

Refugee Law and Policy

**A COMPARATIVE AND INTERNATIONAL APPROACH
FIFTH EDITION**

2021 SUPPLEMENT

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CAROLINA ACADEMIC PRESS
Durham, North Carolina

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July 2021 Update

This Update builds on the July 2020 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. We cover policies which took place in the last six months of the Trump administration, as well as the policies of the Biden administration to date. The chapters with the most developments are 2, 3, 4, 5, 9, 10, 11, 12, and 13, 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 in 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 December 11, 2020, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) finalized their regulation, [Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review](#), 85 Fed. Reg. 80274 (hereinafter “December 2020 Final Regulation”). This regulation was so massive and restrictive that advocates dubbed it the “Death to Asylum Rule.” Several congressmembers went [on record](#) calling on the Trump administration to reverse its overall assault on asylum, including this regulation.

The December 2020 Final Regulation was challenged in two lawsuits: [Pangea Legal Services v. U.S. Department of Homeland Security](#), No. 20-cv-09253-JD, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021), and [Human Rights First v. Wolf](#), No. 1:20-cv-03764 (D.D.C., filed Dec. 21, 2020). The District Court in *Pangea* issued a preliminary injunction against the regulation, and the acting director of the Executive Office for Immigration Review (EOIR) rescinded and canceled the Policy Memorandum guiding its implementation. See Exec. Off. Immigr. Rev., Off. of Dir., [Cancellation of Policy Memorandum 21-09](#) (May 14, 2021). The [Unified Regulatory Agenda](#), which reports on planned agency actions, indicates that [DHS](#) and [DOJ](#) rulemaking is underway to address a limited range of issues covered in the monster regulation – the social group definition, nexus, and the requirements for proving the failure of state protection.

Although the Regulation is currently being challenged, and will likely not survive in its current form, this Update provides information about the ways that the Regulation in its current form may affect the relevant subject matter.

Chapter 1 – The International Origins of Refugee Law

Overview

Casebook pages 3-5

The number of people throughout the world forced to leave their countries of origin and live as refugees fluctuated between around 8 and 12 million people each year from 2000 to 2010. The magnitude of refugee movement has increased steadily over the past decade. The figure of 22.5 refugees in 2018 noted in the Casebook (page 3) rose to 25.4 million in 2019 and again to 26.4 million persons by the end of 2020, according to the United Nations High Commissioner for Refugees (UNHCR). If we add to this figure the 48 million individuals who are internally displaced within their countries' borders, plus over 4 million asylum seekers, and others in refugee-like situations, over [82 million people](#) are thought to be forcibly displaced in the world today.

The UN Relief and Works Agency for Palestine Refugees

Casebook pages 42-54

The Casebook explores the relationship between UNHCR, founded in 1950, and the United Nations Relief and Works Agency for Palestine Refugees (UNRWA), founded in 1948. The text discusses the so-called "protection gap" for Palestinian refugees, many of whom continue to live in a kind of legal gray area, whether they reside in the occupied territories of Gaza and the West Bank, or in the greater Palestinian diaspora. (See Handmaker and Nieuwhof's 2005 article "[No Man's Land,](#)" excerpted on pages 47-49.) Although Article 1(F) of the [1951 Refugee Convention](#) accords deference to UNRWA's essential role vis-a-vis the nearly [5.7 Palestinian refugees](#) in Jordan, Lebanon, Gaza and the West Bank, the text emphasizes that UNRWA lacks the mandate to provide international legal protection for Palestinians outside UNRWA's geographical scope of operations. Hence UNHCR's protection mandate is critical for Palestinian refugees.

Like other refugees and asylum seekers throughout the world, the needs of Palestinians transcend access to legal status and questions of national identity and also encompass their capacity to sustain themselves and provide for their families on a daily basis. Thus, UNRWA's mandate to assist Palestinian refugees remains essential. In 2018, the administration of former US president Donald Trump [cut support](#) to UNRWA in the aftermath of the United States' official recognition of Jerusalem as the capital of Israel and considerable Palestinian opposition to this policy. In April of 2021, the Biden administration [announced](#) the resumption of economic and humanitarian assistance for Palestinians. Included in the \$235 million allocation by the US Department of State was \$75 million earmarked for development aid in the West Bank and Gaza as well as \$150 million pledged directly to UNRWA. This figure only [partially restores](#) UNRWA allocations on the part of the United States, historically the largest UN member-state donor to the agency.

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. Each year the administration further slashed the refugee numbers, reducing to 30,000 for [FY2019](#), to 18,000 in [FY2020](#), and to 15,000 in [FY2021](#). The Trump administration also issued an executive order in 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). In a February 4 Executive Order, President Biden revoked EO 13888. See Executive Order 14013, [Rebuilding and Enhancing Programs To Resettle Refugees and Planning for the Impact of Climate Change on Migration](#), 86 Fed. Reg. 8,839, § 2(a), (Feb. 4, 2021).

As a candidate, Joe Biden [committed](#) to admitting 125,000 refugees. Once elected, on April 16, 2021, he [announced](#) he would leave the current admissions at 15,000 (the Trump administration's number) for the current fiscal year. This prompted an immediate and harsh [backlash](#), which led to him [announcing](#) that he was adjusting the current fiscal year number up to 62,500.

Access to the Territory of Asylum Casebook pages 99-159

The Trump administration engaged in a wide range of practices in an attempt to prevent asylum seekers from accessing the United States to apply for asylum. Each of the practices was more extreme than the preceding one in its attempt to limit or prevent access to asylum relief. The Biden administration reversed or terminated many, but not all, of them.

In May 2018, the Trump administration first attempted to limit access to the United States 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. See Todd Owen, U.S. Customs and Border Protection, [Metering Guidance Memorandum](#) (Apr. 27, 2018) (currently enjoined). Then, in November 2018, the administration imposed “Asylum Ban 1.0,” on asylum for individuals who entered between, rather than at, U.S. ports of entry. See [Aliens Subject to a Bar on Entry Under Certain Proclamations; Procedures for Protection Claims](#), 83 Fed. Reg. 55,934 (Nov. 9, 2018) (was to be codified at 8 C.F.R. § 208, 1003, 1208, currently enjoined). That was followed in January 2019 by the Migrant Protection Protocols (MPP), which allowed migrants to request asylum, but forced all non-Mexican asylum seekers, with few exceptions, to wait in Mexico until their cases could be heard in U.S. Immigration Courts. See Kirstjen Nielsen, U.S. Homeland Security, [Policy Guidance for Implementation of the Migrant Protection Protocols](#) (Jan. 25, 2019). In July 2019, the Trump 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. See [Asylum Eligibility and Procedural Modifications](#), 84

Fed. Reg. 33,829 (July 16, 2019) (was to be codified at 8 C.F.R. § 208, 1003, 1208, currently enjoined). Then, in July – September 2019, the Trump administration entered into [third country cooperative agreements](#) with El Salvador, Guatemala and Honduras, allowing the United States to “outsource” its asylum obligations to these countries by sending asylum seekers there to have their cases adjudicated (a policy that has now been revoked, see section on “Safe Country Agreements”). In October 2019, the Trump administration created two more programs, “Humanitarian Asylum Review Process” ([HARP](#)) and “Prompt Asylum Claim Review” ([PACR](#)), that fast-track asylum seekers through their initial credible fear screenings in a matter of days, without meaningful access to an attorney, and keep them in U.S. Customs and Border Patrol (CBP) custody rather than in U.S. Immigration and Customs Enforcement (ICE) detention centers. The most draconian of all these measures was the March 20, 2020, issuance of an [order](#) that used the COVID-19 pandemic as a pretext to effectively close the border to asylum seekers. The Centers for Disease Control (CDC) order was accompanied by an implementing regulation. See [Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists](#), 85 Fed. Reg. 17,060 (Mar. 20, 2020). The regulation bars the entry of and requires the expulsion of 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 CDC rather than by DHS or DOJ.

The following is a brief overview of the aforementioned practices and their current status under the Biden administration. A number of these practices are also discussed in Chapter 11, which covers bars to asylum.

Metering

The practice of [metering](#) effectively began in 2016. See [Al Otro Lado v. Nielsen](#), No. 3:17-cv-02366-BAS-KSC (S.D. Cal. Oct. 12, 2018) (amended complaint). CBP told asylum seekers who arrived at ports of entry to wait, stating that they only had capacity to accept a certain number of asylum seekers a day. Metering became less important to the Trump administration’s strategy of keeping non-Mexican asylum seekers in Mexico once the administration implemented MPP.

The “Turnback Policy,” an early version of metering, was challenged in a class action by Al Otro Lado and other legal nonprofits in 2017. See [Al Otro Lado v. Kelly](#), No. 2:17-cv-5111 (S.D. Cal. July 12, 2017) (initial complaint). Plaintiffs alleged that this policy violated the Immigration and Nationality Act, the Administrative Procedure Act, the Fifth Amendment, and the doctrine of *non-refoulement*. *Id.* In 2020, the Southern District Court of California granted class certification to all noncitizens denied access to the U.S. asylum process as a result of the metering policy. See [Al Otro Lado v. Wolf](#), No. 17-cv-02366-BAS-KSC (S.D. Cal. Aug. 6, 2020) (order granting class certification).

While metering was in effect, the Trump administration implemented the additional bar to asylum, the Transit Ban, referred to above as “Asylum Ban 2.0.” Al Otro Lado brought a lawsuit challenging, among other things, whether the class of 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. [Al Otro Lado v. McAleenan](#), No. 17-cv-02366-BAS-KSC (S.D. Cal. Nov. 19, 2019) (order granting preliminary injunction).

While this litigation was ongoing, the DHS Office of the Inspector General issued a [report](#) on the practice of metering, and developed three recommendations “aimed at bringing CBP operations in line with long-established practices.” One of these recommendations effectively suggested that CBP end the metering practice. CBP disagreed with this recommendation on the basis of “operational capacity” needs.

The government [appealed](#) the decision of the district court in *Al Otro Lado v. McAleenan*, which addressed application of the Transit Ban to individuals who had been subject to metering prior to the Ban. The Ninth Circuit Court of Appeals decided to hold the appellate proceedings in abeyance pending issuance of the mandates in *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020) and *Capital Area Immigrants’ Rights Coalition v. Trump*, No. 20-5273 (D.C. Cir. Filed Oct. 1, 2020), cases that challenged the Transit Ban itself. [Al Otro Lado v. Wolf](#), No. 19-56417 (9th Cir. 2020) (order). A preliminary injunction against the Transit Ban was issued in *EBSC v. Barr*, and the D.C. District Court vacated the rule imposing it.

