CLE MATERIALS FOR THE PANEL ON THE BORDER, THE ASYLUM PROCESS

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THE ASYLUM PROCESS

Judge Polly Webber[1]

Introduction: I am pleased to hear how interested your membership is in current challenges affecting immigration law. This presentation will cover the structure and functioning of the Immigration Court, with emphasis on asylum issues. At the end, I will discuss current problems, many of which have resulted in a breakdown in services and widespread public criticism of the agency. At least one potential solution will be presented for your consideration. The PowerPoint is in your materials. I won't be able to cover everything in the slides, but hopefully it will give you tools and resources to understand this vital and rapidly changing field of law.

A. From where does the authority to regulate immigration come?
   1. The Plenary Power Doctrine at Article I, Section 8, clause 3 of the U.S. Constitution states that the Congress shall have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Early on, this clause was interpreted to vest total power and authority in the federal government to regulate immigration.
   2. In the Chinese Exclusion Case, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), this interpretation was tested for the first time. "Justice Fields opinion established that the federal government has the power to regulate immigration, and it further suggested that the political branches could exercise this power without being subject to judicial review. He wrote that Congress' power to regulate immigration was based on national security, sovereignty over its own territory, and self-preservation. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*,100 YALE L.J. 545, 550-60 (1990).
   3. Many challenges against the Plenary Power Doctrine have resulted in an acknowledged ability of the judiciary to review the exercise of federal power in immigration cases. See *id*.

B. Structure of Relevant Agencies:
   1. The Immigration Court is a sub-agency of the U.S. Department of Justice. It is located under the Executive Office for Immigration Review, along with the Board of Immigration Appeals.
   2. Department of Homeland Security with its immigration sub-agencies, Immigration and Customs Enforcement, Citizenship and Immigration Services, and Customs and Border Protection, has been a separate agency from DOJ since 2003. Prior to 2003, all these functions were housed by DOJ, and before 1984, the Court was a part of the Immigration and Naturalization Service.
   3. Historically, it has been the position of the National Association of Immigration Judges that the Court should be an Article 1 Court, independent of the Executive

[1] Judge Webber is a retired immigration judge who sat on the bench in San Francisco for 21 years. During that time she issued decisions in over 19,000 cases. Prior to becoming a judge she practiced immigration law for 18 years. She has also served as president of the American Immigration Lawyers Association.

Branch. It was feared that the executive could impose a political agenda on what is supposed to be an independent tribunal. While such fears were scoffed at by both Republican and Democratic administrations alike, it is clear today that this issue needs to be addressed. The ABA and FBA have come out strongly in favor of such a structural change. See https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/july_2019_washington_letter/immigration_article_0719/ http://www.fedbar.org/Advocacy/Issues-Agendas/Article-1-Immigration-Court.aspx

C. Structure of Immigration Court Hearings:
   1. Bond Hearing: Respondent is in custody of DHS
      a. Not everyone is entitled to bond:
         (i) Those in Expedited Removal Proceedings[2] governed by INA § 238.
         (ii) Those in Expedited Removal Proceedings who establish a fear of persecution in the home country and apply for asylum. This rule has been challenged in District Court. ICE appealed the decision to the Ninth Circuit Court of Appeals.[3]
         (iii) "Arriving Aliens:" governed by INA § 235(b).[4]
         (iv) Those subject to Mandatory Detention: governed by INA§ 236(c)[5]

[2] Expedited removal from the U.S. is a procedure established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. It allows immigration officers to issue expedited removal orders against certain non-U.S. citizens, resulting in removals that, except in very limited circumstances, are carried out with no hearing or review by an immigration judge. Those affected are those who have not been admitted or paroled into the U.S., have been in the U.S. for less than two years, and are determined to be inadmissible for either (1) having used fraud or misrepresentation to procure an immigration benefit or (2) lacking a valid visa or other entry document (two of the grounds of inadmissibility). Cubans are excepted.
https://web.archive.org/web/20150722030314/https://nilc.org/removpsds151.html

[3] *Matter of M-S-,* 27 I&N Dec. 509 (A.G. 2019), but see nationwide injunction in *Padilla v. U.S. Immigration & Customs Enforcement*, No. 2:18-cv-00928-MJP (W.D. Wash.). Under that decision, immigration courts must continue to provide bond hearings to individuals who enter the United States without inspection, are placed in expedited removal proceedings, and establish a credible fear of persecution or torture. ICE appealed to the Ninth Circuit, making an emergency motion for stay. The Ninth Circuit denied the stay of the requirement for bond hearings. The case is still pending.

[4] 8 C.F.R. 1.1(q): The term "arriving alien" means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked. However, an arriving alien who was paroled into the United States before April 1, 1997, or who was paroled into the United States on or after April 1, 1997, pursuant to a grant of advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, will not be treated, solely by reason of that grant of parole, as an arriving alien under section 235(b)(1)(A)(i) of the Act.

[5] "Mandatory detention" refers to a provision of the Immigration and Nationality Act that states that non-citizens with certain criminal convictions must be detained by ICE. People who are subject to mandatory detention are not entitled to a bond hearing and must remain in detention while removal proceedings are pending against them. The rules for mandatory detention are contained in INA § 236(c) which states that "the Attorney General *shall* take into custody any alien who" is inadmissible or deportable under select grounds ... "*when the alien is released.*" (emphasis added). See *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018).
https://www.ilrc.org/sites/default/files/resources/mandatory_detention_ice_hold_policy_handout.pdf

b. Those who are eligible must demonstrate they are not a flight risk and are not a danger to society.
c. Minimum bond before the Immigration Judge is $1500.

