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David C. Portillo Jr.
david.portillo@pepperdine.edu

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I. INTRODUCTION

In 2018, the United Nations High Commissioner for Refugees recorded 3.1 million asylum seekers among 25.4 million international refugees.[1] Flouting the "principles and practices" of historic immigration law, the United States responded to this crisis with increased restrictions, including curbing asylum requests, setting stricter criteria for immigrants, increasing border security, and reducing resettlement quotas.[2] Refugees currently face threats including a growing sex trafficking industry and increasing violence against women in refugee camps.[3] Meanwhile, U.S. political leaders continue to villainize migrants generally,[4] and U.S. asylum policy has shifted from a focus on the rights and safety of asylees to a focus on exclusion in the name of national security.[5] Under the Administration of President Donald Trump, a string of asylum decisions have applied this new exclusion focus by imposing an unnecessarily strict standard for a successful asylum claim.[6] This standard is neither humane nor in line with the purpose and intent of United States asylum processes.

Title VIII of the Code of Federal Regulations (CFR), which defines the scope of review for the Board of Immigration of Appeals (BIA), states that "[t]he [BIA] will not engage in *de*

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[1] Refugees and Asylum Seekers: Interdisciplinary and Comparative Perspectives 100 (S. Megal Berthold & Kathryn R. Libal eds., 2019).

[2] *Id.* at 101–02.

[3] *Id.* at 100.

[4] See generally Engy Abdelkader, Immigration in the Era of Trump: Jarring Social, Political, and Legal Realities, 44 The Harbinger 76 (2020).

[5] REFUGEES AND ASYLUM SEEKERS, *supra* note 1, at 101–02.

[6] *See* Matter of A-B-, 27 I&N Dec. 316, 323 (A.G. 2018); Matter of A-C-A-A-, 28 I&N Dec. 84, 84 (A.G. 2020).

novo review of findings of fact determined by an immigration judge."[7] However, "de novo" review is not defined in this statute.[8] In September of 2020, Attorney General William Barr elected to intervene in the case of *Matter of A-C-A-A-* to impose a novel understanding of *de novo* review, requiring the government to "reconsider every aspect of an asylum application."[9] This means that even if asylees win their case at trial, they must "reprove everything again a second time on appeals."[10] This article will argue that this holding is absurd and cruel. It will also show how the decision is merely the latest iteration in the long-term fight over what asylum law is for, what it does, and what it ought to do. By renewing emphasis on national security, Attorney General Barr has imposed another undue burden on asylum applicants that is legally unsound.[11] This article will show the wisdom behind the original humanitarian aims of asylum, explain how we have abandoned this humanitarianism in favor of exclusion, and recommend a path towards future renewal of a just and fair American asylum process.

Part II of this article will explore the history of asylum policy and display its firm roots in the aftermath of The Second World War, a rejection of eugenics, and an embrace of civil rights and humane treatment of asylees. Part III will explore how the Department of Justice has manipulated terms of art employed by immigration officials, stretching them to their breaking point in order to restrict access to asylum and move toward a general policy of exclusion. Part IV will explore in detail how the pendulum of asylum policy swung decisively in favor of

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[7] 8 C.F.R. § 1003.1(d)(3)(i) (2007) (emphasis added).

[8] 8 C.F.R. § 1003.1(d)(3)(ii–iii) (2007).

[9] Matter of A-C-A-A-, 28 I&N Dec. 84, 93 (A.G. 2020); Andrew Geibel, *Attorney General's Decision Makes Matters Worse for Asylum Seekers*, HIAS BLOG (Oct. 5, 2020), https://www.hias.org/blog/attorney-generals-decision-makes-matters-worse-asylum-seekers

[10] Geibel, *supra* note 9.

[11] *See generally* Matter of A-B-, 27 I&N Dec. 316, 319 (BIA 2018); Matter of A-C-A-A-, 28 I&N Dec. 84, 93 (A.G. 2020).

exclusion during the most recent tenures of Attorneys General Sessions and Barr. Part V will argue against viewing this issue as one of pure legal formalism, and rather encourage seeing it as part of a broader political project unjustly weaponizing legal formalism against asylum seekers. Finally, Part VI will discuss possible solutions to bring asylum policy back to its purpose—serving those at our borders seeking refuge from oppression.

II. EXCLUSION vs. HUMANITARIANISM: THE HISTORY OF ASYLUM POLICY

A. MCCARRAN-WALTER vs. HART-CELLER

Historically, concerns for national security often overtook concerns for human rights in immigration law. In 1952, Congress enacted the first iteration of the Immigration and Nationality Act (INA), also known as the McCarran-Walter Act.[12] It operated via a quota system to allow only a few immigrants from nations without large existing U.S. populations.[13] The U.S. would only permit from each country up to 0.17% "of the number of inhabitants of the United States who traced their ancestry to that country in 1920."[14] This favored continued immigration from the northern European nations from which previous generations of Americans descended, such as England, Germany, and Ireland, and limited or prevented immigration from other areas, such as southern Europe, Asia, and Africa.[15]

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[12] Susan M. Akram, Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion, 14 GEO. IMMIGR. L. J. 51, 56 (1999). Congress intended this particular Act to help exclude migrants that carried Communist sympathies from entering the United States. *Id.* While most of the racial elements of this Act would later be replaced by the Hart-Celler Act, much of this policy remains in the U.S. Code today. Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279 (1996).

[13] Chin, *supra* note 12, at 279.

[14] *Id.*

[15] *Id.* at 280. Notably, the McCarran-Walter Act's scheme did not count African Americans "for purposes of awarding quotas to foreign nations" and restricted visas for countries that were colonies of European powers, all but completely ceasing immigration to the U.S. from Africa. *Id.* at 280. Chin dismisses the claim that the Hart-Celler Act can be blamed for the increase in immigration to the U.S. of Latino/a immigrants. *Id.* at 280 n.24.

While the INA originated with exclusionary and racist aims, international and domestic pressure would cause Congress to move away from those aims.[16] In 1965, Congress adopted the Hart-Celler Act, which amended the INA to "eliminat[e] the national-origins quotas" in favor of categories selecting for marriage, high-skilled work, and other race- and national-origin-neutral criteria.[17] This was seen as the application of the Civil Rights movement to immigration law.[18] Its enactment came in the wake of The Second World War, the fall of Nazi Germany, the rejection of the Holocaust's aims, and the massive refugee spike that followed.[19] As the western powers went through a period of decolonialization, newly freed peoples went to the United Nations to speak about the importance of racial equality, and the U.S. "sustained international criticism" for the policies of the McCarran-Walter Act.[20] In short, the U.S. national origins system "create[ed] an image of hypocrisy which [could] be exploited by those who [sought] to discredit [America's] professions of democracy."[21]

The adoption of Hart-Celler also represented the adoption by the United States of the meaning of refugee as it was understood in international law in those times. The U.S. imported the U.N.'s definition of "refugee" into the U.S.C. nearly verbatim,[22] including the language

[16] David S. FitzGerald & David Cook-Martin, *The Geopolitical Origins of the U.S. Immigration Act of 1965*, MIGRATION INFO. SOURCE (Feb. 5, 2015), https://www.migrationpolicy.org/article/geopolitical-origins-us-immigration-act-1965.

[17] *Id.*

[18] *Id.*

[19] *Id.* The shift in the source of immigrants to the United States away from Europe and towards Latin America is often attributed to the enactment of the INA of 1965. *Id.*

[20] *Id.*

[21] *Id.*

[22] Kelly Karvelis, *The Asylum Claim for Victims of Attempted Trafficking*, 8 NW. J. L. & SOC. POL'Y 273, 283–84 (2013).

regarding "well-founded fear" and "membership in a particular social group."[23] While the INA contains "little elaboration" on the meaning of these terms, Congressional intent illustrates that it should be interpreted in accord with the UN's wider understanding of refugee status.[24] The United Nations adopted a similar definition in 1951, shortly following the end of the Second World War.[25] The Senate Committee meant the adoption of this definition in American law to conform with that of the United Nations.[26] The treatment of refugees under international law at the time was meant to be broad and responsive to the various forms the need for asylum may take.[27]

If Hart-Celler represented a step away from exclusion and towards humanitarianism, then this was reinforced by the adoption of the Refugee Act of 1980. This Act came at the behest of drafters who "were motivated chiefly by a sense of duty to combat human rights abuses around the world."[28] It amended the INA to provide anyone who meets the above definition of "refugee" a "statutory right to seek asylum."[29] This amendment reconfirmed Congress's prior

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[23] *Compare* United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 153 (stating that a refugee is one who "owing to *well-founded fear of being persecuted* for reasons of race, religion, nationality, *membership of a particular social group* or political opinion, 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.") (emphasis added), *with* 8 U.S.C. § 1101(a)(42)(A) (stating, "[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or *a well-founded fear of persecution* on account of race, religion, nationality, *membership in a particular social group*, or political opinion.") (emphasis added).

[24] Karvelis, *supra* note 22, at 283.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 284. "[T]he UNHCR's depiction of 'social group' as a broad and adaptable term demonstrates that Congress intended an equally expansive construction of the same term in the Refugee Act." *Id.*

[28] Karvelis, *supra* note 22, at 285. "The Refugee Act's other objectives and the policies that it implemented further illustrate an inclusive intention." *Id.*

[29] *Id.* at 283.

intent to conform with the United Nations on refugee issues.[30] Alongside increasing the number of refugees the United States would admit, Congress established other procedures meant to "assist emerging classes of refugees" and avoid excluding "deserving people because of arbitrary standards."[31] Despite this prior intent, the United States quickly deviated from these goals and diverged from the approach of other nations with similar goals.[32]

Starting in the 1990s, Congress would undertake a concerted shift in policy away from a focus on humanitarianism and back towards a focus on national security and exclusion.[33] In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which established a novel system known as "expedited removal."[34] Expedited removal is the process by which low-level immigration officers can quickly deport immigrants from the United States without judicial review.[35] The process applies to immigrants apprehended "at [the] border" or who are "apprehended within two weeks of arrival and within 100 miles" of the border.[36] Under expedited removal, the migrant bears the burden of proving

[30] *Id.*

[31] *Id.*

[32] *Id.* at 286–88.

[33] *A Primer on Expedited Removal*, AM. IMMIGR. COUNCIL (July 22, 2019), https://www.americanimmigrationcouncil.org/research/primer-expedited-removal.

[34] *Id.*

[35] *Id.* The INA provides: "If an immigration officer determines that an alien who is arriving in the U.S. . . . is inadmissible [either for misrepresentation of a material fact, misrepresentation of their status as an immigrant, or lack of required documentation], the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i) (2006).

[36] A Primer on Expedited Removal, *supra* note 33.

they should be allowed a chance to argue for asylum,[37]—a requirement that some argue constitutes a due process violation.[38]

Congress enacted expedited removal with two goals—to keep fraudulent asylum claimants from accessing the full asylum process, and to maintain access for "sincere asylum seekers."[39] These goals, however, have proven contradictory as a focus on curbing "illegal" immigration has prevented entry of many legitimate asylum claimants.[40] The expedited removal process is "too abbreviated to eliminate weak claims without running a substantial risk of returning bona fide refugees to persecution."[41] Expedited removal has raised concern from the UNHCR, since it can lead to the United States "violating its obligations to protect refugees."[42]

B. THE LIVED ASYLUM PROCESS

On July 22, 2019, the Department of Homeland Security declared it would follow President Trump's directive to carry out expedited removal to its fullest extent.[43] Under the current expedited removal process, a migrant will be immediately deported by the officer at hand unless they either (1) "indicate[] . . . an intention to apply for asylum," or (2) "a fear of persecution."[44] Under either of these two situations, the immigration officer must "refer the alien

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[37] Deborah Anker, Bahar Khoshnoudi & Ron Rosenberg, *Expedited Removal: Applying the Credible Fear Standard*, 21 In Defense of the Alien 193, 193 (1998).

[38] *A Primer on Expedited Removal*, *supra* note 33. This argument stems primarily from the extreme leeway given to low-level immigration officers on the ground, making them "prosecutor and judge." *Id.* Meanwhile, this "truncated process" means that there is a high error rate because courts are rarely able to determine when a migrant may otherwise have been able to obtain relief with so short a timeframe. *Id.* In 2017, 35% of deportations were through the expedited removal process. *Id.*

[39] Anker, *supra* note 37, at 195.

[40] *Id.* at 196.

[41] *Id.*

[42] *Id.* at 195; *see also* Karvelis, *supra* note 22, at 283–84.

[43] A Primer on Expedited Removal, *supra* note 32.