A temporary restraining order blocking the application of the Transit Ban to individuals subject to metering prior to the ban’s implementation continues in force. [Al Otro Lado v. Gaynor](#), No. 17-cv-02366-BAS-KSC (S.D. Cal. 2021) (TRO). The practice of metering itself [remained in effect](#) through March 2020, then became mostly irrelevant once the border was closed by the CDC order (see *infra*, “Closing the Border Under the Pretext of the COVID-19 Pandemic”).

Attempt to Prohibit Asylum to Individuals Who Do Not Enter the United States at Ports of Entry (Asylum Ban 1.0)

In November 2018, the Trump administration issued an interim final rule and a proclamation seeking to prohibit asylum for all individuals who do not enter the United States at a port of entry. See [Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims](#), 83 Fed. Reg. 55,934 (Nov. 9, 2018); [Addressing Mass Migration Through the Southern Border of the United States](#), 83 Fed. Reg. 57,661 (Nov. 15, 2018).

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. No. 18-cv-06810-JST (N.D. Cal. 2018) (TRO). 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. *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274, 18-17436 (9th Cir. 2020).

President Biden [revoked](#) the proclamation upon which the rule was based, EOIR [rescinded](#) the rule's implementing policy memo on May 14, 2021, and the [Unified Regulatory Agenda](#) indicates that DHS and DOJ are "modifying or rescinding" the rule. However, the Ninth Circuit Court of Appeals held in an [amended opinion](#) on March 24, 2021 that the case is not moot.

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

MPP forced individuals arriving without documentation, with few exceptions, to wait in Mexico for the duration of their pending asylum case (as opposed to metering, which required asylum seekers to wait in Mexico prior to presenting at ports of entry (POE) and asking for asylum). The government's justification for the policy was INA 235(b)(2)(C), which allows DHS to return 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 as of the end of the Trump administration was 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](#)).

MPP has been a human rights disaster. 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 2021, over [70,000](#) asylum seekers had been sent back to Mexico to await their court proceedings. Human Rights First (HRF) issued multiple reports on the implementation of MPP, from its first in [August 2019](#) to its latest in [December 2020](#). As of February 19, 2021, HRF had recorded at least [1,544](#) publicly reported cases of murder, rape, kidnapping, and other forms of violence against asylum seekers returned to Mexico, including 341 cases where children were kidnapped or nearly kidnapped. In addition, during the first few months of the Biden administration, HRF recorded at least [492](#) attacks and kidnappings suffered by asylum-seekers forced to wait in Mexico. 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.

There were two principal challenges to MPP – *Innovation Law Lab v. Nielsen* (renamed *Innovation Law Lab v. Wolf*), and *Nora v Wolf*. In *Innovation Law Lab*, in March 2020, the Ninth Circuit issued an [injunction](#) against MPP, limited to the geographic territory of the Ninth Circuit (the Ninth Circuit had previously [affirmed](#) the district court's issuance of a nationwide injunction). No. 19-15716 (9th Cir. Mar. 4, 2020) (order granting injunction). 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 certiorari." The Supreme Court took cert and the challenge to the preliminary

injunction was scheduled for oral argument this term. After Biden was elected, the government asked the court to hold briefing in abeyance and to remove the case from the argument calendar, which [the Court did](#).

The second challenge, [Nora v. Wolf](#), brought in the D.C. Circuit, focused on the April 2020 expansion of MPP to Tamaulipas, Mexico, which is known to be an extremely dangerous area and has been under a State Department [“Do Not Travel” Advisory](#) since at least 2018. No. 1:20-cv-00993 (D.D.C. filed Apr. 16, 2020).

On January 20, 2021, the Biden administration [announced](#) that, as of Jan. 21, 2021, it would stop placing new asylum seekers in MPP. In a February 2, 2021 Executive Order, entitled [“Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the US Border”](#) (hereinafter “Regional Framework EO”), President Biden directed the DHS to “review and determine whether to terminate or modify” MPP. See [Executive Order 14010](#), 86 Fed. Reg. 8,267, § 4(a)(ii)(B) (Feb. 2, 2021). The EO also directed DHS, in coordination with the Secretary of State, Attorney General, and CDC director to “consider a phased strategy for the safe and orderly entry” into the United States of those who had been subjected to MPP. *Id.* On Feb. 11, 2021, the administration [announced](#) a phased process to allow individuals in MPP with pending cases to enter the United States so that they could pursue their claims from within the United States. Then, on June 22, the administration [expanded](#) the categories of individuals who would be permitted to enter the United States to apply for asylum, expanding it to those who had their cases terminated or were ordered removed in absentia under the MPP.

On June 1, 2021, DHS [formally announced](#) the termination of MPP, and the government asked the Supreme Court to vacate as moot the preliminary injunction in *Innovation Law Lab*. The Supreme Court granted that motion and remanded the case to the Ninth Circuit with instructions to direct the District Court to vacate its April 2019 order granting a preliminary injunction. [Mayorkas v. Innovation Law Lab](#), No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021).

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

In July 2019 the Trump administration published a joint interim final rule, [Asylum Eligibility and Procedural Modifications](#), 84 Fed. Reg. 33,829 (Jul. 16, 2019), known as the Transit Ban or Asylum Ban 2.0, which is mentioned above in the metering section. It issued a [final version](#) of the rule on December 17, 2020. The rule sought 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. It did this by barring asylum to anyone who transited a third country *en route* to the southern border of the United States unless they (a) applied for protection from persecution or torture in a third country and received a final judgment denying such protection; or (b) qualified under the regulatory

definition as a “victim[] of a severe form of trafficking.” 85 Fed. Reg. 82,260 (Dec. 17, 2020) (to be codified at 8 C.F.R. § 208.13 and 8 C.F.R. § 1208.13).¹

In his Regional Framework EO, President Biden directed the Attorney General and Secretary of Homeland Security to review and determine whether to rescind the Transit Ban, and the [Unified Regulatory Agenda](#) indicates that the review process is underway. See [Executive Order 14010](#), 86 Fed. Reg. 8,267, § 4(a)(ii)(C) (Feb. 2, 2021). In addition, on May 14, 2021, EOIR [revoked](#) the rule’s implementing memorandum.

There have been two challenges to the Transit Rule, beginning during the Trump administration, and continuing into that of Biden. First, [East Bay Sanctuary Covenant v. Barr](#), brought in the Northern District of California, resulted in a [nationwide preliminary injunction](#) against the interim rule, and a more [limited injunction](#) against the final rule. 964 F.3d 832 (9th Cir. 2020). The parties filed a [joint motion to stay](#) proceedings until DHS and DOJ complete their review, which was granted by the court. The second set of challenges were through two cases, [I.A. v. Barr](#) and [Capital Area Immigrants’ Rights \(CAIR\) Coalition v. Trump](#), brought in the District of Columbia. On June 30, 2020, Judge Kelly granted Plaintiffs’ motions for summary judgment and vacated the rule. [CAIR Coal. v. Trump](#), 471 F.Supp.3d 25 (D.D.C. 2020).

“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 where 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 United States had such an agreement was Canada. Between July and September 2019, the United States entered into similar agreements, with Guatemala, El Salvador, and Honduras, calling them “Asylum Cooperative Agreements” (ACAs). The United States used the [threat of tariffs](#) as well as the threat of [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). This rule put in place procedures for removing individuals pursuant to these and future ACAs. With few exceptions, the rule and the ACAs allowed the United States to remove to Guatemala, El Salvador, and Honduras any individual who sought asylum in the United States. The agreements were roundly criticized given the dire human rights situation in these countries and their lack of any meaningful infrastructure for deciding asylum claims. For discussion and critique of the agreements, see [here](#) and [here](#).

¹ A third exception exists for individuals who did not transit through any country that 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.

In his February 2, 2021, Regional Framework EO, President Biden asked the AG and Secretary of Homeland Security to review and determine whether to rescind the rule implementing the ACAs. See [Executive Order 14010](#), 86 Fed. Reg. 8,267, § 4(a)(ii)(D) (Feb. 2, 2021). On February 6, the State Department [announced](#) that the United States had suspended and initiated the process to terminate the ACAs with all three countries. Although the interim final rule remains in effect, EOIR [rescinded](#) the implementing policy memorandum for the rule on May 14, 2021, stating that it was “unnecessary” when the ACAs with El Salvador, Guatemala, and Honduras had been terminated.

The U.S.-Guatemala ACA was the only ACA ever implemented, and transfers under this ACA were paused in March 2020, due to the COVID-19 pandemic. According to a [U.S. Senate report](#), from November 2019 to March 2020, Guatemala received a total of 945 Hondurans and Salvadorans from the United States under the ACA. Both [press](#) and NGO interviews reported that, upon arriving in Guatemala, the Hondurans and Salvadorans were told to either apply for asylum in Guatemala or leave the country within 72 hours under “voluntary return.” Only 34 people – 3.5% percent of the aforementioned 945 people – officially applied for asylum in Guatemala. For a detailed report on how the ACA process was carried out on the ground in Guatemala, see Human Rights Watch and Refugees International’s [“Deportation without a Layover.”](#)

The interim final rule, guidance by U.S. Citizenship & Immigration Services (USCIS) Asylum Officers on its implementation with Guatemala, and the United States’ categorical designation of Guatemala as a “safe” third country, were all challenged in *U.T. v. Barr*, which was [filed](#) in the D.C. District Court in January 2020. On March 15, 2021, the court [ordered the case stayed](#) in light of the government’s review of the polices. In May 2021, the parties made arrangements for the six plaintiffs in the case to return to the United States to apply for asylum, so any future litigation would be limited to addressing the prospective application of the rule and its associated guidance. See *U.T. v. Garland*, No. 1:20-cv-00116-EGS (D.D.C. May 24, 2021) ([joint status report](#)).

“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. [HARP](#), which applied to Mexican nationals, and [PACR](#), which applied to everyone else, were implemented by the Trump administration with the purpose of further expediting screening interviews for asylum seekers. Section 4(ii)(E) of Biden’s Regional Framework EO terminated both HARP and PACR and requested that the Secretary of DHS “consider rescinding any orders, rules, regulations, guidelines or policies” implementing them. See [Executive Order 14010](#), 86 Fed. Reg. 8,267, § 4(a)(ii)(E) (Feb. 2, 2021).