2. Issuance of Notice to Appear in Removal Proceedings by DHS: 8 C.F.R. § 239.1.
   a. Must contain:
      (i) Factual allegations and Charges.
      (ii) Date, time and place of hearing before an Immigration Judge.
      (iii) *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).
   b. Must be served on Respondent.

3. Master Calendar Hearing: see *Immigration Court Practice Manual* Chapter 4:
   a. To provide advisals to respondent regarding the right to an attorney and the existence of low-cost or free legal services locally. A list is provided.
   b. To provide advisals to respondent of right to present evidence, to present testimony, to object to evidence, to cross-examine any government witnesses. To explain the charges and the factual allegations in the Notice to Appear.
   c. To take pleadings, to identify and narrow factual and legal issues, to set deadlines for filings, and to determine removability.
   d. To provide warnings related to security and background investigations.
   e. To set the individual merits hearing.
   f. To provide advisals on the consequences of failing to appear for the hearing as well as the right to appeal any decision of the Court to the Board.
   g. Burden of Proof is two tiered: Government must prove removability, Respondent must prove eligibility for relief from removal.
   h. Many courts have an Attorney of the Day system to provide temporary representation for otherwise unrepresented respondents at the Masters. DOJ adopted a new set of rules that threaten the very existence of this helpful system, requiring these temporary counsel to file Notices to Appear, which can't be withdrawn without the Court's approval.

4. Individual Merits Hearing: to present the respondent's applications, conduct cross examination, consider other evidence and hear the immigration judge's decision.
   a. Federal Rules of Evidence do not apply. Standard is Fundamental Fairness.
   b. There is no right to discovery. Government evidence might be shared by cooperative government counsel. FOIA is used to obtain documents.
   c. There are generally no Pre-Trial Conferences.
   d. Immigration Judges are required to hear at least 700 cases per year, necessitating that 3 to 4 cases are scheduled every day between 8:30 and 4 pm. Hence the phrase: "Death Penalty Cases in a Traffic Court Setting."
   e. Administrative Closure may not be used as a tool to manage the judges' calendar anymore. Moreover, continuances are discouraged.
   f. The judges have a Dashboard graphic ever-present on their computers in the Courtrooms that reflect whether they are meeting their completion goals.

g. There are no stenographers, rather, the judge must control the record through the digital-audio recorder in the computer. Thus there is no reading back of testimony. The judge may try to rewind the tape to find the proper passage.
h. There are no transcripts prepared unless an appeal has been filed. This is true even when a new judge takes over for a retired judge in the midst of a complex case. The new judge must listen to the tapes.

5. Most Common Types of Hearings in Immigration Court:
   a. Asylum, Withholding of Removal, Convention Against Torture: INA §§208, 241(b)(3)(A) and 8 C.F.R. 208.18.
   b. Adjustment of Status to Lawful Permanent Resident INA §245(a); Registry INA §249.
   c. Cancellation of Removal for 1) Certain Permanent Residents INA § 240A(a) and 2) Certain Non-Permanent Residence INA § 240A(b).
   d. Rescission of Lawful Permanent Residence INA § 246.
   e. Former INA § 212(c) Waiver.[6]
   f. Reviews of Reasonable Fear and Credible Fear Determinations: 8 C.F.R. §§ 208.30(e)(2) and 208.31(c).
   g. Attorney Discipline
6. Immigration Judge's Decision may be oral or written. Parties have 30 days to file an appeal to the Board of Immigration Appeals.

D. Appeal to Board of Immigration Appeals
   1. Notice of Appeal (Form I-290B) must state basis for the appeal and include $675.00 fee. BIA sets briefing schedule. May request extension of time.
   2. Decisions are done by three member panels or by individual Board members. Published decisions appear in the Administrative Decisions Under Immigration and Nationality Laws of the United States. Unpublished decisions are distributed by mail.
   3. Only Respondents can file a Petition for Review of a denial to a Circuit Court of Appeals.
   4. Attorney General has authority under 8 U.S.C. 1103 to certify BIA decisions to himself/herself and override the decisions with an A.G. decision. Purpose for this was to avoid embarrassment at Circuit Court level of BIA failing to follow the evolution of the law. Historically rarely used. See Jeffrey S. Chase, "The A.G.'s Certifying of BIA Cases, 5/29/19 (blog), and Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 Iowa L. Rev. 18 (2016).

E. FOCUS: Asylum, Withholding of Removal, Convention Against Torture Issues:
   1. Asylum

[6] Despite having been repealed effective April 1, 1997, this relief remains available to certain LPRs who are subject to removal based on criminal convictions or guilty pleas *prior to* the repeal of the former section 212(c).

a. Low standard of proof: at least a 10% chance of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.
b. Particular Social Group is controversial and confusing to most. Must show social distinction as well as particularity
c. A.G. opinion in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

2. Withholding of Removal
   a. Higher Standard of Proof: greater that 50% chance of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.
   b. A grant of this relief must be preceded with an order of removal, and it grants no status. The beneficiary of a grant may work but the government could remove the beneficiary to a safe third country.
3. Convention Against Torture
   a. Standard is High: at least a 50% chance that the respondent will be tortured by the government or by other actors with the acquiescence of the government.

F. Current Problems with Immigration Court Proceedings:
   1. 1996 Act: Illegal Immigration and Immigrant Responsibility Act of 1996 was the first step in promised immigration reform. Proponents insisted on passing draconian enforcement provisions so that a generous legal immigration program could be drafted and passed by Congress. The second prong never happened.
      a. Loss of substantial discretionary authority of Immigration Judges
      b. Substantially harsher treatment of non-citizens with criminal records, despite rehabilitation

   2. Administration changing the rules singlehandedly, raising significant due process concerns:
      a. Doing away with Administrative Closure as a tool for managing the Court's calendar. It had been used liberally by the Obama Administration to reduce the severe backlog in the Courts and to concentrate on the more serious cases
      b. Constricting the ability of the Immigration Judge to decide motions for continuance expeditiously and in consideration of a Judge's calendar concerns
      c. Removing Immigration Judges from certain cases where the Administration's view of the case differs from the individual judges.

