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History and Politics of Immigration, Refugee, and Asylum Laws and Policies in the United States

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In 2019, former president Trump declared, "Asylum—you know, I look at some of these asylum people; they're gang members. They're not afraid of anything. They have lawyers greeting them. They read what the lawyer tells them to read. . . . And they say, 'I fear for my life.' . . . It's a scam. Okay? It's a scam. It's a hoax."[1] Vitriol directed at immigrants, refugees, and asylum seekers is not new. As many scholars have shown, U.S. immigration laws have often degraded or excluded various populations based on criteria that include race, nationality, politics, occupation, gender, and sexuality.[2] This chapter provides an overview of asylum and immigration laws and policies to explain the historical context of the current asylum system and its politicization.

Restrictive immigration laws coexist with a deeply embedded narrative about American identity: "We are a 'nation of immigrants.'" The phrase can be traced at least as far back as 1874, when it was used in an editorial in the *Daily State Journal of Alexandria*.[3] From its inception, however, the idea of the United States as a nation of immigrants, with its connotations of inclusivity and racial harmony, coexisted with the racial exclusions of federal immigration laws and policies that ignored the rights of Native Americans, disregarded the legacy of enslaved Africans, and excluded Asians.[4] In 1876, two years after the *Daily State Journal*'s celebration of immigrants, the Supreme Court affirmed that the government's capacity to restrict immigration was a matter of national sovereignty. This ruling formally recognized the federal government's authority to regulate immigration and confirmed Congress's exclusive power to make immigration law. Federal immigration laws, however, continued to be enforced by states, which contributed to disparate

treatment of migrants.[5] To standardize federal authority over immigration laws, Congress created the Bureau of Immigration in 1891, a precursor to the Immigration and Naturalization Service (INS), currently part of the Department of Homeland Security (DHS).[6]

The U.S. first recognized people fleeing persecution as a distinct category in immigration law in response to the refugee crisis after World War II. Congress began to create a formal refugee policy with the passage of the Displaced Persons Act of 1948, which allowed a restricted number of displaced persons from Europe to establish legal residency in the U.S. Subsequent legislation continued the use of quotas to extend visas to those fleeing communist regimes in Europe and China for limited periods of time. U.S. immigration laws did not include a permanent policy for refugees until the Immigration and Nationality Act of 1965. Congress expanded refugee law in the Refugee Act of 1980, which legally defined refugee and systematized federal policies concerning the admission and treatment of refugees. The Refugee Act marked the first time that the U.S. embraced international legal principles regarding refugees. The law distinguishes two types of refugees, applicants for refugee status outside the U.S., who are processed in their home country, and applicants for refugee status physically present in the U.S., who are subject to an "Asylum Procedure" defined by Congress. While the 1980 Refugee Act continues to be the key document governing the treatment of asylum seekers, subsequent presidential administrations have relied on executive authority to enact policies that procedurally deter asylum seekers and substantively narrow grounds for asylum relief.[7]

HISTORY OF U.S. IMMIGRATION LAW

Federal immigration policies have historically encouraged, or limited, specific groups based on criteria that include race, national origin, political affiliation, occupation, and family relationships. Changes in immigration laws stem from national debates that often cross political party lines. Historically, both Democratic and Republican administrations have enacted restrictive immigration laws and policies, and both have implemented laws and policies that expanded immigration and broadened protections for noncitizens living in the U.S. The passage of new immigration laws in Congress has depended on coalitions of liberal and conservative politicians aligned with governmental and national interest groups. When these coalitions fail, presidents have often taken executive action to overcome congressional gridlock and further their own political agendas.[8]

The federal government's first significant acts to regulate immigration restricted migrants because of race and national origin, following earlier legislation that had excluded most "non-white" persons from obtaining citizenship through the Naturalization Acts of 1790 and 1795.[9] While citizenship was extended to persons of African descent in 1870, the continuing exclusion of other "non-white" populations from citizenship legitimized later racially based immigration restrictions. In

1875, Congress passed the Page Act, which sought to regulate Asian immigration by specifically restricting women of Asian descent. The Page Act included a provision that excluded prostitutes but that in practice was used to deny entry to all Asian women, especially women from China. The Chinese Exclusion Act, passed by Congress in 1882, extended immigration restrictions to Chinese men by placing a moratorium on the migration of Chinese laborers to the U.S. In 1907, President Theodore Roosevelt moved to restrict immigration from Japan in the Gentlemen's Agreement, in which the U.S. pledged not to officially bar Japanese immigrants if Japan would end emigration to the U.S. The 1917 Immigration Act went further by restricting all immigrants from a so-called Asiatic zone that included Asians beyond the terms of the Chinese Exclusion acts and the 1907 Gentlemen's Agreement. This Immigration Act resulted in the passage of a literacy test and specified other excludable groups such as "idiots," "imbeciles," and others deemed undesirable based on perceived mental, physical, and moral capacity (characteristics used to exclude LGBTQ+ migrants), criminal background, political views, and occupation. The Asian Exclusion Act, included in the 1924 Immigration Act, restricted all immigration by Asian laborers and prevented all those legally restricted from citizenship in previous legislation from migrating to the U.S.[10]

