Refugee Law and Policy

A Comparative and International Approach
Fifth Edition

2023 Supplement

Karen Musalo
Professor of Law
Director, Center for Gender & Refugee Studies
University of California, College of the Law, San Francisco

Jennifer Moore
Professor of Law
Pamela Minzner Chair in Professionalism
University of New Mexico School of Law

Richard A. Boswell
Professor of Law
University of California College of the Law, San Francisco

Annie Daher
Staff Attorney, Center for Gender & Refugee Studies
University of California College of the Law, San Francisco

Carolina Academic Press
Durham, North Carolina

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

July 2023 Update*

This Update builds on the July 2022 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 Trump administration, as well as the policies of the Biden administration to date. The chapters with the most developments are 2, 3, 5, 11, and 12, and updates to particular sections or issues in those chapters appear below, with links to relevant sources.

If you are teaching from *Refugee Law & Policy,* you can use this Update 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.

This Supplement refers to many Trump era regulations, but references to one in particular appear in a number of chapters. It is the December 11, 2020, regulation, ***Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review***, 85 Fed. Reg. 80274. This regulation was so massive and restrictive that advocates dubbed it the "Death to Asylum" or the "Monster Rule." The rule 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 *Pangea* preliminary injunction remains in effect as of this writing. *See Reyes-Ramos v. Garland*, No. 18-1830, errata (Feb. 7, 2023). The **Unified Regulatory Agenda,** which reports on planned agency actions, indicates that DHS and DOJ rulemaking is underway to address a range of issues covered in the Monster Rule, including the social group definition, nexus, and the requirements for proving the failure of state protection. A summary of portions of the Rule are scattered throughout this Supplement, indicating how it would have changed the jurisprudence discussed in relevant chapters.

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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. According to the **United Nations High Commissioner for Refugees** (UNHCR), by the end of 2021, there were 89.3 million people forcibly displaced, which included 27.1 million refugees, 53.2 internally displaced persons, 4.6 million asylum seekers, and 4.4 million Venezuelans displaced abroad. By May 2022 the number had risen from 89.3 to more than 100 million forcibly displaced individuals.

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(D) 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 of Chapter 1 of the Casebook 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 that the Trump administration lowered the FY2018 refugee allocation to 45,000. Each year Trump 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 jurisdictions in which state and local governments had 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 FY2021 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. However, the **actual admissions** fell far below even that number, with a total of 11,411 admitted in FY 2021. The target **admissions for FY 2022** was set at 125,000, and again, **actual admissions** fell short—this time by 80%—with a total of 25,465 admitted refugees. President Biden has set target admissions at 125,000 for **FY 2023**.

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 has disappointed by keeping the most egregious, Title 42, in place for more than a year and a half, and then once it was set to be terminated, by imposing other draconian restrictions limiting access to the U.S. territory. The paragraph below provides an overview of some of the most significant Trump-era policies. Following the overview is a short discussion of each, including the current status of these policies under Biden.

Overview of Trump-era Policies

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," precluding 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"). The most draconian of all these measures was the March 20, 2020, issuance of an **order** from the Centers for Disease Control (CDC) that used the COVID-19 pandemic as a pretext to effectively close the border to asylum seekers. It was issued under the authority of the 1944 Public Health Act. The 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.

Metering

The practice of **metering** effectively began in 2016. Customs and Border Protection (CBP) personnel told asylum seekers who arrived at ports of entry to wait, based on an alleged lack of "capacity" to process them. The "Turnback Policy," which encompassed a broad range of tactics, including metering, was challenged in a class action by Al Otro Lado, a nonprofit organization, and 13 individual asylum seekers 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 U.S. District Court for the Southern District of California granted class certification to all noncitizens denied or who would be 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). Subsequently, the court held that the government has a duty to process asylum seekers at ports of entry, and that turnbacks are unlawful. *See* ***Al Otro Lado v. Mayorkas***, No. 17-cv-02366-BAS-KSC (S.D. Cal. Sept. 2, 2021) (finding turnbacks unlawful under the Administrative Procedure Act and the Fifth Amendment's Due Process Clause).

While metering was in effect, the Trump administration implemented an additional bar to asylum, the Transit Ban, referred to above as "Asylum Ban 2.0." Al Otro Lado sought a preliminary injunction arguing that the class of individuals who had come to the border prior to the implementation of the Transit Ban on July 16, 2019 but were prevented from entering the United States until after that date because of metering, should not be subject to the Transit Ban. The U.S. District Court for the Southern District of California granted the preliminary injunction,

which enjoined the government from applying the Transit Ban to affected class members and held that the government had to apply pre-Transit Ban practices to those individuals. ***Al Otro Lado v. McAleenan,*** No. 17-cv-02366-BAS-KSC (S.D. Cal. Nov. 19, 2019) (order granting preliminary injunction).

The government **appealed** the preliminary injunction and 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 in *CAIR Coaltion v. Trump*. The mandates in both cases have now been issued.

The preliminary injunction blocking the application of the Transit Ban to individuals subject to metering prior to the ban's implementation has since been converted into a permanent injunction, requiring the government to permanently refrain from applying the Transit Ban to class members. ***Al Otro Lado v. Mayorkas,*** No. 17-cv-02366-BAS-KSC (S.D.Cal. Aug. 5, 2022). The practice of metering itself **remained in effect** through March 2020, when the border was essentially 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 of the 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. Nov. 19, 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. *East 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 cases (as opposed to metering, which required asylum seekers to wait in Mexico prior to presenting at ports of entry (POE) and asking for asylum). Individuals who expressed a fear of return to Mexico were to be exempted, but CBP officers were not permitted to inquire about their fear, so to be exempted individuals had to spontaneously and affirmatively speak up.

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 November 2022, over **81,000** 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, and as of February 19, 2021, it 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.

Legal challenges were brought against the Migrant Protection Protocols and, in March 2020, the Ninth Circuit issued an **injunction** against MPP in *Innovation Law Lab v. Nielsen* (renamed *Innovation Law Lab v. Wolf).* The Supreme Court stayed the injunction and accepted *certiorari.* During his campaign, President Biden promised to end MPP. After Biden was elected, the government asked the Supreme Court to hold briefing in abeyance in *Innovation Law Lab*, and to remove the case from the argument calendar, which **the Court did**.

On January 20, 2021, the Biden administration **announced** that, as of Jan. 21, 2021, it would stop placing new asylum seekers in MPP. 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. The administration subsequently **expanded** the categories of individuals who would be permitted to enter the

United States to apply for asylum, including those who had their cases terminated or were ordered removed *in absentia* under the MPP.

