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Refugee Law and Policy

A Comparative and International Approach
Fifth Edition

2020 Supplement

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July 2020 Update

This Update builds on the December 2019 Update, and seeks to highlight some of the most significant developments since *Refugee Law & Policy* was published in its fifth edition in 2018. There have been so many developments that it is impossible to catalogue them all. This document identifies a subset of the totality – focusing on those which are directly relevant to matters discussed in the Casebook. The chapters with the most developments are 2, 3, 4, 5, 9, 10, 11 & 12, and updates to particular sections or issues in those chapters appear below, with links to relevant sources.

If you are teaching from *Refugee Law & Policy* you can use this Update several ways. You may decide to assign portions of the Update to your students to read, by way of presenting a summary of changes to them. In the alternative, you may select some of the linked primary sources – cases, directives or proposed regulations – as reading for your students. We have tried to draft this Update so it lends itself to either use.

On June 15, 2020, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) issued a joint notice of proposed rulemaking which would have more far-reaching impact than any regulation previously promulgated during this Administration. *See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264 (June 15, 2020) (hereinafter "June 2020 Proposed Regulation"), available here. This Update will note the effect of the June 2020 Proposed Regulation in relation to the subject matter covered chapter by chapter.

We cannot predict whether and/or when this proposed regulation will go into effect. The comment period closed on July 15, and the agencies are required to review and take into consideration the substance in the comments. There will almost certainly be legal challenges to the regulations as being contrary to the plain language of the 1980 Refugee Act and otherwise arbitrary and capricious. The regulation, if finalized, may also be subject to rescission under the authority of the Congressional Review Act, 5 U.S.C. § 802(a) (CRA). Pursuant to the CRA, Congress has sixty legislative days from the promulgation of a final rule to issue a joint resolution rescinding it. In the case of this regulation, if those sixty days extend into a new Congress, and should that new Congress have Democratic majorities in both houses, there is a strong likelihood that the rule would be rescinded. A number of congressmembers are already on record as strongly opposing the proposed regulations, sending a letter to the Trump Administration to reverse its overall assault on asylum, including in its call, this proposed regulation.

Chapter 2 - International Norms and State Practice

The U.S. Refugee Admissions/Resettlement Program
Casebook pages 84-98

The Casebook (page 98) noted the Trump Administration lowered the FY2018 refugee allocation to 45,000. This was further reduced to 30,000 for FY2019, and then to 18,000 for FY2020. The

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Trump Administration also issued an executive order in September 2019 limiting refugee resettlement to only jurisdictions in which state and local governments have consented in writing to receive refugees. *See* Executive Order 13888, *Enhancing State and Local Involvement in Refugee Resettlement*, 84 Fed. Reg. 52,355 (Oct. 1, 2019), available here. On March 19, 2020, the U.S. stated it was halting refugee admissions for three weeks due to the coronavirus pandemic. It is unclear when they will resume.

Access to the Territory of Asylum
Casebook pages 99-159

The Trump Administration has engaged in a wide range of practices in an attempt to prevent asylum seekers from accessing the U.S. to apply for asylum. Each of the practices was more extreme in its attempt to limit or prevent access and/or the relief of asylum. The Administration first (May 2018) attempted to limit access through **"metering,"** which permitted only a limited number of asylum seekers to enter at ports of entry for the purpose of seeking asylum, turning back others to wait in Mexico. It then (Nov. 2018) imposed a ban, **"Asylum Ban 1.0,"** on asylum for individuals who entered between, rather than at U.S. at ports of entry. That was followed (Jan. 2019) by the **Migrant Protection Protocols (MPP),** which allows migrants to request asylum, but forces all non-Mexican asylum seekers, with few exceptions, to wait in Mexico until their cases are heard in U.S. Immigration Courts. In July 2019, the Administration issued a second ban on asylum – "**Asylum Ban 2.0**" – for individuals who could not show they applied for and were denied asylum in countries of transit. Then, in July – Sept. 2019, the Administration entered into **third country cooperative agreements** with El Salvador, Guatemala and Honduras, allowing it to "outsource" its asylum obligations to these countries, sending asylum seekers there to have their cases adjudicated. In October 2019, the Administration created two programs, "Humanitarian Asylum Review Process" **(HARP)** and "Prompt Asylum Claim Review" **(PACR)**, that fast-track asylum seekers through their initial fear screenings in a matter of days, without meaningful access to an attorney, and keeps them in U.S. Customs and Border Patrol (CBP) custody rather than in U.S. Immigration and Customs Enforcement (ICE) detention centers. Most recently, on March 20, 2020, the Administration used the COVID-19 **health pandemic** as a pretext for effectively closing the border to asylum seekers, by barring the entry of and **expelling** all persons entering by land without valid documents. The border closure was carried out under the authority of the 1944 Public Health Act, and was ordered by the Centers for Disease Control (CDC) rather than by DHS or DOJ. The CDC Order was accompanied by an implementing regulation. Following is a brief overview of the aforementioned practices and their current status; a number of these practices are also discussed in Chapter 11, which covers bars to asylum:

Metering.
CBP has forced asylum seekers who arrive at ports of entry to wait, stating that they only have capacity to accept a certain number of asylum seekers a day. It has been reported that the practice began in May 2018. Metering became less important to the government's strategy of keeping non-Mexican asylum seekers in Mexico once it implemented MPP. As of May 2020, one study reports there were approximately 14,580 asylum seekers on waitlists in 11 Mexican border cities. Some of the sites with the longest waitlists report Mexican nationals comprise the majority on the lists, even though an April 2018 CBP memo indicates that Mexican nationals are not

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supposed to be subject to metering. Human Rights Watch accompanied Mexican nationals seeking asylum and confirmed they were being metered; their report on the practice, and the precarious conditions Mexican nationals face while being metered, can be found here. In November 2019, the ACLU filed a complaint, located here, with the DHS Office of Inspector General regarding the practice. However, these waitlists have been essentially frozen - without much movement of people on or off the lists - due to the border closure during the health pandemic. For a discussion of how metering and MPP have interfaced, see Nicole Narea's Nov. 27, 2019 article in Vox, "Trump's policies at the border weren't designed to keep out Mexican asylum seekers – until now," found here.

While metering was in effect, the Administration implemented the additional bar to asylum, the Transit Ban, referred to above. A lawsuit, *Al Otro Lado v. Wolf*, was brought challenging, among other things, whether individuals who had come to the border prior to the Transit Ban, but were forced to wait in Mexico because of metering, should be subject to the Transit Ban. The U.S. District Court for the Southern District of California enjoined the government from applying the Transit Ban to that class and ruled that the government had to apply pre-Transit Ban practices to the class members. On December 4, 2019, the government appealed to the Ninth Circuit Court of Appeals. On March 5, 2020, the Ninth Circuit Court of Appeals denied the motion for a stay of the order until the Ninth Circuit decided the merits of the appeal; the District Court's order remains in effect to date. This litigation is also mentioned below in the section on the Transit Ban.

Attempt to Prohibit Asylum to Individuals Who Do Not Enter the U.S. at Ports of Entry (Asylum Ban 1.0).

In November 2018, the Trump Administration sought to prohibit asylum to all individuals who do not enter at a port of entry through the issuance of an interim final rule. *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018), available here, and *Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57,661 (Nov. 15, 2018), available here. The rule was challenged in *East Bay Sanctuary Covenant v. Trump*, and Judge Tigar, U.S. District Court for the Northern District of California, issued a temporary restraining order (TRO) against the policy. The Ninth Circuit Court of Appeals, and then the Supreme Court, denied the government's requests for stays of the preliminary injunction pending appeal. In February 2020, the Ninth Circuit Court of Appeals affirmed the grant of a nationwide preliminary injunction in an order available here. Other documents from and updates on the status of the litigation can be found here. For an overview of Asylum Ban 1.0 and ensuing litigation, see PennState Law, Center for Immigrants' Rights Clinic, "Joint Interim Rule on Asylum and Presidential Proclamation: What you Need to Know," found here.

Migrant Protection Protocols (MPP), known as "Remain in Mexico."

This policy forces individuals arriving without documentation, with few exceptions, to wait in Mexico for the duration of their pending asylum case (as opposed to metering, which is waiting in Mexico prior to presenting at a port of entry ("POE") and asking for asylum). DHS initial policy guidance issued on Jan. 25, 2019 is available here, and subsequent guidance is available here. The government's justification for the policy is INA 235(b)(2)(C), which allows DHS to return

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individuals to the "contiguous country" from which they arrived by land, and to require them to await their proceedings in that country. MPP was gradually implemented at an expanding number of POEs throughout 2019 and 2020, and is now in effect at seven different POEs:

1) San Diego, CA / Tijuana, Baja California, MX (January 2019);
2) Calexico, CA / Mexicali, Baja California, MX (March 2019);
3) El Paso, TX / Ciudad Juarez, Chihuahua, MX (March 2019);
4) Laredo, TX / Nuevo Laredo, Tamaulipas, MX (July 2019);
5) Brownsville, TX / Matamoros, Tamaulipas, MX (July 2019);
6) Eagle Pass, TX / Piedras Negras, Coahuila, MX (October 2019); and
7) Nogales, AZ / Nogales, Sonora, MX (January 2020).

The Mexican border cities in which the asylum seekers have been forced to wait are some of the most dangerous cities in Mexico, with U.S. State Department danger advisory levels for some at 4 – the same level assigned to countries such as Afghanistan, Iraq and Syria. As of April 2020, over 65,000 asylum seekers had been sent back to Mexico to await their court proceedings. For a general critique of the policy, see "48,000 Asylum Seekers Have Been put in Harm's Way by the Trump Administration," found here. Human Rights First has issued multiple reports on the implementation of MPP, including one in August 2019, another in October 2019, another in December 2019, and a comprehensive report evaluating the first year of MPP in January 2020. As of May 13, 2020, HRF reports there had been a minimum of 1,114 reports of rapes, torture, kidnapping and other forms of violence against asylum seekers returned to Mexico; among these victims were children who had been returned. Although individuals who fear persecution or torture in Mexico are supposed to be exempted from return, there has been extensive documentation of the failure of DHS to abide by that requirement. An internal DHS report leaked to BuzzFeed News, and published on Nov. 15, 2019, detailed such failures; the article and report can be found here.

MPP was challenged in *Innovation Law Lab v. Nielsen* (renamed *Innovation Law Lab v. Wolf*), and Judge Seeborg, U.S. District Court for the Northern District of California, issued a nationwide injunction on April 8, 2019. The Ninth Circuit stayed the injunction in a decision found here. On February 28, 2020, the Ninth Circuit affirmed the district court's grant of a nationwide preliminary injunction setting aside the MPP policy in a decision available here. The Ninth Circuit temporarily stayed its own ruling that same day in an order found here. Then, in an order issued on March 4, 2020, the Ninth Circuit limited the geographic scope of the injunction to the Ninth Circuit. On March 11, 2020, the Supreme Court granted a stay of the injunction pending "timely filing and disposition of the filing of a petition for a writ of certiori." The Court's order is here, and updates can be found here.

In April 2020, MPP's expansion to Tamaulipas, Mexico was challenged in the D.C. Circuit in *Nora v. Wolf*. This challenge focuses on the specific conditions which exist in the Tamaulipas border area, which is an extremely dangerous area, so much so that it has been under a State Department "Do Not Travel" Advisory since at least 2018. It is known as one of the most violent and lawless regions in the world. On June 25, 2020, Judge Berman Jackson of the D.C. Circuit granted the plaintiffs' motion for a preliminary injunction in part, and expedited consideration

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on the merits of plaintiff's claim that the expansion of MPP to Tamaulipas was arbitrary and capricious; Judge Berman Jackson's opinion can be read here.

Delays in Scheduling of MPP Cases.