The Immigration Act of 1924 was openly conceived of as an "act to limit the immigration of aliens to the United States."[11] Rep. Albert Johnson, who authored the bill and chaired the House Immigration Committee, declared during the debate over the bill, "It has become necessary that the United States cease to become an asylum."[12] The 1924 legislation was the first to permanently limit immigration to the United States; it instituted the "national origins quota system," created preferences for family unification and occupation, and authorized the Border Patrol, which was created via an appropriations bill in 1924. The Immigration Acts of 1917 and 1924 defined immigration policies until the 1952 Immigration and Nationality Act (INA), which continued to uphold the national origins quota system and immigration preferences based on family unification and occupation or skills. The 1952 act explicitly barred LGBTQ+ migrants as "sexual deviants," a ban that lasted until 1990. The INA incorporated immigration statutes into one body of law, compiled under Title 8 of the U.S. Code. Subsequent immigration reforms would amend provisions of the 1952 INA. The first significant amendment occurred through the 1965 Immigration and Nationality Act, which repealed the national quota system and ended consideration of race and ethnicity in immigration admissions. Instead, the 1965 law established a preference system based on family relationships and skills, criteria that continue to define U.S. immigration policy today.[13]

The 1986 Immigration Reform and Control Act (IRCA), enacted during the Reagan administration, was an immigration enforcement bill that prohibited employers from hiring undocumented workers. In addition, IRCA regularized the status of some undocumented persons in the U.S. To qualify, individuals had to show that they had resided continuously in the United States since January 1, 1982.

Over three million noncitizens achieved legal status, but this cutoff date excluded many Central American immigrants who fled civil wars in their countries after the deadline. During the George H. W. Bush administration, the Immigration Act of 1990 affirmed family unification as a priority for immigration visas but increased the allotment of employment-based visas and established a new category based on diversity to increase immigration from countries with low rates of immigration to the U.S. The 1990 law ended restrictions on LGBTQ+ migrants and created Temporary Protected Status (TPS), which allowed the attorney general to grant individuals from specific countries temporary protection from deportation and employment authorization. In 1994, Congress authorized the Violence Against Women Act (VAWA), which contained provisions for noncitizens to petition for immigration relief independently of their abusive spouse or parent. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), enacted under the Clinton administration, is the last comprehensive immigration reform passed by Congress. Forged during an economic recession amid fears about terrorism, a revival of xenophobia, and Republican domination of both houses of Congress, the IIRAIRA, signed by a Democratic president, was one of the toughest pieces of legislation limiting immigration to date. The 1996 law provides the legal authority for many current enforcement actions. Notably, it mandated that noncitizens who resided in the U.S. for over 365 days after April 1, 1997, would face expulsion for ten years and that noncitizens convicted of minor crimes (such as shoplifting) would be detained and deported.[14] IIRAIRA also created an expedited removal process that permitted deportation without an immigration hearing and authorized the attorney general to construct physical barriers on the U.S. border with Mexico. Restrictions for noncitizens were further increased in 1996 through the Antiterrorism and Effective Death Penalty Act (AEDPA). This law prohibited the return of noncitizens who had previously been deported and established fines and ten-year imprisonment for violators.[15]

REFUGEE AND ASYLUM LAW

Fear of past and future persecution is the defining feature of being a refugee. Economic motivations and family reunification—the criteria for admission historically used in U.S. immigration law—are not relevant for determining refugee status. Applicants for refugee status outside the United States are subject to numerical quotas yearly established by the president in consultation with Congress. There are no numerical quotas for those already inside the United States, who are defined as asylum applicants. The 1951 United Nations Refugee Convention and the 1967 United Nations Protocol Relating to the Status of Refugees define a refugee as

> a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion

> [the five protected grounds], is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it.

Asylum applicants must demonstrate that they fear persecution on account of at least one of five protected grounds: race, religion, nationality, membership in a particular social group (PSG), and political opinion.[16]

The United States is a party to the 1967 UN Protocol, which affirms the principle of non-refoulement: "refugees should not be returned to a country where they face serious threats to their life or freedom." The Refugee Act of 1980 adopts essentially the same definition of *refugee* as the 1951 UN Refugee Convention and the 1967 UN Protocol; the Refugee Act explicitly links the definition of persecution to the protected grounds and establishes a path to refugee status for those already physically present in the U.S. through asylum. U.S. law permits noncitizens, regardless of their legal status in the U.S., to petition via the affirmative or defensive asylum processes;[17] it includes two additional forms of relief, withholding of removal and relief under the UN Convention Against Torture (CAT), ratified by the U.S. in 1994. The 2005 Real ID Act contained additional provisions that increased the burden on applicants seeking relief through asylum, withholding of removal, and CAT to substantiate their claims. Specifically, the Real ID Act heightens the need for applicants to corroborate, through testimony and supplemental documentation, their personal credibility, the facts of their claim, and the nexus between the persecution they experienced and at least one of the protected grounds, or the reason for torture distinct from the protected grounds.[18]

Not everyone who flees violence in their home countries is eligible for asylum or other forms of relief. Under U.S. law, asylum is a discretionary form of relief that an asylum applicant must apply for within one year of initial physical presence in the United States, unless they meet one of the enumerated exceptions. Individuals who are convicted of certain crimes are not eligible for asylum. Applicants must show a "well-founded fear" (at least 10 percent) of persecution on account of at least one of the protected grounds. If an applicant can demonstrate that they have been persecuted in the past, there is a presumption of future persecution. A grant of asylum confers permission to remain in the U.S. and provides a basis for permanent residency and a path to citizenship. Asylum status may be extended to immediate family members.[19]