On June 1, 2021, DHS issued a memorandum in which it **formally announced** the termination of MPP. The states of Texas and Missouri sued to force the continuation of the policy. On August 13, 2021, the U.S. District Court for the Northern District of Texas ruled in the states' favor, holding that the termination of MPP violated the INA and the Administrative Procedure Act. ***State v. Biden***, 554 F. Supp. 3d 818 (N.D. Tex. 2021). The court further required the Biden administration to "enforce and implement [MPP] in good faith" and file monthly reports with the court demonstrating its compliance with the order. In October, the administration issued a second memorandum terminating MPP in an attempt to address the court's rationale for finding the prior termination unlawful. The Fifth Circuit refused to consider the second memorandum and ultimately affirmed the injunction. ***Texas v. Biden***, 20 F.4th 928 (5th Cir. 2021).

Pursuant to the Fifth Circuit's ruling, the Biden Administration reinstated MPP in December 2021 (this iteration of the policy is referred to as MPP 2.0). Although the court did not require it to do so, the administration expanded the nationalities subject to MPP 2.0, so that it included not only nationals of Spanish-speaking countries and Brazil as in MPP 1.0, but all western hemisphere nationals (except for Mexicans). The new policy required CBP to ask about a fear of persecution or torture in Mexico, and those who express fear are to be given an interview to prove a reasonable possibility of these harms. If established, they would be exempted from return. In addition, DHS expanded the categories entitled to a **"vulnerability screening"** to individuals "with a known mental or physical health issue," those with "a disability or a medical condition related to pregnancy," and "those with particular vulnerabilities given their advanced age," as well as "those at risk of harm in Mexico" because of their "sexual orientation or gender identity."

On June 30, the Biden administration had a partial victory in its efforts to end MPP when the Supreme Court ruled that the termination of Remain in Mexico did not violate the INA. However, the Court did not give a green light to the ending of Remain in Mexico, instead remanding for the lower courts to determine the termination's lawfulness under the Administrative Procedure Act. ***Biden v. Texas***, 142 S.Ct. 2528 (2022). In August 2022, the Fifth Circuit remanded the case to the U.S. District Court for the Northern District of Texas, which lifted the nationwide injunction based on the Supreme Court decision. This ruling no longer required the administration to enforce MPP in good faith or to provide monthly reports proving it was doing so. ***Texas v. Biden***, No. 2:21-cv-00067-Z (N.D. Tex. Aug. 8, 2022) (unopposed motion to vacate the nationwide injunction, which was subsequently granted by the court).

On December 15, the district court stayed the October memoranda, as well as the Biden administration's decision to terminate MPP, pending final resolution of the matter on the merits. ***Texas v. Biden***, No. 2:21-cv-00067-Z (N.D. Tex. Dec. 15, 2022). The administration appealed this order to the Fifth Circuit in February but ultimately decided not to pursue the appeal. ***Texas v. Biden***, No. 2:21-cv-00067-Z (5th Cir. 2023) (unopposed motion to dismiss interlocutory appeal, which was subsequently granted by the court). It is unclear how, exactly, the district court's December stay order has affected MPP on the ground, as the court did not order the administration to take any specific actions and the previously required monthly status

reports were still no longer required due to the lifting of the injunction in August. Notwithstanding the abandoned interlocutory appeal, the main case, which considers whether MPP violates the Administrative Procedure Act, remains pending before the district court. Notably, throughout this protracted litigation, the Mexican government **has expressed opposition** to restarting MPP.

While the case remains pending, the administration's policy regarding MPP enforcement has been to refrain from enrolling new noncitizens into the program and disenrolling individuals who had been enrolled. These individuals, who were previously forced to await court proceedings in Mexico, will continue their proceedings from within the United States, according to the administration. *See* **DHS Statement on U.S. District Court's Decision Regarding MPP** (Aug. 8, 2022) (announcing the end of the MPP program). Immigrant advocates, however, **have noted** several practical difficulties in the disenrollment process, including that noncitizens must wait until their immigration court hearing to disenroll from MPP.

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 a February 2, 2021 **Executive Order on a Regional Migration Framework** ("Regional Framework EO")[2] 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. *See* **Executive Order 14010**, 86 Fed. Reg. 8,267, § 4(a)(ii)(C) (Feb. 2, 2021).

There were 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

[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.

[2] Executive Order on 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 Seeker at the United States Border, Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

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).

"Rebuttable" Asylum Bar For Failure to Apply for Protection in Countries of Transit and Failure to Preemptively Request Parole or Port-of-Entry Appointment (Transit Ban 2.0 or Asylum Ban 3.0)

In February 2023, the Biden administration announced the newest iteration of the Transit Ban in a **proposed rule**, which established a "rebuttable presumption of asylum ineligibility" for individuals who have transited through another country without applying for and receiving a final denial on asylum or other forms of protection and who (1) are not granted parole prior to their arrival at the border, or (2) do not arrange an appointment, via the CBP One smartphone application, to present themselves at a port of entry. There is an exception from the appointment requirement if the individual can prove by a preponderance of the evidence that it was not possible for them to use CBP One, due to a "language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle." Unaccompanied minors are exempted from the ban.

Rebuttal of the presumption of ineligibility can only be made by proof of exceptionally compelling circumstances at the time of entry, including (1) an acute medical emergency, or (2) imminent and extreme threats, or (3) establishing that the individual is the "victim of a severe form of trafficking in persons."

The administration's ban combines the Trump Transit Ban with what several organizations have called "**electronic metering**"—forcing individuals to wait for an available appointment on the CBP One application so they may seek asylum and be paroled into the U.S. This effectively leads to results similar to the MPP program, as asylum seekers remain in Mexico while they await an open appointment slot. These issues are compounded by racial bias in CBP One's **facial recognition algorithms**, which frequently block asylum seekers with darker skin tones from filing their claims on the app, preventing them from arranging an appointment to present themselves at a port of entry, as the regulation requires.

Despite the enormous changes mandated by the regulation, the Biden administration allowed just 30 days for public comments. Over 170 organizations signed onto a **letter** requesting, **to no avail**, that the administration extend this period to at least 60 days due to the proposed rule's length (153 pages) and its extensive implications on the asylum process.

In May 2023, the administration published a final rule, **Circumvention of Lawful Pathways**, 88 Fed. Reg. 31,314 (May 16,2023), implementing the version of the Transit Ban in the proposed rule (with minor changes regarding maritime borders) after considering **over 50,000 comments**. Immigrants' rights organizations **swiftly filed suit** in the Northern District of California, challenging the final rule under the Immigration and Nationality Act and the Administrative

Procedure Act. The lawsuit also challenges other changes made to the asylum process after the 30-day comment period closed, thus foreclosing the public's ability to raise any concerns. These changes include reducing the waiting period before a credible fear interview from 48 to 24 hours and subjecting Cubans, Haitians, Nicaraguans, and Venezuelans to expedited removal procedures that expel them to Mexico and bar them from re-entering the U.S. for five years. *East Bay Sanctuary Covenant v. Biden*, **Amended and Supplemental Complaint** at 21–22.

