

The Difference Between Asylum and Withholding of Removal

For generations, the United States has adhered to a basic promise that no person may be deported to a country where they will face persecution. Under laws passed to fulfill this promise, every year tens of thousands of people ask the United States for protection. Most of those people apply for [asylum](#). Those that win asylum can apply to live in the United States permanently and gain a path to citizenship.¹ They can also apply for their spouse and children to join them in the United States.²

But not everyone can apply for asylum. For individuals who are afraid of persecution in their home country but ineligible for asylum, an alternate path to protection exists, one that is harder to win and offers fewer benefits: withholding of removal.³ This fact sheet provides an overview of withholding of removal, including the basics of seeking protection in the United States, eligibility requirements, the application process, and data on applicants.

What is Asylum?

Asylum is a form of protection granted to foreign nationals already in the United States or arriving at the border who meet the international law definition of a “refugee.” The United Nations 1951 Convention and 1967 Protocol define a refugee as a person who is unable or unwilling to return to his or her home country, and cannot obtain protection in that country, due to past persecution or a well-founded fear of being persecuted in the future “on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁴ This definition was incorporated into U.S. immigration law in the Refugee Act of 1980.⁵

As a signatory to the 1967 Protocol, and through U.S. immigration law, the United States has legal obligations to provide protection to those who qualify as refugees. The Refugee Act established two paths to obtain refugee status—either from abroad as a resettled refugee or in the United States as an asylum seeker.⁶

What is the Difference Between Asylum and Withholding of Removal?

A person granted asylum is protected from being returned to his or her home country, is eligible to apply for authorization to work in the United States, may apply for a Social Security card, may request permission to travel overseas, and can petition to bring family members to the United States.⁷ Asylees may also be eligible for certain government programs, such as Medicaid or Refugee Medical Assistance.⁸

Asylum is technically a discretionary benefit, and certain individuals by law are not eligible for asylum. For example, individuals who have previously been deported and then reentered the United States, or who did not apply for asylum within one year of arriving in the United States, are barred from applying for asylum. Individuals who have been banned from asylum are instead eligible in most cases for “withholding of removal.”⁹

As in the case of asylum, a person who is granted withholding of removal is protected from being returned to his or her home country and receives the right to remain in the United States and work legally. But at the end of the court process, an immigration judge enters a deportation order and then tells the government they cannot execute that order. That is, the “removal” to a person’s home country is “withheld.” However, the government is still allowed to deport that person to a different country if the other country agrees to accept them.¹⁰

Withholding of removal provides a form of protection that is less certain than asylum, leaving its recipients in a sort of limbo. A person who is granted withholding of removal may never leave the United States without executing that removal order, cannot petition to bring family members to the United States, and does not gain a path to citizenship. And unlike asylum, when a family seeks withholding of removal together a judge may grant protection to the parent while denying it to the children, leading to family separation.

Withholding of removal also does not offer permanent protection or a path to permanent residence. If conditions improve in a person’s home country, the government can revoke withholding of removal and again seek the person’s deportation. This can occur even years after a person is granted protection.

Some individuals, including those who were convicted of “particularly serious crimes,” are not eligible for withholding of removal.¹¹ These individuals are limited to applying for relief under the Convention Against Torture, a protection that is harder to win than withholding of removal and that offers even fewer benefits.¹²

How Does a Person Apply for Withholding of Removal?

Unlike asylum, which can be granted by asylum officers working for U.S. Citizenship and Immigration Services (USCIS), withholding of removal may only be granted by an immigration judge working in the immigration court system.¹³

Individuals may be put into immigration court in multiple ways, such as through an unsuccessful asylum application, apprehension inside the country by U.S. Immigration and Customs Enforcement (ICE), or apprehension by U.S. Customs and Border Protection (CBP) at or near the border.

When individuals who have previously been ordered deported are apprehended after reentering the United States, the law permits the earlier removal order to be “reinstated.”¹⁴ Where someone with a prior removal order who fears persecution is encountered by ICE or CBP, he or she is not eligible for full removal proceedings in immigration court, but the individual may seek withholding of removal.¹⁵

When someone expresses a fear of persecution to an immigration officer who is considering reinstating a prior order of removal, the officer is required to first refer the individual to an asylum officer.¹⁶ Individuals who can demonstrate to the asylum officer that they have a “reasonable fear” of persecution in their home country are sent to immigration court for a special form of removal proceedings.¹⁷ These proceedings are known as “withholding-only” proceedings, because the only protection that individuals may seek is withholding of removal or protection under the Convention Against Torture.¹⁸

Once an individual is in the immigration court process, either in withholding-only proceedings or in the standard removal proceeding, they must file an application with the immigration court requesting humanitarian protection in the form of asylum (if eligible) and withholding of removal.¹⁹

How Does Someone Win Humanitarian Protection?