Withholding of removal is defined in INA section 241(b)(3). Unlike asylum, there is no one-year filing deadline. While applicants must also show fear of persecution on account of a protected ground, the standard is much higher: "more likely than not," or a 51 percent or higher chance that they will be persecuted if returned to their home country. As in asylum claims, there is presumption of future harm if

applicants can show past persecution. Applicants convicted of certain crimes are also barred from this form of relief. Relief under withholding of removal is mandatory rather than discretionary; that is, if an applicant proves statutory eligibility and meets the burden of proof, the immigration judge must grant the application. Withholding of removal does not provide a basis for permanent residency, nor does it extend to family members. Withholding of removal prohibits deportation to the country of origin but does allow deportation to another "safe" country.[20]

Withholding of Removal and Deferral of Removal through the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment are U.S. treaty obligations under article 3. CAT requires governments to prevent the use of torture within their territories and prohibits governments from sending persons to any country where they are likely to be tortured. The U.S. became a signatory in 1988 and ratified the Convention in 1994. To gain relief under CAT, applicants must show that it is "more likely than not" that they will be subjected to future torture by governmental officials or by individuals acting with the consent or acquiescence of public officials. Torture is defined in article 1 of the Convention Against Torture as "severe pain or suffering, whether physical or mental."[21] Like withholding of removal under the INA, there is no filing deadline, and if an applicant proves statutory eligibility and meets the burden of proof, relief is mandatory. Unlike asylum and INA-defined withholding of removal, torture does not have to be based on one of the protected grounds; instead an applicant must prove that the act they have been or will be subjected to rises to the level of severe pain and suffering, that the act is intentional and is carried out when the individual is in the perpetrator's custody or control, and that the government is complicit or acquiescent in the act. There are no exemptions to CAT protection, such as past criminal convictions, and there is no presumption of future torture based on past torture. CAT protection does not extend to family members and only prohibits removal to the individual's home country but permits deportation to a safe third country or detention in the United States.[22]

PRACTICE OF ASYLUM AND OTHER FORMS OF RELIEF

Individuals usually apply for all three forms of relief, indicated on Form I-589, "Application for Asylum and for Withholding of Removal." For asylum and withholding under the INA, applicants specify which of the protected grounds are the basis for the requested form(s) of relief and briefly explain the nature of past persecution and/or reasons for fearing future persecution. For relief under CAT, applicants explain the nature of past torture and/or fear of future torture. In a hearing before an immigration judge, this information may be supplemented by additional documentation, including affidavits and testimony by expert witnesses. The grounds for asylum are very narrow, and the criteria for evaluating claims are multifaceted. Applicants (referred to as respondents in hearings) for

asylum and relief through withholding of removal must demonstrate that the violence they fear rises to the level of persecution, that at least one central reason for the persecution is a protected ground (race, religion, nationality, membership in a particular social group, or political opinion), that the government is acquiescent or directly responsible for the persecution (unwilling and/or unable to protect), and that relocation within the country of origin will not protect the individual from persecution. Applicants bear the burden of establishing, by a "preponderance of evidence," that they meet each of these criteria in order to gain refugee status.[23]

Generalized violence and criminality in a country are not bases for asylum. Applicants must demonstrate that they are perceived distinctly in their society on account of at least one of the protected grounds and that the violence they fear is a result of their perceived differences from others. The link between the applicable protected ground(s) and the violent act(s) is referred to as the nexus. Differentiating violent acts that reflect persecution based on a protected ground from generalized violence poses challenges for those who come from countries with high levels of crime and murder, such as the Northern Triangle countries (Guatemala, El Salvador, and Honduras). Gangs, for example, have territorial control in these nations, have infiltrated security and governmental officials, and use extortion, torture, and murder to control these societies. Yet specific sectors, for example, women and LGBTQ+ persons, face forms of violence distinct from the general population because of their gender, gender identity, or sexual orientation. Gangs, for instance, regularly rape and murder women and LGBTQ+ persons not only to assert authority over the individual victims, but to maintain territorial control by enforcing patriarchal norms that subordinate women and degrade LGBTQ+ persons. Governmental policies, practices of security officials and the judiciary, and treatment by family and community members demonstrate that women and LGBTQ+ persons are viewed and treated distinctly in these countries and may thus be considered members of a PSG.

Women, children, and LGBTQ+ persons often flee their countries of origin because of domestic, gender-based, and sexual violence, and their claims for protection are therefore based on their membership in a PSG, the most recently recognized and unstable protected ground in U.S. immigration law. The PSG was incorporated as a new basis for protection in the 1980 Refugee Act to bring U.S. immigration law into alignment with the 1967 UN Protocol; however, Congress did not define the scope of this new category. The PSG was first defined in case law, *Matter of Acosta*, in 1985. In that case, the Board of Immigration Appeals (BIA) interpreted the PSG as "a group of persons, all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed." Immigration judges, the BIA, federal circuit courts, and attorneys general have inconsistently interpreted

membership in a PSG, especially what constitutes "social visibility" and "particularity," making this a difficult protected ground for applicants to substantiate.[24]

Asylum applicants must demonstrate a "well-founded fear" of persecution based on objective facts. Persecution is not defined in U.S. immigration law. The BIA, in *Matter of Acosta*, defines persecution as "harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome." Individuals must explain why the violence, which can include both physical and mental harm, is persecution. Types of harm that may be considered persecution include physical and sexual violence, torture, and psychological and mental harm. Critically, the applicant must demonstrate that the harm is not caused by a personal grievance or delinquency but that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."[25] For women and children, who often experience violence in the domestic sphere, the need to connect persecution to a protected ground is a challenge because judges frequently interpret domestic violence as a private crime and thus ineligible as a basis for asylum.[26]