Individuals subject to MPP have experienced long waits in Mexico; prior to the pandemic, some asylum seekers waited 15 months for their merit hearings in the U.S. This situation has been exacerbated with rescheduling of hearings as a result of court closures in the wake of COVID-19. On March 23, 2020, in a joint statement available here, DHS and the Executive Office for Immigration Review (EOIR) postponed MPP master calendar and merit hearings. The rescheduling applied to any hearings previously scheduled to occur from March 23 – April 22, 2020, however the DHS and EOIR issued subsequent joint statements – found here, here, and here – that extended the rescheduling to all MPP hearings scheduled through June 19, 2020. Rescheduling was subsequently extended to July 17, 2020, pursuant to the DHS and EOIR statement located here. On July 17, 2020, DHS and DOJ issued this joint statement outlining criteria for resuming hearings. As of the publication of this Update (August 2020) MPP hearings had not yet resumed.

Asylum Bar for Failure to Apply for Protection in Countries of Transit (Transit Ban or Asylum Ban 2.0).

In July 2019 the Administration published a joint interim final rule, *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (Jul. 16, 2019), available here, known as the Transit Ban or Asylum Ban 2.0. Effective July 16, 2019, this rule seeks to categorically deny asylum to all non-Mexican nationals entering the United States at the southern border, leaving them with only the opportunity to pursue withholding of removal and protection under the Convention Against Torture. Specifically, it bars asylum to anyone who transited a third country *en route* to the southern border of the U.S. unless they (a) applied for protection from persecution or torture in a third country and received a final judgment denying such protection; or (b) qualify under the regulatory definition as a "victim[] of a severe form of trafficking." 84 Fed. Reg. 33,829.[1]

The procedural history of the various challenges to this rule is complicated. Plaintiffs have brought cases in two jurisdictions. As described below, this litigation has been successful – the Transit Ban has been preliminarily enjoined in one jurisdiction, and vacated by another.

In *East Bay Sanctuary Covenant v. Barr*, brought in the Northern District of California, Judge Tigar issued a nationwide injunction. The Ninth Circuit limited the injunction to California and Arizona but allowed the district court to consider additional evidence. After Plaintiffs supplemented the record, Judge Tigar restored the nationwide injunction. The Ninth Circuit granted an administrative stay of the preliminary injunction and requested additional submissions from both parties. The Administration requested that the Supreme Court stay the injunction, and the court

[1] A third exception exists for individuals who did not transit through any country which is a party to the 1951 Refugee Convention, the 1967 Protocol, or the Convention Against Torture (CAT). However, given that Mexico and all seven countries in Central America are parties to the Refugee Convention and 1967 Protocol, as well as the CAT, this exception does not apply to any individual transiting Central America.

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granted that request, staying the injunction pending the Ninth Circuit's decision on the merits and/or the disposition of the government's petition for a writ of certiorari, if sought. On July 6, in an opinion authored by Judge Fletcher, the Ninth Circuit affirmed the nationwide preliminary injunction. *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020), available here. Judge Clifton concurred, and Judge Miller concurred in part and dissented in part (his dissent focusing on the scope of the injunction). Documents from and updates on the status of the litigation can be found here.

Two cases, *I.A. v. Barr* and *Capital Area Immigrants' Rights (CAIR) Coalition v. Trump*, challenged the Transit Ban in the District of Columbia. These cases were related before Judge Timothy Kelly. On June 30, 2020, Judge Kelly granted Plaintiffs' motions for summary judgment and vacated the rule. *Capital Area Immigrants' Rights Coal. v. Trump*, --- F.Supp.3d ---, 2020 WL 3542481 (D.D.C. June 30, 2020), available here.

As noted above, asylum seekers subjected to metering have been waiting in Mexico to be able to enter to request asylum. As their turn arrived, and they came to the U.S. border, the Trump Administration attempted to subject them to the Transit Ban, which applies to all individuals seeking protection at the border from July 16, 2019 and onward. However, many of these individuals had arrived prior to that date, and argued that they should not be subject to the Transit Ban. As mentioned in the discussion of Metering, *supra*, that issue was litigated in *Al Otro Lado v. Wolf*, and a federal district court in the southern district of California agreed, preliminarily enjoining the government from applying the Transit Ban to individuals subject to metering prior to July 16, 2019. *Al Otro Lado v. McAleenan*, 423 F. Supp. 3d 848 (S.D. Cal. 2019), *appeal docketed*, No. 19-56417 (9th Cir. Dec. 5, 2019). The court's order is found here. The government has appealed and the case remains pending at the Ninth Circuit.

"Safe Third Country Agreements" with Guatemala, El Salvador, and Honduras.

As discussed in Chapter 11, page 949, U.S. law enacted in 1996 allows the preclusion of asylum claims from individuals who could be "removed, pursuant to a bilateral or multilateral agreement" to a country where their life or freedom would not be threatened on account of a protected ground, and they would have access to a "full and fair procedure for determining a claim to asylum[.]" Until July 2019, the only country with which the U.S. had such an agreement was Canada. Between July and September 2019, the U.S. entered into similar agreements, with Guatemala, El Salvador, and Honduras, calling them "Asylum Cooperative Agreements" (ACAs). The U.S. has used the threat of tariffs as well as cutting off foreign aid to pressure all three countries to agree to these ACAs. In November 2019, the Trump Administration published an interim final rule in the Federal Register, *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63,994 (Nov. 19, 2019), available here. This rule put in place procedures for removing individuals pursuant to these and future ACAs. Although the contours of the U.S.'s implementation of these agreements remain quite vague, it appears that, with few exceptions, the rule and the ACAs would allow the U.S. to remove to Guatemala, El Salvador, and Honduras any individual who seeks asylum in the U.S. The agreements have been roundly criticized given the dire human rights situation in these

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countries, and their lack of any meaningful infrastructure for deciding asylum claims. For discussion and critique, see here and here.

To date, the U.S.-Guatemala ACA is the only ACA being implemented. On November 20, 2020, the Administration published the U.S.-Guatemala ACA in the Federal Register at 84 Fed. Reg. 64,095; it released guidance to Asylum Officers on implementation and screening, which is available here. From November 2019 to March 16, 2020, Guatemala received a total of 939 Hondurans and Salvadorans from the U.S. under the ACA. Both press and NGO interviews report that, upon arriving in Guatemala, the Hondurans and Salvadorans are told to either apply for asylum in Guatemala or leave the country within 72 hours under "voluntary return." Only 20 people – 2% percent of the aforementioned 939 people – officially applied for asylum in Guatemala. For a detailed report on how the ACA process is being carried out on the ground in Guatemala, see Human Rights Watch and Refugees International's "Deportation without a Layover," available here.

U.T. v. Barr, which challenges the interim final rule, U.S. Citizenship & Immigration Services (USCIS) guidance to Asylum Officers on its implementation with Guatemala, and the U.S.'s categorical designation of Guatemala as a "safe" third country, was filed in the D.C. District Court in January 2020. Updates on the litigation can be found here.

After Guatemala, the U.S. moved to implement its ACA with Honduras, publishing the U.S.-Honduras ACA on May 1, 2020, in the Federal Register, at 85 Fed. Reg. 25,462. To date, no internal guidance regarding the implementation of the U.S.-Honduras ACA has been publicized. However, the publication of the regulation was perceived as a signal that the Administration may still move forward with plans to send non-Honduran asylum seekers to Honduras, perhaps even during the global coronavirus pandemic.

The status of the implementation of the U.S.-El Salvador ACA is less transparent. To date, the Administration has not published a regulation with the text of the U.S.-El Salvador ACA. However, CBP Acting Director Mark Morgan visited El Salvador in February to review conditions at the government's Migrant Attention Center, and in mid-March told the Salvadoran press, "I have no doubt that El Salvador is ready and we're predicting that the asylum agreement will be online literally any day now."

Due to fears of the COVID-19 contagion, the Guatemalan government suspended receiving asylum-seekers under the U.S.-Guatemala ACA and it has also suspended deportation flights multiple times.[2] But, despite many instances of deportees testing positive for the virus, deportation flights of Guatemalans are typically resumed within days or weeks, after assurances from the U.S. authorities.[3] To date, the U.S. continues deportations to Latin America and the

[2] Here, deportation flights refer to those flights specifically deporting Guatemalan citizens back to Guatemala, in contrast to those flights in which Salvadorans and Hondurans were deported to Guatemala under the ACA.
[3] The first suspension was on March 17, 2020; deportation flights were resumed two days later. A second suspension was ordered for the week of Easter only. At least 44 deportees tested positive for the coronavirus on April 13th flight, prompting another suspension on April 16th. Four flights were carried out from April 30th – May 8th.

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Caribbean during the coronavirus pandemic. An ICE spokesperson commented that, from March 8th to May 9th, the agency had run 112 deportation flights to 13 countries, including 12 in Latin America and the Caribbean. There has been widespread criticism of these continued policies by international human rights and health organizations, among others. Nicole Narea covered the devastating impact these policies have on Central America in her May 12, 2020 article in Vox, "Trump is continuing deportations during the pandemic. It's causing the coronavirus to spread," found here. Jane Regan's article, "Behind the Covid Numbers in Haiti" in the North American Congress on Latin America (NACLA), further explains how the U.S.'s continued deportations of COVID-positive Haitians, as well as social, political, and economic factors on the ground, will further destabilize Haiti and leave the Caribbean nation even more vulnerable to unrest.

"Humanitarian Asylum Review Process" (HARP) and "Prompt Asylum Claim Review" (PACR).
Pursuant to expedited removal (discussed below), asylum seekers must pass a screening interview before even being permitted to apply for asylum. These two programs are designed to further expedite these screening interviews for asylum seekers, resulting in their inability to even consult with attorneys. HARP applies to Mexican nationals, while PACR applies to everyone else. Under HARP and PACR, individuals are held in CBP facilities, not transferred to ICE, and have 24 hours to try to consult with an attorney. Unlike ICE facilities, most attorneys do not have access to CBP facilities so they cannot consult with the asylum seekers in person. The screening standard for asylum is "credible fear," which is meant to be a relatively low screening threshold. However, as a result of the Transit Ban, most non-Mexicans – who have passed through a third country before arriving to the U.S. – are barred from asylum, and may only be eligible for withholding of removal[4] or Convention Against Torture (CAT) protection,[5] which require satisfying a higher standard. According to CBP, unaccompanied children are not subjected to PACR or HARP. More detailed information on how HARP and PACR function, as well as how they interact with other border policies, can be found here. The ACLU is challenging these programs in *Las Americas Immigrant Advocacy Center v. Wolf*. The case remains pending at the District Court for the District of Colombia and updates can be found here.

Closing the Border Under the Pretext of the COVID-19 Pandemic.
Continuing with its policies aimed towards eliminating asylum, the Administration used the COVID-19 pandemic to close the border. On March 20, 2020, the Center for Disease Control and Prevention (CDC), under the purported authority of public health provisions in 42 U.S.C. § 265, issued an unprecedented and sweeping regulation in an interim final rule published at 85 Fed. Reg. 16,559. This regulation added a new provision, 42 C.F.R. § 71.40, which provides that the CDC may prohibit the "introduction into the United States of persons" from foreign countries. On March 26, 2020, the CDC issued a 30-day order ("CDC Order") for the "immediate suspension of the introduction of certain persons," which authorized CBP and other border enforcement agencies to forcibly return any noncitizens arriving at the border without valid documents back

But deportation flights were halted again after ten deportees on a May 13th flight tested positive for the virus. The deportation flights resumed on June 9th.

[4] See Ch. 2, pages 98-99; Ch. 3, page 185; and Ch. 3, pages 263-265.

[5] See Ch. 3, pages 265-267 and Ch. 5, pages 392-393.

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to the country from which they entered (i.e. Canada or Mexico), their country of origin, or another location. These actions are being referred to as "**border expulsions**." The CDC Order is silent on its application to unaccompanied children and to individuals seeking asylum, withholding of removal, or CAT protection. An internal CBP memo ("CBP Memo") was leaked to ProPublica and makes it clear that asylum seekers and unaccompanied children are "amenable to expulsion," and that the only way for them to avoid expulsion is to "make an affirmative, spontaneous and reasonably believable claim" that they fear torture in the country they are being sent back to, in which case the person is supposed to be sent to USCIS for an assessment. The CDC extended its Order for another 30 days on April 20, 2020. Then, on May 19, 2020, the CDC extended its Order *indefinitely*, "until [the CDC Director] determine[s] that the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health, and continuation of the Order is no longer necessary to protect the public health."

