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*The Dual Nature of Digitalization of Asylum Procedure:
Analyzing the CBP One*

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Abstract

Digitalization is reshaping the migration sector, offering new tools and methods for border control, visa proceedings, and asylum procedures. This paper explores the ambiguity of digitalization in asylum procedures, focusing on the case of CBP One, a mobile app used at the American-Mexican border, which allows aliens located outside the country to request appointments with border authorities and obtain travel permits, ensuring safe and secure travel while mitigating the risks associated with illegal immigration.

Il settore dell'immigrazione è sempre più influenzato dall'avanzamento tecnologico che offre nuovi strumenti e metodi per il controllo delle frontiere, per la previsione dei flussi migratori e per l'efficientamento delle procedure di rilascio dei visti. Il presente articolo esplora i problemi posti dalla digitalizzazione nelle procedure di asilo, prendendo come esempio il caso di CBP One, un'applicazione mobile utilizzata nell'ordinamento statunitense, che permette ai richiedenti – situati al di fuori degli Stati Uniti – di prenotare un appuntamento con le autorità di frontiera o ottenere un permesso di

viaggio, così eliminando o mitigando i rischi associati all'immigrazione illegale.

1. Transforming asylum procedures: the role of digitalization

Digitalization is revolutionizing the migration sector, with an increasing reliance on digital tools for various purposes. Many examples can be found in border control, where digital tools enable authorities to monitor and manage arrivals at the border, as well as in the use of artificial intelligence aiding in anticipating and managing migration flows, and in helping governments allocate resources more efficiently ([FORTI](#)).

The use of digital technology is beginning to streamline visa processes, enabling public administrations to operate more quickly and efficiently and the digitalization of asylum procedures makes no exception. The phenomenon has become a prominent subject of study as evidenced by numerous research studies and reports ([MOLNAR](#)) and is widespread across several countries, steadily gaining momentum.

The theme aligns with the use of technology as a means to bridge the physical distance between the applicant's home country and the intended host nation. In this scenario, technology not only expedites procedures but also serves as a legal pathway for migrants, affording them the opportunity to secure travel permits for their host countries while mitigating the risks associated with human smuggling.

Following this trend, the U.S. Customs and Border Protection (CBP) launched a mobile device application called [CBP One](#). Originally, CBP One was developed to offer various functionalities such as providing travelers with access to personal form's information, scheduling of inspection appointments for perishable cargo, or helping international organizations in their efforts to assist individuals seeking to enter the United States.

However, due to an expansion of its uses, CBP One has now become the official way for migrants at the American - Mexican border to pre-schedule an appointment to certain land ports of entry (POE) located in the south of the United States. Such procedure is named Advance Submission and Appointment Scheduling. Moreover, following the trend under Biden Administration of creating country-specific parole programs, CBP One also allows Cubans, Haitians, Nicaraguans, and Venezuelans to request an Advance Travel Authorization while still being in their home countries.

Although at a first glance these tools seem to guarantee a way for migrants to reach the United States in a safe way, the digitalized procedures introduced by CBP One generate concerns and prompt questions about the appropriateness of utilizing digitalization in asylum procedures. To address the problem, the topic will be further examined as follows: the first paragraph will describe the legal framework concerning the legal pathways to the United States under the Biden administration. The second and third paragraphs will analyze the two procedures mentioned above, trying to grasp their nature and level of digitalization. The last and fourth paragraph will provide concluding remarks on digitalization in asylum procedures.

2. *The legal framework*

It goes back to the pandemic, when the [U.S. Health Law – Section 265 of Title 42](#) was used by the Government to expel asylum seekers under the premise of protecting public health. In March 2020, the Department of Health and Human Services (HHS) issued an [emergency regulation](#) to implement a specific aspect of Title 42 by giving the power to the Director of Centers for Disease Control and Prevention to prohibit the introduction into the United States of individuals when a serious danger of a communicable disease was believed to exist.

In May 2023, it was declared the end of the COVID-19 Public Health emergency, thus, the use of Title 42 as a border policy terminated. However, due to concerns that the termination of Title 42 would lead to a significant increase in the number of migrants at the borders, potentially overwhelming the existing immigration system and resources, the previous rule was replaced by the [Circumvention of Lawful Pathways Final Rule, also eloquently called “Asylum Ban”](#).

The [“Asylum Ban”](#) imposes a rebuttable presumption of ineligibility for asylum upon the noncitizens who enter the United States from Mexico without documents required for lawful admission. Such presumption applies to those noncitizens whose entry was «(1) between May 11, 2023 and May 11, 2025; (2) subsequent to the end of implementation of the Title 42 public health Order; and (3) after the noncitizen traveled through a country other than the noncitizen’s country of citizenship, nationality, or, if stateless, last habitual residence» without asking for asylum.

The rule provides some exceptions and one of them regards precisely CBP One: indeed, the presumption does not apply to the noncitizen that «was provided appropriate authorization to travel to the United States to seek parole» or presented at a port of entry (POE) «pursuant to a pre-scheduled time and place». In a nutshell, the recent rule mandates the use of CBP One as an essential requirement for lawful entry into the United States, marking a significant shift in immigration procedures.