Closing the Border Under the Pretext of the COVID-19 Pandemic

The most draconian of the Trump administration’s policies was the closure of the border under the pretext of COVID-19 health concerns. On March 20, 2020, the 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 to an existing rule, [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](#), which was subsequently extended indefinitely, for the “immediate suspension of the introduction of certain persons.” This order authorized CBP and other border enforcement agencies to forcibly return any noncitizens arriving at the border without valid documents back to the country from which they entered (which in most cases was Mexico), their country of origin, or another location. For more details on the CDC order, and an analysis of how the CDC Order overstepped the CDC’s authority as a public health agency, see Lucas Guttentag’s [Just Security article](#).

It is important to underscore that the Title 42 border closure was never about public health; top CDC officials resisted issuing it, and they did so only under pressure from the Trump White House. The closing of the border only excludes those individuals without valid documents (i.e. asylum seekers), while allowing the continued entry of tens of thousands of other individuals. And, notably, leading public health and medical experts have [stated](#) that the policy is not necessary to protect the public health.

During his candidacy, Joe Biden made commitments to end a number of Trump era immigration policies, but Title 42 was not one of them. The February 2 Regional Framework EO directs the Secretaries of HHS, and DHS, along with the CDC Director to “promptly review and determine whether termination, rescission, or modification” of the Title 42 order is “necessary and appropriate.” See [Executive Order 14010](#), 86 Fed. Reg. 8,267, § 4(a)(ii)(A) (Feb. 2, 2021). However, to date, the only modification that the Biden administration has implemented is to [exempt](#) unaccompanied minors from Title 42.

There were a number of lawsuits against the Title 42 border closure; several of them were brought on behalf of unaccompanied children, who are now exempt from the order. [Huisha-Huisha v. Gaynor](#), which is currently pending in the D.C. District Court, challenges the application of Title 42 to families. The case has been stayed while the government and the plaintiffs engage in negotiations. As a result of negotiations, the government agreed to allow a number of families to enter; as of May 18, 2021, the number was set at 250 asylum seekers daily. Advocates continue to call for a total rescission of the policy.

Expedited Removal

Casebook pages 157-167

Expansion of Expedited Removal

On July 22, 2019, during the Trump administration, DHS [announced](#) that beginning July 23, 2019, it would expand expedited removal to individuals found anywhere in the United States who could not prove presence of two years or more. On September 27, 2019, the District Court for the

District of Columbia in [Make the Road New York v. McAleenan](#) issued a preliminary injunction enjoining the expansion of expedited removal, 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.”

In his February 2 Regional Framework EO, Pres. Biden directed the DHS Secretary to “promptly review and consider whether to modify, revoke, or rescind” the July 23, 2019, expansion of expedited removal. See [Executive Order 14010](#), 86 Fed. Reg. 8,267, § 4(b)(ii) (Feb. 2, 2021). The relevant language states that the review is to consider “our legal and humanitarian obligation, constitutional principles of due process and other applicable law, enforcement resources, the public interest, and any other factors consistent with this order that the Secretary deems appropriate. If the Secretary determines that modifying, revoking, or rescinding the designation is appropriate, the Secretary shall do so through publication in the *Federal Register*.” *Id.*

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 United States 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. For a pithy discussion of the decision, see Jeffrey Chase, [“Justices’ Asylum Ruling Further Limits Migrant Protections.”](#)

As noted above, there is a preliminary injunction against the “Death to Asylum” rule. However, because it has not yet been rescinded, this Update will flag its impact on the various topics covered in the Casebook. Below are provisions of the regulation relevant to Expedited Removal.

The most significant changes to expedited removal included in the December 2020 Final Regulation are found at [85 Fed. Reg. 80,274, 80,391-80,399](#) (Dec. 11, 2020) (was to be codified at 8 C.F.R. § 208.30, § 1003.42, and § 1208.30, currently enjoined), and provide as follows:

- 1) Prior to this regulation, individuals who passed the credible fear screening were placed in INA section 240 removal proceedings where they could apply for forms of relief in addition to asylum, withholding, or Convention Against Torture (CAT) protection. The December 2020 Final Regulation places them in “asylum and withholding only” proceedings. See 85 Fed. Reg. 80,391, 80,399 (was to be codified at 8 C.F.R. § 208.30(e)(5) and 8 C.F.R. § 1208.30(g)(1)(i)).

- 2) Under prior regulations, the standard applied in credible fear was that the individual could show a “significant possibility” of being able to establish eligibility for asylum, withholding of removal, or CAT protection. The December 2020 Final Regulation heightens the standard for withholding and CAT, requiring that the individual show a “reasonable possibility” of establishing eligibility for these forms of relief. *See* 85 Fed. Reg. 80,391 (was to be codified at 8 C.F.R. § 208.30(e)(5)).
- 3) Under prior practice, the adjudicator applied the most favorable precedent to an applicant’s claim; the December 2020 Final Regulation changes that to “applicable legal precedent,” thus limiting the adjudicator to the law of the circuit where the interview is taking place. *See* 85 Fed. Reg. 80,394 (was to be codified at 8 C.F.R. § 1003.42(f)).
- 4) Under prior regulations, the adjudicator would not consider whether the asylum seeker could internally relocate or would be subject to any statutory bars. The December 2020 Final 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. *See* 85 Fed. Reg. 80,391 (was to be codified at 8 C.F.R. § 208.30(e)(5)).
- 5) Under prior regulations, an individual who had received a negative credible fear determination did not have to affirmatively request IJ review; under the December 2020 Final Regulation, an individual who does not express a desire for review will be considered to have declined it. *See* 85 Fed. Reg. 80,392, 80,399 (was to be codified at 8 C.F.R. § 208.30(g) and 8 C.F.R. § 1208.30(g)(2)).

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 repeatedly asserted that the credible fear standard was too low, leading to abuse of the system. Under Trump, USCIS made the credible fear process more difficult in at least three 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 United States. 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 to adjudicate CFIs. CBP officers are, unlike Asylum Officers, trained in law enforcement, rather than in asylum law and best practices for interviewing asylum seekers.

Although USCIS has yet to rescind the 2019 Lesson Plan, some of the other Trump-era changes are no longer in effect. The July 2019 USCIS directive on the timing of the credible fear process was [struck down](#) by the D.C. District Court in March 2020 when the court found that Cuccinelli

had been unlawfully appointed as acting USCIS Director. See [L.M.-M. v. Cuccinelli](#), 442 F.Supp.3d 1 (D.D.C. March 1, 2020), *appeal dismissed*, No. 20-5141, 2020 WL 5358686 (D.C. Cir., Aug. 25, 2020). Similarly, in August 2020, the D.C. District Court placed a preliminary injunction on the CBP Memorandum of Agreement with USCIS, finding that it likely violated the INA’s requirements for credible fear interviews. See [A.B.-B. v. Morgan](#), No. 20-cv-846 (RJL) (D.D.C. Aug. 29, 2020).

U.S. Regulatory Framework for Claims Based on Prospective Risk Casebook pages 242-250

Internal Relocation.

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 internal 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 must consider whether internal relocation is possible. The guidance 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[.]”²

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

Relevance of Enjoined December 2020 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 December Regulation, which as noted above, has been enjoined, goes in the extreme opposite direction, listing three “significant adverse” factors that adjudicators must take into consideration, and nine factors that would, except “in extraordinary circumstances,” result in a denial of asylum. See [85 Fed. Reg. 80,274, 80,387](#) (Dec. 11, 2020) (was to be codified at 8 C.F.R. § 208.13(d), currently enjoined). The

² 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 or 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](#).

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 United States

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 United States 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, but for “exceptional circumstances” or missing interview notice; 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.

Chapter 4 – The Definition of Persecution

The Source of Persecution: State and Non-State Agents

Casebook pages 328-332

The Casebook discusses the requirement that in cases where the persecution is perpetrated by non-state actors, the applicant must prove that the government is “unable or unwilling” to protect the individual. The decision in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) ([A-B- I](#)) appeared to increase the burden by stating that it must be shown that the government was “completely helpless” to prevent the persecution, or condoned it. Many have commented that being completely helpless is quantifiably different from being “unable,” to prevent persecution and that “condoning” connotes a complicity which “unwilling” does not. A subsequent Attorney General decision in *Matter of A-B-*, 28 I. & N. Dec. 199 (A.G. 2021) ([A-B- II](#)), rejected the criticism that the prior *A-B-* decision had heightened the standard, stating that the two are “interchangeable formulations.”

As discussed throughout this Update, on June 16, 2021, Attorney General Garland vacated *A-B- I* and *A-B-II* in *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) ([A-B- III](#)). Attorney General Garland’s decision rejects his predecessors’ position on state protection, noting that it has “spawned confusion about whether *A-B-I* changed the ‘unable or unwilling’ standard the Board has long applied,” and that the resolution of that issue is best left to the rule-making process. *Id.* at 309.

Relevance of the Enjoined December 2020 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 enjoined December Regulation attempts to cut back on such an approach. See [85 Fed. Reg. 80,274, 80,386](#) (Dec. 11, 2020) (was to be codified at 8 C.F.R. § 208.1(e)). It presents a “non-exhaustive” list of the specific types of harms that would generally *not* constitute persecution:

- 1) Harm that arises generally out of “civil, criminal, or military strife” in a country;
- 2) “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, applicants must demonstrate that their well-founded fear of persecution was on account of one of five protected grounds; this is referred to as the “nexus requirement.” Three decisions by Trump-era Attorneys General, *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) ([A-B- I](#)), *Matter of A-B-*, 28 I. & N. Dec. 199 (A.G. 2021) ([A-B- II](#)), and [Matter of A-C-A-A-](#), 28 I. & N. Dec. 84 (A.G. 2020), attempted to make it more difficult to establish nexus.

