

Commentary

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Burden Shifting to U.S. Nonprofits: Supporting Access to Asylum When Legal Protection Frameworks Fail

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1 Introduction

In August 2021, after two decades of U.S. military presence in Afghanistan, the world watched the collapse of Kabul via broadcast images and newscasts. Many Afghan men, women, and children rushed to board U.S. military planes in search of safety and protection beyond Afghanistan's borders. Since 2021, over 1.6 million Afghans have fled Afghanistan, over a hundred thousand of whom sought refuge in the United States via Operation Allies Welcome (USA for UNHCR 2023).¹

During and after Operation Allies Welcome, the U.S. government and responding nonprofits were challenged by the ongoing COVID-19 pandemic and the lasting impacts of immigration policies undertaken by the Trump administration; these immigration policies included restricted asylum access and eligibility and a drastically reduced infrastructure for refugee resettlement to the United States (Chisti and Bolter 2020; Pierce, Bolter, and Selee 2018). For example, in 2020, the ceiling for refugee admissions plummeted to a new low of 18,000. Further, many refugee resettlement nonprofits – nonprofits with specialized knowledge about the complex

¹ Operation Allies Welcome was a U.S. government effort, authorized by President Biden and led by the Department of Homeland Security, to support the safe resettlement of Afghan in the United States immediately following the collapse of Kabul in August 2021. More about these government-led efforts can be found here: <https://www.dhs.gov/allieswelcome>

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needs of refugees and asylum seekers – shut down or downsized after 2016 due to the significant reduction of the federal refugee resettlement program.

At the onset of Operation Allies Welcome, Afghans were temporarily housed across eight military bases, arrangements coordinated by the U.S. Department of Defense (Vergun 2021). They primarily entered the United States under humanitarian parole. Humanitarian parole offered Afghans temporary legal permission to enter the country and an opportunity to navigate a less adversarial immigration process by eventually seeking affirmative immigration benefits through the United States Citizenship and Immigration Services (USCIS) rather than in adversarial removal proceedings (Montalvo and Batalova 2024). Humanitarian parole did not, however, lead to permanent legal status, and congressional efforts to bridge an effective and efficient pathway from humanitarian parole to permanent legal status repeatedly failed (Montalvo and Batalova 2024).

Under these emergency circumstances, without permanent solutions and with limited infrastructure to respond, a patchwork of nonprofits stepped in to support the needs and self-determination of arriving Afghans. This commentary focuses on the critical role of nonprofits in bridging access to permanent legal status for Afghans amidst glaring gaps in government protection.² It further highlights the role of specialized knowledge in this complex arena and offers initial observations of resource gaps. Overall, the recent case of Afghans underscores the limitations of existing legal protection frameworks – frameworks that do not match the realities of current migration patterns and do not translate into the *de minimus* standards of adequate protection under the realities of polarized politics. It also identifies areas that require additional resources, capacity, and funding to move toward a more meaningful asylum protection framework in the United States.

2 Legal Pathways for Afghans

The close relationship between Afghans and the United States spans at least two decades. Almost three-quarters of the current Afghan population in the United States arrived after 2010, many of whom were displaced due to political conditions and the withdrawal of U.S. troops from Afghanistan (Montalvo and Batalova 2024). Today,

² Displacement and migration are important global conversations which can benefit from research in various host country contexts, including countries like Türkiye which host large numbers of refugees. This commentary, however, is limited to understanding U.S. nonprofit responses, contextualized by the legal framework of and practices in the United States. This commentary focuses on access to legal protection, with the acknowledgment that there are a bundle of needs and rights that must be addressed during displacement, including education, housing, and health provisions.

Afghans in the United States are concentrated in California, Virginia, Texas, and New York (Montalvo and Batalova 2024).

In addition to the traditional pathways for securing legal status via family, business, and humanitarian immigration applications, Afghans have some unique and distinctive options. Many Afghans have been eligible for a special immigrant visa (SIV) by serving U.S. interests through professional support and interpretation and translation between English, Pashto, and Dari (Montalvo and Batalova 2024). In 2021, some changes were made to the SIV program to help alleviate the burden on applicants under the emergency circumstances of Operation Allies Welcome. Changes included a reduced qualifying period from two years to one year, monetary support for flights and housing, and permission to postpone medical exams (International Refugee Assistance Project 2021).

