ACCESS

The Role of Courts in Shaping Access to Asylum

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INTRODUCTION: OBJECTIVES OF ACCESS

The research project "Gatekeepers to International Refugee Law? – The Role of Courts in Shaping Access to Asylum" ACCESS investigates the role of courts in shaping access to asylum. It seeks to understand how courts globally interpret State-developed barriers in light of the Refugee Convention (RC) and other international norms, what socio-legal factors influence asylum access adjudication, and how the emerging jurisprudence shapes international refugee law (IRL) and migration governance.

ACCESS adopts a comparative approach as it relies on data collected from 19 countries, theoretically selected to cover all geographical regions, various legal systems and adjudication models, and different forms of participation in the international refugee law regime.[1]

Given the comparative and socio-legal approach of the project, our goal is to collect data through multiple methods that guarantee comparability, comprehensiveness, and reliability of the data.

The data collection template, along with the explanatory guidance used for the preparation of this National Report, can be found at: Lacchei, Alice; Lambertini, Sara Mariella; McDonough, Paul; Moraru, Madalina; Reyhani, Adel-Naim; Scissa, Chiara (2026) National Report ACCESS Project Template. DOI: 10.6092/unibo/amsacta/8984

In addition, the summaries of the judicial decisions analysed in Part II of this National Report and cited throughout this document can be found at: Lacchei, Alice; Lambertini Martinez, Sara Mariella; McDonough, Paul; Moraru, Madalina; Reyhani, Adel-Naim; Scissa, Chiara; Jesudoss, Lorett Mary (2026) ACCESS Mid-Term Dataset: The Role of Courts in Shaping Access to Asylum. University of Bologna. DOI 10.6092/unibo/amsacta/8962. [Dataset]

DEFINING TERMS

'**Asylum**' denotes the protection a state grants on its territory to non-citizens who seek it. It includes a legal status that protects against refoulement and provides a right to stay. In several jurisdictions, e.g. those that do not have domestic asylum legislation, this status might not be labelled 'asylum'. The research nevertheless includes such equivalent protection under the term 'asylum'. Similarly, if a national system that includes an asylum status provides additional protection statuses that include a set of rights closely similar to those the 1951 Convention provides for refugees lawfully staying, the research includes those statuses under 'asylum'.

'**Accessing asylum**' describes using legal and practical avenues to move towards the territory of potential host states, or to enter procedures and other arrangements for obtaining such status (labelled as asylum or not) implemented by a state or on its behalf. Territorial asylum processing (sometimes referred to as refugee status determination or RSD) itself or equivalent practices, however, are not studied here.

'**Barriers to accessing asylum**' refers to measures, arrangements, approaches, implementation practices, or structures that impede access to asylum. They can be implemented by state actors and others (if tolerated by the state); be of a practical or legal character; incorporate socioeconomic and cultural elements; and pertain to administrative or judicial spheres. Barriers implemented after the formal start of territorial asylum processing can be considered, if the processing is conducted as a sham or pretence rather than allowing effective access to asylum.

'**Pushbacks**' denote the removal or non-admittance of individuals trying to access asylum, without a substantive assessment of risks or potential rights violations. They can occur both on land and sea, including on international waters.

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[1] Australia; Kenya, South Africa, Tunisia (Africa); Austria, Greece, Italy, Poland, Spain (Europe); India, Malaysia, Pakistan, Türkiye (Asia); Argentina, Brazil, Chile, Ecuador, Mexico (Latin America), USA.

‘**Pullbacks**’ are the dragging back of individuals approaching a destination state to the territory of a state from which they had departed without a substantive assessment of risks or potential rights violations. Such practices are often implemented in cooperation between two or more countries. While typically practiced at sea, such as in the territorial waters of the state of departure, pullbacks can also occur on land.

‘**Walls and fences**’ include physical barriers that prevent access to territory at or near borders, irrespective of the specificities of the construction or the materials used.

‘**Detention**’ is the imprisonment or other limitations of the right to liberty and security of person of individuals, territorially or extraterritorially, in connection with their asylum accessing.

‘**Externalization of asylum processing**’ denotes outsourcing procedures and transferring individuals to other jurisdictions to assess protection claims. Under such a practice, for example, potential destination states disallow asylum procedures on their territory, dismiss the corresponding applications, and deport individuals to cooperating countries. Externalized asylum processes can be based on formal and informal agreements between states.

‘**Procedural barriers**’ refers to any administrative practice or arrangement which, after individuals (attempt to) claim asylum, impedes the formalization of the application or the commencing of a procedure for obtaining asylum. This barrier can, for example, take the form of sham processes or (fast-track) processes based on the safe third country or safe country of origin concept, or a lack of mechanisms for ensuring appointments at registration offices.

‘**Judicial or quasi-judicial body**’ is the body that reviews/assesses the legality of the decisions, actions, or omissions of state authorities. This term encompasses the wide range of institutions adjudicating asylum barriers, including government/executive bodies, UNHCR, etc.

‘**First instance judicial or quasi-judicial body**’ is a court, tribunal, or other quasi-judicial body that hears appeals against administrative or executive decisions. ‘Second instance judicial or quasi-judicial body’ is a court or tribunal or other body that hears appeals against decisions made by a first instance judicial or quasi-judicial body. ‘Third instance judicial or quasi-judicial body’ is a court or tribunal (possibly a constitutional court) or another body that hears onward appeals, i.e., appeals against decisions already made by a judicial or quasi-judicial body of at least a second instance. In some jurisdictions there might be further levels of appeal.

‘**Legal system**’ refers to deeply rooted, historically conditioned attitudes about law’s nature and role, the legal system’s organization and functioning, and how the law is developed, applied, and interpreted (Merryman, 1985). The most common legal systems are the common law, civil law, Islamic, indigenous and socialist legal traditions (idem).

‘**Asylum access adjudication**’ refers to judicial examination and review by courts or quasi-judicial bodies of administrative decisions made by executive or immigration authorities regarding asylum.

‘**Socio-legal factors**’ refer to macro, meso, and micro factors influencing asylum access adjudication in the selected jurisdictions. They can originate at the macro level (state), at the meso level (judicial or quasi-judicial body), and at the micro level (individual). For example, adjudication may be influenced by the level of independence of the judiciary (macro factor) or the specialization of the asylum adjudication system (e.g., specialized courts); or availability of judicial or quasi-judicial bodies resources such as time, funds, human resources (meso factors); or individual characteristics of the actors involved, such as background or gender of adjudicators (micro factors).

‘**Judicialization of politics**’ refers to the increasing reliance on courts and judicial means for addressing core moral, political, and public policy questions (Hirschl 2013). For an overview of the meanings of judicialization, please refer to Hamlin and Sala (2018), who trace various forms in which judicialization of politics can occur (e.g., expanding the jurisdiction of courts, judicial activism, or due to the large number of cases decided by courts).

'**Forced migration**' refers to 'a migratory movement which, although the drivers can be diverse, involves force, compulsion, or coercion' (IOM, 2019:77). Although it is not an international legal concept and the use of the term is debated because of the controversial dichotomy of voluntary/forced movements, in this report we refer to forced migration including the movement of refugees and asylum seekers, as well as other displaced persons (including those displaced by disasters or victims of human trafficking) who will not attempt to lodge an asylum application. When referring to 'other displaced persons', we mean those forced migrants who are not registered as asylum seekers or refugees, etc., despite being present in the country.

1. **Functioning:** What is the barrier's specific functioning? How does it prevent individuals from accessing asylum?

2. **Time:** What is the implementation period of the barrier? Is it still in use? Is there a time frame for its planned termination?

3. **Place:** Where is the barrier implemented?

4. **Actors:** Who are the key institutional and other actors implementing the barrier? Are there relevant actors from other jurisdictions or international actors?

5. **Interaction:** How does the barrier interact with other barriers and the country's asylum system?

6. **Development:** What has been the historical and political context for introducing the barrier, and how have its implementation and its character developed over time? (Please consider e.g. corruption, economic or human resources available to implement the barrier, resistance or support by local actors - officials or local community)

7. **Rationale:** What are the stated purposes (e.g., in legislative preambles, government/executive, or judicial statements) the barrier is designed to serve?

8. **Legal Status:** What legal status does the national legal framework provide to individuals prevented by this barrier from accessing asylum? For example, do they fall under a specific (protected or unprotected) category within national law, such as asylum seekers or refugees before formal recognition, or are they treated under the general framework for non-citizens?

9. **Specific Impact**: What is the impact of the barrier on specific groups, such as children, women, LGBTQ+ individuals, or people with disabilities? How does it differ from the barrier's general impact?

10. **Reach:** How many individuals have been affected by this barrier since 2010, both in absolute numbers and relative to the number of procedures for determining protection status in the same period? Has the barrier contributed to less movement of displaced persons towards the country? Please provide an informed estimate if reliable statistics or studies are unavailable.

11. **Source:** What is the legal basis or source of the barrier? Is it grounded in or approved by domestic, international, or supranational law (even if its legality might be contested)?

12. **Justification:** What justifications have the government/executive branch provided for the barrier? Are there official statements or documents that outline these justifications?

13. **Domestic and International Reactions:** What have been the reactions or interventions from domestic actors, international bodies, or other countries?

14. **Externalization:** How does the barrier outsource migration control functions to actors outside the jurisdiction?

15. **Technology:** How does the barrier draw on technological infrastructure or tools to fulfil its functioning?

16. **Other:** Any further information considered crucial for understanding this barrier to accessing asylum and its relevance.

PART 1: BARRIERS TO ACCESSING ASYLUM

I. IDENTIFYING BARRIERS

This section identifies the barriers to accessing asylum relevant to the USA between 2010 and 2024.

A. Barriers of general relevance

Pushbacks: ☒

Walls and fences: ☒

Detention: ☒

Externalization of asylum processing: ☒

Procedural barriers: ☒

B. Barriers of specific relevance to this jurisdiction

Barrier 1: Narrowing the refugee definition

Definition: several recent US laws and regulations, supported at times by judicial decisions, risk excluding refugees from the asylum process. Examples include requiring a more restrictive definition of particular social group than previously, and expanding the definitions of criminal offenses that lead to exclusion.

Barrier 2: Pretermission

Definition: In 2025-2026, DHS attorneys have increasingly requested, and obtained, immigration court orders pretermitting (administratively closing) a case on technical or procedural grounds before reaching its merits.

Barrier 3: Fees to continue an asylum application

Definition: pursuant to legislation enacted in March 2025, applicants must pay a fee to apply for asylum, and a further annual fee to keep their application open until it is resolved.

Barrier 4: Five year entry ban following removal

Definition: a person ordered removed following expedited or ordinary removal proceedings is barred for five years from entering the US. A second such order incurs a 20 year bar.

Barrier (TBD): Asylum ban

Definition: In January 2025 the President proclaimed that migration across the southwestern land border (Mexico/US) constituted an invasion, and issued an executive order barring entry to (or summarily returning) anyone without residence or visa documents, with no opportunity to request protection.

II. UNDERSTANDING BARRIERS

A. Barriers of general relevance

Preliminary note

US asylum law is largely a matter of federal immigration law,[2] as implemented via administrative (executive) rules under the ambit of Congressional legislation. Asylum per se is granted at executive discretion, but

[2] The governing legislation is 8 U.S.C. (United States Code) sections 1151-1382. See https://www.law.cornell.edu/uscode/text/8/chapter-12/subchapter-II. This is the most accessible online version of the US Code that I have found. All U.S.C. references in this report can be checked there.

withholding of removal (non-refoulement) is legislatively mandated. US immigration and asylum courts operate under the Executive Office of Immigration Review, within the Department of Justice (DoJ), with limited oversight by the US Circuit Courts. However, immigration rules must comply with general administrative law, in the form of the Administrative Procedures Act, and other federal laws. As a result, most of the major barriers to asylum enacted in the 21st century have been challenged in federal District Courts, rather than via immigration courts. Furthermore, most of the federal cases concern District Court injunctions vacating or blocking application of a particular rule, usually with nationwide effect (there are 94 District Courts, supervised by 13 Circuit Courts). In June 2025, the Supreme Court ruled that as a general matter, District Courts lack the jurisdiction to issue nationwide injunctions.[3]

The legislation that governs asylum and immigration in the US is section 8 of the US Code (USC). Legislation is detailed and supplemented by the Code of Federal Regulations (CFR). Regulations (and other federal government acts) are published in the Federal Register, aggregated annually in the CFR. Asylum is governed by Title 8, Aliens and Nationality.

Pushbacks (sea)

Summary: Since 1981 US Coast Guard patrols have intercepted and returned private, often unseaworthy boats presumed to be carrying migrants to the US, by agreement with the (presumed) flag states of those boats. A 1993 US Supreme Court judgment held that neither RC article 33 nor the equivalent legislative provision (INA sec 243(h)(1), now 8 U.S.C. sec 1253(h)) has extraterritorial effect. Therefore, the president could, by executive order, instruct the US Coast Guard (USCG) to intercept and return to Haiti "illegally transport[ed] passengers" in transit from there to the USA. This decision is understood as affirming that the US's non-refoulement obligations end at its physical borders (but include territorial waters). Because maritime routes from nearby countries to the USA are closely patrolled by USCG and other security forces, their significance as migration routes is diminished.

1. *Functioning:* persons encountered at sea by the US Coast Guard (USCG) outside US territorial waters who appear to be intending to enter the US irregularly are summarily returned to their country of (presumed) departure.

2. *Time:* Since October 1981, ongoing. The practice of summarily returning migrants to Haiti dated to a 1981 agreement between the two governments,[4] and subsequent executive orders authorising forced repatriation.[5] The 1992 executive order eliminated the possibility of a removal hearing. This policy remains in effect.

3. *Place:* In principle, the executive can order pushbacks at sea anywhere outside US territorial waters.[6] In practice, this policy predominantly affects migration routes across the Caribbean Sea towards Florida.

4. *Actors:* USCG is the main implementor of the pushbacks at sea policy.[7] Until 1992, officials of the Immigration and Naturalization Service (INS) (subsumed in 2003 into DHS) interviewed migrants on board USCG vessels while in international waters. When the USCG brought those persons who raised a fear of refoulement to the US, INS assumed responsibility for their removal proceedings.

[3] Trump v CASA, Inc. (No. 24A884), 27 June 2025 (observing that plaintiffs still can challenge a government rule as improperly enacted or ultra vires, thus requiring nullification, or seek remedies on behalf of a class of similarly situated persons). See https://www.supremecourt.gov/opinions/24pdf/24a884_8n59.pdf.

[4] Agreement Relating to Establishment of a Cooperative Program of Interdiction and Selective Return of Certain Haitian Migrants and Vessels Involved in Illegal Transport of Persons Coming from Haiti, 23 September 1981, U.S.-Haiti, 33 UST 3559.

[5] Executive Order No. 12324, 3 CFR 181 (1981–1983 Comp.), Executive Order No. 12807, 57 Fed. Reg. 21133 (1992).

[6] Presidential executive order 12807 "Interdiction of Illegal Aliens", 57 FR 23133 (1 June 1992), section 2(d), https://www.federalregister.gov/executive-order/12807.

[7] Gary W. Palmer, "Guarding the Coast: Alien Migrant Interdiction Operations at Sea", in Jack Grunawalt & Michael N. Schmitt (eds), *The Law of Military Operations: Liber Amicorum Jack Grunawalt* (Naval War College Press, 1998) 157-180 at 158, https://archive.org/details/lawofmilitaryope72grun/page/n9/mode/2up ("the task of enforcing U.S. immigration laws at sea rests almost exclusively with the Coast Guard").

5. *Interaction:* Because of the clear territorial distinction, there is essentially no interaction between this barrier and the US asylum/withholding of removal system.

6. *Development:* a general framework for interdiction and return was developed in the 1980s and 1990s, and applied on a state-by-state basis based on bilateral agreements to allow inspections of vessels at sea, and to accept persons returned. Its main application has been in relation to migration from Haiti.

Interception and return were a response to increasing migration by sea from Haiti towards the southeast US. A 23 September 1981 agreement authorised the USCG to stop and board private vessels that appeared to be "involved in the irregular carriage of passengers outbound from Haiti", accompanied by a return agreement and Haiti's promise that returnees would not be prosecuted for illegal departure.[8] A US presidential proclamation and executive order then instructed the USCG to begin intercepting and returning boats carrying migrants toward the US (see Source, below).

After the 1991military coup that deposed the elected Aristide government, forced migration to the US increased and "soon overwhelmed the existing operational posture of the Coast Guard and the ability of the INS to screen the migrants for potential refugee status."[9] In response, the government issued an updated executive order that allows the USCG to return vessels aand passengers to third countries as well as the state of embarkation, and to leave to the AG's discretion whether to "decide that a person who is a refugee will not be returned without his consent", instead of requiring non-refoulement as the 1981 order had.[10]

This policy change was challenged in court. The Supreme Court ultimately affirmed it as within the discretionary authority of the government to operate. The Court ruled, in *Sale v. Haitian Centers Council*, Inc (1993) that neither the legislative non-refoulement provision nor article 33 of the Refugee Convention binds the US government beyond the territory of the US. Since the *Sale* decision, shipboard screening for refoulement fears has at times been reinstituted by the Attorney General's discretion, "as an act of goodwill, rather than as a matter of legal obligation, following Haiti's threat to otherwise suspend the readmission agreement. Instead of providing access to its territory, the US has concluded additional agreements with several Caribbean island States for the processing and resettlement of 'screened-in' claimants elsewhere."[11]

There were several periods of significant migration by sea from Cuba to the US in the 1980s and 1990s, but more limited use of pushbacks. A combination of political factors and diplomatic efforts resulted in a May 1995 agreement by which the US diplomatic mission in Havana processes refugee claims and visa applications for 20,000 Cubans per year. The agreement appears to afford intercepted migrants from Cuba

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[8] See Gary W. Palmer, "Guarding the Coast: Alien Migrant Interdiction Operations at Sea", in Jack Grunawalt & Michael N. Schmitt (eds), *The Law of Military Operations: Liber Amicorum Jack Grunawalt* (Naval War College Press, 1998) 157-180 at 163, https://archive.org/details/lawofmilitaryope72grun/page/n9/mode/2up.

[9] Gary W. Palmer, "Guarding the Coast: Alien Migrant Interdiction Operations at Sea", in Jack Grunawalt & Michael N. Schmitt (eds), *The Law of Military Operations: Liber Amicorum Jack Grunawalt* (Naval War College Press, 1998) 157-180 at 165, https://archive.org/details/lawofmilitaryope72grun/page/n9/mode/2up.

[10] Compare section 2(c)(3) of presidential executive order 12324 "Interdiction of Illegal Aliens", 46 FR 48109 (1 October 1981) (https://www.federalregister.gov/executive-order/12324) ("To return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that no person who is a refugee will be returned without his consent.") with presidential executive order 12807 "Interdiction of Illegal Aliens", 57 FR 23133 (1 June 1992) (https://www.federalregister.gov/executive-order/12807) ("To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent").

[11] Violeta Moreno-Lax, "Protection at Sea and the Denial of Asylum", in Cathryn Costello et al. (eds), *The Oxford Handbook of International Refugee Law* (OUP, 2021), 483-501 at 492-493 (footnotes 106-108 omitted from quote).

the opportunity to have a non-refoulement claim heard by INS.[12] Since the 1990s the USCG has continued to carry out patrol and interdiction missions depending on assessments of migration flows, but since 1993 the basic legal and policy framework has remained essentially unchanged.