[44] 8 U.S.C. §§ 1225(b)(1)(A)(i)–(ii).

for an interview by an asylum officer."[45] During this interview, that asylum officer determines whether the applicant has what is called a "credible fear of persecution."[46] If "credible fear"[47] is shown, the migrant can avoid expedited removal, and receive the "full consideration" of their asylum claim in a "standard removal hearing" before an immigration judge (IJ) at the Executive Office for Immigration Review (EOIR).[48] Then they may appeal to the Board of Immigration Appeals (BIA), and finally may appeal to the federal circuit court where their case originated.[49] During this entire process, the asylum applicants remain detained.[50]

Starting at the BIA stage, the court reviews questions of law *de novo*.[51] The terms "particular social group" and "well-founded fear of persecution" are questions of legal and administrative interpretation because they are not defined in the INA.[52] Therefore, these terms have been reviewed and interpreted in multiple circuits.[53] These judicial interpretations, as well as the appropriate test for establishing a reasonable interpretation in the first place, have been inconsistent and contradictory not just between circuits, but even within the same circuit.[54] One result of this inconsistency has been hesitancy to apply the particular social group finding to

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[45] *Id.*

[46] § 1225(b)(1)(B)(v).

[47] *See* 8 U.S.C. § 1225(b)(1)(B)(v)

[48] Thuraissigiam v. U.S. Dep't of Homeland Sec., 1040 S.Ct. 1959 (2020) (quoting C.F.R. § 208.30(f)).

[49] 8 U.S.C. §§ 1240.15; 8 U.S.C. § 1252(a)(1); 8 U.S.C. § 1252 (b)(2) (2012).

[50] *A Primer on Expedited Removal*, *supra* note 33; *see also Record Number of Asylum Cases in FY 2019*, TRAC IMMIGR. (January 8, 2020), https://trac.syr.edu/immigration/reports/588/ (noting the whole asylum process, from application for asylum up to the time when an applicant finds out whether they will be granted asylum, lasts an average of 1,030 days, or nearly three years).

[51] 8 C.F.R. § 1003.1(d)(3)(ii–iii) (2007). *De novo* means that the reviewing court gives "no deference to a lower court's findings." *Hearing de novo*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[52] Karvelis, *supra* note 22, at 275.

[53] *Id.* at 283.

[54] *Id.* at 275.

domestic violence victims.[55] The question is whether this is a failure of our government to avoid excluding deserving asylum applicants due to arbitrary standards. Answering that question requires inquiring into the historical understanding and purpose behind the "particular social group" standard.

III. THE SCOPE NARROWS: MANIPULATION OF KEY INA TERMS

A. CREDIBLE FEAR

For an asylum applicant to succeed in their application, they must first undergo a "credible fear interview," where they must show a "credible fear of persecution" if returned to their country of origin.[56] By statute, a refugee has "credible fear of persecution" when there is a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."[57] In other words, whether the refugee is granted the opportunity to have their case heard before a judge depends on whether the asylum officer first reviewing their case believes what they say.[58]

The INA states that in deciding whether a migrant can "establish eligibility for asylum" an IJ must take "into account the credibility" of that migrant.[59] For example, in *Gomez-Zuluaga v. Attorney General of U.S*, the Third Circuit reviewed a case involving a migrant fleeing threats

[55] *Id.*

[56] Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 53; 8 U.S.C. § 1225(b)(1)(A)(ii).

[57] Pistone, *supra* note 56, at 57.

[58] *Id.* at 54.

[59] 8 U.S.C. § 1225(b)(1)(B)(v).

of guerilla violence in Colombia.[60] While denying refugee status on other grounds, the court nevertheless agreed with the IJ that the migrant had established credible fear.[61] The migrant declared that Colombian guerillas were "known to threaten, beat, rape, and sexually abuse women," accusations that were perfectly consistent with independent reports of such violence.[62] These objective conditions, combined with the migrant's subjective experiences, were enough for the Third Circuit to consider her credible.[63] In *Canales-Vargas v. Gonzalez*, considering a migrant who had fled Peruvian guerillas after speaking out against them, the Ninth Circuit similarly found the migrant credible where Peru's objective history of guerilla violence matched the migrant's personal experiences.[64]

Even taking into consideration the law enforcement aims behind IIRIRA, there are "various indications" that Congress intended credible fear to be "a low screening hurdle."[65] The UNHCR recommends IJs give a "benefit of the doubt" to applicants who meet "general credibility" with "plausible" statements and not "counter to generally known facts."[66] Congress

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[60] Gomez-Zuluaga v. U.S. Att'y Gen., 527 F.3d 330, 338 (3d Cir. 2008). While the applicant had credible fear, the Court overturned the IJ's determination that the applicant belonged to a "particular social group" as protected under the INA, a controversy which will be discussed in detail later in this article. *Id.*

[61] *Id.*

[62] *Id.* at 348.

[63] *Id.*

[64] Canales-Vargas v. Gonzales, 441 F.3d 739, 744–76 (9th Cir. 2006). The Ninth Circuit at this time applied a low threshold on this issue which has since been superseded by statutory requirements that an asylum applicant "must establish that . . . political opinion was or will be at least *one central reason* for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). For our purposes on this point, this distinction is immaterial.

[65] Anker, *supra* note 36, at 196–97. The two main pieces of evidence Anker, Khoshnoudi, and Rosenberg point to in support of this are (1) a statement to this effect from lead senatorial sponsor Senator Hatch, and (2) the fact that the "final version of IIRIRA *rejected* a more stringent standard" which would have required an inquiry into the claimant's truthfulness. *Id.* (emphasis added).

[66] *Id*. at 197. Notably, the BIA still recognizes that as a matter of law the credibility of the applicant is not *per se* determinative of "credible fear," but rather whether the content matches otherwise verifiable facts. *In Re E-P-*, 21 I&N Dec. 860, 862 (B.I.A. 1997).

wanted asylum officers to focus on the subjective fear, and not to "perform a detailed determination" of asylum eligibility.[67] They were simply meant to determine "whether the applicant's fear appears to be sincere" and consistent with reality.[68] Despite this intent, asylum officers frequently apply a more stringent review in the name of national security.[69] Furthermore, IIRIRA limits judicial review of asylum officers' decisions to merely "(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under [the IIRIRA], and (C) whether the petitioner can prove" that they were legally admitted "for permanent residence" as a refugee, or granted asylum.[70] Asylum officers therefore receive great leeway and little oversight in expedited removal, allowing it to be an effective tool for asylee exclusion.[71]

In 2020, the Supreme Court rejected arguments that IIRIRA's limitations on review of asylum decisions were unconstitutional violations of due process or the right to a writ of habeas corpus.[72] The case of *Department of Homeland Security v. Thuraissigiam* involved Sri Lankan migrant who crossed the U.S.-Mexico border, whereupon Border Patrol immediately

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[67] Anker, *supra* note 37, at 199.

[68] *Id. But see In Re N-M-A-*, 22 I&N Dec. 312, 313 (B.I.A. 1998) (holding that when the statutory conditions leading to credible fear change, such that the original source of the feared persecution is no longer present, the applicant bears the burden of showing credible fear on new grounds).

[69] *See generally* Donald Kerwin, *The Use and Misuse of 'National Security' Rationale in Crafting U.S. Refugee and Immigration Policies*, 17 INT'L J. REFUGEE LAW 749 (2005). Kerwin, Executive Director of the Catholic Legal Immigration Network, heavily criticizes the misuse of national security rhetoric in the shaping of asylum policy, including the characterization of asylum generally as a backdoor through which the U.S. is left vulnerable to terrorist attack. *Id.* at 757. "National security" rhetoric has been misused to "justify the interdiction, repatriation, and detention of . . . asylum-seekers." *Id.* These and similar policies "risk alienating" migrants and undermining the credibility of American values. *Id.* at 751, 763. The anti-terrorism fight, he argues, would be "more likely to be won if the United States understands [national] security to include adherence to its guiding values," including the recognition of "refugee and immigrant rights." *Id.* at 763.

[70] 8 U.S.C. § 1252(e)(2).

[71] Department of Homeland Security v. Thuraissigiam, 134 Harv. L. Rev. 410, 411 (2020).

[72] Thuraissigiam, 140 S.Ct. at 1964.

apprehended him.[73] The migrant, Thuraissigiam, fled Sri Lanka after the nation's government engaged in a "campaign of abduction and torture against Tamils," Thuraissigiam's ethnicity.[74] Thuraissigiam argued that IIRIRA precluded all review for violations during a credible fear interview, even for clearly unreasonable failures, such as "refus[al] to conduct an interview altogether or to provide translation," or even when asylum officers "based their decisions on race or religion."[75] The Ninth Circuit held that IIRIRA "did not provide a meaningful opportunity for review of Thuraissigiam's claims," violating his right to petition the government for a writ of habeas corpus under the United States Constitution.[76]

The Supreme Court disagreed.[77] First of all, the Court emphasized both IIRIRA's interest in crafting "a system for weeding out patently meritless claims and expeditiously removing" such migrants, and reducing overall costs.[78] The Court reiterated a common theme among national-security-minded jurists, characterizing "credible fear" as something to be asserted "in the hope of a lengthy asylum process that will enable [the claimants] to remain in the United States for years."[79] This concern favors what the Court calls a "century-old rule" that the "power to admit or exclude aliens is a sovereign prerogative," arguing the Constitution therefore gives "plenary authority" to the "political department of the government."[80] In other words, the President, through his Cabinet, and Congress, by the will of the people, have the right to refuse

[73] *Id.* at 1967.

[74] Brief for Respondent at 4, Thuraissigiam, 1040 S.Ct. 1959 (No. 19–161).

[75] *Id.*

[76] Department of Homeland Security v. Thuraissigiam, *supra* note 71, at 412.

[77] Thuraissigiam, 140 S.Ct. at 1983.

[78] *Id.* at 1963.

[79] *Id.* at 1966 n.9.

[80] *Id.* at 1982.

due process to refugees seeking asylum in the United States. What Thuraissigiam suffered upon entry was therefore not an "unlawful executive detention," and, in the eyes of the Court, the IIRIRA correctly refused to grant him asylum in the United States.[81] "[T]he Government," wrote Justice Alito for the Court, "is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka."[82]

The Harvard Law Review note on *Thuraissigiam* in 2020 points out the clear implications of the Supreme Court's ruling, as well as the lack of clarification for much of the Court's reasoning.[83] Following the lead of the Trump administration's anti-migrant agenda, the sweeping *Thuraissigiam* holding "deepens the impact of an increasingly stringent immigration regime."[8485] The Harvard Law Review finally points out that the "methodological confusion" stemming from *Thuraissigiam* "further entrench[es] the increasingly expansive, 'shadowy regime' of expedited removal."[86]

B. PARTICULAR SOCIAL GROUP

When Congress adopted the Refugee Act of 1980 to amend the INA, it did not substantially change the definition of "refugee" imported from the United Nations.[87] It still included those persons of whatever nationality who are "persecuted" or have "a well-founded

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[81] *Id.* at 1970–71.

[82] *Id.* at 1970.

[83] Department of Homeland Security v. Thuraissigiam, *supra* note 71 at 415. Despite "anchoring" its holding in an originalist interpretation, the Court nevertheless included in its analysis the application of more recent case law "without clarifying its reasoning or the weight of this body of law." *Id.* Much of this note's criticism of the Court is based on its inconsistent application of an originalist interpretation.

[84] *Id.*

[85] *Id.* at 419.

[86] *Id.*

[87] Karvelis, *supra* note 22, at 283.

fear of persecution" because they are "in a particular social group."[88] Unfortunately, the Refugee Act did not define "particular social group," despite requiring it to be the "central reason" for persecution.[89] However, it is historically clear that the UNHCR, from whom the INA adopted its definition, intended the term to be broad.[90] A broad application was not meant to weaken law enforcement or interfere with a sovereign's territorial integrity, but to make sure law can adapt to new situations creating new "classes of refugees."[91] In recent years, the executive branch has gone on to narrow the meaning of "particular social group," such that the term no longer serves its original purpose. The narrow interpretation is used to exclude valid refugee and asylum claims in violation of the purposes of the INA.

i. IMMUTABLE CHARACTERISTICS

In the case of *Matter of Acosta*, the BIA made one of its first attempts to define the term "particular social group," adding the requirement of immutability.[92] A characteristic is considered immutable if it is either "beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[93] Applying the judicial interpretation theory of *esjudem generis*,[94] the BIA determined that each of the enumerated grounds (race, religion, nationality, and political opinion) had a single

[88] 8 U.S.C. § 1101(a)(42)(A).

[89] *Id.*; 8 U.S.C. § 1158(b)(1)(A)(i).

[90] Karvelis, *supra* note 22, at 284; *see also supra* Section II.A.

[91] Karvelis, *supra* note 22, at 285.

[92] Matter of Acosta, 19 I&N Dec. 211, 233 (B.I.A. 1985).