During Operation Allies Welcome, the Biden administration also invoked executive powers to grant humanitarian parole as a temporary measure to facilitate entry (U.S. Committee for Refugees and Immigrants 2021). Humanitarian parole is considered a lawful admission into the country. Although it does not lead to permanent residency, it sidesteps removal proceedings. For Afghan parolees, certain benefits were available through the Office of Refugee Resettlement (ORR), including cash assistance, medical assistance, job placement, and English language training (Administration for Children & Families 2023). These benefits are typically reserved for approved refugees and asylees. Humanitarian parole was granted to Afghans for up to two years (typically granted for one year), and as of 2023, Afghans can apply for extended parole (U.S. Committee for Refugees and Immigrants 2021). Further, Afghan parolees continue to be exempt from USCIS filing fees (U.S. Citizenship and Immigration Services 2021). In addition, the Biden administration extended Temporary Protected Status (TPS) to Afghans in May 2022, giving them temporary permission to stay in the United States due to country conditions that prevent the safe return of the applicant (U.S. Citizenship and Immigration Services 2024). TPS has since been extended until 2025. While this commentary does not exhaustively describe all options available to Afghans, it does illuminate the significant role of the executive branch in paving emergency pathways for Afghans to enter the United States with legal permission (Chisti, Bush-Joseph, and Putzel-Kavanaugh 2024).

Attempts to move from temporary to more permanent solutions were also pursued. For example, the bipartisan Afghan Adjustment Act was introduced in Congress. The Afghan Adjustment Act received strong public backing from non-profits and communities involved with Afghans. For various reasons, including national security rhetoric, legislation for group pathways for legal status failed, and the remaining option for many Afghans has been to pursue individual asylum cases – resource-intensive cases. To demonstrate individualized persecution in an asylum case, an experienced immigration lawyer spends at least 50–75 h effectively

preparing an asylum case, with additional hours spent on more complicated matters (Grenier 2023). As a consolation to the more laborious process that has ensued, the Office of Refugee Resettlement (ORR) allocated almost 35 million dollars to the U.S. Committee for Refugees and Immigrants for the provision of direct legal services to Afghan parolees and the capacity building of legal service providers (ILSAA, n.d.).

On the one hand, an application for asylum does not guarantee legal protection as would entering the United States with refugee status or having a group pathway to legal status. Yet, it fares better than pursuing asylum at the border without lawful admission, where if an applicant successfully passes a credible fear interview, they will move into defensive removal proceedings before an immigration judge and may also face detention. Further, the government has invested some resources to build capacity among immigration legal providers and bridge information about legal pathways for Afghans.

3 Asylum and Direct Advocacy

Following the overnight collapse of Kabul, nearly 76,000 Afghans were granted humanitarian parole, and more than 60,000 Afghan parolees have sought asylum (American Immigration Council 2022, 2023). Although this commentary focuses on Afghan asylum seekers, it is worth noting the distinction between asylum seekers and refugees.

Asylum seekers and refugees must meet the same legal definition. They must both demonstrate a “well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion” (8 USC §1101(a)(42)). Briefly, “refugee” and “asylum seeker” are distinguished by two factors: (1) the location where they pursue their claim and (2) the status in which they enter the United States. Refugees are physically outside the United States when they seek legal protection. After proving that they meet the *refugee* definition, they must match with the United States and successfully pass a series of background, security, and health screenings. Refugees enter the United States on refugee status. Asylum seekers must meet the same definition and typically apply within one year of physically entering the United States. If their cases are approved, asylum seekers become asylees. Asylum seekers navigate a different process with different agencies because they are physically at or within the borders of the United States (American Immigration Council 2022). If granted asylum, the individual receives protection from persecution, work authorization, a pathway to U.S. citizenship, and an opportunity to replenish one’s life (American Immigration Council 2022).

Direct advocacy in asylum proceedings includes efforts to influence adjudicators on behalf of individuals (Gen and Wright 2020). Direct advocacy via legal representation is critical among asylum seekers due to the increased risks of deportation

(Chand et al. 2021). Yet, there is no guaranteed lawyer for asylum seekers, including asylum seekers in adversarial removal proceedings (8 USC §1229a(b)(4)). Because there is no guaranteed right to a lawyer under U.S. laws (Harris 2020), asylum seekers are left with three options for directly advocating for their case in legal proceedings: private lawyers, pro bono legal aid, or self-representation.