An asylum seeker has the burden of proving that he or she meets the definition of a refugee.²⁰ Asylum seekers often provide substantial evidence to demonstrate that they have been persecuted in the past, or that they have a “well-founded fear” of future persecution in their home country, which the Supreme Court has defined as a 10 percent chance that the person would be persecuted on account of a protected ground if they were to be deported.²¹ A person’s own testimony is usually critical to his or her asylum determination.

Individuals who apply for withholding of removal are held to a higher standard than people seeking asylum. Instead of having to prove that their fear of persecution is “well-founded,” people seeking withholding must demonstrate it is “more likely than not” that they would be persecuted in their home country if forced to return there, unless they can prove that they have suffered persecution on account of a protected ground in the past.²² This means that there must be a greater than 50 percent chance of persecution.²³ As a result, winning withholding of removal is generally harder than winning asylum, because the burden on the applicant is five times higher.

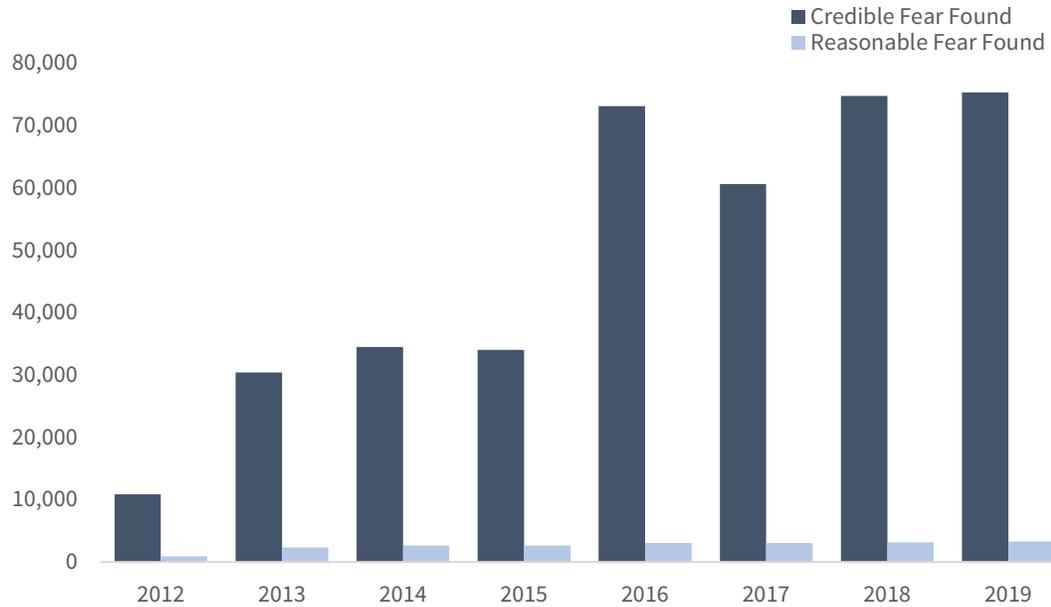
How Common are Withholding-Only Proceedings?

In the context of all asylum-seekers, withholding-only proceedings remain a relatively small subset of asylum-based cases referred to immigration court. In recent years, between 70,000 and 80,000 asylum seekers have been referred to immigration court annually through the credible fear process.²⁴ In total, more than 213,000 people applied for asylum in Fiscal Year (FY) 2019.²⁵

The most common way that individuals are placed into withholding-only proceedings is through an interview at the border with an asylum officer. Individuals without prior orders of deportation who can demonstrate that they have a “credible fear” of persecution in their home country are sent to normal removal proceedings where they may apply for asylum. Individuals who have previously been ordered deported are ineligible for asylum and have a higher burden to meet. If they manage to demonstrate to the asylum officer that they have a “reasonable fear” of persecution in their home country, they are sent to withholding-only removal proceedings where they may apply for withholding of removal, but not asylum.