[93] *Id.*

[94] *Id.* The doctrine of *esjudem generis* (literally "of the same kind") guides courts to consider "general words used in an enumeration with specific words" to be "construed in a manner consistent with the specific words." *Id.*

characteristic in common: they are each an "immutable characteristic."[95] The BIA further explained that the characteristic need not be innate, such as sex or skin color, but could also be a "shared past experience."[96] For example, the Court named "former military leadership or land ownership" as examples of groups that would qualify under this definition.[97] It is important to keep in mind that "immutability" does not mean in this context that the trait is somehow *unchangeable*. The interest being preserved here is one of justice; it would be unjust to permit persecution on account of something that, "as a matter of conscience," the person should not be expected or required to abandon.[98]

The applicant in *Matter of Acosta* claimed to be one of a group of taxi drivers opposing certain guerilla groups by refusing to cooperate with guerilla-sponsored work stoppages.[99] The Court did not consider this group to involve "immutable characteristics" because they could have either "chang[ed] jobs or cooperat[ed] in work stoppages."[100] This is an example of a limitation on the definition of "particular social group," but the BIA did not preclude the possibility of as-of-yet unknown groups which fit this definition. Rather, they require that for a finding of

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[95] *Id.* Since the INA lists as grounds for persecution "race," "religion," "nationality," and "political opinion," all of which are immutable characteristics, the fifth ground of "particular social group" must also be one that shares an immutable characteristic. *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* at 234.

[100] *Id.* The BIA here considered the argument that since this case involves what amounts to a decision between his ability to make a living and his bodily safety (as he was dealing with militant groups), this was a trait for which they should not, "as a matter of conscience," be persecuted, and therefore functionally serves as an "immutable trait." *Id.* The BIA first argued since the international definition of "refugee" does not "guarantee an individual a right to work in the job of his choice," they infer from this conclusion the applicant was "able by his own actions to avoid the persecution of the guerrillas." *Id.* This of course ignores the material realities facing those who must make such decisions between their deeply held political views and their bodily safety, which is cause enough to question exactly what individuals the BIA thinks asylum law serves.

particular social group, the applicant "either cannot change [the trait,] or should not be required to change [the trait] because it is fundamental to their individual identities or consciences."[101]

ii. LARGE PERSECUTED GROUPS

Courts also focus on the size of the social group being considered, even when such a consideration cuts against clear persecution. This is best exemplified in the holding of *Rreshpja v. Gonzales*, where an asylum applicant argued that her persecution was due to being an "attractive young woman who risk[ed] being kidnapped and forced into prostitution if she return[ed] to Albania."[102] The Sixth Circuit held that this group failed to meet the INA requirements of "particular social group" for two reasons: (1) the group was seen as a "generalized, sweeping classification," and (2) "a social group may not be circularly defined by the fact that it suffers persecution."[103] Both holdings cause serious conceptual problems for courts' understanding of what a particular social group is and what function it serves in the INA.

First of all, the idea that "generalized, sweeping classifications" are mutually exclusive with the definition of "particular social group" is unfounded because it ignores how often societies persecute groups that are sweepingly large and generalized in the abstract.[104] The

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[101] Matter of Acosta, 19 I&N at 233. The BIA soon drew another line barring credible fear determination for a migrant claiming to have escaped persecution by guerillas due to being a former state policeman. *Matter of Fuentes*, 19 I&N Dec. 658, 660 (B.I.A. 1988). This is comparable to the taxi drivers, because the officers could theoretically resign; however, the BIA here pointed out that "[v]irtually all participants on either side of an armed struggle could be characterized as 'persecutors.'" *Id.* Size of the group in question is not dispositive, but one cannot read these cases without realizing that from the beginning, size did matter to the BIA's reasoning; the bigger the candidate group, at least in theory, the less likely the BIA is to permit a finding of a particular social group.

[102] Rreshpja v. Gonzales, 420 F.3d 551, 554 (6th Cir. 2005).

[103] *Id.* at 555–56.

[104] *See generally* Jaclyn Kelley-Widmer & Hillary Rich, *A Step Too Far: Matter of A-B-, "Particular Social Group," and Chevron*, 29 CORNELL J.L. & PUB. POL'Y 345 (Winter 2019). Kelley-Widmer and Rich call the idea that a group is "inherently deficient" under the INA for being too large "arbitrary and unexamined." *Id.* at 395 (quoting *De Pena-Paniagua v. Barr*, 957 F.3d 88, 94 (1st Cir. 2020)). These authors explain that, applying *esjudem generis* again, since eligible groups based on race, religion, and nationality "typically refer to large classes of persons," particular social groups also often refer to large

Rreshpja holding contradicted by a holding that same year from the Ninth Circuit in *Mohammad v. Gonzales*.[105] In *Mohammad*, the court considered whether the group "Somalian females," who suffered forced genital mutilation, met the definition of "particular social group" for asylum purposes.[106] The court concluded that according to a "logical application of our law" it was clearly reasonable that women of a certain nationality fall within the definition of "particular social group."[107] In fact, given the pervasiveness of forced female genital mutilation in Somalia, the applicant could successfully have claimed membership in the broad group of all "Somalian females," or "young girls" from her particular tribe; either would have rightly been a basis to claim asylum.[108] Sex is clearly an "innate characteristic" that is "fundamental to individual identity."[109] This innate characteristic is furthermore the "motivating factor—if not a but-for cause—of [their] persecution."[110]

If the Sixth Circuit in *Rreshpja* applied the Ninth's reasoning, "young, attractive Albanian women" could reasonably meet the definition of particular social group as much as "Somalian women" did.[111] Instead, whether "virtually all of the women in Somalia" could

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groups, and therefore "particular social group cannot be limited by its size." *Id.* at 395–96. To put a finer point on it, if an important reason to reject asylum eligibility was that the group is large, that would have excluded asylum for Jews escaping Nazi Germany and Tutsis fleeing the Rwandan genocide, both very large groups. *Id.* at 395 n.374 (citing *Cece v. Holder*, 733 F.3d 662, 674–75 (7th Cir. 2013) (en banc)).

[105] *See generally* Mohammed v. Gonzalez, 400 F.3d 785 (9th Cir. 2005).

[106] *Id.* at 796–97.

[107] *Id.* at 797.

[108] *Id.* at 796–97.

[109] *Id.* at 797.

[110] *Id.* at 798.

[111] Rreshpja, 420 F.3d at 556. The Sixth Circuit argued the *Rreshpja* applicant "did not introduce any evidence" that human trafficking of "young, attractive Albanian women" pervaded Albanian society as much as forced female genital mutilation pervaded Somalian society. *Id.* at 555–56. However, it should be noted that the court in *Mohammad* allowed the applicant to file a motion arguing "prior counsel . . . fail[ed] to raise the issue of female genital mutilation," and appended "a report on female genital mutilation from the [WHO]." Mohammad, 400 F.3d at 789–91. The record does not indicate whether the

constitute a cognizable group bothered the Sixth Circuit.[112] The court missed the legally significant point: "Somalian females" suffered persecution *because* they were "Somalian females." The Ninth Circuit recognized the only way a Somalian woman could avoid forced genital mutilation would be to either stop being female (an immutable trait) or leave Somalia. Similarly, if the applicant in *Rreshpja* had brought evidence to prove the pervasiveness of trafficking of "young, attractive Albanian women," that would meet the definition of particular social group, regardless of what the Sixth Circuit said.[113]

iii. VISIBLY PERSECUTED GROUPS

The BIA modified their understanding of "particular social group" in the case of *In Re C-A-* by discussing and imposing the "visibility" requirement, which states that the group in question must be "highly visible and recognizable by others in the country in question."[114] The BIA considered whether "noncriminal informants" were a "particular social group" when victimized for their activities by a drug cartel.[115] The BIA did not consider this a particular social group for two reasons. First, they considered the group "too loosely" defined to be sufficiently particularized.[116] Second, they did not consider the group "visible."[117] Therefore, on remand, the BIA considered a narrower group identity—"noncriminal drug informants working

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applicant in *Rreshpja* had a similar opportunity. *Rreshpja*, 420 F.3d at 555–57. However, had one been provided, she could have provided significant evidence that human trafficking was endemic in Albania and that their government was unable or unwilling to "fully comply with the minimum standards for the elimination of trafficking." *Country Narratives: Countries A Through F*, U.S. DEP'T OF ST., (2010), https://2009-2017.state.gov/j/tip/rls/tiprpt/2010/142759.htm.

[112] Rreshpja, 420 F.3d at 554, 555.

[113] *Id.* at 554–56.

[114] In Re C-A-, 23 I&N Dec. 951, 960 (B.I.A. 2006).

[115] *Id.* at 957.

[116] *Id.*

[117] *Id.* at 959–61.

against the Cali drug cartel."[118] For one to be an effective police informant, the BIA reasoned, they must be incognito and therefore not "visible" for asylum purposes.[119] The majority of circuits subsequently adopted these "particularity" and "visibility" requirements.[120]

As is often the case, the judicial branch disagreed with the executive branch's logic. In addition, the holding of *In Re C-A-* was rightly challenged in the Seventh Circuit case of *Benitez Ramos v. Holder*.[121] There, the Seventh Circuit reversed a BIA decision which, "[i]n a characteristically terse, one-member opinion," held that former Salvadoran gang members who bore tattoos marking them for ostracization could not be a particular social group in part due to a lack of "social visibility."[122] The court agreed that being a gang member does not, on its own, constitute a particular social group.[123] However, they disagreed that lacking "social visibility" should be a basis for their exclusion, especially if its definition requires that "a complete stranger could identify you as a member if he encountered you in the street."[124] Simply, the Seventh

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[118] *Id.* at 957.

[119] *Id.* at 960. Several years later in 2014, in *Matter of W-G-R-*, the BIA would clarify that "social visibility does not mean 'ocular' visibility," using the analogy of a religious group that is not "visible by sight." 26 I&N Dec. 208, 216–17 (B.I.A. 2014). This clarification would seem to cut against the reasoning that police informants were not "visible" in part because they remain "unknown and undiscovered." *In Re C-A-*, 23 I&N Dec. at 960. Nevertheless, the BIA in *Matter of W-G-R-* doubled down on this reasoning, saying that it is "consistent with [their] prior decisions involving claims of persecution on account of membership in a particular social group." 26 I&N Dec. at 218. This clarification was arguably in response to criticisms we will discuss from, for example, the Seventh Circuit, which asks "whether the [BIA] is using the term 'social visibility' in the literal sense . . . or even-whether it understands the difference." *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).

[120] Kenneth Ludlum, *Defining Membership in a Particular Social Group*, 77 U. PITT. L. REV. 115, 130 (2015).

[121] Benitez-Ramos, 589 F.3d at 430.

[122] *Id.* at 429. Part of the decision was due to *Benitez Ramos* regarding withholding for removal and not asylum, but regarding our discussion of the nuances of "particular social group," this distinction is immaterial. *Id.* at 431.

[123] *Id.*

[124] *Id.* at 430.

Circuit decried the short-sightedness of a doctrine recognizing the existence of "redheads," but not "veterans" because the former is visible whereas the latter, despite more persecution, is not.[125]

iv. CIRCULARITY: IDENTITY THROUGH PERSECUTION

The "non-circularity" rule requirement, which states that "under the [INA] a 'particular social group' must exist independently of the persecution suffered by the applicant for asylum," possibly creates the most unreasonable barrier to successfully establishing a particular social group.[126] In *Castellano-Chacon v. INS*, the Sixth Circuit characterized the BIA's approach as a question primarily concerned with whether the group is "externally distinguishable."[127] They stated, citing prior BIA decisions, "society's reaction to a 'group' may provide evidence" of that group's existence, but only "as long as the reaction by persecutors to members of a particular social group is not the touchstone defining the group."[128] The BIA, therefore, claims to want to know how the group is seen in its own society to understand the basis on which the persecutors

[125] *Id.* To employ a modified and paraphrased version of the analogy the court used, the Soviet Union under Stalin persecuted "bourgeoisie"—comprising middle-class owners of businesses, land, and capital—by taking their property and often killing them. *Id.* at 431. Meanwhile, in most other societies, such as the United States, which certainly have owners of businesses, land, and capital, people do not cognize the presence of a "bourgeoisie." *Id.* However, if these societies adopted an ideology which aimed to collectivize private property, as the Soviet Union did in the 1920s, they would, in essence, *create* a group of dispossessed individuals that could collectively be identified by the word "bourgeoisie." *Id.* In other words, persecution can create "visibility" such that a "particular social group" is only created because of its persecution and not the other way around. The BIA would deny asylum for such a "bourgeois" person running away from such a society under the *In Re C-A-* understanding of "visibility." *Id.* at 431.