   3. Pressures on Immigration Judges to finish 700 cases per year, with less than a 15% remand rate of cases from the Board. The judges often must choose between job retention and due process, spending inordinate amounts of precious time to justify a decision sure to be unpopular with the administration.

   4. Private and government attorneys have no roadmap for presentation of their cases to the Court. The judges have no time for status conferences. Thus, the parties on a complex case have less than two hours each to present direct and cross, witnesses, and hear the judge's decision. The parties must over-document the cases with trial briefs, expert opinions, and other exhibits to compensate, which

might be thought of as good lawyering, if the judges had the time to read everything presented. The immigration judge is also challenged to present a coherent and thoughtful decision with citations under these circumstances.

5. Composition of the Board: Historically there was a concerted effort to appoint nonpartisan people to the Court and to the Board on merit, rather than political opinion. That changed in the early 2000s when there was a purge of more liberal members of the Board. Just a few months ago, the A.G. appointed six new Board members, those with the highest asylum denial rates in the country.

6. Asylum Related Hearings: The Administration has changed the burden on noncitizens in Credible Fear and Reasonable Fear hearings, subjecting them to having to present evidence and coherent legal arguments upon arrival at the border or within a short time thereafter. The A.G. certified Board decisions to himself and issued decisions that reverse the evolutionary course of decisions in the asylum jurisprudence, stating (in dicta) that applicants with certain categories of claims do not qualify for asylum. The Administration has forced asylum seekers to remain in Mexico until it is time for their hearings, severely compromising their ability to exercise their right to seek and retain counsel. The Administration has taken steps to ensure that counsel trying to make themselves available to these folks in Mexico is frustrated, by working with the Mexican authorities not to admit the lawyers into Mexico.

7. Lack of Resources: https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point.

STRUCTURAL DEFECTS IN THE ASYLUM PROCESS, AN ADMINISTRATIVE LAW PERSPECTIVE

Professor Stephen Lee[7]
U.C. Irvine School of Law

Asylum status fits within a broader set of immigration rules that give noncitizens the opportunity to receive immigration-related benefits. Asylum status is a highly coveted benefit because it provides noncitizens with temporary lawful status and also presents the opportunity to apply for lawful permanent status or a "green card." At the same time, the *process* by which noncitizens seek asylum is difficult and suffers from a variety of structural defects. In particular, it suffers from a lack of: (a) independent decisionmakers; (b) discovery tools; and (c) public input.

a. Decisional Independence

Should a noncitizen undertake the decision to seek asylum, it is highly unlikely that the applicant will have her application decided by a truly independent decisionmaker. This is true in two respects. First, most critical aspects of the asylum process are determined by bureaucrats and other government officials. The process begins with an interview with an asylum officer at one of eight regional offices. If asylum is denied there, the applicant may proceed to immigration court where an immigration judge (IJ) will issue a decision. If the applicant receives an adverse decision, she may appeal to the Board of Immigration Appeals (BIA), which has the authority to review and overturn the IJ's decision. In this respect, the asylum process—and the immigration removal process generally—is no different than the process that governs the distribution of other public benefits in the administrative context. Agency officials such as Administrative Law Judges (ALJs) routinely adjudicate social security benefits applications and assess civil penalties for labor violations and ALJs enjoy far fewer protections than Article III judges.[8]

Yet, even within the world of reduced decisional independence, IJs and BIA members occupy a particularly vulnerable place within the removal process. For one thing, IJs and BIA members work within the Department of Justice under the supervision of the Attorney General, which means that all removal decisions and most asylum applications are decided by "judges" under the supervision of the country's top prosecutor.[9] Moreover, BIA members report directly

[7] Professor Lee is a professor of law at U.C. Irvine School of Law. He writes at the intersection of administrative law and immigration law. He is particularly interested in how enforcement realities constrain immigration law and policy across a variety of contexts and institutions, especially the workplace, the criminal justice system, and the food industry. His work has been published in the *Washington University Law Review*, *Michigan Law Review*, *Harvard Law Review*, *California Law Review*, *University of Chicago Law Review*, *Stanford Law Review*, *Arizona Law Review*, and other legal and scholarly publications.

[8] *See* Kent Barnett, *Against Administrative Judges*, 49 UC Davis L. Rev. 1643 (2016).

[9] *See* Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 Kansas L. Rev. 544 (2011).

to the Attorney General[10] and the Attorney General can review and overturn any decision of the BIA.[11] Finally, IJs who demonstrate too much lenience can face adverse employment actions like reassignment.[12] During the George W. Bush administration, the most liberal members of the BIA were dismissed outright.[13] While it is defensible and appropriate for the White House to expect government officials to embrace the priorities set by new presidential administrations especially across party lines, these sorts of abrupt partisan decisions exposes the consequences of an administrative system that lacks true decisional independence, namely the potential for erroneous expulsions of noncitizens.