There are two important points to underscore. First, the public health law – 42 U.S.C. § 265 – was never used to expel people, but only to quarantine, where there was a health threat. Second, although the CDC Order was done under the pretext of public health, it only excluded individuals entering by land without valid documents – and allowed the continued entry of tens of thousands of other individuals. Lucas Guttentag's Just Security article is an excellent primer on how the CDC Order operates and legal analysis of why the CDC Order oversteps the CDC's authority as a public health agency.

On June 10, 2020, two lawsuits, *G.Y.J.P. v. Wolf* and *J.B.B.C. v. Wolf*, were filed in the U.S. District Court for the District of Columbia; both lawsuits challenge the Administration's border closure order as it is applied to unaccompanied children who are entitled to special protection under U.S. law. *G.Y.J.P.* involves a Salvadoran minor child who was returned to El Salvador under the authority of the border closure order, while *J.B.B.C.* involves a Honduran minor in the U.S. who faced imminent removal under the order.

On June 24, 2020, there was a ruling *in J.B.B.C.;* U.S. District Court Judge Nichols extended his earlier order temporarily blocking the Administration from deporting the Honduran minor while the lawsuit continues. He ruled that the CDC had likely exceeded its authority in ordering the expulsion of children under the public health laws. Litigation updates for *G.Y.J.P. v. Wolf* can be found here and updates for *J.B.B.C. v. Wolf* can be accessed here.

The human impact of the these policies has been substantial, as detailed in the Human Rights First report, "Pandemic as a Pretext for Trump Administration," available here. Within ten days of the CDC regulation being promogulated, the U.S. was expelling persons to Mexico on an average of every 96 minutes. By the end of April 2020, the U.S. had expelled over 20,000 people under the CDC Order's provisions.

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Expedited Removal
Casebook pages 157-167

Expansion of Expedited Removal.
On July 22, 2019 DHS announced that beginning July 23, 2019 it was planning to expand expedited removal to individuals found anywhere in the U.S. who have been here less than two years. The announcement is found here. Given the critiques against expedited removal and little evidence of improvement, its expansion is a matter of concern, and litigation was brought to challenge it. On September 27, 2019, the District Court for the District of Colombia in *Make the Road New York v. McAleenan* issued a preliminary injunction enjoining its expansion, pending the outcome of litigation on the issue. On June 23, 2020, the D.C. Circuit Court of Appeals lifted the injunction finding that the expansion of expedited removal was a matter solely "committed to agency discretion." The court's opinion is available here. Background and links to the complaint and other legal documents are found here.

Limiting Review of Expedited Removal/Credible Fear Proceedings.
On June 25, 2020, the Supreme Court issued a decision, *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), which held that the Constitution's Suspension Clause does not provide the right to habeas review of an adverse credible fear determination. The Sri Lankan asylum seeker, Vijayakumar Thuraissigiam, had been abducted and beaten in his home country. He fled to the U.S. and was apprehended a very short distance from the southern border after entering. After a negative credible fear determination by an asylum officer, which was affirmed by an Immigration Judge (IJ), he sought habeas review, arguing that an improper standard was applied to his credible fear determination. The U.S. District Court for the Southern District of California found that it lacked jurisdiction; on appeal the Ninth Circuit ruled that the Immigration and Nationality Act's (INA) limit on the scope of habeas review violated the Constitution's Suspension Clause, a ruling which the Supreme Court rejected in its decision, found here. For a pithy discussion of the decision, see Jeffrey Chase, "Justices' Asylum Ruling Further Limits Migrant Protections," found here.

Relevance of June 15, 2020 Proposed Regulations to Expedited Removal.
The most significant proposed changes to expedited removal included in the June 2020 Proposed Regulation are found in Sections A(1) to A(5) at 85 Fed. Reg. 36,265 – 36,273, and provide as follows:

1) Under existing regulations, individuals who pass the credible fear screening are placed in INA section 240 removal proceedings where they could apply for forms of relief in addition to asylum, withholding or CAT. The June 2020 Proposed Regulation would place them in "asylum and withholding only" proceedings.
2) Under existing regulations, the standard applied in credible fear is that the individual could show a "significant possibility" of being able to establish eligibility for asylum, withholding or CAT. The June 2020 Proposed Regulation heightens the standard for withholding and CAT, requiring that the individual show a "reasonable possibility" of establishing eligibility for these forms of relief.

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3) Under current practice, the adjudicator is to apply the most favorable precedent to an applicant's claim; the June 2020 Proposed Regulation changes that to "applicable legal precedent" thus limiting it to the law of the circuit where the interview is taking place.
4) Under existing regulations, the adjudicator does not consider whether the asylum seeker could internally relocate or would be subject to any statutory bars. The June 2020 Proposed Regulation requires both internal relocation and statutory bars to be taken into account, such that a credible fear would not be established if either applied.
5) Under existing regulations, an individual who has received a negative credible fear determination does not have to affirmatively request IJ review; under the June 2020 Proposed Regulation, an individual who does not express a desire for review will be considered to have declined it.

Chapter 3 - Degrees of Risk: The Standard of Proof in Claims for Protection

The Standard in Expedited Removal – A "Credible Fear of Persecution"
Casebook pages 239-241

The Credible Fear Standard.

The Trump Administration has repeatedly complained about the credible fear standard being too low, leading to abuse of the system. In *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), Judge Sullivan of the U.S. District Court for the District of Colombia affirmed that "Congress intended the credible fear determinations to be governed by a low screening standard." The decision in *Grace v. Whitaker* (renamed *Grace v. Barr*) was appealed to the Court of Appeals for the District of Colombia Circuit, which issued a decision on July 17, 2020. In a 2-1 ruling, the Court agreed that two of the standards imposed (the heightening of the burden for proving the government is unable or unwilling to protect in non-state persecutor cases, and a new rule on choice of law to be applied in CFIs) were arbitrary and capricious and were to continue to be enjoined.[6] *Grace v. Barr*, --- F.3d ---, 2020 WL 4032652 (D.C. Cir. July 17, 2020).

USCIS has made the credible fear process more difficult in at least four respects. First, on April 30, 2019 it released a revised Lesson Plan for asylum officers. The revised Plan deleted a paragraph in the prior training that instructed asylum officers to take into consideration that asylum seekers may not have all the evidence to establish their credible fear of persecution immediately upon arrival to the U.S. The revised plan can be found here. Second, in July 2019, USCIS issued a new directive speeding up the timing of the credible fear interview. Previously, asylum officers had to wait 48 hours after an immigrant's apprehension and detention to carry out the credible fear interview. The new directive allowed the interviews to take place after 24 hours. Third, in July 2019, CBP entered into a Memorandum of Agreement with USCIS to allow CBP officers – who are trained in law enforcement, rather than in asylum law and best practices

[6] As will be discussed in the update to Chapter 10, the Court found, based on the government's concessions, that there was no categorical bar to domestic violence or fear of gang claims, or to particular social group claims including the descriptive language "unable to leave." Because the Court found there was no bar, it vacated the District Court's injunction as applied to those two issues.

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for interviewing asylum seekers, as Asylum Officers are – to adjudicate CFIs. The Memorandum of Agreement was obtained in a Freedom of Information Act (FOIA) request and is available here. Fourth, as mentioned in the Update to Chapter 2, the Administration implemented PACR and HARP, which shorten the screening process to 24 hours, while detaining asylum seekers at CBP facilities where they cannot meet in person with legal counsel and face great difficulties in accessing counsel telephonically.

Relevance of June 2020 Proposed Regulation to Credible Fear.
As mentioned in the Update to Chapter 2, the June 2020 Proposed Regulation would change the expedited screening process in numerous ways. Most relevant to this discussion is the June 2020 Proposed Regulation's heightening of the screening standard for withholding and CAT, requiring that the individual show a "reasonable possibility," rather than a "significant possibility" of establishing eligibility for these forms of relief. See Section A(4) of the June 2020 Proposed Regulation for details. 85 Fed. Reg. 36,268 – 36,271.

U.S. Regulatory Framework for Claims Based on Prospective Risk

Internal Relocation
Casebook pages 242-250

As discussed in the Casebook, the issue of internal relocation is relevant to claims involving past as well as future persecution. In claims of past persecution, the presumption of a well-founded fear can be rebutted by proof by a preponderance of the evidence that relocation would have been safe and reasonable. In claims involving fear of future persecution, the possibility of internal relocation is relevant to whether an individual has a well-founded fear or clear probability of persecution.

On July 29, 2019, USCIS sent guidance to its asylum officers emphasizing the requirement that in cases involving "private violence" (i.e. non-State agents of persecution), they consider whether internal relocation is possible. The guidance, found here, does not read like a neutral directive providing legal analysis; it states that "aliens are overwhelming" the system, that many of them are "ineligible for asylum and are attempting to enter and remain in the country in violation of our laws." It also makes the factual assertion – without any documentation – that each of the Northern Triangle countries (Guatemala, Honduras, and El Salvador) has areas that are "generally very safe[.]"[7]

Relevance of June 2020 Proposed Regulation to Internal Relocation.
The June 2020 Proposed Regulation, Section C(5) at 85 Fed. Reg. 36,282, on internal relocation takes the July 29, 2019 guidance (above), which implies that internal relocation is often possible

[7] In response, the Washington Office on Latin America (WOLA) and the Sheller Center for Social Justice at Temple University Law School provided resources for asylum attorneys that illustrate why internal relocation is not safe nor reasonable for most Central American asylum seekers. These resources are available for attorneys representing clients and are only accessible by sign in and password. The resources can be found here.

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in non-State actor persecution, and proposes to make it into a presumption. In all cases of persecution by non-State actors (including cases involving past persecution) it would be presumed that internal relocation is reasonable unless the applicant establishes by a preponderance of the evidence that it would not be.

The Role of Discretion in the Refugee Determination Process
Casebook pages 251-260

Relevance of June 2020 Proposed Regulation to Discretion.
Asylum is a discretionary remedy, and the Casebook discusses the factors that may be considered in the exercise of discretion. *Matter of Pula* (page 252) emphasizes the humanitarian nature of asylum, and retreats from its earlier, harsher approach. The June 2020 Proposed Regulation goes in the extreme opposite direction, listing three "significant adverse" factors that adjudicators must take into consideration, and nine factors that would, except in "in extraordinary circumstances," result in a denial of asylum in the exercise of discretion. Section C(6) in the June 2020 Proposed Regulations, at 85 Fed. Reg. 36,282 – 36,285. The following is a distillation of the factors, which, for brevity, does not include detail on applicable exceptions.

The three significant adverse factors listed are:

1) Unlawful entry;
2) Failure to apply for protection in a country of transit; and
3) The use of fraudulent documents to enter the U.S.

The nine factors listed which generally would mandate denial are:

1) Sojourn in a country of transit for more than 14 days;
2) Transiting through more than one country without applying for and being denied asylum;
3) Would be subject to mandatory denial under 208.13(c) [the regulatory provision including bars for particularly serious crimes, and aggravated felonies, but for "reversal, vacatur, expungement, or modification of a conviction";
4) Unlawfully present in the U.S. for more than a year;
5) Failed to file tax returns, pay tax obligations;
6) Has had two or more prior asylum applications "denied for any reason";
7) Withdrew a prior application with prejudice or abandoned a prior application;
8) Failed to attend an interview on an affirmative application; and
9) Was subject to a final order of removal and did not file a motion to reopen based on changed country conditions within a year of county conditions changes.

<u>Chapter 4 – The Definition of Persecution</u>

Relevance of June 2020 Proposed Regulation to Persecution.
This Chapter of the Casebook makes the case for a broad human rights approach to defining what meets the definition of persecution. The June 2020 Proposed Regulation attempts to cut back on such an approach; Section C(3), at 85 Fed. Reg. 36,280-36,281, presents a "non-exhaustive" list of the specific types of harms that would not constitute persecution:

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1) Every instance of harm that arises generally out of civil, criminal, or military strife in a country;
2) Any and all treatment that the U.S. regards as unfair, offensive, unjust, or even unlawful or unconstitutional;
3) Intermittent harassment, including brief detentions;
4) Repeated threats with no actions taken to carry out the threats;
5) Non-severe economic harm or property damage; and
6) Government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally

Chapter 5 – The Nexus Requirement

The Casebook explains that to establish eligibility for asylum, an applicant must demonstrate that the applicant's well-founded fear of persecution was on account of one of five protected grounds; this is referred to as the "nexus requirement." The Updates to Chapters 9 and 10 discuss two attorneys general's decisions, *Matter of A-B-* and *Matter of L-E-A-*. Although these two decisions do not expressly focus on the issue of nexus, they do touch on nexus in a significant manner. You might want to consider the issues in these cases in thinking about and discussing nexus in this Chapter.