7. *Rationale:* The main objective stated in 1981 was to stop irregular migration by sea into the southeastern USA. The presidential proclamation announcing the initiation of international cooperation to intercept and return migrants at sea cited "continuing illegal migration by sea of large numbers … into the southeastern United States [that] have severely strained the law enforcement resources of the [INS] and have threatened the welfare and safety of communities in that region."[13] The preamble to the subsequent 1981 executive order stated as its main purpose "to carry out the suspension and interdiction" of the entry by sea of "migrants … without necessary entry documents".[14] The 1992 order reaffirmed this as an ongoing concern and the main purpose of the orders.[15]

8. *Legal Status:* until 1992, persons who expressed a fear of life or freedom on a Convention ground, or of torture, could be disembarked in the US for removal hearings in immigration court. Thereafter, persons interdicted attempting to immigrate irregularly to the USA by boat have no legal status under US law, and (in principle) are returned to the jurisdiction the boat originated from.

9. *Specific Impact:* as with many barriers to asylum in the US, the USCG practice of pushbacks at sea is essentially indiscriminate, but has disparate racial impacts, as well as disproportionate effects on particularly vulnerable persons. The majority of persons interdicted at sea in route to the US are from countries where most of the population is of African or mixed ethnic origin, and unlike persons from Cuba, are summarily returned almost without exception. And, similarly to other pushback barriers, there are disproportionate risks to particularly vulnerable persons; however unlike most land pushbacks from the US, the sea pushbacks implemented by the USCG entail transfer of responsibility by agreement to the governments of the states the boats departed from.

It appears that the USCG makes some exceptions to the pushback policy for particularly vulnerable persons, as for example in FY 2023, the USCG "screened 257 unaccompanied children for human trafficking," and referred them to partner agencies.[16]

10. *Reach:* from 1982 to 2002 the USCG intercepted 185,801 persons, most from Haiti, Cuba or the Dominican Republic.[17] From 1981 to 1992 the USCG intercepted and returned about 25,000 persons to Haiti.[18] In the 12 months preceding the 1992 executive order, the USCG intercepted 37,618 persons coming from Haiti. Following Operation Able Manner, which commenced in June 1993, interdictions had stabilised at about 150-300 per month by 1998.[19]

[12] Gary W. Palmer, "Guarding the Coast: Alien Migrant Interdiction Operations at Sea", in Jack Grunawalt & Michael N. Schmitt (eds), *The Law of Military Operations: Liber Amicorum Jack Grunawalt* (Naval War College Press, 1998) 157-180 at 169, https://archive.org/details/lawofmilitaryope72grun/page/n9/mode/2up.

[13] Presidential proclamation 4865 "High seas interdiction of illegal aliens", 46 FR 48107, 3 CFR, 1981 Comp., p. 50, 29 September 1981, https://www.archives.gov/federal-register/codification/proclamations/04865.html.

[14] Presidential executive order 12324 "Interdiction of Illegal Aliens", preamble, 46 FR 48109 (1 October 1981), https://www.federalregister.gov/executive-order/12324.

[15] Presidential executive order 12807 "Interdiction of Illegal Aliens", 57 FR 23133 (1 June 1992), recital (4), https://www.federalregister.gov/executive-order/12807.

[16] https://www.usni.org/magazines/proceedings/2025/march/us-coast-guard-year-review.

[17] Andrew Brouwer and Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide", 21 Refuge 4 (2003), 6-24 at 12.

[18] Gary W. Palmer, "Guarding the Coast: Alien Migrant Interdiction Operations at Sea", in Jack Grunawalt & Michael N. Schmitt (eds), *The Law of Military Operations: Liber Amicorum Jack Grunawalt* (Naval War College Press, 1998) 157-180 at 165, https://archive.org/details/lawofmilitaryope72grun/page/n9/mode/2up.

[19] Gary W. Palmer, "Guarding the Coast: Alien Migrant Interdiction Operations at Sea", in Jack Grunawalt & Michael N. Schmitt (eds), *The Law of Military Operations: Liber Amicorum Jack Grunawalt* (Naval War College Press, 1998) 157-180 at 167, https://archive.org/details/lawofmilitaryope72grun/page/n9/mode/2up.

After the 1995 return related agreement with Cuba, USCG interceptions decreased, and had stabilised by 1998 at about 30 to 50 persons per month from Cuba.[20] Increased patrols of the Mona Passage between the Dominican Republic and Puerto Rico (a self-governing Commonwealth of the US) led to the interception and return of several thousand persons per year to the Dominican Republic.[21]

Migration towards the southeast US increased again in the 21st century. By 2009, the USCG had "interdicted over 350,000 migrants at sea" since 1980, with considerable variability year to year.[22] In the early 2020s, the USCG reported significant increases in migration by sea from Haiti and Cuba, with over 12,000 interdictions in FY 2022, and the increase apparently continuing into 2023.[23] The USCG reportedly interdicted 857 persons coming from Haiti in FY 2024, and 412 in the first half of FY 2025.[24]

11. *Source:* the policy of interdiction and return on the high seas was established by a 29 September 1981 presidential proclamation suspending the entry and ordering the interdiction "of undocumented aliens from the high seas",[25] and an accompanying executive order "Interdiction of Illegal Aliens" issued in October 1981.[26] The latter was replaced in June 1992 by a modified order of the same name.[27] The legislative basis for both orders is 8 USC 1182(f) (President may suspend entry if entry "would be detrimental to the interests of the United States") and 1185(a)(1) (President's general authority to regulate entry and exit of non-citizens).

As is reflected in the 1981 executive order, the law of the sea limits USCG's authority to interdict and detain in international waters, but allows it by agreement with the vessel's flag state. Similarly, disembarkation is by return agreement with the state of embarkation.[28] The 1992 executive order removed the non-refoulement protection of the 1981 order, interpreting the federal provision implementing article 33 of the Refugee Convention as not having extraterritorial effect.[29] The Supreme Court agreed with this interpretation in 1993.[30] In 1995 the 11th Circuit Court of Appeals further ruled that persons taken to military facilities leased abroad, such as the US Navy base at Guantanamo Bay, Cuba, were not "within the United States" so as to engage article 33 or US immigration law, or due process rights.[31]

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[20] Gary W. Palmer, "Guarding the Coast: Alien Migrant Interdiction Operations at Sea", in Jack Grunawalt & Michael N. Schmitt (eds), *The Law of Military Operations: Liber Amicorum Jack Grunawalt* (Naval War College Press, 1998) 157-180 at 169, https://archive.org/details/lawofmilitaryope72grun/page/n9/mode/2up.
[21] Gary W. Palmer, "Guarding the Coast: Alien Migrant Interdiction Operations at Sea", in Jack Grunawalt & Michael N. Schmitt (eds), *The Law of Military Operations: Liber Amicorum Jack Grunawalt* (Naval War College Press, 1998) 157-180 at 170, https://archive.org/details/lawofmilitaryope72grun/page/n9/mode/2up (3,375 persons in 1995, and 6,273 in FY 1996).
[22] https://www.dhs.gov/news/2009/03/18/testimony-us-coast-guard-drug-and-migrant-interdiction.
[23] https://www.usni.org/magazines/proceedings/2023/february/coast-guard-migrant-interdiction-operations-are-state-emergency (attributing the increases to "[p]erceived changes in Title 42 migration policy combined with soaring price inflation in Haitian and Cuban economies").
[24] https://www.miamiherald.com/news/nation-world/world/americas/haiti/article303273646.html.
[25] Presidential proclamation 4865 "High seas interdiction of illegal aliens", 46 FR 48107, 3 CFR, 1981 Comp., p. 50, 29 September 1981, https://www.archives.gov/federal-register/codification/proclamations/04865.html.
[26] Presidential executive order 12324 "Interdiction of Illegal Aliens", 46 FR 48109 (1 October 1981), https://www.federalregister.gov/executive-order/12324.
[27] Presidential executive order 12807 "Interdiction of Illegal Aliens", 57 FR 23133 (1 June 1992), https://www.federalregister.gov/executive-order/12807.
[28] Presidential executive order 12324 "Interdiction of Illegal Aliens", 46 FR 48109 (1 October 1981), section 2(b), https://www.federalregister.gov/executive-order/12324.
[29] Presidential executive order 12807 "Interdiction of Illegal Aliens", 57 FR 23133 (1 June 1992), recital (2), https://www.federalregister.gov/executive-order/12807 (the US's "international legal obligations" under Article 33 of the Refugee Convention (via the Protocol) "do not extend to persons located outside the territory of the United States").
[30] Sale v. Haitian Centers Council, Inc, 509 US 155 (1993).
[31] Gary W. Palmer, "Guarding the Coast: Alien Migrant Interdiction Operations at Sea", in Jack Grunawalt & Michael N. Schmitt (eds), *The Law of Military Operations: Liber Amicorum Jack Grunawalt* (Naval War College Press, 1998) 157-180 at 170, https://archive.org/details/lawofmilitaryope72grun/page/n9/mode/2up (citing Haitian Refugee Center, Inc. v. Christopher, 43 F. 3d 1431 (11th Cir., 1995)).

12. *Justification:* the main justification for the interdiction and return policy is as a deterrence measure to disincentivise the undertaking of dangerous and potentially deadly sea journeys to the US. Irregular immigration is also generally portrayed and publicly understood as a threat in its own right.

In particular, the government justified repatriations as necessary in light of insufficient capacity aboard USCG vessels,[32] to avoid creating a pull factor by bringing persons 'screened out' to the US pending removal. Similarly, in the 1992 order it justified ending the practice of screening for refoulement fears of as reducing the incentives to undertake the dangerous journey to the US, and thereby saving lives.[33]

13. *Domestic and International Reactions:* The Supreme Court's ruling that the US's non-refoulement obligations under legislation and especially the Refugee Convention lack extraterritorial effect was controversial. UNHCR and scholars have criticised it as erroneously narrowing the scope of article 33, and contrary to the jurisprudence of the IACHR which has found article 33 applicable on the high seas.[34]

14. *Externalization:* there is no externalisation of asylum access per se, because the pushbacks operate under what amount to return agreements with the state the persons concerned are presumed to have come from. However, some of the agreements contain undertakings from the receiving state to accept the returnees without administering punishment or mistreatment.

15. *Technology:* USCG deploys a range of modern surveillance, rescue and combat ships, supported by satellite observation and communications. This renders it essentially impossible for unauthorised boats to reach US borders across open seas without detection and interdiction.

16. *Other:* this barrier remains relevant in the 2020s largely because of its deterrent effect. Given the size and sophistication of maritime patrols, few persons attempt to cross international waters by boat to travel irregularly to the US. Migration routes from the Caribbean to the US now run westward to Mexico, then overland north to the Mexico/US border.

Pushbacks (land) – metering

Summary: US Customs and Border Protection (CBP) developed the practice of simply turning away persons arriving without immigration eligibility (visa, etc), either refusing to hear claims for asylum or asserting that the border post had no further capacity and the would-be applicants should return another day. In 2023, CBP deployed a phone app, "CBP One" for applicants to make appointments to present their asylum claims at the border, and officers would turn away applicants who did not have appointments. From May 2023, under the DHS rule "Circumvention of Lawful Pathways", the use of CBP One to make asylum appointments became mandatory. Both versions of metering were challenged in federal court. In June 2024 the government promulgated a new interim final rule, "Securing the Border" that imposed a near-total bar on asylum applications if daily border arrivals exceeded 2,500, effective until fewer than 1,500 persons had arrived per day for 7 consecutive days (28 consecutive days in the final rule enacted in September 2024). In October 2024 the Circuit Court for the 9th Circuit ruled the initial CBP metering practice unlawful.[35] Litigation relating to CBP One was stayed in November 2024 without yet having reached the merits of the case. In January 2025, the government removed the asylum appointments function from the CBP One app by executive order of the President.

1. *Functioning:* CBP officers stationed at border posts met arriving non-citizens just before they reached the international border, and refused them access to the entry queues without a visa or other authorisation to

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[32] Violeta Moreno-Lax, "Protection at Sea and the Denial of Asylum", in Cathryn Costello et al. (eds), *The Oxford Handbook of International Refugee Law* (OUP, 2021), 483-501 at 492.
[33] Violeta Moreno-Lax, "Protection at Sea and the Denial of Asylum", in Cathryn Costello et al. (eds), *The Oxford Handbook of International Refugee Law* (OUP, 2021), 483-501 at 492.
[34] Andrew Brouwer and Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide", 21 Refuge 4 (2003), 6-24 at 16.
[35] *Al Otro Lado v Mayorkas* (9th Cir., 23 October 2024).

enter or, later, a CBP One appointment. (CBP One was widely criticised for being unreliable or unavailable, and appointments being very difficult to secure.) Although the implementing regulations provide for exceptions for persons unable to access CBP One (e.g. age, literacy, internet access), they seem to have been applied rarely, if ever. Persons arriving without a CBP One appointment were simply turned back to Mexico, thus did not have the opportunity to raise non-refoulement in a removal proceeding.

2. *Time:* CBP officers began denying entry to US territory or opportunity to request asylum in 2016. The practice was approved by DHS in November 2016 and formalised in an Apri 2018 CPB guidance memorandum.[36] CPB ended the practice in November 2021, via new guidance that instructed CBP officers not to turn away persons arriving at a border point when it is open.[37] De facto metering reportedly resumed in May 2023, when a new DHS/DoJ rule required the use of CBP One for appointments, and CBP officers at the border reportedly refused inspection or entry to noncitizens without appointments or documents authorising entry into the USA.[38] Under the rule "Securing the Border", from 5 June 2024 asylum applications were no longer accepted other than by CBP One appointment, or in exceptional cases that mostly relate to particular vulnerabilities or life threatening emergencies. CBP One's asylum appointment function was removed in January 2025.

3. *Place:* metering operated at border posts along the USA's land borders, predominantly the border with Mexico.

4. *Actors:* CBP, part of the Department of Homeland Security, was the main institutional actor on the US side. Claimants who challenged the metering policy in court also raised the participation of Mexican border and police authorities, who reportedly at times removed persons waiting to approach the US border, or having been denied access to that border.

5. *Interaction:* Metering restricts the only available lawful channel by which to approach the US border without entry documents, viz a border crossing point. Informal arrival by sea is effectively impossible, and persons found to have crossed into the USA "uninspected" – i.e. not through a CBP-operated crossing point – are barred from applying for asylum (see **, below).

6. *Development:* during 2016, CBP officers at particular border points reportedly turned away arriving noncitizens without allowing an opportunity to ask for asylum, citing a lack of capacity. Metering became DHS policy in November 2016, and was formalised in DHS guidance to its officers in April 2018.[39] Following litigation, CPB rescinded its metering policy in November 2021. The May 2023 joint DHS/DoJ final rule "Circumvention of Lawful Pathways", inter alia, required appointments via CBP One to request asylum at the border.[40] CBP officers reportedly continued to refuse access or inspection to noncitizens without documents or a CBP One appointment.

In June 2024, a more formal form of metering was introduced. A presidential proclamation,[41] supported by an interim rule "Securing the Border",[42] defined emergency circumstances (7 consecutive days of more than 2,500 daily border encounters with persons lacking entry/residence permission) beyond which asylum is unavailable, and withholding of removal further restricted (from "reasonable possibility" to "reasonable

[36] See *Al Otro Lado v Mayorkas* (9th Cir., 23 October 2024), 10.
[37] See *Al Otro Lado v Mayorkas* (9th Cir., 23 October 2024), 15.
[38] See *Al Otro Lado et al. v Mayorkas* (District Court for the Southern District of California, 23-cv-1367-AGS-BLM, 30 September 2024), Order Granting in Part Defendants' Motion to Dismiss, 18 (plaintiffs alleged that "across several ports of entry, different officers (presumably under different supervisors) all started turning away asylum applicants at around the same time and for the same reason: lack of a CBP One appointment." The court found that the policy in question – the "CBP One Turnback Policy", although unwritten, could plausibly have existed, and thus be subject to challenge under the APA, section 706(2)).
[39] A*l Otro Lado, Inc. v Mayorkas* (District Court for the Southern District of California, 17-cv-02366-BAS-KSC, 2 September 2021), at 3-7. (Guidance was updated in 2019 and 2020.)
[40] CBP One was made available to book asylum appointments in January 2023, and became mandatory (with limited exceptions) in May 2023.
[41] https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/.
[42] https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border.

probability" threshold).[43] A final rule followed in September 2024, increasing from 7 to 28 the number of consecutive days of no more than 1,500 encounters required for these added restrictions to cease.[44] In May 2025 a federal District Court vacated key aspects of the rule: the limitation on asylum eligibility (i.e. the metering specifically for asylum access) as unlawful per se, and two of its procedural changes as arbitrary and capricious according to the APA (requiring a proactive manifestation of fear, i.e. CBP officers not required to ask, and reducing the minimum time window prior for consultation prior to the credible fear interview from 24 to 4 hours), leaving in place the "reasonable probability" fear screening threshold for withholding of removal.[45]

CBP announced on January 20, 2025 that the function for scheduling asylum appointments had been removed from CBP One.[46] Already pending appointments were cancelled.[47]

7. *Rationale:* the June 2024 interim final rule "Securing the Border" presented a detailed rationale for the most recent version of the metering policy. The main rationale for the strict numerical limit on asylum applications and consequent border closure was the lack of sufficient capacity on the part of CBP to carry out the necessary expedited removal procedures, and on the part of USCIS to conduct credible fear screenings, to avoid paroling applicants into the US while their cases were pending. (See Justification below for further details.)

8. *Legal Status:* none. In general, persons barred from applying for asylum can apply for withholding of removal. However, in the case of metering the persons concerned were summarily refused immigration inspection, so had no opportunity to ask for withholding. Persons who cross the border informally will generally be placed in expedited removal proceedings, where in principle they can raise non-refoulement leading to withholding, but for procedural reasons this is very difficult in practice.

9. *Specific Impact:* this barrier results in forced migrants being required to, at best, wait indefinitely near the border, often without formal accommodation or legal status. This has severe impacts on vulnerable persons, including crime, trafficking, exploitation, etc.

Indigenous persons are disproportionately impacted by the CBP One policy, as the app is only available in English, Spanish and Haitian Creole, and due to de facto exclusion from formal education, illiteracy is a challenge in Indigenous communities as well, making CBP One difficult or impossible to use. Poverty is a further barrier to accessing a smart phone to use the app.[48] CBP One's facial recognition feature introduces racial bias, as photos must be uploaded in order to secure an appointment and the technology disproportionately fails to register darker skin tones.[49]

10. *Reach:* the reach of metering is intrinsically difficult to quantify. Persons summarily turned away at a border point are not enrolled in a removal procedure, and these encounters are generally not reported. There is also probably a deterrent effect, whereby persons who would otherwise have attempted to get to a border post to request protection did not make the attempt and therefore could not request asylum.

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[43] ** at 48718, https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border. ("The "reasonable probability" standard is defined to mean substantially more than a "reasonable possibility" but somewhat less than more likely than not.")

[44] https://www.federalregister.gov/documents/2024/10/07/2024-22602/securing-the-border.

[45] *Las Americas Immigrant Advocacy Center, et al., v. U.S. Department of Homeland Security, et al.*, 1:24-cv-01702-RC, D.D.C. 9 May 2025.

[46] CBP media release, 'CBP Removes Scheduling Functionality in CBP One™ App', 21 January 2025, https://www.cbp.gov/newsroom/national-media-release/cbp-removes-scheduling-functionality-cbp-one-app.

[47] https://www.aljazeera.com/gallery/2025/1/22/migrants-stranded-in-mexico-as-appointments-to-enter-us-cancelled.

[48] https://www.uscis.gov/sites/default/files/document/foia/CircumventionofLawfulPathwaysFinalRule-Neilson.pdf. (Noting also that while the CLP rule provides an exception to the CBP One requirement for persons who can show "by a preponderance of the evidence" that they faced barriers such as language, literacy or access to technology, but no instructions seem to exist about how to do this in practice.)