After establishing that persecution is on account of at least one protected ground, applicants must show that the government cannot protect them from that persecution. U.S. immigration law affirms that governments have the responsibility to protect their citizens from persecution. The BIA clarified the connection between persecution and government authority in *Matter of Acosta*, specifying that "harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." For some applicants, such as women, the need to present evidence that the government is unwilling or unable to protect them presents obstacles. Women often flee persecution perpetrated by private actors, gender-based violence and femicide are generally underreported, and protective legislation may mask the government's lack of will or incapacity to protect women.[27]

A well-founded fear of persecution is also dependent on the ability of the applicant to escape persecution by relocating within the home country. Individuals need to present evidence that they would be endangered anywhere in the country by demonstrating a widespread pattern of persecution on account of one of the protected grounds and/or that the persecutor has the capacity to locate them anywhere in the country. Relocation must also be a "reasonable" option; that is, judges may consider other factors, such as economic, cultural, or social constraints, that would subject the respondent to other forms of harm. Claims of an individual's inability to relocate have come under increasing scrutiny by the U.S. government; in 2019, U.S. Citizenship and Immigration Services (USCIS) issued guidance to asylum officers asserting that "private violence" (referring to gang violence in this instance) is not "pervasive" throughout the Northern Triangle. Citing U.S. State Department reports, the USCIS contended that "there are areas that are generally

very safe within each of the countries" and directed asylum officers to obtain information on prior attempts to relocate within the country of origin. This USCIS guidance reflects a trend in U.S. immigration procedures to increase the burden on applicants to present supporting documentation for each aspect of their claims for relief.[28]

ACCESS TO LEGAL REPRESENTATION AND IMMIGRATION COURT ASSIGNMENT

Asylum and withholding of removal claims require applicants to articulate and substantiate narrow and interconnected legal arguments. Considering the complexity of this process, it is not surprising that applicants with legal representation are twice as likely to gain protection. The Transactional Records Access Clearinghouse (TRAC) at Syracuse University annually tracks data and produces reports on civil, criminal, and DHS immigration enforcement, immigration courts, and judges. According to TRAC, there were a record number of asylum hearings in FY 2019 and an exceptionally high denial rate; 69 percent of applicants were denied asylum and other forms of relief. In FY 2019, unrepresented applicants were successful in only 16 percent of their claims, compared to a 33 percent rate of success for applicants with legal representation.[29]

Lack of legal representation is especially disadvantageous for some populations, such as children, who find themselves alone in immigration courts. In 2014, the ACLU, the American Immigration Council, and other legal advocacy groups argued that children cannot be expected to understand the complexity of U.S. immigration law and that, therefore, lack of legal representation prevented them from receiving a "full and fair" hearing, a violation of due process. In response to a class-action lawsuit on behalf of minors, the Obama administration presented Judge Jack Weil, an assistant chief immigration judge responsible for overseeing policies in the fifty-eight immigration courts, as an expert witness to argue that children did not need legal representation in immigration hearings. Judge Weil told an ACLU attorney, "I've taught immigration law literally to 3-year-olds and 4-year-olds. . . . They get it." This legal challenge to require representation for children failed; the Ninth Circuit ruled in 2016 that the plaintiffs lacked jurisdiction and in 2018 denied a request for a rehearing. Unaccompanied minors without legal representation in immigration hearings are more likely than other populations to be returned to their country of origin; between 2005 and 2014, 90 percent of children without legal representation were deported.[30]

Serendipity is a major determinant in asylum claims. The success of asylum claims also depends on the location of the immigration court and assignment to a specific immigration judge. Immigration judges have great discretion in granting or denying asylum claims. TRAC records the decisions of all immigration judges and found, for example, that in New York denial rates of individual judges range

from an average of 5 percent to 95 percent.[31] Applicants are also affected by the hearing docket of the judge to which they are assigned. There is a tremendous backlog of active docket (scheduled) cases (1,596,193 as of December 2021). This case load is not evenly distributed among the relatively few immigration judges; in New York, for example, in June 2021 there were over 100,000 pending cases, while in Montana there were fewer than 1,000 pending cases.[32] As more cases are placed on a judge's docket, applicants assigned to that judge will face increasingly long wait times for their hearings. Asylum applicants waiting for hearings are in legal limbo; they cannot leave the country during this time and increasingly are not given work authorizations. In addition, cases may become harder to prepare as conditions change in their countries of origin and witnesses become unavailable.[33]

IMPACT OF NATIONAL ORIGIN ON THE ASYLUM PROCESS

Individuals apprehended at the U.S.-Mexico border are primarily women and children from the Northern Triangle. According to the U.S. Customs and Border Patrol (CBP), in FY 2019, 851,508 persons were apprehended at the border. Of that number, 549,702, or 65 percent, were unaccompanied minors and family units (a term used to describe a parent, usually a mother, traveling with a child or children), the majority from Northern Triangle countries. This migration pattern can be traced to the 2014 immigration "surge," when there was a sharp increase in the number of mothers and children from the Northern Triangle apprehended at the border. Between October 2013 and June 2014, 47,000 children, three-quarters from Northern Triangle countries, were apprehended crossing the U.S.-Mexico border, representing a 90 percent increase from the previous year. The UNHCR issued a report on unaccompanied child migrants on the U.S. southern border in 2014, finding that 58 percent of the 404 children the agency interviewed had suffered serious harm that might merit international protection. In 2019, 76,020 children arrived alone at the border to ask for protection; 83 percent (62,748) fled Northern Triangle countries.[34]

