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Regulating the Border

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ABSTRACT

Under the current presidential administration, asylum seekers at our southern border have prompted enormous political controversy. Amidst a record-breaking government shutdown, the separation of asylum-seeker families, the declaration of a national emergency, and other drastic actions, agency adjudicators at the border continued their daily work of screening asylum applicants. This process was not, however, untouched by the ongoing politicization of the border. Rather, in June 2018, then-Attorney General Jefferson Sessions issued a restrictive precedent decision, Matter of A-B-, *targeting domestic violence asylum claims. The Department of Homeland Security ("DHS") rushed to implement* Matter of A-B- *in its border screenings, known as credible fear determinations. In December 2018, a federal district court judge enjoined several aspects of that decision and its implementation in credible fear processes. In the interim, however, DHS likely refouled refugees at the border as a result of the Attorney General's asylum interpretations.*

In this Article I will examine border adjudications within the structure of our administrative state. I will consider proper roles between and within agencies, as well as among the agencies and courts. Specifically, I will consider how the underlying aims of judicial review of agency decisionmaking should shape and guide credible fear processes. I will argue that revised agency practices and recalibrated judicial review can help ensure fair screenings:

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ones that abide by statutory design and thereby help avoid refoulement *of refugees. For the agencies, I will suggest delayed or declined implementation of restrictive Department of Justice asylum precedents at the border, as well as greater consideration of the views of the asylum office. For the courts, I will propose stronger assertion of Article III primacy in declaring "what the law is" for screening purposes, as well as a recalibration of judicial review to favor agency expertise over politicized decisionmaking. I will conclude with recommendations for structural and statutory reforms of agency decisionmaking at the border and beyond.*

INTRODUCTION

Each year, thousands of asylum seekers flee dangerous conditions in their countries of origin and request safe haven in the United States, typically at the U.S.-Mexico border. Under the current system, immigration officials conduct curtailed screening interviews of asylum seekers, making quick decisions on whom to allow into our full immigration system. Since 2017, as immigration officials went about this daily work, the Trump Administration issued a spate of policies targeting the arrival of asylum seekers at the border as a "threat," "invasion," and "emergency."[1] I will examine these border asylum adjudications at the present moment in our administrative state. How do, and should, asylum screening interviews operate amidst the administration's constant politicization of our border? The screenings—credible fear proceedings within the expedited removal process—involve two levels of agency adjudicators sitting in two separate executive departments. Department of Homeland Security ("DHS") asylum officers conduct curtailed, quick interviews; and Department of Justice ("DOJ") immigration judges review the interview outcomes in curtailed, quick hearings. Both apply the domestic laws of Congress, implementing U.S. treaty obligations under the Refugee Convention and Protocol.[2] And, although only one set of adjudicators sits within the DOJ—immigration judges—both agencies must apply the precedential decisions of the Attorney General and their delegate, the Board of Immigration Appeals ("BIA").

To complicate matters further, the federal courts, of course, play a key role in asylum decisions, as they also interpret the immigration laws. The courts do so both with and without deference to agency interpretations, depending on the clarity of those laws (or the scope of Congressional delegation). But who properly pronounces the applicable contours of asylum law

1. *See infra* Part IV.

2. United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter Refugee Protocol].

in border screenings, and how and when should the various pronouncements be implemented? And how should both DHS and DOJ approach the inter-agency nature of decisionmaking to ensure fidelity to statutory and constitutional design?

In answering these questions, I will consider how the underlying aims of judicial review of agencies' statutory interpretations should shape border screenings. I will examine in particular the aims of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[3]—but also consider how courts and agencies might better approach asylum screenings even in *Chevron*'s absence. As a focal point for this discussion, I will explore developing law in the area of domestic violence asylum claims. In a controversial June 2018 precedential decision, *Matter of A-B-*,[4] then-Attorney General Sessions reversed BIA precedent on the viability of domestic violence asylum claims—and did so despite DHS disagreement on that point. Irrespective of its own prior contrary positions, DHS proceeded to immediately implement the *Matter of A-B-* decision in credible fear interviews. But in December 2018, a United States District Court judge in the District of Columbia, enjoined several aspects of the *Matter of A-B-* decision and DHS's implementation in credible fear proceedings at the border. Although the court's decision was correct in rejecting flawed interpretations of asylum law in *Matter of A-B-* and the DHS guidance, and provided essential relief by enjoining them, the injunction left in place a structurally-flawed system of credible fear adjudications.

My analysis will look closely at the structure of decisionmaking at the border to uncover a tension between the two central justifications for judicial deference to agency interpretations. Namely, the technocratic expertise of the asylum adjudication system is easily undermined by the politically accountable design of that same system. Ultimately, I will conclude that Congress has pronounced which aspect of the system must prevail in the context of asylum screenings, favoring technocratic expertise and *non*-politicized adjudication of claims. Moreover, the standard for credible fear, considered in light of the respective roles of our three branches of government, requires agencies to allow greater space for judicial pronouncements of law. As a result, I will argue that agencies must proceed with significant delay and caution before implementing restrictive agency precedent at the border and courts should assert their Article III primacy to declare "what the law is"[5] in the context of credible fear interviews. These recommendations find support under both *Chevron* and *National Cable & Telecommunications Ass'n v.*

3. 467 U.S. 837, 842 (1984).

4. 27 I. & N. Dec. 316 (A.G. 2018).

5. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Brand X Internet Services,[6] as well as in the writings of Justice Gorsuch.[7] I will further propose that courts recalibrate review to favor agency expertise, specifically of the asylum corps, to achieve better fidelity to statutory design of the asylum system. These core recommendations are rooted in our asylum laws and in the proper weighing of agency expertise and would hold even in the absence of *Chevron*.

My discussion proceeds in several parts. First, in Part I, I will engage in a close review of our current frameworks for judicial review of agency statutory interpretations, focusing on justifications for deference. Given the present uncertainty over *Chevron*, I also briefly consider a post-*Chevron* world. Next, in Part II, I will provide an overview of the governing statutory frameworks for asylum and expedited removal, as well as practical limitations within the asylum system. With these legal frameworks in mind, in Part III I will trace the historical trajectory of domestic violence asylum claims in the agencies and courts as they lead to our present moment. I will next in Part IV examine the politicized border under President Trump, then describe how domestic violence asylum claims were targeted as one aspect of his restrictive policies in Part V. Finally, in Part VI I will propose new frameworks for judicial review and implementation of agency precedent at the border, then briefly touch upon potential interventions by Congress.

I. ON JUDICIAL DEFERENCE AND ITS REASONS

Although commentators have cast its future in doubt,[8] *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.* continues to structure judicial review of agency interpretation. Scholars have long debated the extent to which *Chevron* in fact changed prior judicial practices—but there is no doubt that the decision has impacted and shaped the landscape in decades since.[9] In this Part, I examine *Chevron* and key shifts in its application, with

6. 545 U.S. 967 (2005).

7. *See infra* Sections I.B, I.D.

8. *See, e.g.*, Eric Citron, *The Roots and Limits of Gorsuch's Views on* Chevron *Deference*, SCOTUSBLOG (Mar. 17, 2017, 11:26 AM), https://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference/; Joshua Matz, *The Imminent Demise of Chevron Deference?*, TAKE CARE BLOG (June 21, 2018), https://www.takecareblog.com/blog/the-imminent-demise-of-chevron-deference.

9. *See, e.g.*, Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 84 n.5 (1994) (noting that some commentators "question whether *Chevron* represents the revolution in administrative law that many have proclaimed"); Peter L. Strauss, *"Deference" Is Too Confusing-Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1144 (2012) ("Administrative law scholars have leveled a forest of trees exploring the mysteries of the *Chevron* approach contemporary judges take to reviewing law-related aspects of administrative action."); Russel L. Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129, 129–31 (1993) (claiming "*Chevron*'s importance has been exaggerated"). A Westlaw search reveals over 6000 reported cases citing the decision in the United States Courts of Appeals.

particular attention to rationales for deference articulated by jurists and scholars. I also briefly explore how deference may function in a post-*Chevron* future (namely, a likely return to a pre-*Chevron* past). Finally, I trace *Chevron*'s application in the Court's asylum jurisprudence.

A. Chevron—The Current Framework

In *Chevron*, the United States Supreme Court upheld the Reagan-era Environmental Protection Agency's ("EPA") interpretation of the Clean Air Act, rejecting a challenge brought by environmental groups.[10] The 1984 decision set forth a new framework for judicial review of agency decisionmaking. At issue in *Chevron* was the EPA's determination that a cluster of pollution-emitting devices within a plant could be treated as a single "source," thereby avoiding stringent permitting requirements under the Clean Air Act.[11] The Court of Appeals for the D.C. Circuit disagreed, reasoning that such treatment failed to promote improved air quality and thus conflicted with the Act.[12] The Supreme Court rejected not only the conclusion of the court below, but also the framework used to get there.

Justice Stevens, writing for the majority, articulated a new two-step process for examining the legality of an agency interpretation. Under the first step, courts ask whether the statutory language has clear meaning,[13] which includes a court "employing traditional tools of statutory construction" to "ascertain[] that Congress had an intention on the precise question at issue."[14] If so, "that intention is the law and must be given effect."[15] If, on the other hand, the statute is ambiguous, the inquiry proceeds to step two, under which courts defer to a reasonable agency interpretation.[16]

The majority provided two core sets of rationales for the high level of deference at *Chevron* step two—what Professor Cass Sunstein has character-

10. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

11. *Id.* at 840.

12. *Id.* at 841–42.

13. *Id.* at 842–43.

14. *Id.* at 843 n.9.

15. *Id.* The application of canons and the extent to which they can "fill in" any gaps in meaning in the text alone is oft-contested. Some commentators have observed that step one as a result takes precedence in determining the outcomes of *Chevron* review. *See, e.g.*, Gregory G. Garre, *CERCLA, Natural Resource Damage Assessments, and the D.C. Circuit's Review of Agency Statutory Interpretations Under* Chevron, 58 GEO. WASH. L. REV. 932, 953 (1990) ("*Chevron* step one . . . has become the 'primary battleground' on which challenges to agency statutory interpretations are fought."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 990 (1992) ("In short, under the two-step *Chevron* framework, everything turns on the theory of judicial interpretation adopted at step one.").

16. *Chevron*, 467 U.S. at 837.

ized as "dual commitments to specialized competence and democratic accountability."[17] The first commitment, rooted in practicality and expertise, recognizes the value of the *knowledge* of the agency. Put simply, "[j]udges are not experts in the field"[18]—whereas the administrative bodies set up to daily administer a statute are. This justification acknowledges the realities of the modern administrative state, wherein technocratic agencies play an outsized role in governance and rulemaking.[19] The administration and regulation of the Clean Air Act in *Chevron*, for example, required expertise in quantifying emissions, assessing new technologies, and measuring impacts on the environment and public health.[20] The Court described the statute itself as "lengthy, detailed, technical, [and] complex."[21]

The second reason for deferring to agency decisions is rooted in separation of powers and political accountability principles. Justice Stevens explained that because judges are not part of the two political branches of government, they must not make decisions on the basis of "personal policy preferences."[22] In contrast, agencies *can* properly rely upon the policy views of the incumbent administration to inform their judgements, as they are ultimately democratically accountable to the people via the President.[23] Thus, "it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency."[24]

17. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 206 (2006). The Court in *Chevron* also indicated that congressional delegation of interpretive authority to the agency could underlie deference; as explained in Section I.C. below, this line of reasoning was later taken up by the Court in what many commentators have referred to as a *Chevron* step zero.

18. *Chevron*, 467 U.S. at 865.

19. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989) ("Broad delegation to the Executive is the hallmark of the modern administrative state; agency rulemaking powers are the rule rather than, as they once were, the exception . . . .").

20. *See The Clean Air Act: Solving Air Pollution Problems with Science and Technology*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/clean-air-act-overview/clean-air-act-solving-air-pollution-problems-science-and-technology (last visited Jan. 28, 2020).

21. *Chevron*, 467 U.S. at 848. Justice Scalia, however, has noted that the precise question at issue—is a "bubble" a "source"?—is a fairly straightforward interpretive inquiry well within the competencies of the federal courts. He expressed skepticism over the "expertise" rationale of *Chevron*. *See* Scalia, *supra* note 19, at 514 ("The cases, old and new, that accept administrative interpretations, often refer to the 'expertise' of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes. In other words, they are more likely than the courts to reach the correct result.").

22. *Chevron*, 467 U.S. at 865.

23. *Id.*

24. *Id.* at 865–66.

Although commentators and some Justices have expressed disagreement with these underlying aims,[25] the Court has reiterated both the agency expertise and political accountability rationales over the years.[26] In a recent decision, *Kisor v. Wilkie*,[27] the Court similarly rooted "*Auer* deference" [28]—for agency interpretations of their own regulations—in the dual facets of agency's specialized knowledge and their political/policy functions.[29]

B. Step Two's Expansion (and Its Cabining by Critics)

In 2000, the Court expanded the scope of agency authority at *Chevron* step two. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, a decision penned by Justice Thomas, the Court held that a reasonable agency interpretation of an ambiguous statute prevails over a contrary judicial interpretation of that same statute.[30] Only where the prior court decision construes an *unambiguous* statute—that is, under *Chevron* step one—does the prior judicial interpretation "trump[]" the agency's contrary interpretation.[31] Otherwise, under *Chevron* step two, the agency's construction of the ambiguous statute will prevail so long as it is reasonable.

Brand X engendered strong criticism, including a spirited dissent by Justice Scalia, joined in part by Justices Souter and Ginsberg. In a single member portion of his dissent, Justice Scalia described the majority decision as

25. *See, e.g.*, Scalia, *supra* note 19, at 514. Justice Scalia expressed skepticism over the rationale of agency expertise, reasoning that *Chevron* should instead survive for reflecting proper deference to the policymaking function of agencies and for providing legislators with a bright line rule to guide legislative design. *Id.* at 514–17, 521; *see also* Citron, *supra* note 8 (discussing Justice Gorsuch's critiques and their alignment with conventional "high-school civics" teachings of separation of powers).

26. In *Pension Benefit Guaranty Corp. v. LTV Corp.*, for example, the Court reaffirmed that "practical agency expertise is one of the principal justifications behind *Chevron* deference." 496 U.S. 633, 651–52 (1990). The Court there deferred to the agency administrator's decision to restore certain pension plans under the Employee Retirement Income Security Act, reversing the determination of the United States Court of Appeals for the District of Columbia Circuit that the agency decision was arbitrary and capricious. *Id.* at 647. As explained in Section I.E. below, the Court has also reaffirmed the political accountability principle through the years, deeming it particularly strong in the area of immigration.

27. 139 S. Ct. 2400 (2019).

28. *Auer* deference refers to the standard of review for agencies' interpretations of their own regulations, announced in *Auer v. Robbins*, 519 U.S. 452 (1997).

29. *See Kisor*, 139 S. Ct. at 2413 (plurality opinion) (Kagan, J.) (rooting *Auer* in the "unique expertise" of agencies and the fact that "they are subject to the supervision of the President, who in turn answers to the public"); *see also id.* at 2416–17 (majority opinion) (explaining that for *Auer* to even apply, a decision must be authoritative and understood to "emanate from those [agency heads or] actors" to whom Congress delegated authority and must "implicate its substantive expertise"). Justice Kagan also identified agencies' ability to conduct factual investigation as a reason for deference. *Id.* at 2413.

30. 545 U.S. 967, 1003 (2005).

31. *Id.* at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

"yet another breathtaking novelty: judicial decisions subject to reversal by executive officers."[32] He lamented the majority's failure to take seriously the primacy of the judiciary in interpreting law. Or, as he put it, "Article III courts do not sit to render decisions that can be reversed or ignored by executive officers."[33]

In his authorship of Tenth Circuit immigration decisions, then-Judge Gorsuch took up Justice Scalia's line of reasoning to cabin the temporal reach of *Brand X*. He accepted that *Brand X* permitted the BIA to "effectively overrule[]" a court,[34] but limited the ability of agency decisions under *Brand X* to operate retroactively and, to a certain extent, prospectively.

In 2015 in *De Niz Robles v. Lynch*,[35] then-Judge Gorsuch wrote for the unanimous panel holding the BIA could not retroactively apply a *Brand-X*-invoking agency decision that conflicted with the Tenth Circuit's prior judicial interpretation of an ambiguous statute.[36] At issue was whether the petitioner, Mr. De Niz Robles, could obtain permanent resident status even with multiple unlawful entries. Under the Tenth Circuit's 2006 interpretation of the Immigration Code in *Padilla-Caldera v. Gonzales* ("*Padilla-Caldera I*"),[37] Mr. De Niz Robles was eligible for permanent residence.[38] However, under a 2007 BIA decision, *Matter of Briones*,[39] which invoked *Brand X* to reject *Padilla-Caldera I*, he was not.[40] Mr. De Niz Robles had applied for permanent residence after the Tenth Circuit issued *Padilla-Caldera I* and before the BIA issued *Matter of Briones*. Then-Judge Gorsuch concluded that *Matter of Briones* could not retroactively apply to Mr. De Niz Robles, and that accordingly *Padilla-Caldera I*—the judicial decision—controlled his case. Thus, Mr. De Niz Robles remained eligible for permanent residence. In explaining why the agency decision should apply only prospectively,

32. *Id.* at 1016 (Scalia, J., dissenting).

33. *Id.* at 1017.

34. De Niz Robles v. Lynch, 803 F.3d 1165, 1171 (10th Cir. 2015).

35. 803 F.3d 1165 (10th Cir. 2015).

36. *Id.* at 1169. The 2006 Tenth Circuit decision, *Padilla–Caldera v. Gonzales* ("*Padilla-Caldera I*") held that the immigration courts had authority to grant permanent residence to petitioners with multiple unlawful entries. The Board of Immigration Appeals's ("BIA") 2007 decision, *Matter of Briones*, invoked *Brand X* to reach to the opposite conclusion, holding instead that immigrants with multiple entries were barred from obtaining permanent residence from the immigration courts. 24 I. & N. Dec. 355, 371 n.9 (B.I.A. 2007). Ultimately, the Tenth Circuit in a 2011 decision, *Padilla-Caldera v. Holder* ("*Padilla-Caldera II*"), deferred to the agency interpretation in *Matter of Briones*. 637 F.3d 1140 (10th Cir. 2011).

37. 453 F.3d 1237 (10th Cir. 2006).

38. *Id.* at 1244.

39. 24 I. & N. Dec. 355 (B.I.A. 2007).

40. *Id.* at 371.

Judge Gorsuch noted that agency interpretations are policy-driven and therefore lack permanency: "the agency judgment to which the court defers is not 'a once-and-for-always definition of what the statute means.'"[41]

In a 2011 decision, *Padilla-Caldera v. Holder* ("*Padilla-Caldera II*"),[42] the Tenth Circuit reexamined the statute at issue in *Padilla-Caldera I*. It held that the BIA's intervening decision in *Matter of Briones* was reasonable and thus entitled to *Chevron* deference under *Brand X*.[43] Thus, the Tenth Circuit in *Padilla-Caldera II* held that, pursuant to *Matter of Briones*, petitioners with multiple unlawful reentries would no longer be eligible for permanent residence within the Tenth Circuit.[44]

Yet, in a 2016 decision, *Gutierrez-Brizuela v. Lynch*, [45] then-Judge Gorsuch authored another Tenth Circuit decision cabining the temporal reach of the agency decision—this time ruling that, in certain cases, the BIA's decision in *Matter of Briones* could not apply even *prospectively*.[46] Mr. Gutierrez-Brizuela, applied for permanent residence *after* the BIA decided *Matter of Briones* in 2007—but *before* the Tenth Circuit decided *Padilla-Caldera II* in 2011.[47]

Writing for a unanimous panel, Judge Gorsuch concluded that in this posture as well, the judicial construction from *Padilla-Caldera I* must apply. He characterized the court's prior decision in *De Niz Robles* as a pronouncement that the BIA's decision in *Matter of Briones* "was not legally effective in the Tenth Circuit until this court discharged its obligation under *Chevron* step two and *Brand X* to determine that the statutory provisions at issue were indeed ambiguous, that the BIA's interpretation of them was indeed reasonable."[48] He stressed that people need to be able to rely on "judicial declarations of what the law *is*."[49]

In a separate concurrence, not joined by the rest of the panel, then-Judge Gorsuch took on the "elephant in the room with us today": the fact that, in his view, "*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[50] He concluded that "*Chevron* seems no

41. *De Niz Robles*, 803 F.3d at 1174 n.7 (quoting Garfias-Rodriguez v. Holder, 702 F.3d 504, 515–16 (10th Cir. 2012)).