Overall the [Circumvention of Lawful Pathways Final Rule](#) seems quite restrictive and this is why it has been taken before the U.S. District Court for the Northern District of California on May 11, 2023 ([United States District Court Northern District Of California, East Bay Sanctuary Covenant v. Biden](#)). The process is still ongoing, but for the time being, the rule has been kept.

3. **The Advance Submission and Appointment Scheduling procedure: digitalization as a legal pathway?**

Focusing now on the aforementioned Advance Submission and Appointment Scheduling procedure, it is important determine whether CBP One simply serves as a digital tool that improves efficiency in the migration system, or if it could offer something more, potentially

acting as a new legal channel for migrants.

The debate on the definition of “legal pathway” hinges on meeting three conditions: firstly, the application should be grounded in humanitarian reasons or other situations of vulnerability; secondly, the procedure must culminate in granting a legal entitlement that allows the individual to enter and remain, even temporarily, in the State and thirdly the alien must be outside of the State at the time of application, even though it is not necessary for them to be in their home Country since the condition of vulnerability can also arise later on ([UN General Assembly Resolution 73/195, Global Compact for Safe, Orderly and Regular Migration, 19 December 2018, Objective 5, para. 21\(g\)\(h\)](#)).

CBP One, when used to apply for an appointment at the port of entry, only partially fulfills the three mentioned conditions.

Firstly, while the procedure is accessible to individuals potentially eligible for asylum, the application does not require the provision of detailed personal information to substantiate the asylum request: this implies that such information is not considered at this initial stage. Secondly, the process neither ensures the issuance of a permanent visa nor permits entry into the United States, since the only outcome is to facilitate the *access* to a designated port of entry within the State territory, where the scheduled appointment will take place. Furthermore, access to the system is granted randomly, as it selects “winners” for appointments in a non-transparent manner. The only known criterion is a preference for older accounts, which favors those who have been waiting longer. Finally, although the applicant may be situated outside the United States, submission of their application is contingent upon their proximity to the Mexican border. Thus, while it enables safe border crossing, any attempt to submit the request through CBP One outside the northern regions of Mexico will be hindered by the mobile device’s geolocation.

In other words, to be considered a legal pathway, it should at least offer a genuinely safe journey. The Advance Submission and Appointment Scheduling procedure, instead, only guarantee a safe border crossing, since the journey prior to this can expose migrants to risks such as smuggling.

That said, it is important now to analyze what sort of digitalization is involved in such CBP One procedure.

To do that, it has to be distinguished between what scholarship refers to as “weak” digitalization and “strong” digitalization (MARCHETTI).

Weak digitalization refers to the use of digital tools to facilitate existing processes without affecting the exercise of administrative power, but only the *way* it is exercised. For instance, submitting and receiving a form through a digital portal represents an example of weak digitalization. Thus, the submission of a migrant’s information via the CBP One app falls into this category.

Strong digitalization, on the other hand, involves the integration of more advanced technologies, such as artificial intelligence, that can fundamentally alter how public authority is exercised. In this regard, however, the specifics of how an alien’s request is processed by

CBP One remain unclear, including whether AI is employed in this process.

A clue is provided by the CBP One website, which notes that applicants are selected on a daily basis, favoring older accounts. This suggests some level of automation in the selection process, but it doesn't necessarily indicate the use of AI. The absence of AI in this context is further highlighted by its omission in the [Artificial Intelligence Use Case Inventory](#), a publication mandated for every agency under the [President Executive Order 13960 of 3 December 2020](#).

Regardless of the involvement or lack thereof of AI, the system is opaque and, as reported by various newspapers, is also malfunctioning. Consequently, the outcome of this analysis conflicts with what is the terminology found in the law, which speaks of a "[lawful, safe, and orderly pathway to the United States](#)".

Indeed, it is not a pathway nor is "orderly and safe", since, even without considering the involvement of AI, also weak digitalization can be a serious problem especially when vulnerable people, such migrants, are involved. This is said due to the lack of access to Internet connection or devices that can reduce if not eliminate any chance to apply for the appointment with the immigration office, which is a condition that has already been proven in similar contexts (European Council on Refugees and Exiles, *Digitalisation of asylum procedures: risks and benefits*, 2021). Not only, it has also [been noted](#) how obtaining an appointment with the designated border office is exceedingly challenging and that the application itself has encountered functionality issues.

On such grounds, against the exclusive use of CBP One as the sole portal for requesting appointments, a class action has been initiated ([Al Otro Lado and Haitian Bridge Alliance v. Mayorkas](#)). The reason is that migrants are considered ineligible for the mere fact of not being able to schedule remotely an appointment, while it is very difficult for them to prove «by a preponderance of the evidence that it was not possible to access or use» the mobile application. Therefore, we are confronted with a tool that cannot be qualified as a legal pathway but, on the contrary, should be regarded as a "technological border". Moreover, denying access to a territory to determine refugee status may result also in a violation of the international principle of non-refoulement stated by the 1951 Refugee Convention.