While the devastating consequences of Biden's asylum ban remain to be seen, this rule is a far cry from the outrage he expressed and the asylum process he promised during his presidential campaign. **Final Presidential Campaign Transcript** (Oct. 22, 2020) ("[President Trump] is the first President in the history of the United States of America that anybody seeking asylum has to do it in another country. That's never happened before in America…You come to the United States and you make your case. That I seek asylum based on the following premise, why I deserve it under American law. They're sitting in squalor on the other side of the river.").

"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.

Under Trump, 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**.

The U.S.-Guatemala ACA was the only ACA ever implemented, and transfers under this agreement 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 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.

In his 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. On March 15, 2021, the court in *U.T. v. Barr* **stayed** the case in light of the government's review of the rule implementing the ACAs.

The **Unified Regulatory Agenda** indicates that DHS and DOJ rulemaking is underway to "modify or rescind" the regulations implementing the ACA.

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. Individuals could only be exempted from return if they spontaneously expressed a fear of return, and then passed an official screening with an asylum officer. 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**.

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***, challenged the application of Title 42 to families. U.S. District Court Judge Emmett Sullivan issued a **preliminary injunction;** on appeal the **D.C. Circuit** upheld Title 42 but ruled that the government was required to screen for fear of persecution or torture before expulsion.

During his candidacy, President Biden made commitments to end a number of Trump-era immigration policies, but Title 42 was not one of them. It was not until more than a year into his presidency that the administration took steps to end the border closure. The CDC issued a **"Public Health Determination"** stating that Title 42 was no longer a necessary health measure and would formally end on May 23, 2022. Two dozen state attorneys general challenged the termination in federal district court in Louisiana. The judge, a Trump appointee, ruled for the plaintiffs in ***Arizona v. CDC,*** and issued a nationwide injunction holding that the termination likely violated the Administrative Procedure Act, thereby prohibiting the federal government from enforcing the CDC's Title 42 termination order, which would have allowed immigration officials to process noncitizens under Title 8.

The Biden administration appealed and the case was scheduled for oral argument in March. Just three weeks before oral argument, the Fifth Circuit held the case in abeyance until May 11, the day on which the CDC's COVID-19 public health emergency declaration was set to expire. On May 12, the government **sought to dismiss the case as moot** on the ground that the expiration of the public health emergency independently terminated the Title 42 order, regardless of whether the CDC's termination order violated the Administrative Procedure Act. On that same day, the government began processing noncitizens under Title 8.

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 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.* On March 21, 2022, the Biden administration **rescinded** the Trump rule expanding expedited removal, returning it to its prior scope of applicability.

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 to consider his claim. The Ninth Circuit reversed, holding that the Immigration and Nationality Act's (INA) limit on the scope of habeas review violated the Constitution's Suspension Clause. The Supreme Court reversed and remanded, ruling that although habeas corpus could be used to challenge imprisonment or detention, it could not be used to challenge the "right to enter or remain in [the] country." *Thuraissigiam*, 140 S.Ct. at 1969. After *Thuraissigiam*, courts have repeatedly found that they have no jurisdiction to review expedited removal orders, including where non-citizen petitioners have raised constitutional claims. The *Thuraissigiam* decision and its broader implications for due process rights for non-citizens is discussed at more length in Chapter 12 of this Update.

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, all of which have been reversed. The policies and the successful challenges against them appear below:

On April 30, 2019, USCIS released a **revised Lesson Plan** for asylum officers which heightened the requirements for establishing a credible fear of persecution. The District Court for the District of Colombia vacated the Plan as inconsistent with the INA and its implementing regulations. ***Kiakombua, et al. v. Mayorkas,*** 498 F. Supp. 3d 1, (D.D.C.).

On July 2019, USCIS issued a **new directive** reducing the time between an individual's apprehension and the credible fear interview from 48 to 24 hours. This directive was **struck down** by the D.C. District Court in March 2020 when the court found that the acting USCIS Director had been unlawfully appointed. *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).

Also in July 2019, CBP entered into a **Memorandum of Agreement** (MOU) 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. In August 2020, the D.C. District Court placed a preliminary injunction on the MOU 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 26, 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[.]"[3] This guidance now appears on a **USCIS page** as archived content," with the advisal that: "The information on this page is out of date. However, some of the content may still be useful so we have archived the page."

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 Monster Rule, 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 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

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[3] 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**.

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.

Circuit courts vary widely in evaluating whether an applicant has established that her government is unable or unwilling. For example, in ***Portillo-Flores v. Garland*****,** 3 F.4th 615 (4th Cir. 2021) (en banc), the Court held that the BIA committed legal error in applying a per se reporting requirement in order to show the government failure to protect. The Court noted that reporting is not required if it would have been futile or resulted in additional risk of harm. In

contrast, in ***Ortiz v. Garland*****,** 959 F. 3d 779 (6th Cir. 2021) the Sixth Circuit held that the applicant had not shown a failure of state protection where she had never contacted the police.

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 Monster Rule 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). In 2022, the Fourth Circuit Court of Appeals affirmed the approach it had taken *in Hernandez-Avalos*, in ***Tomas-Ramos v. Garland,*** 22 F.4th 973 (4th Cir. 2022) ruling that it was error to find the absence of nexus (to a family-based social group), when gang members threatened the petitioner after he resisted their efforts to recruit his son.

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.

There is an ongoing circuit split on the issue. The Sixth and Eighth Circuits 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. See ***Guzman-Vazquez v. Barr***, 959 F.3d 253 (6th Cir. 2020); ***Garcia-Moctezuma v. Sessions***, 879 F.3d 863 (8th Cir. 2018).

Other circuits have come to opposite conclusions. Among them are the First, Second, Third, Fifth, and Eleventh Circuits. See ***Barnica-Lopez v. Garland***, 59 F.4th 520 (1st Cir. 2023) (articulating that the "one central reason" standard applies to both asylum and withholding of removal), ***Gonzalez-Posadas v. U.S. Attorney General***, 781 F.3d 677 (3rd Cir. 2015), (ruling 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), ***Singh v. Garland,*** 11 F.4th 106 (2d Cir.

2021) (citing to *C-T-L-* for "one central reason" requirement), ***Revencu v. Sessions***, 895 F.3d 396 (5th Cir. 2018) (applying "one central reason" standard to withholding of removal claim based on the REAL ID Act language regarding burden of proof for asylum), and ***Perez-Zenteno v. U.S. Att'y Gen***., 913 F.3d 1301 (11th Cir. 2019) (same).