42. 637 F.3d 1140 (10th Cir. 2011)

43. *Id.* at 1153.

44. *See id.*

45. 834 F.3d 1142 (10th Cir. 2016).

46. *See id.* at 1145.

47. Recall that Mr. De Niz Robles, meanwhile, had applied for permanent residence before the BIA issued *Matter of Briones*.

48. *Gutierrez-Brizuela*, 834 F.3d at 1145.

49. *Id.* at 1143.

50. *Id.* at 1149 (Gorsuch, J., concurring).

less than a judge-made doctrine for the abdication of the judicial duty."[51] By permitting courts to avoid their core function of interpreting law and saying what it is, he argued, the doctrine invites the political branches to intrude on judicial functions, raising due process and equal protection concerns.[52] Judge Gorsuch questioned whether the Constitution in fact permits the legislature to delegate lawmaking authority to the executive and cautioned against a doctrine that allows "an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day" to curtail people's liberties.[53] He concluded his concurrence with a call to overrule *Chevron*.[54]

C. Step Zero

In addition to disagreeing with *Chevron*'s fundamentals, then-Judge Gorsuch took the Supreme Court to task for muddying its waters considerably in its subsequent decisions.[55] And indeed, although *Brand X* expanded the agency's authority at step two, the emergence of what Professors Thomas Merrill and Kristin Hickman termed a *Chevron* "step zero" shifted the balance of power back toward the courts—but in somewhat unpredictable fashion.[56] As Professor Sunstein notes, the question of *applicability* of *Chevron* was "largely invisible" in the decision's first decade, with several decisions applying its two-step formula without considering the threshold question: Should *Chevron* framework even be used?[57] In a series of cases, most notably in *United States v. Mead Corp.*,[58] the Court announced a more searching inquiry along these lines.[59]

51. *Id.* at 1152.

52. *Id.*

53. *Id.* at 1153.

54. *Id.* at 1158 ("We managed to live with the administrative state before *Chevron*. We could do it again.").

55. *Id.* at 1157 ("Neither, respectfully, does looking to the Supreme Court's case law supply a great deal of guidance on how to apply *Mead*'s balancing test.").

56. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001) (coining the phrase *Chevron* "step zero" to describe "the inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all").

57. Sunstein, *supra* note 17, at 208. Professor Sunstein also explores then-Judge Breyer's and Justice Scalia's differing views on *Chevron* in its earlier days. Whereas Breyer advocated for a more flexible case-by-case approach to *Chevron*, in which judges take a hard look at the legislative text and context to ascertain whether an intent to delegate is present, or at the very least, not implausible, *see* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370–82 (1986), Scalia urged a uniform rule of applying *Chevron* across the board, which would be easier for litigants and the lower courts to apply and more readily put legislators on notice regarding the interpretive authority of agencies, Scalia, *supra* note 19, at 516–17. Or, as Professor Sunstein observes, the two clashed over whether *Chevron* should be applied as a standard or a rule. Sunstein, *supra* note 17, at 192.

58. 533 U.S. 218 (2001).

59. *Id.* In an earlier case, *Christensen v. Harris County*, Justice Scalia penned a concurrence criticizing the majority's application of step-zero-type analysis to an opinion letter of a Department of Labor Wage and Hour Division administrator. 529 U.S. 576, 589 (2000) (Scalia, J., concurring).

In *Mead*, the Court held *Chevron* deference is afforded only where Congress delegates authority to the agency to make rules carrying the force of law and where an agency interpretation exercises that authority.[60] To decide whether delegation exists absent an express statement by Congress, the Court looked to the degree of formality and procedure involved in the agency decision.[61] The *Mead* majority determined that delegated authority, and thus the *Chevron* framework, did *not* apply to a tariff classification ruling by the U.S. Customs Service.[62] That, however, did not mean no deference at all was warranted. Rather, the Court applied its 1944 decision in *Skidmore v. Swift*,[63] looking to whether the agency decision had the "power to persuade."[64]

Justice Scalia dissented in *Mead*, urging stronger adherence to *Chevron*'s simpler two-step inquiry.[65] Rather than engaging in a step zero-type analysis, he argued, courts should simply look for ambiguity in the statute. If present, the "[a]mbiguity means Congress intended agency discretion. Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable."[66] Justice Scalia characterized *Skidmore* as an "anachronism" and criticized the Court for "breathing new life" into it.[67] As Professor Sunstein has noted, *Mead* reflects that "[t]o a significant extent, Justice Breyer has succeeded in ensuring case-by-case assessments of whether Congress intended to delegate law-interpreting power to agencies."[68]

The majority determined opinion letters lacked the "force of law" and thus "do not warrant *Chevron*-style deference." *Id.* at 587. Justice Scalia disagreed and argued deference was due simply because the opinion letter reflected the authoritative view of the Secretary of Labor; he joined the judgment of the Court, however, because he viewed the Secretary's interpretation as unreasonable. *Id.* at 589 (Scalia, J., concurring).

60. *Mead Corp.*, 533 U.S. at 226–27, 229.

61. *Id.* at 229 ("[A] . . . good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.").

62. *Id.* at 226–28.

63. 323 U.S. 134 (1944).

64. *Mead Corp.*, 433 U.S. at 226–28 (quoting *Skidmore*, 323 U.S. at 140).

65. *Id.* at 239, 257 (Scalia, J., dissenting).

66. *Id.* at 257.

67. *Id.* at 250.

68. Sunstein, *supra* note 17, at 247. A 2019 decision penned by Justice Gorsuch confirms the robustness of that inquiry. In *Epic Systems Corp. v. Lewis*, the majority declined to apply *Chevron* deference to an interpretation of the National Labor Relations Board ("NLRB") that implicated not only the National Labor Relations Act ("NLRA"), which it administers, but also the Federal Arbitration Act, which it does not. 138 S. Ct. 1612 (2018). The NLRB had held that the NLRA prohibited the enforcement of agreements requiring individualized arbitration, rather than class or collective actions. The majority held that petitioner's (and NLRB's) view was foreclosed by the plain text of the statute. It went on to explain that petitioners could not "seek[] shelter in *Chevron*" because "[o]ne of *Chevron's* essential premises is simply missing" where an agency interpretation exceeds the scope of its delegated authority by limiting a second statute it does not administer. *Id.* at 1629.

D. Before, Outside, and After(?) Chevron

The *Skidmore* decision, newly applied in *Mead*, predated *Chevron* by some decades. In that 1944 decision, the Court pronounced a more flexible standard for judicial consideration of agency statutory interpretation. Recent shifts in the Court suggest a possible return to this earlier approach.

Skidmore considered whether overtime pay under the Fair Labor Standards Act applied to on-call employees.[69] The lower courts had concluded simply that it could not, whereas the agency adopted a more nuanced view.[70] The Court, reversing, considered that the views of the agency, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[71] It continued, "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[72] The Court also noted that deference could be due based on agencies' "specialized experience and broader investigations and information."[73]

Recently in *Kisor v. Wilkie*, a bare majority kept in place *Auer* deference,[74] which applies a *Chevron*-type two-step inquiry to agency interpretations of their own regulations.[75] Although *Chevron* itself was not at issue, the decision reveals much about how a future Court might treat both doctrines. Justice Roberts joined in a 5-4 opinion by Justice Kagan, preserving *Auer* largely on grounds of stare decisis.[76] True to his reputation as the most ardent opponent of current deference frameworks,[77] Justice Gorsuch penned a concurrence joined fully by Justice Thomas, and in part by Justices Alito and Kavanaugh, arguing for *Auer*'s demise.[78] Echoing his Tenth Circuit concurrence in *Gutierrez-Brizuela* criticizing *Chevron*, Justice Gorsuch urged the judiciary to reclaim its primacy in declaring what law is. He opened by

69. *Skidmore*, 323 U.S. at 135.

70. *Id.* at 134–40.

71. *Id.* at 140.

72. *Id.*

73. *Id.* at 139; *see also Mead*, 533 U.S. at 234.

74. 139 S. Ct. 2400, 2407 (2019).

75. Auer v. Robbins, 519 U.S. 452 (1997).

76. The majority opinion also imposed a more searching inquiry at the outset to determine whether *Auer* should actually apply, that is, an *Auer* step zero. *See Kisor*, 139 S. Ct. at 2416–18.

77. *See* Erwin Chemerinsky, *Justice Gorsuch Fulfills Expectations from the Right and the Left*, ABA JOURNAL (Aug. 1, 2019, 6:00 AM), http://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-fulfills-expectations-from-right-and-left ("Many predict that [Justice Gorsuch] will be a leader on the court in urging greater judicial oversight over the administrative state. His opinions so far suggest that indeed he will try to push the court in this direction.").

78. *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring).

voicing particular concern for the consolidation of power in the executive *vis-à-vis* ordinary people, castigating *Auer* for "creat[ing] a 'systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else.'"[79]

Justice Gorsuch's concurrence also expressly identified *Skidmore* as the would-be status quo in a post-*Auer* world (and presumably, post-*Chevron* one as well): "Overruling *Auer* would have taken us directly back to *Skidmore*, liberating courts to decide cases based on their independent judgment and 'follow [the] agency's [view] only to the extent it is persuasive.'"[80]

Notably, his approach under *Skidmore* allows agency expertise to serve as a basis for deference but moves decidedly away from political accountability as a reason. On expertise, he stated plainly, "no one doubts that courts should pay close attention to an expert agency's views on technical questions in its field."[81] Although he believed courts should remain open to other interpretations to a greater extent than permitted under *Auer*, he nevertheless agreed with the majority that "of course . . . respectful consideration" is due to the expertise of the agency.[82]

On the political accountability rationale, Justice Gorsuch was decidedly less sanguine. Far from justifying deference to an agency, the political nature of agencies in his view underscores the *danger* of deference frameworks. Judges, in his view, should not be "forced to subordinate their own views about what the law means to those of a political actor,"[83] but instead must "guard the people from the arbitrary use of governmental power."[84] The founders, he asserted, "knew that when political actors are left free not only to adopt and enforce written laws, but also to control the interpretation of those laws, the legal rights of 'litigants with unpopular or minority causes or . . . who belong to despised or suspect classes' count for little."[85] He continued:

> Maybe the powerful, well-heeled, popular, and connected can wheedle favorable outcomes from a system like that—but what about everyone else? They are left always a little unsure what the law is, at the mercy of political actors and the shifting winds of popular opinion, and without the chance for a fair hearing before a

79. *Id.* (quoting Paul Larkin & Elizabeth Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J.L. & PUB. POL'Y 625, 641 (2019)). His concurrence also explored at length how, in his view, the *Auer* framework violates the Administrative Procedure Act. *Id.* at 2432–35.

80. *Id.* at 2447 (alterations in original) (quoting Gonzales v. Oregon, 546 U.S. 243, 269 (2006)).

81. *Id.* at 2442.

82. *Id.* at 2443.

83. *Id.* at 2429.

84. *Id.* at 2438.

85. *Id.* at 2437 (alteration in original) (quoting Palmore v. United States, 411 U.S. 389, 412 (1973) (Douglas, J., dissenting)).

> neutral judge. The rule of law begins to bleed into the rule of men.[86]

Thus, whereas agency expertise would continue to receive deference from the courts even under Justice Gorsuch's approach, politically-driven agency decisions likely would not.

E. Chevron *in Asylum Law*

In the realm of immigration, the Supreme Court has extended *Chevron* to precedent decisions of the BIA, including on substantive asylum law. It has done so in ways, moreover, that to some extent have allowed the "rule of law . . . to bleed into the rule of men,"[87] as Justice Gorsuch warned, by deferring to political considerations.[88]

In 1987 in *Immigration & Naturalization Services v. Cardoza-Fonseca*,[89] the Court first applied the *Chevron* framework to the refugee definition, addressing the meaning of a "well-founded fear" of persecution.[90] The agency had construed "well-founded fear" for asylum purposes to require a more-likely-than-not showing—the same standard governing withholding of removal, a lesser form of protection.[91] Writing for the Court, Justice Stevens disagreed with the agency, applying statutory canons of construction to conclude that the two standards were not identical.[92]

Notably, the Court found ambiguity in the term "well-founded fear," but nevertheless rejected the agency's construction at step one of *Chevron* because the statute was sufficiently clear in differentiating between the two standards. The Court recognized that *Chevron* deference to the BIA as the delegate of the Attorney General was appropriate where the BIA gave "concrete meaning through a process of case-by-case adjudication."[93] However, it deemed the question presented by the case as properly resolved by the courts:

> [O]ur task today is much narrower, and is well within the province of the Judiciary. We do not attempt to set forth a detailed description of how the "well-founded fear" test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.[94]

86. *Id.* at 2438.
87. *Id.*
88. *See supra* Section I.D.
89. 480 U.S. 421 (1987).
90. *Id.* at 448.
91. *Id.*
92. *Id.* at 448–49.
93. *Id.* at 448.
94. *Id.* (footnote omitted).

In a footnote, the Court additionally noted that the BIA's shifting positions on the matter undermined the government's claim of deference.[95] The Court did not provide a controlling definition of well-founded fear, instead remanding to the agency to redefine the term. A lengthy portion of its opinion explored legislative history and international law understandings to reach its conclusion. This analysis drew spirited criticism from Justice Scalia in a separate concurrence for (in his view) ranging beyond the step one inquiry into statutory ambiguity.[96]

In a 1999 case, *Immigration & Naturalization Services v. Aguirre-Aguirre*,[97] a unanimous Court again applied *Chevron* to the BIA's construction of domestic refugee law. In this case, it deferred to the agency construction.[98] At issue was the test developed by the BIA for the serious non-political crime bar to withholding of removal.[99] The BIA's standard focused on whether the common-law criminal nature of the act outweighed its political aspects.[100] The United States Court of Appeals for the Ninth Circuit rejected the BIA's test, concluding that adjudicators must also consider other factors, including the relative seriousness of the conduct *vis-à-vis* risk of persecution, as well as the atrociousness of the act.[101] The Supreme Court disagreed. It

95. The Court explained:

> An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view.

Id. at 446 n.30 (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981)).

96. In a concurrence, Justice Scalia agreed that plain textual analysis supported the majority's conclusion, as "the INS's interpretation is clearly inconsistent with the plain meaning of that phrase and the structure of the Act." *Id.* at 453 (Scalia. J., concurring). He disagreed strongly, however, with the majority's application of canons of statutory construction at *Chevron* step one, as well as its in-depth exploration of legislative history. In his view:

> The Court . . . implies that courts may substitute their interpretation of a statute for that of an agency whenever, "[e]mploying traditional tools of statutory construction," they are able to reach a conclusion as to the proper interpretation of the statute. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*.

Id. at 454 (alteration in original) (citation omitted).

97. 526 U.S. 415 (1999).

98. *Id.* at 424–25.

99. *Id*. at 418–19. Withholding of removal prohibits the return of refugees to their countries of origin where they will likely face persecution but provides less permanent status and fewer rights than full asylum status. The applicable provision for serious non-political crime bar at the time was located at 8 U.S.C. § 1253(h)(2)(C) (1994) (repealed 1996). Currently, the serious non-political bars for asylum and withholding are at 8 U.S.C. § 1158(b)(2)(A)(iii) (2009) and 8 U.S.C. § 1231(b)(3)(B)(iii) (2012), respectively.

100. *See Matter of* McMullen, 19 I. & N. Dec. 90, 97–98 (B.I.A. 1984) (discussing *Aguirre-Aguirre*, 526 U.S. at 422).

101. Aguirre-Aguirre v. Immigration & Naturalization Servs., 121 F.3d 521, 522 (9th Cir. 1997), *rev'd*, 526 U.S. 415 (1999).

held that the circuit court erred in both failing to apply *Chevron* and failing to defer to the BIA's interpretation.[102] The Court emphasized, "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"[103]

In *Negusie v. Holder*,[104] the Supreme Court reiterated this same point—the "special importance" of judicial deference in immigration due to political and foreign relations implications.[105] Its decision, however, declined to actually apply *Chevron* in rejecting the BIA's interpretation of the persecutor of others bar to asylum and withholding.[106] The Court determined the BIA had wrongly considered itself bound by an earlier Supreme Court decision, *Fedorenko v. United States*,[107] which had interpreted a different statutory provision. Thus, the Court concluded "that the BIA has not exercised its interpretive authority but, instead, has determined that *Fedorenko* controls."[108] This "mistaken assumption," it continued, "stems from a failure to recognize the inapplicability of the principle of statutory construction invoked in *Fe-*

102. *Aguirre-Aguirre*, 526 U.S. at 424–25.

103. *Id.* at 425 (quoting Immigration & Naturalization Servs. v. Abudu, 485 U.S. 94, 110 (1988)). The Court in *Abudu* held that federal courts review BIA denials of motions to reopen based on untimeliness under an abuse of discretion standard. It explained that deference to the administrative agency was due to political nature of INS proceedings:

> In sum, although all adjudications by administrative agencies are to some degree judicial and to some degree political—and therefore an abuse-of-discretion standard will often apply to agency adjudications not governed by specific statutory commands—INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context.

Abudu, 485 U.S. at 110 (footnotes omitted). Mr. Abudu, the respondent, had received a prior deportation order but sought to reopen his case to apply for asylum. *Id.* at 97.

104. 555 U.S. 511 (2009).

105. *Id.* at 517.

106. The persecutor bar applies to individuals who "assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2012) (for asylum); *see also id.* § 1231(b)(3)(B)(i) (for withholding).

107. 449 U.S. 490 (1980). *Fedorenko* interpreted the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, *amended by* Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219 (codified as amended at 50 U.S.C. §§ 1951–66 (1951)) (no longer in force). The Court held that under the statute, serving as a concentration camp armed guard—even if involuntary—amounted to participating in persecution under the Nazi regime and rendered the applicant ineligible for a Displaced Persons Act visa. In concluding that a voluntariness requirement did not apply, the Court considered that a different provision in the same act—barring individuals who "*voluntarily* assisted the enemy forces"—did include an express voluntariness consideration. *Fedorenko*, 449 U.S. at 512. In contrast, the persecutor bar for asylum and withholding considered in *Negusie* does not appear alongside any other bar expressly requiring voluntariness. *See Negusie*, 555 U.S. at 518–19.

108. *Negusie*, 555 U.S. at 522.

dorenko, as well as a failure to appreciate the differences in statutory purpose."[109] Applying the ordinary remand rule,[110] the Court remanded the case for the agency to construe the bar in the first instance.

These immigration decisions reveal a tendency for the Court to locate the rationale for *Chevron* deference in the area of asylum in the political accountability and policy functions of the agency. They also reveal, however, a willingness to scrutinize the logic of the agency's reasoning at step one, as in *Cardoza-Fonseca*, and to engage in a step-zero-type look into whether the agency in fact exercised its delegated authority, as in *Negusie*. *Aguirre-Aguirre*, however, confirms that within those bounds, the Court has been willing to defer to the agency, viewing asylum law as implicating sensitive political and foreign relations functions. Yet, as I explore in Part II, this view of asylum law does not properly reflect Congress's intent in designing a *depoliticized* asylum system.

II. ASYLUM AND EXPEDITED REMOVAL

Below, I provide a brief overview of the core international and domestic refugee frameworks, as well as the U.S. asylum system, particularly as they relate to expedited screening processes in immigration law. I also discuss the structure of asylum decisionmaking.