Since FY 2012, the number of individuals found to have a credible fear of persecution has increased from 10,838 to 75,252 (see Figure 2). At the same time, the number of individuals found to have a reasonable fear of persecution and sent to withholding-only removal proceedings has only increased from 916 to 3,306. Thus, despite a very large increase in the number of asylum seekers at the border over the past decade, withholding-only proceedings remain relatively rare.

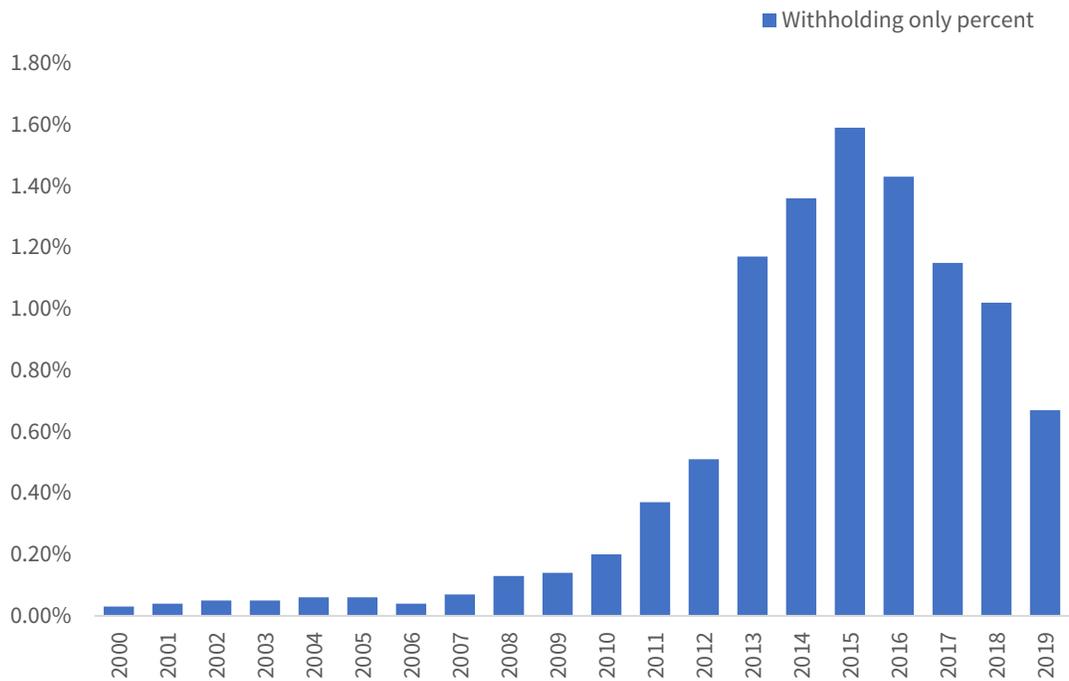
Figure 1 Number of Individuals Passing Credible Fear and Reasonable Fear Interviews



Source: USCIS Credible Fear and Reasonable Fear Workload Reports, FY2012-2019.

From FY 2014 to FY 2019, a little more than 3,000 withholding-only proceedings were begun each year, an amount which has largely stayed the same since FY 2014. At the same time, the number of new removal proceedings begun each year has routinely exceeded 200,000.²⁶ While the number of withholding-only proceedings has remained relatively stable, the number of removal proceedings filed in immigration court continues to rise. In FY 2019, 543,997 cases were filed in immigration court, of which 3,652 (0.6%) were withholding-only proceedings.

Figure 2 Withholding-Only Proceedings as a Percent of All Cases Filed in Immigration Court



Source: Executive Office for Immigration Review: Statistics Yearbooks, FY 2010-2018, <https://www.justice.gov/eoir/statistical-year-book>; data on file with author for FY2019.

Are People in Withholding-Only Proceedings Eligible for Release on Bond?

Most individuals who are placed in withholding-only proceedings are held in ICE detention throughout the entire process of seeking protection and are not given the opportunity to ask a judge for release. ICE takes the legal position that people in withholding-only proceedings are not eligible for bond and must be held in “mandatory detention.” This means that some people are held for months or years in detention even if ICE or an immigration judge would normally have released them.