While most circuit courts deliberately applied one standard over the other based on their interpretation of Congress's intent in enacting the REAL ID Act of 2005 or the BIA's interpretation of Congress's intent in *C-T-L-*, at least two circuit courts have seemingly adopted the "one central reason" standard by conflating asylum and withholding of removal requirements as regards nexus. As indicated above, for instance, the Fifth Circuit did not engage in an analysis that determined "one central reason" to be the standard intended by Congress for withholding of removal claims. Instead, the court applied the "one central reason" standard by stating that the requirement was established by the REAL ID Act of 2005 and cited to statutory language that specifically deals with asylum claims. See *Revencu*, 895 F.3d at 402. The Eleventh Circuit came to the same conclusion by citing the same language. See *Perez-Zenteno*, 913 F.3d at 1158.

Similarly conflating the nexus requirement for the two types of claims, the First Circuit applied the "one central reason" standard to withholding by citing precedent that applied the standard to an asylum claim. In *Barnica-Lopez*, the First Circuit began its analysis by stating: "[f]or both asylum and withholding of removal purposes, [a] causal connection exists only if the statutorily protected ground…was one central reason for the harm alleged" (internal citations omitted). It then cited two cases to support this rule—*Sanchez-Vasquez v. Garland*, 994 F.3d 50 (1st Cir. 2021) and *Singh v. Mukasey*, 543 F.3d 1 (1st Cir. 2008). The first case, *Sanchez-Vasquez*, considered withholding-only relief and also applied the "one central reason" requirement, based on the second case, *Singh v. Mukasey*. In *Singh v. Mukasey*, the First Circuit engaged solely in an asylum eligibility analysis and held that because the petitioner had not met the higher standard for asylum, a withholding of removal analysis was unnecessary.

The Fourth, Seventh, and Tenth Circuits have not decided on the issue but are aware of the two standards. See ***Hercules-Torres v. Whitaker***, 765 F.App'x 233 (4th Cir. 2018) (not reaching question of whether "one central reason" or "a reason" applied to withholding of removal claim because non-citizen was unable to prove nexus requirement regardless of the standard applied), ***W.G.A. v. Sessions***, 900 F.3d 957 (7th Cir. 2018) (applying "one central reason" standard because petitioner did not argue that different standards should govern asylum and withholding of removal claims), and ***Orellana-Quintanilla v. Rosen***, 842 F.App'x 227 (10th Cir. 2021) (same).

The Supreme Court has yet to consider the issue and will ultimately not need to if Congress resolves the circuit split first. In February 2023, Representative Mike Johnson of Louisiana introduced a bill, **Asylum Reform and Border Protection Act of 2023**, that would impose the "one central reason" requirement on withholding of removal uniformly across the country. Similar proposals, however, have been introduced in past immigration bills without success.

Relevance of Enjoined December 2020 Regulation to Nexus

The December 2020 Monster 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 a Trump-era 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.

In November 2022, the Second Circuit agreed. The court cited to the Attorney General's 2020 *O-F-A-S-* decision and held that the "under color of law" standard, as used in the civil rights context for § 1983 claims, applies to CAT claims. See *Garcia-Aranda v. Garland*, 53 F.4th 752 (2d Cir. 2022). It further noted that while "personal pursuits" are not covered under the standard, there is no bright line test to determine whether an act is a "personal pursuit" or an action taken "under color of law." See *Garcia-Aranda*, 53 F.4th at 759–60.

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 that would have reinforced the political nature of the gangs by demonstrating that they have transformed into third generation gangs, characterized by involvement in transnational criminal operations, and the **"imposition of territorial control supplanting state authority."**

Relevance of Enjoined December 2020 Regulation to Political Opinion

The December 2020 Monster Rule 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 Rule 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.

Introduction to Interrelated Developments in Chapter 9 (Particular Social Group) and Chapter 10 (Gender Claims)

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)(I)(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***), *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 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 (by August 2021), 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." (by November 2021). *Id.* at § 4(c)(ii). The issuance of regulations has been delayed, and as of July 2022, they have yet to be released.

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

During the Trump administration, Attorney General Barr 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.

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

As noted above, during the Biden administration, 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.

Although the vacatur of *L-E-A-II* was a positive development, the A.G. left in place *L-E-A-I*, the BIA decision which makes it more difficult to establish nexus in family-based social group cases. Circuit court decisions subsequent to Garland's vacatur of *L-E-A-II* demonstrate just how substantial of a barrier to relief proof of nexus continues to pose.

For example, in ***Toledo-Vasquez v. Garland*****,** 27 F.4th 281 (4th Cir. 2022), the Mexican petitioner, Ms. Toledo-Vasquez had intervened to protect her sister, Guisela Toledo-Vasquez from her violent spouse, Rogelio Witrago. Ms. Toledo-Vasquez helped the sister escape, and cooperated with the authorities, leading to Witrago's arrest and prosecution. As a result of her actions, Witrago's accomplices murdered Ms. Toledo-Vasquez's husband, threatened her father, vandalized her parents' home, and subjected her to ongoing threats. In her claim for asylum, she argued that she had been persecuted on account of her membership in the particular social group of "family members of Guisela Toledo Vasquez." The Fourth Circuit upheld the BIA's denial, finding there was no nexus to a protected ground and that Witrago's actions were motivated by revenge rather than family membership.

Not all courts follow the approach exemplified in *Toledo-Vasquez*. In *Naranjo Garcia v. Wilkinson*, 988 F.3d 1136 (9th Cir. 2021), the Mexican petitioner's husband was forced to turn the deed to his property over to the Knights Templar drug cartel, who then murdered him. The Templars later tried to recruit her son, and when she helped him escape, they told her she had one month to leave, and that once she left, they would take over her property. Because of her experience with her husband's assassination, she took the threat seriously and left. The BIA denied her claim on nexus, rejecting the particular social groups of family and property owners. The Ninth Circuit remanded, finding that the evidence of nexus was "compelling."