The decision in *A-B- I* strongly implied that nexus was less likely to be found when the persecutor was a non-state actor and had a personal relationship with the victim. *Id.* at 338-339. This ran counter to decades of precedent where nexus was established in cases involving personal relationships. See, e.g., [Kamar v. Sessions](#), 875 F.3d 811, 818-19 (6th Cir. 2017) (recognizing honor killing by family members as persecution); [Sarhan v. Holder](#), 658 F.3d 649, 656-57 (7th Cir. 2011) (same); [Bringas-Rodriguez v. Sessions](#), 850 F.3d 1051, 1073 (9th Cir. 2017) (finding nexus to particular social group based on sexual orientation where persecution was inflicted by family members); [Matter of S-A-](#), 22 I. & N. Dec. 1328, 1336 (BIA 2000) (finding nexus to protected ground in case of father’s abuse of his daughter); [Matter of Kasinga](#), 21 I. & N. Dec. 357, 366-67 (BIA 1996) (finding nexus connecting familial coercion to submit to female genital cutting to social group-based persecution).

Matter of A-C-A-A- doubled-down on the assertion made in *A-B-I* – namely that in cases where there is a personal relationship, it will be difficult to establish nexus to a protected ground.

The decision in *A-B-II* took another approach to raising the standard for proving nexus, holding that a showing of “but-for” causation (i.e. but for the protected ground the persecution would

not have occurred) is insufficient, and the individual must show the protected ground is “at least one central reason” for the persecution. The decision stated that if the persecution was a “means to a non-protected end,” nexus would generally fail. *Id.* at 207-12. This decision contradicted existing precedent which found nexus where the choice of a victim because of a protected ground was also a means to an end. For example, nexus was found where a mother was targeted because of her family relationship to her son, who the gangs hoped to recruit. [Hernandez-Avalos v. Lynch](#), 784 F.3d 944 (4th Cir. 2015).

On June 16, 2021, Attorney General Merrick Garland vacated the two *A-B-* decisions, wiping out their nexus holdings. *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) ([A-B- III](#)). On July 26, 2021, he vacated [Matter of A-C-A-A-](#), 28 I&N Dec. 351 (A.G. 2021).

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 for persecution.

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-](#), 25 I&N Dec. 341 (BIA 2010) 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-Romero*, 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. U.S. Attorney General](#), 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.

Relevance of Enjoined December 2020 Regulation to Nexus

The December 2020 Final Rule 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 “[i]nterpersonal 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 "in furtherance of a discrete cause against such organizations," or "expressive behavior that is antithetical to 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's targeting based on their actual or perceived wealth or affluence;
- 6) The applicant's subjection to – or fear of the threat of – criminal activity;
- 7) The applicant's "[p]erceived, past or present, gang affiliation" ; or
- 8) "Gender."

See [85 Fed. Reg. 80,274, 80,386, 80,395](#) (Dec. 11, 2020) (was to be codified at 8 C.F.R. § 208.1 and §1208.1, currently enjoined).

Taken as a whole, the December 2020 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 standards also are explicit in their attempt to extinguish the possibility of bringing gender-based claims.

Protection under the Convention Against Torture (CAT) Casebook pages 390-410

This casebook Update is not intended to capture every published decision relevant to claims for protection, 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 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." [Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment](#) (CAT) art 1, § 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

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. As Jeffrey Chase [noted](#) in his blog post on the case, the Attorney General’s decision does not establish new precedent, but was intended to send a message that IJs and BIA members do not have discretion to grant CAT relief, 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.” CAT art. 1, § 1, Dec. 10, 1984, 1465 U.N.T.S. 85. 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). 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”; 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.

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 Court ultimately granted the CAT claim and remanded back to the BIA to grant deferral of removal.

In July 2020, the Attorney General vacated the Board’s 2019 decision and remanded the case. See [Matter of O-F-A-S-](#), 28 I. & N. Dec. 35 (A.G. 2020). The Attorney General ruled that the use of two standards – “under color of law,” and “rogue official” – had caused confusion, and that only the former standard should be applied in the adjudication of CAT claims. According to the decision, the “key determinant” of whether an individual is acting under color of law is “whether the actor, at the time in question, purposes to act in an official capacity.” *Id.* at 39. The decision also clarified that there is no distinction between low-level and high-level officials for purposes of the “official capacity” requirement.

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.

Two circuit court decisions rendered in 2021 demonstrate the opposing trends of an expansive versus a restrictive interpretation of “political opinion.” The expansive approach is illustrated by the Ninth Circuit decision [Rodriguez-Tornes v. Garland](#), No. 19-71104 (9th Cir. Apr. 15, 2021). The Mexican petitioner in *Rodriguez-Tornes* had suffered a lifetime of abuse – first by her husband, and then by her partner.

Throughout her relationships she had expressed the belief that there should be “equality between men and women.” Her expression of resistance was met with increased violent abuse. The BIA held that Ms. Rodriguez-Tornes had failed to prove that she had been persecuted on account of her political opinion. The Ninth Circuit reversed, citing approvingly the Third Circuit’s ruling in [Fatin v. INS](#), 12 F.3d 1233, 1342 (3d Cir. 1993) that there is “little doubt that feminism qualifies as a political opinion,” and she was abused precisely because of her assertion of equality. The Ninth Circuit elaborated on its expansive conceptualization of political opinion, observing that it had “held repeatedly that political opinions ‘encompass [] more than electoral politics or formal political ideology or action’” and that there was no need for her to “engage in feminist ‘electoral’ activities,” or to “espouse political theory” in order to have a recognizable political opinion.

The broad conceptualization of political opinion in *Rodriguez-Tornes* stands in stark contrast to the Second Circuit’s decision in [Zelaya-Moreno v. Wilkinson](#), No. 17-2284 (2d Cir. Feb. 26, 2021). The Salvadoran petitioner, Douglas Adrian Zelaya-Moreno, had been threatened and beaten by gangs for his refusal to join. On the first occasion, he was told his choices were to join or leave town, and when he refused to join because he thought that gangs were bad for “his town and his country,” he was beaten.

Two months later, uniformed police officers beat him, forced him into their vehicle, and transported him to a house occupied by gang members. He again refused to join, repeating his opinion about the negative influence of gangs. In response, the gang members slammed him to the concrete floor, fracturing his arm. He was subsequently threatened with death by the gangs, and shortly thereafter decided to leave El Salvador.

The Second Circuit Court of Appeals affirmed the BIA’s ruling that Zelaya-Moreno’s anti-gang opinion was not a political opinion within the meaning of the statute. It justified this conclusion stating that “gangs are criminal organizations and. . . gang activities are not political in nature.” The Second Circuit’s *Zelaya-Moreno* decision portrays an impoverished view of what constitutes a political opinion. It is unclear from the decision if the record contained evidence demonstrating that the gangs in El Salvador have “[transformed into what are referred to as third generation](#)

gangs, characterized by participation in transnational criminal operations, and the imposition of territorial control supplanting state authority” (emphasis added).

Relevance of Enjoined December 2020 Regulation to Political Opinion

The December 2020 Regulation attempted to dramatically limit the meaning of political opinion. See [85 Fed. Reg. 80,274, 80,385, 80,394](#) (Dec. 11, 2020) (was to be codified at 8 C.F.R. § 208.1(d) and §1208.1(d), currently enjoined). As written, the regulation 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 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 a discrete cause related to political control of a state or a unit thereof.”) Second, the December 2020 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

During the Trump administration, Attorneys General Sessions and Barr certified three particular social group (PSG) cases to themselves, pursuant to their authority under 8 CFR 1003.1(h)(1)(i)-(iii), and issued decisions attempting to dramatically curtail the use of the PSG ground in claims for protection. The three cases are *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019) ([L-E-A- II](#)), and *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) ([A-B- I](#)), and [Matter of A-C-A-A-](#), 28 I & N Dec. 84 (A.G. 2020). *L-E-A-* addressed family as a PSG, and was especially relevant in cases involving fear of gangs, where targeting is often motivated by family relationships. *A-B- I*, which was briefly discussed in Chapter 5, limited PSG claims arising out of domestic violence. A second decision in *A-B-*, referred to as [A-B- II](#), was focused more on nexus than the definition of PSG. See *Matter of A-B-*, 28 I. & N. Dec. 199 (A.G. 2021), while *Matter of A-C-A-A-* attempted to make it more difficult to establish nexus in cases involving harm inflicted by family members. It also directed the BIA to review every element of a claim on appeal, and not to rely on DHS stipulations.

On June 16, Attorney General Merrick Garland responded to a call by advocates to use his authority to vacate *Matter of A-B-I* and *A-B-II*, *Matter of L-E-A-*, and *Matter of A-C-A-A-*. See *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) ([A-B- III](#)), *Matter of L-E-A-*, 28 I & N Dec. 304 (A.G. 2021) ([L-E-A- III](#)) and [Matter of A-C-A-A-](#), 28 I&N Dec. 351 (A.G. 2021).

AG Garland’s decision to vacate these cases was related to the Biden administration’s commitment to addressing the issues raised in these decisions. During his presidential campaign, Joe Biden [committed](#) to restoring “asylum protections...for domestic violence and sexual violence survivors[.]” His February 2 Regional Framework EO directed the Attorney General and the Secretary of DHS to “conduct a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims and

determinations of refugee status to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards[.]” See [Executive Order 14010](#), 86 Fed. Reg. 8,267, § 4(c)(i) (Feb. 2, 2021). That review was to be completed within 180 days, and 90 days after that, the agencies were to “promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a ‘particular social group’” as the term is used in U.S. law, “as derived from the 1951 Convention relation to the Status of Refugees and its 1967 Protocol.” *Id.* at § 4(c)(ii).

Below is an overview and discussion of principal cases and developments impacting the PSG definition.

Chapter 9 - Persecution Based on Membership in a Particular Social Group

Matter of L-E-A

L-E-A- I (BIA Decision)

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 his membership in a PSG, arguing that he was targeted on account of his membership in the PSG of his father’s family.

The IJ denied asylum, withholding and CAT 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) ([L-E-A- I](#)).

L-E-A- II (Trump-era Attorney General Decision)

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 Attorney General 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) ([L-E-A- II](#)). He relied heavily on the requirements of social distinction and particularity, finding that ordinary families (in contrast to “famous ones”) are not recognized by society at large (social distinction) and that because families can include “fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others” they did not have clear benchmarks and thus lacked particularity.

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-*](#).” The USCIS document emphasized 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

critiques were issued in the immediate aftermath of the decision; see, for example, [*Matter of L-E-A: Attorney General Overrules Finding of Family as a Social Group*](#), which appeared in the Harvard Law Review.