A. Refugee Protocol and Act

In 1968, the United States signed onto the U.N. Protocol Relating to the Status of Refugees ("Refugee Protocol"),[111] which incorporated the key substantive provisions of the 1951 U.N. Convention Relating to the Status of Refugees ("Refugee Convention").[112] Under these conventions, a refugee is an individual 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."[113] At the heart of these instruments is a prohibition on the return of refugees to persecution, or *refoulement*—a norm that has since risen to the level of customary international law.[114]

109. *Id.*

110. *See* Immigration & Naturalization Servs. v. Orlando Ventura, 537 U.S. 12, 16–17 (2002) (per curiam) (holding that if BIA has not yet spoken on "a matter that statutes place primarily in agency hands," the ordinary remand requires court to "giv[e] the BIA the opportunity to address the matter in the first instance in light of its own expertise").

111. Refugee Protocol, *supra* note 2.

112. Refugee Convention, *supra* note 2.

113. Refugee Convention, *supra* note 112, at art. 1(A)(2).

114. *See, e.g.*, Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW 87, 149

Over a decade later, Congress passed the Refugee Act of 1980,[115] which created a comprehensive system for the adjudication of refugee claims of individuals abroad and in the United States.[116] Via the substantive provisions of this law, Congress intended to bring the United States into compliance with its obligations under the Refugee Protocol—as emphasized explicitly throughout the legislative history.[117] Central to the 1980 Act was the enactment of a uniform refugee definition derived from international law.[118] This core definition does not require a showing of certain or even likely harm, but rather only a "well-founded fear" that the individual will be persecuted upon return to her country. The Supreme Court has stated that a one in ten chance of persecution meets this standard.[119]

Critically, Congress enacted the Refugee Act with the explicit aim of changing the executive branch's prior ad hoc and discriminatory approach to refugee protection, which was driven by foreign policy, geography, and ideological concerns. The Senate Report accompanying the Senate version of the Act highlights "repeal[ing] the current immigration law's discriminatory treatment of refugees by providing a new definition of a refugee that recognizes the plight of homeless people all over the world" as the *first* of the bill's "five basic objectives."[120]

B. Asylum Seekers at the Border: Expedited Removal

Prior to 1996, all individuals seeking asylum generally had a right to an evidentiary hearing on their asylum claim. Individuals apprehended at ports of entry, including border ports, had fewer procedural protections than indi-

(Erika Feller et al. eds., 2003) (ebook) ("*[N]on-refoulement* must be regarded as a principle of customary international law."); United Nations High Comm'r for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, REFWORLD (Jan. 31, 1994), https://www.refworld.org/docid/437b6db64.html.

115. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

116. *Id.*; 8 U.S.C. § 1101(a)(42)(A) (2012); *see also* Deborah Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 30 (1981).

117. *See* Immigration & Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . .").

118. Refugee Convention, *supra* note 112, at art. 1(A)(2).

119. *See Cardoza-Fonseca*, 480 U.S. at 440.

120. S. REP. 96-256, at 1–2 (1980); *see also* 125 CONG. REC. 4481 (1979) ("The basic purpose of the bill I introduce today is to update the law—and to help insure greater equity in our treatment of refugees and displaced persons and to establish a more orderly procedure for their admission into the United States in reasonable numbers.").

viduals already in the United States but, nevertheless, would receive an exclusion hearing before an immigration judge on their asylum claims.[121] Although less robust than the deportation hearing received by individuals (including asylum seekers) already in the interior of the United States, exclusion hearings permitted asylum applicants to present and receive evidence, give testimony, secure witnesses, and appeal an adverse decision.[122] In 1996, however, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[123] IIRIRA eliminated deportation and exclusion hearings, replacing them with more general removal proceedings and curtailed admission procedures.[124] Most notably—with regard to individuals seeking but not yet granted admission to the United States—IIRIRA largely did away with the right to an evidentiary hearing, with few exceptions.[125] Instead, it created a curtailed process called expedited removal, which made it far easier for immigration authorities to remove individuals at the border.[126]

Under the new scheme, immigration enforcement officials can issue an administrative order and promptly return an individual to their home country, even absent further review or a hearing before a neutral adjudicator.[127] In essence, expedited removal allows DHS to act as the prosecutor and the judge with respect to applicants for admission.[128] IIRIRA authorizes expedited removal of individuals who arrive at ports of entry without valid entry documents or who commit misrepresentation or fraud.[129] It further permits (but does not require) the use of expedited removal for individuals who have been in the United States for less than two years and who are similarly inadmissible due to fraud or lack of entry documents.[130]

Until 2019, the government applied expedited removal to the following three groups of individuals: (1) "arriving aliens" who seek to enter the United

121. *See* 8 U.S.C. § 1226(a) (1952).

122. *Id.*; *see, e.g.*, Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984) (holding that robust procedural rights, including a right to translation of proceedings, was required under statute with regard to asylum claim, and under the Fifth Amendment with regard to mandatory withholding claim).

123. Pub. L. No. 104-208, 110 Stat. 3009–546 (codified as amended in scattered sections of 8 U.S.C.).

124. *Id.*

125. Certain individuals who are applicants for admission do continue to have a right to a hearing, if they claim they are in fact asylees, refugees, or lawful permanent refugees. *See* 8 U.S.C. § 1225(b)(1)(C) (2012).

126. *See generally id.* § 1225 (including in title "expedited removal of inadmissible arriving aliens").

127. *Id.* § 1225(b)(1)(A)(i).

128. *See* AM. IMMIGRATION COUNCIL, ET AL., EXPEDITED REMOVAL: WHAT HAS CHANGED SINCE EXECUTIVE ORDER NO. 13767, BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS (2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory-_updated_2-21-17.pdf.

129. 8 U.S.C. § 1225(b)(1)(A)(i).

130. *Id.* § 1225(b).

States;[131] (2) individuals interdicted by sea without being admitted or paroled, who have been in the United States for less than two years;[132] and (3) individuals apprehended within 100 miles of a land border within fourteen days of entering the country, who have not been admitted or paroled.[133] More recently, the Trump Administration has expanded expedited removal to the fullest extent of law, applying it to inadmissible individuals in the United States for less than two years.[134]

Importantly, expedited removal contains critical protections for asylum seekers, implementing screening provisions for those who express a desire to seek asylum or a fear of return to their home countries. When encountered by immigration officials, such individuals must be referred for a "credible fear interview."[135] If an asylum seeker passes the interview, they will then be permitted to pursue their asylum claims in a full merits hearing before an immigration judge.[136] If the asylum seeker fails the screening interview, they may request de novo review by an immigration judge—who, unlike the asylum officer, is an immigration generalist rather than a refugee specialist.[137] However, that review hearing does not incorporate the full panoply of procedural protections of a regular removal hearing.[138] There is no further review of the credible fear decision authorized by statute, except for a limited habeas inquiry.[139] If an applicant fails at the immigration judge review stage, DHS will quickly return them to their home country.[140]

131. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312 (Mar. 6, 1997); *see also* 8 C.F.R. § 1.2 (2019) (defining "arriving aliens" as "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").

132. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 12, 2002).

133. Designating Aliens For Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

134. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 22, 2019); Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793, 8795–96 (Jan. 25, 2017).

135. *See* 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B); 8 C.F.R. §§ 208.30, 235.3(b)(4) (2019).

136. *See* 8 U.S.C. §§ 1225(b)(1)(B)(ii), 1229a(b)(4).

137. 8 C.F.R. §§ 208.30(g), 1208.30(g)(2).

138. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. §§ 208.30(g), 1208.30(g)(2).

139. 8 C.F.R. § 1208.30(g)(2)(IV)(A).

140. *See* 8 U.S.C. § 1252(e). This provision permits judicial review of individual expedited removal orders for only a narrow subset of issues:

> Judicial review of any determination made under section 1225(b)(1) . . . is available in habeas corpus proceedings, but shall be limited to determinations of—
>
> (A) whether the petitioner is an alien,
>
> (B) whether the petitioner was ordered removed under [§1225(b)(1)], and
>
> (C) whether the petitioner can prove . . . that the petitioner is [a lawful permanent resident], has been admitted as a refugee . . . or has been granted asylum . . . .

Although curtailed in nature, Congress designed the credible fear process to ensure the United States complies with international legal obligations to refugees. It expressly incorporated a lower standard for credible fear interviews than for full asylum eligibility,[141] providing that an individual should pass the screening as long as they have a "significant possibility" of eligibility for asylum.[142]

The legislative history confirms an intention to ensure bona fide asylum seekers' access to protection. The Judiciary Committee report to the House version of the bill explained that:

> Under this system, *there should be no danger that an alien with a genuine asylum claim will be returned to persecution*. The initial screening, which should take place in the form of a confidential interview, will focus on two questions: is the alien telling the truth; and does the alien have some characteristic that would qualify the alien as a refugee. As in other cases, the asylum officer should attempt to elicit all facts relevant to the applicant's claim.[143]

Senator Hatch, a principal sponsor of the Senate bill, described the credible fear interview as governed by a low screening standard. He explained:

> The credible fear standard applied at the screening stage would be whether, taking into account the alien's credibility, there is a significant possibility that the alien would be eligible for asylum. The Senate bill had provided for a determination of whether the asylum claim was "manifestly unfounded," while the House bill applied a "significant possibility" standard coupled with an inquiry into whether there was a substantial likelihood that the alien's statements were true. The conference report struck a compromise by rejecting the higher standard of credibility included in the House bill. The standard adopted in the conference report *is intended to*

Id. § 1252(e)(2). In Castro v. United States Department of Homeland Security, the Third Circuit ruled that this provision prohibited review of an underlying credible fear decision and that such prohibition did not violate the Suspension Clause. 835 F.3d 422 (3d Cir. 2016). The Ninth Circuit recently reached the opposite conclusion on the constitutional issue, holding that the provision violated the Suspension Clause. Thuraissigiam v. Dep't of Homeland Sec., 917 F.3d 1097, 1119 (9th Cir. 2019) ("[W]e hold that § 1252(e)(2) violates the Suspension Clause as applied to Thuraissigiam, although we do not profess to decide in this opinion what right or rights Thuraissigiam may vindicate via use of the writ."). The Supreme Court, however, granted certiorari in Thuraissigiam, which remains pending before it. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 427 (2019).

141. *See generally* 8 U.S.C. § 1158.

142. *Id.* § 1225(b)(1)(B)(v) (defining "credible fear of persecution" as "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 under section 1158 of this title").

143. H.R. REP. NO. 104-469, at 158 (1996) (emphasis added); *see also* H.R. REP. NO. 104-828, at 36 (1996) (Conf. Rep.).

> *be a low screening standard for admission into the usual full asylum process.*[144]

Although the selection of a "significant possibility" standard reflects a higher threshold than one that screens out only "manifestly unfounded" claims, the credible fear standard was explicitly designed to be "low": ensuring that individuals who could eventually establish asylum eligibility would be allowed a full adjudication of their claims in regular removal proceedings. As mentioned above, the well-founded fear standard for full asylum eligibility itself requires only a one in ten chance of persecution, rendering a *significant possibility* of a well-founded fear quite minimal.[145]

The DHS has also recognized credible fear as involving a low screening threshold in agency guidance and official documents.[146] In issuing interim rules for the implementation of IIRIRA, the then-Immigration and Naturalization Service ("INS") and Executive Office of Immigration Review characterized the credible fear standard as "set[ting] a low threshold of proof of potential entitlement to asylum"—recognizing that many individuals "who have passed the credible fear standard will not ultimately be granted asylum."[147] As understood by the agency at the time, the standard would properly function to favor screening any individuals with a bona fide claim, even if allowing "many" to apply for asylum who are ultimately denied.

Senator Hatch further explained that the structure of asylum screening at the border, conducted by trained and specialized asylum officers under supervisory guidance, would prevent the possibility of erroneous decisionmaking:

> Under the conference report, screening would be done by fully-trained asylum officers supervised by officers who have not only had comparable training but have also had substantial experience adjudicating asylum applications. This should prevent the potential that was in the terrorism bill provisions for erroneous decisions by lower level immigration officials at points of entry.[148]

144. 142 CONG. REC. 25,347 (1996) (emphasis added).

145. Immigration & Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

146. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997) (stating that credible fear is "a low threshold of proof of potential entitlement to asylum," the purpose of which is to ensure access to a full hearing for all individuals who have such potential entitlement). United States Citizenship and Immigration Services ("USCIS") Guidance previously also recognized that Congress meant for a significant possibility to be "a low screening standard for admission into the usual full asylum process." U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE PARTICIPANT WORKBOOK: CREDIBLE FEAR 11 (2006).

147. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,320.

148. 142 CONG. REC. 25,347 (1996).

In the final version of the statute, Congress took the effort both to require that screenings be conducted by an asylum officer,[149] and to define that term for the first time. The expedited removal statute itself specifies that:

> As used in this paragraph, the term "asylum officer" means an immigration officer who—
>
> (i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158 of this title, and
>
> (ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.[150]

The statutory text thus mandates an adjudicating official with specialized training in not only substantive law but also background country conditions of refugee-sending countries and interviewing techniques. Moreover, it specifies that these officers be supervised by trained officers with a body of experience adjudicating asylum claims. These features likely render the Trump Administration's current plan to have Customs and Border Protection ("CBP") conduct screenings illegal, as described in the following section, which also explores the history and structure of the asylum office.

C. Structure of Asylum Decisionmaking at the Border and Beyond

As Senator Hatch stressed, the current scheme places credible fear adjudications under the auspices of specially trained asylum officers. The asylum office was established in 1990 via regulations implementing the 1980 Refugee Act.[151] Those regulations took affirmative asylum cases (those filed by individuals not in proceedings) away from general INS examiners who had adjudicated a range of immigrant benefits, giving them instead to asylum specialists.[152] The regulations also ensured that immigration judges would continue to hear asylum and withholding claims of individuals in proceedings.[153]

149. 8 U.S.C. § 1225(b)(1)(B)(i) (2012) ("An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.").

150. *Id.* § 1225(b)(1)(E).

151. *See* Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,676 (Jul. 27, 1990). In formal documents, the office is referred to as the Asylum Division, but I use the more common phrase "asylum office" throughout this article.

152. *Id.*; *see also* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The* Déjà Vu *of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 482–83 (2007).

153. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. at 30,675.

The 1980 Refugee Act enacted the core refugee definition and a structure for adjudication of overseas refugee claims;[154] however, it gave little guidance on the process for hearing asylum claims in the United States. The 1990 regulations reflected ten years of debate, during which the then-INS[155] considered many differing visions for the proper adjudication system, including both adversarial and non-adversarial models. As the agency explained, the creation of a non-adversarial and specialized corps reflected "[a] fundamental belief that the granting of asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration process; and a recognition of the essential need for an orderly and fair system for the adjudication of asylum claims."[156] Although the 1980 Refugee Act itself did not mandate creation of the asylum corps, in 1996 Congress formalized the corps' existence via IIRIRA, which required that asylum officers conduct credible fear interviews.[157]

In 2003, pursuant to the Homeland Security Act, the asylum corps became part of U.S. Citizenship and Immigration Services ("USCIS") within the newly created DHS.[158] Officers in the corps specialize in asylum claims and hear them exclusively. They need not be attorneys—although many are—and all officers receive an intensive course and ongoing weekly training on a range of issues.[159] Training topics include substantive law, procedure, country conditions, and interviewing techniques specific to refugees.[160] A resource information bank allows officers ready access to information about human rights conditions throughout the world.[161]

154. *See supra* note 118 and accompanying text.

155. The INS was dissolved in 2003. Most of its functions are now carried out by the USCIS, U.S. Immigration and Customs Enforcement ("ICE"), and the U.S. Customs and Border Protection ("CBP"). *See* Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135, 2195–96; *see also Did You Know?: The INS No Longer Exists*, USCIS: BEACON (Apr. 13, 2011), https://www.uscis.gov/archive/blog/2011/04/did-you-know-ins-no-longer-exists.

156. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. at 30,675.

157. *See supra* notes 149–150 and accompanying text.

158. Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135, 2195–96.

159. Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 468 (2016); Heidi Boas, *Tips from a Former Asylum Officer*, ASYLUMIST (Mar. 25, 2018), https://www.asylumist.com/2018/03/21/tips-from-a-former-asylum-officer (last visited Feb. 4, 2019) ("Asylum officers are required to undergo an extensive six-week training program in asylum law, and pass exams before adjudicating asylum cases. In addition, they continue receiving weekly training throughout their tenure at the asylum office.").

160. *See* Boas, *supra* note 159; *see also* Doris Meissner et al., *The U.S. Asylum System in Crisis: Charting a Way Forward*, MIGRATION POL'Y INST. (2018), https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward.

161. *See* Boas, *supra* note 159.

The office hears asylum merits applications received through the affirmative process, in addition to conducting credible fear interviews for individuals in expedited removal. It does not handle defensive applications—that is, those filed by individuals in removal proceedings.[162] Eight asylum office jurisdictions adjudicate claims throughout the United States, with most offices serving several states.[163] In 2018, the asylum office received over 99,000 credible fear case referrals,[164] up from 5047 in 2008.[165] In 2017, the office also received nearly 140,000 affirmative applications.[166] If the asylum office declines to grant a merits case and the applicant is out of status, the office refers the case to the immigration courts, where the individual will have a chance to apply for asylum again in defensive posture.[167]

Despite the considerable adjudicatory experience and expertise of the asylum corps, their decisions—even for full merits cases—do not result in legal precedent. Rather than placing precedent decisional authority within

162. 8 C.F.R. § 208.2(a)(b) (2019) (setting forth jurisdiction of asylum office over applications for asylum by individuals not in removal proceedings and of immigration court over applicants who have been served with a notice to appear in immigration court or related document); *see also Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Oct. 19, 2015), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (describing difference between affirmative and defensive asylum applications). Of note, the asylum office also lacks jurisdiction over merits cases of individuals with reinstated prior removal orders, that is, individuals who unlawfully entered the United States after having been issued a removal order, including an expedited removal order. *See* 8 C.F.R. § 208.2(c)(2). The DHS can only reinstate prior orders for individuals who unlawfully enter; not those who present at ports of entry. 8 U.S.C. § 1231(a)(5) (2012); 8 C.F.R. § 241.8. If such individuals are apprehended by immigration authorities after unlawful entry and claim a fear of return to their home country, they receive a "reasonable fear interview" rather than a credible fear interview—a screening interview for threshold eligibility for withholding of removal or Convention Against Torture ("CAT") protection. If they pass, they are placed into "withholding only" proceedings before an immigration judge in which they can apply for withholding of removal and protection under CAT, but not asylum. *See* Ramirez-Mejia v. Lynch, 794 F.3d 485 (5th Cir. 2015).

163. *See USCIS Service and Office Locator*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://egov.uscis.gov/office-locator/ (last visited Jan. 29, 2020). The offices are Arlington, VA; Chicago, IL; Houston, TX; Los Angeles, CA; Miami, FL; New York, NY; Newark, NJ; and San Francisco, CA. *Id.*

164. U.S. CITIZENSHIP & IMMIGRATION SERVS., CREDIBLE FEAR WORKLOAD REPORT SUMMARY (2018), https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_CFandRFstats09302018.pdf.

165. *Credible Fear Cases Completed and Referrals for Credible Fear Interview*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.dhs.gov/immigration-statistics/reading-room/RFA/credible-fear-cases-interview (last updated Apr. 29, 2019).

166. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2017, at 7 (2019), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf.

167. ASYLUM DIV., U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 26 (2016), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AAPM-2016.pdf ("The Asylum Office must refer to the Immigration Court for adjudication in removal proceedings an applicant who is ineligible to apply for or be granted asylum and appears inadmissible or deportable at the time the decision is issued.").

the asylum office or elsewhere in DHS, the immigration laws provide that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."[168] The precedent asylum decisions of the BIA and the Attorney General, arising from "defensive claims" raised in removal proceedings, apply to asylum officers in merits adjudications—and, as described in more detail in Section V.B. below, have also been applied in credible fear proceedings.