Chapter 10 - Gender-Related Claims to Refugee Status

Chapter 10 provides an overview of the controversy surrounding claims for protection arising from domestic violence. In 2014, after years of uncertainty, the BIA issued a precedent decision, ***Matter of A-R-C-G-*** (Casebook, p. 814). The decision accepted 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*

During the Trump administration, Attorney General Sessions issued a decision in *Matter of A-B-*, using it as a vehicle to vacate *A-R-C-G-*, stating that the BIA had not carried out the required in-depth analysis in its 2014 opinion. *See Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) **(*A-B- I*)**. Sessions' 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 by A.G. Sessions 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 President Biden's Regional Migration 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 implied the non-viability of certain types of claims (referring to A-B-'s dicta that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum") could be interpreted as creating a presumption against DV or gang cases, thus discouraging the necessary "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's conclusion that she had suffered past persecution on account of her gender-defined

PSG. During the Trump administration, A.G. Barr certified the case to himself, 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*

During the Biden administration, A.G. Garland certified the case to himself, and 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-*

Decisions prior to A.G. Garland's vacatur of A-B-I and II

Prior to A.G. Garland's vacatur of *A-B-I*, some circuit courts of appeals applied *Matter of A-B-I* to essentially foreclose domestic violence asylum claims with very little individualized analysis, while others rejected that approach. The **Eleventh, Fifth and Third Circuits** rejected PSGs which included the "unable to leave" characteristic; among them were ***Amezcua-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 the Eleventh, Fifth and Third Circuits, the **First, Sixth, and Ninth Circuits** did not read *A-B-I* so broadly. In ***De Pena Paniagua v. Barr*****,** 957 F.3d 88 (1st Cir. 2020), the First Circuit held that *Matter of A-B-* did not preclude PSGs defined by women unable to leave their domestic relationships as a basis for asylum, and that the BIA must conduct an individualized analysis. The particular social groups which had been put forward in *De Pena* all included an "unable to leave" component: (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 court also suggested that the Board consider whether the 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.

In ***Juan Antonio v. Barr*****,** 959 F.3d 778 (6th Cir. 2020), 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, which included "unable to leave" was cognizable.

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 filed 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").

Decisions subsequent to A.G. Garland's vacatur of A-B-I and II

To date there are only a few circuit court decisions which directly address domestic violence claims based on particular social group following the vacatur of *A-B-I and II*. The **Fifth and Third Circuits** have continued the restrictive interpretive approach which characterized their pre-vacatur jurisprudence, while the **Sixth Circuit** has ruled that the vacating of *A-B-* requires a reconsideration of analysis. A brief survey of the relevant cases from these circuits follows.

In *Jaco v. Garland*, 24 F. 4th 396 (5th Cir. 2022) the Honduran petitioner argued that her proposed social group of Honduran women unable to leave their domestic relationships should be considered viable since the *A-B-* decisions had been vacated, and *Matter of A-R-C-G-* restored as controlling precedent. The Fifth Circuit rejected that argument, holding that it found *A-B-*'s reasoning that "unable to leave groups" were not cognizable to be more persuasive than *A-R-C-G-*'s ruling accepting such groups. The court acknowledged that it owed deference to "reasonable" agency decisions," but found *A-R-C-G-*, with its acceptance of "unable to leave" groups to be not reasonable.

In contrast to *Jaco*, *Chavez-Chilel*, 20 F.4th 138 (3d Cir. 2021) did not involve a particular social group including "unable to leave" as a defining characteristic. The Guatemalan petitioner in *Chavez-Chilel* proposed "Guatemalan women" as her PSG – a formulation which, as discussed above, the First and Ninth Circuits have directed the BIA to consider (remanding with instructions to consider the viability of groups defined by **nationality and gender alone**). Inexplicably, the Third Circuit ruled that the PSG of Guatemalan women lacked particularity and was too overbroad to constitute a viable group. It based this conclusion on the erroneous premise that finding a PSG to be cognizable translates into a grant of asylum to all its members.

The Sixth Circuit, in *Zometa-Orellana v. Garland*, 19 F.4th 970 (6th Cir. 2021) considered the impact of the *A-B-* vacatur in a case where the BIA had cited the decision in rejecting "Salvadoran women of childbearing age in domestic partnerships" as a particular social group. The court ruled that in relying on *A-B-*, the BIA had "presumptively" rejected the petitioner's

proposed PSG. The court ruled that in cases where "a decision on which the IJ or BIA relied to make a determination was vacated or abrogated. . . [the] change in the law 'counsels remand.'" The court directed the BIA to consider what change the vacatur had on its PSG analysis and "whether groups pertaining to domestic violence are now cognizable."

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)

Under Trump, Attorney General Barr certified the BIA's decision to himself, vacated it, 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. Barr's decision stated 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. Advocates have appealed to AG Garland to vacate Barr's opinion and to reinstate the BIA's prior decision permitting duress.

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.

Since the fall of the Taliban, a significant number of Afghans have sought asylum in the United States. Many of them may have provided some form of support to the Taliban, making them potentially ineligible for protection. Advocates for the Afghans had urged the Biden administration to address this issue, and on June 14, 2022, DHS and DOS responded, **announcing new exemptions** from the terrorism bars for certain categories of Afghans. The exemptions apply to "Afghans who have supported and worked with the United States in Afghanistan," and who might be "mistakenly barred because of overly broad application: of the terrorism bars." In a move to limit *A-C-M-*'s application to Afghan asylum seekers, an exemption is provided for individuals "who provided insignificant or certain limited materials support to a designated terrorist organization."

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 rule expanded the application of the danger to national security bar to purported public health concerns relating to the COVID 19-pandemic, as follows:

1) Included public health concerns based on communicable disease as a basis on which adjudicators can find a person to be a danger to the security of the United States and therefore ineligible to be granted asylum or withholding of removal;
2) Made 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), the 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."

The Biden administration initially **delayed** implementation of the rule to March 22, 2021, and subsequently extended the date to Dec. 31, 2021, and then Dec. 31, 2022. 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" or "monster rule"), which had been enjoined on January 8, 2021 by the court in *Pangea Legal Services v. Department of Homeland Security.* In December 2022, the Biden administration **delayed** implementation of the rule once again—this time until Dec. 31, 2024—citing the same grounds, as the *Pangea* preliminary injunction of the "Global Asylum" rule remains in effect.

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.

In June 2023, the Supreme Court of Canada unanimously upheld the constitutionality of the Agreement as it relates to Section 7 of the Charter. See ***Canadian Council for Refugees v. Canada (Citizenship and Immigration)***, 2023 SCC 17. The Court explained that the Federal Court's ruling (the initial ruling, which held the Agreement to be unconstitutional) erred by

finding that detention was "automatic" for asylum seekers who are returned to the U.S.; instead, the Supreme Court noted that determinations about whether to detain returned asylum seekers vary on a case-by-case basis and are complemented by alternatives to detention, thereby further reducing the risk that they would be detained. It further reasoned that despite some risk of detention for returned asylum seekers, nothing in the record supported the conclusion that the U.S. detention system is fundamentally unfair—a high bar that would have sustained a finding of unconstitutionality under Section 7.