Asylum is prepared based on individual merits – an immense resource and emotional burden for arriving Afghans, the government, immigration lawyers, and supporting nonprofits.³ Further, the asylum process is complicated to navigate, benefits are discretionary, and there are many pitfalls along the way. Briefly, there is disparity among decision-makers (Ramji-Nogales, Schoenholtz, and Schrag 2007; Paskey 2016) and subjectivity in decision-making (Holland 2018; Paskey 2016). The applicant's credibility is crucial (Holland 2018; Paskey 2016). Yet, certain aspects of the applicant, their story, and their credibility are overlooked, such as the display of post-traumatic stress disorder or cross-cultural implications that do not meet the Western standards by which it may be judged (Ardalan 2015).

Direct advocacy via legal representation is critical because it is associated with positive outcomes in asylum cases (Harris 2020; Katzmann 2008; Miller, Keith, and Holmes 2015; Ramji-Nogales, Schoenholtz, and Schrag 2007; Schoenholtz and Jacobs 2002). Effective lawyering appears to be an important factor in successfully navigating the asylum process, which is ever-changing and fraught with procedural disparities in outcomes (Raman, Vera, and Manna 2022; Ramji-Nogales 2017). One study evidenced gross disparities within the walls of the same courthouse where “one judge is 1820 % more likely to grant an application for important relief than another judge”. There are also some more nuanced findings. Not all legal representation is equal, and ineffective representation may be more harmful than none (Mellinger 2021; Shanahan, Carpenter, and Mark 2016). One study found that nonprofit lawyers were associated with improved outcomes (Keith and Holmes 2009). In another study of federal appeals of immigration cases, big law firms were associated with improved outcomes compared to non-big law firms, with the selectiveness of cases and resources as potentially related factors (Krishnan, Riley, and Dias 2024).

Recent research suggests that nonprofit legal aid cannot keep pace with the demand of indigent immigrants, with legal aid deserts in several states around the country (Kerwin and Millet 2022). This finding is illuminated by another study (previously mentioned in “Legal Pathways for Afghans”) which indicates that an

3 Some Afghans were eligible to pursue other forms of legal status, such as a special immigrant visa, as briefly discussed above in the section titled “Legal Pathways for Afghans.” The emphasis of this commentary is to better understand asylum protection, the form of protection which most arriving Afghans have had to pursue.

experienced immigration lawyer spends an average of fifty to seventy-five hours to effectively prepare an asylum case, with additional hours spent on more complicated matters (Grenier 2023). For asylum seekers affirmatively applying for asylum via USCIS, including Afghan parolees, the time burden may fall on the lower end of the range. Nonetheless, options for asylum seekers to secure legal representation are fraught with barriers, including the high cost of private lawyers, potential selectiveness among big law firms, and long waiting lists for pro bono legal aid.

Altogether, these findings suggest that beyond the supply shortage of immigration lawyers, capacity-building of lawyers to provide effective counsel in immigration cases and additional resources are warranted to keep pace with the specialized skillsets and demands in this area of law. Ultimately, when asylum seekers seek protection from the U.S. government through the asylum process, they are up against significant odds, and skilled legal representation has demonstrated positive outcomes in adjudications. The underlying complexities of asylum protection in the United States have been on display during Operation Allies Welcome, and the heavy burden on nonprofits to respond to the legal needs of Afghans must be more deeply understood before discussing solutions.

4 Burden Shifting to Nonprofits

During flight, asylum seekers often have limited access to resources and support, including legal aid (Asgary, Charpentier, and Burnett 2013). Due to various barriers, specialized knowledge of immigration laws, and inadequate legal protection, a heavy burden shifts to nonprofits. These factors were indeed relevant to Afghan evacuees. According to some estimates, more than 350 nonprofits responded, welcomed, and supported Afghans into the United States (Immigration Justice Campaign, n.d.). It is unclear to what degree and whether all these nonprofits have been involved in responding to the legal needs of Afghans.