The BIA, created in 1940, is a delegatee of the Attorney General.[169] The BIA hears appeals from immigration judge decisions and may decide those appeals and may issue precedent decisions.[170] Although regulations charge the BIA with providing "clear and uniform guidance to the Service, the immigration judges, and the general public,"[171] the Attorney General can also override the BIA via a certification process. Namely, under 8 C.F.R. § 1003.1(h), the Attorney General has authority to direct the BIA to refer its cases to them for their own adjudication.[172] Finally, the United States Courts of Appeals review removal decisions of both the Attorney General and the BIA.[173]

In 2019, the Trump Administration announced and implemented a new policy allowing CBP agents to conduct credible fear interviews.[174] Such action likely runs afoul of statutory language, intent, and design—which as ex-

168. 8 U.S.C. § 1103(a)(1) (2012). The Homeland Security Act of 2002 ("HSA") created the Department of Homeland Security and transferred to it immigration functions previously within the Department of Justice including enforcement and benefits. *See* Pub. L. No. 107-296, 116 Stat. 2135 (2002). However, the Act specifically provided for the Attorney General to retain:

> [S]uch authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the [HSA].

8 U.S.C. § 1103(g)(1).

169. Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 461 (2007) ("[W]hen the BIA decides a case, it is acting as an agent of the Attorney General.").

170. *See* 8 C.F.R. §1003.1 (2019).

171. *See id.* §1003.1(d)(1).

172. *Id.* §1003.1(h).

173. 8 U.S.C. § 1252(a)(1), (5).

174. *See* Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System, 2019 DAILY COMP. PRES. DOC. 1–2 (Apr. 29, 2019); HUMAN RIGHTS FIRST, ALLOWING CBP TO CONDUCT CREDIBLE FEAR INTERVIEWS UNDERMINES SAFEGUARDS TO PROTECT REFUGEES (2019), https://www.humanrightsfirst.org/sites/default/files/CBP_Credible_Fear.pdf (concluding CBP officers are not equipped to conduct screening of asylum seekers, and that such action would violate regulation); Molly O'Toole, *Border Patrol Agents, Rather Than Asylum Officers, Interviewing Families for "Credible Fear,"* L.A. TIMES (Sept. 19, 2019, 5:50 AM), https://www.latimes.com/politics/story/2019-09-19/border-patrol-interview-migrant-families-credible-fear (reporting on implementation of CBP credible fear interviews).

plained above, require that specialized, trained, and experienced asylum officers conduct screenings.[175] Despite the administration's rushed attempt to provide training to CBP agents,[176] the agency's enforcement-orientation and documented record of abuses against migrants render it ill-suited to conduct non-adversarial and sensitive screenings.[177] This is especially so given practical limitations and challenges in border screenings, explored below.

D. Practical Limitations in Asylum Adjudication via Expedited Removal

The low screening threshold in expedited removal, properly construed, takes into consideration structural and practical limits presented in screening interviews. Although trained asylum officers conduct credible fear interviews, they do so in constrained and chaotic conditions. Many interviews take place telephonically, with no ability for the adjudicator and the applicant to establish in-person rapport.[178] The interviews are not recorded, and interpretation problems plague the process, such that asylum seekers often receive inadequate or no interpretation in their primary language.[179] Moreover, regulations provide no guarantee of participation by attorneys, even for individuals lucky enough to secure counsel within days of making it to the United States. Rather, regulations state only that attorneys provided at no cost to the government "may" be present at interviews.[180] In curtailed review hearings of cases in which the asylum officer finds no credible fear, immigration judges also often limit the role of attorneys, as an immigration court policy manual expressly denies a right to counsel to credible fear applicants.[181]

175. *See supra* note 174; *see also supra* Section I.E.

176. *See* Yegenah Torbati, et. al., *U.S. Will Assign Dozens of Border Agents to Migrant Asylum Interviews*, REUTERS (May 9, 2019, 6:09 PM), https://www.reuters.com/article/us-usa-immigration/u-s-will-assign-dozens-of-border-agents-to-migrant-asylum-interviews-idUSKCN1SF2N0.

177. *See, e.g.*, HUMAN RIGHTS FIRST, *supra* note 174, at 2 ("Border Patrol agents have repeatedly used excessive force in encounters with migrants, threatened unaccompanied children, and some have pressured refugees who have crossed the border to not apply for asylum. . . . Some CBP officers have openly expressed skepticism of asylum claims . . . .").

178. INTER-AMERICAN COMM'N ON HUMAN RIGHTS, REFUGEES AND MIGRANTS IN THE UNITED STATES: FAMILIES AND UNACCOMPANIED CHILDREN 68–69 (2015), https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf.

179. *See, e.g.*, COMM'N ON IMMIGRATION, AM. BAR ASS'N, FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE 38 (2015), https://www.americanbar.org/content/dam/aba/administrative/immigration/FamilyDetentionReport2015.pdf; HUMAN RIGHTS FIRST, FAMILY DETENTION: STILL HAPPENING, STILL DAMAGING 11–12 (2015), http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf.

180. 8 C.F.R. § 208.30(d)(4) (2019) (stating that attorneys "may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview").

181. A policy memorandum states that "[t]here is no right to representation prior to or during the [credible fear] review." MICHAEL J. CREPPY, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, INTERIM OPERATING POLICY AND PROCEDURE MEMORANDUM 97-3:

As scholars and commentators have noted, the above conditions impede the ability of individuals to present their claims.[182] The structural limitations of the interview itself are compounded by detention of individuals throughout expedited removal proceedings. Immigration and Customs Enforcement ("ICE") keeps both families and adult asylum seekers detained during credible fear processes in jail-like conditions that pose a risk to both physical and mental health.[183] Asylum seekers, moreover, often experience extreme deprivation, sexual abuse, and physical violence during their migration journeys, and many suffer trauma from past persecution.[184]

Despite these documented issues, the Trump Administration has sought to expand these curtailed processes to their furthest reach.[185] As I argue in Part VI below, structural and practical limitations of expedited removal should inform implementation of the credible fear standard. But first, I turn to the framework for judicial review of agency decisionmaking in the next Part.

III. DOMESTIC VIOLENCE-BASED ASYLUM: AN OVERVIEW

Since the passage of the Refugee Act, both DOJ and DHS have articulated official positions on the viability of asylum claims based on domestic violence. Whereas DOJ's views have varied widely, DHS has expressed largely consistent official recognitions of these claims. I delve into the views of each agency below.

PROCEDURES FOR CREDIBLE FEAR AND CLAIMED STATUS REVIEWS 10 (1997), https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/07/97-3.pdf.

182. *See, e.g.*, Michele R. Pistone and John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167 (2006); COMM'N ON IMMIGRATION, AM. BAR ASS'N, *supra* note 179, at 38.

183. Reports documenting human rights abuses in ICE detention centers are legion. *See, e.g.*, AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2009), https://www.amnestyusa.org/wp-content/uploads/2011/03/JailedWithoutJustice.pdf; DET. WATCH NETWORK, EXPOSE AND CLOSE: EXECUTIVE SUMMARY (2012), https://www.detentionwatchnetwork.org/pressroom/reports/2012/expose-and-close; HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON (2009), https://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf; KAREN TUMLIN ET AL., A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRATION DETENTION CENTERS (2009), https://www.nilc.org/wp-content/uploads/2016/02/A-Broken-System-2009-07.pdf; U.S. COMM'N ON CIVIL RIGHTS, WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES (2015), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf; *US: Deaths in Immigration Detention*, HUM. RTS. WATCH (July 7, 2016, 12:00 AM), https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention.

184. *See* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME I: FINDINGS AND RECOMMENDATIONS 60–61, 68–69 (2005), https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf.

185. *See supra* note 134 and accompanying text (explaining expanded application of expedited removal to inadmissible individuals in the United States for less than two years, irrespective of geographic location of apprehension).

A. DOJ Position Through the Years

In the years following the passage of the Refugee Act, the Department of Justice began to recognize—albeit in fits and starts—the legitimacy of asylum protections for women seeking asylum from gender-based persecution.[186] It has approved these claims largely but not exclusively by finding persecution on account of particular social group, which is one of the five grounds for asylum along with race, religion, nationality, and political opinion. Indeed, in defining particular social group for the first time in *Matter of Acosta*,[187] the BIA in 1985 explained that "sex" could be a defining characteristic that met its newly-articulated standard for social group.[188] That test required the group to be defined around fundamental or immutable characteristics that an applicant either could not change or should not be forced to change.

In *Matter of Kasinga*,[189] the BIA in 1996 held for the first time that a woman could establish asylum protections for gender-based harms, granting asylum to a young woman from Togo fleeing female genital cutting ("FGC").[190] The BIA held the practice of FGC against a woman's will constituted persecution, and recognized a social group rooted in gender, nationality, tribal membership, and opposition to the practice. It also held that the record established the harm was on account of her membership in the proposed social group, based on evidence of societal context and gendered social norms.[191]

In 1999, however, the BIA denied protection to Rody Alvarado Peña, a Guatemalan survivor of domestic violence who also raised a gender-based asylum claim.[192] The BIA there issued a divided precedent decision, *Matter of R-A-*,[193] reversing the immigration judge's grant of asylum.[194] Ms. Alvarado had suffered years of physical, emotional, and sexual violence by her husband, which she claimed was based on her gender, her relationship status, and the gendered beliefs of her persecutor.[195] The BIA did not question that

186. *See generally* Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURV. Q. 46 (2010) (discussing the development of domestic violence-based asylum in the United States).

187. 19 I. & N. Dec. 211 (B.I.A. 1985).

188. *Id.* at 233.

189. 21 I. & N. Dec. 357 (B.I.A. 1996).

190. *Id.* at 358.

191. *Id.* at 365–68.

192. *See Matter of R-A-*, CTR FOR GENDER & REFUGEE STUD., https://cgrs.uchastings.edu/our-work/matter-r-a- (last visited Feb. 20, 2020) (explaining case background and identifying Ms. Alvarado).

193. R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999).

194. *Id.*

195. *Id.* at 908–910.

the abuse she suffered was horrific or severe. It ruled, however, that Ms. Alvarado failed to establish persecution on account of membership in a particular social group.[196] Specifically, it rejected the proposed group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination"—accepted by the immigration judge below—because the group was not "recognized and understood to be a societal faction."[197] It also held that Ms. Alvarado did not show nexus to—or persecution "on account of"—her membership in this social group.[198]

Matter of R-A- drew immediate criticism and resulted in a series of agency actions.[199] In 2000, the DOJ under Attorney General Janet Reno issued proposed regulations to address claims such as Ms. Alvarado's.[200] A long background section discussed the viability of gender-based asylum and the DOJ's disagreement with the BIA in *R-A-*. The DOJ explained that the proposed rule was designed to "remove[] certain barriers that the [*Matter of*] *R-A-* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group."[201] After issuing the proposed regulations, Attorney General Reno in 2001 certified the BIA's decision to herself and vacated it, remanding back to the BIA with instructions to stay the case while regulations remained pending.[202]

Regulations, however, never issued under Attorney General Reno's watch, and in 2003, Attorney General John Ashcroft intervened and ordered the parties to brief the case.[203] Rather than issuing a decision, he sent it back to the BIA in 2005, with instructions to reconsider the case under final regulations when they issued. To date, however, no regulations have issued,[204] and in 2008, Attorney General Mukasey vacated the stay and ordered the BIA

196. *Id.* at 918–19.

197. *Id.* at 918.

198. The BIA also rejected Ms. Alvarado's claim of asylum based on political opinion. *See id.* at 916–17.

199. *See* Musalo, *supra* note 186, at 58.

200. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000).

201. *Id.* at.76,589. The DOJ noted that rather than attempt a "universal model for persecution claims based on domestic violence," it has instead opted for a rule that states "generally applicable principles that will allow for case-by-case adjudication of claims based on domestic violence." *Id.*

202. *R-A-*, 22 I. & N. Dec. at 906.

203. *See* R-A-, 24 I. & N. Dec. 629, 629 (A.G. 2008) ("On February 21, 2003, Attorney General Ashcroft certified the Board's decision for review but remanded the case on January 19, 2005, again directing the Board to reconsider its decision 'in light of the final rule.'" (quoting R-A-, 23 I. & N. Dec. 694 (A.G. 2005)).

204. The Obama Administration did state its intent to issue new proposed regulations in 2010 but failed to do so. *See* Regulatory Plan, 74 Fed. Reg. 64,137 (Dec. 7, 2009); Asylum and Withholding Definition, 74 Fed. Reg. 64,220, 64,220–21 (Dec. 7, 2009).

to reconsider the case.[205] The BIA remanded to the immigration judge, and in 2009, the immigration judge granted asylum to Ms. Alvarado after both parties stipulated to a grant.[206] Thus, Ms. Alvarado's case was favorably resolved after almost a decade, but with no guiding precedent for agency adjudicators.

Finally, in 2014 the BIA issued a precedent decision, *Matter of A-R-C-G-*,[207] providing guidance on the viability of domestic violence asylum claims.[208] The BIA in *A-R-C-G-* recognized a social group of "married women in Guatemala who are unable to leave their relationship."[209] As in *Kasinga*, the BIA examined social and cultural context in assessing the group. It applied its newly articulated three-part test for social group—developed in 2014 to require that a group be "particular" and "socially distinct" in addition to immutable or fundamental.[210] In considering these new prongs, the BIA cited "societal expectations about gender and subordination" and a culture of "machismo and family violence" in Guatemala.[211] *Matter of A-R-C-G-* was thus a clear acknowledgement of the gender dynamics of persecution against women, including in intimate partnerships and within a family home.

B. DHS Position Through the Years

Although DHS originally opposed the grant of asylum to Ms. Alvarado before the BIA in 1999, since the mid-2000s DHS has taken an overall consistent official position before the BIA and Attorney General recognizing the viability of domestic violence asylum claims. In its 2005 briefing before Attorney General Ashcroft, DHS argued that Ms. Alvarado had in fact established asylum eligibility under the immigration laws, changing its prior position in her case.[212] In a 2009 BIA case called *Matter of L-R-*, DHS headquarters submitted a supplemental brief, requested by the BIA to specifically address domestic violence asylum claims. DHS argued that the BIA could accept as cognizable either the particular social group of "Mexican

205. *R-A-*, 24 I. & N. at 629.

206. *See* A-R-C-G-, 26 I. & N. Dec. 388, 391–92 n.12 (B.I.A. 2014) ("In remanded proceedings, the parties stipulated that [Ms. Alvarado] was eligible for asylum. Her application was granted on December 10, 2009.").

207. 26 I. & N. Dec. 388 (B.I.A. 2014).

208. *Id.* at 391–92 & n.12.

209. *Id.* at 389.

210. *Id.* at 390–92.

211. *Id.* at 393–94 (noting that "married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation" and that "the record in this case includes unrebutted evidence that Guatemala has a culture of 'machismo and family violence'").

212. Brief for DHS on Respondent's Eligibility for Relief at 2, R-A-, 23 I. & N. Dec. 694 (A.G. 2005) (No. A 73 753 922), http://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf.

women in domestic relationships who are unable to leave" or "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."[213] And in *Matter of A-R-C-G-*, DHS similarly argued that the proposed social group rooted in gender, nationality, and relationship status—"married women in Guatemala who are unable to leave their relationship"—was cognizable.[214]

Agency guidance also confirms the Department's position on the viability of domestic violence claims, even prior to *Matter of Kasinga* and *Matter of R-A-*. A May 1995 guidance memorandum addressed to all asylum offices within INS instructed that "rape (including mass rape in, for example, Bosnia), sexual abuse and *domestic violence*, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds."[215] More recent asylum officer training course materials have further elaborated on the viability of these claims. For example, December 2002 training guidance, citing to the 1995 INS guidelines, explains that domestic violence claimants can meet various elements of asylum eligibility, including harm rising to the level of persecution, particular social group, and nexus.[216]

C. Court Decisions Through the Years

The United States Courts of Appeals did not have the opportunity to apply *Chevron* to *Matter of A-R-C-G-* prior to the BIA decision's vacatur and reversal by former Attorney General Sessions.[217] In several cases, however, the courts reviewed the agency's application of *Matter of A-R-C-G-* in domestic violence asylum cases. In so doing, the federal courts upheld and reversed denials of domestic-violence-based asylum in cases that the agency

213. Supplemental Brief for DHS at 14, L-R- (B.I.A. Apr. 13, 2009), https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf.

214. *A-R-C-G-*, 26 I. & N. Dec. at 390 ("DHS now concedes the respondent established that she suffered past harm rising to the level of persecution and that the persecution was on account of a particular social group comprised of 'married women in Guatemala who are unable to leave their relationship.'").

215. PHYLLIS COVEN, OFFICE OF INT'L AFFAIRS, DEP'T OF JUSTICE, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN (1995), *reprinted in* 7 INT'L J. REFUGEE L. 700, 703–04 (1995) (emphasis added).

216. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE PARTICIPANT WORKBOOK: FEMALE ASYLUM APPLICANTS AND GENDER-RELATED CLAIMS (2002).

217. Notably, in asylum and withholding appeals to federal circuit courts brought by individual petitioners, the DOJ Office of Immigration Litigation represents the agency itself, and thus *defends* the decisions of the BIA. *See Office of Immigration Litigation*, U.S. DEP'T OF JUST., https://www.justice.gov/civil/office-immigration-litigation (last updated Oct. 20, 2014). Asylum applicant petitioners raising domestic violence asylum claims, meanwhile, had an interest in challenging the *application* of *Matter of A-R-C-G-* to deny them protection, but not the validity of *Matter of A-R-C-G-* itself.

had deemed distinguishable from *Matter of A-R-C-G-*. In an unpublished Ninth Circuit case, for example, the applicant raised an *A-R-C-G-*-type social group of Honduran women in a relationship they are unable to leave. The BIA had held that the applicant was in fact *able* to leave her relationship; however, the circuit court reversed, determining that the BIA's conclusion was not supported by substantial evidence in light of the abuser's continuing violence and stalking.[218] In a published Sixth Circuit case, the court reached the opposite conclusion on a similar issue, upholding the agency's determination that the petitioner *was* able to leave her relationship because she moved freely about her country and avoided her abuser.[219]

Outside the intimate partner violence context, the courts have recognized the viability of a range of gender-based asylum claims, including other forms of persecution that take place within a family home. In doing so, federal courts have analyzed the underlying gender norms that cause and enable persecution. In *Sarhan v. Holder*,[220] for example, the Seventh Circuit examined the gendered societal context of "honor killings" of women by their family members under the particular social group ground, concluding that:

> The social group in this case . . . is a function of a pre-existing moral code in Jordanian society . . . . Social stigma causes the violence. Society as a whole brands women who flout its norms as outcasts, and it delegates to family members the task of meting out the appropriate punishment—in this case, death.[221]

The Seventh Circuit also rejected the agency's reasoning that the persecutor—the applicant's brother—acted out of personal motivations, rather than on account of protected ground:

> There is no personal dispute between Disi [the petitioner] and her brother [Besem]. He has not vowed to kill her because of a quarrel about whether she or Besem should inherit a parcel of land, or because she did a bad job running his store, or because she broke Besem's favorite toy as a child. She faces death because of a widely-held social norm in Jordan—a norm that imposes behavioral obligations on her and permits Besem to enforce them in the most drastic way. The dispute between Disi and Besem is simply a piece of a complex cultural construct that entitles male members of families dishonored by perceived bad acts of female relatives to

218. Alvarado-Garcia v. Lynch, 665 F. App'x 620, 621 (9th Cir. 2016).

219. Marikasi v. Lynch, 840 F.3d 281, 291 (6th Cir. 2016) (upholding agency denial where substantial evidence supported the agency's conclusion that applicant was in fact able to leave her relationship where there were no continued stalking and abuse, unlike applicant in *Matter of A-R-C-G-*); *see also* Vega–Ayala v. Lynch, 833 F.3d 34, 39 (1st Cir. 2016) (upholding agency denial of protection to woman who claimed asylum based on domestic violence but never lived with her abuser, unlike the applicant in *Matter of A-R-C-G-*).