Women and children are fleeing the Northern Triangle primarily because of gender-based, sexual, and gang violence. The UNHCR reported that U.S. immigration officers who conducted credible fear interviews (CFIs) on the U.S. border in fiscal year 2015 found that 80 percent of women and girls from Northern Triangle countries and Mexico established a "significant possibility" of persecution or a well-founded fear of persecution on account of a protected ground or that they would be subjected to torture if returned to their countries of origin. According to the UNHCR, most of these women and girls fled gender-based and sexual violence perpetrated by domestic partners and gang members. In this report, the UNHCR reiterated that its "long-standing interpretation of refugee law recognizes that gender violence (including intimate partner violence); family

association; political opinion; lesbian, gay, bisexual, transgender and intersex (LGBTI) status; and racial or indigenous status, among others, meet the criteria for protection."[35]

By federal law, asylum claims must be evaluated on a case-by-case basis through the process outlined above. However, individuals from the Northern Triangle face increasing barriers to accessing the asylum process and immigration judges deny their asylum claims at significantly higher rates than for applicants from other countries. CBP officers are required to ask individuals apprehended at the border and subject to expedited removal whether they fear returning to their country of origin because of persecution and/or torture. If individuals answer affirmatively, they are referred to a CFI, conducted by an asylum officer. At the end of 2017, Attorney General Jeff Sessions urged greater review of CFI claims specifically for individuals apprehended at the Mexican border, mostly individuals from the Northern Triangle, because he predetermined that their claims were likely to be fraudulent. As seen above, recent USCIS guidance to asylum officers specifically targets those from Northern Triangle countries for additional scrutiny. The USCIS assertion that Northern Triangle countries have safe regions undermines the credible fear claims of those fleeing violence in that region and encourages asylum officers to order their expedited deportation rather than allow them to apply for asylum. While negative CFIs may be reviewed by an immigration judge, due to increasing politicization of the immigration court and judicial appointments, since 2018 immigration judges have increasingly upheld CFI denials. Once in the asylum hearing, immigration judges are also more likely to deny applications from Northern Triangle applicants. The greatest number of asylum applicants are from China, and in FY 2021 they had an overall success rate of 67 percent, in contrast to Honduran applicants, who had a success rate of 18 percent. Nearly one in every three asylum grants in the past two decades were for applicants from China.[36]

PRESIDENTIAL POLITICAL AGENDAS GENERATE RESTRICTIVE ASYLUM POLICIES

U.S. immigration and refugee laws are determined by Congress. The executive branch is constrained by congressional intent but still exercises great authority to implement policies and procedures that affect immigrants and refugees. Recent administrations, through executive orders and precedential decisions by attorneys general, have deterred asylum applicants, obstructed due process, and narrowed grounds for asylum. Detention policies and legal directives that exclude most forms of gender-based and gang violence from asylum protection target noncitizens from Northern Triangle countries, especially women and children. Civil and immigration rights organizations have filed federal lawsuits to halt some of these policies, but the overall effect of these presidential initiatives has been to make it more difficult for individuals to initiate and substantiate asylum claims.[37]

Procedural Restrictions through Executive Orders

Both the Obama and Trump administrations responded to increasing numbers of asylum seekers from the Northern Triangle at the U.S.-Mexico border by issuing executive orders to expand immigrant detention. Expansion of detention effectively limits applicants' ability to obtain legal representation, which, as discussed above, is a critical factor determining the outcome of asylum cases. According to the National Immigrant Justice Center (NIJC), detained individuals with representation are five times more likely to succeed in their claims for protection than those without representation. Detained persons are hampered by the location of detention centers in often remote areas, lack and expense of communication, and limited access to information or documentation to support claims for relief. In addition, conditions in detention centers can augment physical and mental trauma, due to lack of medical and psychological services and incidences of family separation, all of which diminish the capacity of detained persons to advance a complex set of arguments and procure the documentation necessary to support an asylum claim. Finally, hearings for detained cases are often expedited, giving applicants little time (a matter of weeks) to prepare for their hearings in front of an immigration judge.[38]

The Obama administration took executive action in 2014 to expand the use of family detention. Detention of children and families was not a new practice, but before 2014 the only government-operated family detention center was the Berks County Residential Center in Pennsylvania, with ninety-six beds. In 2014, the Obama administration opened new, larger family detention centers; family detention increased by 1,200 percent between June and August 2014. The first new family detention facility opened in Artesia, New Mexico, in June 2014 to house up to seven hundred mothers and children from the Northern Triangle in trailers. The remoteness of the detention center, two hundred miles from any major city, and policies that restricted access to the center by attorneys impeded oversight of the facility's conditions and access to legal representation. Additional family detention centers in Texas would eventually house thousands more women and children. The creation and administration of these family detention centers, by design, discouraged due process of asylum claims; Obama officials viewed these detention facilities for women and children from the Northern Triangle as deportation holding centers. Secretary of Homeland Security Jeh Johnson, testifying before a Senate committee in 2014 about the situation of mothers and children in detention centers, stated bluntly, "Our message to this group is simple: we will send you back. We are building additional space to detain these groups and hold them until their expedited removal orders are effectuated." The Obama administration faced court challenges regarding family detention and the lack of access to counsel.[39]

The Trump administration also viewed immigrant detention as a tool to restrict asylum claims. President Trump accelerated widespread family detention and

instituted expansive policies to separate and detain children away from their parents. In January 2017, Trump issued Executive Order 13767: Border Security and Immigration Enforcement Improvements. Among the provisions included in this order were directives to expand the use of expedited removal and to construct additional immigrant detention centers. In response to public condemnation and litigation against what had become the standard practice under his administration to separate and detain children away from their parents, in June 2018 Trump issued Executive Order 13841: Affording Congress an Opportunity to Address Family Separation. This order called for indefinite detention of immigrant families and expedited processing of their asylum proceedings.[40]