[126] Lukwago v. Ashcroft, 329 F.3d 157, 172 (3d Cir. 2003).

[127] Castellano-Chacon v. INS, 341 F.3d 533, 546 (6th Cir. 2003) *abrogated on other grounds by Almuhtaseb v. Gonzalez*, 453 F.3d 743, 748 (6th Cir. 2006).

[128] *Id.*

themselves identify the group.[129] To put it another way, a "particular social group" is a "group of persons who share a common characteristic other than their risk of being persecuted."[130]

This rule is unreasonable because it ignores the realities of persecution. In *Lukwago v. Ashcroft*, the Third Circuit ruled against asylum for an applicant who testified that, as an escaped child soldier in the Ugandan Lord's Resistance Army (LRA), he faced punishment from both the Ugandan government and the LRA if he returned.[131] For his asylum application, the applicant Lukwago identified the persecuted social group as "children from Northern Uganda who are abducted and enslaved by the LRA and oppose their involuntary servitude to the LRA."[132] The applicant not only offered testimony but also documentary evidence to show "that the LRA [systematically] targets children for abduction."[133] Regardless, the Court was not convinced he was persecuted due to membership in this group.[134] They instead reasoned the LRA did not *exclusively* target the group as described, but alongside multiple groups effected by atrocities, and therefore was not persecution *on account of* the group.[135]

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[129] *Id.* at 548.

[130] *Id.* (citing U.N. High Commissioner for Refugees, Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (2002)); *see also* Lushaj v. Holder, 380 F. App'x 41 (2d Cir. 2010) (where "young women in Albania" was not considered a "particular social group" because of this "circularity" problem).

[131] Lukwago, 329 F.3d at 164–65.

[132] *Id.* at 172.

[133] *Id.*

[134] *Id.* at 183.

[135] *Id.* at 172–73. The Third Circuit explained, "most of those abducted are between 13 and 16 years old. Younger children are generally not strong enough to carry weapons or heavy loads while older children are less malleable to the will of their abductors." *Id.* The court admitted these conditions and worse were "very well documented." *Id.* This evidence alone shows the falsity in the Third Circuit's holding; children in this age range were explicitly targeted for a combination of ability to do the work of a child soldier and malleability to their abductors' will. *Id.* They were therefore clearly targeted *on account of* their age.

The non-circularity rule is misguided considering the aim of asylum law—safety for those fleeing persecution. Following the rule's logic, it is possible to characterize any oppressed group with or without circularity, creating two groups containing identical persons, but with one obtaining asylum, and the other not, based solely on the language used to define them. In 2020, the Ninth Circuit identified this problem with a thought experiment about "[l]eft-handed people."[136] Left-handedness is an immutable characteristic, defined with particularity, representing a significant portion of the population, but not a particular social group under the current INA interpretations because it is not a trait American society considers to "set apart the group in a meaningful way."[137] Hypothetically, if the U.S. adopted a policy persecuting left-handedness, this persecution would suddenly grant left-handed people social visibility.[138] Yet the "formulation" of the particular social group "makes all the difference to the group's cognizability" if the fact that it "include[s] mention of feared harm" means that it "cannot exist independently of that harm."[139] Therefore, if hypothetically an asylum officer characterized the group as "left-handed people who have been persecuted," that would not qualify as a particular social group for violating the rule against circularity.[140] A different officer could articulate that same group as *persecuted because of their left-handedness*, suddenly avoiding the circularity rule. Courts should not allow such linguistic manipulation to change a claim's outcome without changing the claim's substance.[141]

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[136] Diaz-Reynoso v. Barr, 968 F.3d 1070, 1083 (9th Cir. 2020).

[137] *Id.*

[138] *Id.*

[139] *Id.* at 1084.

[140] *Id.*

[141] In 2015, Kenneth Ludlum identified *Cece v. Holder*, a holding out of the Seventh Circuit, which he believed could be the basis for resolving this problem by returning asylum law to a "uniform and consistent set of standards that properly adheres to the INA and international law alike." Kenneth

By 2013, identifying a particular social group involved looking for a group with an "immutable characteristic," which was not so "loosely defined" as to be "sweeping" or "generalized," but was "visible," or already socially identified in an applicant's country of origin, and which was not defined "with circularity," meaning the identity of that group must be independent of the persecution itself.[142] We have discussed the potential problems with each element of this definition and must now turn our attention to the consequences of its application under the context of recent and troubling holdings from the BIA.

C. A RETURN TO FOCUS: *MATTER OF A-C-R-G-*

In 2014, the BIA recognized that "married women in Guatemala who are unable to leave their relationship" could, depending on the particular facts, constitute a particular social group.[143] The applicants in *Matter of A-R-C-G-* suffered violence in Guatemala that included beatings, burnings, threat of death, stalking, and rape.[144] Despite victims' efforts to involve the police, Guatemalan law enforcement refused to "interfere in a marital relationship," and the victim believed that if she returned her husband would kill her.[145] The IJ on the case did not believe the victim carried her burden of demonstrating eligibility for asylum, without considering the

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Ludlum, *Defining Membership in a Particular Social Group*, 77 U. PITT. L. REV. 115, 125, 135 (2015). The Seventh Circuit in *Cece* considered the BIA's conclusion that a social group was not cognizable because it was "defined in large part by the harm inflicted" and did not "exist independently of" those committing the harm to be "not a reasoned conclusion." Cece v. Holder, 733 F.3d 662, 671 (7th Cir. 2013). Rather than declare that "gender alone can for the basis of a social group," the Seventh Circuit ultimately held that a "particular social group" can be "defined by gender plus one or more narrowing characteristics." *Id.* at 676. Unfortunately, many courts have not adopted this standard, which has impacted a string of recent cases.

[142] *See supra* Sections III.B (i–iv).

[143] Matter of A-R-C-G-, 26 I&N Dec. 388, 388–89 (2014).

[144] *Id.*

[145] *Id.*

conditions of abuse she endured to be "persecution."[146] Rather, the IJ characterized them as "criminal acts" committed "arbitrarily" and "without reason."[147] The BIA disagreed with this determination, relying on empirical evidence to determine that such acts of violence were reinforced by "societal expectations about gender and subordination."[148] Despite the fact that her husband abused her, something with which law enforcement refused to interfere, the IJ did not consider her abuse to be "on account of" her being a "married woman in Guatemala who was unable to leave the relationship."[149] Furthermore, the IJ relied in part on the fact that her husband was not shown to have abused her "in order to overcome" her being a member of that group, essentially imposing an extra material element to the case.[150]

The BIA rightly reversed *A-R-C-G-*, finding the elements for a particular social group met.[151] First, sex is already considered a "common immutable characteristic."[152] *Matter of A-R-C-G-* involved a group identified as women, with the additional characteristics of being married and unable to leave their relationships.[153] Considering the victim's experiences, as well as background information and evidence, the BIA concluded the victim was a member of a "particular," "socially distinct" group, recognized in Guatemalan society, whose "discrete and

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[146] *Id.* at 390.

[147] *Id.*; *Contra* Singh v. INS, 94 F.3d 1353, 1358–59 (9th Cir. 1996) (holding that "[w]hile a single incident in some cases may not rise to the level of persecution" under the INA, "the cumulative effect of several incidents may constitute persecution," even when the applicant cannot necessarily prove a "pattern or practice . . . of persecution" in their native society.).

[148] *See* Matter of A-R-C-G-, 26 I&N Dec. at 393.

[149] *Id.* at 389.

[150] *Id.* at 389–90.

[151] *Id.* at 388–89.

[152] Matter of Acosta, 19 I&N Dec. 211, 233 (1985); *see also Cece*, 733 F.3d at 666 (holding sex can form the basis of a particular social group as long as it is accompanied by at least one other factor so as not to be circular).

[153] Matter of A-R-C-G-, 26 I&N Dec. at 388–89.

definable" boundaries were expressed in the words "married," "women," and "unable to leave the relationship."[154] This BIA reversal was a return to the main purpose of asylum law: to apply broad rules to determine asylum in order to attain humane ends, not to apply increasingly exclusive rules to deny sanctuary to persons fleeing persecution. However, if the BIA's decision here represented progress, they would regress yet again under the guidance of Attorney General Sessions.[155]

IV. THE PENDULUM SWINGS: EXCLUSION UNDER ATTORNEYS GENERAL SESSIONS AND BARR

A. NO NEW GROUPS: *MATTER OF A-B-*

The *Matter of A-B-* applicant was a Salvadoran woman who fled years of domestic violence from her partner, which she claimed included physical, emotional, and sexual abuse.[156] The particular social group she identified herself with was that of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common."[157] The IJ originally denied the asylum claim on these facts, and the applicant appealed that decision to the BIA.[158] The BIA found the IJ's determination "clearly erroneous" and granted asylum in December of 2016, finding the applicant met their burden of proving particular social group and

[154] *Id.* at 393.

[155] Matter of A-B-, 27 I&N Dec. 316, 319 (B.I.A. 2018).

[156] *Id.* at 320–21.

[157] *Id.* at 321.

[158] *Id.* "The immigration judge denied the respondent's asylum claim for four independent reasons: (1) the respondent was not credible; (2) the group in which she claimed membership did not qualify as a 'particular social group' within the meaning of 8 U.S.C. § 1101(a)(42)(A); (3) even if it did, the respondent failed to establish that her membership in a social group was a central reason for the persecution; and (4) she failed to show that the El Salvadoran government was unable or unwilling to help her." *Id.*

overturning the prior decision.[159] Attorney General Sessions disagreed, elected to take this case under his own consideration pursuant to his powers as Attorney General, and overruled *Matter of A-R-C-G-*.[160]

Sessions' frustration with *Matter of A-R-C-G-* lay with its establishment of a "broad new category of cognizable particular social groups," including "Central American domestic violence victims."[161] He believed *Matter of A-R-C-G-* wrongly created "an expansive new category of particular social groups based on private violence" as opposed, in his opinion, to broader societal conditions.[162] He decried the BIA's application of this precedent as consisting of "only two sentences," calling the holding "conclusory."[163] The BIA did not, he argued, "perform the necessary legal and factual analysis," and "fail[ed] meaningfully to consider" whether the applicant "met her burden" of showing a particular social group or whether "respondent's persecution was on account of her membership in that group."[164] He further believed that the BIA "gave insufficient deference to the factual findings of the immigration judge."[165] Sessions

[159] *Id.* The court found the group at issue here to be "substantially similar" to "married women in Guatemala who are unable to leave their relationship." *Id.*; *Matter of A-R-C-G*, 26 I&N Dec. at 390.

[160] Matter of A-B-, 27 I&N Dec. at 340.

[161] *Id.* at 332. Interestingly, Sessions claims that "the [BIA] has articulated a consistent understanding of the term 'particular social group.'" *Id.* at 331. This is controverted by a cursory exploration of this term's historical development and ever-changing meaning. *See supra* §§ III.B.i–iv. Sessions tries to explain this confused semantic history by blaming the BIA itself, arguing "not all of its opinions have *properly* applied that framework." Matter of A-B-, 27 I&N Dec. at 331 (emphasis added).

[162] *Id.* at 319.

[163] *Id.* at 332.

[164] *Id.* at 319–20.

[165] *Id.* at 320.

agreed with the IJ's decision to overturn the BIA holding.[166] If the BIA had considered the facts more closely, he argued, it would have also agreed.[167]

Sessions applied the circularity rule again to conclude that the group in *Matter of A-B-* was not "cognizable" to Guatemalan society.[168] In dicta Sessions explains that since domestic and gang violence victims are likely large, "diffuse" groups, they could not form a particular social group.[169] However, Sessions himself knew the BIA had evidence of Guatemala's "culture of machismo and family violence," and that local police "often failed to respond to requests for assistance related to domestic violence," rendering local domestic violence laws worth little more than the paper they were printed on.[170] In a show of either ignorance or deliberate disregard for the historic aim of asylum law, Sessions disregarded Guatemala's status quo, inexplicably declaring these facts to neither evince nor explain how "Guatemalan society perceives, considers, or recognizes 'married women in Guatemala who are unable to leave their relationship' to be a distinct social group."[171]

Naturally, *Matter of A-B-* was the subject of much criticism and debate. For example, Cornell Law Professor Jaclyn Kelley-Widmer called this holding not only "a source of [public] concern and outrage," but also "legally concerning."[172] Sessions not only considered whether a

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[166] *Id.*

[167] *Id.*

[168] *Id.* at 334–35. Despite each part of the proposed group's definition clearly being identifiable in Guatemala, their collection could not itself be "defined with particularity" because it did not "exist independently" of the "harm asserted." *Id.* at 334.