220. 658 F.3d 649 (7th Cir. 2011).

221. *Id.* at 655.

> kill those women. . . . The very fact that these are called "honor killings" demonstrates that they are killings with broader social significance.[222]

The Seventh Circuit's analysis wholly rejects any notion that the gender-based persecution of women fails if an applicant has a relationship with her persecutor. Other circuits have also recognized the viability of honor killing or forced marriage claims, as well as claims rooted in incest or familial abuse due to sexual orientation—contexts that inherently involve some relationship of the applicant to her persecutor.[223] And, in *Perdomo v. Holder*,[224] the Ninth Circuit recognized that a social group based on gender and nationality alone might be cognizable, reversing the agency's cursory rejection of the proposed social group of "women in Guatemala."[225] The court remanded to the agency for a case-specific assessment of that social group in the context of the applicant's fear of femicide, or the gender-motivated killing of women.[226]

These cases demonstrate that the federal courts of appeals do broadly recognize that persecution of women *for being women* falls within the scope of refugee protection. Harms perpetrated by individuals with relational ties to a woman applicant—be they intimate partners, siblings, or parents—are not exempted. Yet, as discussed in Part V, the DOJ under President Trump took on this growing consensus around gender-based refugee protections, using agency interpretive authority in an attempt to reverse course on these claims.

IV. THE BORDER UNDER PRESIDENT TRUMP: POLITICIZATION AND CONSTANT CRISIS

The *Matter of A-B-* decision, which I will discuss in detail shortly, did not take place in a vacuum. Rather, it was part of a broader narrative adopted by the Trump Administration of a nation under threat—specifically from asylum seekers at the U.S.-Mexico border. Below, I provide a non-exhaustive overview of executive actions that overtly politicize the concept of "the border."

Over December 2017 and January 2018, President Trump caused a government shutdown in an attempt to force Congress to provide $5.7 billion in

222. *Id.* at 656.

223. Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1056, 1076 (9th Cir. 2017) (incest committed against gay petitioner); Kamar v. Sessions, 875 F.3d 811, 818 (6th Cir. 2017) (honor killing claim); Qu v. Holder, 618 F.3d 602, 604, 608 (6th Cir. 2010) (forced marriage claim); Nabulwala v. Gonzalez, 481 F.3d 1115, 1117–18 (8th Cir. 2007) (familial abuse of lesbian-identified petitioner).

224. 611 F.3d 662 (9th Cir. 2010).

225. *Id.* at 667–69.

226. *Id.* at 669.

funding for his border wall.[227] His brinksmanship failed, and he reopened the government after a record thirty-five days of closure—during which time over 380,000 federal workers went without pay.[228] Thousands of federal workers lined up at food banks and many more struggled to pay medical bills and rent.[229] In total, the Congressional Budget Office estimated the shutdown caused $11 billion in lost GDP over two quarters, $3 billion of which will never be recovered—as well as lasting indirect economic harms.[230] Successful funding negotiations post-shutdown resulted in legislation providing President Trump with $1.37 billion for his wall, but this was not enough: President Trump signed the bill, but denounced it as inadequate.[231] On February 15, 2019, he accordingly declared a national emergency in order to divert nearly $7 billion in federal funds, primarily from the Department of Defense, for his wall.[232] Even as litigation against that diversion of funds continues, [233] the Pentagon recently announced plans to divert an additional $3.8 billion for the wall.[234]

Earlier in fall 2018, President Trump attempted to ban individuals from asylum eligibility if they crossed unlawfully into territory between ports of

227. Julie Hirschfeld Davis & Emily Cochrane, *Government Shuts Down as Talks Fail to Break Impasse*, N.Y. TIMES (Dec. 21, 2018), https://www.nytimes.com/2018/12/21/us/politics/trump-shutdown-border-wall.html. Although the House passed a bill for continuing three weeks of funding for the government, President Trump's stated refusal to sign a bill without the requested border wall funding derailed its passage in the Senate, as Senate Leader Mitch McConnell refused to bring a funding bill to vote without President Trump's approval. *See id.*

228. *See* Bob Bryan, *The Government Shutdown Is in Day 35 and Has Shattered the Record for the Longest Shutdown in History*, BUS. INSIDER (Jan. 25, 2019, 11:52 AM), https://www.businessinsider.com/history-of-government-shutdowns-in-congress-2018-1.

229. Ian Stewart, *As Shutdown Continues, Thousands of Federal Workers Visit D.C. Area Pop-Up Food Banks*, NPR (Jan. 13, 2019, 6:00 AM), https://www.npr.org/2019/01/13/684824384/as-shutdown-continues-thousands-of-federal-workers-visit-d-c-area-pop-up-food-ba.

230. Kate Davidson, *CBO: Shutdown Will Cost Government $3 Billion of Projected 2019 GDP*, WALL ST. J. (Jan. 28, 2019), https://www.wsj.com/articles/cbo-shutdown-will-cost-government-3-billion-of-projected-2019-gdp-11548688574.

231. Peter Baker, *Trump Declares National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html.

232. *Id.*

233. *See Sierra Club v. Trump: Border Wall Injunction*, U.S. COURTS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000995 (last updated Nov. 13, 2019, 11:37 AM) (consolidating the related cases on appeal from the Northern District of California). Although the United States District Court for the Northern District of California issued a permanent injunction against construction of the border wall using diverted funds, the Supreme Court granted a stay of the injunction pending litigation. Trump v. Sierra Club, 140 S. Ct. 1 (2019) (order granting stay of permanent injunction).

234. Emily Cochrane, *Administration to Divert Billions from Pentagon to Fund Border Wall*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/border-wall-funds-pentagon.html.

entry.[235] The immigration laws on this point, however, clearly allow for asylum status irrespective of manner of entry.[236] In less than two weeks, the United States District Court for the Northern District of California issued a nationwide temporary restraining order against the policy.[237]

Also in fall 2018, President Trump took the dramatic and unprecedented step of sending some 5000 military troops to the U.S.-Mexico border to meet the "threat" of a migrant caravan.[238] Human rights researchers documented that the vast majority of individuals were men, women, children, and families fleeing violence and humanitarian crises—yet President Trump persisted in characterizing them as "stone cold criminals" mounting an invasion of the country.[239] Given the military's lack of jurisdiction to enforce immigration laws, the episode largely amounted to an expensive political stunt, as the deployed troops could not permissibly take direct action against migrants.[240] The troops instead provided primarily logistical support to immigration officers at the border.[241] Although some were soon recalled, in February 2019, President Trump ordered an additional 3750 servicepersons to the border, bringing the total up to 6000 active military troops.[242]

In summer 2018, the Trump Administration under former Attorney General Jeff Sessions implemented the widely-condemned practice of family separation.[243] Under Attorney General Sessions's "zero tolerance" policies, the DOJ criminally prosecuted asylum-seeker parents who crossed the border

235. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,934 (Nov. 9, 2018); Proclamation No. 9822, 83 Fed. Reg. 57,661, 57,661–63 (Nov. 9, 2018).

236. 8 U.S.C. § 1158(a)(1) (2012) (providing that asylum may be granted to "[a]ny alien who is physically present in the United States or who arrives in the United States" and meets the eligibility requirements).

237. East Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094 (N.D. Cal. 2018).

238. Alex Ward, *The U.S. Is Sending 5,000 Troops to the Border. Here's What They Can and Can't Do*, VOX (Oct. 31, 2018), https://www.vox.com/2018/10/29/18026646/military-border-caravan-immigrants-trump-caravan.

239. Bart Jansen & Alan Gomez, *President Trump Calls Caravan Immigrants "Stone Cold Criminals." Here's What We Know*, USA TODAY (Nov. 26, 2018, 1:39 PM), https://www.usatoday.com/story/news/2018/11/26/president-trump-migrant-caravan-criminals/2112846002/; Ward, *supra* note 238; *see also* Kennji Kizuka, *Debunking President Trump's Tweets on the Migrant Caravan*, HUM. RTS. FIRST (Oct. 28, 2018), https://www.humanrightsfirst.org/blog/debunking-president-trumps-tweets-migrant-caravan.

240. *See* 18 U.S.C. § 1385 ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.").

241. Ward, *supra* note 238.

242. Matthew S. Schwartz, *Pentagon Deploying 3,750 Troops to Southern Border*, NPR (Feb. 4, 2019, 7:04 AM), https://www.npr.org/2019/02/04/691222383/pentagon-deploying-3-750-troops-to-southern-border.

243. Clara Long, *The False Choice Between Family Separation and Detention*, HUM. RTS. WATCH (June 26, 2018, 1:07 PM), https://www.hrw.org/news/2018/06/26/false-choice-between-family-separation-and-detention.

unlawfully with their children;[244] the families were driven to do so in large part due to U.S. Border Patrol's refusal to process them at ports of entry.[245] DOJ separated children—including babies and toddlers—from their parents and sent the parents to federal criminal custody to await trial. The children, meanwhile, were held in the custody of Office of Refugee Resettlement. The public broadly condemned the cruelty of the policy,[246] and the United States Federal District Court for the Southern District of California swiftly enjoined it.[247] Under the policy, the government separated over five thousand immigrant children from their parents.[248] In some cases, the separations were permanent.[249]

In 2019, the administration began requiring thousands of asylum seekers processed at the southern border to wait in Mexico while their U.S. immigration court cases remained pending.[250] Under the policy, termed the "Migrant Protection Protocols," the U.S. government has returned over 60,000 asylum seekers to Mexico to await their immigration court hearings, despite the significant risks of trafficking, violence, and organized crime that migrants face

244. *Fact Sheet on Family Separation for Asylum Seekers*, CATHOLIC LEGAL IMMIGR. NETWORK (2018), https://cliniclegal.org/resources/family-separation/fact-sheet-family-separation (last updated Aug. 9, 2018). The DOJ charged the parents with either the misdemeanor of "improper entry by alien," or under the felony provision for "re-entry by removed alien." *Id.*; see 8 U.S.C. §§ 1325, 1326.

245. *See Fact Sheet on Family Separation*, *supra* note 244. The government also separated some asylum-seeker families presenting at ports of entry, sending the parents to adult ICE detention and the children to Department of Health and Human Services Office of Refugee Resettlement custody, despite the fact that such presentation *does* not constitute a crime. *Id.*

246. *See, e.g.*, Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html.

247. *See* Ms. L. v. U.S Immigration & Customs Enf't, 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018).

248. *See* Elliot Spagat, *Tally of Children Split at Border Tops 5,400 in New Count*, ASSOCIATED PRESS (Oct. 25, 2019), https://apnews.com/c654e652a4674cf19304a4a4ff599feb (reporting Trump Administration separated over 5400 children from parents since July 2017); *see also Family Separation by the Numbers*, ACLU, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation (last visited Feb. 2, 2020) (reporting over 2600 children separated in prior count). Due to the failure of DOJ, DHS, and the Office of Refugee Resettlement to keep records linking the separated children and their parents, the process of reunification of some of the families dragged on for weeks and even months. *See id.*

249. *See Family Separation by the Numbers*, *supra* note 248. The Trump Administration deported the parents of over a hundred children before they could be reunified, and the families made the difficult decision for the children to stay in the United States to pursue their cases. *Id.* As of October 2018, approximately twenty-six children remained separated due to the government's opposition to reunification on unfitness or danger grounds. *Id.*

250. *See* DEP'T OF HOMELAND SEC., POLICY GUIDANCE FOR IMPLEMENTATION OF THE MIGRANT PROTECTION PROTOCOLS (2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; *see also* 8 U.S.C. § 1225(b)(2)(C) (2012); Jason Kao & Denise Lu, *How Trump's Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. TIMES (Aug. 18, 2019), https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html (reporting almost 32,000 individuals subject to return to Mexico under the policy as of August 2019).

there.[251] Two courts have determined that the policy likely contravenes U.S. non-*refoulement* obligations in light of those risks, in addition to violating domestic immigration laws.[252]

Also in 2019, the Trump Administration secured "Asylum Cooperative Agreements" with Guatemala, El Salvador, and Honduras.[253] The agreements, in conjunction with a new interim final rule, effectively bar Central American (and other) asylum seekers arriving by land at the U.S.-Mexico border from obtaining asylum in the United States, with only limited exceptions.[254] Pursuant to the agreements and regulations, asylum seekers can be sent back to Guatemala, El Salvador, or Honduras and required to first seek asylum there, so long as they traveled through that country and are not a citizen there.[255] Such action almost certainly violates international and domes-

251. *See generally* Molly O'Toole, *Asylum Officers Rebel Against Trump Policies They Say Are Immoral and Illegal*, LA TIMES (Nov. 15, 2019, 2:00 AM), https://www.latimes.com/politics/story/2019-11-15/asylum-officers-revolt-against-trump-policies-they-say-are-immoral-illegal ("Since the Trump administration announced its Migrant Protection Protocols in December, U.S. officials have pushed roughly 60,000 asylum seekers back across the southern border to wait in places the State Department considers some of the most dangerous in the world . . . ."); *"We Can't Help You Here": US Returns of Asylum Seekers to Mexico*, HUM. RTS. WATCH (July 2, 2019), https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico (documenting risks of serious crime, including sexual assault and kidnapping).

252. A federal district court preliminarily enjoined the "Migrant Protection Protocols," finding that domestic immigration statutes likely did not permit forced return to Mexico of asylum seekers and that the policy likely violated the government's non-refoulement obligations. *See* Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110, 1123–27 (N.D. Cal. 2019). The Ninth Circuit initially stayed the injunction, Innovation Law Lab v. McAleenan, 924 F.3d 503, 510 (9th Cir. 2019), but ultimately agreed with the district court that the policy likely violated the immigration statutes and U.S. non-refoulement obligations. Innovation Law Lab v. Wolf, No. 19-15716, 2020 WL 964402 (9th Cir. Feb. 28, 2020). Although I served as counsel in this litigation, the views expressed herein are strictly mine alone.

253. *See* DEP'T OF HOMELAND SEC., FACT SHEET: DHS AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR (2019), https://www.dhs.gov/sites/default/files/publications/19_1003_opa_fact-sheet-agreements-northern-central-america-countries.pdf (discussing the "Agreement between the Government of the United States and the Government of the Republic of Guatemala on Cooperation in the Examination of Protection Claims" (signed July 26, 2019), the "Agreement between the Government of the United States and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims" (signed Sept. 20, 2019), and the "Agreement between the Government of the United States and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims" (signed Sept. 25, 2019)).

254. *See* Interim Final Rule: Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act**,** 84 Fed. Reg. 63,994, 63,994–96 (Nov. 19, 2019) (explaining that the new regulation "bars an alien subject to [an Alternative Country Agreement] from applying for asylum in the United States," but that exceptions exist, including when an officer determines that allowing an individual to apply for asylum in the United States would be in the "public interest").

255. *See id.*

tic law, which permit such return to "third countries" only where those countries are safe and have functioning asylum systems.[256] Guatemala, Honduras, and El Salvador all lack such systems, and are among the most dangerous countries in the world.[257] This policy, too, has been challenged in court.[258]

Throughout all these actions, the President has painted a picture of a border under siege from those seeking refuge. His Twitter account, interviews, and speeches are littered with statements attacking asylum seekers. For example, he has asserted:

> "We shouldn't be hiring judges by the thousands, as our ridiculous immigration laws demand, we should be changing our laws, building the Wall, hire Border Agents and Ice and not let people come into our country based on the legal phrase they are told to say as their password."[259]
>
> ***
>
> "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order."[260]
>
> ***
>
> "I have instructed the Secretary of Homeland Security not to let these large Caravans of people into our Country. It is a disgrace."[261]
>
> ***
>
> "We have the worst immigration laws in the history of the world, okay? So it's a joke. . . . Somebody touches our land, we now take them to a court, to a judge. They want us to choose 5,000

256. *See* 8 U.S.C. § 1158(a)(2)(A) (2012); Susan Gzesh, *"Safe Third Country" Agreements with Mexico and Guatemala Would be Unlawful*, JUST SECURITY (July 15, 2019), https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/.

257. *See, e.g.*, Gzesh, *supra* note 256 ("Guatemala would not provide protection from persecution for asylum seekers, nor can it provide a 'full and fair' procedure for determining asylum claims."); Aaron Reichlin-Melnick, *What the Safe Third Country Deals Mean for the Future of Asylum in the United States*, IMMIGR. IMPACT (Oct. 4, 2019), https://immigrationimpact.com/2019/10/04/safe-third-country-deals-asylum/ ("Guatemala has just 8 employees in the agency responsible for hearing asylum applications. El Salvador has just a single employee processing asylum applications . . . . El Salvador has the world's highest intentional homicide rate. Honduras is fourth, while Guatemala is 15th.").

258. *See* Complaint, U.T. v. Barr, No. 20-00116 (D.D.C. Jan. 15, 2020), https://www.aclu.org/legal-document/complaint-ut-v-barr.

259. Donald J. Trump (@realDonaldTrump), TWITTER (June 21, 2018, 5:12 AM), https://twitter.com/realdonaldtrump/status/1009770941604298753.

260. Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 AM), https://twitter.com/realdonaldtrump/status/1010900865602019329.

261. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 23, 2018, 6:44 AM), https://twitter.com/realdonaldtrump/status/988413372298416128.

> judges. . . . It's crazy. . . . If they step on our land, we have judges. It's insane. So we're going to have to change our whole immigration policy."[262]

Attorney General Jeff Sessions also expressed strong views against asylum seekers, broadly questioning the legitimacy of their claims. He cited "rampant abuse and fraud" and concluded, "[t]he system is being gamed. The credible fear process . . . has become an easy ticket to illegal entry into the United States."[263] In a speech to a national convening of immigration judges, the same day he issued the *Matter of A-B-* decision, he pronounced, "the vast majority of the current asylum claims are not valid."[264] He asserted, "We can elevate the threshold standard of proof in credible fear interviews."[265] And, as described in Part V below, the *Matter of A-B-* decision was precisely the vehicle he used to attempt to do that.

V. *MATTER OF A-B-*: DECISION, IMPLEMENTATION, INJUNCTION

A. Matter of A-B-

In December 2015, an immigration judge in Charlotte, North Carolina, issued a decision denying asylum to a Salvadoran woman, Ms. A.B., who had fled over fifteen years of domestic violence in her home country. He did so despite the binding precedent issued by the BIA in August 2014 in *Matter of A-R-C-G-*, which recognized domestic violence as a basis for asylum.[266] The BIA reversed his denial and took the unusual step of directing a grant of asylum below so long as background checks cleared.[267] Nevertheless, Ms. A.B.'s case remained unresolved due to the actions of the immigration judge on remand. Instead of granting asylum as directed after security checks returned, the immigration judge attempted to "certify" the case back to the BIA

262. Remarks at a Lunch with Republican Members of Congress and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. 1, 11 (June 26, 2018).

263. *Attorney General Jeff Sessions Delivers Remarks to Executive Office for Immigration Review*, U.S. DEP'T OF JUSTICE (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

264. *Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program*, U.S. DEP'T OF JUSTICE (June 11, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal.

265. *Attorney General Jeff Sessions Delivers Remarks to Executive Office for Immigration Review*, *supra* note 263.