[49] https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias.

From November 2016, metering was increasingly practiced, by April 2018 (or earlier) at all entry points on the southern border. Based on publicly available CBP data, Human Rights Watch reported that CBP made 1,000 CBP One appointments available per day, rising to 1,450 per day in June 2023. {**sentence stating that CBP did/did not record encounters with those who came to POEs without an appointment, then were turned back to Mexico} Between January 2023 and February 2024, over 500,000 persons were paroled into the US for asylum appointments, while from May 2023 to February 2024 there were 64 million attempts to access CBP One to make an appointment (including persons who tried repeatedly).[50]

From May 2023, when CBP One appointments became mandatory, through January 2024, CBP reported an average of about 7,240 'encounters' per day (inadmissible arrivals at border points (OCO) and apprehensions between border points (USBP)),[51] declining to 6,030 per day for February through May 2024, and 3,460 per day from June 2024 when the "Securing the Border" rule took effect through December.[52] Under the CLP rule, the daily quota for asylum applications accounted for about 21% of about 2.7 million total encounters (1,450pd / 6,870pd). Although it is unclear how many of the persons encountered would have expressed a protection need, and some who were turned away at border points might have then crossed between points and been encountered again, up to about 2 million persons might have been unable to apply for asylum during this phase of metering.{*look into expedited removal stats, that could clarify} After "Securing the Border" eliminated expedited removal proceedings for spontaneous arrivals in June 2024, making non-refoulement protections also unavailable without a CBP One appointment, encounters decreased to where about 43% of persons encountered presumably arrived at a border point with a CBP One appointment. The remainder, slightly more than 320,000 persons total, are placed in expedited removal proceedings. If they receive a negative credible fear determination in the first interview, that determination is subject to review by an immigration judge under a heightened "reasonable probability" (rather than "reasonable possibility") standard for a risk of persecution if returned.[53]

11. *Source:* the government did not publicly acknowledge the metering policy until the June 2024 presidential proclamation and subsequent rule ("Securing the Border") that formalised a bar on asylum applications based on numbers of arrivals. DHS apparently developed metering as an internal policy, confirmed by a 5 June 2018 internal memorandum from the Secretary (this and further details of its origins and implementation were published in an October 2020 report of the DHS Inspector General).[54]

CBP One was made available for asylum appointments in January 2023,[55] and made mandatory in May 2023 by the CLP rule. The app implemented metering by making only a certain number of appointments available, and CBP officers denied entry or access to asylum to arriving persons without appointments. The June 2024 rule "Securing the Border" formalised metering, in the sense that, with limited exceptions (e.g. unaccompanied children, victims of "particularly severe forms of trafficking") it directed CBP officers to place all arriving persons (or persons who had crossed the border) without a CBP One appointment in expedited removal proceedings, with heightened thresholds for credible fear screening.

However, metering appears to be an unlawful practice, as federal immigration regulations (DHS) require the inspection of all persons presenting at a border entry point.[56] Although courts did not come to final

[50] https://www.hrw.org/report/2024/05/01/we-couldnt-wait/digital-metering-us-mexico-border.
[51] https://www.hrw.org/report/2024/05/01/we-couldnt-wait/digital-metering-us-mexico-border.
[52] Calculated from data available at https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.
[53] DHS/DoJ, "Securing the Border", 89 Fed. Reg. 111, 7 June 2024, 48710-48772 at 48771, https://www.govinfo.gov/content/pkg/FR-2024-06-07/pdf/2024-12435.pdf.
[54] DHS, Office of the Inspector General, "CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry" OIG-21-02, 27 October 2020 at 9, https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf.
[55] Margaret Noll, "CBP One and the Due Process Rights of Asylum Seekers at the Threshold", 24 U. Md. L.J. Race Relig. Gender & Class 51-72 at 56.
[56] See "Circumvention of Lawful Pathways", final rule issued by DHS and DoJ, 88 Fed. Reg. 94 31314 at 31358, 16 May 2023 (citing 8 C.F.R. 235.1(a)). "That said, those noncitizens who arrive … without a pre-scheduled appointment will be subject to the rule's presumption of asylum ineligibility unless they establish the applicability of an exception to or a ground for rebutting the presumption." Id.

conclusions and orders on the merits of metering, it appears to be a point of agreement in the 9th Circuit that metering practices violate section 706(1) of the APA (federal courts can compel executive agencies to perform actions "unlawfully withheld or unreasonably delayed") in conjunction with 8 USC 1225(a) (border officials must inspect applicants for admission to the US) and 1158 (a noncitizen stopped by border officials may apply for asylum).[57] CBP One was also the subject of litigation in January 2025, when its asylum related functionality was disabled pursuant to an executive order.[58]

12. *Justification:* the stated justifications of the rule "Securing the Border" focused on addressing migration towards the US southern border that had increased since 2011, with particular surges from 2017-19 and after the end of the Title 42 order in May 2023; the increasing prevalence of arrivals from non-contiguous countries and higher rates of credible fear claims; the growing prevalence and sophistication of international smuggling networks; and the inadequacy of Congressionally approved resources to process arrivals according to the laws and regulations in place.[59] The explanations presented within the interim final rule highlighted the degree to which prior efforts had addressed efficiency concerns, but asserted that in the face of growing numbers of arrivals and protection requests, and inaction by Congress to provide additional resources, DHS would soon not be able to "deliver … timely consequences to noncitizens at the southern border" and it had thus become necessary to strictly limit encounters at the southern border.[60]

13. *Domestic and International Reactions:* Human Rights Watch denounced the CLP rule as inhumane, focusing on CBP One as a form of metering ("Appointments are extremely limited and usually book up within minutes"), and discriminatory against those without access to the technology and stable temporary residence, with those who arrive at the border without an appointment subject to inhumane detention conditions and expedited removal proceedings.[61]

14. *Externalization:* There is no outsourcing of migration control, just a refusal to undertake it.

15. *Technology:* The phone app CBP One is the gateway technology, and it can and apparently did act as a barrier. Among other significant limitations, it provided far too few appointment slots for the numbers of persons wishing to apply for asylum.

Pushbacks (land) – public health emergency

Summary: During the Covid-19 pandemic, the US government invoked existing public health emergency legislation, Title 42 U.S.C. 265, to deny access to US territory for anyone lacking a visa or residence status. Such persons approaching border posts or encountered inland were expelled without immigration inspection. Federal courts accepted in principle that the government may deny access to asylum and expel non-residents during a public health emergency, but not to a risk of refoulement, and ultimately vacated the rule (and order) as "arbitrary and capricious", in violation of federal administrative law. The extent of the government's power to deny entry during a public health emergency is thus not fully clear.

1. *Functioning:* During a declared public health emergency, all persons arriving at the land borders lacking valid travel documents were denied entry to the USA and summarily returned to Mexico or to their

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[57] *Al Otro Lado v Mayorkas.* These rulings are binding on federal courts within the 9th Circuit only. Because no other circuit court has addressed metering, they may be argued as persuasive precedent in other circuits. Although they were issued specifically with respect to in-person metering, the District Court in the CBP One case seemed to consider itself bound by them as well.

[58] "Securing Our Borders", 20 January 2025, https://www.whitehouse.gov/presidential-actions/2025/01/securing-our-borders/.

[59] DHS/DoJ, "Securing the Border", 89 Fed. Reg. 111, 7 June 2024, 48710-48772 at 48721-48730, https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border.

[60] DHS/DoJ, "Securing the Border", 89 Fed. Reg. 111, 7 June 2024, 48710-48772 at 48732, https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border.

[61] Human Rights Watch, 'Biden 'Asylum Ban' Endangers Lives at the Border', 11 May 2023, https://www.hrw.org/news/2023/05/11/us-biden-asylum-ban-endangers-lives-border.

countries of origin. This included persons approaching a border point, and those who crossed the border informally and then encountered CBP or other officers.

2. *Time*: in practice, from March 2020 to May 2023. The policy was fully in force under a March 2020 interim order of the Centers for Disease Control and Prevention (CDC) (within the Department of Health and Human Services, HHS) until the CDC withdrew that order in April 2022,[62] following a March 2022 ruling from the federal Circuit Court for the District of Columbia that the order and its underlying rule could lead to violations of non-refoulement provisions.[63] Nevertheless, the policy continued in force during further litigation, until it ended with the CDC's 11 May 2023 declaration of the end of the public health emergency.

3. *Place:* land borders (Canada, Mexico).

4. *Actors:* the CDC Director declares public health emergencies and can order measures to address them. CDC/HHS ordered the border closure. CBP (part of the Dept of Homeland Security, DHS), with responsibility for border security and inspections, implemented it.

5. *Interaction:* the Title 42 rule and order functioned as a stop to prevent other barriers from being reached. It cut off access to asylum procedures before further barriers could take effect.

6. *Development:* pursuant to a new interim rule (see below, "Source"),[64] the CDC Director on 26 March 2020 announced a public health emergency and ordered the immediate closure of the border to any non-citizen without a visa or residence status.[65] The rule and order were challenged in the District Court for Washington DC on grounds that Title 42 Sec 265 does not authorise expulsions; that federal legislation establishes a right to apply for asylum; and that non-refoulement provisions in federal legislation precluded the rule's application. The court granted a preliminary injunction suspending the policy.[66] The injunction was appealed to the Circuit Court for Washington DC, which ruled in March 2022 that in a public health emergency the government may order expulsions without inspection, and may refuse to receive asylum applications, but agreed that the Title 42 policy violated federal non-refoulement legislation.[67] In April the government withdrew the order that had established the policy.[68] In August 2022 the same plaintiffs applied again to the District Court, which vacated the Title 42 policy as arbitrary and capricious, in violation of the Administrative Procedures Act (APA).[69] Meanwhile, the District Court for the Western District of Louisiana had awarded several states a preliminary injunction against the withdrawal of the order closing the border, on grounds that it had not been done correctly according to the APA.[70] Litigation was ongoing when the CDC declared the end of the public health emergency on 11 May May 2023, rendering the court cases moot.[71]

7. *Rationale:* HHS/CDC determined. based in part on their experience of the Covid-19 pandemic, that normal operation of the border immigration and asylum system would exposing staff and the wider US

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62 CDC Press Release "CDC Public Health Determination and Termination of Title 42 Order", 1 April 2022 (https://stacks.cdc.gov/view/cdc/115909).

63 *Huisha-Huisha v. Mayorkas*, 27 F. 718 (D.C. Cir. 2022), 4 March 2022, at 733, https://cgrs.uclawsf.edu/sites/default/files/Huisha-Huisha_Opinion_2022.03.04.pdf.

64 https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into.

65 https://www.govinfo.gov/content/pkg/FR-2020-03-26/pdf/2020-06327.pdf.

66 *Huisha-Huisha v Mayorkas*, No CV 21-100 (EGS), 2021 WL 4206688 (D.D.C. 16 Sept, 2021) (560 F. Supp. 3d at 155).

67 *Huisha-Huisha v. Mayorkas*, 27 F. 718 (D.C. Cir. 2022), 4 March 2022.

68 CDC Press Release "CDC Public Health Determination and Termination of Title 42 Order", 1 April 2022 (https://stacks.cdc.gov/view/cdc/115909).

69 *Huisha-Huisha et al. v. Mayorkas* (District Court for the District of Columbia, Civil Action No. 21-100 (EGS), 15 November 2022) at 40-41; ibid at 20-27. "Arbitrary and capricious" generally refers to failure to sufficiently consider policy consequences or alternatives, or public comments received during rulemaking.

70 *Louisiana v. CDC* (District Court for the Western District of Louisiana, 22-cv-885, 2022 WL 1604901, 20 May 2022).

71 The Supreme Court had agreed to hear arguments over whether the states engaged in the Louisiana case should be allowed to intervene in the D.C. case, but removed the case from its docket once the public health emergency has ended (US federal courts may not give advisory opinions; a live dispute is necessary for them to render a decision).

population to a risk of infection. CBP quarantine facilities are limited, and general facilities are not configured so as to prevent the spread of infectious diseases. While legal residents could self-quarantine in their homes, monitored by health authorities, those without entry documents would have to stay in congregate settings, or travel on common carriers.[72]

8. *Legal Status:* none. Persons denied inspection under the CDC orders were not allowed to enter the US, or were summarily removed. The court ruling that the policy may not be implemented so as to violate non-refoulement would imply an opportunity to apply to an immigration court for withholding of removal, if a similar policy is implemented in the future.

9. *Specific Impact:* as with other summary expulsion policies at the land borders, the main impact was to force persons without means of subsistence to reside informally near the border, with even more severe impacts on persons with particular vulnerabilities. However, unaccompanied children were excepted from the policy based on a November 2020 ruling of the federal District Court for D.C., and a subsequent notice from HHS/CDC.[73]

10. *Reach:* from March 2020 through May 2023, CBP reported that the Office of Field Operations (OFO) had expelled 118,055 persons who arrived at border points (39.8% at the northern border, 60.2% at the southwest border) and the US Border Patrol (USBP) had expelled 2,842,848 persons encountered between border points (99.94% at the southwest border).[74]

2020			
	CD	328 USBP (between border points)	1,668 OFO (at border points)
	MX	197,043 USBP	7,744 OFO
2021			
	CD	475 USBP	7,074 OFO
	MX	1,040,220 USBP	23,306 OFO
2022			
	CD	420 USBP	24,034 OFO
	MX	1,054,084 USBP	25,423 OFO
2023			
	CD	507 USBP	14,197 OFO
	MX	549,771 USBP	14,609 OFO

(NB – these are reported by fiscal year, eg fiscal 2021 runs from Oct 2020 through Sept 2021)

11. *Source:* federal legislation, Title 42 U.S.C. 265 (enacted 1908), authorises the government (HHS) to declare a public health emergency and order the denial of entry into the US of persons coming from a country where there is a "serious danger" of introducing a communicable disease to the US and allowing entry might increase the risk. The March 2020 HHS interim rule empowered the CDC Director, on finding that the conditions specified in Title 42, Sec 265 exist, to issue orders prohibiting "the introduction into the United States of persons from designated foreign countries" for as long as the Director "deems

[72] HHS CFR Part 71, Control of Communicable Diseases (etc), 85 Fed. Reg. 177, 11 September 2020, at 56426-27.
[73] HHS, CDC, "Notice of Temporary Exception From Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination," 86 *Federal Register* 9942, February 17, 2021.
[74] See https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (month by month data downloaded & archived). OFO and USBP are law enforcement agencies located within CBP.

necessary for the public health".[75] The final rule, issued in September 2020,[76] took substantially the same form.

Eventually, the government withdrew the order, the District Court for D.C. vacated the rule it was based on as having been improperly enacted, and the government declared the end of the underlying health emergency. Meanwhile, the federal Circuit Court for D.C. clarified that a Title 42 health emergency could authorise summary expulsions without the opportunity to apply for asylum,[77] but must if possible be interpreted harmoniously with the rules of non-refoulement present in federal legislation[78] and the CAT. The government cannot expel persons to countries where they would face such risks.[79] This ruling remained under challenge at the Supreme Court when the policy ended, albeit on procedural grounds relating to administrative law, so the scope of Title 42 to override immigration and asylum law provisions is not fully established.

12. *Justification:* formally, in terms of public statements and instructions to staff,[80] the government justified the Title 42 policy as a way to protect officials, service providers and the public from the risk of further spread of the Covid-19 virus.(*) Informally, the government could also rely on a background of policy and public discourse of a crisis of irregular immigration, particularly at the southwestern border, where the Title 42 policy could be seen as one measure in a toolset of means available to reduce irregular immigration.(*) After the initial court orders suspending it in September 2021, the policy remained in effect in practice during legal challenges, with the government defending it in courts as within the executive's prerogative but largely refraining from issuing public justifications of it. As the limited epidemiological utility of the Title 42 policy became clearer and public concern over Covid receded, the government ended it. In April 2022, the Secretary of Homeland Security reaffirmed that "Title 42 is not an immigration authority but rather a public health authority" the CDC uses to protect the public, and that DHS retains its Title 8 based authority to expel persons not entitled to remain.[81]

13. *Domestic and International Reactions:* the Title 42 policy received widespread criticism from international organisations, American and US civil society, arguing that the government was using Covid-19 as a pretext to pursue the actual policy goal of restricting access to asylum. In open letters to the heads of HHS and DHS and other officials, public health experts objected that the policy was unjustifiable and ineffective as a public health measure, and incorporated racial bias,[82] and the American Bar Association called on the government to end the Title 42 policy, as violative of the right to non-refoulement, unnecessary and ineffectual as a public health measure, aimed instead at restricting access to asylum, and unworkable as a

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[75] https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into.

[76] https://www.govinfo.gov/content/pkg/FR-2020-09-11/pdf/2020-20036.pdf.

[77] *Huisha-Huisha v. Mayorkas*, 27 F. 718 (D.C. Cir. 2022), 4 March 2022, at 728-29 (section 265 in conjunction with other provisions of federal law can authorise expulsions) and 730-31 (an opportunity to apply for asylum would have been meaningless, there being no possibility the government would exercise its discretion to actually grant asylum, but inviting the District Court to rule further on the question of whether section 1158 requires the government to accept an asylum application nevertheless}.

[78] 8 U.S.C. Sec 1231(b)(3)(A).

[79] *Huisha-Huisha v. Mayorkas*, 27 F. 718 (D.C. Cir. 2022), 4 March 2022, at 731-32.

[80] See e.g., DHS/CBP 'Talking Points and Q&A for Implementation of Title 42 USC § 265' (internal document, apparently distributed in May 2020 or later), https://www.dhs.gov/sites/default/files/publications/2020-hqfo-01493_-_responsive_records.pdf.

[81] https://www.dhs.gov/archive/news/2022/04/01/statement-secretary-mayorkas-cdcs-title-42-order-termination.

[82] Letter To HHS Secretary Azar, CDC Director Walensky and DHS Secretary Mayorkas, Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions, 1 September, 2021, https://www.publichealth.columbia.edu/research/programs/program-forced-migration-health/voices/september-2021-title-42-letter (referencing a previous, similar letter of 18 May 2020). (see also https://www.nejm.org/doi/full/10.1056/NEJMp2200274)

matter of law.[83] Human Rights First reports of January[84] and June[85] 2022 criticised the Title 42 policy as contrary to refugee protection obligations, and documented the severe dangers and human rights violations faced by persons excluded from the US at the southwestern border. The Inter-American Commission on Human Rights echoed criticisms by UNHCR and other international agencies of the Title 42 policy as raising the "risk of chain refoulement of people in vulnerable situations", in contravention of international law.[86]

14. *Externalization:* there is no outsourcing of migration control, just a refusal to undertake it.

15. *Technology:* n/a.

16. *Other:* this policy was the first use of Title 42 to prohibit entry into the US since 1929. It apparently remains available for use again, if the government formally determines the existence of a public health emergency that merits such a response. Before the Covid-19 emergency was declared ended in 2023, the Supreme Court had agreed to hear an appeal relating to it, which means at least four Justices (out of nine) perceived a legal question requiring further examination.

Pullbacks – n/a

Summary: there was an agreement in the 1980s between the governments of Haiti and the USA to cooperate to return seaborne migrants to Haiti, but it lapsed already in the 1980s. Otherwise, there is little or no practice of authorities from countries other than the US acting to interdict migrants before their arrival at the land or sea borders of the US.

Walls and fences

Summary: the northern border of the US is largely unobstructed and lightly patrolled. There are longstanding physical barriers along the southwestern border, particularly in urban areas of neighbouring Mexican and US cities, and in the vicinity of border posts. Construction of physical barriers began in the 1990s, expanded significantly in 2006-08, 2019-20, and since 2025. Some segments of the border have been designated as (closed) defence areas, with military personnel assigned to deploy and exercise authority there. In total, walls and fences cover about 1300-1500 km of 3145 km, with most of the remaining unfenced area being along the Rio Grande border segment between Mexico and Texas.

