court conservatively takes between 40-80 hours of work, with an estimated 35 hours of face-to-face communication with the client.”²² An Immigration Justice Campaign attorney estimated volunteer attorney time commitment to be 75 to 125 hours over 3 to 4 months, depending on the experience of the attorney and the complexity of the case.²³ Both of these estimates are per case, with the assumption that each attorney is carrying a case load of many cases simultaneously.
- **There are significant barriers to accessing detained asylum seekers which add time to effective representation.**
 - **An attorney is often prevented from seeing their detained client in person at all.** As the American Civil Liberties Union (ACLU) reported in a recent survey, “[o]ver a third of [ICE] facilities do not allow for ‘contact’ visits or have any in person visits between attorneys and detained.”²⁴
 - **When attorneys are allowed contact visits, they are often denied or delayed.** In the same report, “attorneys at nearly half (20 out of 42) of facilities... [stated that] [i]n-person client visits were denied or delayed because of failures by facility employees to accurately keep track of detained clients, inadequate staffing, or arbitrary and shifting attorney dress codes. Moreover, at several facilities, pandemic-related quarantine procedures prevented attorneys from being able to visit their clients.”

Recommendations

- **Any processing deadlines need to be used sparingly and when used should take practical considerations into account and allow enough time for an asylum seeker to obtain counsel and for the attorney to adequately prepare for their case.**
- **Equitable tolling needs to go hand in hand with all processing timelines to ensure due process.** Specifically, the new RFR timeline under the asylum processing rule needs to allow for equitable tolling to offer an opportunity to meaningfully file an RFR. Equitable tolling prevents

²⁰ See e.g., Montesino Translation, accessed Nov. 23, 2022, <https://www.montesinotranslation.com/>.

²¹ Migrant Center Preliminary Report.

²² AILA Asylum & Refugee Committee, AILA Sends Letter to DHS Acting Secretary Detailing MPP’s Barriers to Counsel, American Immigration Lawyers Association (June 3, 2019), <https://www.aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp>.

²³ Immigration Justice Campaign, “Types of Volunteer Opportunities,” accessed Nov. 23, 2022, <https://immigrationjustice.us/volunteeropportunities/types-of-volunteer-opportunities/>

²⁴ ACLU Report at 8.

an asylum seeker from being penalized when their window of time was consumed by delays outside of their control.

- **Reasonable continuances should always be allowed to obtain an attorney or for attorney preparation.** Any regulatory, statutory, or policy processing deadlines should not curtail this.
- **Remove barriers to access to counsel that cause delays in detained cases.** Removing these barriers includes ensuring an attorney can have confidential contact visits with their client, as well as ensuring access to free confidential phone calls and video conferencing. This should be done without arbitrary limits such as those reported by the Migrant Center, who reports being limited to “two video consultations per day” across their entire organization and all their detained clients.²⁵

Policies that mandate processing times are intended to ensure government efficiency but are seemingly created in a vacuum without looking at the context of existing delays within the system. Ignoring the context creates a situation where this no meaningful access to counsel or due process, both of which are too important to trade away in the name of efficiency.

²⁵ Migrant Center Preliminary Report.