[169] *Id.* at 335. "A particular social group must avoid, consistent with the evidence, being too broad to have definable boundaries and too narrow to have larger significance in society." *Id.* at 336.

[170] *Id.* at 336.

[171] *Id.*

[172] Kelley-Widmer, *supra* note 104, at 403.

group met the particular social group definition, but applied the holding generally to "victim[s] of private criminal activity."[173] He imposed obligations on victims of society-wide, implicitly-state-sanctioned, violence to clear "higher hurdles" to get asylum.[174] The "unilateral expansion of some and contraction of other requirements" is an example of "agency overreach" and should be understood as such by reviewing courts.[175] Finally, and most importantly, she identifies Sessions' holding as part of a wider project "to attack particular social group cases involving asylum seekers from Central America," one that has continued to this day.[176]

Professor Kelley-Widmer's work is also useful to critique the recent Attorneys General's handling of asylum law. Her explanation of the "nebulousness" of INA terms of art shows a fundamental mismatch between asylum legal theory and the material reality facing asylees.[177] For example, she argues that whereas courts see "race" under the INA as a scientific classification, they should instead recognize it for what it is: "a social phenomenon of stigmatization" causing the "subjective position where collective identities are social constructs

[173] *Id.* at 363.

[174] *Id.* at 403.

[175] *Id.*

[176] *Id.* at 403–04. Professor Kelley-Widmer attacks *Matter of A-B-* under the *Chevron* test, which sets out a two-step analysis for determining whether courts should afford deference to an agency's interpretation of an ambiguous statute, or whether they should consider it unlawful as "in excess of statutory jurisdiction, authority, or limitations." *Id.* at 365–66; *see also generally* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984). Attorney General Sessions argued courts should apply *Chevron* deference to his interpretation of "ambiguous provisions in the immigration laws" because "every court of appeals" considers the term "particular social group . . . inherently ambiguous." Matter of A-B-, 27 I&N Dec. at 326–27. Professor Kelley-Widmer argues this deference should not apply here because Sessions' interpretation of "particular social group" is "arbitrary." Kelley-Widmer, *supra* note 104, at 381.

[177] Kelley-Widmer, *supra* note 104, at 355–56, 374. Recall that refugees under the INA are those unable or unwilling to return to their country of origin due to "fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *See* 8 U.S.C. § 1101(a)(42)(A) (2013).

dependent upon variable perceptions."[178] On the other hand, she points out courts recognize religions even when they lack "formal requirements for membership," or any "doctrine, symbol, hierarchy, [or] deity;" religions can be so loosely defined that courts must consider their "societal persecution or discrimination" in order to understand their "boundaries."[179] Finally, courts consider the "political context" of the home country to determine "political opinion" for asylum purposes, a determination that includes widely varied groups leaving vastly different circumstances.[180] These categories all share two important features: they are "meant to be interpreted broadly," and are defined based on the home country's social context.[181] Context may include novel persecution, with no historical analogy, from the state itself or from groups the state is unable *or* unwilling to control.[182] Therefore the United Nations embraces broadness and flexibility to more readily apply asylum, and continues to criticize the "restrictive perspective endorsed by Attorney General Sessions in *A-B-*."[183]

B. ARBITRARY AND CAPRICIOUS: *GRACE v. BARR*

Grace v. Barr illustrates a new and major push against this restrictive perspective.[184] Attorney General Barr, the successor to Sessions, denied asylum for a dozen Central American

[178] Kelley-Widmer, *supra* note 104, at 375.

[179] *Id.* at 375–77. For example, Professor Kelley-Widmer points to Falun Gong, widely understood and legally treated as a religion despite not considering itself as such and having no signs of membership. *Id.* at 376. What makes Falun Gong a religion is their persecution by the Chinese government *as* a religion. *Id.* at 376–77. Additionally, courts have defined "[n]ationality" in terms as broad and vague as those defining many rejected candidates for "particular social group." *Id.* at 378.

[180] *Id.* at 378–80.

[181] *Id.* at 380.

[182] *Id.*

[183] *Id.* at 393.

[184] Grace v. Barr, 965 F.3d 883 (D.C. Cir. 2020).

migrants fleeing domestic and gang-related violence in their home countries.[185] Barr removed them from the United States despite asylum officers finding their applications credible.[186] Therefore, the asylum seekers sought review of their applications arguing that certain BIA policies were "arbitrary and capricious."[187] The court reviewed four policies: (1) requiring the country of origin's government condone or be unable to stop the persecution, (2) requiring asylum officers to apply the law of the district where they conduct credible fear interviews, rather than the law most favorable to the asylum seeker, (3) the circularity rule, and (4) Sessions's guidance that migrants' claims "pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[188] The D.C. Circuit found each of these "raise the bar for demonstrating a credible fear of persecution far above what Congress intended."[189] Nevertheless, the Court could only reverse policies found to be "arbitrary and capricious"[190]; namely, the first two policies.[191]

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[185] *Id.* at 890.

[186] *Id.*

[187] *Id.* at 890–91.

[188] *Id.* at 890 (quoting *Matter of A-B-*, 27 I&N Dec. at 320.). Sessions's statement goes on: "While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address." *Id.*

[189] Grace v. Barr, 965 F.3d at 887.

[190] *Id.* The standard of review in this case did not come from *Chevron*; these policies are not based on INA interpretations, but interpretations of precedent from the BIA, Attorneys General, and various appellate courts. *Id.* at 896–97; *see* Kelley-Widmer *supra*, note 176 (discussing the *Chevron* analysis). Rather, the D.C. Circuit applied a "narrow standard of review" from the Administrative Procedure Act (APA), asking whether such policies are "arbitrary and capricious." Grace v. Barr, 965 F.3d at 897. In other words, the court "is not to substitute its judgment for that of the agency, but instead [should] assess only whether [such policies were] based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* This higher standard limited the extent to which the Court could amend Sessions' decisions.

[191] Grace v. Barr, 965 F.3d at 900. "[W]e have no choice but to find the [condoned-or-completely-helpless] standard arbitrary and capricious." *Id.* "[T]he new choice-of-law policy is arbitrary and

First, the court held the "condoned-or-completely-helpless standard" was "arbitrary and capricious."[192] The rule's language differs from the plain meaning of credible fear in the INA, which states the home country's government must be "unwilling or unable" to protect asylum applicants.[193] To illustrate this point, consider a case where local law enforcement officers honestly try to solve a murder, but systematic corruption makes the government *unwilling* to investigate, meaning local law enforcement is *unable* to bring the crime to justice.[194] This corruption is one of the kinds of persecution Congress intends the INA to serve.[195] A "condoned-or-completely-helpless standard" would however bar such a claim because, rather than condoning or being helpless, law enforcement tried to investigate the crime and would have but for the corruption.[196]

Second, the court held the new policy of applying the law of the circuit where the credible fear interview took place to be arbitrary and capricious.[197] Previous policy required application of "the [statutory] interpretation most favorable to the applicant."[198] The *Grace* applicants argued the new policy "represents a dramatic, unacknowledged, and unexplained departure from years of prior agency practice," and the court agreed.[199] The new policy posed a

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capricious due to USCIS's failure to acknowledge and explain its departure from past practice." *Id.* at 903.

[192] *Id.* at 898.

[193] *Id.* at 898–99; 8 U.S.C. § 1158.

[194] *Id.* at 899 (citing *Rosales Justo v. Sessions*, 895 F.3d 154, 159 (1st Cir. 2018)).

[195] *Id.*

[196] *Id.*

[197] *Id.* at 903.

[198] *Id.* at 900 (citing USCIS, Lesson Plan: Credible Fear of Persecution and Torture Determinations 17 (Feb. 13, 2017), J.A. 379 ("Lesson Plan")).

[199] *Id.* at 900–01 (citing Appellees' Br. 30).

threat to asylum applicants, who previously enjoyed "the benefit of the doubt" of the "most favorable circuit law" and were "treated equally across circuits because officers applied nationally uniform guidance."[200] Without that protection, asylum applicants in one state can face deportation under facts that would have secured asylum for them in another state.[201] This arbitrariness would vitiate one of the purposes of the INA: "that individuals with valid asylum claims are not returned to countries where they could face persecution."[202]

Conversely, the D.C. Circuit agreed with the BIA on the latter two issues. Discussing a critique similar to that developed earlier in this article,[203] the D.C. Circuit points out the social group identified—"El Salvadoran women who are unable to leave their domestic relationships where they have children in common with their partners"—appears circular only when defined by the harm of being "unable to leave."[204] But that same group may not be circular where the harm of being "unable to leave" results from circumstances in their native society.[205] The court recognized the problem of abstracting these issues out of reality into a mere issue of linguistic definition, stating "whether a given group is circular depends on the facts of the particular case."[206] Nevertheless, the Court's limited power on review bound its holding; it challenged neither the circularity rule itself nor the *Matter of A-B-* precedent.[207] Since the BIA was merely

[200] *Id.* at 901.

[201] *Id.*

[202] *Id.* at 902–03.

[203] *Supra* Section III.B.iv.

[204] Grace v. Barr, 965 F.3d at 904 (citing A-B-, 27 I&N Dec. at 321).

[205] *Id.* Examples of such circumstances may include divorce being illegal or limited, the state refusing to enforce laws limiting domestic violence, or others. *Id.*

[206] *Id.*

[207] *Id.*

applying precedent, it did not abuse its discretion, whatever the wisdom of the precedent may be.[208]

The Court's final consideration, and the second BIA holding affirmed, regarded application of the "particular social group" standard.[209] Attorney General Sessions set down "guidance" in *Matter of A-B-* stating "claims based on membership in a . . . particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible fear or reasonable fear of persecution."[210] The D.C. District Court originally held this "guidance" constituted a "categorical ban," whereby decisions to remove the applicants would not revolve around the facts of each situation, and therefore constituted "arbitrary and capricious" policy.[211] The D.C. Circuit disagreed, rejecting applicants' argument that this guidance constituted a *de facto* rule.[212] In support of this holding, the court stated the guidance only applied "generally," had "limited exceptions," and had language guiding asylum officers on the ground to perform a case-by-case analysis.[213] Therefore, the court concluded, the guidance did not constitute a "rule."[214]

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[208] *Id.* at 904–05.

[209] *Id.* at 906.

[210] *Id.* at 905 (citing USCIS, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-* 1, PM–602–0162 (July 11, 2018), Joint Appendix (J.A.) 353 ("Guidance")).

[211] *Id.* at 891 (citing *Grace v. Whitaker*, 344 F Supp. 3d 96, 126, 146 (D.D.C. 2018)).

[212] *Id.* at 906.

[213] *Id.*

[214] *Id.* The Ninth Circuit agreed with the D.C. Circuit on this point when citing to it later that same year. Diaz-Reynoso v. Barr, 968 F.3d 1070, 1079 (9th Cir. 2020). In *Diaz-Reynoso*, the court took Attorney General Sessions at his word when he declared his guidance (that generally victims of domestic and gang violence could not establish membership in a particular social group) was not a "categorical bar," and emphasized that "the BIA must [still] conduct . . . 'rigorous analysis.'" *Id.*

Of course, this analysis ignores one important fact: the guidance itself merely restated the previous, binding, *Matter of A-B-* rule.[215] In the opinion, discussion of the guidance is closely linked to broad discussion of *Matter of A-B-*, including whether either counts as "regulation," whether the District Court had jurisdiction to review either, and the relationship between these and the INA's language.[216] The opinion admitted the guidance uses statutory language from the INA to act as a "*policy* memorandum" that "provides *guidance*" to asylum officers on how to apply the holding of *Matter of A-B-*.[217] The government "assured" the court that "there is no general rule," rather "none of these groups are categorically barred."[218] This assurance, however, is meaningless. The case at issue, *Matter of A-B-*, was itself an example of Attorney General intervention blocking such a claim and overturning what precedent had previously allowed it.[219] In other words, when the BIA strays from the Attorney General's "guidance," it invites the Attorney General's arbitrary and capricious micromanagement to align BIA decisions with Executive Branch aims, exposing all insistence that there is no categorical bar as a lie.[220]

C. BARR'S OPPORTUNITY: MATTER OF *A-C-A-A-*

i. BAD FACTS

On November 16, 2012, a native of El Salvador identified as A-C-A-A-, entered the U.S. illegally near Hidalgo, Texas, and faced expedited removal proceedings in 2013.[221] She claimed

[215] *Id.* at 889.

[216] *Id.* at 891–95.

[217] *Id.* at 892.

[218] *Id.* at 906 (citing Rec. 24:03–07).

[219] Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018).

[220] *See infra* Section V.