Overall, different types of nonprofits have been involved in addressing legal needs, including immigrant nonprofits, community-based organizations, legal aid providers, refugee resettlement agencies, faith groups, and informal networks. Several nonprofits seemed to diversify their offerings to bridge access to direct advocacy and legal resources. For example, many nonprofits incorporated education and legal screenings for asylum seekers filing their own claims without a lawyer. Many nonprofits also focused on increasing the supply of professional support via continual legal education and specialized training to lawyers who do not specialize in immigration law but want to provide professional support to asylum seekers and other indigent immigrants. At least in some cases, nonprofit responses have

overlapped, often leveraging their own relative advantages, whether it be legal knowledge, community proximity, or language access, or all the above.

Overall, nonprofits have developed nimble responses and strategies. For example, Exodus Refugee Immigration – an Indiana-based refugee resettlement nonprofit and part of the Church World Service network – welcomed over 400 Afghans between 2021 and 2022. To do so, the organization aggressively invested in resources. Exodus hired its first immigration lawyer by early 2021 before the evacuation but rapidly increased its legal department to seven by 2023 to file 95 applications for asylum (Exodus Refugee Immigration 2023). The scaling and responses to meet the needs of Afghan evacuated necessitated emergency strategies, long hours, private funding support, expanded programs, and increased staffing.

Legal aid nonprofits, immigration advocacy nonprofits, and professional membership lawyer associations were front and center for the legal needs of Afghans. For example, the professional membership organizations of the American Immigration Lawyers Association (AILA) and the American Bar Association (ABA) provided resources and training for attorneys to help understand the complexities of asylum and immigration laws and special considerations of Afghan evacuees. These efforts were geared at building capacity within the legal profession to respond to the legal immigration needs of Afghan evacuees. Many branches of the Council on American-Islamic Relations (CAIR) provided direct legal representation, resources, and public advocacy related to the legal needs of Afghans. The global International Refugee Assistance Project (IRAP), which origins in 2008 as the Iraqi Refugee Assistance Project, developed a self-help portal with various resources for Afghans, employers, and attorneys; IRAP also continued to update its longstanding resources on SIV and other immigration pathways relevant to Afghans. Further, the Immigrant Justice Campaign coordinated volunteer attorneys, interpreters, and translators.

New organizations and ventures also emerged in response to the crisis. For example, Project ANAR emerged in the summer of 2021 as a fiscally sponsored project of Pangea Legal Services. Project ANAR is an “Afghan community immigrant justice organization formed and led by Afghan American women, in partnership with other immigration lawyers, that focuses on legal services, community education, and advocacy and engagement” (Project ANAR, n.d.). The motivations for launching this organization included gaps in the fundamental understanding of legal options among Afghan evacuees and inconsistent immigration policies for Afghans (Project ANAR, n.d.).

Further, individuals, associations, and nonprofits of the same ethnic and faith background were eager to welcome, provide legal resources, and serve as bridges to incoming Afghans (Paarlberg 2023). The Afghan-American Foundation, for example, provides videos and translated written guides for navigating some steps in the immigration legal process (Afghan-American Foundation, n.d.). U.S. lawyers of Afghan background were especially integral to bridging legal and cultural

knowledge. U.S. immigration lawyer Mahsa Khanbabai co-led the Afghan Task Force with AILA, including advocacy efforts for the Afghan Adjustment Act (Paarlberg 2023). The Biden Administration also piloted the Welcome Corps program during this time, where independent groups of five or more people could sponsor refugees and, in essence, replicate the initial support traditionally offered by refugee resettlement nonprofits with the lengthy vetting process intact (U.S. Department of State, n.d.).

In many ways, organizational responses were overlapping and complementary, bridging the strengths of different groups. Various coalitions and collaborations also emerged across these domains. For example, many nonprofits referenced each other's resources and aggregated publicly available information for use by their stakeholders. Pars Equality Center offers one among many examples of a nonprofit that partnered with law firms and community groups to produce publicly available resources and guidance for navigating legal options. Project ANAR offers a second example of a group that directly provided legal aid and housed a variety of publicly available information via video and written materials while referencing Pars Equality Center, IRAP, and others who offered complementary and overlapping resources.