However, in some locations, federal courts have ruled that individuals in withholding-only proceedings are eligible for release on bond. In the jurisdiction of the Second Circuit Court of Appeals (New York, Connecticut, and Vermont) and the Fourth Circuit Court of Appeals (Maryland, North Carolina, South Carolina, Virginia, and West Virginia), immigrants in withholding-only proceedings may ask an immigration judge for release on bond.²⁷ The Supreme Court is set to decide this issue in 2021.²⁸

How Difficult is it to Win Withholding of Removal?

Withholding of removal is a difficult protection to win. In most years, few people win withholding of removal, due in part to structural obstacles unrelated to the merits of the claim. Individuals in withholding-only proceedings also have a high bar to winning relief, made worse by the fact that individuals in withholding-only proceedings are generally held in detention during proceedings.

Detention significantly impedes the ability of immigrants to obtain counsel and win their cases. A 2016 study revealed that just 14 percent of individuals held in detention managed to hire counsel, compared to 66 percent of individuals whose cases proceeded outside of detention.²⁹ Those who managed to obtain a lawyer while detained were able to win relief in 21 percent of cases, compared to just 2 percent of those who did not obtain a lawyer.³⁰

Access to counsel also plays a significant role in whether individuals in detention file for protection, including withholding of removal. In 2016, just 3 percent of detained immigrants without lawyers filed for a form of relief from removal, compared to 32 percent of represented immigrants in detention.³¹ When detained individuals without lawyers managed to apply for relief, they were able to win relief just 23 percent of the time, compared to 49 percent of the time for those who had lawyers.³²

As a result, the fact of detention itself can be the reason that many people in withholding-only proceedings are denied protection or abandon or withdraw their application.

Winning withholding of removal has also gotten more difficult in recent years. A suite of anti-asylum policies and decisions passed by the Trump administration, discussed below, together with the expansion of the detention system inside the United States over the past decade, have been responsible for declining asylum and withholding grant rates.³³

Despite these obstacles, from FY 2010 to FY 2018 more than 1,000 people won withholding of removal each year, peaking at 1,746 grants in FY 2018.³⁴ This includes hundreds of individuals placed in withholding-only proceedings who win protection every year.³⁵ Unfortunately, a significant number of individuals who seek withholding of removal abandon their cases, likely due to the inability to proceed with an application for relief from within detention.

How Have Administrative Changes Affected the Availability of Withholding of Removal?

The Trump administration has enacted policies severely curtailing asylum rights, some of which have forced people to seek withholding of removal rather than asylum.³⁶ A 2019 transit ban, for example, barred from asylum eligibility anyone who traveled through a third country without seeking status, forcing people to apply for withholding of removal instead.³⁷ In June 2020, a federal court in Washington, DC struck down that ban as unlawful.³⁸

Other policies and decisions enacted by the Trump administration have made winning asylum and withholding of removal more difficult. These include restrictions on asylum for victims of domestic violence, new requirements for immigration judges to rapidly process claims for asylum-seeking families, and the hiring

of immigration judges and Board of Immigration Appeals members with records of anti-immigrant animus and hardline positions against asylum seekers.³⁹

New regulations proposed in 2020 would continue to restrict access to asylum and withholding-of-removal protections in violation of U.S. and international law, including proposed changes to the asylum system which would impose widespread new bans on asylum that could strip asylum eligibility from hundreds of thousands of people.⁴⁰ The Trump administration has gone so far as to invoke the threat of COVID-19 in a proposed regulation that would bar asylum seekers from both asylum *and* withholding of removal, declaring that any person who passed through a country where a contagious disease is present is a “danger to the security of the United States.”⁴¹

Despite these challenges, individuals continue to apply for, and win, both asylum and withholding of removal. In FY 2019, 18,824 individuals were granted asylum or withholding of removal, the most in over a decade.⁴²

How Often Are People Granted Withholding of Removal Deported to Third Countries?

Despite the possibility that individuals granted withholding of removal could be deported to a third country, ICE rarely exercises that ability. Data acquired through the Freedom of Information Act reveals that in FY 2017, just 21 people in total granted withholding of removal were deported to a third country. That is just 1.6 percent of the 1,274 people granted withholding of removal that year.

The reason so few people are deported to third countries is because countries have no incentive to accept non-citizens. By contrast, customary international law holds that a country has a duty to accept the return of its nationals.⁴³ The data provided did not clarify which of those 21 people were dual citizens or had some form of permanent immigration status in another country. It is likely that at least some of them fell into one of these two categories.⁴⁴

This data shows that despite the possibility of deportation to a third country, those granted withholding of removal are generally able to remain in the United States without being deported. Only ICE initiating the process of formally revoking their withholding of removal would threaten their ability to remain in the United States.