Regarding the risk of *refoulement* from the U.S., the Supreme Court found that "safety valves" in Canadian immigration laws cure the potential unconstitutionality of returning asylum seekers. These "safety valves" refer to the discretion Canadian immigration officials may exercise if they believe an individual is at risk of *refoulement* upon return to the U.S. The Court expressed that due to the existence of this discretion, as opposed to a categorical mandate to return all eligible asylum seekers, the Agreement was not "overbroad or grossly disproportionate" so as to violate principles of fundamental justice. Finally, the Court remanded the claim regarding the Agreement's disproportionate effect on women and its unconstitutionality under Section 15, noting that the factual record had not been sufficiently developed for the Court to decide that issue.

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. These agreements and subsequent developments are discussed in the updates to Chapter 2.

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). To the great disappointment of those hoping for a departure from Trump-era policies, the Biden administration issued a transit ban, and other restrictive measures as Title 42 came to an end. Please see the updates to Chapter 2 for a discussion of these policies.

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, 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 Monster Rule 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. 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. As noted earlier, this rule has been enjoined and the **Unified Regulatory Agenda** indicates DHS and DOJ are developing regulations which would modify or rescind the Trump era rule.

New Proposed Criminal Bars to Asylum from Trump Era

On October 21, 2020, the Trump administration published a rule which added seven new categorical bars to asylum. *See* **85 Fed. Reg. 67,202** (Oct. 21, 2020). Judge Illston in the Northern District of California issued a **preliminary injunction**, and the government's Ninth

Circuit appeal remains in abeyance while the rule is **under review** by the Biden administration. *See* ***Pangea Legal Serv. v. U.S. Dept. of Homeland Sec.,*** No. 20-17490 (9th Cir. Apr. 26, 2021).

The enjoined rule would have added seven new categorical bars to asylum eligibility:

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 rule would have required adjudicators to apply a multi-factor test to determine whether a vacated, expunged, or modified conviction or sentence relevant to the new categorical bars is valid for the purpose of determining asylum eligibility. The test would have placed the burden on the noncitizen, allowed adjudicators to consider outside evidence, and to 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.

Finally, the rule would have rescinded 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. For a critique of the rule, see the American Immigration Council's **public comment**.

Chapter 12 - The Process and Rights of Asylum Seekers

The Adjudicatory Structure
Casebook pages 988-1002

Biden Administration Rule Changing Adjudicatory Process

Chapter 12 provides an overview of the adjudicatory structure. On March 28, 2022, the Biden administration issued interim final regulations which significantly change the adjudicatory procedures. The regulations are entitled ***Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers.***

The rule changes existing procedures by shifting initial adjudication of claims by those in expedited removal to the non-adversarial setting of Asylum Offices. Individuals not granted relief at the Asylum Office will be referred to the immigration court for a de novo consideration of their claims.

While these measures were generally welcomed by refugee advocates, the rule includes "streamlining provisions" which imposed accelerated deadlines at each stage of the process. Non-adversarial "Asylum Merits Interviews," for instance, were set to occur **21 to 45 days** after an individual's positive credible fear interview. If the asylum officer denied asylum, the individual would then be referred to an expedited immigration court process, designed to adjudicate the case in two to four months. These were harshly criticized as leaving inadequate time for individuals to, among other things, obtain counsel, to gather their evidence, and to prepare and submit their applications.

The administration announced a **phased implementation** of the rule, beginning on May 31, 2022. It initially applied to individuals detained at two facilities in Texas, who planned to reside in any of the following six cities: Boston, Los Angeles, Miami, New York, Newark, or San Francisco. The **subsequent phase** broadened the criteria to include asylum seekers detained at an additional three facilities in Texas and one in California, as well as non-detained individuals, all of whom must have indicated an intention to reside in one of the initial six cities, Chicago, Washington D.C., or New Orleans.

Challenges to the implementation of the rule were filed in **Louisiana** and **Texas,** with **arguments made** that the shift to adjudication by asylum officers would make it easier for asylum seekers to be granted relief. Neither court issued a ruling halting the implementation of the rule, causing the rule to become effective on May 31 as planned. As of this writing, both cases are in the discovery phase.

In April 2023, the Biden administration placed the asylum processing rule **on hold** to prepare for the end of Title 42 (discussed in Update to Chapter 2), which it presumed would increase border crossings. Although the administration maintains that the hold is temporary, advocates have expressed doubts and criticized the move, expecting that it signals the Biden administration's shift back toward Trump-era border policies.

Biden Administration "Dedicated Dockets" – Another Strategy to Fast-track the Adjudication of Claims

On May 28, 2021, prior to the issuance of the regulation discussed above, the Biden administration announced another means to fast-track cases, through the establishment of **"Dedicated Dockets."** The cases of families apprehended between ports of entry, on or after May 28, 2021, would be placed on these dockets in ten designated cities (Denver, Detroit, El Paso, Los Angeles, Miami, Newark, New York City, San Diego, San Francisco, and Seattle). In July 2021, the administration expanded the Dedicated Docket program by **adding Boston** to the list of designated cities.

In its announcement, the Department of Justice stated that the Dedicated Docket would seek to conclude cases within 300 days of an initial master calendar hearing, while still promoting fairness in adjudication. 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. A **recent study** by the UCLA Center for Immigration Law & Policy presented data on the failure of prior accelerated dockets to ensure due process. Seventy per cent of the families on accelerated dockets under Obama were unrepresented, and over 50% of those were ordered removed *in absentia*. The numbers worsened under Trump with 80% of the families receiving *in absentia* orders

The UCLA study, which focused on the Los Angeles immigration court, demonstrates that the Biden administration's Dedicated Dockets have fared just as poorly as its predecessor fast-track programs. Seventy per cent of the individuals lacked counsel, 99.1% of the completed cases resulted in orders of removal, and 72.4% of those orders were issued *in absentia.*

The Harvard Immigration and Refugee Clinical Program at Harvard Law School conducted a similar **study** on the Dedicated Docket in Boston, the largest Dedicated Docket in the country. The study found that within the first year of the program, over 20,000 immigrants (40% of whom were children under 21) were assigned to the Boston Dedicated Docket. Forty-nine per cent of individuals lacked counsel, 36.8% of the completed cases were dismissed because the Department of Homeland Security failed to file a Notice to Appear, 33.7% of completed cases resulted in removal orders, and 72.6% of those orders were issued *in absentia*. Only 4.2% of completed cases resulted in a grant of asylum, all of whom had legal representation.

A particularly grave aspect of *in absentia* removal orders is not only that they summarily close asylum cases—some of which are undoubtedly meritorious, but also that the only avenue to vacate an *in absentia* removal order is by filing a motion to reopen—a process that is inaccessible to most people without legal representation.