Mixed Motives and the "One Central Reason" Requirement of the REAL ID Act of 2005
Casebook pages 371-375

The Casebook details how the REAL ID Act of 2005 tightened the nexus requirement by requiring that one of the five protected grounds be at least one central reason for persecuting the applicant. Mixed motive claims remained viable under the REAL ID Act as long as one of the motives was a central reason.

Whether the "One Central Reason" Requirement Applies to Both Asylum and Withholding.
As discussed on page 374, note 4, the Board of Immigration Appeals (Board or BIA) held in *Matter of C-T-L-* that the "one central reason" requirement applies to both asylum and withholding of removal, a position rejected by the Ninth Circuit, in *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017). In *Barajas,* the court held that the nexus standard applicable to withholding of removal is "a reason," a lower standard than the "one central reason" required for asylum.

Two other circuits have considered this issue and come to opposite conclusions. In *Gonzalez-Posadas v. Attorney Gen. U.S.*, 781 F.3d 677 (3rd Cir. 2015), the Third Circuit ruled that *Matter of C-T-L-* had correctly assessed Congress's intent and that the "one central reason" standard applied to both asylum and withholding claims. In contrast, the Sixth Circuit, in *Guzman-Vazquez v. Barr*, 959 F.3d 253 (6th Cir. 2020), agreed with *Barajas-Romero* and held that applicants for withholding of removal only need demonstrate that a protected ground was "a reason" for their persecution.

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Relevance of June 2020 Proposed Regulation to Nexus.
Section C(4) of the June 2020 Proposed Regulation, at 85 Fed. Reg. 36,281-36,282, provides that "in general" the following non-exhaustive situations would be insufficient to demonstrate persecution on account of a protected ground:

1) The alleged persecutor acts out of "[p]ersonal animus or retribution;
2) The alleged persecutor has not targeted or shown animus against other members of the proposed particular social group (PSG) (e.g. a husband only commits violence against his wife, but shows no animosity towards other women in abusive relationships);
3) The applicant's "[g]eneralized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations" without the applicant having exhibited expressive behavior[8] against such organizations in concert with the state;
4) The applicant's "[r]esistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations";
5) The applicant based on their actual or perceived wealth or affluence;
6) The applicant has been subjected to – or fears the threat of – criminal activity;
7) The applicant's "[p]erceived, past or present, gang affiliation" does not constitute a PSG; or
8) "Gender."

Taken as a whole, the June 2020 Proposed Regulation's standards for nexus appear to be intended to rule out entire categories of claims based on persecution by gangs and other non-state actors. The proposed standards also are explicit in their attempt to extinguish the possibility of bringing gender-based claims. They certainly open themselves up to being challenged as contrary to the law, which determines nexus on the basis of the persecutor's intent or motivation – a factually based inquiry.

The June 2020 Proposed Regulation also provides that "cultural stereotypes" (such as that Guatemala has a "culture of machismo and family violence"—language which appeared in *Matter of A-R-C-G-*) will not be admissible in the adjudication of applications for protection.

Protection under the Torture Convention
Casebook pages 390-410

This casebook Update is not intended to capture every published decision across jurisprudential areas, but rather to highlight some significant Attorney General and BIA decisions as well as a sampling of circuit court decisions that impact the law's interpretation in a meaningful way. To

[8] In a footnote, the June 2020 Proposed Regulation characterizes "expressive behavior" as including "public behavior commonly associated with political activism, such as attending rallies, organizing collective actions such as strikes or demonstrations, speaking at public meetings, printing or distributing political materials, putting up political signs, or similar activities ***in which an individual's political views are a salient feature of the behavior and communicated to others at the time the behavior occurs***." (emphasis added) Acts of "personal civic responsibility" such as voting, reporting a crime, or assisting law enforcement in an investigation, would not, by themselves, constitute expressive behavior and accordingly would not support a political opinion claim.

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that end, three decisions are discussed below; one on the issue of specific intent in CAT claims, and two on the definition of "public official" in the context of the requirement that torture be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Specific Intent in CAT Claims.
As discussed on page 394-395, the BIA and a number of circuit courts have ruled that torture requires specific intent. Therefore, horrific prison conditions will generally not constitute torture where they are the consequence of lack of resources and neglect that affect all detainees. In these cases, IJs and the BIA weigh the facts to determine whether intent is present.

One such case where the facts were weighed in the applicant's favor involved a 71-year-old Mexican man who suffered from "mental and physical problems, including inter alia, Parkinson's Disease, Major Neurocognitive Disorder (dementia), Major Depressive Disorder, traumatic brain injury, Posttraumatic Stress Disorder, and chronic kidney disease." In a one-member decision, the BIA upheld the IJ's grant of CAT deferral to the applicant. *See Matter of R-A-F-*, I. & N. Dec. 778 (A.G. 2020) ("The Board concluded that "we discern no clear error in the Immigration Judge's determination that the respondent established that it is more likely than not that he will be tortured by or at the instigation of or with the consent or acquiescence (including willful blindness) of a public official or other person acting in an official capacity in Mexico.") This unpublished decision was brought to the Attorney General's attention, who certified it to himself. Making sure that no good deed goes unpunished, the Attorney General vacated the BIA decision. He remanded it to be considered by a three-member panel, emphasizing the specific intent requirement, and that "'negligent acts' or harm stemming from a lack of resources" do not amount to torture. The AG's decision, issued on February 26, 2020, can be found here. As Jeffrey Chase noted in his blog post on the case, found here, the A.G.'s decision doesn't really establish new precedent, but was intended to send a message that IJs and BIA members do not have discretion to grant, even in the most sympathetic of cases.

A Public Official / Acting in an Official Capacity.
Article 1 of the CAT requires that the torture be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." On December 6, 2019, the BIA issued a precedent decision, *Matter of O-F-A-S-*, 27 I. & N. Dec. 709 (B.I.A. 2019), found here. In this decision, the BIA held that in order for a public official to meet the CAT standard, they must act "under color of law" and conduct by an official who is *not* acting in an official capacity, i.e. a "rogue official" is not covered by CAT. The Board's interpretation was in conflict with the Ninth Circuit, and the BIA acknowledges that point, citing to *Barajas-Romero v. Lynch*, 846 F.3d 351, 362-63 (9th Cir. 2017), which has held that there is no rogue official exception to CAT protection.

In July 2020, the Attorney General vacated the Board's 2019 decision and remanded the case. *Matter of O-F-A-S-*, 28 I. & N. Dec. 35 (A.G. 2020), available here. The Attorney General confirmed that conduct by "rogue officials" – to the extent that this term referred to public officials not acting "under color of law" – would not constitute torture because it would not be considered

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conduct carried out "in an official capacity." The decision also clarified that there is no distinction between low-level and high-level officials for purposes of the "official capacity" requirement – so long as a public official acts "under color of law," their conduct would satisfy the requirement for CAT protection.

On June 26, 2020, a unanimous panel of the Ninth Circuit affirmed its position on this issue in *Xochihua-Jaimes v. Barr*, 962 F.3d 1175 (9th Cir. 2020). The Ninth Circuit noted that it had rejected the BIA's "rogue official" exception as inconsistent with earlier precedent in *Barajas-Romero* and explicitly stated, "a rogue public official is still a 'public official' under CAT." *Id*. at 1184. The published decision, granting the CAT claim and remanding back to the BIA to grant deferral of removal, can be accessed here.

Relevance of June 2020 Proposed Regulation to CAT Claims.
As discussed on page 390-396, the U.S. largely adopted the international definition of torture as being an extreme harm inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 CFR 1208.18(a)(1). Section C(8) of the June 2020 Proposed Regulation, at 85 Fed. Reg. 36,286-36,288, addresses two key aspects of the existing definition – the identity of the perpetrator, and the meaning of acquiescence.

As to the identity of the perpetrator, the June 2020 Proposed Regulation adopts the holding of *O-F-A-S-* in stating that pain or suffering inflicted by a rogue official does not meet the "torture" definition. And the proposed rule would also make it more difficult to prove acquiescence by requiring actual knowledge or willful blindness. Proof of "willful blindness" would require that "the public official or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth." Under the June 2020 Proposed Regulation, proof that the public official was "mistaken, recklessly disregarded the truth, or negligently failed to inquire" would be insufficient to satisfy proof of willful blindness. The proposed rule also requires that the public official must have had a duty to prevent the tortuous act in order to find consent or acquiescence.

Chapter 6 – Persecution on Account of Political Opinion

This Chapter of the Casebook explores the broad range of circumstances in which an opinion may be considered 'political' under U.S. asylum law. It references international authority and domestic jurisprudence to demonstrate an evolving interpretation of the term "political opinion" within the meaning of the 1951 Convention.

Relevance of June 2020 Proposed Regulation to Political Opinion.
The June 2020 Proposed Regulation attempts to dramatically limit the meaning of political opinion. Section C(2) of the June 2020 Proposed Regulation, at 85 Fed. Reg. 36,279-36,280, would legitimize a more restrictive interpretation in two key ways. First, it would confine political opinion to expressed or imputed opinions about the state, rather than non-state actors. (The proposed regulation provides that "a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of

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a discrete cause related to political control of a state or a unit thereof.") Second, the June 2020 Proposed Regulation would also explicitly direct adjudicators to reject an applicant's opposition to non-state actors (e.g. gangs and other organized criminal entities) as a political opinion claim unless the applicant exhibited expressive behavior in concert with the state.

Chapter 9 - Persecution Based on Membership in a Particular Social Group &
Chapter 10 - Gender-Related Claims to Refugee Status

There have been a number of significant decisions addressing particular social groups. Attorneys General Sessions and Barr certified two PSG cases to themselves, pursuant to their authority under 8 CFR 1003.1(h)(I)(i)-(iii), and issued decisions attempting to dramatically curtail the use of the particular social group ground in claims for protection. The two cases are *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019), addressing family as a PSG, found here, and *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), focusing on the use of PSGs in domestic violence claims, found here.

In addition to *L-E-A-* and *A-B-,* there was one noteworthy BIA decision, *Matter of E-R-A-L-*, 27 I. & N. Dec. 767 (B.I.A. 2020) which involves a particular social group claim based on land ownership, and will be discussed along with Chapter 9 materials. Two circuit court decisions, *De Pena Paniagua v. Barr* in the First Circuit and *Juan Antonio v. Barr* in the 6th Circuit address gender-based claims and are relevant to the discussion of *A-B-* and other Chapter 10 materials.

Finally, the June 2020 Proposed Regulation seeks to categorically preclude a broad range of PSG claims based on gender, gangs, and family ties, and will be discussed below.

Chapter 9

Matter of L-E-A-.
The Mexican asylum seeker in *L-E-A-* was threatened and assaulted after his father, who owned a store, refused to comply with the request of cartel members to sell drugs in his store. His claim was based on particular social group, arguing that he was targeted on account of his membership in the PSG of his father's family.

The IJ denied asylum, withholding and Convention against Torture relief. On appeal, the BIA ruled that although family qualified as a particular social group, Mr. L.E.A.'s claim failed because he had failed to show nexus. According to the BIA, he had been targeted "as a means to an end" and not because he was a member of his father's family. The BIA remanded to the IJ for the CAT claim to be more fully considered. *Matter of L-E-A-*, 27 I. & N. Dec. 40 (B.I.A. 2017).

The Attorney General certified the BIA decision to himself and ruled that "in the ordinary case, a nuclear family will not, without more, constitute a 'particular social group[.]'" In so doing, the A.G. ignored decades of precedent from the BIA as well as numerous circuit courts of appeals. *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019).