Endnotes

1. 8 U.S.C. § 1159(b).
2. 8 U.S.C. § 1158(b)(3)
3. See generally 8 U.S.C. § 1231(b).
4. U.N. General Assembly (U.N.G.A.), Convention Relating to the Status of Refugees, § 1(A)(2), U.N. Treaty Series (Vol. 189), at 137 (July 28, 1951), available at <http://www.refworld.org/docid/3be01b964.html>; U.N.G.A., Protocol Relating to the Status of Refugees, U.N. Treaty Series (Vol. 606), at 267, (January 31, 1967), available at <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b3ae4>.
5. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, codified at 8 U.S.C. § 1101(a)(42).
6. 8 U.S.C. §§ 1157-1158. This fact sheet does not describe the law or process for gaining refugee status abroad.
7. See 8 U.S.C. § 1158(c).
8. See, e.g., Administration for Children & Families, “Asylee Eligibility for Assistance and Services,” July 12, 2012, <https://www.acf.hhs.gov/orr/resource/asylee-eligibility-for-assistance-and-services>.
9. See 8 U.S.C. § 1231(b)(3)(A).
10. *Id.*; 8 U.S.C. § 1231(b)(2).
11. 8 U.S.C. § 1231(b)(3)(B).
12. 8 C.F.R. §§ 208.16(c); 208.18(a).
13. 8 C.F.R. § 208.16(a) (“An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien’s life or freedom would be threatened must be withheld”).
14. 8 U.S.C. § 1231(a)(5); 8 C.F.R. 241.8(a).
15. 8 U.S.C. § 1231(a)(5); 8 C.F.R. 208.2(c)(2)(i) (immigration judge has jurisdiction over withholding-only cases where the individual has a reinstated order of removal);
16. 8 C.F.R. § 241.8(e).
17. 8 C.F.R. § 208.31.
18. *Id.*; 8 C.F.R. §§ 208.31(e) (requiring asylum officer to refer case to IJ); 1208.31(e) (same); 241.8(e) (same); 1241.8(e) (same); 208.2(c)(2) (IJ jurisdiction in referred cases); 1208.16 (withholding-only hearings before IJ).
19. U.S. Citizenship and Immigration Services, “I-589, Application for Asylum and for Withholding of Removal,” last modified August 25, 2020, <https://www.uscis.gov/i-589>.
20. 8 U.S.C. § 1158(b)(1)(B)(i).
21. See 8 U.S.C. § 1158(b)(1)(A) (declaring that a person may be granted asylum if they fit the definition of a “refugee” in 8 U.S.C. § 1101(a)(42)).
22. See 8 C.F.R. § 208.16(b)(1)(iii), (b)(2).
23. See, e.g., *Yousif v. Lynch*, 796 F.3d 622, 629 (6th Cir. 2015); *Wakkary v. Holder*, 558 F.3d 1049, 1065 (9th Cir. 2009).
24. See Department of Homeland Security, “Credible Fear Cases Completed and Referrals for Credible Fear Interview,” <https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview> (last updated July 24, 2020).
25. Executive Office for Immigration Review, *Total Asylum Applications* (July 14, 2020), <https://www.justice.gov/eoir/page/file/1106366/download>.
26. Executive Office for Immigration Review, “New Cases and Total Completions,” July 14, 2020, <https://www.justice.gov/eoir/page/file/1060841/download>.
27. *Guzman Chavez v. Hott*, 940 F.3d 867 (4th Cir. 2019), cert. granted sub nom. *Albence v. Guzman Chavez*, 207 L. Ed. 2d 1050 (June 15, 2020), *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016); but see *Padilla-Ramirez v. Bible*, 882 F.3d 826, 835-36 (9th Cir. 2017) (adopting ICE’s position that individuals in reinstatement detention are detained mandatorily), cert. denied sub nom. *Padilla-Ramirez v. Culley*, 139 S. Ct. 411, 202 L. Ed. 2d 312 (2018); *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 219 (3d Cir. 2018) (same); *Martinez v. Larose*, 968 F.3d 555, 564 (6th Cir. 2020) (same).
28. See *Albence v. Guzman Chavez*, Case No. 19-897 (cert granted June 15, 2020).
29. American Immigration Council, Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, September 2016, at 5, https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.
30. *Id.* at 19.