The Vacatur of *L-E-A- II*

As noted above, Attorney General Merrick Garland vacated *Matter of L-E-A- II*, the decision of his predecessor William Barr. See [*L-E-A- III*](#). AG Garland’s decision notes that President Biden directed DHS and DOJ to promulgate regulations “addressing the circumstances in which a person should be considered a member of a ‘particular social group.’” The decision cites to the precedent of prior Attorneys General vacating decisions “in light of pending or future rulemaking” and considers that the appropriate path. In vacating *L-E-A- II*, Garland observes that the decision itself acknowledged its conflict with “several courts of appeals that have recognized families as particular social groups” and notes that it is preferable to address “complex” legal issues of “great importance” through the rule-making process since it provides the opportunity for all “interested parties” to participate. AG Garland did not vacate *L-E-A- I*, which did not have to do with PSG definition, but more with the determination of nexus.

Chapter 10 - Gender-Related Claims to Refugee Status

Chapter 10 provides an overview of the controversy surrounding claims for protection arising from domestic violence. After years of controversy, in 2014, the BIA issued a precedent decision, [*Matter of A-R-C-G-*](#) (Casebook, p. 814) accepting that a successful claim could be premised on domestic violence, and finding that “married women in Guatemala unable to leave the relationship” was a cognizable social group. 26 I&N Dec. 388 (BIA 2014). *A-B-I* vacated *A-R-C-G-*, making it much more difficult to prove asylum eligibility in cases involving domestic violence; *A-B- II* expanded and elaborated on aspects of *A-B- I*; and *A-C-A-A-* relied upon and reaffirmed the *A-B-* decisions. Attorney General Garland vacated all three decisions. The following is an overview of developments.

1) *Matter of A-B-I*

Matter of A-B- vacated *A-R-C-G-*, stating that the BIA had not carried out the required in-depth analysis in its opinion. See *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) ([*A-B-I*](#)) The decision included sweeping statements throwing doubt on the viability of domestic violence and fear of gang claims (e.g., “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum”). *Id.* at 320. Although it did not purport to change the applicable legal standards or framework, it expressed skepticism that the asylum requirements can be met in a case involving domestic violence:

-The decision questioned the viability of PSGs which included the characteristic of “unable to leave,” suggesting they are defined by the harm, and lack social distinction and particularity. *Id.* at 343.

-It raised doubts about nexus, stating that domestic violence is generally motivated by the “preexisting personal relationship” rather than a protected ground. *Id.* at 339.

-It attempted to increase the burden for showing the government is unable or unwilling to protect (the requirement in cases involving non-state actors) by restating the standard as “completely helpless” for unable and “condoning” for unwilling. *Id.* at 337.

2) *Matter of A-B-II*

The *A-B- I* decision remanded the case to the IJ, who denied, as did the BIA on appeal. The case was pending at the Fourth Circuit Court of Appeals when Acting Attorney General Rosen issued a second decision in Ms. A.B.’s case, *A-B- II*. *Matter of A-B-*, 28 I. & N. Dec. 199 (A.G. 2021) ([*A-B-II*](#)). This decision did not elaborate on the PSG analysis, but addressed state protection and nexus. It stated that the completely helpless/condoned standard was not a heightened burden, and it set forth a two-part nexus test requiring that the protected ground 1) be a but-for cause of the persecution, and 2) not be incidental or tangential to another reason for the harm. The Attorney General remanded the case to the BIA for a decision consistent with the holding, effectively removing it from the Fourth Circuit’s docket.

The Vacatur of the *A-B-* Decisions

As with his ruling in *Matter of L-E-A*, Attorney General Garland referenced Biden’s EO and directive for the promulgation of regulations on the issues implicated in *A-B-I* and *A-B- II*, and concluded that rule-making was the more appropriate approach to answering questions addressed in the two *A-B-* decisions. However, as the Attorney General had done in *L-E-A-*, he flagged several problematic aspects to the *A-B-* decisions. He noted that *A-B- I*’s language that “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum” could “be read to create a strong presumption against asylum claims based on private conduct,” and could discourage “careful case-by-case adjudication of asylum claims.” *Matter of A-B-*, 28 I&N Dec. 307, 309 (A.G. 2021) ([*A-B- III*](#)). Attorney General Garland’s decision also pointed to the confusion arising from the standard to be used in determining the failure of state protection.

A little more than a month after the Attorney General’s vacatur of the *A-B-* decisions, DHS joined in a motion by Ms. A-B-’s attorneys to request that the BIA grant her asylum. A grant was issued on July 14, 2021.

3) *Matter of A-C-A-A- (I)*

The Salvadoran asylum seeker in *A-C-A-A-* claimed persecution by her parents and her former partner on the basis of her membership in the particular social group of “Salvadoran females.” *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) ([*A-C-A-A- I*](#)). The BIA affirmed the immigration judge conclusion that she had suffered past persecution on account of her gender-defined PSG. On certification, Attorney General Barr vacated the grant and reaffirmed the assertion made in

A-B-I – namely that in cases where there is a personal relationship, it will be difficult to establish nexus to a protected ground. Contrary to long-standing precedent, Barr’s decision also prohibited the BIA from relying on stipulations made by the parties and directed it to review every element of the asylum definition – even those which were not contested by the government.

4) *Matter of A-C-A-A- (II)*

On certification, A.G. Garland vacated his predecessor’s decision, noting that he had previously vacated *A-B-I*, *A-B- II*, and *L-E-A- II* – all of which were relied upon to some degree by Barr in his ruling. *Matter of A-C-A-A-*, 28 I&N Dec. 351 (A.G. 2021) ([*A-C-A-A- II*](#)). Garland also stated that *A-C-A-A-* merited vacatur because its prohibition on stipulations and its requirement that every element of a claim be reviewed was a departure from “long-standing practice,” and ran counter to regulations which “expressly contemplate” the narrowing of issues, including by entering into stipulations. *Id.* at 352. The A.G. remanded the case to the BIA.

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

Since the Attorney General’s 2018 decision in *Matter of A-B-*, and prior to Attorney General Garland’s vacatur, there have been decisions which have adopted its reasoning, and others that have rejected it or found it to not foreclose all similar claims. Examples of cases which have adopted it are [*Amezcu-Preciado v. U.S. Attorney General*](#), 943 F.3d 1337 (11th Cir. 2019) (rejecting a PSG of “women in Mexico who cannot leave domestic relationships”); [*Gonzales-Veliz v. Barr*](#), 938 F. 3d 219 (5th Cir. 2019)(finding PSG of “Honduran women unable to leave the relationship” not cognizable); and [*S.E.R.L. v. U.S. Attorney General*](#), 894 F. 3d 535 (3d Cir. 2018) (rejecting a PSG of “immediate family members of Honduran women unable to leave a domestic relationship”).

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

The First Circuit issued a decision, [*De Pena Paniagua v. Barr*](#), 957 F.3d 88 (1st Cir. 2020), in which the proffered 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.” *Id.* at 11. 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 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, opining that a PSG defined by those characteristics should meet the criteria of immutability/social distinction and particularity.

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 Ninth Circuit has issued a number of decisions addressing various aspects of the holding in *Matter of A-B-*. In [*Diaz-Reynoso v. Barr*](#), 968 F. 3d 1070 (9th Cir. 2020) the Ninth Circuit ruled that *A-B-* does not categorically preclude domestic violence claims or PSGs defined by an inability to leave a relationship. In three other decisions, the Ninth Circuit remanded cases to the BIA to consider whether a cognizable social group could be based on nationality and gender alone. See [*Torres Valdivia v. Barr*](#), 777 F.App’x 251, 253 (9th Cir. 2019) (remanding where BIA failed to provide adequate reasons why “all women in Mexico” are not cognizable); [*Silvestre-Mendoza v. Sessions*](#), 729 F. App’x 410, 410 (9th Cir. 2018) (remanding for consideration of “Guatemalan women”); [*Ticas-Guillen v. Whitaker*](#), 744 F. App’x 410, 410 (9th Cir. 2018)(“Under our law, gender and nationality can form a particular social group.”).

Relevance of Enjoined December 2020 Regulation to PSG Claims

The December 2020 Regulation is in the spirit of the Trump-era decisions in *Matter of L-E-A-* and *Matter of A-B-*, which dramatically cut back on the viability of PSG claims. However, the December 2020 Regulation attempted to go much further. See [85 Fed. Reg. 80,274, 80,385, 80,394](#) (Dec. 11, 2020) (was to be codified at 8 C.F.R. §208.1(c) and §1208.1(c), currently enjoined). 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;”
- 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.

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 “persecution 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 accepts that there can be an exception from the persecutor bar upon a showing of duress. It sets a high threshold, requiring, 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).

The Attorney General certified the BIA’s decision to itself, and held in *Matter of Negusie*, 28 I&N 120 (A.G. 2020) that the “persecutor bar does not include an exception for coercion or duress.” *Id.* at 121. The decision also rejected the BIA’s holding as to the evidentiary burden. The BIA had held that the initial burden is on DHS to put forth evidence that shows assistance or participation in persecution, and then the burden shifts to the non-citizen to show by a preponderance of evidence that the bar does not apply. The Attorney General’s decision states that DHS does not have an evidentiary burden; if the evidence in the record shows that the bar may apply, the non-citizen has the burden to show it does not.

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.

Biden Administration Delays Implementation of Rule Expanding Danger to National Security Bar

On December 23, 2020, the Trump administration published a final rule, [Security Bars and Processing](#), 85 Fed. Reg. 84,160 (Dec. 23, 2020), which was to take effect on Jan. 22, 2021. The Biden administration initially [delayed](#) implementation of the rule to March 22, 2021, and then extended the date to Dec. 31, 2021.

The rule would expand the application of the danger to national security bar to purported public health concerns relating to the COVID 19-pandemic. It 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 United States and, thus, ineligible to be granted asylum or withholding of removal;
- 2) Make the danger to national security bars to asylum and withholding applicable at the credible fear screening stage;

As with the CDC COVID-19 border closure order (discussed *supra* in the Update to Chapter 2), this rule sought to use the pandemic as a pretext for denying asylum and related protection. For a critique of this rule, see Scott Roehm’s [piece](#), “Trump’s Latest Assault on Asylum Has Nothing to Do with National Security or Public Health.”