[221] Amicus Brief for Petitioner, *Castro v. Barr*, 819 F.App'x. 722 (11th Cir. 2020) (No. 20–70311), at A-012.

asylum on April 24, 2018[222], arguing membership in the "particular social group" of "Salvadoran females."[223] The IJ performed a complete analysis of this group identification analyzing whether it was immutable, defined with particularity, and visible within Salvadoran society, and concluded the facts met each requirement.[224] Overall, the IJ found the applicant successfully established a claim for asylum.[225] The persecution came primarily at the hands of her parents, who for nine years beat her with various weapons, threw, punched, and kicked her while she lay on the ground.[226] They also subjected her to psychological and verbal abuse, made her work "from the age of six," and forbade her to attend school.[227] Another source of danger came from her "former partner," who wounded her with bladed weapons, broke her bones, and threatened to kill her on multiple occasions.[228] "[O]verwhelming" evidence showed the "Salvadoran

[222] *Id.* She also sought withholding of removal, and protection under the United Nations Convention Against Torture (CAT). *Id.* CAT states that "[n]o state shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture," and for purposes of determining such grounds "the competent authorities shall take into account all relevant considerations including . . . a consistent pattern . . . [of] violations of human rights." *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85, 113 (Dec. 10, 1984). A discussion of claims under the CAT are beyond the scope of this article (the IJ here did not reach the issue), but it is worth noting another example of the United Nations' treatment of asylum law focusing on the humanitarian needs of those asylees/refugees. *Id.*

[223] Amicus Brief for Petitioner, *supra* note 221, at A-018 (which appends the IJ opinion on appeal in *Matter of A-C-A-A-*).

[224] *See id.* at A-019–020. For immutability, the IJ adopted the logic of the Ninth Circuit, finding "Salvadoran females," a group defined by its gender and nationality, "satisfies the immutability requirement." *Id.* at A-019; *See also* Mohammad v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005). For particularity, the IJ said "Salvadoran females" was "limited to a discrete section of Salvadoran society—only female citizens of El Salvador—and [was] thus distinguishable from the rest of society." Amicus Brief for Petitioner, Castro v. Barr, 819 F.App'x at A-019. Finally, while discussing visibility the IJ proactively responded to the circularity rule by pointing out the overwhelming evidence showing misogyny was "reinforced at every stage" and violence against women was "deeply entrenched in Salvadoran society." *Id.* at A-019–020. This evidence shows rather than being defined circularly, it was clear "Salvadoran society" targeted females for victimization and persecution. *Id.*

[225] *Id.* at A-025.

[226] *Id.* at A-018.

[227] *Id.*

[228] *Id.* at A-023.

government [did] not adequately protect females from gender-based violence" and what laws addressed gender-based violence "remained poorly enforced."[229]

The Department of Homeland Security (DHS) appealed, arguing the IJ on the case failed to "establish the nexus requirement" between the applicant's persecution and her membership in a particular social group and challenging the IJ's credibility findings.[230] The BIA decisively dismissed this appeal, citing the INA rule stating it reviews "law, discretion, and judgment" issues *de novo*. [231] However, the BIA cannot engage in *de novo* review pertaining to "findings of fact determined by the immigration judge" and reviews questions of law only for "clear error."[232]

i. BAD LAW

Motivated by frustration with the BIA holding, Attorney General William Barr elected to take this case under review and overturned the BIA, claiming it failed to "meaningfully consider[] any of the elements of the respondent's asylum claim."[233] He specifically focuses on the "nexus" element of the applicant's claim, which says that an asylum applicant must show their membership in a particular social group was "at least one central reason for persecuting the applicant,"[234] saying that "[a] closer examination . . . in light of the record, would have raised questions concerning" this element.[235] Therefore, he instructed the BIA to review "the immigrations judge's legal conclusions *de novo*," and to "analyze whether the [applicant] could

[229] *Id.* at A-021.

[230] *Id.* at A-010.

[231] *Id.*

[232] *Id.* at A-010–11; 8 C.F.R. § 1003.1(d)(3)(i) (2007); 8 C.F.R. § 1003.1(d)(3)(ii–iii) (2007).

[233] Matter of A-C-A-A-, 28 I&N Dec. 84, 84, 91 (A.G. 2020).

[234] 8 U.S.C. § 1158(b)(1)(B)(i).

[235] Matter of A-C-A-A-, 28 I&N at 93.

establish that the nexus requirement had been satisfied."[236] In explanation of *de* novo, he asserts the BIA should have evaluated "specific facts and evidence" regarding whether the applicant's claim met this nexus requirement.[237]

Furthermore, Barr misrepresents the IJ's analysis concluding the applicant "establish[ed] that her membership in a particular social group was at least one central reason for [her] persecution."[238] Barr accuses the IJ of "not cit[ing] any evidence that the respondent's parents themselves had ever . . . express[ed] hostility to 'Salvador females' in general," as opposed to merely toward their daughter.[239] Barr's accusation is simply false; the IJ explicitly explained "[t]he record is replete" with evidence the applicant's parents acted violent to her "because she was a Salvadoran female."[240] Barr focuses on the *prima facie* nature of statements arguing they do not, alone, indicate broader persecution.[241] The IJ rightly points out "[i]n the context of Salvadoran society" evidence showed the violence the applicant experienced was "the type of gender-based violence perpetrated in El Salvador due to the widely-shared belief that women are

[236] *Id.* at 94.

[237] *Id.* at 92. Keep in mind that the BIA's review was limited to questions of law, not fact. 8 C.F.R. § 1003.1(d)(3)(i).

[238] Amicus Brief for Petitioner, *Castro v. Barr*, 819 F.App'x 722 (11th Cir. 2020) (No. 20–70311), at A-020 (internal quotations omitted).

[239] Matter of A-C-A-A-, 28 I&N at 93.

[240] Amicus Brief for Petitioner, *Castro v. Barr*, 819 F.App'x 722 (11th Cir. 2020) (No. 20–70311), at A-021. "[H]er parents repeatedly made derogatory statements indicating that they believed they could treat the respondent however they wished because, as a female, the respondent must obey them." *Id.* Her father told her that as his daughter, she had to do what he said. *Id.* Both parents explicitly forbade her from attending school because "as a female, she should clean and take care of the house." *Id.*

[241] Matter of A-C-A-A-, 28 I&N at 93–94 (arguing there is only evidence of personal animus between the parents and their daughter that does not rise to the level of proving "a general animus against a broad social group.").

inferior to men."[242] If the applicant "were not a Salvadoran female," she would not have suffered harm "in this manner," and therefore, a nexus existed.[243]

Attorney General Barr also disagrees with the IJ's finding in favor of humanitarian asylum.[244] Although Barr frames his objections as against the BIA's analysis and standard of review, stating he does "not consider" whether the applicant warrants humanitarian asylum, it is clear that Barr's concern is with the conclusion.[245] Barr claims the BIA "neglected to . . . analyze whether the immigration judge's conclusions were consistent with" BIA precedent.[246] Therefore, Barr instructs the BIA to "meaningfully analyze [whether] the respondent's alleged past persecution [was] on account of her membership in a particular social group," including by reviewing the analysis of "other serious harm."[247] Taking this holding a step further, he demands the BIA "not affirm the immigration judge's decision unless the Board concludes that the

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[242] Amicus Brief for Petitioner, *Castro v. Barr*, 819 F.App'x 722 (11th Cir. 2020) (No. 20–70311), at A-021.

[243] *Id.* Barr cites *Matter of A-B-*, which held a similar particular social group claim—one of "married women in Guatemala who are unable to leave their relationship"—did not meet INA requirements because it was not "defined with particularity" nor did the group "exist independently" of the persecution. Matter of A-C-A-A-, 28 I&N at 90. He criticizes the BIA for agreeing with the IJ that the "persistence of domestic violence in El Salvador" could be probative evidence showing a nexus between that particular social group and the persecution. *Id.* In 2021, Acting Attorney General Jeffrey A. Rosen revisited Barr's decision in *Matter of A-B-* to clarify, among other things, this nexus requirement. 28 I&N Dec. 199, 207–212 (A.G. 2021). To show a nexus "between past or feared future persecution and one of the protected grounds," including particular social groups, "requires proof that the persecutor knew or believed that the applicant had one of these protected characteristics, and that knowledge or belief motivated the persecutors' harmful actions against the applicant." *Id.* at 207–08. The IJ's analysis would easily stand under this new rule, since the parents, ex-husband, and Salvadoran government all knew she was a "Salvadoran woman," and given the underlying misogyny, which has been discussed, this knowledge clearly motivated the persecution. *See* Amicus Brief for Petitioner, *Castro v. Barr*, 819 F.App'x 722 (11th Cir. 2020) (No. 20–70311), at A-020–21.

[244] Matter of A-C-A-A-, 28 I&N at 95.

[245] *Id.*; *See* Amicus Brief for Petitioner, *Castro v. Barr,* 819 Fed.Appx. 722 (11th Cir. 2020) (No. 20–70311), at A-023–24.

[246] Matter of A-C-A-A-, 28 I&N at 95.

[247] *Id.*

respondent has met her burden and has satisfied" the required elements to prove need for humanitarian asylum.[248] This holding lays bare the fundamental role of the BIA, not to be a body of judicial appeal, but to be a tool of executive action, because to be the former requires the BIA to behave outside the normal bounds of a judicial body.

First, we should consider the BIA's standard of review when it considers IJ opinions. Chapter Eight of the Code of Federal Regulations governs the powers of the BIA, including the scope of review.[249] These regulations intend the BIA to "function as an appellate body," reviewing administrative decisions under the INA "in a manner that is timely, impartial, and consistent with the [INA] and regulations," and "not engag[ing] in *de novo* review of *findings of fact* determined by an immigration judge."[250] Regarding those findings of fact, the BIA merely reviews to determine whether those findings were "clearly erroneous."[251] According to the Supreme Court, a finding of fact is "clearly erroneous" only when, despite supporting evidence, the reviewing body "on the entire evidence is left with the definite and firm conviction that a mistake has been committed," and has characterized this standard as "significantly deferential."[252] When reviewing IJ decisions, the BIA may consider a factual finding "clearly erroneous" only when they are "illogical or implausible."[253] Applying these standards, the BIA

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[248] *Id.* at 95–96.

[249] *See generally* 8 C.F.R. § 1003.1(d).

[250] 8 C.F.R. § 1003.1(d)(1); 8 C.F.R. § 1003.1(d)(3)(i) (emphasis added).

[251] *Id.*

[252] Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 622–23 (1993).

[253] Matter of A-B-, 27 I&N at 341; *See also* Anderson v. Bessemer City, 470 U.S. 564, 575 (1985). In *Matter of A-B-*, Sessions even points out that in the context of the BIA's scope of review, "where credibility determinations are at issue, . . . even greater deference must be afforded to the [immigration judge]'s factual findings." 27 I&N at 341; Rodriguez v. Holder, 683 F.3d 1164, 1171 (9th Cir. 2012) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)).

here found no clear error, saying: "While we may have reached a different result if we were the factfinders, we discern *no clear error* in the immigration judge's findings of fact supporting her positive credibility finding."[254]

Barr instructed the BIA to essentially ignore this "clearly erroneous" standard. Rather than state reasons for having a definite or firm conviction that the IJ's analysis was wrong, Barr opines a "closer examination" would have "raised questions."[255] This ignores the fact that the IJ already performed that close examination, discussing in detail not only the facts in favor of the applicant's asylum claim but also the inconsistencies between the applicant's "testimony and documentary evidence."[256] Specifically, the IJ takes issue with the applicant's testimony regarding 1) the Salvadoran government's role in permitting persecution by her husband and 2) her own criminal history.[257] To the former, the IJ points out that the applicant testified her husband had "never been arrested in connection to his abuse," while her credible interview contradicted that statement.[258] To the latter, the applicant denied ever being arrested, withholding the fact Salvadoran police briefly detained her when she scolded her niece in public

[254] Amicus Brief for Petitioner, *Castro v. Barr*, 819 F.App'x 722 (11th Cir. 2020) (No. 20–70311), at A-010 (emphasis added).

[255] Matter of A-C-A-A-, 28 I&N at 94.

[256] Amicus Brief for Petitioner, *Castro v. Barr*, 819 F.App'x 722 (11th Cir. 2020) (No. 20–70311), at A-014–15.

[257] *Id.*

[258] *Id.*

When confronted with her [credible fear interview] testimony, [the applicant] replied that she could not remember his arrest or perhaps she or the asylum officer were confused. The Court does not find this explanation sufficiently persuasive because [the applicant] did not otherwise assert encountering any communication difficulties with the asylum officer.