1. *Functioning:* the barriers along the southern border physically impede access to the US, and facilitate pushbacks by officers monitoring the border. In building the barriers the US has prioritised zones close to travel routes and crossing points, with the result that persons attempting to enter irregularly need to travel further from those locations before trying to enter. Inability to access the territory means there is no opportunity to ask for protection; the US courts have determined that a person has not "effected entry" while they remain close to the border (so if the wall is a few meters inside the US, as its sections along the Rio Grande are, a person who approaches it is considered still to be outside US territory).

2. *Time:* Building of barriers to deny border crossings began in the 1990s, largely as an ad hoc measure. The two main phases of barrier construction were from 2006-2008 and 2019-2021. Extension of existing, and addition of new, barriers has accelerated again in 2025.

[83] Reginald M Turner, President, American Bar Association, letter available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-letter-re-title-42-3-30-22.pdf.
[84] https://humanrightsfirst.org/wp-content/uploads/2022/09/ShamefulRecord.pdf.
[85] https://humanrightsfirst.org/wp-content/uploads/2023/02/NightmareContinues_final.pdf.
[86] Inter-American Commission on Human Rights, press release 'The IACHR Expresses Concern about the Expulsion of People in a human mobility context from the United States and Mexico and calls on States to Ensure the Effective Protection of Their Rights', 17 September 2021, https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/243.asp.

3. *Place:* nearly all the border barriers are along the border with Mexico, with only limited fencing at some crossing points at the Canadian border. The early construction took place in the San Diego border zone. In the 2000s further barriers were installed, predominantly along the border between Mexico and California, Arizona and New Mexico, starting in urban zones and extending outward over time. Since 2017, most of the new barriers have been in the Rio Grande Valley sector, i.e. the border between Mexico and Texas. The border is 3,145km long, 2020km of it along the Rio Grande. By August 2024 walls or fencing ran along about 1,180km of the total border.[87]

[88]

4. *Actors:* CBP (USBP) has the main responsibility for border control between border points. Most actual construction and repairs are carried out by private companies, under contract to DHS. The National Guard and the US military are at times deployed to the border in supporting roles such as logistics and construction. In April 2025 the military established "defence areas" on several non-contiguous border segments on land already owned by the US government in California, Arizona and New Mexico, and along the first 100km of the border east of New Mexico in Texas, which the military and CBP jointly patrol.[89]

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[87] American Immigration Council, "The High Cost and Diminishing Returns of a Border Wall" (September 2019), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the_high_cost_and_diminishing_returns_of_a_border_wall.pdf.

[88] Diana Roy et al., "How the U.S. Patrols Its Borders", Council on Foreign Relations, 28 July 2025, https://www.cfr.org/backgrounder/how-us-patrols-its-borders.

[89] See Al Jazeera, "Second US military zone along border with Mexico set up to deter migrants", 3 May 2025, https://www.aljazeera.com/news/2025/5/3/second-us-military-zone-along-border-with-mexico-set-up-to-deter-migrants. The National Guard, under the joint authority of the federal and various state governments, is a military reserve force deployable by states upon declaration of a state of emergency, or in support of the regular US military in missions abroad. The military is

5. *Interaction:* border barriers, increased patrols, and military zones increase the probability that persons trying to cross irregularly will be intercepted and detained, whereupon the various procedural barriers to asylum would engage.

6. *Development:* the construction of walls and fences along about half of the Mexico/US border has taken place in three main phases. Under the legal basis of the 1996 IIRIRA, security oriented legislation in 2006-2008 resulted in the construction of about 1,000km of barriers. Nearly all of the remainder has been built under Congressional appropriations from 2017, and from expenditures following a declared state of emergency from 2019, until 2021. Further construction has resumed in 2025. Since 2021, the state of Texas, where most of the still unfenced border is, is also building a border wall.

According to a Congressional Research Service report:

> Physical barriers to deter migrants are a relatively new part of the border landscape and were first built in the 1990s in conjunction with counterdrug efforts. This phase of construction, extending into the 2000s, was largely driven by legislative initiatives. Specific authorization for border barriers was provided in 1996 in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and again in 2006 in the Secure Fence Act of 2006. These authorities were superseded by legislation included in the Consolidated Appropriations Act, 2008, which rewrote key provisions of IIRIRA and replaced most of the Secure Fence Act of 2006. The result of these initiatives was construction of more than 650 miles [1,050 km] of barriers along the nearly 2,000-mile [3,200 km] border. Authoritative data on federal investment in the earliest years of border barrier construction has proven elusive. Funding was not specifically designated for border barrier construction until FY2006.[90]

The Secure Fences Act directed the DHS Secretary to take all "necessary and appropriate" actions "to achieve full operational control over the entire international and maritime borders of the Unted States", amending the IIRIRA to require construction of "reinforced fencing" in specific locations along the border.[91] Legislation in 2008 "again required the construction of reinforced fencing along at least 700 miles" of the border, but left the DHS Secretary the discretion to decide the locations.[92] By April 2008 there were 172 miles of fencing, planned to reach 370 miles by the end of the year, and 142 of a planned 300 miles of vehicle barriers.[93] After the initial extensions based on the 2006-2008 legislation, there was little additional construction of barriers through 2016.

generally not permitted to deploy within the US borders, except as necessary to secure military facilities there{***, or in case of invasion.*?}

[90] William L Painter and Audrey Singer, "DHS Border Barrier Funding Through FY2021", Congressional Research Service report R45888, 4 March 2024 at 2, https://www.congress.gov/crs-product/R45888.

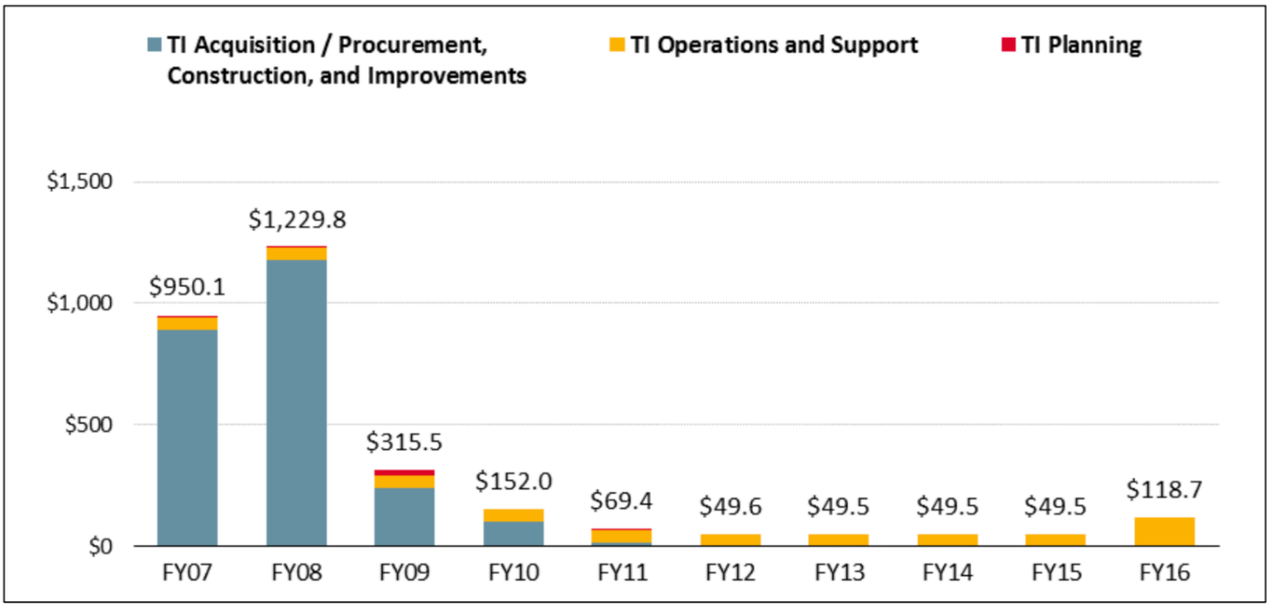
[91] Public Law 109-367 "Secure Fence Act of 2006", 120 STAT. 2638, Sec. 3, 26 October 2006, https://www.govinfo.gov/content/pkg/PLAW-109publ367/pdf/PLAW-109publ367.pdf (locations appear to have been selected to extend existing fencing at border crossing points further from those points).

[92] William L Painter and Audrey Singer, "DHS Border Barrier Funding Through FY2021", Congressional Research Service report R45888, 4 March 2024 at 4, https://www.congress.gov/crs-product/R45888.

[93] Chad C Haddal et al., "Border Security: Barriers Along the U.S. International Border", Congressional Research Service report R33659, 16 March 2009 at 25, https://sgp.fas.org/crs/homesec/RL33659.pdf.

Figure 2. CBP-Reported Data on Border Barrier Funding, FY2007-FY2016

Millions of Nominal Dollars



Source: U.S. Customs and Border Protection, "Summary of Historical Spending for TI and Wall Programs," email attachment sent to CRS November 26, 2018.

Note: Data provided in **Table 1**.

[94]

Following a January 2017 executive order that directed the Secretary of Homeland Security to use all lawfully available funds for wall construction and to prepare requests to Congress for more,[95] the government requested and Congress appropriated about $3.1 billion for border wall construction (of a total $8.3 billion requested) during FY2017-FY2019.[96] In February 2019, Congress passed, and the president signed into law, an extensive package of legislation that, among other funding appropriations, "provide[d] $1.375 billion to build approximately 55 miles of bollard-style fencing along the southern border in the Rio Grande Valley of Texas", plus smaller amounts for fixed and mobile surveillance systems and additional CBP staff.[97] Simultaneously, the president declared a national emergency based on "large-scale unlawful migration through the southern border", requiring the use of the military including for construction works.[98] This would repurpose a further $3.6 billion allocated to other military construction; $2.5 billion from DOD's drug interdiction budget; and $600 million from federal civil asset seizures, for border wall construction.[99] Court challenges against DHS accessing funds Congress allocated to the military, and against repurposing funds allocated to other priorities within military budgets to border wall building, resulted in District court injunctions. However, the Supreme Court soon stayed the injunctions,

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[94] William L Painter and Audrey Singer, "DHS Border Barrier Funding Through FY2021", Congressional Research Service report R45888, 4 March 2024 at 7, https://www.congress.gov/crs-product/R45888.

[95] Executive Order 13767 of January 25, 2017, "Border Security and Immigration Enforcement Improvements" at 4(a)-(c), https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02095.pdf.

[96] William L Painter, "DHS Border Barrier Funding Developments FY2021-FY2024", Congressional Research Service report R47979, 20 March 2024 at 1, https://www.congress.gov/crs-product/R47979.

[97] Cristobol Ramon, "The FY2019 Senate Appropriations Bill: Funding Immigration Activities Prioritized by Both Parties", Bipartisan Policy Center, 21 March 2019, https://bipartisanpolicy.org/blog/the-fy2019-senate-appropriations-bill-funding-immigration-activities-prioritized-by-both-parties/. For the legislative text, see 116th Congress, Public Law 116-6, 133 STAT 13, section 230(a)(1), 15 February 2019, https://www.govinfo.gov/content/pkg/PLAW-116publ6/pdf/PLAW-116publ6.pdf.

[98] Proclamation 9844 of February 15, 2019 "Declaring a National Emergency Concerning the Southern Border of the United States", 84 Fed. Reg. 34, 4949, https://www.govinfo.gov/content/pkg/FR-2019-02-20/pdf/2019-03011.pdf (referencing 10 USC section 2808).

[99] Aaron Reichlin-Melnick, "Trump Declares National Emergency to Fund His Border Wall", American Immigration Council, 15 February 2019, https://www.americanimmigrationcouncil.org/blog/trump-declares-national-emergency-border-wall/.

allowing the use of military funds according to the 2019 proclamation to continue. In January 2021, a new presidential proclamation rescinded the executive orders that had moved funds from military budgets to border wall construction. In total, from January 2017 to January 2021, 458 miles of wall panels had been built, of which "69 miles of contracted border wall system was completed".[100]

A January 2021 presidential proclamation negated the 2019 proclamation of a national emergency at the southern border. A subsequent executive order rescinded the 2017 order to construct new border walls,[101] and the government cancelled border wall projects funded from military budgets, while continuing to apply the $1.375 billion reserved annually through 2021 by Congress specifically for "the construction of barrier system along the southwest border".[102] In June 2023 DHS authorised the construction of a further 20 miles (32 km) of "border barrier system", using unspent funds from the 2019 CBP border barriers allocation.[103] Texas began building segments of border wall in mid-2021 as part of its Operation Lone Star that deployed state law enforcement officers and National Guard to intercept and prosecute migrants on state criminal charges such as trespass or smuggling, pursuant to a disaster proclamation of the governor.[104] By June 2024 Texas state efforts had completed about 55 km of walls, with ongoing planned expenditures of $2.5 billion per year.[105] (In Texas most of the land at the border is privately owned, requiring the government(s) to negotiate and purchase access rights.)

A January 2025 presidential order instructed the Secretaries of Homeland Security and Defense to "take all appropriate action to deploy and construct temporary and permanent physical barriers to ensure complete operational control of the southern border of the United States".[106] Construction of border walls resumed in January, first near San Ysidro, the westernmost border crossing point, then near El Paso, Texas, using funds left over from pre-2021 appropriations.[107] By mid-2025 the Department of Defense had "authorised the transfer of $1bn to army engineers for the construction of 57 miles of fencing".[108] In June 2025 CBP awarded a contract for 27 miles of new wall in the Tucson (Arizona) sector, funded by 2021 allocations left unspent after contracts were cancelled, and the DHS Secretary issued environmental waivers to accelerate the construction of a further 17 miles in the Rio Grande Valley sector (Texas);[109] 20

[100] William L Painter, "DHS Border Barrier Funding Developments FY2021-FY2024", Congressional Research Service report R47979 at 3 (further details provided in a table on the same page), 20 March 2024, https://www.congress.gov/crs-product/R47979.
[101] Executive Order 14010 of February 2, 2021, "Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border" at section 4(F)(1), 86 Fed. Reg. 23, 8267 at 8270.
[102] Michael John Garcia and Sean M. Stiff, "Barriers Along the U.S. Border: Key Authorities and Recent Developments", Congressional Research Service legal sidebar, 23 October 2023 at 3-4, https://tracreports.org/tracker/dynadata/2023_11/LSB11059.pdf (in FY2022 and FY2023 allocations for CBP "Procurement, Construction, and Improvement" continued, but did not specify it for building border barriers).
[103] Michael John Garcia and Sean M. Stiff, "Barriers Along the U.S. Border: Key Authorities and Recent Developments", Congressional Research Service legal sidebar, 23 October 2023 at 4, https://tracreports.org/tracker/dynadata/2023_11/LSB11059.pdf.
[104] https://txilc.org/txilc-program/operation-lone-star/.
[105] Jasper Scherer, "At half a mile a week, Gov. Greg Abbott's border wall will take around 30 years and $20 billion to build", The Texas Tribune 3 July 2024, https://www.texastribune.org/2024/07/03/texas-mexico-border-wall-greg-abbott-progress-cost/.
[106] "Securing Our Borders", 20 January 2025, section 3 (Physical Barriers), https://www.whitehouse.gov/presidential-actions/2025/01/securing-our-borders/. Section 4 similarly orders the deployment of personnel by both departments, as well as the DOJ for law enforcement.
[107] Jeff Yoders, "With contracts dating from first Trump administration, Texas seeks $11b reimbursed for enforcement", Engineering News-Record, https://www.enr.com/articles/60254-border-wall-construction-restarts-in-california-and-texas.
[108] Michael Goldhaber, "American presidency: Pentagon authorises a billion dollars for border wall amidst flurry of litigation", International Bar Association (undated 2025), https://www.ibanet.org/article/af7cfd35-3472-4b24-a795-8437480137d8.
[109] CBP, "DHS awards contract for 27 miles of new border wall in Arizona; issues waiver to accelerate construction in Texas", 18 June 2025, https://www.cbp.gov/newsroom/national-media-release/dhs-awards-contract-27-miles-new-border-wall-arizona-issues-waiver.

miles in New Mexico; and 16 miles in the Tucson and Yuma sectors in Arizona.[110] By June 2025, Texas had completed 66.4 miles of its own border wall, with work ongoing and easements purchased for further construction.[111] The 'reconciliation' package of legislation passed in July of 2025 provided $46.5 billion to CBP for wall construction, among other increased allocation of resources to DHS for use during the years 2025-2029.[112] In June 2025, the Texas legislature ceased funding for border wall construction, completed by then along about 8% of 805 planned miles.[113]

In parallel with wall construction, military forces were deployed to the border in the mid/late 2000s, then gradually reduced until restarted in 2018-2020 and since 2025. The first deployments, up to 6,000 in the 2000s (declining to 1,200 after 2008), and 2,500 from 2018, were National Guard units activated to supplement CBP in administration, logistics, and other supporting roles.[114] Since 2018, military units have also been assigned border wall construction duties, and full time military units (all services, but predominantly US Army) have increasingly been deployed in addition to the National Guard.{**cites} As of March 2025 there were approximately 9,000 active military assigned to the southern border, including for example Stryker armoured infantry units,[115] and elite rapid deployment combat units.[116]

7. *Rationale:* Initially, interdiction and deterrence of drug and other smuggling was the main purpose of walls and fences between border points. The 1996 IIRIRA instructed the AG to install physical barriers at the border to support USBP's "prevention through deterrence" strategy of forcing irregular migrants to travel further, away from border points, in order to try to enter the US.[117] The 2006 Secure Fences Act directed the DHS Secretary "to achieve and maintain operational control" of the borders (in part through building barriers) in order to "[prevent] all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism , narcotics and other contraband".[118]

From 2017, the rationale for increased border barriers shifted towards countering perceived safety or security threats posed by undocumented immigration, and situations requiring declaration of a national emergency. The January 2017 executive order reinitiating wall construction cited threats to national security or public safety posed by "aliens" who entered the US uninspected; consequent strains on administrative systems; and associated crime and smuggling, particularly of illegal drugs.[119] In 2018 the president directed the DOD to deploy the National Guard to support DHS at the border in response to a "combination of illegal drugs, dangerous gang activity, and extensive illegal immigration" that threatens public safety and "undermines the rule of law".[120] After Congress declined the government's 2019 budget request to increase funding for border barriers, the president declared a national emergency and ordered

[110] Austin Fisher, "Homeland Security accelerates border wall construction in New Mexico and Arizona", Source NM 6 June 2025, https://sourcenm.com/2025/06/06/homeland-security-accelerates-border-wall-construction-in-new-mexico-and-arizona/.

[111] Texas Facilities Commission, statement of June 18, 2025, https://www.tfc.texas.gov/wall/.

[112] See American Immigration Council, fact sheet "What's in the 2025 Reconciliation Bill So Far?", 1 July 2025, https://www.americanimmigrationcouncil.org/fact-sheet/house-reconciliation-bill-immigration-border-security/.

[113] https://www.texastribune.org/2025/06/17/texas-border-wall-funding-ends-abbott-trump/.

[114] Diana Roy et al., "How the U.S. Patrols Its Borders", Council on Foreign Relations, 28 July 2025, https://www.cfr.org/backgrounder/how-us-patrols-its-borders.

[115] U.S. Army Northern Command Public Affairs, "Additional troops to enhance border security operations", 3 March 2025, https://www.army.mil/article/283494/additional_troops_to_enhance_border_security_operations.

[116] Jennifer Kavanagh, "The absolute wrong way to deploy US military on the border", Responsible Statecraft 18 February 2025, https://responsiblestatecraft.org/us-military-southern-border/.