The asylum and immigration processes also suffer from a lack of decisional independence in a second sense: asylum seekers have fewer opportunities to seek review from Article III judges, the only truly independent decisionmakers within our system of government. Since 1996, Congress has barred noncitizens from seeking review within federal district courts[14] and it has severely narrowed the types of claims that immigrants can ask federal courts of appeal to consider.[15] In most cases, if an immigrant loses before the BIA, her only recourse is to seek review before the circuit court in which the IJ completed the proceedings. [16] With so many immigration claims being channeled to appellate courts, federal circuit courts have strained under the weight of the rise in immigration cases.[17]

b. Discovery substitutes

Putting to one side the lack of decisional independence, asylum seekers must also contend with another structural defect: the lack of discovery rules before immigration courts. As a general matter, asylum claims involve tricky evidentiary challenges given that so many of the key events underlying the asylum application transpired in foreign countries and that those fleeing persecution typically do not necessarily carry within them documentary evidence of those events. But even where asylum seekers have a strong case for establishing past persecution, their applications might get derailed by prior encounters with the immigration process. As between the asylum seeker and the government, of course, the government is the party with superior information and without discovery rules, asylum seekers (or rather, their lawyers) have little option but to resort to FOIA applications in order to secure this information. One study found

[10] By regulation, the Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them. The Board shall consist of 15 members. *See* 8 CFR § 1003.1(a).
[11] 8 CFR § 1003.1(h).
[12] *See* Stephen H. Legomsky, *Deportation and the War of Independence*, 91 Cornell L. Rev. 369 (2005).
[13] *See id.* at 376. *See also* Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave; Critics Call it a "Purge"*, LA Times, March 12, 2003.
[14] See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 423, 110 Stat. 1214, 1272 (formerly codified at 8 U.S.C. § 1105a(e) (1) (1997)) (repealed 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306, 110 Stat. 3009-546, 3009-607 to -612 (codified as amended at 8 U.S.C. § 1242).
[15] *See* Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction through the Lens of Habeas Corpus*, 91 Cornell L. Rev. 459 (2006).
[16] *See* 8 U.S.C. § 1252(b)(2).
[17] *See* Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 Texas L. Rev. 1097 (2018); Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*,59 Duke L.J. 1501 (2010).

that the Department of Homeland Security—the agency which houses the various immigration enforcement agencies—has consistently received the largest volume of FOIA requests within the federal government.[18]

c. Diminished Public Input

A final structural defect to the asylum process doesn't affect individual applicants but rather asylum seekers as a class. The problem is one of diminished opportunities for the public to weigh in on asylum policy. The primary method by which agencies pass regulations with the force of law is through the notice and comment process. Agencies propose rules, the public comments on those rules, and agencies take those comments into account as they revise and promulgate final versions of those rules. This "notice and comment" rulemaking allows for agencies to incorporate the views of the public thereby ensuring that their policies reflect a certain degree of democratic legitimacy.

In certain instances, agencies can promulgate rules without first gathering public input. This is the "interim final rulemaking" process by which agencies promulgate rules without comment—that is, without first getting public input. This process allows for agencies to gather information for potential future revisions. In order to create policy through the interim final rulemaking process, agencies must typically show that they have "good cause," which is listed as an exemption to the ordinary notice and comment rulemaking process.[19] This is precisely what the DOJ and DHS did when they issued a joint interim final rule requiring asylum seekers to first seek asylum in a third-country.[20] The "good cause" that the government offered was to avoid a "surge" in migrant flows had those agencies pursued this policy through ordinary channels. In other words, posting a notice that the DOJ and DHS were considering a rule that would make it harder to seek asylum in the United States would, according to the government, lead to a rush of migrants seeking to effectuate entries before any such rule went into effect.[21]

[18] *See* Margaret B. Kwoka, *First-Person FOIA*, 127 Yale L.J. 2204, 2224 (2018).
[19] See 5 U.S.C. § 553(b)(3)(B).
[20] *See* DHS and DOJ Issue Third-Country Asylum Rule, Press Release, U.S. Dept. of Homeland Security, July 15, 2019, at https://www.dhs.gov/news/2019/07/15/dhs-and-doj-issue-third-country-asylum-rule.
[21] *See* Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Federal Register 63,994, 64,006 (Nov. 19, 2019).

IMMIGRATION TO THE UNITED STATES, OVERVIEW OF ASYLUM LAW AND PROCESS, AND RECENT POLICY MEASURES LIMITING ACCESS TO ASYUM

Lisa Frydman[22]
Kids in Need of Defense

A. Categories of Immigrants to the United States

An immigrant can come to the United States through an "immigrant visa," through a "non-immigrant" visa, as a resettled refugee.[23] Other immigrants may enter the United States without a visa, with the intention to seek asylum or another form of humanitarian protection.

An individual granted an immigrant visa is admitted to the United States as a lawful permanent resident. The Immigration and Nationality Act (INA) allows the United States to approve permanent immigrant visas each year across different visa categories, including, for example, family based visas (spouses, parents, and children under the age of 21 of U.S. citizens and lawful permanent residents)[24], employment based visas, or individuals who win the "diversity visa" lottery for individuals from countries with low rates of immigration to the United States. Once a person obtains an immigrant visa and comes to the United States, they become a lawful permanent resident (LPR). In some circumstances, noncitizens already inside the United States can obtain LPR status through a process known as "adjustment of status."

In addition, each year the president is required to consult with Congress and set an annual number of refugees to be admitted to the United States through the U.S. Refugee Resettlement Process. Each year the United States also admits a variety of noncitizens on a temporary basis by granting them "non-immigrant" visas. Non-immigrant visas are for everyone from tourists to foreign students to temporary workers permitted to remain in the U.S. for a certain number of years.