266. A-R-C-G-, 26 I. & N. Dec. 388, 390, 395 (B.I.A. 2014).

267. Specifically, the BIA ordered that the case be remanded to the Immigration Judge "for the purpose of allowing [DHS] the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h)." A-B-, 27 I. & N. Dec. 247, 248 (A.G. 2018) (alteration in original) (quoting *A-B-*, at 4 (B.I.A. Dec. 8, 2016)).

without issuing a new decision—an unauthorized procedural mechanism that fell outside the scope of applicable regulations.[268]

In March 2018, Attorney General Sessions personally intervened in the case, invoking 8 C.F.R. § 1003.1(h)(1)(i).[269] The DHS countenanced caution, moving for the Attorney General to suspend briefing in the case due to its defective procedural posture.[270] In the alternative, DHS asked the Attorney General to both clarify the scope of his intervention and to extend the parties' briefing schedule. DHS explained that it needed more time "due to the complexity of the issues involved in this matter and the need for extensive intra-Departmental coordination."[271] Attorney General Sessions denied the motion to suspend briefing despite recognizing "[t]he Immigration Judge did not act within his authority."[272] Attorney General Sessions also declined to issue any clarification, and permitted only a partial extension of time for briefing, not the full amount requested by the DHS.[273]

On the merits, both Ms. A.B. and DHS submitted briefing in the case urging the Attorney General to uphold *Matter of A-R-C-G-*. The Department opened its brief asserting, "The Department generally supports the legal framework set out by the Board in *Matter of A-R-C-G-* . . . for the adjudication of asylum and statutory withholding of removal applications premised on inter-partner domestic violence and the protected ground of membership in a particular social group."[274]

On June 11, 2018, the Attorney General issued a decision rejecting this view. He overruled the prior BIA precedent in *Matter of A-R-C-G-* and also reversed the favorable decision of the BIA in Ms. A.B.'s own case. Attorney

268. *Id.* at 248–49 (describing procedural history); *see infra* note 272 and accompanying text (explaining Attorney General Sessions' conclusion that the procedural mechanism used by the immigration judge was defective).

269. A-B-, 27 I. & N. Dec. 227 (A.G. 2018) (certification order); A-B-, 27 I. & N. Dec. 316, 317 (A.G. 2018) (merits decision); *see supra* notes 170–172 and accompanying text (describing certification authority of the Attorney General).

270. U.S. Dep't of Homeland Sec. Motion on Certification to the Attorney General, A-B-, 27 I. & N. 316 (A.G. 2018) (merits decision) (on file with author). DHS contended that invocation of 8 C.F.R. § 1003.1(h) was not appropriate because jurisdiction for the case had never vested back to the BIA, as the immigration judge's attempt to "certify" the case back to the BIA was procedurally defective. *See id.* at 2; *see also* 8 C.F.R. §1003.1(h)(1)(i) (2019) (providing mechanism for the BIA to "refer to the Attorney General for review of its decision all cases that . . . [t]he Attorney General directs the Board to refer to him," without referencing analogous mechanism for an immigration judge). Attorney General Sessions agreed that the immigration judge's actions were defective but, nevertheless, ruled that he himself had authority to certify a case still technically with the immigration judge. *See* A-B-, 27 I. & N. Dec. 316, 321–22, n.2 (A.G. 2018) (merits decision) (noting "procedurally defective" action by Immigration Judge Couch); A-B-, 27 I. & N. Dec. 247, 248–49 (A.G. 2018) (noting the same defective action).

271. Motion on Certification to the Attorney General, *supra* note 270, at 4.

272. A-B-, 27 I. & N. Dec. 247, 248 (A.G. 2018).

273. *See id.* at 249–50.

274. U.S. Dep't of Homeland Sec. Brief on Referral to the Attorney General at 2, A-B-, 27 I. & N. Dec. 316 (A.G. 2018) (on file with author).

General Sessions's decision relied heavily upon the BIA's purported failure to engage in in-depth analysis in *A-R-C-G-*. He criticized, in particular, the BIA's reliance on concessions by DHS with regard to particular social groups and other legal issues in the case.[275] Attorney General Sessions invoked his authority under the *Chevron* framework, concluding "the phrase 'membership in a particular social group' is ambiguous"[276] and emphasizing his own "primary responsibility for construing ambiguous provisions in the immigration laws."[277] His discussion of this authority cited the Supreme Court's decisions in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, *Negusie v. Holder*, and *Immigration & Naturalization Services. v. Aguirre-Aguirre*.[278]

Yet, his decision went far beyond merely construing the term "particular social group," to generally opine on facts and circumstances not present in Ms. A.B.'s case. Among the more reaching aspects of his decision was its conclusion that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum"[279]—notwithstanding the fact the Ms. A.B. herself did not present a gang claim. Attorney General Sessions additionally concluded in a footnote that "[a]ccordingly, few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution."[280]

The decision also muddled the long-established standard for failure of state protection against harm by non-state actors, which requires only that a home government be unable or unwilling to protect the individual. As the BIA has previously noted, the "unable or unwilling" standard governed claims for refugee protection under U.S. law even prior to the passage of the Refugee Act.[281] Under this standard, a refugee need show only either that her country of origin cannot effectively protect her, or that it is unwilling for

275. A-B-, 27 I. & N. Dec. 316, 334–35 (A.G. 2018) (merits decision).

276. *Id.* at 326.

277. *Id.*

278. *Id.* at 326–27 ("The Attorney General's reasonable construction of an ambiguous term in the Act, such as 'membership in a particular social group,' is entitled to deference." (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005); Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); Negusie v. Holder, 555 U.S. 511, 516 (2009); Immigration & Naturalization Serv. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999))).

279. *Id.* at 320.

280. *Id.* at 320 n.1 (citing 8 U.S.C. § 1225(b)(1)(B)(v) (2012)).

281. *See* Acosta, 19 I. & N. Dec. 211, 222–23 (B.I.A. 1985) ("We conclude that the pre-Refugee Act construction of 'persecution' should be applied to the term as it appears in section 101(a)(42)(A) of the Act. It is a basic rule of statutory construction that words used in an original act or section, that are repeated in subsequent legislation with a similar purpose, are presumed to be used in the same sense in the subsequent legislation." (quoting Lorillard v. Pons, 434 U.S. 575, 581 (1978))); *id.* at 222 (determining that one of the "significant aspects" of the "accepted construction of the term 'persecution'" was "harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control").

any reason to do so.[282] Yet Attorney General Sessions articulated the standard as requiring the home government to "condone[]" or be "complete[ly] helpless[]" to protect an applicant against harm.[283]

In perhaps the most disturbing part of his decision, Attorney General Sessions addressed nexus—the statutorily-required link between harm and one of the five protected grounds—in a manner that implicitly questioned the very viability of gender-based persecution claims, which, as explained above, often arise in the context of community, family, and partner relationships.[284] Unlike the term "particular social group," the statute provides a clear definition for nexus, requiring that protected ground on which an individual is seeking asylum be "one central reason" for persecution—a standard that permits mixed motives for harm.[285] Attorney General Sessions, however, characterized domestic violence as personal harm beyond the reach of refugee protection. He opined that "[w]hen private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group may well not be 'one central reason' for the abuse."[286] He suggested that domestic violence survivors, as "victim[s] of private criminal activity," may have difficulty in showing "that their persecutors harmed them on account of their membership in that group rather than for personal reasons."[287] More simply, he stated, "An alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet the asylum statute does not provide redress for all misfortune."[288]

282. *See* Rosa v. Immigration & Naturalization Servs., 440 F.2d 100, 102 (1st Cir. 1971) (recognizing viability of refugee claim if non-governmental persecutor is able "to carry out its purposes without effective hindrance"); Eusaph, 10 I. & N. Dec. 453, 454 (B.I.A. 1964) (indicating that non-governmental persecution would qualify if "the police powers of the government have degenerated to the point where it is unable to take proper measures to control individual cases of violence"). A post-*Matter of A-B-* decision by the First Circuit confirms the continuing understanding of this standard. *See* Rosales Justo v. Sessions, 895 F.3d 154, 163 (1st Cir. 2018) (holding that "an applicant must prove *either* unwillingness *or* inability" (emphasis added)).

283. A-B-, 27 I. & N. Dec. 316, 337 (A.G. 2018) (merits decision).

284. *See supra* Part III.

285. *See* 8 U.S.C. § 1101(a)(42)(A) (2012) (persecution must be "on account of" protected ground); *id.* § 1158(b)(1)(B)(i) (specifying that protected ground must be "one central reason" for the harm); *see also* N-M-, 25 I. & N. Dec. 526, 530 (B.I.A. 2011) (explaining that nexus can be established "where an [individual] demonstrates more than one plausible motive for the harm imposed or the harm feared").

286. A-B-, 27 I. & N. Dec. 316, 338–39 (A.G. 2018) (merits decision).

287. *Id.* at 317.

288. *Id.* at 318. Feminist scholars and theorists, of course, have long rejected the divide between "personal" and "public" harm. Overcoming these distinctions in the law has been a core aim of the gender equality movement through the years. *See, e.g.*, Ronnie Cohen & Shannon O'Byrne, *"Can You Hear Me Now . . . Good!"® Feminism(s), the Public/Private Divide, and* Citizens United v. FEC, 20 UCLA WOMEN'S L.J. 39, 39 (2013) ("An important goal identified by early feminists was to challenge and even eliminate the distinction between the public and private spheres."). Although an in-depth exploration of that literature is outside the scope of this Article, the elimination of the public/private divide has been key to the advancement of women's equality in, for example, the

Attorney General Sessions' decision was a clear attempt to largely shut the door on women seeking asylum on the basis of domestic violence. His decision also reflects an explicit desire to impact credible fear screenings at the border for these women and many other asylum seekers.

B. Immediate Implementation

Despite having taken a position urging the Attorney General to uphold *Matter of A-R-C-G-* in Ms. A.B.'s case, DHS moved quickly to implement his decision in *Matter of A-B-*, including in credible fear proceedings. On June 13, 2018, John Lafferty, the head of the Asylum Office, issued interim guidance instructing officers to apply the decision.[289] The brief interim guidance instructed officers in merits adjudications and screening interviews that they should no longer cite to or rely on *Matter of A-R-C-G-*, and instead conduct a case-by-case analysis of particular social groups under pre-existing BIA caselaw.

On July 11, 2018, however, far more reaching final guidance replaced the interim guidance.[290] That guidance, notably, was issued on USCIS letterhead with no authorship attribution—diverging from USCIS's prior practice of issuing guidance attributed to and signed by the head of the asylum office.[291] The final guidance instructed (in boldface font) that "[i]n general . . . claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang

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movement for equal pay, the criminalization of domestic violence, the extension of rape laws to marital relationships, and the recognition of a Title VII claim against sexual harassment. *See, e.g.*, *id.*; Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights La*w, 6 HARV. HUM. RTS. J. 87, 123 (1993); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1702 (1998). Notably, decades of research have confirmed the gendered dynamics of domestic violence—research presented to, but never once cited by, Attorney General Sessions. *See* Brief of Respondent at 39–40, A-B-, 27 I. & N. Dec. 316 (A.G. 2018), https://uchastings.app.box.com/s/tt1ydliq5ttm1i2zxlz4rname4bk29s7/file/291241595459.

289. E-mail from John L. Lafferty to RAIO – Asylum Field Office Managers; RAIO – Asylum Field Office Staff; and RAIO – Asylum HQ (June 13, 2018, 5:20 PM) (on file with author) (including USCIS Asylum Division Interim Guidance following the *Matter of A-B-* merits decision).

290. U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-*, (2018) [hereinafter USCIS GUIDANCE].

291. *See, e.g.*, JOHN LAFFERTY, U.S. CITIZENSHIP & IMMIGRATION SERVS., HQRAIO 120/9.15a, GUIDANCE ON IMMEDIATE FAMILY MEMBERS IN CREDIBLE FEAR (2014), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2014/MEMO_Guidance_on_Immediate_Family_Members_in_Credible_Fear.pdf; JOHN LAFFERTY, U.S. CITIZENSHIP & IMMIGRATION SERVS., HQRAIO 120/9.15b, RELEASE OF ASYLUM DIVISION OFFICER TRAINING COURSE (ADOTC) LESSON PLAN, *CREDIBLE FEAR OF PERSECUTION OR TORTURE DETERMINATIONS* (2014), https://www.fairus.org/sites/default/files/2017-08/dhs_asylum_doc_4212014.pdf.

violence committed by non-government actors will not establish the basis for . . . a credible or reasonable fear of persecution."[292]

The USCIS Guidance ("Guidance") also directed officers to apply the restrictive analysis of *A-B-* in several respects—going far beyond simply requiring adherence to *A-B-*'s central holding in reversing *A-R-C-G-*. For example, the Guidance stated that "when a private actor inflicts violence based on a personal relationship with the victim, the victim's membership in a larger group often will not be 'one central reason' for the abuse."[293] It imported *A-B-*'s conclusory statements regarding social groups to conclude that any social group involving inability to leave a relationship is circular.[294] The Guidance also incorporated *A-B-*'s language that the government must condone or be completely helpless to stop persecution by a private actor.[295]

The Guidance additionally sought to maximize the reach of *A-B-* vis-à-vis federal circuit court decisions, directing that asylum officers must "apply the case law of the relevant federal circuit court, *to the extent that those cases are not inconsistent with Matter of A-B-*."[296] It defined the relevant circuit as the one where the applicant is physically present, explaining that circuit law elsewhere can simply be ignored—even in the context of screening, and not merits adjudications—simply because DHS might relocate individuals elsewhere in the country if they establish credible fear. This attempt to avoid consideration of favorable circuit court decisions marked a departure from prior agency practice. Previously, USCIS Guidance directed officers to apply the circuit interpretations most favorable to the applicant when conducting border screening interviews.[297]

The Guidance instructions were particularly jarring given the asylum office's longstanding recognition of gender-based persecution claims, including in the context of domestic violence.[298] As described in Part III, agency guidance, dating back to the legacy INS era, long recognized the validity of women's asylum claims, and more recent asylum office training materials have confirmed this understanding.[299]

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292. USCIS GUIDANCE, *supra* note 290, at 6.

293. *Id.*

294. *Id.* at 5 ("The applicant must show something more than the danger of harm from an abuser if the applicant tried to leave, because that would amount to circularly defining the particular social group by the harm on which the asylum claim was based.").

295. *Id.* at 6.

296. *Id.* at 8–9 (emphasis added).

297. U.S. CITIZENSHIP & IMMIGRATION SERV'S, ASYLUM DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS 17, 47 (2017), https://www.aila.org/File/DownloadEmbeddedFile/70907; U.S. CITIZENSHIP & IMMIGRATION SERV'S, ASYLUM DIVISION OFFICER TRAINING COURSE: REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS 11 (2017), https://www.aila.org/File/DownloadEmbeddedFile/70908.

298. *See supra* Section III.B.

299. *See* Coven, *supra* note 215; U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 216.

C. Grace v. Sessions—Matter of A-B- Enjoined at the Border

In August 2018, plaintiffs represented by the American Civil Liberties Union and the Center for Gender & Refugee Studies challenged the application of *Matter of A-B-* and the related USCIS Policy Guidance in expedited removal. The twelve plaintiffs—nine adult asylum seekers and three minor children—contended that numerous aspects of the decision and guidance violated the laws governing asylum and expedited removal. They also alleged constitutional due process and separation of powers violations.[300] Although the lawsuit was not a class action, it sought systemic relief under a provision of the immigration laws, Title 8, section 1252(e)(3) of the United States Code, which authorizes challenges to expedited removal policies in the United States.[301]

On December 18, 2019, the United States District Court for the District of Columbia entered a permanent injunction prohibiting DHS and immigration judges from applying several aspects of *Matter of A-B-* and the USCIS guidance.[302] The district court decision addressed plaintiffs' statutory claims, raised under the Administrative Procedure Act and applied *Chevron* in reviewing *Matter of A-B-*.

300. Complaint, Grace v. Sessions, No. 18-cv-1853, 2018 WL 3812445 (D.D.C. Aug. 7, 2018). The plaintiffs' statutory claims alleged violations of the Refugee Act, Immigration and Nationality Act, and Administrative Procedure Act. *Id.*

301. The applicable provision reads:

> (A) In general
>
> Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—
>
> (i) whether such section, or any regulation issued to implement such section, is constitutional; or
>
> (ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.
>
> (B) Deadlines for bringing actions
>
> Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

8 U.S.C § 1252(e)(3)(A)–(B) (2012). The provision guarantees judicial review of expedited removal policies notwithstanding jurisdiction-stripping provisions of the same section, which limit review of individual expedited removal decisions and orders. *See id.* § 1252(e)(1)–(2). Of note, however, the sixty-day limitation and the requirement that the suit be brought in the D.C. federal district court pose large barriers to non-sophisticated litigators.

302. Grace v. Whitaker, 344 F. Supp. 3d 96, 124 (D.D.C. 2018)

The court found that *Chevron* deference does apply to decisions of the Attorney General interpreting the "particular social group" ground for asylum.[303] Judge Sullivan then analyzed the general rule that domestic violence and gang claims will fail under *Chevron* step two, rejecting it as unreasonable for several reasons. He found "no legal basis" for the rule in the statute and deemed it inconsistent with Congress's intent to comply with its international refugee law obligations and to ensure non-discriminatory treatment of claims.[304] Additionally, he concluded the rule violated the individualized adjudication system for asylum, including at the credible fear stage, as well as the governing standard for credible fear:

> The Attorney General's direction to deny most domestic violence or gang violence claims at the credible fear determination stage is fundamentally inconsistent with the threshold screening standard that Congress established: an alien's removal may not be expedited if there is a "significant possibility" that the alien could establish eligibility for asylum.[305]

The district court also rejected—this time at *Chevron* step one—the heightened state protection standard requiring an applicant to show that her government "condoned" or was "completely helpless" to protect her against non-State actor persecution.[306] The court ruled that the settled meaning of "persecution" enacted by Congress in the 1980 Refugee Act required only a showing of the government's inability or unwillingness to provide effective protection.[307]

Judge Sullivan additionally held that the USCIS Guidance's prohibition of social groups involving an "inability to leave" a relationship was arbitrary and capricious.[308] According to Judge Sullivan, the Guidance's conclusion on this point both went beyond *A-B-* itself and misconstrued existing agency caselaw on circularity, as prior agency precedent had never required social groups to be completely independent from harm.[309] Thus, he reaffirmed that social group cognizability is a fact-specific analysis.[310]

303. *Id.* ("[T]he Court concludes that Congress has not 'spoken directly' on the precise question of whether victims of domestic or gang-related persecution fall into the particular social group category."). The court notably rejected the government's contention that *Matter of A-B-* and the guidance's statement that domestic violence and gang claims "will generally fail" did not set forth a general rule. *Id.* at 125 ("The government's principal response is straightforward: no such general rule against domestic violence or gang-related claims exists.").

304. *Id.* at 126.

305. *Id.* at 126–27.

306. *Id.* at 128.

307. *Id.*

308. *Id.* at 133.

309. *See id.*; USCIS GUIDANCE, *supra* note 290, at 5.

310. *Grace*, 344 F. Supp. 3d at 133.

Finally, Judge Sullivan enjoined the USCIS Guidance's requirement that asylum officers ignore circuit law contrary to *Matter of A-B-* in adjudicating credible fear cases.[311] He observed first, that the wide-ranging analyses in *A-B-* that stretched beyond the legal effect of overruling *Matter of A-R-C-G-* were mere dicta, as conceded by the government—and therefore not entitled to deference under *Brand X*.[312] Judge Sullivan continued, "[s]imply put, *Brand X* is not a license for agencies to rely on dicta to ignore otherwise binding circuit precedent."[313] He additionally enjoined the instruction to officers only to apply circuit law in which the applicant was physically present, reasoning that this instruction violated the "significant possibility" standard for credible fear by forcing adjudicators to ignore favorable circuit law that would allow applicants to meet the standard.[314]

To remedy these illegalities, Judge Sullivan enjoined the government from applying the unlawful aspects of *Matter of A-B-* and the USCIS Guidance. He further vacated the expedited removal orders of the twelve individual plaintiffs and ordered the government to bring back to the United States any of the plaintiffs it had removed.[315]

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The *Grace* injunction, which remains in effect pending appeal,[316] has served as a critical check against executive overreach at the border. The district court rightly concluded that the *Matter of A-B-* decision conflicted with the statutory refugee definition and the laws governing expedited removal, as well as unreasonably interpreted ambiguities in the statute. The relief the court ordered, however, was limited in two respects. First, the injunction failed to reach asylum seekers who were previously deported pursuant to the unlawful interpretations adopted by USCIS in implementing *Matter of A-B-*; as a result, many individuals who are in fact refugees were likely refouled without clear remedy. Second, the court injunction left in place a structurally unsound system of credible fear adjudications, in which *future* unlawful decisions of the agency may continue to be applied and also result in *refoulement* of refugees. Below, I consider how different approaches to agency

311. The USCIS Guidance instructs that, when conducting credible fear interviews: "The asylum officer should . . . apply the case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*." *See* USCIS GUIDANCE, *supra* note 290, at 8.