31. *Id.* at 20.
32. *Id.* at 21.
33. See American Immigration Council, *Policies Affecting Asylum Seekers at the Border*, January 29, 2020, <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>; TRAC, “Asylum Decisions and Denials Jump in 2018,” November 29, 2018, <https://trac.syr.edu/immigration/reports/539/>.
34. Executive Office for Immigration Review: Statistics Yearbooks, FY 2010-2018, <https://www.justice.gov/eoir/statistical-year-book>.
35. Data produced via the Freedom of Information Act, on file with author.
36. See generally American Immigration Council, *Policies Affecting Asylum Seekers at the Border*, January 29, 2020, <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>.
37. Department of Homeland Security, *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829 (July 16, 2019).
38. In June 2020, the U.S. District Court for the District of Columbia struck down the third-country transit asylum ban, immediately halting its implementation. See *Capital Area Immigrants' Rights Coal. v. Trump*, --- F. Supp. 3d ---, No. CV 19-2117 (TJK), 2020 WL 3542481 (D.D.C. June 30, 2020).
39. Royce Murray, “Asylum Seekers Fleeing Domestic Violence and Gangs Now Face Even Higher Hurdles to Protection,” *Immigration Impact*, June 13, 2018, <https://immigrationimpact.com/2018/06/13/asylum-seekers-domestic-violence-gangs-hurdles-protection/#.X3XgpWhKhjE>; Sarah Pierce, “As the Trump Administration Seeks to Remove Families, Due-Process Questions over Rocket Dockets Abound,” July 2019, <https://www.migrationpolicy.org/news/due-process-questions-rocket-dockets-family-migrants>; “Ex-FAIR Research Director Among 46 New Immigration Judges,” *Law360*, July 20, 2020, <https://www.law360.com/articles/1293543/ex-fair-research-director-among-46-new-immigration-judges>; Noah Lanard, “The Trump Administration’s Court-Packing Scheme Fills Immigration Appeals Board With Hardliners,” *Mother Jones*, August 29, 2019, <https://www.motherjones.com/politics/2019/08/the-trump-administration-has-packed-the-immigration-appeals-board-with-hardliners/>.
40. See Nat’l Immigrant Justice Ctr., “Trump Eviscerates U.S. Asylum System in Proposed Rule,” June 11, 2020, <https://immigrantjustice.org/press-releases/trump-eviscerates-us-asylum-system-proposed-rule?eType=EmailBlastContent&eld=ec9d7004-4d2f-406c-8bfb-28fcb931980>; see also Aaron Reichlin-Melnick, “What You Need to Know About Trump’s Proposal to Eliminate the US Asylum System,” *Immigration Impact*, June 11, 2020, <https://immigrationimpact.com/2020/06/11/end-asylum-trump/#.X3d2U2hKiUk>; Human Rights First, “Human Rights First Condemns Rule that Seeks to Re-Write Refugee Laws Eliminate Asylum,” June 11, 2020, <https://www.humanrightsfirst.org/press-release/human-rights-first-condemns-rule-seeks-re-write-refugee-laws-eliminate-asylum>.
41. See Nat’l Immigrant Justice Ctr., “Comment In opposition to Security Bars and Processing; Docket No: USCIS 2020-0013, A.G. Order No. 4747-2020; RIN 1615-AC57,” August 10, 2020, https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-08/NIJC_Comment_Asylum_Public_Health_NPRM.pdf.
42. Executive Office for Immigration Review, “Asylum Decision Rates,” July 14, 2020, <https://www.justice.gov/eoir/page/file/1248491/download>.
43. See Lessing, *Das Recht der Staatsangehörigkeit und die Aberkennung der Staatsangehörigkeit zu Straf- und Sicherungszwecken*, XII *Bibliotheca Visseriana* 117, 110, 139, 148 (1937); Clemens Hufmann, *Duty to Receive Nationals?*, 24 *FORDHAM L. REV.* 235, 256-57 (1955).
44. See, e.g., *Matter of Salim*, 18 I&N. Dec. 311, 317 (BIA 1982) (granting withholding of removal as to Afghanistan only, while ordering removal to both Afghanistan and Pakistan).