B. Asylum; origins and background

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees (collectively referred to as the Refugee Convention) are the primary legal instruments of international refugee law. Countries that ratify these international instruments are legally bound to offer safe haven to individuals who are at risk of persecution because of their race, religion, or nationality, or because of other fundamental characteristics, such as deeply held beliefs.[25] The Refugee Convention defines a refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular

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[22] Lisa Frydman is Vice President for Regional Policy and Initiatives at Kids in Need of Defense (KIND). Lisa leads KIND's work to address the root causes of child migration and to promote policies and practices throughout the U.S.-Mexico-Central America corridor focused on protection and rights for migrant and refugee children.
[23] INA §201, 203 (immigrant visas); § 214 (non-immigrant visas); § 207 (refugees).
[24] Siblings of U.S. citizens can be admitted to the U.S. as well but this is a slow process that can sometimes take 10 years or more.
[25] United Nations Convention relating to the Status of Refugees of 1951, 189 U.N.T.S. 137 (1951); 1967 Refugee Protocol, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1967).

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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." The Refugee Convention was developed in response to the tragedy of the Holocaust and the world's failure to respond. It addressed the flows of people fleeing following the end of World War II, and included a definition of a refugee that required a well-founded fear of harm grave enough to be considered persecution, inflicted because of the above-mentioned characteristics.

The Refugee Convention and Protocol were codified into U.S. law in the 1980 Refugee Act, passed by Congress in order to bring the United States into conformance with international commitments.[26] An individual must be physically located in the United States, including at a U.S. port of entry (airport, or other) in order to seek asylum. Individuals outside the United States cannot seek asylum, and there is no such thing as an asylum visa to seek permission to go to the United States in order to seek asylum. U.S. law has never required authorized entry into the United States in order to seek asylum. Rather, U.S. law makes clear that asylum is available to individuals who enter with authorization, as well as those who, for example, present themselves at a port of entry, and those who cross the border between ports of entry.[27] An individual outside of the United States who meets the refugee definition can, sometimes, depending where they are located be considered for overseas Refugee Resettlement, but not for asylum.

Several eligibility bars exist to seeking asylum. They are:

1) Safe Third Country: an individual may not seek asylum if the U.S. determines that, pursuant to a bilateral or multilateral agreement, they can be sent "to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection."[28]
2) Former denial of asylum: an individual previously denied asylum may seek withholding of removal or protection under the Convention Against Torture, but is barred from seeking asylum. [29]

[26] The Refugee Act of 1980, Pub. L. No. 96-212 § 101(a), 94 Stat. 102, codified the United States' obligations under the United Nations Convention relating to the Status of Refugees of 1951, and the 1967 Refugee Protocol. Additionally, Congress enacted the Foreign Affairs Report and Restructuring Act of 1998 (an act to consolidate international affairs agencies that in chapter three sets out specific policies on refugees and migration), Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822. The Immigration and Naturalization Act (INA) of 1952 (as amended) sets out the specific legal processes for asylum. The INA is codified at 8 U.S.C. §§1101 et seq, and is current as cited as of Nov., 2019.

[27] See section 208 and Section 235 of the Immigration and Nationality Act.

[28] INA § 208(a)(2)(A).

[29] INA § 208(a)(2)(C). Withholding of removal provides protection from removal to an individual who establishes that they would more likely than not suffer persecution in that country. *See* INA § 241(b)(3). The United Nations Convention Against Torture, provides that an individual cannot be sent to a country where they are more likely than not to suffer torture. 8 C.F.R. §§ 208.16–208.18.

3) One year filing deadline: an individual must establish "by clear and convincing evidence" that they filed for asylum within one year of arrival in the United States,[30] unless they can prove that they qualify for an exception to the deadline.

Aside from the bars to filing for asylum, certain bars exist to receiving asylum for those determined to have been convicted of a particularly serious crime in the United States, have committed a serious "non-political" crime outside of the United States, have persecuted others (on account of their race, religion, nationality, membership in a particular social group), have been "firmly resettled" or granted an offer of permanency in another country, or are found to be a danger to the security of the United States.[31]

C. Process for Seeking Asylum in the United States

The process to seek asylum in the United States varies, depending on whether an individual is in removal proceedings or not, and whether they have been placed in expedited removal.

Expedited removal is a process intended to do, exactly as its name implies, expedite the removal of individuals from the United States. Enacted into law in 1996, this process fundamentally changed asylum as it allowed for fast track removal of asylum seekers apprehended at or near a border, and those requesting protection at U.S. ports of entry. Under the expedited removal statute, if an individual is apprehended at or near the border and does not have a valid visa or other authorized status, such as permanent residency or U.S. citizenship, the presumption is that he or she should be removed to his/her country of origin or last habitual residence. However, if such individual expresses a fear of persecution upon return to his/her country then he/she entitled to a "credible fear interview" with an asylum officer.[32] Same goes for those presenting at ports of entry. An individual who proves during that interview that they have a "credible fear" of persecution upon return to their country, defined as "a significant possibility" of suffering persecution on account of race, religion, nationality, political opinion, or membership in a particular social group, then gets referred for a hearing on asylum, withholding of removal, and protection under the Convention Against Torture.

If an individual is found not to have a credible fear of persecution, he/she is to be removed by the Department of Homeland Security. An individual found not to have a credible fear of persecution can request review before an immigration judge.

Removal proceedings: an individual apprehended at the border or internally in the United States, or an individual presenting at a port of entry may ultimately be placed into removal proceedings before an immigration judge. In the context of removal proceedings the individual must respond to allegations by the U.S. government that they entered the United States without proper documentation, do not have authorization to be in the United States, overstayed a visa they were issued, or committed a crime that makes them "removable." If an individual is "removable" they may seek asylum, withholding of removal, or protection under the Convention

[30] INA § 208(a)(2)(B).
[31] INA § 208(b)(2).
[32] INA § 235(b)(1).

Against Torture as a defense to removal. After filing an application for asylum, application I-589, the individual has a hearing before the immigration judge on their claim(s). *See pages 3-7, Judge Webber, for more information on this process*.