312. *Grace*, 344 F. Supp. 3d at 138 n.22 ("According to the government, the only legal effect of *Matter of A-B-* is to overrule *Matter of A-R-C-G-*. Any other self-described dicta would not be entitled to deference under *Chevron* and therefore *Brand X* could not apply.").

313. *Id.*

314. *Id.* at 139–40. The court also enjoined a portion of the USCIS Policy Guidance that required applicants to themselves articulate a particular social group at the credible fear stage. *Id.* at 135.

315. *Id.* at 144–45.

316. Notice of Appeal at 2, Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018) (No. 1:18-cv-01853-EGS).

decisionmaking and judicial review at the border can better avoid *refoulement*.

VI. REGULATING THE BORDER

For now, a discussion of permissible agency interpretations of law at the border begins with an inquiry under *Chevron*. Yet many scholars have carefully probed and questioned the applicability and contours of *Chevron* in immigration space. Professor Kevin Johnson has persuasively argued that the political accountability underpinnings of *Chevron* disfavor its use in this space. He observes that *Chevron*'s "political process rationale does not apply comfortably to the immigration bureaucracy for a simple reason—noncitizens cannot formally participate in the political process."[317] Because immigrants lack the power of the vote, they have little ability to hold the executive branch officials accountable through the elected office of the Presidency.[318] Moreover, it is precisely the rights of these disenfranchised individuals at stake in the decisions of the agency.

Whereas Professor Johnson has suggested eliminating *Chevron* deference to the decisions of the immigration agency entirely,[319] others have proposed modifying the framework or discarding *Chevron* for certain subsets of agency decisions. Professor Bassina Farbenblum, for example, urges stronger incorporation of an international law perspective at *Chevron* step one for asylum and withholding decisions. Because Congress has indicated an intent to conform with international law obligations, she argues that courts should look to international law consensus and interpretations to construe the plain meaning of the statute.[320] Or, at a minimum, Professor Farbenblum proposes that consistency with international refugee law must robustly inform *Chevron* step two, prompting U.S. federal courts to more closely scrutinize decisions out-of-step with comparative and international law.[321] Examining Congressional intent, the structure of the Department of Justice, and the evolution of *Chevron* doctrine—and in particular its step zero—Professor Maureen Sweeney concludes that *Chevron* should not apply to asylum and withholding decisions of the Attorney General or BIA.[322] She highlights the

317. Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 37 (2008).

318. *See id.* at 39.

319. *Id.* at 43 ("One incremental solution would be to eliminate *Chevron*-style deference to the decisions of the immigration bureaucracy. Meaningful judicial review would encourage the immigration agencies to take greater care in immigration matters and to comply with the law.").

320. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 DUKE L.J. 1059, 1096, 1098 (2011).

321. *Id.* at 1104.

322. Maureen A. Sweeney, *Enforcing/Protection: The Danger of* Chevron *in Refugee Act Case*s 71 ADMIN. L. REV. 127 (2019). Professor Alina Das makes a similar argument with regard to the interpretation of federal immigration detention statutes, arguing that *Chevron* should not apply in

dangers of allowing the head or functionaries of the Department of Justice—which has core prosecutorial functions against immigrants, for example, the crimes of illegal entry and re-entry—to also interpret asylum laws designed to protect vulnerable populations.[323] Professor Mary Holper has scrutinized the Attorney General certification process in particular, suggesting that the Attorney General's precedent decisions in the criminal immigration context should not survive *Chevron* step zero. She contends that they fail to adequately allow public input, ensure transparency, or reflect careful consideration, and as a result, should be analyzed outside *Chevron* altogether.[324]

The invocation of certification authority in *Matter of A-B-* reflects each of the concerns explored by the scholars above. Asylum seekers, such as Ms. A.B. and the thousands of others in removal and credible fear proceedings to whom the decision has been applied, lack a voice in the political process. The certification of Ms. A.B.'s case also failed to reflect a fair, transparent, and accountable process.[325] And, the Attorney General's core prosecutorial functions, including those deployed against asylum seekers who enter unlawfully, raise serious doubts about the office's ability to engage in impartial and protection-oriented adjudication of asylum claims. Indeed, former Attorney General Sessions used the power of his office to target asylum-seeker families via the criminal process, including by using unlawful entry prosecutions to effectuate the Administration's widely-condemned family separation policies.[326] In prior statements, he also expressed skepticism over the validity of the asylum system as a whole as well as subsets of claims within them.[327]

Yet, although I agree with the normative non-applicability of *Chevron* deference to *Matter of A-B-* in merits adjudications for all of these reasons, I consider here the special concerns posed by applying this decision—and others that adopt restrictive interpretations of asylum law—specifically at the border. Correctly or not, the Supreme Court has applied *Chevron* to substantive interpretations of the refugee definition arising in merits adjudications of asylum claims. Even so, it does not follow that agency *screening* interpretations should proceed in the same way. Thus, I consider how courts should apply *Chevron* for border screening interviews, and how agencies should

habeas review of detention. Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 189 (2015).

323. *See also* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 464 (2007) ("An argument can be made, however, that deference has less justification in asylum cases than in other areas."). Specifically, Professor Legomsky observes that ideological biases of immigration judges resulting in huge disparities in asylum grant rates diminish rationales for deference. *Id.*

324. Mary Holper, *Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1243 (2011).

325. *See supra* Section V.A.

326. *See supra* notes 243–249 and accompanying text.

327. *See supra* notes 263–265 and accompanying text.

structure and apply DOJ precedent decisions. I also offer thoughts on how these recommendations might continue to hold in a post-*Chevron* world.

A. Precedent and Deference Frameworks at the Border

As discussed, *Chevron* and its progeny rely on two core justifications for the framework. Deference is due to policy functions of the executive branch, ensuring democratic accountability for policy choices.[328] Deference is also due to agency expertise, including technical know-how arising from the qualifications of agency officials and their day-to-day experience of administering the statute.[329]

In chaotic border interviews, however, an incongruous picture emerges. Asylum office adjudicators are indeed specialized in their field, trained not only on substantive asylum law, but also on interviewing techniques, the special needs of trauma survivors in an adjudicative setting, and the country conditions of sending nations, among other topics.[330] Yet their decisions are given no real weight under the adjudicative framework. Rather, the asylum officers are bound by the opinions of the BIA—who are immigration generalists, not asylum specialists—and the Attorney General, who is even further removed and charged with enforcing all of U.S. law.

With regard to policy considerations, the office of the Attorney General (and to a lesser extent the Board of Immigration Appeals directly under the Attorney General) is closer to democratic accountability than the asylum officer at the border. Justice Kagan, writing prior to her time on the bench, has argued that the accountability principle is so central to *Chevron* that full deference should extend only to the agency head receiving delegated authority from Congress.[331] Thus, she urged adoption of what she and Judge David Barron termed an "internal-agency nondelegation doctrine."[332] They posit that the closer an official sits in the chain of command to the agency head, the greater the leeway the courts should provide under *Chevron*. Compared to a low-level official, the agency head is far more accountable to the will of the people due to the nature and visibility of her office. Justice Scalia reflects echoes of this thinking as well. Although he would not limit broad *Chevron* step two deference to high-ranking officials, he locates justifications of *Chevron* in the policy functions of the agency.[333] However, Justice Gorsuch, in

328. *See supra* notes 17–21 and accompanying text.

329. *See supra* notes 22–24 and accompanying text.

330. *See* Paskey, *supra* note 159; Boas, *supra* note 159.

331. David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 242–43 (2001).

332. *Id.* ("It is only the presence of high-level agency officials that makes plausible *Chevron*'s claimed connection between agencies and the public; and it is only the involvement of these officials in decision making that makes possible the kind of political accountability that *Chevron* viewed as compelling deference.").

333. *See* Scalia, *supra* note 25.

his views *against* existing deference frameworks, tacks decidedly away from political and policy reasons for deference to agencies and toward their expertise instead.[334]

The asylum screening system presents something of a conundrum under the differing aims and rationales of *Chevron*. Its day-to-day work is carried out primarily by specialized asylum officials in one agency (DHS) who sit several degrees removed from political accountability. On the other hand, asylum precedents are generated by the agency head or their delegate in another (DOJ), with the Attorney General of course being a cabinet-level official confirmed by the Senate. What role should each of these two disparate functionaries play with regard to asylum adjudications in credible fear proceedings? What agency law should govern at the border, and when should it apply? And how might deference apply in the absence of *Chevron*?

In thinking through these questions, we should also consider that credible fear interviews are different from merits adjudications. As explained in Part II, credible fear processes are curtailed and rife with documented problems. Applicants do not receive full procedural protections of immigration removal proceedings; nor do they have the time to secure counsel or prepare claims as they would in a merits adjudication.[335] In this context, mistakes are likely. Thus, whatever framework applies must give adjudicators leeway for error. But error, of course, can run in both directions. A screening official may err in thinking that an applicant has a viable claim when she does not. Or the official may decide the applicant has little chance of prevailing when in fact the individual's claim—fleshed out in better processes and with the benefit of counsel and preparation—is strong. So, for which type of error should the applicable framework create room?

I posit that these sets of questions—on adjudicative roles, governing precedent, and allowances for error in credible fear proceedings—can be resolved by looking at the overarching statute and its aims. Although decisions of the Attorney General and BIA do bind both immigration judges and asylum officers in adjudicating merits claims under the Immigration and Nationality Act ("INA"),[336] three key aspects of statutory design favor a different approach to implementation of DOJ precedent in credible fear screenings.

First, and most critically, Congress specified a low screening threshold for credible fear. The statute requires an applicant at this stage to show only a "significant possibility" that they will prove their asylum claim at a full hearing.[337] Moreover, as discussed above, Congress was explicit in selecting

334. *See supra* Section I.D.

335. *See supra* Section II.D.

336. *See* 8 U.S.C. § 1103 (2012).

337. *Id.* § 1225(b)(1)(B)(v) ("For purposes of this subparagraph, the term 'credible fear of persecution' means that 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

this standard to prevent the possibility of *refoulement* of refugees at the border.[338] The point, in short, was to err on the side of screening *in*, and not out. This favors a generous and protective read of substantive asylum law in credible fear screenings.

Second, Congress's 1996 reforms codified into the INA the existence and importance of the asylum office.[339] Although originally a creature of regulation, the asylum office was formalized by Congress specifically in the context of credible fear. As explained above, the laws now mandate that credible fear interviews be conducted by asylum officers, overseen by supervisory officers who have asylum adjudication experience.[340] They also require that both adjudicating officers and their supervisors receive training in substantive law, interviewing techniques, and country conditions.[341] The command here is clear: The credible fear process falls within the jurisdiction of a specialized and protection-oriented asylum office—*not* officials within the enforcement arms of the government. For this reason, CBP-officer screening decisions would not only run afoul of the statute,[342] but should also fail to garner any deference in statutory interpretations.

Finally, the refugee definition that applies in credible fear derives from the Refugee Act of 1980, in which Congress enacted a non-discriminatory asylum system to course-correct from a prior politicized era. As previously recounted, the executive branch had once allowed foreign policy interests, geography, and political ideology to guide U.S. refugee decisions.[343] In enacting a universal refugee definition conforming to the international law definition, Congress expressed a clear and unequivocal intent to de-politicize the asylum adjudication system.[344]

Taken together, these congressional actions favor a modified approach to agency adjudications at the border. In immediately implementing *Matter of A-B-* to such an extreme extent, DHS officials likely refouled refugees in violation of both the credible fear standard and U.S. international law obligations. If we take seriously Congress's clearly-stated desire to adhere to those

officer, that the alien could establish eligibility for asylum . . . ."); *see also* Grace v. Whitaker, 344 F. Supp. 3d 96, 107 (D.D.C 2018) (characterizing credible fear as a low screening standard).

338. *See supra* Section II.B.

339. *See supra* Section II.C.

340. *See* 8 U.S.C. § 1225(b)(1)(E) (providing the definition of "asylum officer"); *see also supra* Section II.C.

341. *See* 8 U.S.C. § 1225(b)(1)(E).

342. *See supra* notes 175–177 and accompanying text.

343. *See supra* Section II.A.

344. The Court's *Chevron* doctrine also generally favors construing the statute as a cohesive whole. *See* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a harmonious whole.'" (first quoting Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995), then quoting FTC v. Mandel Bros., Inc., 359 U.S. 385, 389 (1959))) (discussing statutory interpretation at *Chevron* step one).

obligations, we must consider a different approach to the review and implementation of agency precedent at the border.

B. Solutions for a Well-Regulated Border

To ensure better asylum decisionmaking at the border, I propose several changes below for the agency and the courts. For each, I draw upon my earlier discussions to explore theoretical and practical justifications for these shifts. I also briefly consider how Congress might step in to ensure better fidelity to its laws.

1. Agency

Below, I provide three recommendations for the agencies involved in credible fear adjudications at the border. Each is rooted in the statutory design of our asylum system, as well as in administrative law principles. First, I recommend that DHS delay implementation of protection-restricting DOJ precedent decisions in credible fear processes. Second, I propose that DHS simply not apply restrictive DOJ precedent decided under *Chevron* step two, wherein the agency construes statutory ambiguities. Finally, I suggest elevation of the role of the asylum office in adjudications leading to precedent DOJ decisions.

a. A Wait-and-See Approach for Agency Adjudication at the Border: Delayed Implementation of Protection-Restricting Attorney General and BIA Decisions to Allow for Judicial Review

The "significant possibility" standard is protective and forward-facing.[345] It considers whether a screened-in applicant might, with better preparation in a full removal proceeding, show asylum eligibility down the line. The primacy of the judiciary in declaring "what the law is," considered in light of this standard, favors building in time for review of agency decisions by the federal courts of appeals.[346]

Although agencies can interpret the law, with particular leeway for ambiguous statutes, they are not its final arbiters. Rather, the federal courts claim that role in our constitutional order. Thus, irrespective of whether the agency reaches an interpretation via *Chevron* step one or invokes its authority under step two, Article III courts have the ultimate say on whether the agency's decision will stand as consistent with plain text, or as a reasonable

345. *See supra* Section II.B; *see also* 8 C.F.R. § 1.2 (2019); Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312 (Mar. 6, 1997).

346. *See supra* Section I.B; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

construction of ambiguous text.[347] Until they do so, there remains a great deal of uncertainty around whether the agency's interpretation of law will survive judicial review.

I posit that this aspect of constitutional design, combined with the statutory standard for credible fear proceedings, should prompt DHS to *wait* for the federal courts of appeals to review protection-restricting DOJ decisions before implementing them at the border. Although the determinations of law of the Attorney General or BIA are immediately controlling upon DHS in the merits stages, the "significant possibility" standard for credible fear logically contemplates time for the Article III courts to first weigh in. Because the judiciary has final say on what the law is, an agency precedent that rejects or casts doubt on an applicant's claim does not, *standing alone*, defeat a "significant possibility" that the applicant will prevail on the merits. Accordingly, in credible fear processes, DHS should adopt a wait-and-see approach for protection-restricting DOJ precedent.

Caution and delay are warranted particularly if the restrictive decision comprises a change in the agency position as it did in *Matter of A-B-*, which overruled prior precedent accepting domestic violence asylum claims.[348] Under step two of the *Chevron* inquiry, the Court has stated that agency positions inconsistent with prior views merit less deference,[349] or even none at all if not adequately explained.[350] Shifting agency interpretations are thus especially suspect, and more susceptible to ultimate rejection by the courts.

Justice Gorsuch's decisions while on the Tenth Circuit bench support temporal restraint, particularly when agency decisions invoke *Brand X* to reach conclusions contrary to the federal courts. Per *Guitierrez-Brizuela v. Lynch*, agency pronouncements that "effectively overrule[]" prior judicial constructions are "not legally effective" until a reviewing federal court accepts the agency's view under *Chevron* step two.[351] Yet, in direct conflict with this view, the USCIS Guidance on *Matter of A-B-* instructed its officers to "apply the case law of the relevant federal circuit court, *to the extent that*

347. It follows that restrictive analyses that are mere dicta and thus do not invoke delegated interpretive authority should also not apply in credible fear interviews. In *Grace*, Judge Sullivan concluded dicta statements are not entitled to *Chevron* deference. *See* Grace v. Whitaker, 344 F. Supp. 3d 96, 138 (D.D.C. 2018).

348. *See supra* Section V.A.

349. Immigration & Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981))).

350. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

351. Gutierrez–Brizuela v. Lynch, 834 F.3d 1142, 1145 (10th Cir. 2016).

those cases are not inconsistent with Matter of A-B-."[352] In *Grace v. Whitaker*, Judge Sullivan correctly enjoined this portion of the USCIS policy memorandum, in addition to substantive illegalities in *Matter of A-B-*.[353] But it would have been better, and wiser, for the agency not to have rushed implementation of a *Brand X* decision in the first place.

Finally, individual liberty interests further countenance a wait-and-see approach for restrictive agency decisions at the border, particularly in light of the substantial risk of rights violations. The agency's speedy implementation of protection-restricting decisions at the border poses precisely the concern highlighted by Justice Gorsuch while on the Tenth Circuit bench in *Gutierrez-Brizuela*, and again in his concurrence in *Kisor v. Wilkie*: that politicized administrative agents may imperil the legal rights of litigants, particularly those with minority or disfavored causes.[354]

Indeed, should *Chevron*'s two step framework be overruled, as Justice Gorsuch has urged, that would be all the more reason for DHS to delay implementing restrictive agency precedent at the border. Under *Skidmore*'s more flexible and less deferential standard, an agency interpretation would be even less likely to survive judicial scrutiny—and the agency thus even less able to declare that administrative decisions defeat an applicant's "significant possibility" of prevailing on the merits.

But what about decisions that expand refugee protections? Must the agency wait on implementing those in credible fear proceedings, too? The answer, I believe, is no. Agency precedent recognizing greater protections *can* be implemented immediately without violating the credible fear standard, precisely because a "significant possibility" is a *screen-in* standard. It functions not to keep out every ultimately invalid claim, but rather to give every potentially viable claim a chance in full proceedings. Moreover, protection-expanding decisions, even if later rejected by the courts, do not pose the same risk of violating applicants' rights in the interim.[355] Thus, BIA or Attorney General decisions that expand the scope of refugee protection may be implemented without violating the screening standard, risking *refoulement*, or curtailing applicants' rights.

352. *See* USCIS GUIDANCE, *supra* note 290, at 8–9 (emphasis added); *see also supra* Section V.B.

353. *See supra* Section V.C.

354. *See supra* Sections I.B, I.D.

355. *Cf. supra* Sections I.B, I.D (exploring Justice Gorsuch's view that current deference frameworks risk violating individuals' rights).

b. Nonapplication in Credible Fear of Any Protection-Restricting Attorney General and BIA Decisions Decided Under Chevron *Step Two*

A second proposal is for the DHS simply not to implement *any* protection-restricting decisions of the Attorney General or BIA construing ambiguous statutes in credible fear screenings—irrespective of the outcome of judicial review. This approach is supported by the very instability caused by the scope of agency options under *Chevron* step two—even where the agency stays within bounds of reasonableness.