[117] William L Painter and Audrey Singer, "DHS Border Barrier Funding Through FY2021", Congressional Research Service report R45888, 4 March 2024 at 2, https://www.congress.gov/crs-product/R45888 (at the time, USBP was part of the Immigration and Naturalization Service, within the DOJ).

[118] Public Law 109-367 "Secure Fence Act of 2006", 120 STAT. 2638, Sec. 2(b), 26 October 2006, https://www.govinfo.gov/content/pkg/PLAW-109publ367/pdf/PLAW-109publ367.pdf.

[119] Executive Order 13767 of January 25, 2017, "Border Security and Immigration Enforcement Improvements" at 4(a)-(c), https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02095.pdf.

[120] "Memorandum on Securing the Southern Border of the United States" (to Secretaries of Defense and Homeland Security, and the Attorney General) 4 April 2018, https://www.govinfo.gov/content/pkg/DCPD-201800218/pdf/DCPD-201800218.pdf.

the deployment of military resources for wall construction due to "long-standing", "large-scale unlawful migration", and in particular "sharp increases in the number of family units entering and seeking entry to the United States" that would overflow detention capacity during the removals process.[121]

The 2021 presidential proclamation revoked the 2019 proclamation of a national emergency at the border on the basis that "building a massive wall that spans the entire southern border is not a serious policy solution".[122] Because of the federal government had "abandoned its responsibilities to secure the border and Texans are suffering as a result", the governor of Texas announced that the state would build a border wall to protect its communities from crime and its consequences.[123] In 2025, the 2021 presidential proclamation revoking the 2019 presidential proclamation was revoked by presidential proclamation.[124] The 2025 proclamation cited a grave, "present danger and imminent threat" to the people and border integrity of the US to declare a national emergency requiring a military responses in support of DHS, including for construction duties as authorised by the Secretary of Defense.[125]

8. *Legal Status:* persons prevented by physical barriers from entering the US have no status under US law.

9. *Specific Impact:* the specific impacts of walls and fences will depend to a significant degree on the level of preparedness to travel and survive in dangerous places (either informal living in border zones, or attempting to navigate remote, challenging terrain). Walls and fences at the US border thus disproportionately impact particularly women and children with families, who make up a significant share of persons encountered at the border, as well as older persons and those with disabilities.

10. *Reach:* apprehensions following unauthorised border crossing increased significantly in 2019, dropped sharply until 2021, increased dramatically to over 2 million per year, then fell back in the second half of 2024 to about 100,000 per month, then declined about 90% from February 2025. This more or less tracks with barrier construction – increasing barriers correlating to fewer apprehensions - however it is difficult to estimate whether and how much the walls affected these numbers. Operation Lone Star, which took place along the approximately 40% of the border that lies in Texas and was not covered by a federal border fence, reported about 500,000 apprehensions of irregular migrants in the three years to June 2024.[126]

11. *Source:* Congressional legislation first authorised, then required, the construction of border barriers. The 1996 IIRIRA authorised the Attorney General to construct border barriers in areas of frequent irregular crossings (exact locations were left to the AG's discretion).[127] The IIRIRA also empowers the DHS Secretary to waive two federal environmental laws "to the extent … necessary to ensure expeditious construction of the barriers and roads under" section 102 of the IIRIRA (concerning barrier building).[128] The Secure Fence Act of 2006 required the DHS Secretary to install "reinforced fencing" in specified

[121] Proclamation 9844 of February 15, 2019 "Declaring a National Emergency Concerning the Southern Border of the United States", 84 Fed. Reg. 34, 4949, https://www.govinfo.gov/content/pkg/FR-2019-02-20/pdf/2019-03011.pdf.
[122] Proclamation 10142 of January 20, 2021 "Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction", 86 Fed. Reg. 16, 7225, https://www.govinfo.gov/content/pkg/FR-2021-01-27/pdf/2021-01922.pdf ("It is a waste of money that diverts attention from genuine threats to our homeland security").
[123] https://gov.texas.gov/news/post/governor-abbott-announces-border-wall-construction-strategy.
[124] "Declaring a National Emergency at the Southern Border of the United States", 20 January 2025 at Sec. 5, https://www.whitehouse.gov/presidential-actions/2025/01/declaring-a-national-emergency-at-the-southern-border-of-the-united-states/.
[125] "Declaring a National Emergency at the Southern Border of the United States", 20 January 2025, https://www.whitehouse.gov/presidential-actions/2025/01/declaring-a-national-emergency-at-the-southern-border-of-the-united-states/.
[126] https://gov.texas.gov/news/post/operation-lone-star-surges-to-stop-illegal-entry-of-large-groups.
[127] "Illegal Immigration Reform and Immigrant Responsibility Act of 1996" (Public Law 104-208, Omnibus Consolidated Appropriations Act, 1997, Division C), section 102(a), 110 STAT. 3009-554, 30 September 1996.
[128] "Illegal Immigration Reform and Immigrant Responsibility Act of 1996" (Public Law 104-208, Omnibus Consolidated Appropriations Act, 1997, Division C), section 102(c), 110 STAT. 3009-554, 30 September 1996.

locations.[129] It was superseded in the Consolidated Appropriations Act of 2008, which also required the construction of "reinforced fencing along not less than 700 miles of the border", but deferred to the secretary to select the "most practical" locations.[130]

The 2017 executive order did not establish a new legal source, but rather instructed the DHS Secretary to take all possible steps to build a wall using existing legislative authorisations.[131] The 2019 Consolidated Appropriations Act authorised $1.75 billion "for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector",[132] after a similar sized appropriation for barriers in 2018 and about $341 million on 2017.[133] The 2019 emergency proclamation and executive order invoked the National Emergencies Act and consequently 10 USC 12302 (calling the military ready reserve to active duty), and 10 USC 2808 (authorising the military "to undertake military construction projects, not otherwise authorized by law, that are necessary to support [its mission]").[134] Subsequently, following a DHS request for assistance, the Department of Defense repurposed $2.5 billion in unrelated military spending authorisations to wall building, citing the secretary's discretion under section 8005 of the 2019 defense appropriations act to transfer up to $4 billion in capital funds between military projects if it is in the national interest.[135] Both of these legal bases were called into question in federal court cases, which were not yet decided on the merits by 2021 when the executive orders concerned were rescinded.{*check that[136]}

The president's January 2025 declaration of national emergency and executive order relied on the same emergency powers and legislative basis (10 USC 12302 and 10 USC 2808) as the 2019 order had.[137] Among other measures, it instructed the DHS and DOD secretaries to "immediately take all appropriate action, consistent with law, including 10 U.S.C. 2214, to construct additional physical barriers along the southern border".[138]

12. *Justification:* The stated justifications for renewed building of barriers and other restrictive measures in the January 2025 presidential executive order "Securing Our Borders" were large numbers of unauthorised entrants to the US including criminals, the difficulty in locating such persons once in the US, and "narcotics and other illicit materials" entering the country while officers are diverted by processing persons "for release into the United States".[139] CBP has for example referenced the use of walls to "slow or stop illegal activity" consequently giving agents more time to respond and enhancing their safety,[140] and later justified focusing new construction in Arizona cited large numbers of "illegal-entry attempts" and "of individuals

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129 Public Law 109-367 "Secure Fence Act of 2006", 120 STAT. 2638 at 2639, 26 October 2006, https://www.govinfo.gov/content/pkg/PLAW-109publ367/pdf/PLAW-109publ367.pdf.

130 Public Law 110-161 "Consolidated Appropriations Act, 2008", Sec. 564(a), 121 STAT. 1844 at 2090, 26 December 2007, https://www.govinfo.gov/content/pkg/PLAW-110publ161/pdf/PLAW-110publ161.pdf.

131 Executive Order 13767 of January 25, 2017, "Border Security and Immigration Enforcement Improvements" Sec. 4(a), https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02095.pdf.

132 Public Law 116-6 "Consolidated Appropriations Act, 2019", Sec. 230(a)(1), 133 STAT. 13 at 28, 15 February 2019, https://www.congress.gov/116/plaws/publ6/PLAW-116publ6.pdf.

133 William L Painter and Audrey Singer, "DHS Border Barrier Funding Through FY2021", Congressional Research Service report R45888, 4 March 2024 at 10, https://www.congress.gov/crs-product/R45888.

134 Proclamation 9844 of February 15, 2019 "Declaring a National Emergency Concerning the Southern Border of the United States", 84 Fed. Reg. 34, 4949, https://www.govinfo.gov/content/pkg/FR-2019-02-20/pdf/2019-03011.pdf.

135 Public Law 115-245 "Department of Defense Appropriations Act of 2019", Sec. 8005, 132 STAT. 2981 at 2999, 28 September 2018, https://www.govtrack.us/congress/bills/115/hr6157/summary#libraryofcongress.

136 https://www.congress.gov/crs-product/R45908.

137 "Declaring a National Emergency at the Southern Border of the United States", 20 January 2025, https://www.whitehouse.gov/presidential-actions/2025/01/declaring-a-national-emergency-at-the-southern-border-of-the-united-states/.

138 "Declaring a National Emergency at the Southern Border of the United States", 20 January 2025 at Sec. 2, https://www.whitehouse.gov/presidential-actions/2025/01/declaring-a-national-emergency-at-the-southern-border-of-the-united-states/. Section 2214 allows the Secretary of Defense, with oversight by Congress, to transfer certain funds appropriated for the DOD to higher priority military needs.

139 https://www.whitehouse.gov/presidential-actions/2025/01/securing-our-borders/.

140 https://www.cbp.gov/frontline/wall-construction-continues-part-holistic-approach-stop-illegal-immigration.

and narcotics being smuggled into the country illegally" particularly by "transnational criminal organizations".[141]

13. *Domestic and International Reactions:* Concerns about the impacts of US border barriers have risen during the 21st century. The IACHR reported in 2010 that walls built along the Mexico/US border since 2006 had led to increased deaths among migrants "as they merely steer immigrants in the direction of those border areas where no physical barriers have been erected and where conditions tend to be so extreme as to make the crossing highly dangerous".[142] Renewed focus on border barriers from 2017 led to legislative and public debate. The American Immigration Council summarised typical public and civil society concerns: barriers were already in place in most accessible border areas, and would be costly and inefficient to build elsewhere; Congress and federal executive bodies had deemed them unnecessary; private property owners and the border-spanning Tohono O'odam Nation would assert their legal rights; and further barriers would cause more deaths along the southwest border, disrupt habitats of highly endangered wildlife, and risk further environmental harms such as flooding.[143]

After Congress declined to appropriate most of $5.7 billion requested for border barrier construction, the president declared a national emergency, triggering a legislative provision authorising the application of military construction funds unallocated to a specific project to projects not yet authorised; relied on provisions of the 2019 DOD Appropriations Act to apply up to $6 billion in contingency funding for "military functions" to barrier construction, and to authorise the transfer of further military funds to the DEA to build barriers to interdict narcotics smuggling; and invoked the Department of the Treasury's prerogative to allocate unobligated assets from its forfeiture funds to law enforcement agencies.[144]

Attorneys general of 15 states sued in the 9th Circuit, and NGOs initiated three further cases in the District Court of D.C.[145] The 9th Circuit cases were the most prominent of these, focusing on the apportionment of spending powers between the president and Congress, with the plaintiffs raising environmental and land use related concerns in order to assert standing. The Sierra Club and the Southern Border Communities Coalition,[146] and, separately, a coalition of states,[147] asserted harm to their interests by construction proceeding without regard for applicable environmental protection regulations. They argued that the 2019 DOD Appropriations Act provisions do not allow the use of military contingency funding for border barrier construction, as the Constitution assigns Congress the exclusive competence over federal appropriations; Congress had denied funding for the wall; and the provision of the Act the government relied on to repurpose funds forbids such repurposing "where the item for which funds are requested has been denied by the Congress".[148] The court issued a permanent injunction against spending the funds in question, and the 9th Circuit court affirmed.[149] Several states and the Sierra Club also

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[141] CBP, "DHS awards contract for 27 miles of new border wall in Arizona; issues waiver to accelerate construction in Texas", 18 June 2025, https://www.cbp.gov/newsroom/national-media-release/dhs-awards-contract-27-miles-new-border-wall-arizona-issues-waiver.

[142] IACHR, "Report on Immigration in the United States: Detention and Due Process", para 107, 30 December 2010, https://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf.

[143] American Immigration Council, "The High Cost and Diminishing Returns of a Border Wall" (September 2019), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the_high_cost_and_diminishing_returns_of_a_border_wall.pdf.

[144] https://www.congress.gov/crs-product/R45908 (referencing respectively 10 USC 2808; 2019 DOD Appropriations Act sections 8005 and 9002; 10 USC 284; and 31 UCS 9705).

[145] Michael Goldhaber, "American presidency: Pentagon authorises a billion dollars for border wall amidst flurry of litigation", International Bar Association (undated), https://www.ibanet.org/article/af7cfd35-3472-4b24-a795-8437480137d8.

[146] Sierra Club v. Trump et al., Nos. 19-16102, 19-16300 (9th Cir., 26 June 2020), https://cdn.ca9.uscourts.gov/datastore/opinions/2020/06/26/19-16102.pdf.

[147] California et al. v. Trump et al., No. 19-16299 and California and New Mexico v. Trump et al., No. 19-16336 (9th Cir., 26 June 2020), https://cdn.ca9.uscourts.gov/datastore/opinions/2020/06/26/19-16299.pdf.

[148] Sierra Club v. Trump et al., Nos. 19-16102, 19-16300 (9th Cir., 26 June 2020), 23 (quoting section 8005 of the 2019 DOD Appropriations Act), https://cdn.ca9.uscourts.gov/datastore/opinions/2020/06/26/19-16102.pdf.

[149] Sierra Club v. Trump et al., Nos. 19-16102, 19-16300 (9th Cir., 26 June 2020), https://cdn.ca9.uscourts.gov/datastore/opinions/2020/06/26/19-16102.pdf.

challenged the emergency use of unobligated military construction funds. The court agreed that the statute's conditions that the use be for "military construction" and "necessary" were not fulfilled by border barrier construction, and upheld the lower court's ruling against that use.[150]

Political debate over border barriers resumed in 2025. A bill introduced in the Senate in January 2025 would have redirected all remaining funds authorised for state and local post-Covid economic relief to border barrier construction,[151] but it was not enacted. In April 2025, Earthjustice aggregated and published statements by civil society actors objecting to the expansion of funding and resumption of construction of the southwest border wall, which referred to the project as a political gesture and diversion of funds to supporters of the administration, with predictably severe effects on border communities, including Indigenous, wildlife and the environment, and the local economies.[152] Specialised organisations raised concerns over environmental impacts, such as the disruption of wildlife corridors, and impacts on local communities.[153] Litigation in these areas remains ongoing.

National defense areas (NDAs), narrow corridors of land along the border designated as military installations, have also attracted criticism. The Brennan Center for Justice cited as an example a 20 meter wide strip of land extending over 150km along the Mexico/US border where military police may arrest and deliver intruders to civilian law enforcement, evidently to fit the "military purpose doctrine", a judicially created exception to the Posse Comitatus Act (which generally prohibits the US military from carrying out law enforcement tasks within the US).[154] The Brennan Center argued this is an invalid use of the exception, because the military would be acting to protect an installation that was established only in order to require protection; and the land seizures to build the installation relied on another federal statute that operates only in time of emergency (the arguably spurious January 2025 declaration of an invasion), but warned that any of these executive actions would be difficult to challenge in court.[155]

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150 *Sierra Club v. Trump et al.,* Nos. 19-17501, 19-17502, 19-15044 (9th Cir., 9 October 2020) (applying 10 USC 2808), https://cdn.ca9.uscourts.gov/datastore/opinions/2020/10/09/19-17501.pdf. (Vacated 22 November 2021, essentially for mootness, see https://cdn.ca9.uscourts.gov/datastore/opinions/2020/10/09/19-17501.pdf.)

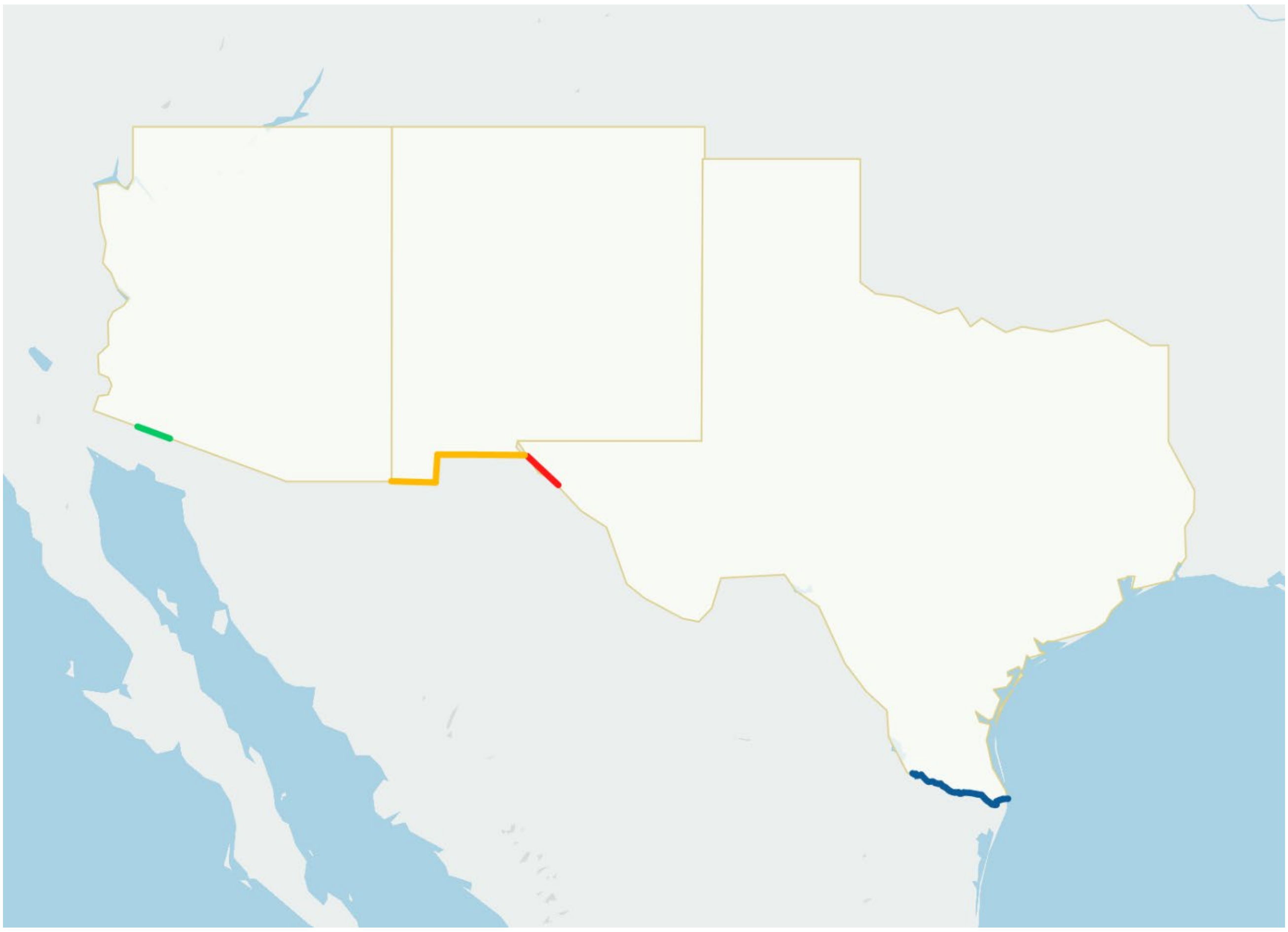
151 https://www.congress.gov/119/bills/s42/BILLS-119s42is.pdf.