Affirmative asylum process: an individual not in removal proceedings make seek asylum affirmatively, so long as they are not ineligible to do so (see above for eligibility bars to filing for asylum). Those eligible to file asylum claims affirmatively do so with the United States Citizenship and Immigration Services (USCIS), a sub-agency of the Department of Homeland Security. They must present evidence of their claims to USCIS and get scheduled for an interview on their asylum claim.

D. Policy Changes Limiting Access to Asylum and to Due Process

A series of policy changes implemented, particularly in 2018 and 2019 have fundamentally altered the U.S. asylum system, and in particular have cut off access to the asylum system for migrants seeking asylum at the border. A brief explanation of these policy measures, the legal authority the U.S. government uses to justify them, and the laws they potentially violate as well as legal challenges to these policies are discussed below.

1. Metering

Although U.S. law requires U.S. Customs and Border Protection Officials to process asylum seekers at ports of entry, since the fall of 2019 CBP has been limiting access of asylum seekers to ports of entry, claiming the ports are "full." This process, known as "metering" forces asylum seekers to register their name on a list and wait in Mexico until their number gets called for processing by CBP. Over 25,000 asylum seekers are currently waiting in Mexican border towns for their number to be called by CBP for processing at a port of entry.[33] Because some ports are processing as few as 10 asylum seekers per day, the wait can be months long.

2. Migrant Protection Protocol

In January 2019 the United States initiated the Migrant Protection Protocol (MPP) at the San Ysidro port of entry near San Diego. Under the MPP, the United States claims it can return asylum seekers who entered the United States from the territory of Mexico to wait in Mexico during the pendency of their removal proceedings in the United States. The U.S. government relies on Section 235 of the INA to justify MPP's legality, specifically section (b)(2)(C), which provides that, "in the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the U.S.," the Secretary of Homeland Security 'may return the alien to that territory pending a [removal] proceeding under § 240' of the INA." However, this provision was not written to apply to asylum seekers. It was written to apply to very limited circumstances, only, for example, in the event of "insufficient detention space" and "as a last resort," INS Inspector Field Manual, and only for individuals who did not "express[]a fear of persecution related to Canada or Mexico."[34]

[33] *See* https://time.com/5701989/mexico-asylum-seekers-border/

[34] Memorandum for Regional Directors from Michael A. Pearson, INS Executive Associate Commissioner of Field Operations on Detention Guidelines ("Pearson Memo") at *3 (Oct. 7, 1998) ("If an alien expresses a fear of

The 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees, to which the United States is party, requires that the United States not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The Refugee Convention prohibits the return of individuals to countries where they would directly face persecution on a protected ground as well as to countries that would deport them to conditions of persecution. Congress codified these prohibitions in the Immigration and Nationality Act §241(b)(3), 8 U.S.C. § 1231(b)(3), which bars the removal of an individual to a country where it is more likely than not that he or she would face persecution. Under this provision, an immigration judge must determine whether an sending an asylum seeker back to a particular country would amount to refoulement, and therefore be unlawful.

However, under the MPP program it is USCIS asylum officers that determine whether return of an individual asylum seeker to Mexico would be refoulement, and therefore impermissible. As a result asylum seekers who risk suffering persecution in Mexico are being returned in violation of protections against non-refoulement. After a district court issued a preliminary injunction to halt implementation of the MPP, a Ninth Circuit panel lifted the preliminary injunction, permitting the government to implement MPP until the case is decided on the merits. A challenge to MPP on the merits is pending in the Ninth Circuit Court of Appeals.[35]

3. Third Country Transit Bar

In July 2019 DHS and the Department of Justice (DOJ) issued an interim final regulation barring from asylum eligibility any individual who had passed through another country that is a signatory to the Refugee Convention or Protocol on their way to the United States.[36] The government has argued that the new rule is consistent with the INA. However, Congress years ago set out the two circumstances under which asylum can be denied based on the possible protection available in a third country; neither of which depend on transit.[37] Under the statute on Safe Third Country agreements, an asylum applicant can be required to seek asylum in another country rather than in the United States if, the U.S. and that country have entered into an agreement, the country can provide protection against persecution, and the country has a fair and efficient asylum system. This provision or bar to asylum also does not turn merely on whether an individual transited that country or another country, but whether the conditions for a Safe Third Country are met. The new rule issued in July, however, turns merely on transit through another country and bars from asylum any individual who did.

Through this new rule individuals who fled persecution in their country but did not seek asylum in a country they passed through on their way to the United States will be ineligible for

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persecution related to Canada or Mexico, the alien . . . may not be required to wait in that country for a determination of the claim.").

[35] *See Innovation Law Lab v. McAleenan*, No. 19-15716. Arguments were heard October 1, 2019.

[36] *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (interim final rule proposed July 16, 2019),https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications.

[37] *See* 8 U.S.C. §§ 1158(a)(2)(A), (b)(2)(A)(vi).

asylum, unless they can establish one of two very narrow criteria: that the person is a victim of human trafficking or that the person sought asylum and was denied it in at least one country they transited. For those unable to establish these exceptions, the only avenue they now have to receive protection in the United States and be protected from removal to their country of origin is to establish that sending them back to their country would amount to refoulement because they are more likely than not to be persecuted or tortured in their country. The burden of proof is on the applicant and the standard is high, and applicants are not entitled to a hearing before an immigration judge to determine this criteria. Rather, it is USCIS Asylum Officers, or CBP border agents who are hearing and deciding these claims. For those found not to meet the standard there is no review before an immigration judge, and deportation is imminent.