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Shortly after the publication of *L-E-A-,* USCIS issued "Guidance for Processing Reasonable Fear, Credible Fear, Asylum and Refugee Claims in Accordance with *Matter of L-E-A-*" which can be found here. The USCIS document emphasizes that all prior USCIS guidance and training that took a more inclusive approach to recognizing the cognizability of particular social groups "are **no longer valid** and **do not** reflect the current state of the law." Guidance at page 3 (emphasis in original).

Many analyses and critiques were issued in the immediate aftermath of the decision, and more will certainly come. Because the case is pending before an IJ on the CAT claim, it will take some time for an appeal of Mr. L.E.A.'s case to reach the circuit court. However, in the meantime, many other cases involving family based social groups will be brought before the circuit courts of appeal for decision.

Matter of E-R-A-L.

On February 10, 2020, the BIA issued a decision in a case involving social groups based on family and land ownership. *Matter of E-R-A-L-*, 27 I. & N. Dec. 767 (B.I.A. 2020), found here. The applicant in *E-R-A-L-* was a Guatemalan landowner who had been threatened by a drug cartel. He argued that he had been persecuted on account of his membership in PSGs of: (i) landowners, (ii) landowners who resist drug cartels, and (iii) members of the applicant's family.

The BIA held that landowners do not automatically constitute a PSG, and that evidence showing immutability, particularity and social distinction must be in the record to demonstrate their cognizability. It should be noted that in the landmark BIA decision, *Matter of Acosta* (Casebook page 664), the BIA had listed "land ownership" as an example of the type of characteristic (along with kinship ties) that may satisfy the particular social group definition.

After ruling that status of a landowner does not automatically "render" a person a member of a PSG, the BIA ruled that, on the record, neither landowners nor landowners who resist drug cartels in Guatemala were valid social groups. The Board held that (a) they lacked immutability since the applicant could give up his property; (b) even if they were immutable, they lacked particularity because the PSGs could include landowners of varying backgrounds, circumstances, and motivations and there was no "clear benchmark" for determining who would fall into the groups; and (c) the PSGs were not socially distinct because the record did not show that the society in question (the specific Guatemalan department) nor the alleged persecutors themselves (cartel members) perceived members of the proposed PSGs as distinct in some significant way from other persons within the society. The BIA then cited to *Matter of L-E-A-*'s holding (above) to conclude that the applicant's family PSG lacked the requisite social distinction because he was a member of a typical nuclear family in Guatemala. For a short but blistering critique of *Matter of E-R-A-L-,* see former Board Member Paul Schmidt's "Rewriting History: BIA Disembowels Acosta, Reads Seminal "Particular Social Groups" – "Landowners" – Out of Refugee Protection," found here.

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Chapter 10

Matter of A-B-.

As discussed above, *Matter of A-B-* attempts to foreclose claims for protection based on domestic violence and fear of gangs. After the A.G.'s June 2018 decision, the case was remanded back to the IJ, who promptly denied it again, as did the BIA on appeal.

There have been some significant developments in decision-making in domestic violence cases since *Matter of A-B-*. This Update will not provide an exhaustive overview, but does address some cases worthy of mention:

1) *Matter of A-B-* in the Credible Fear Process

As discussed in the Update to Chapter 3, in December 2018 Judge Emmet G. Sullivan of the U.S. District Court for the District of Colombia issued a nationwide injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), prohibiting the application of *Matter of A-B-* in the credible fear context. The government appealed the decision in *Grace v. Whitaker* (renamed *Grace v. Barr*) to the Court of Appeals for the District of Colombia Circuit, which issued a decision on July 17, 2020. In a 2-1 ruling, the Court partially upheld Judge Sullivan's ruling. *Grace v. Barr*, --- F.3d ---, 2020 WL 4032652 (D.C. Cir. July 17, 2020).

The challenge in *Grace* arose out of the fact that the A.G.'s decision in *Matter of A-B-*, and USCIS Guidance on its implementation, went beyond the ruling in the individual case of Ms. A.B., and addressed credible fear determinations in the expedited removal context, stating that because there was a general rule against these claims, they would most likely not meet the credible fear standard. This made them susceptible to litigation pursuant to INA § 242(e)(3)(A) which provides jurisdiction for challenges to "a written policy directive, written policy guideline, or written procedure" which implements expedited removal. Exclusive jurisdiction for such challenges lies in the U.S. District Court for the District of Colombia.

The Plaintiffs in *Grace* argued that various holdings of *A-B-* were unlawful and/or arbitrary and capricious as applied in the credible fear context. Judge Sullivan agreed on most counts, including these aspects of *A-B-* or USCIS Guidance: 1) imposing a general rule against domestic violence and fear of gang claims; 2) finding that all particular social groups which include the formulation "unable to leave" are impermissibly circular; 3) heightening the standard for proving that the government is unable or unwilling to protect in non-state actor cases of persecution (requiring a finding of "completely helpless" to show "unable" and "condoning" to show "unwilling;" and 4) changing the rule on choice of law from application of the most favorable circuit court law to law of the circuit where the asylum seeker is located. Judge Sullivan issued a nationwide injunction against the application of these, and other aspects of *A-B-* in credible fear determinations.

In a 2-1 ruling, the Court of Appeals for the D.C. Circuit agreed that the changed standards for unable/unwilling and choice of law were arbitrary and capricious and were to continue to be enjoined. However, the court vacated the injunction as to the remaining two issues, relying upon the government's concession that neither *A-B-* nor the USCIS Guidance impose a general rule

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against domestic violence or gang claims, or preclude PSGs with the "unable to leave" formulation.

2) Circuit Court Decisions Addressing *Matter of A-B-* on the Merits

Since the Attorney General's 2018 decision in *Matter of A-B-*, there have been decisions which have adopted its reasoning, and others that have rejected it or found it to not foreclose all similar claims. The cases which have adopted it are *Amezcua-Preciado v. U.S. Atty. Gen*., 943 F.3d 1337 (11th Cir. 2019), found here; *Gonzales-Veliz v. Barr*, 938 F. 3d 219 (5th Cir. 2019), found here; and *S.E.R.L. v. U.S. Atty. Gen*., 894 F. 3d 535 (3d Cir. 2018).

In contrast to these decisions, the First and Sixth Circuits have taken a different approach.

In April 2020, the First Circuit issued its decision in ***De Pena Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020)**, in which the PSGs were: (i) "Dominican women abused and viewed as property by their romantic partners, who are unable to escape or seek protection, by virtue of their gender;" (ii) "Dominican women viewed as property and unable to leave a domestic relationship;" and (iii) "Dominican women unable to leave a domestic relationship." The First Circuit held that *Matter of A-B-* did not categorically preclude PSGs defined by women unable to leave their domestic relationships as a basis for asylum, and that the BIA must analyze their particular circumstances. It also suggested that the Board should consider whether a case should be remanded to the Immigration Court for the petitioner to raise a claim based on nationality and gender. The decision can be read here.

In May 2020, the Sixth Circuit issued a decision, ***Juan Antonio v. Barr*, 959 F.3d 778 (6th Cir. 2020)**, where the PSG in question was "married indigenous women in Guatemala who are unable to leave the relationship." The Sixth Circuit rejected as unsupported by the evidence the BIA's ruling that that the applicant was no longer a member of the group because she had left the relationship, that the state was willing and able to control her persecutor, and that she was able to internally relocate. Having rejected those bases for denial, the court remanded to the BIA to determine whether the PSG was cognizable. Most notably, the Sixth Circuit pointedly wrote in footnote 3, "We acknowledge that we are not bound by *Grace* but find its reasoning persuasive. Because *Matter of A-B-* has been abrogated, *Matter of A-R-C-G-* likely retains precedential value. But, on remand, the agency should also evaluate what effect, if any, *Matter of A-R-C-G-* and *Grace* have had on the particular social group analysis." *Id.* at 791. The *Juan Antonio v. Barr* decision is available here.

Relevance of June 2020 Proposed Regulation to All PSG Claims (Not Just Gender).

The June 2020 Proposed Regulation is in the spirit of *Matter of L-E-A-* and *Matter of A-B-*, which dramatically cut back on the viability of PSG claims. However, the June 2020 Proposed Regulation goes much further. Section C(1), at 85 Fed. Reg. 36,277-36,279. After codifying the existing requirements of immutability, particularity and social distinction, they provide a "non-exhaustive list of examples that would **generally be insufficient to establish a PSG**." (emphasis added). The listed PSGs include those "consisting of or defined by the following circumstances":

1) "Past or present criminal activity or associations;"

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2) "[P]ast or present terrorist activity or association;"
3) "[P]ast or present persecutory activity or association;"
4) "[P]resence in a country with generalized violence or a high crime rate;"
5) "[T]he attempted recruitment of the applicant by criminal, terrorist, or persecutory groups;"
6) Targeting the applicant for extortion based on perceived wealth or affluence;
7) "[I]nterpersonal disputes of which governmental authorities were unaware or uninvolved;"
8) "[P]rivate criminal acts of which governmental authorities were unaware or uninvolved;" and
9) "[S]tatus as an alien returning from the United States."

This proposed list would effectively preclude most PSG formulations of asylum seekers with gender-based and fear-of-gang claims, including cases involving domestic violence, forced recruitment, forced relationships with gang members, and extortion.

The June 2020 Proposed Regulation would also require all particular social groups to be formulated at the Immigration Court stage, finding alternate social groups waived if not raised at that stage of proceeding. It would also preclude the filing of a motion to reopen or reconsider based on a social group formulation that could have been brought at the prior hearing.

Chapter 11 - Qualifications Upon Protection

U.S. Law – Persecutor of Others
Casebook pages 903-912

Matter of Negusie.

The facts and procedural background of *Matter of Negusie* and its relevance to the interpretation of the persecutor of others bar is discussed in Note 4, at pages 908-909. As signaled in Note 4, the Board had pending before it the issue of duress, and under what circumstances it could be raised as a defense to the persecutor of others bar. The BIA's 2018 *Negusie* decision sets a high threshold for overcoming the bar, stating that it requires, as a minimum, that the asylum seeker establish by a preponderance of the evidence that they:

> (1) acted under an imminent threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation where he knew or reasonably should have known he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others.

Matter of Negusie, 27 I.&N. Dec. 347, 363 (B.I.A. 2018).

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Application of the Danger to Security and Terrorism Bars
Casebook pages 930-941

***Matter of A-C-M-*.**
The security risk/terrorist support bar is covered on pages 930-941, with a discussion of its harsh impact on individuals who are the victims, rather than the perpetrators, of terrorist acts. The *A-C-M-* decision perpetuates that cruelty. In *Matter of A-C-M-*, 27 I. & N. Dec. 303 (B.I.A. 2018), an asylum seeker, a Salvadoran woman, was kidnapped and held as a "slave" by guerrillas. She was ordered to cook, clean and wash their clothing under threat of death. Prior to being taken, she had been forced to witness the murder of her husband, a sergeant in the military. She argued that the material support bar should not apply to her because her acts of cooking, cleaning and washing were *de minimis* and carried out under duress. The Board panel, with one dissenting member, held that under precedent, duress does not excuse material support and the fact that her assistance was *de minimis* was irrelevant because there is no quantitative requirement in the application of the bar.

Proposed Rule Expanding Danger to Security Bar.
Following the issuance of the June 2020 Proposed Regulation which, as noted throughout this Update, would impact multiple aspects of asylum decision-making, on July 9, 2020, the Administration published another notice of proposed rulemaking, *Security Bars and Processing*, 85 Fed. Reg. 41,201 (July 9, 2020), available here. This proposed rule would expand the application of the danger to security bar based on purported public health concerns relating to the COVID 19-pandemic. Specifically, the rule would:

1) Add "emergency public health concerns based on communicable disease due to potential international threats from the spread of pandemics" to the national security grounds on which adjudicators can find the person a danger to the security of the U.S. and, thus, ineligible to be granted asylum or withholding of removal;
2) Make the danger to security bars to asylum and withholding applicable at the credible fear screening stage;
3) Require individuals seeking CAT protection to demonstrate at the credible fear stage that they would more likely than not be tortured in their country of removal;
4) Allow DHS prosecutorial discretion to remove to a third country certain individuals determined at the credible fear stage to be dangers to security (and thus ineligible for asylum and withholding of removal), rather than place them in removal proceedings to pursue deferral of removal.