152 Geoffrey Nolan, "Congress Moves Forward with Billions in Funding for Border Wall Construction", Earthjustice 29 April 2025, https://earthjustice.org/press/2025/congress-moves-forward-with-billions-in-funding-for-border-wall-construction.

153 Lily Huntsman, "The State of the Borderlands", Wildlands Network, 15 April 2025, https://www.wildlandsnetwork.org/news/border-wall-update-2025; Austin Fisher, "Homeland Security accelerates border wall construction in New Mexico and Arizona", SourceNM, 6 June 2025, https://sourcenm.com/2025/06/06/homeland-security-accelerates-border-wall-construction-in-new-mexico-and-arizona/.

154 https://www.brennancenter.org/our-work/research-reports/how-turning-border-military-zone-evades-congress-and-threatens-rights.

155 ** (28 April 2025), https://www.brennancenter.org/our-work/research-reports/how-turning-border-military-zone-evades-congress-and-threatens-rights (reminding that the president announced on 2 March 2025 that "the Invasion of our Country is OVER", but did not rescind the emergency declaration predicated on that invasion).



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14. *Externalization:* the construction of border barriers has not involved external cooperation.

15. *Technology:* Physical barriers are supplemented by "surveillance tools, towers, cameras, motion detectors, thermal imaging sensors, stadium lighting, ground sensors and drones".[157] Where there are barriers, roads run along the border behind the barrier for USBP vehicle access. Further inside the US, between border points, USBP officers patrol in vehicles and on horseback, supported by vans with sensory equipment and aerial drones. Some patrols carry additional advanced equipment such as anti-drone weaponry. In more urban areas and near border points, border barriers are ubiquitous, and aerial assets including observation balloons and drones monitor the border constantly. National Defense Areas deploy infrared and other sensory technologies, presumably as well as advanced targeting and support systems available to the US military. In February 2026, a US military anti-aircraft laser system shot down a CBP observation and reconnaissance drone near Fort Hancock in Texas, triggering the closure of El Paso regional airspace.[158]

[156] https://apnews.com/article/border-military-trump-national-defense-area-89f046e09809fe5b5071c6b9e1f48da9. From left to right: 51 km (32 mi) transferred 23 July 2025 from the Department of the Interior to the US Navy at Marine Corps Air Station Yuma; 274 km (170 mi) established 21 April 2025, extending east from the US Army base at Fort Huachuca, Arizona; 101 km (63 mi) established 1 May 2025, extending southeast from Fort Bliss in the El Paso, Texas region; and 402 km (250 mi) established 25 June 2025, at the southeast end of the Mexico/US border, administered by Joint Base San Antonio (US Air Force & US Army).

[157] American Immigration Council, "The High Cost and Diminishing Returns of a Border Wall" (September 2019) at 1, https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the_high_cost_and_diminishing_returns_of_a_border_wall.pdf.

[158] https://www.texastribune.org/2026/02/26/texas-el-paso-border-drone-laser-airspace-closure/.

16. *Other:* courts have not confronted asylum access cases relating to walls or other physical barriers. Rather, such litigation as has occurred concerns environmental impacts, property rights, and constitutional separations of powers.

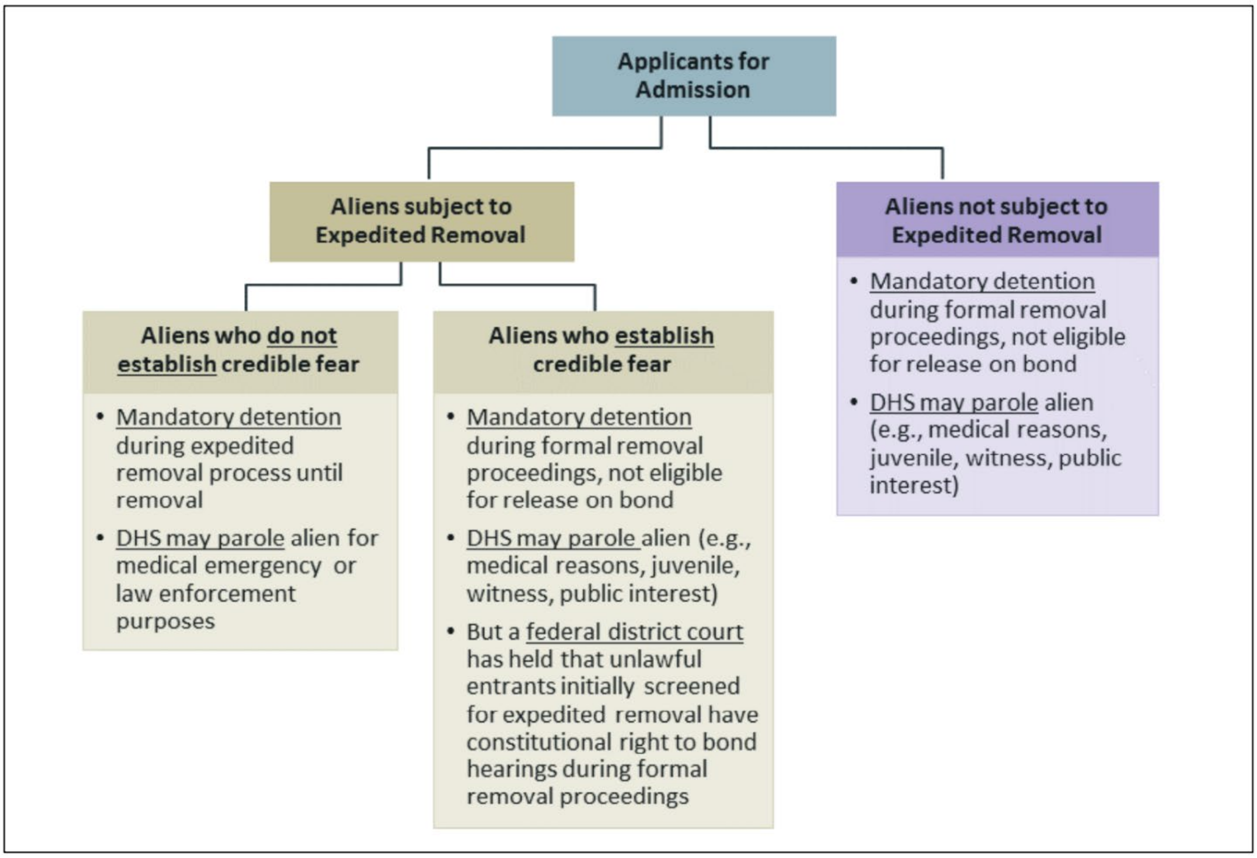
Detention

Summary: persons in US removal proceedings, a category that includes most protection applicants, are subject to detention pending removal. Only after a screening officer or an immigration judge issues a positive credible fear finding may the applicant be released (paroled) into the US. (Affirmative asylum applicants, i.e. those who raise a claim while already in the US with a lawful immigration status, are not detained.) Otherwise, CBP (borders) and ICE (inland) automatically detain anyone without a valid visa or residence status, pending either removal or expedited removal. Detention is a barrier because it significantly decreases the quality of the immigration proceedings, particularly in combination with other policies such as expedited removal procedures. Limited access to information, advice and legal counsel, in tandem with short deadlines, can make it practically impossible for a protection application to succeed.

1. *Functioning:* in general, any person subject to removal is placed in detention. This includes all who attempt to enter at the border (CBP), or who encounter immigration authorities inland (ICE), without visas or lawful residence in the US. Individuals subject to removal may raise a defensive asylum claim, or withholding of removal because of a risk of refoulement. If the claimant receives a positive credible fear determination (or reasonable fear for withholding) from a border or asylum officer, or an immigration judge, they are placed in regular removal proceedings and may be paroled into the country rather than detained. Otherwise, protection applicants remain in detention until final resolution of their status. (There may some uncertainty around this situation due to litigation. The rules as stated here depend in part on a 2019 decision of the AG, which was challenged on constitutional grounds and modified by District court order, with the result that persons arriving at the border who are detained in the context of regular removal proceedings do not have a right to a bond hearing, whereas those who were encountered in the interior of the US do.[159])

[159] Hillel L. Smith, "Immigration Detention: A Legal Overview", Congressional Research Service, 16 September 2019 at 26-27, https://www.congress.gov/crs-product/R45915. {**nb – this needs follow up; have the cases proceeded further?}

Figure 2. Detention of Applicants for Admission



Sources: 8 U.S.C. §§ 1182(d)(5)(A), 1225(b)(1)(B)(ii), (iii)(IV), 1225(b)(2(A); 8 C.F.R. §§ 212.5(b), 235.3(b)(2)(iii), (3), (4)(ii), (5)(i), 235.3(c); Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Padilla v. U.S. Immigration and Customs Enforcement, 387 F. Supp. 3d 1219 (W.D. Wash. 2019).

[160]

2. *Time:* the US "has the largest and oldest immigration detention system in the world",[161] with some form of immigration detention practiced almost continuously since the 19th century. Modern mandatory immigration detention dates to 1988,[162] then "a massive expansion" began in 1996 with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[163] which consolidated and expanded the applicability of removal proceedings, and provided for detention throughout the proceedings.(*) Since then there have been several legislative updates and relevant court rulings (see Development, below), and practice continues to evolve, but the basic outlines of US detention policy remain unchanged. All persons in or arriving to the US without entry or residence permission, who are not covered by an exception, are subject to detention pending removal.

3. *Place:* CBP detains persons encountered at or near the border without valid entry documents pending their expedited removal, or (at border points) pending ordinary removal. In principle, CBP detention should last up to 72 hours, after which the person should either have been removed, or transferred to ICE custody for the duration of the removal proceedings. CBP facilities are largely in border regions,

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[160] Hillel L. Smith, "Immigration Detention: A Legal Overview", Congressional Research Service, 16 September 2019 at 29, https://www.congress.gov/crs-product/R45915.
[161] https://www.freedomforimmigrants.org/the-problem.
[162] See https://www.detentionwatchnetwork.org/issues/mandatory-detention.
[163] Eleanor Acer and Olga Byrne, "How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources", 5 Journal on Migration and Human Security 2, 356-378 at 364, https://journals.sagepub.com/doi/pdf/10.1177/233150241700500207.

particularly at crossing points and airports. ICE is directly responsible for about 120 detention facilities around the US,[164] and engages local law enforcement or private contractors to provide others (up to several hundred, varying widely in capacity).(*)

4. *Actors:* CBP officers encounter and detain persons arriving at border points (OFO) or between points (USBP). Border (CBP) detention should in principle last no more than 72 hours. Applicants not quickly released or removed are transferred to ICE detention facilities pending their hearings and any appeals. During FY 2023, persons in OFO detention remained there on average 4.49 hours, and those in USBP detention, 63.26 hours.[165] ICE reports average detention times during FY 2023 of 37.5 days (slightly higher if the person was originally detained by CBP).[166] This increased to 46.9 days in FY 2024, and 49.9 days in FY 2025 through June (with a noticeable increase to 60.9 days for persons detained by CBP based on immigration violations unrelated to criminal charges, due largely to significant increases in detention duration since February 2025).[167]

Legislation (the IIRIRA) empowers the AG (DoJ) to order detention, and via EOIR, to oversee the immigration courts. The US Marshals Service (USMS), also part of the DoJ, detains those accused of criminal offenses. CBP runs its own detention centres, while USMS has agreements with local law enforcement agencies for prison space, and ICE uses a mix of its own facilities, federal or local law enforcement facilities, and private prison contractors. At the end of 2017, 9% of ICE detainees were held in ICE-owned facilities; 19% in the custody of private prison companies; 25% in reserved areas within local jails;[168] 28% in dedicated local government facilities; and 19% in local facilities used to house both ICE detainees and persons in USMS custody.[169] By around 2024, the Detention Watch Network estimated that 91% of persons in ICE detention were held in private facilities.[170] About 61% of ICE detainees are under mandatory detention.

5. *Interaction:* the immigration detention system interacts with several barriers to asylum in the US. Applicants denied or barred from asylum are usually, especially at the border, placed immediately into removal proceedings and thus detention. The effectiveness of any claim for withholding of removal thereafter depends significantly on factors such as access to means of communication or to advice of counsel while in detention. For example, the ACLU reported in 2011 that, largely to the absence of government funded lawyers, 84% of the approximately 363,000 persons detained during FY 2010 did not have legal counsel for their immigration/protection cases.[171] The National Immigrant Justice Center reported in 2021 that unrepresented persons in immigration detention win their deportation cases 4% of

[164] See list and contact details at https://www.ice.gov/detention-facilities; map of facilities (distinguishing private from government run facilities) at https://www.freedomforimmigrants.org/map; and map of facilities scaled for detainee population at https://www.visualcapitalist.com/cp/ice-detentions-february-2025/. An apparently complete list of facilities as of 2009 is available at https://www.ice.gov/foia/detention-facility-list.
[165] CBP, "Short Term Detention: FY 2023 Report to Congress", at 5, https://www.dhs.gov/sites/default/files/2024-03/2024_0111_cbp_short_term_detention.pdf (after the end of the Title 42 policy, ie 12 May to 30 September 2023, these averages increased to 4.86 hours for OFO detention, and 70.73 hours for USBP detention). From October 2022 through June 2023, on average, applicants detained in permanent CBP facilities remained there for 61.57 hours, and those held in temporary USBP structures for 74.24 hours. Id at 3-4 ("average times in custody vary widely … based on their Immigration processing pathway").
[166] ICE, FY 2023 detention statistics, https://www.ice.gov/detain/detention-management.
[167] ICE, FY 2024 and 2025 detention statistics, https://www.ice.gov/detain/detention-management.
[168] In the US, localities such as cities or counties exercise powers devolved from the state government. Therefore local jails will be run by local authorities, but governed largely by state and some federal law.
[169] See American Immigration Council, 'Immigration Detention in the US by Agency', 2 January 2020, at 3, https://www.americanimmigrationcouncil.org/fact-sheet/immigration-detention-united-states-agency/.
[170] Detention Watch Network, "Immigration Detention 101", https://www.detentionwatchnetwork.org/issues/detention-101 (undated, but including 2024-25 data in places).
[171] Judy Rabinovitz, "Ending the Laws that Fuel Mass Detention and Deportation", American Civil Liberties Union, 20 October 2011, https://www.aclu.org/news/immigrants-rights/ending-laws-fuel-mass-detention-and [sic.].

the time, while 48% of similarly situated persons who are not detained and have a lawyer succeed in their cases.[172]

Particularly any barrier that redirects potential protection applicants into expedited removal proceedings can interact with detention, for example changing standards or practices for credible fear screening, or highly accelerated border procedures such as PACR or HARP (see below). Another major interaction is with changes to credible fear screenings: for example, heightened thresholds for a positive finding ("credible fear"); CBP detention facilities enabled for only phone interviews; and CBP officers replacing USCIS officers to carry out the screenings. Greatly reduced positive finding rates mean that more applicants remain in detention while pursuing withholding of removal, with the access obstacles that implies. Detention policy interacted with MPP (see below) in two senses: persons raising a fear of return to Mexico are detained for that assessment, but also, MPP was presented as a substitute to paroling persons in removal proceedings into the US, in the face of insufficient detention capacity.

Expanded use of CBP rather than ICE detention facilities for persons arriving at the border has exacerbated the access issues (communications and other necessary infrastructure is more limited in CBP facilities). As of late 2020, ICE detention facilities provided "unrestricted access to telephones for contacting legal counsel, private meeting spaces for attorneys to meet with their clients, and an online system for attorneys and others to locate detainees in ICE custody",[173] which are generally lacking in CBP facilities.[174] As with prisons, the federal immigration detention system has evolved in recent years toward an outsourcing model, whereby private companies (prominently CoreCivic and GEO Group)[175] operate some major pre-removal detention centres.

6. *Development:* Federal legislation as early as 1875 provided for the exclusion and detention pending removal "of certain classes of aliens (e.g., those with criminal convictions)".[176] In the first half of the 20th century, Congress enacted laws restricting the numbers of immigrants permitted to enter and excluding others, based largely on perceived race or ethnicity. The 1952 Immigration and Nationality Act (INA) consolidated and restructured immigration related legislation, with significant reduction in detention as a by-product. Subsequent detention regimes were mostly related to specific migration influxes, such as the 1980 Mariel boatlift from Cuba. In 1988, the INA was amended "to require the mandatory detention of immigrants with certain criminal convictions".[177]

In 1996, two new federal laws regularised mandatory detention and set in place the main structures of the US immigration detention system. A provision of the Antiterrorism and Effective Death Penalty Act (AEDPA), enacted in April, established expedited removal procedures, which require detention and limit access to immigration hearings, and have since come into wide use in civil immigration procedures. Six months later the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) authorised detention pending removal proceedings, and required it for persons involved in certain crimes. Particularly as legislation, regulations and court rulings expanded the definitions of key terms such as "aggravated

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172 National Immigrant Justice Center, "Ending Mandatory Detention", March 2021, at 3, https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-03/Policy-Brief_Ending-Mandatory-Detention_March-2021.pdf.

173 See Las Americas et al. v. Wolf et al. (District Court for the District of Columbia, 19-cv-03640 (KBJ), 30 November 2020) at 9. (The court indicated that it was reporting allegations from the applicants' complaint, rather than making a formal judicial finding of fact.)

174 See Las Americas et al. v. Wolf et al. (District Court for the District of Columbia, 19-cv-03640 (KBJ), 30 November 2020) at 11. (CBP facilities "generally lack beds and other living amenities … and the holding-cell lights are kept on 24 hours a day, 7 days a week". The plaintiffs further alleged that CBP facilities do not permit in-person visits with detainees; telephone access is limited to 30-60 minutes per day; and there is no way for lawyers or others to locate a detainee or return their telephone calls.)

175 See https://stateline.org/2025/04/11/for-profit-immigration-detention-expands-as-trump-accelerates-his-deportation-plans/.

176 Hillel L. Smith, "Immigration Detention: A Legal Overview", Congressional Research Service, 16 September 2019 at 5, https://www.congress.gov/crs-product/R45915.

177 Detention Watch Network, "Immigration Detention 101", https://www.detentionwatchnetwork.org/issues/detention-101

felony" and "crime of moral turpitude", then further to include immigration related infractions, the detention of persons not yet granted protection or otherwise authorised to enter the US became routine.