Id.

and "released her later that day."[259] Reviewing these issues, the IJ said the applicant's "willingness to withhold information detrimental to her case" troubled her and believed that these inconsistencies "bear directly on the heart of the respondent's claim."[260] Nevertheless, these inconsistencies did not make up the whole of the evidence.[261] Under the totality of the circumstances, including the conditions in El Salvador explored above, the IJ found the applicant "marginally credible" and therefore "decline[d] to make an adverse credibility finding."[262]

The BIA here provided the IJ's decision its warranted deference.[263] Though Barr decries the BIA for "deferring to the immigration judge's credibility finding and concluding . . . that it could 'discern *no clear error* in the Immigration Judge's determination,'" that was clearly the BIA's prerogative.[264] Barr criticizes the BIA for behaving in what he considers "a conclusory fashion," implying it failed to apply the proper standard of review while also implicitly demanding that the BIA substantially abandon that same standard of review.[265] Yet Barr's criticism of the BIA's decision to uphold the IJ's analysis clearly lacks credibility when considering the actual analysis itself.[266] Barr implores the BIA to "examine de novo whether *the facts* found by the immigration judge satisfy all of the statutory elements of asylum *as a matter*

[259] *Id.* at A-014. "On redirect, the respondent added that she did not believe she was arrested because she was not handcuffed or detained in a cell; rather, the police required her to wait in the police station until they released her." *Id.* at A-015.

[260] *Id.* at A-014.

[261] *Id.* at A-014–15.

[262] *Id.* at A-015.

[263] *Id.* at A-010–11.

[264] Matter of A-C-A-A-, 28 I&N at 87 (emphasis added); 8 C.F.R. § 1003.1(d)(3)(i).

[265] Matter of A-C-A-A-, 28 I&N at 88.

[266] *Id.* at 88.

of law."[267] These instructions contradict any reasonable interpretation of law, but it is worth asking whether this is fairly considered a pure issue of legal interpretation.[268] Fully understanding this issue requires departing the world of pure legal reasoning, exploring the source of these confused decisions in the political realm, and exploring the wider implications of the BIA's position in our governmental structure.

V. THE SOURCE: ASYLUM LAW AS A POLITICAL PROBLEM

A. THE POLITICS OF WILLIAM BARR

William Barr's views on immigration and asylum are well-documented. Barr has stated he believes asylum applicants abuse the system.[269] He also believes asylum applicants are "being coached as to what to say" to get asylum at all costs and that illegal immigration, in part through this alleged abuse, has generally worsened over the last three decades, creating "unsafe conditions for many people."[270] His ideal immigration system would allow entry for "people . . . who are entitled to come into the [U.S.]," but "keep[s] out those that are flouting our laws."[271]

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[267] *Id.* at 84 (emphasis added); *cf.* 8 C.F.R. § 1003.1(d)(3)(i).

[268] Two decades ago, Rex D. Khan argued the "disparate treatment of victims [in asylum law] demonstrates that refugee status is not truly based on humanitarian concerns," and instead asylum status is "inherently political in nature." Rex D. Khan, *Why Refugee Status Should Be Beyond Judicial Review*, 35 UNIV. SAN FRANCISCO L. REV. 57, 57 (1999). While this statement is true, his further conclusion—that any interference in asylum matters by the judiciary should be decried as judicial activism overstepping its bounds into "nonjusticiable political questions"—is clearly absurd given the consequences of unfettered Executive power in this realm. *Id.* at 79–81. The two decades since Khan's article have shown the Executive Branch, when left to its devices, can easily match, and exceed, the Judiciary in arbitrariness and incompetence.

[269] William P. Barr Oral History, Assistant Attorney General; Deputy Attorney General; Attorney General, Miller Center (Apr. 5, 2001) https://millercenter.org/the-presidency/presidential-oral-histories/william-p-barr-oral-history.

[270] Confirmation Hearing on the Nomination of Hon. William Pelham Barr to be Attorney General of the United States Before the S. Comm. on the Judiciary, 116th Cong. 40 (2019) (statement of General Barr), https://www.congress.gov/116/chrg/CHRG-116shrg36846/CHRG-116shrg36846.pdf [hereinafter William Barr Confirmation Hearing].

[271] *Id.* Describing what he saw as the problem of too much immigration, Barr told Congress:

Barr sees immigration as a way of "rationing" the wealth of the U.S. among those that would migrate and become citizens here.[272] He analogizes asylum itself to a "back door"—a way for migrants to "just walk[] up to the front" of a line of people—and calls it "unjust" and "unfair" to traditional immigrants.[273] This characterization of asylum as a large back door for immigration is unfounded, as the United States accepts fewer asylees per capita than forty-nine other nations.[274]

His record as a public servant also confirms that Barr's concern with the supposed abuse of the asylum process trumps other considerations, including the rights of asylum applicants. William Barr has been called a "maximalist" regarding his views on executive power and immigration policy, and has stated he seeks to be a "political subordinate" to the President and his goals.[275] Most importantly for our discussion, Barr frequently invokes his power to intervene

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People would get on the airplane, they'd come to the United States, and then they'd claim asylum as soon as the airplane touched down. . . . They'd be put out on parole pending their asylum hearing, and then they'd disappear. Then we tried detaining them, and we ran out of space in New York. We had 40,000, 50,500 a month. It was just unbelievable, the influx coming into the United States claiming asylum. I can't vouch for that figure, but we just didn't have the space to put them

Id. Barr's predecessor Sessions expressed similar guiding views on asylum policy, stating he believed asylees have "[p]owerful incentives . . . created for aliens to come here illegally and claim a fear of return." *Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program*, U.S. DEP'T OF JUST. (June 11, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal. In that speech, he claims, "word spread [among migrants] that by asserting [credible] fear, they could remain in the United States one way or the other." *Id.* Sessions made it clear he believes most asylum claims are not valid, which explains much of the decision-making discussed in this article. *Id.* While he claims the "percentage of asylum claims found meritorious by our [immigration] judges has declined," this is likely not due to the claims' inherent merit, but the increasingly stringent and unreasonable standards imposed. *Id.*

[272] William Barr Confirmation Hearing, *supra* note 270.

[273] *Id.*

[274] David J. Bier, *49 Nations Accept Asylees & Refugees at Higher Rates Than America*, CATO INSTITUTE (July 20, 2018), https://www.cato.org/blog/49-nations-accept-asylees-refugees-higher-rates-america.

[275] John Washington, *William Barr May Be Worse On Immigration Than Jeff Sessions*, THE INTERCEPT (January 15, 2019, 4:30 a.m.), https://theintercept.com/2019/01/15/william-barr-confirmation-hearings-

in BIA cases with worrisome frequency and to controversial effect.[276] Immigration Judge J. Tracy Hong, who retired amid "pressure to speed up cases and deport more people," considers the power of "certification"—allowing the Attorney General to refer BIA decisions to himself and then overturn them—a "nuclear option."[277] It is "a way for the attorney general [sic] to stamp his or her own views on immigration law."[278] Some have called it "abuse," yet it clearly lies within the purview of the powers of the Attorney General.[279]

In *Matter of A-C-A-A-*, Barr reinforces Sessions's earlier guidance: while courts should still review matters on a case-by-case basis, in his opinion certain groups will never qualify.[280]

> [I]t seems unlikely that the respondent will be able to demonstrate that she suffered persecution based on membership in a social group as broad as all 'Salvadoran females,' because of the need to establish that the private violence reflected a general animus against a broad social group rather than the personal animus arising from the relationship between the purported persecutors and the asylum applicant.[281]

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immigration/. Barr believes the Attorney General serves three roles: (1) to enforce the law, (2) to be a legal advisor to the President, and (3) to execute the policy goals of the President. William Barr Confirmation Hearing, *supra* note 270.

[276] Kim Bellware, *On Immigration, Attorney General Barr Is His Own Supreme Court. Judges and Lawyers Say That's a Problem*, WASH. POST (March 5, 2020, 6:51 a.m.), https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power/.

[277] *Id.*

[278] *Id.*; s*ee* 8 C.F.R. § 1003.1(h)(1)(i).

[279] Bellware, *supra* note 276.

[280] Matter of A-C-A-A-, 28 I&N at 94.

[281] *Id.*; *cf.* Matter of A-B-, 27 I&N Dec. 316, 320 (A.G. 2018):

> Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum. While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address. The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.

Here, Barr not only implies the BIA should presume private violence does not originate in systemic violence but imposes his view of how the BIA ought to decide these cases.[282] This imposition is not unique to Barr but stems from a broader political struggle against immigration generally.[283]

B. THE BIA AS EXECUTIVE WEAPON

Any administration must overcome clear barriers to make any progress in asylum adjudication after the Trump administration,[284] yet President Biden has taken steps to do so.[285] In March, 2021, Merrick Garland replaced William Barr as Attorney General.[286] Early on, few had any clear idea how he would approach immigration, let alone asylum, matters.[287] Garland does, however, share an important attribute with Barr—extreme deference to an executive branch

[282] Of course, William Barr is not unusual in his opinions on immigration, as 75% of Republicans (Barr's party) believe "immigrants burden local communities," 74% of Republicans were in favor of the infamous "travel ban" on persons from Muslim-majority countries, and 56% of Republicans "object to allowing immigrants brought illegally to the U.S. as children to gain legal resident status." Engy Abdelkader, *Immigration in the Era of Trump: Jarring Social, Political, and Legal Realities*, 44 HARBINGER 76, 93 (April 24, 2020). As Abdelkader says, "[x]enophobia has translated into jarring social, political, and legal realities for immigrant populations and socially oppressed groups in ways that overlap and intersect," and this has extended to the asylum context. *Id.*

[283] *See generally* Matter of A-C-A-A-, 28 I&N Dec. 84 (A.G. 2020).

[284] Sarah Libowsky & Krista Oehlke, *President Biden's Immigration Executive Actions: A Recap*, LAWFARE (Mar. 3, 2021, 12:13 PM), https://www.lawfareblog.com/president-bidens-immigration-executive-actions-recap#Asylum (identifying three primary obstacles: (1) the sheer number of changes and time it would take to reverse them; (2) the potential for mutiny and enforcement refusal by ICE and state-level officials; and (3) the fact that "Trump's anti-immigrant legacy has left completely gutted systems in its wake" on which an administration will have to rely to make change).

[285] Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021) (instructing the DHS to "reinstate the safe and orderly reception and processing" of asylees and directing it to either revoke or "promptly review" multiple Trump immigration policies).

[286] Tucker Higgins, *Senate confirms Merrick Garland as U.S. attorney general*, CNBC (Mar. 10, 2021), https://www.cnbc.com/2021/03/10/merrick-garland-confirmed-as-us-attorney-general-by-senate.html.

[287] Seth Millstein, *How Garland Might Rule On Immigration*, BUSTLE (Mar. 21, 2016), https://www.bustle.com/articles/149037-what-are-merrick-garlands-immigration-views-hes-offered-up-some-hints.

with his preferred party in power.[288] It is as no surprise, then, that Garland quickly elected to review *Matter of A-B-*, overturning it.[289] This decision followed an Executive Order from the President instructing the Attorney General to "address the circumstances in which a person should be considered a member of a particular social group."[290] He rightly characterizes *Matter of A-B-* as setting a "strong presumption against asylum claims based on private conduct," discouraging case-by-case analysis.[291] As he says, his predecessors "sometimes have vacated Attorney General or Board opinions in light of pending or future rulemaking," and he did likewise.[292] Garland declared asylum issues should be "left to the forthcoming rulemaking," coming from the President, "with the benefit of a full record and public comment."[293] One wonders whether Garland believes this fix, immediately endangered under any forthcoming administration, is truly a fix at all. While Garland's holding reverts to a more humane rule, it fails to address the underlying cause of the problem: the relationship between the BIA, the Attorney General, and the President.[294]

To be clear, while it is fair to criticize Barr's anti-asylum policies and frequent interference with the BIA as extreme, abusive, and harmful, his actions were not unlawful. The

[288] *Id.*

[289] Matter of A-B-, 28 I&N Dec. 307, 307–09 (A.G. 2021).

[290] *Id.*at 308 (internal quotations omitted).

[291] *Id.* at 309.

[292] *Id.*

[293] *Id.*

[294] Libowsky & Oehlke, *supra* note 284. "[I]n the absence of congressional action in the past decade, the fates of immigrants in the United States will remain subject to the whims of the executive branch." *Id.* The authors criticize Biden's actions as having "limited scope and effect" but commend them for being "nuanced, thoughtful and pragmatic" with "the potential to serve as a guidepost for more sustained, lasting reform." *Id.*

Attorney General's powers include review of BIA decisions and setting of binding precedent.[295] The Attorney General's power over the BIA, however, goes further. Ultimately, BIA decisions are only final unless "reviewed by the Attorney General."[296] The Attorney General appoints attorneys to the BIA "to act as [his or her] delegates," chooses the Chairman of the BIA, and governs the BIA through decisions made under discretionary review.[297] The relationship between the BIA and Attorney General is more like that of "an employee and his superior" than that of "an administrative agency and a reviewing court."[298] Therefore, while it is important to note Barr's abuse, it is also important to recognize the law facilitates that abuse.[299]

A replacement Attorney General, therefore, solves nothing because the current administrative framework permits these abuses by any man or woman in that role—regardless of party or politics. Therefore, it stands to reason that a Garland-run DOJ will be just as efficient a tool for the President as a Barr-run DOJ—the only difference being the directed policy preferences of the President himself.[300] The Attorney General serves as a weapon for the

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[295] 67 Fed. Reg. 54877 (Aug. 26, 2002).