The government issued this policy as an interim final rule in order to avoid public notice and comment and begin immediate implementation. The rule was quickly challenged in a federal district court and a preliminary injunction was issue, enjoining the government from implementing the rule. However, the preliminary injunction was ultimately challenged at the Supreme Court and a majority of the court ruled that the policy could go into effect pending a determination on the merits of the underlying substantive legal challenge proceeding in the federal court.[38] Litigation on the legality of the underlying asylum ban rule is pending.

4. Asylum Cooperative Agreements

From July to October of 2019, the U.S. signed "asylum cooperative agreements" with El Salvador, Guatemala, and Honduras that would allow the U.S. to send asylum seekers to these countries and bar them from applying for protection in the U.S. Then, in mid-November, the Department of Homeland Security issued an interim final rule seeking to implement these agreements, including through the creation of unprecedented and unlawful procedures that risk the return of children and families to persecution and other harm.[39]

Since the interim final rule issued in mid-November, the United States has now begun sending asylum seekers to Guatemala and Honduras to seek asylum there, instead of in the United States. The U.S. government points to the Safe Third Country bar to asylum included in the INA to claim that it has authority to require asylum seekers to proceed with their claims elsewhere, and that Guatemala and Honduras are able to provide protection from persecution and access to fair and efficient asylum proceedings. Similar to the very limited exception to the application of MPP to those fearing return to Mexico, individuals facing forced return to Honduras or Guatemala under this agreement can only be excepted if: 1) they have a valid visa for the United States, 2) they are an unaccompanied child, or 3) they can prove that it is more likely than not that they will suffer persecution or torture in Guatemala and Honduras.

As with the Third Country Transit ban, the U.S. government published this rule as an interim final regulation (IFR) in order to begin immediate implementation and avoid public notice and comment. The IFR implementing these agreements will certainly be challenged as a

[38] Barr v. East Bay Sanctuary Covenant, No. 19A230, 588 U.S. ____ (2019).
[39] Rule Implementing Bilateral and Multilateral Cooperative Agreements for Asylum under the Immigration and Nationality Act, 84 FR 63994, https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and

violation of the Administrative Procedure Act's requirement for notice and comment, as well as a violation of the INA's provisions protecting against refoulement (sending an asylum seeker to persecution), and a violation of the Safe Third Country provision itself since these countries cannot provide safety or meaningful access to asylum.

ON THE BORDER: THE ASYLUM PROCESS
A VIEW FROM MEXICO

Cecilia Flores Rueda[40]
FloresRueda Abogados, Mexico

While the debate regarding those who seek asylum in the United States rages, few understand the history and origins of US refugee law and how the asylum process, including the immigration courts, works. Current US policies toward asylum seekers and policy changes directed at immigration courts and judges have a significant impact on asylum seekers and their access to due process.

This analysis will provide a view of the asylum process and Mexican law, as well as current challenges to due process for asylum seekers.

1. DIFFERENCE BETWEEN REFUGEE AND ASYLEE

The terms refugee and asylee are similar in nature, since both are related to people who are forced to leave their home to move to another place in search of shelter. However, the similarities between these words end there because the truth is that they have different meanings.

1.1. Refugee

The term refugee refers to a person seeking shelter in a country that is not theirs due to fear of being persecuted for religious reasons, to war, race or nationality. There are also other reasons why some people enter a country that is not their own in search of refuge, for example, it could be due to natural disasters or political violence in their countries of origin.

The refugees cannot guarantee themselves the protection of another country, but in order that they can be relocated to a safer place, it is the other countries (especially border countries) that must wish to provide them with the things they need.

1.2. Asylee

On the other hand, the term asylee refers to a person who cannot return to his home country for fear of persecution; but in this case that person had to have requested asylum in the country in which he is located and that is not his.

Cases of political asylum are common, since persecutions are generally of this type; although there are also frequent cases of religious persecution, racist or a particular group. In addition, due to

[40] Cecilia Flores Rueda, established FloresRueda Abogados, a dispute resolution boutique, after several years as arbitration and litigation counsel, including as head of the arbitration practice at leading international and local firms. Handles complex and high-stake international and domestic cases. Her value lies in her ability to draw upon experience in order to formulate creative solutions to complex issues.

differences of opinion some individuals have been persecuted throughout history and have been forced to apply for asylum.

Finally, asylum is usually something requested by one or a few people at the same time, however, when it comes to refugees the groups can be very large; even from thousands of people.

1.3. Political Asylum

Why do we confuse political asylum with asylum? The generalization of the term "political asylum" versus "asylum" is much more widespread in Spain than in the rest of the world. Both words are used as synonyms erroneously, it is likely because their use became popular in our country after the Spanish Civil War.

A curious fact is the fact that the term "political asylum" in Spain has many more searches than "asylum", while in the rest of the world it barely reaches 10%.

1.4. Origin of the Term Asylum

The term asylum is born from the Greek *asylos,* which means inviolable temple or place where no one can be disturbed. Everything indicates that its origin is in the first nomadic villages, who welcomed foreigners fleeing their territory for various reasons as a symbol of hospitality.

For a long time, asylum was used to protect people who did not want to submit to the rigidity of their people's laws and were looking for safe areas to take refuge.

Later, Greece recognized asylum as an entity in itself to which it assigned two basic functions: (i) Territorial asylum, which took place in the cities; and (ii) Religious asylum, in temples and sacred areas.

1.5. Asylum Seeker

An asylum seeker or asylee applicant is one whose request to take refuge in a certain country has not yet been processed. In accordance with the United Nations Refugee Agency (UNHCR), each year, about one million people ask for asylum in other countries.[41]

An asylum seeker is a type of migrant and may be a refugee or a displaced person. A person becomes an asylum seeker by making a formal application for the right to remain in another country and keeps that status until the application has been concluded.