IIRIRA also introduced section 287(g) to the INA (now 8 USC 1357(g)), permitting the AG to enter into agreements with states or localities allowing their officers to carry out "investigation, apprehension, or detention" duties of federal immigration officers.[178] The use of '287(g) agreements'(*right?)[179] grew with the establishment of DHS in 2001, and has continued to expand. From about 2005, local officials could increasingly "place immigration detainers on noncitizens who have been arrested on state or local charges",[180] thereby making those persons subject to detention and removal under what is now 8 USC 1226(c). Since 2008, the Secure Communities programme allows ICE to run federal immigration checks on all persons booked into local jails in participating jurisdictions, with similar results.[181] In 2009, the Congressional act that authorised the DHS budget established that ICE must maintain 34,000 available detention beds.[182] The government's 2014 decision to re-implement family detention led to further expansion of detention capacity.[183] In 2025 Congress amended 8 USC 1226(c), adding further crimes to those requiring detention without bail or parole,[184] and deferring to state criminal laws for definitions of those crimes.[185]

In 2025 the government announced new contracts with GEO Group and CoreCivic to reopen and operate disused detention facilities, and invited further bids to provide detention facilities and services, as part of an effort to increase ICE detention capacity to 100,000.[186] Some states have banned private prisons, but this can only apply to the state justice systems – states do not have the power to ban federal use of private prison providers within their jurisdiction.[187]

Most litigation involving immigration detention has focused on detention conditions, or the due process rights it is alleged to interfere with (e.g. access to legal counsel or to information, stringent deadlines), rather than on the fact of detention itself. Cases seeking release from detention have instead raised habeas corpus or due process rights to a hearing (instead of mandatory detention); or to a bond or parole hearing; or against indefinite detention.[188]

A series of Supreme Court rulings has established that as long as the detainee is in a process that has a definite end point (e.g. removal proceedings leading to admission or to a final removal order), there is no statutory right to a bond hearing or release.[189] Otherwise habeas corpus claims (28 USC 2241) are available to challenge detention, but cannot overcome the mandatory detention language enacted in legislation. All persons within the US, regardless of citizenship or immigration status, have constitutional due process rights under the 5th Amendment, but whether and under what circumstances this could require bond hearings or release from mandatory immigration detention has not been established(**right?? – double

[178] 8 USC 1357(g)(1). The AG determines whether the officers are qualified to perform these duties. Id.
[179] For an outline of the programme and its uptake, see https://www.ice.gov/identify-and-arrest/287g.
[180] https://scholars.org/brief/how-americas-1996-immigration-act-set-stage-increasingly-localized-and-tough-enforcement.
[181] https://scholars.org/brief/how-americas-1996-immigration-act-set-stage-increasingly-localized-and-tough-enforcement.
[182] https://justiceforimmigrants.org/wp-content/uploads/2017/01/Detention-Bed-Mandate-1-18-17.pdf.
[183] Detention Watch Network, "Immigration Detention 101", https://www.detentionwatchnetwork.org/issues/detention-101.
[184] 8 USC 1226(c)(1)(E)(ii) (the provision now applies to an inadmissible person who "is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person").
[185] 8 USC 1226(c)(2).
[186] https://stateline.org/2025/04/11/for-profit-immigration-detention-expands-as-trump-accelerates-his-deportation-plans/.
[187] https://stateline.org/2025/04/11/for-profit-immigration-detention-expands-as-trump-accelerates-his-deportation-plans/.
[188] See generally, https://www.fedbar.org/wp-content/uploads/2010/09/feature4-sept2010-pdf-1.pdf.
[189] See Jennings v. Rodriguez, 583 U.S. 281 (2018) (8 1225(b)(1), (2) (removal of those arriving and not entitled to enter) cannot be interpreted to require bond (release) hearings before the removal proceedings have concluded. 8 1226(a) and (c) read together require detention of those within its scope pending a removal decision); but see *Zadvydas v. Davis*, 533 U.S. 678 (2001) (once the 90 day detention period pending final removal specified under 8 USC 1231(a)(6)(**check that) has expired, the government may only detain as long as "reasonably necessary" to effect return. If after 6 months the detainee can show it is removal is unlikely in the reasonably foreseeable future, then the government must rebut that showing (in a bond hearing)).

check these cases on remand …).[190] In 2019, the Supreme Court ruled that the provision mandating immigration detention based on prior criminal involvement is applicable at any time after their release from the criminal justice system.[191]

7. *Rationale:* the consistent rationale presented for detention of removable persons has been to ensure their attendance at hearings (and, if appropriate, their subsequent removal), and to protect community safety during the removal process.[192]

8. *Legal Status:* persons in detention are generally under a removal order, and therefore have only minimal legal status. Those eventually removed have no alternative status in the US. Those found to have a credible fear enter the regular removal proceedings under INA 240 (8 USC 1229(a)), where they may "pursue asylum and related protections".[193] A person in such circumstances will "be detained for further consideration of the application for asylum",[194] but may be paroled by an immigration judge.

9. *Specific Impact:* AEDPA and IIRIRA connected the immigration system to the criminal justice system in legislative provisions, and in practice. This connection brought with it the racially based inequities of the US criminal justice system, exacerbating the racial disparities already visible in 1980s/90s immigration enforcement (and consequent detention) "targeting immigrants from Haiti and Cuba".[195] As of early 2021, about 5.4% of irregular immigrants in the US were Black, versus 10.6% of those in removal proceedings, and about half the Black immigrants detained for removal were in that status due to prior involvement with the criminal justice system.[196]

In 2014, because of the prevalence of Central American families among border arrivals, the government increased family detention.[197] Families are reportedly often separated, with the father and children 18 or older going to adult detention centres while mothers and children under 18 go to family detention centres (of which there are three).[198]

A 1997 agreement in settlement of a class action lawsuit (the 'Flores Settlement') set standards for the detention conditions of children, including in family detention, and requires that children be released to non-custodial care as soon as possible, and in any case after 20 days.[199] During FY 2023, unaccompanied children were detained longer than the average when held in OFO (border points) detention (16.15 hours

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190 Hillel L. Smith, "Immigration Detention: A Legal Overview", Congressional Research Service, 16 September 2019, at 15-16, https://www.congress.gov/crs-product/R45915.

191 Nielsen v. Preap, 586 US ____ (2019). (The statutory language requires detention "when they are released" from the criminal system. Plaintiffs claimed that would only apply if they were placed in immigration detention immediately upon such release; as they were detained significantly later than that, they argued, they had the right to a bond hearing before an immigration judge. The 9th Circuit agreed with this understanding, creating a split with other circuits that had not, so the Supreme Court took on the case and reversed the 9th Circuit Court's ruling.)

192 Hillel L. Smith, "Immigration Detention: A Legal Overview", Congressional Research Service, 16 September 2019, at 1, https://www.congress.gov/crs-product/R45915.

193 Hillel L. Smith, "Immigration Detention: A Legal Overview", Congressional Research Service, 16 September 2019, at 23-24, https://www.congress.gov/crs-product/R45915.

194 8 USC 1225(b)(1)(B)(ii).

195 National Immigrant Justice Center, "Ending Mandatory Detention", March 2021, at 2, https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-03/Policy-Brief_Ending-Mandatory-Detention_March-2021.pdf.

196 National Immigrant Justice Center, "Ending Mandatory Detention", March 2021, at 2, https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-03/Policy-Brief_Ending-Mandatory-Detention_March-2021.pdf.

197 Detention Watch Network, "Immigration Detention 101", https://www.detentionwatchnetwork.org/issues/detention-101.

198 See American Immigration Council, 'Immigration Detention in the US by Agency', 2 January 2020, at 5, https://www.americanimmigrationcouncil.org/fact-sheet/immigration-detention-united-states-agency/.

199 ** at 3-4, https://immigrationforum.org/wp-content/uploads/2021/01/Immigration-Detention-Factsheet_FINAL.pdf. For CBP's interpretation of the detention conditions requirements, see CBP, "Short Term Detention: FY 2023 Report to Congress", at 4, https://www.dhs.gov/sites/default/files/2024-03/2024_0111_cbp_short_term_detention.pdf.

vs 4.49 on average, and 4.23 for family units), and not as long as average when in USBP (between points) detention (26.56 hours vs 63.26 on average, and 56.75 for family units).[200]

In contrast to mandatory detention, once there is a positive credible fear finding and the person can enter regular removal proceedings, DHS has discretion to parole them into the US. In practice, this discretion is usually not exercised, but eligible categories for parole under DHS regulations include persons with serious medical conditions; pregnant women; children with a sponsor; witnesses in judicial or other formal proceedings; and those "whose continued detention is not in the public interest".[201]

10. *Reach:* as of 15 June 2025, there were reportedly 56,397 persons in ICE immigration detention, with a further 183,756 enrolled in ICE AtD programmes.[202] An empirical study by the American Immigration Council found that, in 2015, about 356,000 persons were held at some time in ICE detention, at "over 630" facilities, and that 2/3 of these detainees were held at some time in a privately run facility.[203] CBP detentions appear not to be reported, but it may be possible to broadly estimate their scale. In the 12 months up to the end of September 2024 (i.e. the 2024 federal fiscal year (FY)), USBP carried out 1,577,319 "enforcement actions" between border crossings, and OFO 1,343,823 at crossing points (in FY 2025 through May it was 221,733 and 368,336).[204] Because transfer to ICE custody does not occur until the person has received a positive credible fear assessment (from a USCIS asylum officer),[205] it is likely that most of these persons were detained in CBP facilities throughout their expedited removal procedures (in principle, up to 7 days).

11. *Source:* federal legislation, as implemented by government regulations. Legislation, originally the Immigration and Nationalization Act (INA) (1952),[206] authorises detention "pending removal proceedings",[207] and requires it for removable persons connected to certain kinds of criminal activity;[208] apparently removable applicants for admission (border posts or entered without inspection);[209] and for 90 days following the completion of removal proceedings (after which they may be paroled, or kept in detention).[210] In practice, in about 2/3 of the cases where ICE has discretion whether or not to detain someone, they detain.[211] Because, unlike most other US barriers to asylum, detention is governed in some detail by legislation, the specific implementing regulations are not analysed here. The January 2025 executive order "Securing Our Borders" instructed DHS to detain noncitizens apprehended for immigration violations "to the fullest extent permitted by law"; implementing regulations had not been published by May 2025, when the American Immigration Council filed a freedom of information request

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200 CBP, "Short Term Detention: FY 2023 Report to Congress", at 5, https://www.dhs.gov/sites/default/files/2024-03/2024_0111_cbp_short_term_detention.pdf.

201 Hillel L. Smith, "Immigration Detention: A Legal Overview", Congressional Research Service, 16 September 2019, at 25, https://www.congress.gov/crs-product/R45915.

202 https://tracreports.org/immigration/quickfacts/.

203 Emily Ryo and Ian Peacock, "The Landscape of Immigration Detention in the United States" (American Immigration Council, December 2018), https://www.americanimmigrationcouncil.org/report/landscape-immigration-detention-united-states/.

204 https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics.

205 See American Immigration Council fact sheet, "A Primer on Expedited Removal" (February 2025) at 2, https://www.americanimmigrationcouncil.org/sites/default/files/research/a_primer_on_expedited_removal_0225.pdf.

206 For an overview, see Hillel L. Smith, "Immigration Detention: A Legal Overview", Congressional Research Service, 16 September 2019, https://www.congress.gov/crs-product/R45915. The provisions cited in this Source section refer to the same provisions, as later incorporated in 8 USC.

207 8 USC 1226(a) (the AG may order arrest and detention of "aliens" persons pending a removal decision).

208 8 USC 1226(c) (requiring the AG and the DHS Secretary to detain deportable persons who have committed, or are accused of, certain non-international crimes).

209 8 USC 1225(b) all arrivals without permission to enter go to expedited removal proceedings and are detained for the duration, unless they obtain a positive credible fear or reasonable fear determination).

210 8 USC 1231(a) requires the Attorney General to remove non-citizens within 90 days of a removal order (1231(a)(1)(A)) and to detain them during that time (1231(a)(2)(A)).

211 https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-03/Policy-Brief_Ending-Mandatory-Detention_March-2021.pdf.

with ICE "seeking all records implementing" this order and the proclamation "Guaranteeing the States Against Invasion" (see asylum ban, below).[212]

12. *Justification:* the justifications for immigration detention in the US have not changed much since its use became widespread early in the 21st century. In public discourse, except for some civil society organisations, immigration detention as such is uncontroversial (to a significant degree, this discourse is a continuation of the 1990s proliferation of anti-crime policies). Such debate as there is tends to focus on conditions of detention, and on the needs of particularly vulnerable persons, particularly children. The accepted narrative is that detention is necessary to ensure that persons in the removal process (which includes most persons with a claim for asylum or protection from refoulement) attend hearings and remain removable in practice, and to protect public safety. Public safety is engaged because of the perception that persons who arrive in the US or stay in the US without permission are prone to commit further, unrelated infringements of the law; and because many persons in immigration detention are detained pursuant to INA 236(c) based on being implicated in crimes unrelated to immigration.

13. *Domestic and International Reactions:* after IIRIRA and AEDP went into effect, concerns arose that they unjustifiably increased immigration detention. The ACLU argued that mandatory detention based on criminal offenses, introduced by AEDPA and extended to further offenses by IIRIRA, "violates a principle fundamental to our legal system – that people cannot be deprived of liberty without due process of law," and highlighted the injustice of potentially indefinite detention of persons subject to removal orders who cannot actually be deported, particularly those classified as "aggravated felons".[213]

More recent reviews reiterated these concerns. Human Rights Watch criticised IIRIRA and AEDPA for, among other aspects, their combined functioning as a barrier to asylum.[214] Marking 25 years after the entry into force of IIRIRA, the Vera Institute called for an end to immigration detention, citing severe human rights violations, as well as research showing that legal representation, not detention, is the most the most effective way to ensure persons in deportation proceedings attend hearings and comply with the process.[215] The Detention Watch Network has criticised the practice of contracting with local governments and private corporations to provide immigration detention as "creat[ing] a perverse financial incentive to keep people incarcerated. Private prison corporations profit and local governments pad their shrinking budgets through lucrative federal contracts."[216] The National Immigrant Justice Center advocated for the passage of two House bills introduced in 2019 and 2021 that would have significantly curtailed or ended mandatory immigration detention, but neither bill was passed into law.[217]

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212 https://www.americanimmigrationcouncil.org/foia-request/investigating-ice-changes-parole-policies-president-trump/.

213 American Civil Liberties Union, "Analysis of Immigration Detention Policies", 18 August 1999, https://www.aclu.org/documents/analysis-immigration-detention-policies (estimating about 3,500 persons affected at that time). US legislation forbade INS (precursor to DHS) from detaining anyone for more than six months after the issuance of their removal order (unless they were obstructing their deportation) until 1990, when an exception was introduced for "aggravated felons". Id. ****"Aggravated felony" is defined {*in AEDPA and refined/expanded in IIRIRA, and says in sum *long quote*}.

214 Human Rights Watch, "US: 20 Years of Immigrant Abuses", 25 April 2016, https://www.hrw.org/news/2016/04/25/us-20-years-immigrant-abuses ("the fast-track border deportations authorized by these laws deny many asylum seekers a meaningful opportunity to make their claims, as required by US and international law"). This brief report also has links to other HRW reports on detention and asylum.

215 Erica Bryant, "25 Years of IIRIRA Shows Immigration Law Gone Wrong", 28 June 2022, https://www.vera.org/news/25-years-of-iirira-shows-immigration-law-gone-wrong.

216 Detention Watch Network, "Immigration Detention 101", https://www.detentionwatchnetwork.org/issues/detention-101.

217 National Immigrant Justice Center, "Ending Mandatory Detention", March 2021, at 4, https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-03/Policy-Brief_Ending-Mandatory-Detention_March-2021.pdf.

The IACHR reported in 2010 on immigration detention in the US,[218] and in 2015 on children and families arriving at the southern US border.[219] The 2010 report reminded of a prior IACHR decision which found that the discretionary authority over the decision to detain held by DHS, the same agency that would carry out the detention, violated the Inter-American Convention's article XXV right to a judicial remedy against fundamental rights violations.[220] It also highlighted increasingly stringent requirements placed on applicants even after a positive credible fear determination, in order for DHS to grant parole,[221] and deployment of criminal law against irregular immigrants with little attention to due process,[222] among other practices that could impede access to protection. The 2015 report, based on a three day field visit in September-October 2014 to the Mexico/Texas border where most children and families arrived at that time, raised similar concerns, and in particular the apparent automatic detention of families even after the mother had obtained a positive credible fear determination, and a practice of turning back unaccompanied children of Mexican nationality.[223]

14. *Externalization:* historically there has not been a particular externalisation dimension to US immigration detention. In 2025, a practice began of deporting some migrants from the US to third countries, with the expectation they would be detained there. It is likely that the purported legal basis for these deportations is past criminal involvement in the sense of INA 236(c), and that the persons concerned did not have an opportunity to contest their removal on a non-refoulement basis. Continued detention in those third countries (or at waypoints, eg US military bases abroad) prevents any further opportunity to request protection in the US, or probably in the third countries.[224]

15. *Technology:* ICE provides an online search tool to locate persons who are in detention, either in ICE facilities or for more than 48 hours in a CBP facility.[225] Detention facilities employ video surveillance technology as well as a tracking system to monitor "movements and actions relating to a subject's detention" such as welfare checks, uses of communications facilities, and provision of daily necessities.[226] In general, ICE facilities are better equipped than CBP facilities, particularly with communications infrastructure, internet access, and meeting spaces; as a result, persons transferred promptly to ICE detention (which usually means released from the expedited removal to the normal removal procedure) have greater practical access to legal aid and other kinds of external support, which significantly increases the probability of being granted protection from refoulement.

16. *Other:* In principle in the US, non-mandatory immigration detention need not pose a barrier to asylum. (By contrast, those in mandatory detention, particularly those still within an expedited removal procedure, can be deported without an opportunity to state a protection need; this is however a consequence of a procedural barrier rather than the fact of detention itself.) Detainees still have the right to raise a protection claim and have it heard before an immigration judge. However the compressed time frames and evidentiary requirements of removal procedures, coupled with the practical complications introduced by detention, often lead to cursory examination of protection claims, or frequently, treatment of claims as abandoned.

[218] IACHR, "Report on Immigration in the United States: Detention and Due Process", 30 December 2010, https://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf.
[219] IACHR, "Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America", 24 July 2015, https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf.
[220] IACHR, "Report on Immigration in the United States: Detention and Due Process", 30 December 2010, at para 122, https://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf.
[221] IACHR, "Report on Immigration in the United States: Detention and Due Process", 30 December 2010, at paras 125-128, https://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf.
[222] IACHR, "Report on Immigration in the United States: Detention and Due Process", 30 December 2010, at paras 145-156, https://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf.
[223] IACHR, "Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America", 24 July 2015, at ***pages, https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf.
[224] The Supreme Court of Costa Rica mandated the release from detention of third country nationals deported there from the US, but in other states they apparently remain in detention with no prospect of release or onward travel.
[225] https://locator.ice.gov/odls/#/search.
[226] CBP, "Short Term Detention: FY 2023 Report to Congress", at 2-3, https://www.dhs.gov/sites/default/files/2024-03/2024_0111_cbp_short_term_detention.pdf. ICE facilities operate similar types of technology systems.{*cite}

Complicating factors introduced by detention include limited hours or space to meet with counsel; remote locations, with few lawyers available except from distant urban areas; limited access to communications; and of course the ongoing trauma of detention of unknown duration, at least at times in poor conditions.

Externalization of asylum processing – Safe Third Country (Asylum Cooperation Agreements)

Summary: Asylum Cooperation Agreements (ACAs) were bilateral agreements that resembled STC agreements, with El Salvador, Guatemala and Honduras (the 'Northern Triangle' states), made in mid/late 2019. Citizens or residents of a NT state seeking asylum in the US would be returned from the US to a different NT state to have their claims assessed. The federal rules necessary to support the agreements were implemented over the ensuing year, entering their final phase in late December 2020. In early 2021, the US suspended its participation in the agreements. In total, over 900 asylum seekers were returned from the US (to Guatemala) under these ACAs.[227] Legislation pending before the US Congress in 2025 would seek to re-engage with the agreements.[228] In March 2025 the US entered into a new ACA with Honduras, with most of its main terms the same as in the 2019 agreements.