85 Fed. Reg. at 41,201, 41,211, 41,215-41,219.

As with the CDC COVID-19 border closure order (discussed *supra* in the Update to Chapter 2), this proposed rule seeks to use the pandemic as a pretext for denying asylum and related protection. For further explanation and a critique of this proposed rule, see Scott Roehm's piece, "Trump's Latest Assault on Asylum Has Nothing to Do with National Security or Public Health," available here. *See also* Human Rights First, "Trump Administration Expands Public Health Pretext to Block Asylum-Seekers," available here.

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Safe Third Country Agreements & the U.S.-Canada Agreement
Casebook pages 949-952

U.S.-Canada Safe Third Country Agreement.
As discussed at pages 951-952 of the Casebook, advocates have raised two challenges to the U.S.-Canada Safe Third Country Agreement. With regard to the second, on July 22, 2020, the Federal Court of Canada held provisions of Canadian law enacting the Safe Third Country Agreement unconstitutional under Section 7 of the Canadian Charter of Rights and Freedoms of the "the right to life, liberty or security of the person." The court based its decision on U.S. detention policies (citing unsafe conditions, the practice of holding individuals in solitary confinement, and failing to ensure access to medical care and adequate food, among other things) and the related risk of *refoulement* as a result of the barrier detention poses to access to legal advice and the ability to establish eligibility for asylum. The court did not reach advocates' claim that the Agreement disproportionately impacts women asylum seekers because it found the Agreement unconstitutional under Section 7. The court suspended its decision for 6 months to allow the Parliament to respond. The decision is available here.

Asylum Cooperative Agreements (ACAs) with Guatemala, El Salvador, and Honduras.
The U.S.'s entry into purported Safe Third Country Agreements (called "Asylum Cooperative Agreements") with Guatemala, El Salvador, and Honduras, and a legal challenge thereto is discussed in the Update to Chapter 2, *supra*. It is worth noting again that this development, and the designation of Guatemala as a safe third country, has been challenged in *U.T. v. Barr*, cited *supra.* While that case remains pending, Judge Fletcher recently cited the extremely difficult situation facing asylum seekers in Guatemala in his decision on a challenge to the Transit Ban (discussed further below and in the Update the Chapter 2). *See E. Bay Sanctuary Covenant v. Barr,* 964 F.3d. 832 (9th Cir. 2020).

New Bars to Asylum for Individuals Seeking Protection at the Southern Border (Asylum Bans 1.0 and 2.0).
As discussed in the Chapter 2 Update, *supra*, the Trump administration has attempted to implement two new bars to eligibility – one for individuals who enter between ports of entry (Asylum Ban 1.0), and the other for those who transit a third country without applying for and receiving a denial of protection before seeking asylum at the U.S.-Mexico border (Transit Ban or Asylum Ban 2.0). As argued in the litigation challenging these new bars, they have no basis in the Refugee Convention and Protocol or in the Refugee Act's safe third country provision. As described above, the courts have preliminarily enjoined, and vacated, both of these policies, though litigation remains ongoing.

Firm Resettlement under U.S. Law
Casebook pages 952-965

Relevance of June 2020 Proposed Regulation to Firm Resettlement.
The firm resettlement bar rests on a rationale that the person does not need protection because they could live in a third country where they would not be subjected to persecution. The

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Casebook at pages 952-965 addresses this bar, highlighting that the regulation defining "firm resettlement," 8 C.F.R. § 208.15, requires that a person receive "an offer of permanent resident status, citizenship, or some other type of permanent resettlement" from a third country, subject to certain exceptions. The June 2020 Proposed Regulation would define the firm resettlement bar much more broadly.

As set forth in the June 2020 Proposed Regulation, an asylum-seeker would fall under the firm resettlement bar if:

1) They "either resided or could have resided in any permanent legal immigration status or any nonpermanent, potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist) in a country through which [they] transited prior to arriving in or entering the United States, regardless of whether [they] applied for or [were] offered such status;"
2) They "physically resided voluntarily, and without continuing to suffer persecution or torture, in any one country for one year or more after departing [their] country of nationality or last habitual residence;" or
3) (i) They are "a citizen of a country other than the one where [they] allege a fear of persecution" and they were "present in that country prior to arriving in the United States," or (ii) they were "a citizen of a country other than the one where [they] allege a fear of persecution, they were "present in that country prior to arriving in the United States," and they "renounced that citizenship after arriving in the United States."

85 Fed. Reg. at 36,294. *See also* Section A(7) at 85 Fed. Reg. 36,285 - 36,286.

The proposed regulation makes clear that it "would expand the firm resettlement bar to include forms of relief that were available to [a noncitizen] in a country in which he or she resided before traveling to the United States, even if [they] did not affirmatively apply for or accept such relief." 85 Fed. Reg. at 36,286. The June 2020 Proposed Regulation would also specify that "when the evidence of record indicates that the firm resettlement bar may apply," the burden is on the applicant to demonstrate that the firm resettlement bar does *not* apply. *Id.* And it would provide that the firm resettlement of a parent or parents with whom a child was residing at the time shall be imputed to the child. *Id.*

New Proposed Criminal Bars to Asylum.

On December 19, 2019 (prior to the June 2020 Proposed Regulation discussed elsewhere in this Update), USCIS and EOIR issued a joint notice of proposed rulemaking, *Procedures for Asylum and Bars to Asylum Eligibility*, 84 Fed. Reg. 69,460 (Dec. 19, 2019), available here. This proposed rule would add seven new categorical bars to asylum eligibility, for:

1) Any conviction for a felony offense;
2) Any conviction for "smuggling" or "harboring" under 8 U.S.C. § 1324(a), even if the asylum seeker committed the offense for the purpose of bringing their own spouse, child or parent to safety;
3) Any conviction for unlawful reentry under 8 U.S.C. § 1326;
4) Any conviction for an offense that the adjudicator has reason to believe was in furtherance of "criminal street gang" activity;

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5) Any second conviction for an offense involving driving while intoxicated or impaired;
6) Any conviction or accusation of conduct for acts of battery involving a domestic relationship; and
7) Any conviction for several new categories of misdemeanor offenses under federal or state law, including:
    (a) Offenses involving a fraudulent document;
    (b) Fraud in public benefits; or
    (c) Drug-related offenses except for a first-time marijuana possession offense.

84 Fed. Reg. at 69,645-55.

The proposed rule would also require adjudicators to apply a multi-factor test to determine whether a vacated, expunged, or modified conviction or sentence relevant to the above new categorical bars is valid for the purpose of determining asylum eligibility. The test would place the burden on the noncitizen, allow adjudicators to consider outside evidence, and even apply a rebuttable presumption against the effectiveness of an order vacating, expunging, or modifying a conviction or a sentence in certain circumstances. *Id.* at 69,654-55. The stated purpose of this proposed change is to "ensure that [noncitizens] do not have their convictions vacated or modified for purported rehabilitative purposes that are, in fact, for immigration purposes," which would make it more likely that adjudicators find individuals with vacated, expunged, or modified convictions or sentences ineligible for asylum. *Id.* at 69,654.

Finally, the proposed rule would rescind a current regulatory provision providing for automatic reconsideration of denials of asylum where the applicant was denied solely in the exercise of discretion, and where they were granted withholding relief. *Id.* at 69,656-57.

This proposed rule has been widely criticized. For one critique, see the American Immigration Council's public comment, available here. To date no final rule has been published.

Relevance of June 2020 Proposed Regulation to "Discretionary" Denials of Asylum.
While not technically bars to asylum, as cited and discussed in the Update to Chapter 3, *supra*, the June 2020 Proposed Regulation sets forth nine "discretionary" factors which would preclude a favorable exercise of discretion except in "extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an [asylum applicant], by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship to [them]." The proposed regulation specifies that "[d]epending on the gravity of the circumstances, . . . a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion." 85 Fed. Reg. at 36,293-94. Thus, it seems that these new proposed "discretionary" factors may operate as additional bars to asylum protection.

Chapter 12 - The Process and Rights of Asylum Seekers

The Update to Chapter 12 will address the following issues:

1) ***Matter of E-F-H-L-***, denying the right to a full hearing for all asylum seekers;

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2) **New appointees to the BIA**, causing further politicization and bias;
3) **Federal court review of CAT orders**;
4) Limitations on constitutional due process protections for asylum seekers as addressed in ***Dep't of Homeland Sec. v. Thuraissigiam***;
5) Further limitations on asylum seekers' rights to **legal representation;**
6) Changes and challenges to policies relating to **detention of asylum seekers;**
7) **Performance "metrics" for Immigration Judges**; and
8) **Limits on work authorization** and **fees for asylum applications.**

The Adjudicatory Structure
Casebook pages 988-1002

***Matter of E-F-H-L-* and Pretermission for Failure to Establish *Prima Facie* Eligibility.**
The Casebook's overview of the adjudicatory structure discusses the process for applying for asylum and other relief from removal, including in Immigration Court. Related to that discussion is the issue of whether a person has a right to a hearing to present and testify in support of their case in Immigration Court. In 2018, the Attorney General vacated *Matter of E-F-H-L-*, 26 I. & N. Dec. 319 (B.I.A. 2014), a precedent decision of the BIA which had held that every applicant for asylum and withholding had the right to an immigration hearing, without being required to first establish *prima facie* eligibility. *Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018) (vacating *Matter of E-F-H-L-*, 26 I. & N. Dec. 319 (B.I.A. 2014)). The Attorney General's decision is found here. The **June 2020 Proposed Regulation** proposes to codify that IJs may pretermit and deny – without a hearing – an application for asylum, withholding of removal, or CAT protection if the applicant has not established a *prima facie* claim for relief or protection based on their Form I-589 asylum application and any supporting evidence. 85 Fed. Reg. 36,302.

New Appointees to the BIA.
In the section describing the BIA at pages 994-995, the Casebook discusses the historical politicization of this adjudicatory body. Later, beginning at page 1058, the Casebook addresses the problem of bias in asylum case adjudication more broadly, highlighting highly disparate asylum grant/denial rates between different jurisdictions and adjudicators. The Trump Administration has made significant changes to the composition of the Board, expanding it and raising even more significant concerns regarding politicization and bias.

In August 2019 the Administration appointed six new BIA members, all of whom were previously IJs and who had some of the highest asylum denial rates in the country. For example, between 2013 and 2018, former IJ William A. Cassidy denied almost 96% of cases, and V. Stuart Couch (also the judge who denied Ms. A.B.'s asylum case, described above) denied over 92% according to the Transactional Records Access Clearinghouse (TRAC) [reports available here]. They also had very high reversal rates. Furthermore, instead of requiring these new appointees to go through the customary two-year probationary period, they were immediately appointed to the Board on a permanent basis, with a very limited vetting process that did not appear to take into account complaints that have been filed against several of them based on their conduct as IJs. The new BIA members are also for the first time being permitted to remain in their home location, marking

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the first time BIA members would not work out of the BIA's Virginia headquarters. And these new BIA members were appointed to act in a dual capacity, i.e., to adjudicate cases at the Immigration Courts as well as review IJ decisions appealed to the Board. *See* Tanvi Misra, "DOJ changed hiring to promote restrictive immigration judges," Roll Call (Oct. 29, 2019), available here. The current list of BIA members is available here.

In April 2020, the Administration published an interim rule, *Expanding the Size of the Board of Immigration Appeals*, 85 Fed. Reg. 18,105 (Apr. 1, 2020), adding two Board member positions to the BIA and thereby expanding it to 23 members. In May 2020, three new members were appointed to the BIA; two were IJs and one was an attorney for the DOJ's Office of Immigration Litigation (OIL), Civil Division. Tanvi Misra's follow-up article, "DOJ hiring changes may help Trump's plan to curb immigration," Roll Call (May 4, 2020), available here, provides more information on the significance of these policies and BIA hires, including an overview of new EOIR hiring practices obtained through an AILA lawsuit. Among other things, AILA has voiced concerns about the hiring process and the fact that these new appointees would act as "appellate judges" who can review cases at the trial and appellate level, which could create conflicts of interest.