Because of President Trump's executive orders, the number of detained children skyrocketed to the highest ever recorded. In September 2018, the *New York Times* counted 12,800 detained children. In May 2017, this number was 2,400. The Trump administration announced its intention to triple the size of a temporary "tent city" in Tornillo, Texas, to house up to 3,800 children through the end of the year. At its height, in December 2018, the Tornillo detention center held children in one hundred tents and was the largest immigrant child detention center in the country. Public protest and legal challenges due to the poor conditions in Tornillo closed the center in January 2019. Detaining children in these privately run detention centers costs about $750 per child per day, or three times the amount of a typical shelter. In August 2019, the Trump administration challenged the Flores Settlement Agreement, which prohibits the detention of children for more than twenty days, arguing that the government should be able to detain children indefinitely. In addition, the Flores Settlement Agreement mandates that children be provided with food, clothing, grooming items, and medical care. In response to litigation, an attorney for the Trump administration argued that soap and toothbrushes might not be necessary for detained children. Further undermining safety in immigration detention centers, the government decided not to administer flu vaccines to immigrants detained in border facilities, despite outbreaks of other preventable diseases, such as mumps. Despite challenges by both the Obama and Trump administrations, federal courts have repeatedly preserved the Flores Settlement Agreement.[41]

Trump officials separated immigrant children from their families on an unprecedented scale. In spring 2018, 2,700 children, including infants and toddlers, were separated from their parents and put into detention. A federal judge ordered the government to reunite children with their parents by the end of July, but at the end of August almost 500 children remained separated from their parents. Over 100 children remained separated from their parents five months later. When ordered to reunite the parents and children, the government admitted it could not identify the children's parents because of inadequate accounting. According to the ACLU, 55.8 percent of the children separated from their parents were from Guatemala. In

October 2019, the ACLU and co-counsels sued the U.S. government for damages on behalf of the separated families, including ongoing trauma.[42]

Substantive Restrictions by Attorneys General

Presidential executive orders to expand the use of immigrant detention and expedited removal have an impact on detainees' access to due process for their asylum claims. The executive branch also exercises influence over the interpretation and application of asylum law through the Executive Office for Immigration Review (EOIR), an office within the Department of Justice. The Department of Justice is run by the attorney general, who is nominated by the president and approved by the Senate, is a member of the president's cabinet, and can be removed at will by the president. Immigration judges are appointed by the attorney general and are therefore employees of the Department of Justice in the executive branch, unlike judges in the judiciary branch. Decisions by immigration judges can be appealed to the Bureau of Immigration Appeals, also an office in the EOIR. BIA decisions are binding but can be overruled or modified by the attorney general. Decisions by both the BIA and the attorney general can be appealed to U.S. Circuit Courts of Appeal to determine whether the decisions are congruent with congressional intent in the INA. The attorney general can intervene in the appeal of a BIA decision to U.S. Circuit Courts of Appeal by certifying a case for review. Based on this review, the attorney general's decision sets precedent for future cases for immigration judges and the BIA. The authority of the attorney general to appoint immigration judges, establish judicial proceedings in immigration hearings, and issue precedential decisions regarding asylum policy enables the executive branch to advance presidential priorities by changing judicial practice and narrowing asylum eligibility through the EOIR.[43]

The EOIR extends the authority of presidential administrations to create and enforce immigration and refugee policies. Under the Trump administration, Attorneys General Jeffery Sessions and William Barr directly targeted the protected ground that defines refugee status for women and children who are fleeing persecution in the Northern Triangle on account of their membership in a PSG related to their gender and/or family status. Using their authority to review BIA decisions in *Matter of A-B-* and *Matter of L-E-A-*, Sessions and Barr changed asylum legal standards by excluding most forms of gender-based, sexual, and gang violence from consideration as forms of persecution; instead, they defined this violence as private criminality and therefore not a basis for asylum or withholding of removal.

In 2018, Attorney General Sessions issued the decision *Matter of A-B-*, which overturned a 2014 BIA decision, *Matter of A-R-C-G*. In that earlier decision, the BIA determined that in some instances women fleeing domestic violence could "constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal." This BIA decision significantly advanced the

claims for women who experienced gender-based persecution on account of their status in a domestic partnership. In *Matter of A-B-*, Attorney General Sessions certified the case to himself to decide whether "being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum and withholding of removal." In reference to the original cases, *A-R-C-G-* and *A-B-*, he determined that domestic violence is "vile" and can be severe enough to rise to the level of persecution but defined domestic abuse as personal, private conflict rather than persecution on account of a protected ground. While the original case did not include gang violence as a factor of persecution, Sessions extended his decision in *Matter of A-B-* to include gang violence as another form of private crime caused by delinquency and therefore not a basis for refugee protection. In his decision Sessions wrote, "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." Legal professionals and scholars have found numerous faults with Sessions's decision, including his use of dicta—unsubstantiated opinion—rather than legal analysis based on facts of the case and prior case law.[44] Despite legal challenges to *Matter of A-B-*, Sessions's decision made it easier for immigration judges and the BIA to dismiss claims by applicants fleeing violence perpetrated by domestic partners, gang members, and other private actors.[45]