In delaying the implementation of the *Security Bars and Processing* Rule, the Biden administration [noted](#) that the rule was “premised upon, and reliant upon,” the “Global Asylum” rule (referred to in Chapter 2 as the “death to asylum” rule) which had been enjoined on January 8, 2021 by the court in *Pangea Legal Services v. Department of Homeland Security*.

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, [Canadian Council for Refugees v. Canada](#), 2020 FC 770, 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, finding it contrary to 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 six months to allow the Parliament to respond.

The Canadian government appealed the Federal Court’s decision and on April 15, 2021, in [Canada \(Citizenship and Immigration\) v. Canadian Council for Refugees](#), 2021 FCA 72, the Federal Court of Appeal set aside the lower court’s decision striking down the agreement as unconstitutional. The court ruled that the Federal Court’s decision was flawed because it drew systemic conclusions from evidence of individual incidents, because it applied Canadian standards to foreign legal systems, and because it ignored powers and discretions that could alleviate the harsh effects on refugee claimants. *Id.* at ¶ 138, 146, 155, 43, 45. The Canadian Association of Refugee Lawyers, [called the decision](#) a “step backwards for human rights,” and criticized the decision as being based on technicalities.

Asylum Cooperative Agreements (ACAs) with Guatemala, El Salvador, and Honduras

The United States entered into purported Safe Third Country Agreements (called “Asylum Cooperative Agreements”) with Guatemala, El Salvador, and Honduras during the Trump administration, and a legal challenge thereto is discussed in the Update to Chapter 2, *supra*.

As noted in Chapter 2, in his February 2, 2021 Regional Framework EO, President Biden asked the Attorney General and Secretary of Homeland Security to review and determine whether to rescind the rule promulgating the ACAs. See [Executive Order 14010](#), 86 Fed. Reg. 8,267, § 4(a)(ii)(D) (Feb. 2, 2021). A few days later, the State Department [announced](#) that the United States had suspended and initiated the process to terminate the ACAs with all three countries. Although the interim final rule remains in effect, EOIR [rescinded](#) the implementing policy memorandum for the rule on May 14, 2021, stating that it was “unnecessary” when the ACAs were no longer in effect.

[U.T. v. Barr](#), which challenges the interim final rule, USCIS guidance to Asylum Officers on its implementation with Guatemala, and the United States’ categorical designation of Guatemala as a “safe” third country, was filed in the D.C. District Court in January 2020. See No. 1:20-cv-00116-EGS (D.D.C. Jan. 15, 2020) (complaint). Due to the termination of the ACAs by the Biden administration, the proceedings were [placed in abeyance](#) on February 22, 2021. The proceedings are currently stayed while the Biden administration reviews the challenged rule. In May 2021, the parties [made arrangements](#) for the six plaintiffs in the case to return to the United States to apply for asylum, so any future litigation would be limited to addressing the prospective application of the rule and its associated guidance.

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 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).

Entering between ports of entry

As discussed in the Update for Chapter 2, *supra*, 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. No. 18-cv-06810-JST (N.D. Cal. 2018) (TRO). 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. *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274, 18-17436 (9th Cir. 2020).

President Biden [revoked](#) the proclamation upon which the rule was based, EOIR [rescinded](#) the Ninth Circuit’s implementing policy memo on May 14, 2021, and the [Unified Regulatory Agenda](#) indicates that DHS and DOJ are “modifying or rescinding” the rule. However, the Ninth Circuit Court of Appeals held in an [amended opinion](#) on March 24, 2021 that the case is not moot.

Transit Ban

As discussed in the Update for Chapter 2, in July 2019, the Trump administration published a joint interim final rule, [Asylum Eligibility and Procedural Modifications](#), 84 Fed. Reg. 33,829 (Jul. 16, 2019), known as the Transit Ban or Asylum Ban 2.0. It issued a [final version](#) of the rule on December 17, 2020. The rule sought 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. It did this by barring asylum to anyone who transited a third country *en route* to the southern border of the United States unless they (a) applied for protection from persecution or torture in a third country

and received a final judgment denying such protection; or (b) qualified under the regulatory definition as a “victim[] of a severe form of trafficking.” 85 Fed. Reg. 82,260 (Dec. 17, 2020) (to be codified at 8 C.F.R. § 208.13 and 8 C.F.R. § 1208.13).³ Plaintiffs brought cases in two jurisdictions, and the litigation was successful, with the Transit Ban being preliminarily enjoined in one jurisdiction, and vacated by another. Details of the litigation appear below; the procedural history of the challenge in the Ninth Circuit involved multiple decisions, going up to the Supreme Court.

Ninth Circuit Litigation

In *East Bay Sanctuary Covenant v. Barr*, brought in the Northern District of California, Judge Tigar initially issued a [nationwide injunction](#). See No. 19-cv-04073-JST (N.D. Cal. July 24, 2019) (order granting preliminary injunction). The Ninth Circuit [limited the injunction](#) to California and Arizona but allowed the district court to consider additional evidence. See No. 19-16487 (9th Cir. Aug. 16, 2019) (order limiting preliminary injunction). After Plaintiffs supplemented the record, Judge Tigar [restored](#) the nationwide injunction. See No. 19-cv-04073-JST (N.D. Cal. Sept. 9, 2019) (order restoring nationwide preliminary injunction). The Trump administration requested that the Supreme Court stay the injunction, and the Court [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. See *Barr v. E. Bay Sanctuary Covenant*, 140 S.Ct. 3 (Mem) (2019).

On July 6, 2020, 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). The final version of the Transit Ban rule was promulgated on December 17, 2020, and Judge Tigar [granted a preliminary injunction](#) against it on February 16, 2021. See No. 19-cv-04073-JST (N.D. Cal. Feb. 16, 2021) (order granting preliminary injunction). The Ninth Circuit [amended its prior order](#) to uphold the preliminary injunction as applied to the four states along the U.S.-Mexico border on April 8, 2021. In the meantime, the District Court granted the parties’ [joint motion to stay](#) the proceedings until the Attorney General and the Secretary of Homeland Security finished its review of the rule, as called for in Biden’s February [Executive Order](#). See [Executive Order 14010](#), 86 Fed. Reg. 8,267, § 4(a)(ii)(C) (Feb. 2, 2021). Documents from and updates on the status of the litigation can be found [here](#).

District of Columbia Circuit Litigation

Two cases, [I.A. v. Barr](#) and [Capital Area Immigrants’ Rights \(CAIR\) Coalition v. Trump](#), challenged the Transit Ban in the District of Columbia. See *I.A. v. Barr*, No. 1:19-cv-02530, 2019 WL 3945577 (D.D.C. Aug. 21, 2019); *CAIR Coal. v. Trump*, 471 F.Supp.3d 25 (D.D.C. 2020). These cases were

³ A third exception exists for individuals who did not transit through any country that is 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.

related before Judge Timothy Kelly. On June 30, 2020, Judge Kelly granted Plaintiffs' motions for summary judgment and vacated the rule. [CAIR Coal. v. Trump](#), 471 F.Supp.3d 25 (D.D.C. 2020).

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

Note 5 on page 965 of the Casebook mentions [Matter of A-G-G-](#), 25 I&N Dec. 486 (BIA 2011). *A-G-G-* set forth a framework for determining firm resettlement. First, DHS has the burden of putting forth prima facie evidence of an offer of firm resettlement, by direct or indirect evidence. Direct evidence could include proof of "refugee status, a passport, a travel document, or other evidence indicative of permanent residence." *Id.* at 502. Indirect evidence could include "the immigration laws or refugee process of the country of proposed resettlement; the length of . . . stay in a third country; the . . . intent to settle in the country; family ties and business or property connections; the extent of social and economic ties developed. . . in the country; the receipt of government benefits or assistance, such as assistance for rent, food, and transportation; and whether the [noncitizen] had legal rights normally given to people who have some official status, such as the right to work and enter or exist the country." *Id.*

After DHS presents prima facie evidence, the burden shifts to the applicant to rebut by a preponderance that no offer of residency was made, or that the person's circumstances would have rendered them ineligible for such an offer. A presumption of resettlement cannot be rebutted by an individual's *refusal* to accept an offer of firm resettlement.

A totality of circumstances test is then applied to determine whether the applicant was firmly resettled, and if they were, then the burden would be on them to show that they come within one of the two regulatory exemptions (the regulation appears on p. 953 of the Casebook): 1) entry into the country was solely as a "necessary consequence" of flight, or 2) conditions of residence were "so substantially and consciously restricted by the authority of the country of refuge" that the person was not in fact resettled.

The Ninth Circuit's decision [Arrey v. Barr](#), 916 F. 3d 1149 (9th Cir. 2019) is instructive for its holding regarding safety in the country of potential firm resettlement. The petitioner, Delphine Arrey, was born in Cameroon, where she suffered decades of physical and sexual abuse. She fled to South Africa, where she was granted refugee status. In the seven years that she lived in South Africa, she was robbed and assaulted, and her brother was shot and killed there. Ms. Arrey returned to Cameroon so she could bury her brother in his country of birth, and then traveled through Nigeria and, eventually, Mexico to arrive in the United States where she sought protection. The BIA held that she had been firmly resettled in South Africa because of her refugee status, but the Ninth Circuit ruled that her past persecution in South Africa showed she would not be safe there, evidence sufficient to rebut the firm resettlement presumption because "firmly resettled aliens are by definition no longer subject to persecution." *Id.* at 20.

Relevance of Enjoined December 2020 Regulation to Firm Resettlement

The December 2020 Regulation attempted to define firm resettlement much more broadly 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. See [85 Fed. Reg. 80,274, 80,388, 80,397](#) (Dec. 11, 2020) (was to be codified at 8 C.F.R. §208.15, §1208.15, currently enjoined). It also would have provided that the firm resettlement of a parent or parents with whom a child was residing at the time of the application 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. 69,640 (Dec. 19, 2019). The final version of this rule was published on October 21, 2020, with an effective date of November 20, 2020. See [85 Fed. Reg. 67,202](#) (Oct. 21, 2020). However, on November 19, 2020, Judge Illston in the Northern District of California [issued a TRO](#) against the final rule. See *Pangea Legal Serv. v. U.S. Dept. Homeland Sec.*, No. 20-cv-07721-SI (N.D. Cal. Nov. 19, 2020). Five days later, Judge Illston converted the TRO into a [preliminary injunction](#) against DHS and DOJ. The rule remains enjoined, and the government's appeal at the 9th Circuit remains in abeyance while the rule is under review. See [Pangea Legal Serv. v. U.S. Dept. of Homeland Sec.](#), No. 20-17490 (9th Cir. Apr. 26, 2021). The 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;
- 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](#).