Federal Court Review of CAT Orders. The Casebook addresses the Circuit Courts of Appeals at pages 995-1002, including limitations on the scope of review and standards of review. On June 1, 2020, the Supreme Court issued a decision, *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), which resolved a long-standing circuit split over the scope of judicial review of orders in cases involving CAT relief. Mr. Nasrallah was a Legal Permanent Resident (LPR) who was found removable due to criminal offenses. An IJ granted him CAT relief, which the BIA reversed. The Eleventh Circuit Court of Appeals ruled that it was barred from reviewing the factual findings in his case pursuant to 8 U.S.C. § 1252(a)(2)(C), which prohibits courts from reviewing questions of fact in "any final order of removal" against a noncitizen "removable by reason of having committed" certain criminal offences .

The Supreme Court concluded that the federal appellate courts have jurisdiction to review factual challenges to administrative orders denying relief under CAT, and that the "substantial evidence" standard, generally applicable to factual findings, applied. Under this standard, the agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* at 688. Seven justices joined in the majority opinion by Judge Kavanaugh. Justices Thomas and Alito dissented. This opinion is significant for several reasons, among them that it rejects the more restrictive approach that many circuit courts of appeal had taken, that they were without jurisdiction to review such orders at all.

Limits on Constitutional Protections for Asylum Seekers in the United States
Casebook pages 1010 – 1019

The Casebook discusses the historical dichotomy in Constitutional Due Process jurisprudence providing that individuals considered to have "entered" the territorial jurisdiction of the U.S. were historically entitled to Due Process protections, while and those who had not were held to lack such safeguards. And, on page 1014, the Casebook raises the question of whether the Illegal

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Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) impacted whether individuals who had "entered" but had not been "admitted" (which requires lawful entry after admission and inspection) would continue to be held to be entitled to Due Process protection. The Supreme Court addressed this specific issue in the following case.

***Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020).**

As noted in the Update to Chapter 2, the Supreme Court held in this case that the Suspension Clause does not provide a right to habeas review of expedited removal orders. Mr. Thuraissigiam, a Sri Lankan asylum seeker, fled to the U.S. and was apprehended 25 yards north of the southern border after entering. After receiving a negative credible fear determination, which was upheld by an IJ, he sought habeas review of his expedited removal order, arguing among other things that the government applied an improper standard to his credible fear determination.

The U.S. District Court for the Southern District of California found that it lacked jurisdiction to consider his petition for habeas corpus pursuant to 8 U.S.C. § 1252(e)(2), which limits habeas review in expedited removal to three issues – the alienage of the individual, whether a removal order was in fact issued, and whether the individual falls within a category not subject to expedited removal. On appeal, the Ninth Circuit ruled that this limitation on the scope of habeas review violated the Constitution's Suspension Clause.

In a 7-2 opinion authored by Justice Alito, the Supreme Court reversed the Ninth Circuit, holding that the Suspension Clause only "protects the writ as it existed in 1789." According to the Court, habeas traditionally only provided a means to seek release from unlawful detention. Characterizing Mr. Thuraissigiam's habeas petition as seeking "the right to enter or remain in the country or to obtain administrative review potentially leading to that result," the court held that his claims fell outside the scope of the writ.

Justice Breyer, joined by Justice Ginsberg, concurred in the outcome; however their analysis was limited to the facts of the case: specifically the fact that Mr. Thuraissigiam was apprehended a mere 25 yards inside the border and had never lived in or been lawfully admitted to the U.S. They concurred in the conclusion that the Suspension Clause had not been violated but noted that they would limit the holding to Mr. Thuraissigiam's specific circumstances, and not rule more broadly that the Suspension Clause generally does not protect individuals challenging removal.

Justice Sotomayor dissented, joined by Justice Kagan. Justice Sotomayor emphasized that the majority had mischaracterized Mr. Thuraissigiam's claim and that it was not simply a request to remain in the country. She also pointed out that the majority did not consider his contentions that the system by design denied him of a meaningful ability to establish his claims, that the translator and Asylum Officer misunderstood him, and that he was not given a "reasoned explanation" for the decision. She also observed that habeas relief had been permitted in past cases involving circumstances beyond release from detention, and that the Supreme Court had never before "demanded the kind of precise factual match with pre-1789 case law that today's [c]ourt demands."

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Notably, the majority also considered the issue of whether Constitutional Due Process protections were due to Mr. Thuraissigiam. The Ninth Circuit had found that Mr. Thuraissigiam was entitled to Due Process protections based on the fact that he had "entered" the U.S. (he was apprehended on U.S. soil approximately 25 yards from the border). However, the Supreme Court majority rejected this holding, finding that a noncitizen in Mr. Thuraissigiam's position "only has only those rights regarding admission that Congress has provided by statute." *Id.* at 1983. Troublingly, this suggests that, at least in circumstances like Mr. Thuraissigiam's, the Supreme Court has moved the Constitutional dividing line in a way which denies Due Process protection to a broader category of individuals. Under long-standing precedent, with the exception of the legal fiction which applied to individuals who have been paroled into the U.S., those on U.S. soil have been entitled to Due Process rights.

In his concurrence, Justice Breyer did not directly address this issue. *Id.* at 1988-90 (Breyer, S., concurring).

Addressing this issue in her dissent, Justice Sotomayor pointed out that "drawing the line for due process at legal admission rather than physical entry, the Court tethers constitutional protections to a noncitizen's legal status as determined under contemporary asylum and immigration law. But the Fifth Amendment, which of course long predated any admissions program, does not contain limits based on immigration status or duration in the country: It applies to 'persons' without qualification." *Id.* at 2012 (Sotomayor, S., dissenting). She further reasoned:

> In addition to creating a textual gap in the Constitution's coverage, the Court's rule lacks any limiting principle. This is not because our case law does not supply one. After all, this Court has long affirmed that noncitizens have due process protections in proceedings to remove them from the country once they have entered.
>
> Perhaps recognizing the tension between its opinion today and those cases, the Court cabins its holding to individuals who are "in respondent's position." Presumably the rule applies to—and only to—individuals found within 25 feet[9] of the border who have entered within the past 24 hours of their apprehension. Where its logic must stop, however, is hard to say. Taken to its extreme, a rule conditioning due process rights on lawful entry would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems unlawfully admitted and summarily deport them no matter how many decades they have lived here, how settled and integrated they are in their communities, or how many members of their family are U.S. citizens or residents.
>
> This judicially fashioned line-drawing is not administrable, threatens to create arbitrary divisions between noncitizens in this country subject to removal

[9] The majority decision notes that Mr. Thuraissigiam was apprehended within 25 *yards* from the border.

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> proceedings, and, most important, lacks any basis in the Constitution. Both the Constitution and this Court's cases plainly guarantee due process protections to all "persons" regardless of their immigration status, a guarantee independent of the whims of the political branches. This contrary proclamation by the Court unnecessarily decides a constitutional question in a manner contrary to governing law.

Id. at 2013 (Sotomayor, S., dissenting) (citations omitted).

For an interesting analysis and critique, see Aditi Shah's commentary in Lawfare, "The Supreme Court Rules against Judicial Review of Expedited Removal," available here.

Legal Representation
Casebook pages 1019-1029

Friend of the Court Representation.
Over the years, pro bono attorneys in locations around the U.S. have provided *amicus curiae*, or "friend of the court," limited-scope legal services to individuals in immigration proceedings, assisting them in such matters as understanding the proceedings, identifying benefits to which they might be eligible, filling out and filing forms and paperwork, and helping them speak to the judge in open court. This type of limited-scope representation has been especially important in cases involving unaccompanied children. On November 21, 2019, EOIR issued a Policy Memorandum, available here, limiting the kinds of actions that a "friend of the court" may take on behalf of an individual in proceedings. While the stated purpose of this policy memo is to protect "the integrity of immigration court proceedings" and individuals in such proceedings, this memo has been roundly criticized as limiting access to information and increasing inefficiency in the Immigration Courts. One critique by a former IJ is available here.

Recent Policies Limiting Access to Representation.
As noted, a number of the policies outlined in the Update to Chapter 2, including metering, MPP, HARP, and PACR, have significantly limited access to legal representation for asylum seekers. As for the case of MPP specifically, returning asylum seekers to Mexico has grave consequences for their ability to obtain legal counsel, as does the adjudication of asylum claims in "tent courts," discussed below. In November 2019, the ACLU filed a class action lawsuit, *Doe v. Wolf*, which sought to require that migrants subjected to MPP be given access to their retained counsel prior to and during their non-refoulement interviews (NRIs). On November 12, 2019, the District Court granted a temporary restraining order, ordering the Administration not to conduct NRIs for asylum seekers under MPP without first affording them access to their retained counsel both before and during the NRI. *Doe v. McAleenan*, 415 F. Supp. 3d 971 (S.D. Cal. 2019). On January 14, 2020, the District Court granted a preliminary injunction upholding access to counsel for persons detained pending NRIs, available here. *Doe v. Wolf*, 424 F. Supp. 3d 1028 (S.D. Cal. 2020). The government's appeal is currently pending in the Ninth Circuit. For more information, see ACLU's Practice Advisory on the right to counsel in MPP NRIs, available here.

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Detention of Asylum Seekers
Casebook pages 1037-1057

There have been numerous developments resulting in increasing use of detention and limiting alternatives to detention. However, it should be noted that policies such as MPP and the CDC border closure have refused entry of asylum seekers. The following are some of the most notable developments relevant to those asylum seekers who are present in the U.S.:

The Family Case Management Program.
The Family Case Management Program, described in Prof. Marouf's article on Casebook page 1049, was terminated by the Trump Administration in June 2017. More details about the termination can be found here.

Ending the Presumption of Release from Detention For Pregnant Women.
ICE terminated an August 15, 2016 Policy Directive which provided for a presumption of release of pregnant detainees. The superseding ICE document, issued on Dec. 14, 2017, can be found here.

Family Separation.
Responding to reports of family separation, on Feb. 8, 2018, members of Congress sent a letter of concern to former DHS Secretary Kirstjen Nielsen. Although it had started much earlier, the Trump Administration attempted to justify family separation by pointing to A.G. Sessions's May 2018 call for "zero tolerance" towards unlawful entry at the southern border. The zero tolerance memo, found here, called on U.S. Attorneys to prosecute all unlawful entry along the southern border. The criminal prosecution and related incarceration became the justification for removing children from their parents.

The policy of family separation was first challenged in *Ms. L. v. ICE*, a class action. U.S. District Court Judge Sabraw ordered the reunification of the separated families. *See Ms. L. v. ICE*, 330 F.R.D. 284 (S.D. Cal. 2019). Although Trump subsequently issued an executive order ending family separation, it is widely and credibly reported to have continued. In response, plaintiffs in *Ms. L. v. ICE* filed a motion to enforce the preliminary injunction, which the court granted in part and denied in part. *See Ms. L. v. ICE*, 415 F. Supp. 3d 980 (S.D. Cal. 2020). Litigation updates are available here.

This year, another lawsuit relating to family separation was filed in the U.S. District Court for the District of Arizona. In *A.P.F. v. United States*, six asylum-seeking families separated subjected to family separation have sued the government for damages based on intentional infliction of emotional distress, negligence, and loss of consortium. The Amended Complaint, filed in July 2020, is available here and updates are available on the Southern Poverty Law Center's website here.

A detailed summary of family separation under the Trump Administration (including reports on the effect of the policy on asylum seeking children and its breadth) is provided by the Southern

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Poverty Law Center here. In February 2020, the Government Accountability Office (GAO) issued a report concluding, after an extensive review, that the federal government agencies involved in family separation – CBP, ICE, Office of Field Operations (OFO), the Office of Refugee Resettlement (ORR), and the Department of Health and Human Services (DHHS) – have inaccurate and missing records and therefore have effectively lost track of children, parent(s), or both. However, there is potential for further family separation under the guise of the pandemic, as discussed *infra*.