Attorney General Barr, in 2019, sought to further narrow the PSG by limiting family membership as a basis for persecution, ruling that "most nuclear families are not inherently socially distinct and therefore do not qualify as 'particular social groups.'" This decision complicates claims by women who are fleeing violence on account of their status in a domestic relationship and by victims of gang violence who are targeted with violence because of their kinship with another targeted individual. The respondent in *L-E-A-* was targeted in retaliation for his father's refusal to collaborate with a drug cartel. As in *Matter of A-B-*, legal professionals and scholars challenged Attorney General Barr's decision in *Matter of L-E-A-* because it relied on dicta rather than legal analysis based on evidence. There is a considerable quantity of case law confirming that family-based social groups have been continually recognized as a PSG since *Matter of Acosta* in 1985. In that decision, "family background" and "kinship relations" are included as foundational examples of "a group of persons all of whom share a common, immutable characteristic," the defining characteristic of a PSG. *Matter of L-E-A-* reflects the capacity of presidential administrations to restrict access to asylum by narrowing the scope of the PSG in order to exclude people seeking refuge at our border with Mexico. Because the PSG continues to be ambiguously defined, individuals fleeing gender-based, sexuality-based, and gang violence face greater challenges in their asylum claims.[46]

* * *

Leaving home is not trivial. Among those who embark from Northern Triangle countries, 80 percent of women and girls are raped crossing through Mexico.[47] At

the U.S. border, numerically restricted entry ("metering") prevented thousands from requesting asylum, others have been forced to return to Mexico to await televised immigration hearings held in tents ("Migrant Protection Protocol"), and some were immediately deported to request asylum in countries known for high levels of violence ("Third-Country Transit Ban").[48] For those granted an immigration hearing, U.S. asylum law authorized by Congress is both narrow and ambiguous, allowing the executive branch to further political agendas by crafting restrictive procedures and substantively changing legal standards. Antipathy to noncitizens continues to uneasily coexist with the definition of the United States as a "nation of immigrants"; a 2019 Gallup poll found that 76 percent of respondents viewed immigration as "good" for our country.[49]

Many attorneys view recent attacks on asylum as unprecedented, but the U.S. has a long history of stigmatizing and excluding immigrants and asylum seekers.[50] Despite the odds against them, 99.9 percent of represented immigrant families released from detention attend their immigration hearings.[51] Applicants with legal representation are clearly advantaged, but the criteria for substantiating claims for asylum and other forms of relief increasingly require significant documentation to contextualize the violence that provokes individuals to flee their homes. Expert witnesses on country conditions provide research and analysis that informs attorneys and assists immigration judges to determine the merits of an individual's claim. The stakes are high for asylum applicants; through affidavits and hearing testimony, expert witnesses are an integral part of the process that will determine their fate.

NOTES

I thank S. Deborah Kang and Maria Baldini-Potermin for their careful reading of and insightful suggestions on this chapter. Any factual or interpretive errors are my own.

1. "Remarks by President Trump in Roundtable on Immigration and Border Security | Calexico, California," May 5, 2019.

2. Oscar Handlin is known as the founder of U.S. immigration history and is the author of *The Uprooted: The Epic Story of the Great Migrations That Made the American People* (Boston: Little, Brown, 1951), which won the Pulitzer Prize for History in 1952. For an analysis of the impact of U.S. foreign policy and racialized politics on restrictive immigration laws and policies, see Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ: Princeton University Press, 2004). Nancy Hiemstra, in *Detain and Deport: The Chaotic U.S. Immigration Enforcement Regime* (Athens: University of Georgia Press, 2019), argues that racism and xenophobia are enforced through detention and deportation policies; S. Deborah Kang offers a comprehensive analysis of restrictive immigration policies carried out by INS officials on the U.S.-Mexico border in *The INS on the Line: Making Immigration Law on the US-Mexico Border, 1917–1954* (Oxford: Oxford University Press, 2017). For analyses of Central American immigrants and refugees, see María Cristina García, *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada* (Berkeley: University of California Press, 2006); and Susanne Jonas and Néstor Rodríguez, *Guatemala-U.S. Migration* (Austin: University of Texas Press, 2014). For gender- and sexuality-based restrictions on immigration and

asylum, see Efrat Arbel et al., eds., *Gender in Refugee Law: From the Margins to the Centre* (London: Routledge, 2014); Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2009); and Sara L. McKinnon, *Gendered Asylum: Race and Violence in the U.S. Law and Politics* (Urbana: University of Illinois Press, 2016).

3. Miriam Jordan, "Is America a 'Nation of Immigrants'? Immigration Agency Says No," *New York Times*, Feb. 22, 2018.

4. Handlin, *The Uprooted*.

5. Chy Lung v. Freeman, et al., 92 U.S. 275 (1876); Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (Oxford: Oxford University Press, 2017).

6. Kelly Lytle Hernández, *Migra! A History of the U.S Border Patrol* (Berkeley: University of California Press, 2010).

7. USCIS, "Immigration and Naturalization Service Refugee Law and Policy Timeline, 1891–2003"; Displaced Persons Act of 1948 (Pub. L. 80-774); 1980 Refugee Act, 94 STAT. 102 PUBLIC LAW 96-212–MAR. 17, 1980.

8. Daniel J. Tichenor, in *Dividing Lines: The Politics of Immigration Control in America* (Princeton, NJ: Princeton University Press, 2009), analyzes the policies and politics of immigration reforms from the nineteenth century to the 1990s.