The importance of obtaining counsel in removal proceedings cannot be overstated, and yet, the Dedicated Docket further complicates matters by being fast-paced in some cases and unpredictable in others. The Harvard study, for instance, found that the amount of time attorneys had to prepare for a merits hearing at the Boston Immigration Court varied from 96 to 811 days. Due to this unpredictability, the study found that attorneys tended to decline cases that they knew or suspected to be on the Dedicated Docket.

Trump-era Rules Limiting Procedural Rights

1) Matter of E-F-H-L-* and *the Right to a Hearing

In 2018, Trump's Attorney General Sessions 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 Monster Rule would have codified Sessions' *E-F-H-L-* decision that IJs may pretermit and deny – without a hearing – an

application for asylum, withholding of removal, or CAT protection if the applicant has not established a *prima facie* claim for relief or protection based on their Form I-589 asylum application and any supporting evidence. *See* **85 Fed. Reg. 80,274, 80,397** (Dec. 11, 2020) (was to be codified at 8 C.F.R. § 1208.13). By February 2019, one year after Sessions' decision, **practitioners reported** that IJs were indeed pretermitting asylum applications without full merits hearings if they deemed an asylum seeker's claims insufficient to establish a *prima facie* case.

The **Unified Regulatory Agenda** indicates that the Department of Justice will propose regulations restoring the right to an evidentiary hearing without the requirement of establishing a *prima facie* case. As of July 2023, the Biden administration has not proposed such a regulation, so although Sessions' *E-F-H-L* decision was not codified, it remains good law.

2) Administrative Appellate Procedures and Administrative Closure

In the name of "efficiency," the Trump administration issued a rule which accelerated administrative appellate procedures and limited the scope of review. The rule, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, **85 Fed. Reg. 81,588** (Dec. 16, 2020), took effect January 15, 2021. 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). The Biden administration has not rescinded the rule, but it did **cancel the policy memorandum**, which provided guidance on the implementation of the now enjoined rule. In addition, 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).

Federal Court Review of CAT Orders
Casebook pages 995-1002

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 offences.

The Supreme Court concluded that the federal appellate courts have jurisdiction to review factual challenges to administrative orders denying relief under CAT, and that the "substantial evidence" standard, generally applicable to factual findings, applied. Under this standard, the agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* at 688. Seven justices joined in the majority opinion by Judge Kavanaugh. Justices Thomas and Alito dissented. This opinion is significant for several reasons, among them that it rejects the more restrictive approach that many circuit courts of appeal had taken, that they were without jurisdiction to review such orders at all. 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 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 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 applies 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 in "drawing the line for due process at legal admission rather than physical entry, the Court tethers constitutional protections to a noncitizen's legal status as determined under contemporary asylum and immigration law. But the Fifth Amendment, which of course long predated any admissions program, does not contain limits based on immigration status or duration in the country: It

applies to 'persons' without qualification." *Id.* at 2012 (Sotomayor, S., dissenting). She further reasoned:

> In addition to creating a textual gap in the Constitution's coverage, the Court's rule lacks any limiting principle. This is not because our case law does not supply one. After all, this Court has long affirmed that noncitizens have due process protections in proceedings to remove them from the country once they have entered.
>
> Perhaps recognizing the tension between its opinion today and those cases, the Court cabins its holding to individuals who are "in respondent's position." Presumably the rule applies to—and only to—individuals found within 25 feet[4] 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).

In her journal article, ***Due Process in Removal Proceedings***, Diana G. Li argues that *Thuraissigiam's* holding on due process protections should be limited to the facts of the case – that of a recent entrant stopped immediately within twenty-five yards of the border. To hold otherwise, she posits, would be inconsistent with decisions going back to the 1880s, which have stood for the principle that all individuals within U.S. borders are entitled to constitutional due process rights.

Unfortunately, as Li discusses in her article, several lower court decisions have already applied *Thuraissigiam* more broadly, to deny constitutional procedural due process rights to non-citizens on the basis of not having been legally admitted. For instance, in **Bhaktibhai-Patel v. Garland**, 32 F.4th 180 (2d Cir. 2022), the Second Circuit found that a non-citizen who challenged the reinstatement of a prior removal order in withholding-only proceedings did not have a due

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

process right to judicial review pursuant to *Thuraissigiam*'s holding that a non-citizen "who is detained shortly after unlawful entry cannot be said to have 'effected an entry.'"

In **Martinez v. LaRose**, 980 F.3d 551 (6th Cir. 2020), the Sixth Circuit also relied on *Thuraissigiam* to deny a non-citizen's rehearing en banc regarding a habeas petition challenging his 34-month detention. Similar to the court in Bhaktibhai-Patel, the Sixth Circuit emphasized the distinction drawn in *Thuraissigiam* between the due process rights of apprehended non-citizens who live in the United States and those who have not "effected an entry," effectively treating them as applicants for admission at the border.

The Ninth Circuit has similarly interpreted *Thuraissigiam* broadly. In **Mendoza-Linares v. Garland**, 51 F.4th 1146 (9th Cir. 2022), a non-citizen received an expedited removal order after an asylum officer and an immigration judge found him to lack a credible fear of persecution in his home country, El Salvador. Mendoza-Linares claimed he was denied due process because the asylum officer and immigration judge determinations were held to a higher standard under the Transit Ban. The Court dismissed the case for lack of subject matter jurisdiction despite the due process claim and relied on *Thuraissigiam* to find that Mendoza-Linares "has no constitutional rights regarding his [asylum] application" because he was an "arriving alien."

And as discussed in the following section, in *Padilla v. Immigration and Customs Enforcemen*t, the government relied upon *Thuraissigiam* to defend against challenges that prolonged detention violates the rights of non-citizens who have not been lawfully admitted.

Detention of Asylum Seekers
Casebook pages 1037-1057

Family Case Management Program and Other Alternatives to Detention

The Family Case Management Program, described in Professor Marouf's article beginning on Casebook page 1049, was terminated by the Trump Administration in June 2017. 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. Notwithstanding these commitments, the Biden Administration has detained **increasing numbers** of individuals, including in private facilities, since taking office.

Family Separation under the Trump Administration

As is now widely known, the Trump administration attempted to deter asylum seekers through the inhumane practice of separating children from their parents. In May 2018, Attorney General Sessions called for "zero tolerance" of unlawful entry at the southern border and directed U.S. Attorneys to prosecute all violators along the southern border. The criminal prosecution and related incarceration of the adults became the justification for removing children from their parents.

The first legal challenge to family separation was *Ms. L. v. ICE*, a class action. It was successful, with U.S. District Court Judge Sabraw **ordering** 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).