Attempt to Halt the Legal Orientation Program (LOP).
Initiated by EOIR as an effort to ensure that detained asylum seekers understand their rights in immigration proceedings, the LOP – which provides legal information and workshops to immigration detainees – has historically received bipartisan support. Then-Attorney General Jeff Sessions instructed EOIR to halt the LOP in April 2019, claiming that the Trump Administration needed to review the program's cost-effectiveness. After significant congressional pushback, the Administration reinstated the LOP; however, in September 2018 DOJ released the first of three studies regarding the LOP. An American Immigration Council Fact Sheet explains the LOP and the Trump Administration's efforts to undermine it, available here.

The Release of Asylum Seekers Who Have Established a Credible Fear.
The Administration has continued to limit release of asylum seekers, including by contesting their ability to seek release on bond.

In *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019), A.G. Barr overruled the BIA's decision *Matter of X-K-*, 23 I. & N. Dec. 731 (B.I.A. 2005), which had held that individuals in expedited removal, who establish a credible fear and are put in full removal proceedings, are eligible for release on bond. The Attorney General held that *X-K-* had been wrongly decided and that, under the statutory language of the INA, individuals in expedited removal who establish a credible fear "must be detained" unless they are paroled.

In April 2019, U.S. District Court Judge Pechman, Western District of Washington, issued a preliminary injunction against the application of *M-S-* in *Padilla v. ICE*, 379 F. Supp. 3d 1170 (W.D. Wash.), *modified sub nom. Padilla v. ICE*, 387 F. Supp. 3d 1219 (W.D. Wash. 2019). On March 27, 2020, the Ninth Circuit Court of Appeals, in a split decision, upheld the grant of a preliminary injunction but remanded the case for factual findings and to consider the bond hearing procedures. *Padilla v. ICE*, 953 F.3d 1134 (9th Cir. 2020). Noting that the government presented no evidence that Congress considered plaintiffs to present a flight risk or danger to security, and that their detention would likely last from six months to more than a year, plaintiffs had satisfied their burden of showing a likelihood of success on the merits with respect to their Due Process claim. Notably, with regard to the discussion above regarding Constitutional Due Process protections and the Supreme Court's decision in *Thuraissigiam*, the court in this case rejected the government's contention that the plaintiffs lacked any due process rights, citing "the general rule that once a person is standing on U.S. soil—regardless of the legality of his or her entry—he or she is entitled to due process." *Id.* at 1146. More information and updates are available here.

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On March 18, 2020, the BIA issued a published decision, *Matter of R-A-V-P-*, 27 I. & N. Dec. 803 (B.I.A. 2020), further restricting the ability of asylum seekers to be released on bond. The BIA reasoned that certain asylum seekers – those who do not have family or community ties in the U.S., are not currently employed, or may lose their asylum case – pose a flight risk. The decision is available here.

"Tent Courts."
Related to MPP, the Trump Administration has erected mass "tent courts" to adjudicate via video teleconference (VTC) the claims of many individuals subject to MPP. This significantly impedes individuals' access to counsel and raises other significant due process concerns associated with a lack of transparency (including not allowing observers) and the widespread use of VTC technology, which can cause credibility and other problems for applicants (see discussion of VTC use at Casebook pages 993-994). Some of these problems are outlined in an American Immigration Lawyers' Association (AILA) Policy Brief, available here.

Updated ICE Detention Guidelines.
In December 2019, ICE released new guidelines on detention standards for its facilities. The ACLU provided a detailed summary, found here, of the changes between the prior version of standards (issued in 2000) and the 2019 standards. The changes include:

- More permissive use of force standards;
- Less protection for detainees in terms of environmental health and safety;
- More permissive standard for restraints used on minors while in transport, allowing use "when appropriate;"
- No longer requiring written consent for ICE to conduct a body cavity search;
- Diminished sanitation requirements in food service handling;
- Less stringent medical care standards, including: removing a requirement that medical centers within detention facilities have accreditation; revisions to the informed consent requirement that now allow medical treatment against detainee's will in broadened circumstances; and allowing medical staff to segregate detainees refusing medical examination or treatment;
- Removing language requiring that facility immediately contact ICE in the event of serious injury or illness, and that ICE will arrange to notify the family;
- Removing requirement to document detainee's serious injury or illness in a memorandum and notify EOIR or court of record;
- More discretion to facilities to reject requests to tour facilities and press and NGO visitation of detainees; and
- Diminished standards in providing detainees access to persons providing legal orientation programs and legal resources through a law library.

Taken together, the new ICE detention guidelines further deny detained immigrants and asylum seekers basic standards of living, health care, safety, and access to due process. In 2019 – even prior to the pandemic – ICE reported that 9 people died in its custody, and advocacy groups have linked deaths in immigration custody to violations of medical standards.

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The COVID-19 pandemic only increases concerns relating to poor and unsafe conditions for immigration detainees. ICE reports that, from January through July 2020, 9 people died in its custody. An independent list of immigration detainees who have died in custody maintained by AILA indicates that 13 individuals have died in custody so far this year, several from COVID-19-related causes. Yet according to media reports, including from BuzzFeed News, DHS's Office of Inspector General (OIG) is currently only conducting virtual visits to detention facilities, and it is unclear when they will resume in-person visits.

Policy Changes Resulting From the Coronavirus Pandemic.
As covered in Chapter 2 of this Update, the Administration has implemented numerous policies and procedures to effectively shut down the borders and summarily expel migrants seeking protection amidst the coronavirus health pandemic. The pandemic has also impacted detention practices.

Section 212(d)(5)(A) of the INA grants DHS the power to parole "any [noncitizen] applying for admission" for urgent humanitarian reasons or significant public benefit. Various immigrant advocacy groups have demanded that ICE parole or release on bond at-risk immigrants from detention centers. ICE has paroled some detainees, but advocacy groups have also filed numerous lawsuits throughout the country in order to secure the release of at-risk detainees whom ICE has refused to release. More information on litigation efforts for COVID-19 related release of detainees can be found here.

ICE reported 944 COVID-19 positive cases of individuals currently in custody as of July 29, 2020. (ICE data on COVID-19 cases is available here.) However, an excellent June 2020 report by the Vera Institute of Justice, found here, estimates the spread of COVID-19 among the detained populations and explains how ICE's reported data obscures the (likely much higher) true rate of infection within the detention centers. As of July 16, 2020, three detained immigrants had died from "complications related to COVID-19" while in, or shortly upon being released from, ICE custody. However, this number is likely underreported as there is no way to track how many immigrants have died after contracting COVID-19 while in ICE or CBP custody who were later released or deported.

Another worrisome development relates to the risk of family separation occurring as a result of the pandemic. In April 2020, Amnesty International reported that ICE officials were pressuring parents at the three family detention centers to either consent to release their children (e.g. family separation) or stay together in indefinite detention during the COVID-19 pandemic. On June 26, 2020, Judge Dolly Gee of the U.S. District Court for the Central District of California – who oversees the *Flores* settlement – ordered the Administration to release any children detained in family detention centers for more than 20 days no later than July 17, 2020, noting that the ICE-operated facilities are "on fire" and that "there is no time for half measures." She ordered that children be released with either with their parents or to suitable guardians with parental consent. She later granted a ten-day extension of the July 17th deadline.

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A Fair, Independent and Unbiased Adjudicator
Casebook pages 1058-1091

This section of the Casebook addresses criticisms of IJs and the quality of their decision-making. The politicization cited above with respect to the current Administration "stacking" the BIA , taken together with the imposition of new "performance metrics" by the Attorney General, described in the following paragraph, will further affect the independence and impartiality of IJs.

"Performance Metrics," Including Quotas, on IJs.
On January 17, 2018, the EOIR issued new metrics for evaluating the performance of IJs. The standards, which went into effect on Oct. 1, 2018, require judges to complete 700 cases per year, and not have more than 15 per cent of their cases remanded by the BIA or circuit courts. These performance evaluation measures have been criticized as encroaching on the independence of IJs. Dana Leigh Marks, former president of the National Association of IJs, stated that the measures were a "huge, huge, huge encroachment on judicial independence" and was treating IJs "like assembly-line workers." As recently as February 18, 2020, rights groups continued to petition Congress to establish an independent Immigration Court.

The Right to Work and Social Benefits
Casebook pages 1091-1095

New Limits on Work Authorization and Reauthorization.
On April 29, 2019, President Trump called for regulations to be released requiring that cases be processed more quickly, barring individuals who entered the U.S. unlawfully from receiving work authorization and revoking employment authorization for individuals who have been denied asylum. The memo is found here.

On November 14, 2019, the Administration released a proposed rule relating to employment authorization, 84 Fed. Reg. 62,374, available here, and final rules were issued on June 26, 2020. *See Asylum Application, Interview, and Employment Authorization for Applicants*, 85 Fed. Reg. 38,532 (June 26, 2020), available here. Some of the significant changes effectuated by these rules are:

1) Extending the employment authorization waiting period applicable to asylum applicants to 365 days from the 150 days that asylum seekers previously had to wait before they could apply and 180 days they had to wait before becoming eligible for employment authorization;
2) Adding grounds for terminating employment authorization based on such factors as the denial of an asylum application and pending petitions for review at the federal courts of appeal; and
3) Creating expansive bars to eligibility for employment authorization based on such factors as:
    (a) having entered the U.S. without inspection;
    (b) having failed to file asylum applications within one year of entry; and

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(c) having certain criminal convictions or, in some circumstances, being believed to have committed certain crimes.

Exceptions to these bases for denial or termination of employment authorization are extremely limited.

Fees for Asylum Applications.
Also on November 14, 2019, DHS released a proposed rule, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 84 Fed. Reg. 62,280 (Nov. 14, 2019), available here. In addition to significantly raising fees for other types of immigration applications, it proposed charging asylum seekers $50 to file an affirmative asylum application. The final rule was published July 31, 2020 and is available here. The final rule imposes a $50 fee for asylum applications (I-589s), unless the I-589 application is only submitted to seek withholding of removal or CAT protection. The only other exception to the $50 filing fee is for unaccompanied children, who are not required to pay a fee for their asylum applications.

These new rules are deeply concerning, as they will infringe asylum seekers' access to protection. Only three other countries – Iran, Fiji, and Australia – charge fees for asylum applications.

On February 28, 2020, DOJ published a new notice of proposed rulemaking, *Executive Office for Immigration Review; Fee Review*, 85 Fed. Reg. 11,866 (Feb. 28, 2020), available here. This proposed rule would substantially increase filing fees for cancellation of removal applications, notices to appeal, and motions to reopen or reconsider. The fees for certain types applications to the BIA will increase from $110 to $677 - $965 (for different notice to appeal forms) and $895 (motion to reopen and motion to reconsider). The proposed rule provides that while the aforementioned DHS rule would require a $50 fee for asylum applications (Form I-589), the $50 fee would not apply where a Form I-589 is submitted for the sole purpose of seeking withholding of removal or CAT protection.

Chapter 13 – Proving the Claim

Credibility
Casebook pages 1102 – 1103

Matter of Y-I-M-.
Adjudicators have generally required that an asylum seeker be provided notice of a discrepancy in their evidence and an opportunity to provide an explanation for the discrepancy before it can form a basis for an adverse credibility determination. In *Matter of Y-I-M-*, 27 I. & N. Dec. 724 (B.I.A. 2019), the BIA considered the type of notice and opportunity to explain an asylum seeker must be given. Considering the case of a Ukrainian asylum seeker, the Board analyzed whether, if inconsistencies in the record are obvious or have previously been identified by the applicant or the DHS, an IJ is personally required to specify the discrepancies and solicit an explanation from the applicant prior to relying on them to make an adverse credibility finding. The Board held that

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an Immigration Judge may rely on inconsistencies to support an adverse credibility finding as long as either the IJ, the applicant, or DHS has identified the discrepancies and the applicant has been given an opportunity to explain them during the hearing. As to "obvious" inconsistencies, the Board further held that an IJ is not required to personally identify the inconsistency where it is reasonable to assume that the applicant was aware of it and had an opportunity to offer an explanation. This decision chips away at the longstanding principle holding that individuals must be given fair notice of inconsistencies and/or other credibility issues and given an opportunity to explain.