9. "A Bill to Establish an Uniform Rule of Naturalization, and Enable Aliens to Hold Lands under Certain Conditions," Mar. 4, 1790 (SEN1A-C1); "An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Act Heretofore Passed on that Subject," Jan. 29, 1795; 18th Cong., 1st sess., May 26, 1824, Chap. CLXXXV, Act 4, Stat. 69. While most immigration historians concur that the first immigration restrictions were racially motivated, Hidetaka Hirota argues that class biases were the motivation. See Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (Oxford: Oxford University Press, 2017).

10. 1870 Naturalization Law (Pub. L. 41-254); Page Act (Pub. L. 43-141); 1882 Chinese Exclusion Act (Pub. L. 47-126); "Chinese Heritage," U.S. National Archives; 1906 Gentlemen's Agreement: *Letter from Theodore Roosevelt to Victor Howard Metcalf*, Nov. 27, 1906, Theodore Roosevelt Collection, MS Am 1540 (408), Harvard College Library; 1917 Immigration Act (Pub. L. 64-301); 1924 Immigration Act (Pub. L. 68-139); "Chinese Immigration to the United States 1884–1944," Bancroft Library Digital Archive, University of California, Berkeley.

11. Immigration Act of 1924 (Pub. L. 68-139).

12. "The Immigration Act of 1924: Historical Highlights," U.S. House of Representatives.

13. Immigration and Nationality Act of 1952 (Pub. L. 82-414); Sharita Gruberg, "On the 50th Anniversary of the Immigration and Nationality Act, Changes Are Needed to Protect LGBT Immigrants," Center for American Progress, Mar. 23, 2014; Immigration and Nationality Act of 1965 (Pub. L. 89-236); U.S. Code Title 8: Aliens and Nationality.

14. In 1996, IIRAIRA and AEDPA added twenty-one new crimes to the aggravated felony ground for deportation. IIRAIRA also lowered the threshold for crimes that would qualify for the status of aggravated felony by reducing the term of imprisonment provision from five years to one year. See Human Rights Watch, "Deportation Law Based on Criminal Convictions after 1996," in "Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy," 2007.

15. National Archives, "Major United States Laws Relating to Immigration and Naturalization: 1790–2005"; Immigration Reform and Control Act of 1986 (Pub. L. 99-603); Immigration Act of 1990 (Pub. L. 101-649); Violence Against Women Act, Subtitle G—Protections for Battered Immigrant Women and Children, Sec. 40710, H.R. 3355, 1994; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. 104-208); Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132).

16. UNHCR, "Convention and Protocol Relating to the Status of Refugees"; U.S. Dept. of Justice Fact Sheet: Asylum and Withholding of Removal Relief Convention Against Torture Protections (2009).

17. In affirmative asylum claims, the applicant is not under removal proceedings and applies directly to the U.S. Citizen and Immigration Services (USCIS). In defensive asylum claims, the applicant is in removal proceedings and is referred to an immigration judge. USCIS, "Obtaining Asylum in the United States"; see also chapter 4 in this volume.

18. Human Rights First, "Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk," Nov. 2018 ; Real ID Act of 2005 (Pub. L. 109-13); Immigration Equality, "Asylum Manual: Real ID" (chap. 9); Mary Giovagnoli, Esq., "Overhauling Immigration Law: A Brief History and Basic Principles of Reform," American Immigration Council, Feb. 14, 2013.

19. 8 USC 1158: Asylum; American Immigration Council, "Asylum in the United States," June 11, 2020; Immigration Law Blog, "Exceptions to the 1-Year Bar in Asylum," Sept. 9, 2014.

20. Withholding of removal under section 241(b)(3)(B) of the act and withholding of removal under the Convention Against Torture, Title 8 CFR 208.16.

21. The full definition of torture in CAT Article 1.1 is as follows: "For the purpose of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions."

22. UNHCR, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"; "Deferral of Removal under the Convention Against Torture," Title 8 CFR 208.17; "Implementation of the Convention Against Torture," Title 8 CFR 208.18.

23. USCIS, "Form I-589"; "Definition of Refugee," 8 USC 1101(a) INA 101(a); UNHCR, "How to Apply for Asylum, Withholding of Removal, and/or Protection under Article 3 of the Convention Against Torture."

24. Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985); Immigration Equality, "Asylum Basics: Elements of Asylum Law."

25. INA § 208(b)(1)(B)(I).

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Statistics on Immigrants and Immigration in the United States," Mar. 14, 2019; TRAC Immigration, "Asylum Decisions Vary Widely across Judges and Courts—Latest Results," Jan. 13, 2019.

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38. National Immigrant Justice Center, "Special considerations when representing detained applicants for asylum, withholding of removal and relief under the Convention Against Torture," Aug. 2019; see also chapter 8 of this volume.

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"Board of Immigration Appeals"; EOIR, "About the Office of the Executive Office of Immigration Review"; Southern Poverty Law Center, "The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool," June 25, 2019.

44. Cornell's Legal Information Institute defines *dicta* as follows: "The plural form of dictum. A statement of opinion or belief considered authoritative because of the dignity of the person making it. The term is generally used to describe a court's discussion of points or questions not raised by the record or its suggestion of rules not applicable in the case at bar. Judicial dictum is an opinion by a court on a question that is not essential to its decision even though it may be directly involved."

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46. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); Matter of L-E-A-, 27 I&N Dec. 581 (A.G. 2019); attorney general vacated *Matter of L-E-A-* on June 16, 2021, Matter of L-E-A- III, 28 I&N Dec. 304 (A.G. 2021). Catholic Immigration Legal Network (CLINIC) describes the PSG as a "developing area of law": CLINIC, "Attorney General Garland Vacates *Matter of A-B-* and *Matter of L-E-A-*," July 28, 2021.

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