Relevance of Enjoined December 2020 Regulation to “Discretionary” Denials of Asylum.

While not technically bars to asylum, as cited and discussed in the Update to Chapter 3, *supra*, the December 2020 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].” See [85 Fed. Reg. 80,274, 80,388, 80,397](#) (Dec. 11, 2020) (was to be codified at 8 C.F.R. §208.13, §1208.13, currently enjoined). The 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.” *Id.* 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 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 enjoined December 2020 Regulation proposed to codify the rule that IJs may pretermite 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. See [85 Fed. Reg. 80,274, 80,397](#) (Dec. 11, 2020) (was to be codified at 8 C.F.R. § 1208.13, currently enjoined).

Additional Procedural Hurdles for Asylum Seekers Before the Immigration Courts and the BIA

Under the Trump administration, several regulations were introduced which limited asylum seekers' procedural due process rights in removal proceedings, both before the Immigration Courts and the Board.

For example, in November 2020, the Trump administration introduced a notice of proposed rulemaking, *Good Cause for a Continuance in Immigration Proceedings*, [85 Fed. Reg. 75,925](#) (Nov. 27, 2020), which would have limited individuals' ability to obtain continuances of their hearings—an integral step toward being able to adequately present their claims and find legal counsel. To date, this rule has not been finalized.

Another rule, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, [85 Fed. Reg. 81,588](#) (Dec. 16, 2020), took effect January 15, 2021. Citing the pretext of efficiency, this rule created significant new hurdles for asylum applicants and their representatives. Among other changes, it shortened briefing schedules and/or required simultaneous briefing; reduced and/or prohibited extensions; limited facts that the BIA could consider and its ability to remand cases; restricted the Board from *sua sponte* remanding for additional fact-finding; and upended the BIA's appellate function by allowing an IJ to dispute the BIA's decision and request that the EOIR Director review it. This rule also codified [Matter of Castro-Tum](#), 27 I&N Dec. 271 (A.G. 2018), which had eliminated "administrative closure," a tool that enabled Immigration Courts to manage their dockets, address the substantial backlog of cases facing them, and prioritize certain cases over others. This rule was enjoined in March 2021. See [Centro Legal de la Raza v. EOIR](#), No. 21-CV-00463-SI, 2021 WL 916804 (N.D. Cal. Mar. 10, 2021). Subsequently, Attorney General Garland issued a decision overruling *Matter of Castro-Tum* and making clear that administrative closure is once again a tool that Immigration Judges may use going forward. See [Matter of Cruz-Valdez](#), 28 I&N Dec. 326 (A.G. 2021).

Trump 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 at the BIA and the Immigration Courts. The Trump administration 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 Trump 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 by the courts of appeal. 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 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). The current list of BIA members is available [here](#).

In April 2020, the Trump 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), 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. AILA and others have voiced concerns about the hiring process, 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, and the increasing politicization of the Board. See further discussion of the Immigration Courts and the Board, and calls for reform of these bodies, *infra* in this Update.

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) from Lebanon 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 offenses.

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. On remand from the Supreme Court, the Eleventh Circuit denied Mr. Nasrallah's petition for review, finding that substantial evidence supported the BIA's determination that he was not more likely than not to be tortured if returned to Lebanon. See [Nasrallah v. U.S. Att'y Gen.](#), 824 F. App'x 667, 670 (11th Cir. 2020).

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 those who had not lacked such safeguards. And, on page 1014, the Casebook raises the question of whether the Illegal 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."

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 feet⁴ 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 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 further analysis and critique, see Aditi Shah’s commentary in Lawfare, [“The Supreme Court Rules against Judicial Review of Expedited Removal.”](#)

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 who do not have attorneys representing them in their removal proceedings. They have helped *pro se* individuals 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](#) 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 was to protect “the integrity of immigration court proceedings” and individuals in such proceedings, this memo was roundly criticized as limiting

⁴ The majority decision notes that Mr. Thuraissigiam was apprehended within 25 yards from the border.

access to information and increasing inefficiency in the Immigration Courts. One critique by a former IJ is available [here](#).

The Trump Administration subsequently issued a proposed rule, *Professional Conduct for Practitioners-Rules and Procedures, and Representation and Appearances*, [85 Fed. Reg. 61,640](#) (Sept. 30, 2020), which would have limited the scope and nature of permissible services representatives could provide to *pro se* respondents and disincentivized attorneys and others from providing limited scope legal assistance, though it was not finalized. For more information on the proposed rule and a detailed critique, see the ILRC's [comment](#).

Border Policies

As noted previously, a number of the policies outlined in the Update to Chapter 2, including metering, MPP, HARP, PACR, and closing the border under Title 42, significantly limited access to legal representation for asylum seekers. See the Update to Chapter 2 for more information on these policies and their current status.

MPP in particular has had grave consequences for asylum seekers' ability to obtain and access legal counsel, both by requiring asylum seekers to return to Mexico and requiring that their claims be adjudicated via video teleconference (VTC) in "tent courts." Tent court adjudication significantly impeded individuals' access to counsel and raised other 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](#).

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), the interviews which determined whether they could be sent back to Mexico. 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, [Doe v. Wolf](#), 424 F. Supp. 3d 1028 (S.D. Cal. 2020). On July 19, 2021, citing the Biden Administration's termination of MPP and the Supreme Court's disposition of *Mayorkas v. Innovation Law Lab* (discussed *supra* in the Update to Chapter 2), the Ninth Circuit remanded the government's appeal to the District Court with instructions to vacate the preliminary injunction order as moot. [Doe v. Mayorkas](#), No. 20-55279, 2021 WL 3039419 (9th Cir. July 19, 2021).

Presidential Memorandum to Expand Access to Representation

In May 2021, President Biden signed a Presidential Memorandum, *Restoring the Department of Justice's Access-to-Justice Function and Reinvigorating the White House Legal Aid Interagency*

Roundtable, [86 Fed. Reg. 27,793](#) (May 21, 2021), which, among other things, instructed the Attorney General to submit a plan to expand the Department of Justice’s [access-to-justice](#) initiative (which had been shut down under the Trump Administration) and to convene the White House Legal Aid Interagency Roundtable. While it is still too early to tell, these initiatives could potentially result in increased access to legal representation for asylum seekers and other immigrants, including unaccompanied children who are specifically mentioned in the [White House’s press release](#).

Dedicated Docket

The Biden Administration has announced a new process, termed the “[Dedicated Docket](#),” to fast-track the Immigration Court cases of certain families apprehended between ports of entry after May 28, 2021, and placed in Immigration Court proceedings in eleven cities in the United States. Prior administrations’ fast-track programs, which also sought to address the significant backlog of cases pending in Immigration Courts, were widely criticized for sacrificing due process in the interest of speedy adjudication. According to the Biden Administration, the Dedicated Docket will seek to encourage, but not require, Immigration Judges to issue a decision within 300 days of an initial master calendar hearing, while still promoting fairness in adjudication. This program has yet to be implemented, but many advocates fear that—among other concerns—individuals processed on the Dedicated Docket will face an even more onerous battle in securing legal representation than they would otherwise, given the expedited time-frame and limited capacity of legal service providers.

Detention of Asylum Seekers **Casebook pages 1037-1057**

While policies such as MPP and the CDC border closure have refused entry to many asylum seekers, those permitted to enter the United States have also faced a changing landscape relating to detention. The following are a collection of notable developments in this area.

Family Case Management Program and Other Alternatives to Detention

More information on the Family Case Management Program, described in Professor Marouf’s article beginning on Casebook page 1049, is available [here](#). This program was terminated by the Trump Administration in June 2017, as described [here](#).

President Biden committed in his immigration campaign platform and the [U.S. Citizenship Act of 2021](#) to restoring the Family Case Management Program, seeking to increase the use of other alternatives to detention, and decreasing the use of private detention facilities. However, while the overall numbers of detained immigrants in the United States remain well below the peaks recorded during the Trump Administration, the Biden Administration has detained [increasing numbers](#) of individuals, including in private facilities, since taking office. For more information on the Biden Administration’s enforcement priorities and detention practices, see the American Immigration Council’s May 2021 [report](#).

Detention of Pregnant, Postpartum, and Nursing Women

Under the Trump Administration, 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](#). In July 2021, the Biden Administration reversed course, announcing a [new policy](#) against detaining pregnant, postpartum, or nursing individuals unless legally prohibited or in the event of exceptional circumstances.

Family Separation under the Trump Administration

Responding to reports of family separation, on February 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 Attorney General Sessions's May 2018 call for "zero tolerance" towards unlawful entry at the southern border. The zero-tolerance [memo](#) 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](#).

Another lawsuit relating to family separation was filed in the U.S. District Court for the District of Arizona in early 2020. In *A.P.F. v. United States*, six asylum-seeking families subjected to family separation have [sued](#) the government for damages based on intentional infliction of emotional distress, negligence, and loss of consortium. 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 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. In July 2020, the government released a [plan](#) for reunification. Despite the work of advocates in reuniting families, and the Biden Administration's creation of a Task Force on family separation, as of April 2021 hundreds of families were known to still be separated, while countless others were deported without being counted in official tallies. Advocates continue to work toward reunifying the

separated families and prevent future separations. For more information, see [this blog post](#) by Lee Gelernt of the ACLU. Worryingly, there is also potential for further family separation under the guise of the COVID-19 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. While the Biden Administration has appeared more supportive of the LOP than its predecessor, advocates have nevertheless [voiced concerns](#) about its support of and approach to the program.

The Release of Asylum Seekers Who Have Established a Credible Fear

The Trump Administration limited 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, of the U.S. District Court for the 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). Unlike in the Supreme Court’s decision in *Thuraissigiam*, the Ninth Circuit 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. However, the Supreme Court later reversed and remanded in light of *Thuraissigiam*. *ICE v. Padilla*, 141 S. Ct. 1041 (2021). More information is available [here](#).

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.

Updated ICE Detention Guidelines

In December 2019, ICE released [new guidelines](#) on detention standards for its facilities. The ACLU has provided a detailed [summary](#) 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. And reports of mistreatment of immigrant detainees and substandard detention conditions have continued, as summarized by the Brennan Center [here](#). In 2019 – even prior to the pandemic – [ICE reported](#) that 9 people died in its custody, and advocacy groups have [linked](#) such deaths to violations of medical standards.