The fact that the agency can later change its mind within a range of permissible interpretations means that a *Chevron* step two agency decision lacks permanence. This, in turn, creates a risk that implementation of the decision in border screening interviews will lead to violation of the credible fear screening standard: An applicant prevented from establishing a claim under today's narrow agency interpretation may, in theory, still prevail in the future under a different agency interpretation. And indeed, this is what we saw in the trajectory of agency precedent decisionmaking on domestic violence asylums claims—and what Ms. Rody Alvarado, the petitioner in *Matter of R-A-*, herself experienced—as the prospects of prevailing in her merits case veered widely under Attorneys General Reno, Ashcroft, and Mukasey.[356]

Notably, although ultimately contrary to Congress's intent to insulate asylum adjudication from political interference (as I argue below and above), the policy and political accountability rationales of *Chevron*[357] favor nonapplicability of agency decisions that construe ambiguous statutes to curtail applicants' rights in credible fear. For, under *Chevron* step two, agencies have significant leeway and may be choosing between multiple reasonable interpretations. If agency decisions on asylum can in fact properly hinge on the political aims or foreign policy goals of a given administration, then the same agency will likely reach a different conclusion under a future administration with different political orientations. Given the current backlog in the immigration courts, merits cases can easily span multiple administrations, and an applicant who seems to lack a "significant possibility" under today's agency interpretation may well prove their case down the line. Thus, DHS arguably should not apply in credible fear *any* DOJ decisions that restrict asylum protections under *Chevron* step two—even if those decisions do clear the bar for reasonableness.

356. *See supra* Section III.A.

357. *See supra* Section I.A (discussing policy and political accountability rationale in *Chevron* decision); *supra* Section I.D. (discussing Supreme Court asylum decisions engaging *Chevron* and its policy and political accountability rationales).

c. Elevated Agency Consideration of the Protection-Oriented Views of the Asylum Office

DOJ should also more carefully consider the views of DHS, rooted in its specialized experience adjudicating asylum claims. One of the more shocking aspects of *Matter of A-B-* is how little respect Attorney General Sessions displayed toward the expertise and interests of a sister agency.

In the lead-up to his decision, the Attorney General declined DHS's request to suspend briefing and to clarify his call of question.[358] He even denied in part DHS's motion for more time to submit briefing, which DHS explained it needed due to the complexity of the issues and the need for intra-agency coordination. In its request, DHS highlighted that it "adjudicates thousands of asylum-related matters (including affirmative asylum applications, credible fear claims, and reasonable fear claims) each year."[359] But this fact was not persuasive to Attorney General Sessions on either the motion or the merits.

In his merits ruling, Sessions not only rejected DHS's view that *Matter of A-R-C-G-* was correctly decided, but also castigated BIA for accepting the earlier positions of DHS in issuing its decision. As explained above, DHS in *A-R-C-G-* agreed with the respondent that a social group based on nationality, gender, and inability to leave a relationship could be cognizable, and the BIA, in turn, agreed with both parties.[360] And because of this, Sessions asserted: "*A-R-C-G-* was wrongly decided and should not have been issued as a precedential decision. DHS conceded almost all of the legal requirements necessary for a victim of private crime to qualify for asylum based on persecution on account of membership in a particular social group."[361] Sessions thus drew a *negative* association between DHS's agreement with the BIA and the respondent, and the validity of the BIA precedent. He appeared to presume that if DHS concedes any issues in cases before the BIA, the BIA should decline to generate precedent in those cases.

I posit that the BIA in *Matter of A-R-C-G-*, and not Attorney General Sessions in *Matter of A-B-*, got it right with respect to inter-agency persuasiveness and roles. DHS views, rooted in its experience adjudicating affirmative asylum cases, should not be dismissed out of hand by DOJ. One important caveat is necessary: It is the expertise of DHS via its *asylum office* that should be persuasive here, not the prosecutorial interests of ICE. Unlike the asylum office, ICE lacks specialization in humanitarian protection claims, instead carrying out broad enforcement of the immigration laws. Similar lack

358. *See supra* Section V.A.

359. Motion on Certification to the Attorney General, *supra* note 270, at 4.

360. *See supra* note 214 and accompanying text.

361. A-B-, 27 I. & N. Dec. 316, 333 (A.G. 2018) (merits decision). "Because of DHS's multiple concessions, the Board performed only a cursory analysis of the three factors required to establish a particular social group." *Id.* at 331.

of specialization also merits de-emphasis of the views of CBP on asylum, despite the present involvement of border enforcement agents in credible fear interviews.

For its part, if DHS as a whole wishes to better persuade DOJ (and as I argue below in Section VI.B.2, eventually the federal courts), it should find ways to elevate the voice of its asylum office in official positions before the BIA and Attorney General. This may be accomplished by, for example, ensuring that DHS counsel appearing before the BIA or Attorney General in precedent-generating cases represent the interests and positions of the asylum office, and not solely the interests of ICE. In *Matter of A-B-*, for example, the ICE Office of Principal Legal Advisor alone appeared before the Attorney General at the merits posture, whereas in *Matter of R-A-* and *Matter of L-R-*, Counsel for USCIS, which houses the asylum office, also appeared.[362] The appearance of counsel for the asylum office should render DHS's views more persuasive.[363]

2. Courts

I provide two recommendations for courts reviewing agency interpretations of asylum law. First, they must enforce the credible fear standard in a way that gives proper credence to their own decisions as Article III courts. Second, they should recalibrate *Chevron* review to favor agency subunits with expertise in humanitarian protection.

a. Enforce the "Significant Possibility" Screening Standard in a Manner That Preserves the Primacy of the Judiciary

Article III courts play an essential role in protecting asylum claimants at the border. In *Grace v. Whitaker*, the United States District Court for the District of Columbia properly concluded that *Matter of A-B-* and the USCIS Guidance violated the law in several respects.[364] The court's speedy issuance of a permanent injunction undoubtedly prevented DHS from refouling many refugees. As mentioned, however, the injunction did not redress the injuries of non-plaintiff asylum seekers removed under unlawful policies. It also left in place a system in which future illegal precedent decisions of DOJ can be quickly implemented in screening interviews, before the federal appeals

362. *See supra* note 212.

363. I recognize that competing interests within DHS make it difficult for DHS to elevate the expertise of the asylum office over the prosecutorial interests of ICE in cases before the BIA and Attorney General, especially since counsel for ICE litigates cases in the immigration courts on behalf of the Department. Toward that end, in my concluding Section, I propose structural changes to the agency treatment of asylum claims. *See infra* Section VI.B.3.

364. *See supra* Section V.C.

courts have their say.[365] For example, in 2019, DHS promptly implemented a restrictive decision of Attorney General William Barr, *Matter of L-E-A-*,[366] which limited asylum claims based on family persecution.[367] DHS applied the decision even in credible fear proceedings[368] despite *L-E-A-*'s inconsistency with decades of federal circuit court caselaw establishing the viability of family-based asylum claims[369] and with prior DOJ precedent.[370]

The district court's in-depth decision displayed a sophisticated understanding of asylum law on several substantive points. Yet, federal court review of credible fear policies might also reach a similar end—and an injunction or temporary restraining order could issue even more quickly—if the courts simply ask: Has restrictive agency precedent been implemented in credible fear screenings before the federal courts of appeals have weighed in? If so, I posit that immediate implementation usurps the proper role of the Article III courts, as I explain in greater detail in Section VI.B.1.a. Although I do not repeat that whole discussion here, I underscore that courts should recognize that in our constitutional order, their decisions, and not the agency's, ultimately control whether an applicant has a "significant possibility" of prevailing on the merits in an asylum claim.[371] This is currently true under *Chevron*, and would be even more so in *Chevron*'s absence, which would entail lesser deference to agency interpretations.

365. Individuals living in the District are placed into removal proceedings in Arlington, Virginia, and the Fourth Circuit thus hears their appeals. *See EOIR Immigration Court Listing*, DEP'T. OF JUSTICE, https://www.justice.gov/eoir/immigration-court-administrative-control-list#Arlington (last updated Feb. 3, 2020).

366. 27 I. & N. Dec. 581 (A.G. 2019).

367. *Id.* at 582.

368. U.S. CITIZENSHIP & IMMIGRATION SERVS., GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF L-E-A-* 7 (2019), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/USCIS_Memorandum_LEA_FINAL.pdf.

369. *See, e.g.*, Hernandez-Avalos v. Lynch, 784 F.3d 944, 949 (4th Cir. 2015) ("[M]embership in a nuclear family qualifies as a protected ground for asylum purposes."); Aldana-Ramos v. Holder, 757 F.3d 9, 15 (1st Cir. 2014) ("It is well established in the law of this circuit that a nuclear family can constitute a particular social group . . . ."), *as amended* Aug. 8, 2014; Ayele v. Holder, 564 F.3d 862, 869 (7th Cir. 2009) ("Our circuit recognizes a family as a cognizable social group . . . ."); Bernal-Rendon v. Gonzales, 419 F.3d 877, 881 (8th Cir. 2005) ("[P]etitioners correctly contend that a nuclear family can constitute a social group. . . ."); Gebremichael v. Immigration & Naturalization Servs., 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family.").

370. *See Matter of L-E-A-*, 27 I. & N. Dec. 40 (B.I.A. 2017). Litigants filed a separate lawsuit challenging application of *L-E-A-* in expedited removal. *See* Complaint, SAP v. Barr, No. 19-03549 (D.D.C. Nov. 22, 2019), https://cliniclegal.org/resources/asylum-and-refugee-law/sap-v-barr-complaint.

371. Or, the courts might ask another, arguably still somewhat simple question: Does the agency decision invoke *Brand X* to restrict refugee protections in a manner that fundamentally reflects a *policy* choice? This, too, could prompt courts to find a violation of the "significant possibility" standard. *See* Section VI.B.1.b.

b. Recalibrate Review to Favor Protection-Orientation and Agency Expertise over Politically Driven Decisionmaking

On a more fundamental level, federal courts reviewing agency interpretations of asylum law should re-evaluate their approach to deference to agency decisionmaking. I propose a shift toward protection-oriented agency divisions, which would better adhere to congressional intent and design.

Although strains of *Chevron*'s democratic accountability rationale have featured prominently in the Court's asylum jurisprudence,[372] the laws of Congress in fact demand non-politicized decisionmaking. As explained above and in Section II.A, Congress crafted the refugee definition and asylum system as an intentional rejection of politicized refugee decisions. Moreover, its design of expedited removal situates border screenings squarely within the protection-oriented and specialized asylum office, not within enforcement-oriented divisions or even with higher-ranking DHS officials.[373]

As mentioned, scholars have persuasively called for non-applicability of *Chevron* to DOJ decisionmaking in asylum law, especially for decisions by the Attorney General.[374] Even if the Court chooses to generally retain *Chevron* in this space (or at all), however, it should recalibrate its inquiry to more easily reject policy-driven decisions. It can and should do so via a modified step two approach, which moves away from viewing asylum law as implicating "sensitive political functions that implicate questions of foreign relations,"[375] and towards elevating the other core justification of *Chevron*: agency expertise in humanitarian protection. The Court should review with particular scrutiny BIA or Attorney General decisions inconsistent with the long-standing practice of the asylum office. And it should also more readily reject as unreasonable DOJ decisions that fail to engage seriously with views of the DHS informed by asylum expertise—as occurred in *Matter of A-B-* itself.

Should the Court wipe *Chevron* off the books and return to the more flexible and less deferential *Skidmore* inquiry, that would be all the more reason to shift deference toward the specialized experience and humanitarian orientation of the asylum office. For, as Justice Gorsuch observed in *Kisor*, even absent *Chevron*, agency expertise will undoubtedly continue to serve as an important consideration for reviewing courts.[376] Politicized asylum decisions of political actors would be far more suspect.

372. *See supra* Section I.E.

373. *See supra* Section II.C.

374. *See supra* Section VI.A.

375. Immigration & Naturalization Servs. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (quoting Immigration & Naturalization Servs. v. Abudu, 485 U.S. 94, 110 (1988)).

376. *See supra* Section I.D.

3. Congress

Although my discussion centers on the proper roles of agencies and the courts under immigration laws as written, I would be remiss not to conclude with a few thoughts for policymakers beyond the confines of current statutory design. The trajectory of domestic violence asylum law and the debacle of *Matter of A-B-*'s hasty implementation countenance deeper structural changes to asylum decisionmaking at the border. Allowing politicized actors to guide protection decisions, especially in an early and procedurally limited screening stage, has proven risky and unwise.

First, and most simply, Congress could end the use of expedited removal against asylum seekers. As the trajectory of *Matter of A-B-* and the actions of the current administration demonstrate, screening procedures at the border are too rife with error and too easily manipulated by political actors to ensure non-*refoulement* of refugees. And, even before *A-B-* and its faulty implementation, a growing chorus of experts, including DHS's own Advisory Committee on family detention, advocated for expedited removal's end or significant curtailment.[377] The simplest way to prevent *refoulement* of refugees at the border is to allow asylum seekers to pursue full merits claims before the asylum office or immigration courts. Although Congress might retain some basic level of screening to weed out fraudulent claims, preliminary assessments of the *merits* of claims, even under a low screening threshold, has proven flawed.[378] Eliminating credible fear screenings in favor of a default merits adjudication would also bring the work of the asylum office back to a sustainable level, thereby reducing the enormous backlog of affirmative asylum claims.[379]

Short of elimination, Congress should act to insulate asylum decisionmaking at the border from political pressure. As an initial matter, it can clarify that the favorable decisions of the federal courts, and not the Attorney General or BIA, bind asylum adjudicators in border screenings. Although I argue that the screening standard viewed in light of our system of government

377. *See, e.g.*, Michele R. Pistone & John J. Hoeffner, *supra* note 182; CATHOLIC LEGAL IMMIGRATION NETWORK, EXPEDITED REMOVAL AND FAMILY DETENTION: DENYING DUE PROCESS 2 (2015), https://cliniclegal.org/file-download/download/public/147https://cliniclegal.org/sites/default/files/cara/Expedited-Removal-Backgrounder.pdf; U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 184; U.S. DEP'T OF HOMELAND SEC., REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 2–7 (2016), https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf . I have previously made this argument as well. Karen Musalo & Eunice Lee, *Seeking a Rational Approach to Regional Refugee Crisis: Lessons from the Summer 2014 "Surge" of Central American Women and Children at the US-Mexico Border*, 5 J. ON MIGRATION & HUM. SEC. 137, 142 (2017).

378. *See supra* notes 182–184 and accompanying text.

379. *See* Meissner et al., *supra* note 160, at 11–13 (discussing the backlog of 320,000 merits asylum cases before the asylum office as of June 2018, due in large part to diversion of asylum officer time to credible fear screenings).

requires this already, the agencies themselves have disagreed and could use explicit constraints.

Congress should also elevate the role of the asylum office in the adjudicative structure. Currently, the views of the asylum office are often not adequately reflected in the positions of the DHS before the DOJ adjudicators and the federal courts. Congress could mandate that, when issuing precedent on asylum law, the BIA or Attorney General consider the views of the asylum office represented separately from ICE's counsel. This, in turn, will allow reviewing federal courts to glean the extent to which BIA or Attorney General decisions are informed by DHS agency experts on asylum. Although in my view the statute already prohibits officers engaged primarily in enforcement duties from conducting credible fear screenings, Congress could also step in with strengthening language to ensure CBP does not encroach upon the proper work of the asylum office.

Additionally, Congress should revisit its jurisdictional bars to federal court review of credible fear adjudications, an agency process demonstrably rife with error. Currently, immigration law provides asylum seekers with little direct recourse for a negative credible fear finding.[380] Although Title 8, section 1252(e)(3) of the United States Code allows systemic challenges within sixty days of a new expedited removal policy, the time, forum, and other limitations of that provision prevent full redress of injuries from unlawful screening decisions.[381]

Lastly, the very delegation of precedent-setting adjudicative authority—and adjudicative authority *at all*—to the DOJ in the immigration and asylum space bears revisiting. A growing chorus of scholars, commentators, and experts have called for an independent Article I immigration court system to house both immigration judges and the BIA.[382] Their discussions have articulated compelling consistency, efficiency, due process, and humanitarian reasons for such reforms;[383] I add only one point here. Policymakers considering creation of Article I immigration courts should contemplate how to incorporate the specialization and protection-orientation of the asylum office into any new system. Absent careful design, this critical voice may again be

380. *See supra* note 140 (explaining jurisdiction-stripping statutes and differing court of appeals' conclusions on asylum seekers' rights under the Suspension Clause in expedited removal); *see also supra* Section II.B.

381. *See* 8 U.S.C. § 1252(e)(3) (2012) (providing action against a policy must be brought in the United States District Court for the District of Columbia within sixty days of implementation of challenged policy and limiting scope of action).

382. *See, e.g.*, Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 15–20 (2008); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 386 (2007); COMM'N ON IMMIGRATION, AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM 6-19 to 6-22 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf.

383. *See supra* note 382.

diminished or lost. For example, if the enforcement arm of the DHS (ICE) continues to advocate for removal of an individual before an Article I generalist immigration judge, and if an Article I generalist immigration appellate board sets applicable precedent, the views of the asylum corps may fail to meaningfully inform resulting precedent. Professor David Koelsch has persuasively argued that on this point, we might look to the structure of Canada's Immigration and Refugee Board, wherein Refugee Protection Officers (in many ways akin to asylum officers) actively participate in formal hearings conducted by the Refugee Board.[384] He has suggested that a new Article I system of immigration adjudication include strengthened powers of asylum officers, including their participation before an Article I immigration court and their independence from the DHS.[385] In light of the myriad of deficiencies we have seen in our current adjudicative structure, we should consider other models.

Finally, it bears mention that even apart from ensuring proper agency decisionmaking, Congress should condemn the Trump Administration's blatant attempts to shut down asylum altogether. While restrictive agency precedent can be a huge hurdle for applicants, policies such as the "Alternative Country Agreements" and "Migration Protection Protocols" issued outside of adjudicative processes may pose an even graver threat.[386] Both the former—applied in credible fear through interim regulations—and the latter—operating outside the credible fear context to force asylum seekers in regular proceedings to wait in Mexico—threaten to prevent meaningful access to asylum for the vast majority of Central American asylum seekers and others at the U.S.-Mexico border.[387] These policies violate the laws of Congress and run afoul of the design of our system of asylum, intended to ensure compliance with U.S. international law obligations toward refugees.

VI. CONCLUSION

The politicized treatment of asylum seekers at the border fundamentally conflicts with the aims and design of our asylum laws. To correct against discriminatory and ideological treatment of claims, Congress in 1980—in the midst of the Cold War—implemented a comprehensive system to shift us away from politically-driven refugee adjudications. In 1996, it built critical protections for asylum seekers into expedited removal, which included formalizing the existence and expertise of a professionalized asylum office. Yet today, a frenzy of executive policies target asylum seekers at our border in

384. David C. Koelsch, *Follow the North Star: Canada as a Model to Increase the Independence, Integrity and Efficiency of the U.S. Immigration Adjudication System*, 25 GEO. IMMIGR. L.J. 763 (2011).

385. *Id.* at 795.

386. *See supra* notes 250–257 and accompanying text.

387. *See supra* notes 250–257 and accompanying text.

overtly politicized and punitive ways—treatment at least as concerning as the refugee decisionmaking of any prior era.[388]

Revised agency practices and recalibrated judicial review can help ensure fair screenings of asylum claims at the border. These must account for inherent limits of rushed border interviews, the screen-*in* nature of the credible fear standard, and the importance of non-discriminatory and humanitarian treatment of claims. In a *Chevron* world, the impermanence of agency decisions at step two of the inquiry favors delay or caution in applying restrictive precedent at the border. In both a *Chevron* and possible post-*Chevron* world, elevating the humanitarian orientation and expertise of the asylum office in judicial review and agency approaches offers better fidelity to statutory design. So too does asserting the primacy of the judiciary in declaring "what the law is" when considering *whose* statutory interpretations control a "significant possibility" screening standard. A combination of these steps will better ensure non-*refoulement* of refugees at the border.

388. *See supra* Part IV.