The applicant becomes an asylee if its claim is accepted and asylum is granted. The relevant immigration authorities of the country of asylum determine whether the asylum seeker will be granted protection and become an officially recognized refugee (asylee) or whether asylum will be refused and asylum seeker becomes an illegal immigrant who has to leave the country and may even be deported.

[41] https://eacnur.org

The asylum seeker may be recognized as a refugee and given a refugee status, if the person's circumstances fall into the definition of refugee in accordance with the Convention Relating to the Status of Refugees (1951 Geneva Convention) or other refugee laws. However, signatories to the refugee convention create their own policies for assessing the protection status of asylum seekers, and the proportion of asylum applicants who are rejected varies from country to country and year to year.

1.6. Applying for Asylum

1951 Geneva Convention recognizes as a refugee: "Any person who, due to well-founded fears of being persecuted for reasons of race, religion, nationality, political opinions, belonging to a certain social group, of gender or sexual orientation, is outside the country of their nationality and cannot or, Because of these fears, he does not want to benefit from the protection of such a country. "

When someone asks for asylum in another country they will not become a refugee until their request is resolved positively.

Meanwhile, applicants could not be returned, expelled or extradited and their detention should be avoided, under international law. Nevertheless, in case of Hungary, it enacted laws contrary to European legislation itself to carry out mass arrests at its borders.

2. MEXICAN EXPERIENCE

2.1. Procedure to be Recognized as a Refugee in Mexico

Any foreigner who, being in national territory, has the right to request to be recognized as a refugee, and must submit its application to the General Coordination of the Mexican Commission for Refugee Assistance (*Coordinación General de la Comisión Mexicana de Ayuda a Refugiado*) or to the National Migration Institute (*Instituto Nacional de Migración*), in this case the Institute will submit the request to the General Coordination.

Once the application is formally received, the non-return of the applicant to its country of origin or to the place where its life, security or freedom is threatened, is guaranteed. Similarly, the principles of confidentiality and non-discrimination apply.

The applicant must reach to the General Coordination of the Mexican Commission for Refugee Assistance to fill out a questionnaire and be interviewed in person. During the interview the applicant must describe the facts on which bases its request, and provide all relevant elements. If necessary, it would be assisted by a translator or interpreter of its language or a language of its understanding.

Subsequently, the General Coordination conducts a detailed investigation of the conditions on the country of origin, considers the opinion of the Ministry of Foreign Affairs, as well as objective information from reliable sources, and if necessary, request information from the United Nations High Commissioner for Refugees.

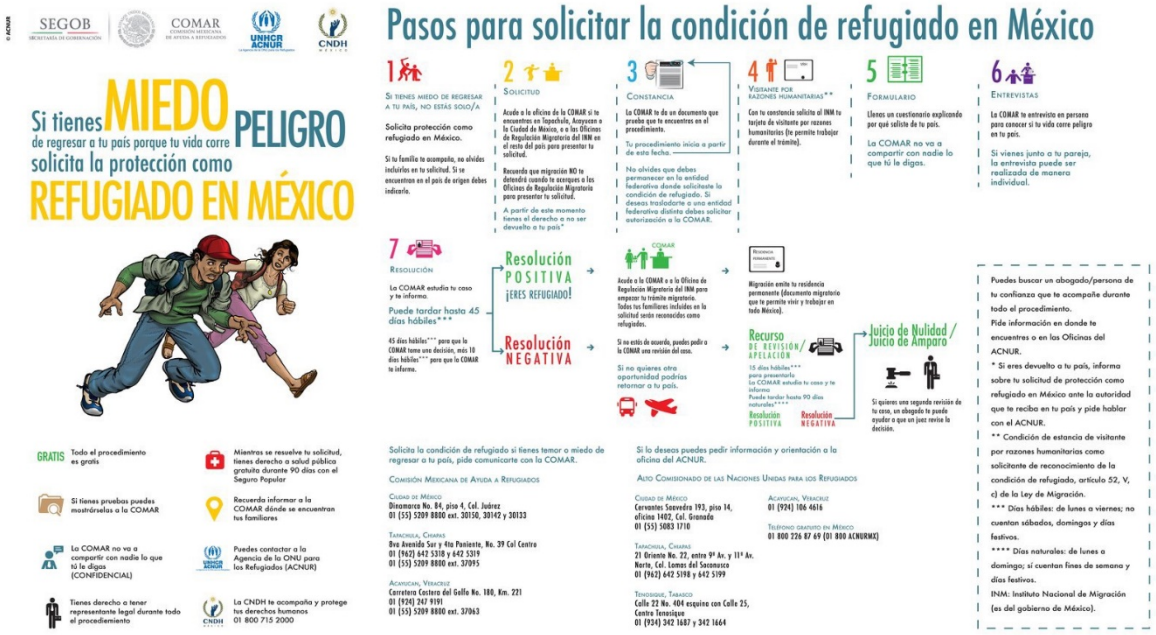
The General Coordination, considers the facts narrated by the applicant during the interview and the investigation of information; and analyses the request for recognition of refugee status.

Within 45 business days after the application is submitted, the General Coordination must issue a reasoned resolution regarding the recognition or not of refugee status.

In the event that a foreigner is recognized as a refugee, the National Migration Institute will document it under the status of Immigrant. In the event that refugee status is not recognized, the General Coordination in the same resolution must rule in the sense of granting or not granting complementary protection.

2.2. Mexican Law

The following image, explains the legal proceedings under Mexican law regarding the request of asylum in Mexico:[42]



[42] https://www.acnur.org/es-mx/publications/folletos/5b0335094/pasos-para-solicitar-la-condicion-de-refugiado-en-mexico.html