The COVID-19 pandemic has only increased concerns relating to poor and unsafe conditions for immigrant detainees. As of March 23, 2021, ICE reported that more than 10,000 people had tested positive for COVID-19 at 127 different facilities. However, the Vera Institute of Justice estimates that the true number of infections among immigrant detainees is much higher, as described in [this April 2021 report](#). Many detained immigrants have [died](#) from complications related to COVID-19 while in, or shortly upon being released from, ICE custody.

Detention Policy Changes Resulting From the Coronavirus Pandemic

Pandemic-related health concerns have caused advocates to call for changes to 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. Information on litigation efforts relating to COVID-19 related release of detainees can be found [here](#).

One particularly worrisome development has been 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 Trump 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. However, litigation to enforce this order, as well as to release families from other immigration detention facilities, has been ongoing.

Related to the *Flores* settlement, beginning around the summer of 2020, the government also began detaining unaccompanied children prior to expelling them from the United States pursuant to Title 42 in private hotels, and in ORR custody much longer than permitted under the *Flores* settlement. *Flores* counsel moved to enforce the settlement agreement as to these children, and the practice was preliminarily enjoined in September 2020. See [Flores v. Barr](#), No. CV-85-4544-DMG (AGRx), 2020 WL 5491445 (C.D. Cal. Sept. 4, 2020). The Ninth Circuit affirmed in June 2021. [Flores v. Garland](#), No. 20-55951, 2021 WL 2673142 (9th Cir. June 30, 2021).

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

“Stacking” the BIA and Immigration Courts

This section of the Casebook outlines several criticisms of IJ and BIA decision-making. As noted *infra*, the Trump administration “stacked” the BIA with adjudicators biased toward denial of claims. The Biden administration has followed up by hiring many Immigration Judges who had been initially selected by the prior administration, a group consisting mainly of former immigration enforcement officials and other individuals with very little immigration experience, as outlined in [this EOIR announcement](#). Many advocates, scholars, and former adjudicators have criticized the current Administration for failing to “vet” these IJs and voiced concern that these appointments will further degrade the impartiality, quality and fairness of decision-making, as described in this [May 8, 2021 The Hill article](#).

“Performance Metrics,” Including Quotas, on IJs

On January 17, 2018, EOIR issued new [metrics](#) for evaluating the performance of IJs. The standards, which went into effect on October 1, 2018, require judges to complete 700 cases per year, and not have more than 15% 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.”

Increasing Calls for an Independent Court and Other Reforms

Criticisms of the BIA and Immigration Courts and calls for reform have only increased in recent years. One of the principal proposals, furthered by advocates, academics, and former adjudicators alike, has been to establish an independent Immigration Court. Below are several discussions of this and other proposed reforms geared toward restoring independence, impartiality, and greater competence to the adjudication of immigration cases:

- ABA, [2019 Update Report: Reforming the Immigration System](#) (2019);
- AILA, [Policy Brief: Why President Biden Needs to Make Immediate Changes to Rehabilitate the Immigration Courts](#) (Feb. 12, 2021); and
- New York Times Editorial Board, [Immigration Courts Aren’t Real Courts. Time to Change That](#) (May 8, 2021).

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

New Limits on Work Authorization and Reauthorization

In June 2020, the Trump Administration finalized new rules limiting the provision of employment authorization to asylum seekers. *See Removal of 30-Day Processing Provision for Asylum Applicant Related Form I-765 Employment Authorization Applications*, [85 Fed. Reg. 37,502](#) (June 22, 2020); *Asylum Application, Interview, and Employment Authorization for Applicants*, [85 Fed. Reg. 38,532](#) (June 26, 2020). Some of the most significant changes effectuated by these rules were:

- 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;
- 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

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

Exceptions to these bases for ineligibility for employment authorization are extremely limited and, when they exist, onerous for asylum applicants to establish. Two lawsuits have been brought to challenge these rules. In the first, filed in the U.S. District Court for the District of Maryland, plaintiff organizations Casa de Maryland and Asylum Seeker Advocacy Project secured a preliminary injunction preventing the government from applying a subset of the EAD rules to members of those organizations. See [Casa de Maryland, Inc. v. Wolf](#), 486 F. Supp. 3d 928 (D. Md. 2020). A second lawsuit, *AsylumWorks v. Wolf*, filed in the District Court for the District of Columbia, seeks broader invalidation of the rules, and remains pending. More information on this case is available [here](#).

Fees for Asylum Applications and Other Economic Impediments to Protection

In 2020, the Trump Administration introduced new rules that would have substantially impeded access to protection for asylum seekers.

In August 2020, DHS finalized a rule, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, [85 Fed. Reg. 46,788](#) (Aug. 3, 2020), which, in addition to significantly raising fees for other types of immigration applications and asylum seekers' work authorization applications, imposed a new—and unprecedented—\$50 fee to file an asylum application. The only exception would have been for unaccompanied children in removal proceedings. Only three other countries – Iran, Fiji, and Australia – charge fees for asylum applications.

This rule has been enjoined in two different jurisdictions. The first injunction was issued September 29, 2020 in the Northern District of California, just before the rule was set to take effect, and prohibits USCIS from implementing any of the fees, policies, or forms associated with the rule. See [Immigrant Legal Res. Ctr. v. Wolf](#), 491 F. Supp. 3d 520 (N.D. Cal. 2020). A second injunction issued October 8, 2020 in the District of Columbia. See [Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs.](#), 496 F. Supp. 3d 31 (D.D.C. 2020). Accordingly, the rule is not in effect anywhere in the United States. The Biden administration has also signaled its lack of support for this rule in an Executive Order signed February 2, 2021. See Exec. Order No. 14012, [86 Fed. Reg. 8277](#), § 2(a)(ii) (Feb. 2, 2021).

On December 18, 2020, DOJ finalized another rule relating to fees impacting asylum seekers, *Executive Office for Immigration Review; Fee Review*, [85 Fed. Reg. 82,750](#) (Feb. 28, 2020). This rule substantially increased filing fees for BIA appeals, motions to reopen or reconsider, and cancellation of removal applications. For example, it raised the previously \$110 fee for appeals and motions to reopen to \$975 for an appeal of an IJ decision, \$705 for an appeal of a USCIS adjudication, and \$895 for a motion to reopen filed with the BIA. This rule has been mostly enjoined in *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, No. 20-CV-03812

(APM), 2021 WL 184359 (D.D.C. Jan. 18, 2021). Additional information and updates are available [here](#).

Chapter 13 – Proving the Claim

Credibility

Casebook pages 1102 – 1103

[Garland v. Dai](#), 141 S. Ct. 1669 (2021)

In a unanimous decision, the Supreme Court overruled Ninth Circuit precedent holding that a reviewing court must treat as credible and true a person’s testimony absent an explicit adverse credibility finding. This decision was issued in the cases of Ming Dai, who sought asylum from China after authorities targeted him and his wife for violating its one-child policy; and Cesar Alcaraz-Enriquez, who sought permission to remain in the United States based on a fear of persecution in his home country of Mexico. In both cases, an immigration judge or the Board of Immigration Appeals failed to make a finding on credibility, and the 9th Circuit treated the asylum seekers’ testimony as credible in its own review. The 9th Circuit ruled Dai was eligible for asylum and ordered the immigration court to reconsider Alcaraz-Enriquez’s case. The Supreme Court reversed, rejecting the Ninth Circuit’s “deemed-true-or-credible” rule as irreconcilable with the Immigration and Nationality Act (INA) which mandates a highly deferential standard of review. For further analysis, see Eunice Lee, [Justices united against “magic words” and judge-made rules on asylum seekers’ credibility](#) (June 12, 2021).

[Matter of Y-I-M-](#), 27 I&N Dec. 724 (B.I.A. 2019)

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 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.

Chapter 14 – Current and Future Challenges in Refugee Protection **Casebook pages 1189-1244**

In addressing “challenges in refugee protection” this chapter includes sections on ongoing threats to the norm of *non-refoulement*, the benefits and drawbacks of temporary and “complementary” forms of protection, UNHCR's expanded mandate to protect those in “refugee-like” situations, and the predicament of internally displaced persons. We also explore the root causes of refugee movements, and the importance of recognizing that refugees are healers of communities as well as victims of oppression. These challenges have not receded in our current historical moment, whether in responding to the needs of children, single adults, and families from Central America at the United States’ southern border under the Biden administration; considering the health, sanitation, and dignity rights of asylum seekers in detention centers and refugee camps in the Americas, Europe, Africa, Asia and Oceania; or imagining new policy frameworks for admitting, welcoming, and naturalizing refugees in societies throughout the world.

In facing the challenges and dynamism of refugee law and policy, we can identify both restrictive trends and attacks on asylum-seekers, on the one hand, alongside welcoming trends and affirmations of the basic dignity of individuals fleeing persecution, on the other. Yet in calling for more humane and lawful treatment of refugees, practitioners and scholars continuously grapple with the basic notion of who “refugees” are, in order to affirm their claims to legal status and humanitarian assistance. In this vein, a recent [essay](#) published on the Public Seminar blog explores whether academics can or should maintain a linguistic border between refugees and non-refugees.

What makes a refugee – is it the experience of oppression, need, or both? Is it the threat to life, freedom, or dignity? Is it the will to survive or thrive? Are these qualities distinct or overlapping? Refugee advocates continually face the question of what makes refugees unique and different from other migrants and other human beings. As we – individuals, agencies, states, the “international community” – call for the protection of individuals who flee human rights abuses, we sometimes presume hierarchies of need and categories of entitlement to various legal, social, and political privileges which do not hold up upon deeper examination. Many of the “binaries” or oppositional categories of humans on the run have been and will continue to be challenged – refugees vs. “economic migrants,” victims of state oppression vs. victims of “non-state actors,” those who flee persecution vs. those who flee armed conflict, cross-border refugees vs. “internal refugees,” etc. And yet, if we fail to make distinctions between refugees and non-refugees, do we risk further weakening the fragile protections that those with a well-founded fear of persecution should enjoy, particularly freedom from forced return to violence at the hands of powerful state actors?

These questions will and should remain at the heart of refugee law, policy, advocacy, and scholarship.