In February 2020, the Government Accountability Office (GAO) issued a **report** concluding 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) – maintained inaccurate and missing records and effectively lost track of children, parent(s), or both. In July 2020, the government released a plan for reunification, and, in 2021, the Biden administration created a **Task Force** on family separation. The administration **projected** the Task Force would end in September 2022, by which time it expected to reunify all remaining separated families. As of July 2023, the Task Force continues working towards that goal. Despite these efforts, hundreds of families are still separated, while countless others were deported without being counted in official tallies. In February 2023, the Task Force **reported** that 998 children remained to be reunited with their families.

To facilitate reunification between children in the U.S. and their now-deported parents, the Task Force created a **website** where parents, legal guardians, and children affected by the Zero Tolerance Policy between January 20, 2017 and January 20, 2021 may register to begin the process and receive support services, including counseling for trauma caused by family separation. Eligible individuals who have been deported may return to the U.S., live in the U.S. for three years under humanitarian parole, and apply for work authorization.

In May 2023, the Task Force **reported** that a total of 3,033 families have been reunited. However, most of those reunifications—2,328 of the 3,033 reunified families—occurred before the inception of the Task Force. The Task Force claimed responsibility for just 705 reunifications since its inception in 2021.

There have been a number of lawsuits seeking damages for the harms inflicted on families as a result of the separation. As has been widely reported, including in the **Washington Post**, President Biden initially stated that separated families deserved compensation, and his Justice Department was in settlement negotiations with the lawyers for the families. However, once it was leaked that individual claims might settle for $450,000, Republicans harshly criticized the administration, leading to an about-face. Biden stated that payments of that amount had not been offered, and negotiations ceased. Justice Department attorneys have taken the position that the families are not entitled to damages and the cases should be dismissed.

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). The preliminary injunction ordered EOIR to conduct bond hearings within seven days of a bond hearing request by a *Padilla* class member, placed the burden of proof on DHS to demonstrate why the class member should not be released on bond, required the recording of bond hearings for class members (which is not required in typical bond hearings and not every immigration court records such proceedings), and required EOIR to produce a written decision with "particularized determinations of individualized findings" at the bond hearing (which is also not required in typical bond hearings, where IJs can simply check a box stating whether bond was or was not granted).

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). The Ninth Circuit rejected the government's contention that subsequent to *Thuraissigiam,* 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. The Supreme Court granted c*ertiorari* in *Padilla* and vacated the Ninth Circuit decision without opinion, remanding for "further consideration" pursuant to *Thuraissigiam*. *ICE v. Padilla*, 141 S. Ct. 1041 (2021).

While the case was pending at the Ninth Circuit, the Supreme Court issued another decision, ***Garland v. Aleman Gonzalez***, 142 S. Ct. 2057 (2022), which held that the INA deprived district courts of jurisdiction on noncitizens' requests for class-wide injunctive relief regarding certain immigration laws, including immigration detention statutes. The preliminary injunction is thus no longer in effect due to the *Aleman Gonzalez* decision, but the *Padilla* case remains pending regarding whether class members have a due process right to a bond hearing after *Thuraissigiam*. Unfortunately, *Padilla* class members remain without bond hearings in the meantime.

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 nine people died in its custody, and advocacy groups have **linked** such deaths to violations of medical standards.

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

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.

As of July 2022, Attorney General Merrick Garland had made **four appointments** to the Board of Immigration Appeals, two of them categorized as "temporary" appointments. Given the recognized importance of adjudicator background, and the lack of Board members drawn from the public interest sector, it was not encouraging that only one of the four new BIA members, Andrea Saenz, has a non-government, social justice background. Merrick Garland's first round of appointment of immigration judges also disappointed – he simply proceeded with installing judges who had been selected by the Trump administration. In contrast, the Trump administration withdrew offers to individuals selected by Obama to serve on the Board of Immigration Appeals.

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).

On May 12, 2022, the House Judiciary Committee approved legislation for immigration court reform. **H.R. 6577,** the Real Courts, Rule of Law Act of 2022, would "transition the

nation's immigration court system into an independent judiciary." The courts would be established under Art. 1 of the Constitution and would have a trial and appellate division. The **American Bar Association** and the **American Immigration Lawyers Association** both issued statements in support of H.R. 6577.

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

Work Authorization and Reauthorization – From Trump to Biden

In June 2020, the Trump Administration issued final rules limiting 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.

The rules had issued under acting DHS Director Chad Wolf, who had not been appointed in a manner consistent with department rules of succession. Judge Beryl A. Howell a federal district court judge in the District of Colombia struck down the rules on the basis that an illegally appointed official lacks authority to issue regulations. See ***AsylumWorks, et al. v. Wolf, et al.,*** Docket No. 1:20-cv-03815 (D.D.C. Dec 23, 2020).

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.

The Fifth and the Ninth Circuits issued notable decisions addressing credibility in 2022:

***Nkenglefac v. Garland*, 34 F. 4th 422 (5th Cir. 2022)**

This case involved the claim for asylum, withholding and Convention against Torture relief of a Cameroonian man involved in a prohibited political party. Mr. Nkenglefac testified in immigration court that he had three encounters with the police, two of which resulted in his arrest and beating. He also testified that the army had shot and killed his father. The BIA upheld the immigration judge's ruling that he was not credible because of inconsistencies between his testimony and interviews conducted by Customs and Border Protection (CBP) and asylum officers, documents which had not been presented in court or submitted into the record.

Citing *Matter of Y-I-M-* (discussed above), the Fifth Circuit held that "an adverse credibility determination should not be based on inconsistencies that take an alien by surprise," noting that other Fifth Circuit precedent has made clear that the reasons for an adverse determination must be "derived from the record." Observing that the petitioner was given no opportunity to

explain any inconsistencies or to dispute the accuracy of the records, it granted his petition for review and remanded the case to the BIA.

***Alam v. Garland*, 11 F.4th 1133 (9th Cir. 2021) (en banc)**

In *Alam v. Garland* the Ninth Circuit revisited its credibility jurisprudence in light of the 2005 REAL ID Act (discussed at p. 1103 of the casebook). Prior to REAL ID, the Ninth Circuit looked to whether an inconsistency went to the "heart of the claim" in making adverse credibility determinations; a single inconsistency could be the basis for an adverse finding (called the "one factor rule").

The REAL ID Act expressly removed the "heart of the claim" requirement, imposing a "totality of the circumstances" approach, and providing that any of a number of factors could be the basis for finding an individual not credible, "without regard" to whether those factors went to the heart of the claim.

Sitting *en banc*, the Ninth Circuit held that it would no longer apply the "one factor rule" since its origins were in earlier jurisprudence which required that the one inconsistency be central to the claim. Consistent with the REAL ID's language, it would apply a "totality of circumstances approach," rejecting the a "bright-line rule" which looks to the number of inconsistencies.

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.