4. ...CBP One Advance Travel Authorization: a new digitalized private sponsorship?

Turning the attention to the second CBP One application, namely the Advance Travel Authorization, we should conduct a similar analysis.

As mentioned briefly in the first paragraph, this procedure was created for individuals from Cuba, Haiti, Nicaragua, and Venezuela, who are seeking humanitarian [parole](#) and, differently from the former one, it involves a comprehensive pre-screening process before arriving at an airport.

As outlined by the [U.S. Citizenship and Immigration services](#), the procedure was designed to facilitate the entry of applicants into the United States in a manner that is both safe and orderly,

by creating a preliminary screening in which all the requisites are verified. First, applicants must have a “supporter” within the United States; second, they are required to satisfy other eligibility criteria, undergo and pass thorough security vetting; and ultimately, they must «warrant a favorable exercise of discretion». However, even if the application is successful, it does not automatically translate into a humanitarian parole, as the applicants will be subject to further checks upon arrival at the airport.

By applying the same conditions mentioned earlier, this procedure fits within the category of legal pathway and serves as a consequence of a humanitarian parole policy by Biden.

Specifically, it can be categorized as a private sponsorship due to the presence of four conditions. First, the applicant is located outside the United States; second, the application is based on humanitarian grounds; third, the procedure results in the issuance of a legal entitlement permitting entry into the state; fourth, there is the involvement of a private entity in the procedure, serving as a sponsor or supporter ([GALLI](#), [SICCARDI](#), [SAVINO](#)).

The procedure unfolds as follows: initially, a U.S.-based supporter submits information for the beneficiary, who then provides their biographic details and submits a request through the CBP One. Following these steps, the beneficiary will receive a notification in their online account, indicating whether the authorization to travel to the United States is granted. Later, upon arriving at a U.S. port of entry, the beneficiary applies for parole, which will be considered for discretionary approval.

Despite such description provided by CBP, it remains unclear how the application is processed, especially in the first stage prior to the release of the travel authorization. Indeed, it is only stated that «An officer must first determine whether the applicant otherwise meets the statutory and regulatory eligibility requirements».

This aspect is particularly significant because the issuance of travel authorization, unlike the previously described procedure, is a discretionary measure. This implies that the decision is inherently subjective and must be accompanied by clear justification.

However, the introduction of AI and automated systems complicates this process. While these technologies aim to assist in decision-making, they often make it less transparent and difficult to understand. This is the reason why the metaphor of the “black box” is often used to describe such systems ([PASQUALE](#)): the use of AI can obscure the rationale behind decisions, making it challenging to understand the basis on which these discretionary judgments are made.

The automation integrated into administrative procedures poses, indeed, specific challenges concerning the “reasoned transparency” of decisions and so the justification of the choices made. This is essential for justifying the choices made, a requirement embedded in the due process clauses of the [Fifth](#) and [Fourteenth](#) Amendments as well as in the APA’s procedural requirements, especially under [5 U.S.C. par. 706\(2\)\(A\)](#) ([COGLIANESE](#), [LEHR](#)).

However, even though it is argued that American administrative law doesn’t demand absolute transparency or require meticulously detailed reasoning ([COGLIANESE](#)), it is also true that violating procedural fairness rights can impact a migrant’s ability to comprehend the reasons for their application’s rejection and to exercise their rights accordingly.

5. Striking a Balance: Concluding Remarks on Digitalization in Asylum Procedures

Considering what has been discussed in the previous paragraphs, it is necessary to distinguish between two scenarios, of which the cases discussed are a good representation.

In a first case, digital technologies can be as beneficial for enhancing efficiency and expediting procedures, as they can contribute to the violation of certain rights. The CBP One Advance Submission and Appointment Scheduling procedure, for instance, may constitute a “digital wall” or a “digital border”, impeding the exercise of the right to asylum due to difficulties in securing appointments. The issue arises when the regulatory framework conditions the right to asylum solely on using the mobile application, adopting what is termed as the “digital-only” approach.

However, this doesn’t imply that digital tools have no place whatsoever in asylum procedures, but rather that their use should be considered carefully, since there’s a possibility that migrants might lack access to technology. Given this context, there should always be alternatives, such as non-digital channels for submitting requests, or the option to turn to organizations that can assist with submitting applications through digital portals. Digital divide, in this sense, might be a source of vulnerability that the digital administration must take into account ([RANCHORDAS](#)).

While it remains imperative to uphold the principle of procedural fairness, it is equally important to take into account an alternative perspective. In cases where technology does not inhibit the exercise of fundamental rights, such as the right to seek asylum, using digitized processes can be seen in a positive light, even if they fall short of meeting all requirements of procedural fairness. This is demonstrated by the Advance Travel Authorization system, which serves as a prime example.

In this regard, it could be argued that while digitalized administrative procedures might not always be transparent and shed light on the rationale behind decisions, their use as lawful pathway for migrants – especially when there are no other access channels – should be maintained. The intent is not to prioritize technology over the principles of procedural fairness, but to recognize that an imperfect digital tool may be preferable to having no legal and safe access to the State at all.

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