Although nonprofits creatively pivoted to respond to the legal needs of Afghans and assist with filing applications for asylum (or other available legal pathways), and some federal funding was unlocked to support these efforts, the U.S. government was delayed in its commitment to expedite asylum claims for Afghans within its promise of 150 days. Thus, some nonprofit responses challenged the government to fulfill its minimum obligations. One notable example is a class action lawsuit filed on behalf of about 20,000 Afghans facing prolonged delays in asylum adjudication. The National Immigration Justice Center partnered with pro bono counsel at Kirkland and Ellis. This lawsuit reached a settlement, which scheduled dates for decision-making on affected cases (National Immigrant Justice Center 2023).

Despite some government funding and stated intentions to reduce processing timings, the reliance on nonprofits has stretched available resources and overall, nonprofit responses have been insufficient to keep pace with the lengthy government process as well as demand and time-intensive nature of individualized responses. Rapid scaling of nonprofit efforts via direct services, professional training, and community resources was undertaken to help provide access to legal protection for Afghan evacuees. Yet, these efforts remain unmatched by the scale and need to navigate individualized immigration legal recourse for Afghans.

5 Conclusion

These complex factors – a faulty asylum framework, the importance of direct advocacy, the paucity of legal aid, and the specialized knowledge and training for

effectively making an asylum claim – have been on display during Afghan evacuation responses. Further, despite the longstanding relationship between Afghans and the United States, the political momentum to create more efficient and less burdensome legal pathways for Afghans conflicted with the national security lens by which Afghans were perceived. Amidst this background, nonprofits with specialized knowledge and understanding of immigration, refugee resettlement, legal aid, and Afghan culture have led the charge in addressing the legal needs of Afghans.

While Afghan resettlement does not begin to capture all the barriers and pathways of pursuing asylum, it underscores how the current asylum protection framework has not been able to absorb shocks or effectively respond to the size, scope, or reasons for which people seek protection. The case of Afghan evacuees brings light to these issues and the fact that asylum claims based on individualized persecution are not always the most fitting and efficient manner to provide legal protection for people on the move. With failed Congressional attempts to collectively address needs for protection, such as the Afghan Adjustment Act, the burden remains with nonprofits.

Under these circumstances, nonprofits with specialized skills and understanding of the landscape assume a more prominent role. Due to the ups and downs of immigration policy, they must predict, respond, and scale up (and down) to navigate the ever-changing immigration policy landscape. Some nonprofits are expanding their reach to recruit additional human resources through efforts like professional training. For the Afghan evacuation, a larger supply of asylum-trained lawyers was essential to the timely filing of many protection claims. Although federal funding was unlocked to support nonprofits in these efforts, the funding was insufficient to meet the resource-intensive needs of responding nonprofits. It also did not overcome the resource insufficiencies at the government level, where priority and express processing of asylum applications could not be met.

Lessons learned from Operation Allies Welcome can inform ongoing and future responses. The pace and scale of displaced people around the world continues to increase: by mid-2023, 110 million people have been forcibly displaced from their homes worldwide, among them 6.1 million asylum seekers (UNHCR 2024). In the case of recently displaced Palestinians from Gaza, some of the same and newly emerging nonprofits are navigating legal responses in similar patterns: providing legal information to affected populations, building attorney networks, and resource sharing (Arab Resource & Organizing Center, n.d.; International Refugee Assistance Project, n.d.). As nonprofits respond to the legal needs of forced migrants but find constraints within political and legal environments, they are patching together solutions in creative ways. Operation Allies Welcome is a demonstrative case, however, that patchwork responses from the government and nonprofits do not meet the scale and demand of today's realities.

While emerging research is beginning to understand the landscape of immigrant nonprofits, there is a further need to understand the nuances that nonprofits face for clients and members who hold precarious immigration status and pursue legal status. Thus, future research can build on these threads to understand the nuances of nonprofit engagement with vulnerable populations due to limbo status or forced migration issues. How are immigrant nonprofits mobilizing responses, how do these responses vary, and where do gaps remain? Asking these questions can help uncover philanthropic insufficiencies, including access to legal protection, where government action or inaction relates to the burden of nonprofits. Such research can be critical to informing sound policy decisions regarding improved legal protection for people on the move and additional funding and resource support for nonprofits lifting the burden.

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