[296] *Id.* at 54883 (citing United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954).

[297] 8 C.F.R. § 1003.1(a)(1)–(2) (2021); 8 C.F.R. § 1003.1(d)(1)(i) (2021).

[298] Matter of Hernandez-Casillas, 20 I&N Dec. 262, 289 n.9 (Att'y Gen. 1991).

[299] Others have recognized this Attorney General power over the BIA as abusive. *See generally* Julie Menke, *Abuse of Power: Immigration Courts and the Attorney General's Referral Power*, 52 CASE W. RES. J. INT'L L. 599 (2020). Its proponents argue it "allows the Attorney General to establish definitive interpretations of immigration law and efficiently implement executive branch immigration policy," but whether this is a benefit depends on the merits of those interpretations and policy. *Id.* at 625. Menke argues for either limiting Attorney General review to "when the BIA or the Department of Homeland Security requests review" or restricting his or her "standard of review." Menke *supra*, note 293 at 625–27. Both would be reasonable reforms, but they still ignore the inherent opportunities for manipulation that remain. *See e.g. supra* Section C(i), (ii). Broader, more systematic change is warranted.

[300] The ACLU supported Garland's nomination for this very reason. Cecilia Wang, Jeffery Robinson & Louise Melling, *Merrick Garland Can Transform the Department of Justice. Will He?* ACLU (Feb. 19, 2021), https://www.aclu.org/news/civil-liberties/merrick-garland-can-transform-the-department-of-justice-will-he/. They argue Garland "will be a critical actor" in "carry[ing] out President Biden's promised overhaul of the U.S. immigration system." *Id.* They implore him to "commit to rescinding and replacing his predecessors' opinions that attempted to rig the asylum rules against people fleeing

Executive Branch and the President, to be wielded in whatever way desired to enact their political will. That remains the case no matter who occupies the Attorney General's position.

C. CONSOLIDATION OF EXECUTIVE POWER

Despite its long history as a destination for migrants, the United States has never recognized a constitutional right to asylum and is unlikely to ever do so.[301] Nor has the Supreme Court ruled "on what constitutional protections" to which asylum seekers are legally entitled.[302] The Court instead held that as to migrants, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."[303] The judiciary branch has therefore "taken a hands off approach to immigration issues."[304]

Furthermore, Congress has over the years abandoned its role as the shepherd of immigration policy. Scholars widely accept that the Constitution, through the Naturalization and

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persecution in Central America and elsewhere." *Id.* Such support—while agreeable—assumes a worrying reality that *systematic* change is impossible or unlikely, and that the only hope for asylum applicants is to maintain the *right people in power*. *Id.*

[301] *See generally* Lucas Kowalczyk & Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 CORNELL L. REV. 1219, 1236–38 (2017) (compiling a comprehensive analysis of asylum as a constitutional right worldwide from the perspective of national self-interest and geopolitics). France's Constitution Article 53–1 provides "authorities of the Republic" may "grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds." *Id.* at 1298. Similarly, the German Constitution provides: "Persons persecuted on political grounds enjoy the right of asylum," and requires a court order to suspend an applicant's stay with evidence their application is "obviously unfounded." *Id.* at 1300–01.

[302] Zainab A. Cheema, A Constitutional Case for Extending the Due Process Clause to Asylum Seekers: Revisiting the Entry Fiction After Boumediene, 87 FORDHAM L. REV. 289, 292 (2018). See also Jennifer Lee Koh, Rethinking Removability, 65 FL. L. REV. 1803, 1860–61 (2013). Koh points out that "removability has become subject to a tug-of-war between the Judiciary and the Executive Branch," as well as between "the Judiciary and executive agencies." *Id.* at 1860–61. Similarly, "[t]ension also exists between Congress and the President," as "courts have not clearly allocated power between" them in immigration enforcement. *Id.* at 1862.

[303] Dep't of Homeland Sec. v. Thuraissigiam, 140 S.Ct. 1959, 1982 (2020) (quoting Ekiu v. United States, 142 U.S. 651, 660 (1892)) (emphasis added).

[304] Dalen Porter, Trump v. Hawaii: Bringing the Political Branches' Power Back Into Equilibrium Over Immigration, 97 DENV. L. REV. F. 128, 130–31 (2019).

Foreign Commerce powers, provides the textual basis for the placement of plenary authority to regulate immigration with Congress, as part of its broad interest in national sovereignty.[305] The Constitution provides no such textual basis for Presidential power over immigration.[306] Rather, the Constitution meant the President's power over immigration to come only from what Congress delegates to the Executive Branch.[307] After all, the Constitution adopts the principle of separation of powers, and therefore "sought to divide the delegated powers of the new federal government into three defined categories" to assure "that each Branch of government would confine itself to its assigned responsibility."[308]

Despite that underlying interest in the separation of powers, neither Congress nor the Supreme Court intends to reign in Presidential power in matters of immigration policy. The recent decision of *Trump v. Hawaii* brought this controversy into stark focus.[309] There, the Court upheld an executive order from President Donald Trump which suspended entry for foreign nationals from certain enumerated nations for a limited time, known euphemistically as the

[305] John C. Eastman, *The Power to Control Immigration is a Core Aspect of Sovereignty*, 40 HARV. J. L. & PUB. POL'Y 9, 12–13 (April 2017).

[306] Porter, *supra* note 301 at 146–47.

[307] *Id.* at 147–48. In *INS v. Chadha*, the Supreme Court held unquestionably that Congress had "plenary authority . . . over aliens," as long as they have chosen a "constitutionally permissible means of implementing that power." 462 U.S. 919, 940–41 (1983). On the other hand, the Supreme Court has also deliberately limited the power of the Judiciary to limit the power of the Executive in immigration matters. *Thuraissigiam*, 140 S.Ct. at 1982.

[308] I.N.S. v. Chadha, 462 U.S. 919, 951 (1983). "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." Dalen Porter, Trump v. Hawaii: *Bringing the Political Branches' Power Back Into Equilibrium Over Immigration*, 97 DENV. L. REV. FORUM 128, 129 (Aug. 15, 2019) (quoting THE FEDERALIST NO. 47, at 139 (James Madison) (Roy P. Fairfield ed., 1981)). "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . must be resisted." *Chadha*, 462 U.S. at 951.

[309] 138 S.Ct. 2392 (2018).

"travel ban."[310] The Court granted the Executive Branch deference afforded by the INA,[311] which states:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the Unites States, he may *by proclamation*, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens *any restrictions he may deem appropriate*.[312]

This statute grants "deference to the President in every clause," entrusting extreme power to the President to decide "whether and when to suspend entry . . . and on what conditions."[313] As a matter of "comprehensive delegation," the Supreme Court considered this grant of power from Congress to the President constitutional.[314]

The *Trump* Court argued the ban did not facially discriminate against Muslims, it was not "impossible to discern a relationship" between the travel ban and "legitimate state interests," and it was not "inexplicable by anything but animus."[315] However, as pointed out in Justice Sotomayor's dissent, these conclusions come at the cost of "ignoring the facts, misconstruing legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals."[316] Sotomayor explained that "[r]ather than defend the President's problematic statements, the Government urges this Court to set them aside and defer

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[310] *Id.* at 2403, 2423.

[311] *Id.* at 2408.

[312] 8 U.S.C. § 1182(f) (emphasis added).

[313] Trump, 138 S.Ct. at 2408.

[314] *Id.* at 2408.

[315] *Id.* at 2420–21 (internal quotations omitted).

[316] *Id.* at 2392, 2433 (2018) (Sotomayor, dissenting). Among others, the Court ignored the President's stated goal of "calling for a total and complete shutdown of Muslims entering the United States." *Id.* at 2392, 2435.

to the President on issues related to immigration and national security."[317] Accepting this invitation, the Court allowed the President to seize executive power at the expense of the long-term possibility of immigrant rights in the name of national security.[318]

VI. CONCLUSION: WHAT IS TO BE DONE?

As has been shown, the pendulum of asylum law has swung far to the side of exclusion.[319] Fueled by xenophobia and focused on executive power, recent Attorneys General have weaponized legal formalism to define an ever-smaller category of individuals to whom they are willing to extend asylum.[320] President of the American Bar Association (ABA) Judy Perry Martinez states the solution in the clearest terms:

> We need a system of independent immigration courts that are not under the authority of the U.S. Department of Justice—a system where judges are not subject to arbitrary numerical quotas from the U.S. attorney general, and procedural and substantive due process is not subject to the changing political wings of every new administration. The ABA supports creating a system of independent Article I immigration courts, where judges are removed from potential political pressures.[321]

The recommendation to create "Article I immigration courts" refers to "[a]n independent Article I courts system to replace all of EOIR . . . which would include both a trial level and an appellate

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[317] *Id.* at 2392, 2440 (2018) (Sotomayor, dissenting). This dissent recounts bigoted statements from President Trump, none of which need restatement, but which evince animus which the Court chose to ignore. *Id.* at 2433–40 (Sotomayor, dissenting). This animus is reflected in a certain portion of the U.S. population. *See* Enka, *supra* note 283, at 93. Justice Sotomayor goes on to argue the "travel ban" proclamation should fail rational basis review as "divorced from any factual context from which we could discern a relationship to legitimate state interests." *Id.* at 2441 (internal citations omitted).

[318] Porter, *supra* note 301 at 142.

[319] *See supra*, Section IV.

[320] *See supra*, Section III.

[321] Judy Perry Martinez, *Fighting for Due Process in Immigration Courts*, AMERICAN BAR ASSOCIATION, (Apr. 28, 2020) https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/fighting-for-due-process-in-immigration-courts/. Martinez also identifies "meaningful access to counsel" and "in-person interpreters" as immediately necessary due process concerns. *Id.*

level tribunal."[322] Of the ABA's recommended reforms, Article I courts are most likely to succeed in subverting power in asylum cases from the Executive Branch.[323] By creating a "wholly judicial body," rather than a mere administrative review board like the BIA, we can "increase public confidence in the fairness of immigration adjudication," attract "higher caliber judges" to the process, increase efficiency, and hold the adjudicators accountable to their decisions and judicial ethics.[324] Most importantly, instead of being removable "at any time without cause," Article I judges can only be removed for "incompetency, misconduct, neglect of duty, malfeasance or disability," allowing for neutrality.[325]

Such reform is sorely needed, but so is the political will. More than thirty years ago, judicial oversight in asylum met "sustained and vocal resistance" and, as we have seen, it still does today.[326] *Matter of A-C-A-A-* provided Barr with an opportunity to further restrict access to asylum as part of a broader political anti-immigration project. Barr, Sessions, and Garland are mere political actors, and will take opportunities afforded them by our systems to pursue their aims. Asylees, however, are not mere political pawns, but people. They are not abusers of systems, but victims of those systems.[327] Asylum should provide refuge to those facing

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[322] Executive Summary, Reforming the Immigration System; Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases, American Bar Association Commission on Immigration, p. ES-9 (2010).

[323] *Id.* The ABA also recommends creating a separate "executive adjudicatory agency" to "replace EOIR," or creating a "hybrid approach" with a trial level under the executive branch and an appellate level under an Article I court. *Id.* Both reforms would be warranted but less adequate, because the solution must permanently limit executive branch power in asylum policy-setting. *Id.* at ES-9–10.

[324] *Id.* at ES-10, ES-47.

[325] *Id.* at ES-69. Yet this reform would not address how "often the governmental actors who determine removability are frontline enforcement agents" with little oversight. Lee Koh, *supra* note 299, at 1862.

[326] Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 2357 Minn. L. Rev. 1205, 1216 (1989).

[327] See American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis.

oppression and violence in their home nations. Manipulating legal language to make that process harder, for self-interested reasons, is inhumane and undermines the principles of equality and justice underlying our Constitutional government. [328]

[328] See Kendall Coffey, The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy, 19 Yale L. & Pol'y Rev. 303, 339 (2001).

> [T]he ebbs and flows of immigration tides . . . will continue to buffet public sentiment and political decision makers. The one constant, however, since the creation of our constitution, has been the independent federal judiciary. That sentinel must continue to assure that no controversy or temporal attitude stands taller than the great haven of the United States Constitution.

Id.