1. *Functioning:* after an initial determination of inadmissibility or deportation within an expedited (8 USC 1225), or ordinary (INA section 240, ie 8 USC 1229a) removal proceeding, persons raising a fear of persecution or torture if returned to their countries of origin are referred to an asylum officer. The asylum officer first determines whether the applicant is subject to an ACA and if so, identifies a state to transfer the applicant to for asylum determination. (A negative determination may be appealed to an immigration judge in the ordinary removal procedure.[229]) If the applicant does not both state a fear of persecution or torture in the identified state, and "establish it is more likely than not" to occur, then the officer or judge records a final decision of removal to the identified state.[230] If the applicant does establish such a fear, then the asylum officer may consider whether another ACA could apply, but otherwise must proceed with a credible fear interview (in which a positive determination would lead to a withholding of removal hearing in the US).[231]

2. *Time*: The US signed ACAs with Guatemala on 26 July, El Salvador on 20 September, and Honduras on 25 September 2019.[232] The necessary rules for the US to implement the ACAs were effective from 19 November 2019, and the ACA with Guatemala took effect. DHS announced on 29 December 2020 that all three ACAs had entered into force.[233] A 2 February 2021 executive order suspended US participation

[227] See e.g., https://en.unav.edu/web/global-affairs/fracasados-los-acuerdos-de-tercer-pais-seguro-el-triangulo-norte-bate-record-de-migrantes-hacia-eeuu (El Salvador and Honduras had not yet put the agreements into effect by the time the US suspended its participation).
[228] Bill submitted in the House, and referred to the House Foreign Affairs Committee, on 18 April 2024. See https://www.congress.gov/bill/118th-congress/house-bill/8073/text.
[229] "Guidelines Regarding New Regulations Providing for the Implementation of Asylum Cooperative Agreements", Office of the Director, EOIR (19 November 2019) at 3, https://iptp-production.s3.amazonaws.com/media/documents/Policy_Memo_from_Director_of_Executive_Office_for_Immigration_Review_Explaining_ACAs.pdf.
[230] DHS and DoJ, "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act" 84 Fed. Reg. 63,994 at 63,998 (19 November 2019), https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.
[231] DHS and DoJ, "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act" 84 Fed. Reg. 63,994 at 63,998 (19 November 2019), https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.
[232] DHS, "*Fact Sheet:* DHS Agreements with Guatemala, Honduras, and El Salvador", 28 October 2019, https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf.
[233] DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement (29 December 2020), https://www.dhs.gov/archive/news/2020/12/29/dhs-announces-guatemala-el-salvador-and-honduras-have-signed-asylum-cooperation.

in the northern triangle ACAs,[234] and the Secretary of State subsequently stated that transfers under the Guatemala agreement "had been paused since mid-March 2023 due to COVID-19, and the Agreements with El Salvador and Honduras were never implemented".[235] A new ACA was agreed with Honduras on 10 March 2025, and took effect on 8 July; it is not clear if it has begun to operate in practice(*right?).

3. *Place*: land borders of the US. When in effect, the ACAs with northern triangle states apply along the Mexico/US border. The US/Canada safe third country agreement has applied along their shared border for some periods since it entered into effect in 2004.

4. *Actors*: CBP officers refer persons who raise a claim for asylum or a fear of persecution or torture to USCIS for screening interviews, including making a preliminary determination whether an ACA applies. USCIS asylum officers, affirmed by their supervisors, determine whether an ACA applies as a threshold issue within credible fear screening interviews during removal processes. If the applicant then asserts a credible fear of removal to the identified ACA state (rather than the country of origin), a negative determination on this by the asylum officer can be appealed to an immigration judge, working within the EOIR. Removals are carried out by ICE.

5. *Interaction*: since ACA applicability is assessed as a threshold to the protection procedure, there is no significant interaction with other barriers. In procedural terms, ACAs are engaged at the start of credible fear screening interviews in the context of a removal procedure.

6. *Development*: After the MPP ("remain in Mexico") policy was halted by a preliminary injunction, discussions between the US and Guatemala resulted in "an agreement providing for the transfer … to Guatemala of asylum seekers from any country except Guatemala", after a US court also blocked the administration's TCTB policy.[236] Similar negotiations ensued between the US and El Salvador and between the US and Honduras. The 2019 ACAs were enacted under the same legal provision as the Safe Third Country Agreement with Canada (agreed in 2002, entered force 2004), 8 USC 1158(a)(2)(A) which bars asylum applications from persons subject to a STC agreement. In substance, the main differences between the Canada/US SCTA and the northern triangle ACAs are that the SCTA entails mutual obligations while the ACAs only require counterparty states to accept asylum seekers transferred from the US; and the ACAs are applicable regardless of whether or not the applicant actually transited the counterparty state. The agreement with Guatemala went into effect on 19 November, when the US implementing regulation was published and the first group of Honduran and Salvadoran single adults was transferred to Guatemala from El Paso, Texas.[237] Deportations of Mexican asylum seekers to Guatemala reportedly began in January

[234] Executive Order 14010 of February 2, 2021 "Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border", 86 Fed. Reg. 23, 8267 (5 February 2021), https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf.

[235] US Secretary of State, Press statement "Suspending and Terminating the Asylum Cooperative Agreements with the Governments [of] El Salvador, Guatemala, and Honduras", US Dept of State 6 February 2021, https://2021-2025.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/.

[236] Yael Schacher et al., "Deportation with a Layover: Failure of Protection Under the U.S.-Guatemala Asylum Cooperative Agreement", Refugees International and Human Rights Watch field report, May 2020, at 9-11, https://d3jwam0i5codb7.cloudfront.net/wp-content/uploads/2023/03/GuatemalaACAReport-May2020-FINAL.pdf (Guatemala signed the agreement shortly after the US threatened to impose tariffs if it did not).

[237] Aaron Reichlin-Melnick, "Trump Administration Begins Sending Asylum Seekers to Guatemala" (American Immigration Council, 20 November 2019), https://www.americanimmigrationcouncil.org/blog/trump-sending-asylum-seekers-to-guatemala/ (on 7 November DHS confirmed that it "had already certified that Guatemala will provide a "full and fair procedure" for determining asylum claims") .

2020.[238] The ACAs with Honduras[239] and El Salvador[240] formally took effect on 25 March and 10 December 2020, respectively.

A 10 March 2025 agreement established a new ACA between Honduras and the US, largely similar to its 2019 predecessor, but with Honduras retaining discretion whether to accept persons transferred under the agreement (the previous agreement established a process by which this discretion de facto rested with the US).[241]

7. *Rationale*: the 2019 rule that gave effect to the Guatemala ACA cited as its main rationale the facilitation of "burden-sharing between the United Sates and other countries with respect to refugee-protection claims",[242] as well as of "ongoing negotiations with foreign countries regarding migration issues, including measures to control the flow of aliens into the United States".[243]

8. *Legal Status*: all persons the ACAs could potentially apply to are noncitizens subject to removal orders, who have claimed a fear of persecution or torture if removed to their home country. Within that category, third country nationals an ACA applies to must be returned to the counterparty state, with the status of asylum seekers there.[244]

9. *Specific Impact*: Initially, the US focused removals under the Guatemala ACA on "only … Hondurans and Salvadorans who passed through Guatemala".[245] Although the first groups removed were largely single adults,[246] by 16 March 2020 when implementation was suspended due to the Covid-19 pandemic, "the vast majority of [the 939 asylum seekers transferred from the US to Guatemala in total] were women and children", and only about 2% of transferees applied for asylum in Guatemala.[247]

[238] National Immigrant Justice Center, "A Timeline of the Trump Administration's Efforts to End Asylum" (January 2020), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-01/01-07-2020-asylumtimeline%20-%20final.pdf.

[239] Agreement Between the Government of the United States of America and the Government of the Republic of Honduras on Cooperation Regarding the Examination of Protection Claims (Guatemala agreement), US Dept of State Treaties and Other International Acts Series 20-325, 25 September 2019 (signed) / 25 March 2020 (entered into force), https://www.state.gov/2020/03/honduras-20-325-agreement-on-asylum-cooperation.

[240] Agreement Between the Government of the United States of America and the Government of the Republic of El Salvador on Cooperation Regarding the Examination of Protection Claims (Guatemala agreement), US Dept of State Treaties and Other International Acts Series 20-1210, 20 September 2019 (signed) / 10 December 2020 (entered into force), https://www.state.gov/2020/12/el-salvador-20-1210-agreement-for-cooperation-in-the-examination-of-protection-claims.

[241] DHS, Agreement Between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Requests, 90 Fed. Reg. 128, 30076 (8 July 2025), article 3(2), https://www.govinfo.gov/content/pkg/FR-2025-07-08/pdf/2025-12631.pdf (compare {*the previous agreement's text}).

[242] DHS and DoJ, "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act" 84 Fed. Reg. 63,994 at 63,997 (19 November 2019), https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.

[243] DHS and DoJ, "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act" 84 Fed. Reg. 63,994 at 64,005 (19 November 2019), https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.

[244] See e.g., "Guidelines Regarding New Regulations Providing for the Implementation of Asylum Cooperative Agreements", Office of the Director, EOIR (19 November 2019) at 2-3, https://iptp-production.s3.amazonaws.com/media/documents/Policy_Memo_from_Director_of_Executive_Office_for_Immigration_Review_Explaining_ACAs.pdf.

[245] Aaron Reichlin-Melnick, "Trump Administration Begins Sending Asylum Seekers to Guatemala" (American Immigration Council, 20 November 2019), https://www.americanimmigrationcouncil.org/blog/trump-sending-asylum-seekers-to-guatemala/.

[246] See e.g., https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained.

[247] Yael Schacher et al., "Deportation with a Layover: Failure of Protection Under the U.S.-Guatemala Asylum Cooperative Agreement", Refugees International and Human Rights Watch field report, May 2020, at 6, https://d3jwam0i5codb7.cloudfront.net/wp-content/uploads/2023/03/GuatemalaACAReport-May2020-FINAL.pdf.

The broader context is that persons with protection needs arriving at the Mexico/US border are disproportionately both family units, and from northern triangle countries. Gender based violence and gang violence are reportedly prevalent in all three northern triangle countries, making ACA transfers particularly dangerous for women and girls and for LGBT persons, and the trauma of the ACA process exacerbates psychological vulnerabilities.[248] Since the three states share a free movement area, potential persecutors among relatives or gang members continue to pose a danger throughout the region.(*cite) The plaintiffs in U.T. v. Barr (see Reactions, below) cited the US State Department warnings that women face "a startling degree of violence that has a devastating impact on their daily lives" both via criminal gangs and at home; that "widespread" anti-LGBT violence is "[u]nchecked"; and generally of the inability of police and courts to hold criminals accountable.[249]

10. *Reach*: of the original ACAs with northern triangle states, only the one between Guatemala and the US took effect. November 2019 and January 2020 USCIS guidance to asylum officers stated that this ACA "can be applied to a national of Honduras or El Salvador who has not been convicted of a felony in the United States or any crime in Guatemala, but the amenable nationalities are subject to change at any time".[250] The eligible nationalities, number and frequency of transfers were specified in implementation plans developed for the Guatemala and Honduras ACAs.[251] It was reportedly applied only to persons from El Salvador and Honduras from November 2019 to January 2020, then also to persons from Mexico until the US's Title 42 border closure in March 2020 effectively suspended it. The practical scope of application of the ACA with Honduras that took effect in July 2025 is not yet clear.

Reports of the number of persons actually transferred under the Guatemala ACA vary, but the more recent and reliable estimates indicate about 940 transfers from November 2019 until the operational suspension of the agreement from March 2020. The plaintiffs in U.T. v. Barr on 28 February 2020 (see Reactions, below) stated that "more than 700" persons had been removed to Guatemala,[252] and by 16 March there had reportedly been 939 total transfers.[253] UNHCR informed staff of the US Senate in October 2020 that there had been 945 total transfers.[254] Although they were conceived and have usually been implemented as essentially a responsibility sharing programme among the US and the northern triangle states, the terms of the ACAs can in principle encompass any person in a US removal procedure who raises a protection claim and is not a citizen or resident of the state party to the particular ACA.

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[248] Yael Schacher et al., "Deportation with a Layover: Failure of Protection Under the U.S.-Guatemala Asylum Cooperative Agreement", Refugees International and Human Rights Watch field report, May 2020, at 31-36, https://d3jwam0i5codb7.cloudfront.net/wp-content/uploads/2023/03/GuatemalaACAReport-May2020-FINAL.pdf.

[249] Plaintiff's memorandum of law in support of their motion for summary judgment and permanent injunction (document 38-1), U.*T. et al. v. Barr et al.* (District Court for the District of Columbia, 1-20-cv-00116 (EGS), 28 February 2020) at 12, https://storage.courtlistener.com/recap/gov.uscourts.dcd.214396/gov.uscourts.dcd.214396.38.1.pdf.

[250] Plaintiff's memorandum of law in support of their motion for summary judgment and permanent injunction (document 38-1), *U.T. et al. v. Barr et al.* (District Court for the District of Columbia, 1-20-cv-00116 (EGS), 28 February 2020) at 11, https://storage.courtlistener.com/recap/gov.uscourts.dcd.214396/gov.uscourts.dcd.214396.38.1.pdf.

[251] "Cruelty, Coercion, and Legal Contortions: The Trump Administration's Unsafe Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador" (US Senate Committee on Foreign Relations Democratic Staff Report, 18 January 2021) at 8, https://www.foreign.senate.gov/press/dem/release/menendez-publishes-new-report-documenting-cruelty-coercion-and-legal-contortions-in-trump-administrations-asylum-agreements.

[252] Plaintiff's memorandum of law in support of their motion for summary judgment and permanent injunction (document 38-1), *U.T. et al. v. Barr et al.* (District Court for the District of Columbia, 1-20-cv-00116 (EGS), 28 February 2020) at 1, https://storage.courtlistener.com/recap/gov.uscourts.dcd.214396/gov.uscourts.dcd.214396.38.1.pdf.

[253] Yael Schacher et al., "Deportation with a Layover: Failure of Protection Under the U.S.-Guatemala Asylum Cooperative Agreement", Refugees International and Human Rights Watch field report, May 2020, at 6, https://d3jwam0i5codb7.cloudfront.net/wp-content/uploads/2023/03/GuatemalaACAReport-May2020-FINAL.pdf.

[254] "Cruelty, Coercion, and Legal Contortions: The Trump Administration's Unsafe Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador" (US Senate Committee on Foreign Relations Democratic Staff Report, 18 January 2021) at 4, https://www.foreign.senate.gov/press/dem/release/menendez-publishes-new-report-documenting-cruelty-coercion-and-legal-contortions-in-trump-administrations-asylum-agreements (no transfee had been granted asylum in Guatemala).

11. *Source*: 8 USC 1158(2)(A) prohibits applications for asylum by persons the AG has determined that a STCA applies to. The Interim Final Rule (IFR) "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act", issued on 19 November 2019,[255] relied on this legislative authority(*right?) to establish the necessary procedures to implement the new ACAs into the US asylum process.

The 2019 ACAs all followed a similar form. After preambular recognition of the US's and the counterparty country's international refugee and human rights law and national asylum obligations, the counterparty undertook to provide access to a protection determination system and not to return applicants transferred to it without a formal administrative decision.[256] (References in this paragraph are to the Guatemala agreement; the El Salvador and Honduras agreements are closely similar in substance.) Unaccompanied children and persons with a valid non-transit visa for the US were exempted from the agreement, or either country could at its discretion take responsibility for the application if it decides it is in the public interest.[257] The US stated its intention to collaborate with the counterparty "to identify the appropriate individuals to be transferred" and carry out the transfers, and that it "plans to cooperate to strengthen the institutional capacities of" the counterpart country.[258]

The 2025 agreement with Honduras followed the same basic form of the 2019 ACAs, but clarifying that Honduras retains final discretion to accept individuals transferred under its terms; and that the parties were not required to accept transfers of individuals involved in various crimes or illicit activities; and directing the US's stated intent regarding institutional capacity building specifically towards Honduras's protection determination system.[259]

12. *Justification*: DHS entered into the ACAs in order to address "historic levels of migration and human smuggling", with most arrivals at the southern border having come from one of the northern triangle states, making agreements to "allow migrants to seek protection within the region by facilitating cooperation between the U.S. and host nation governments or international organizations to expand their systems for offering humanitarian protections".[260] Under "Background and Legal Basis", the IFR cited the EU's Dublin system and its acceptance, and UNHCR positions accepting the STC "concept as consonant with international refugee law principles".[261]

13. *Domestic and International Reactions*: the main concerns raised by litigants, legislators, UNHCR and civil society organisations focused on the application of safe third country rules to countries lacking sufficient

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[255] DHS and DoJ, "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act" 84 Fed. Reg. 63,994 (19 November 2019), https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.

[256] Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims (Guatemala agreement), US Dept of State Treaties and Other International Acts Series 19-1115, 26 July 2019 (signed) / 15 November 2019 (entered into force), preambles and article 3, https://www.state.gov/wp-content/uploads/2020/01/19-1115-Migration-and-Refugees-Guatemala-ACA.pdf.

[257] Guatemala agreement, articles 4, 5, https://www.state.gov/wp-content/uploads/2020/01/19-1115-Migration-and-Refugees-Guatemala-ACA.pdf.

[258] Guatemala agreement, article 7(1), (3), https://www.state.gov/wp-content/uploads/2020/01/19-1115-Migration-and-Refugees-Guatemala-ACA.pdf.

[259] DHS, Agreement Between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Requests, 90 Fed. Reg. 128, 30076 (8 July 2025), respectively articles 3(2), 5(2), and 6(3), https://www.govinfo.gov/content/pkg/FR-2025-07-08/pdf/2025-12631.pdf.

[260] DHS, "*Fact Sheet:* DHS Agreements with Guatemala, Honduras, and El Salvador", 28 October 2019, https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf ("Over 27% of all the migrants apprehended at the Southwest border through August of Fiscal Year 2019" were from [the three Northern Triangle states]").

[261] DHS and DoJ, "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act" 84 Fed. Reg. 63,994 at 64,000 (19 November 2019), https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.

capacity to carry out the envisaged asylum determinations, and multiple reports of ongoing human rights abuses in the northern triangle as a whole.

The American Immigration Council criticised the implementation of the ACA with Guatemala as relying on Guatemala to provide a "full and fair" asylum procedure despite its asylum office having fewer than 10 staff nationwide, and DHS's acknowledged uncertainty about the availability of material reception conditions.[262] UNHCR stated its "serious concerns about the new U.S. policy on asylum published Tuesday, 19 November. It is an approach at variance with international law that could result in the transfer of highly vulnerable individuals to countries where they may face life-threatening dangers".[263] Refugees International and Human Rights Watch reported based on field research that all 30 ACA transferees they worked with had experienced inhumane treatement during their detention and removal from the US, had not had an opportunity to apply for asylum in Guatemala, and were experiencing abuses and fears of persecution similar to what they had originally fled from.[264] A staff report for Senators on the Foreign Relations Committee criticised the IFR and the Guatemala ACA and their implementation on these and further grounds, and the political processes by which they were arrived at.[265] Human Rights Watch welcomed the February 2021 termination of the ACAs as having ended a "travesty" whereby persons seeking protection never had a chance to do so, at risk of their lives.[266]

Six persons who had been returned to Guatemala under the ACA challenged the agreement, along with the civil society organisations Tahirih Justice Center and Las Americas Immigrant Advocacy Center. On 15 January 2020, in U.T. v Barr (District court for the District of Columbia), they claimed that rather than the purported burden sharing, "the Rule and ACAs simply turn away asylum seekers and pass the buck to other countries, regardless of what happens to the individuals".[267] The plaintiffs argued that the rule (the IFR) violated federal legislation (the INA) in bypassing mandatory credible fear procedures and non-refoulement provisions, as well as in the STC provision itself.[268] The rule's extra screening step (for ACA applicability) took applicants out of a legally mandatory removal procedure and the subsequent possibility they would not be asked if they feared return to the ACA country violated non-refoulement prohibitions, while the rule failed to satisfy the requirements in the INA's STC exception to the rule that noncitizens in or arriving in the US must be allowed to apply for asylum, in particular by impermissibly placing burdens of proof on the applicant that should by law be on the state, and through truncating the jurisdiction of

262 Aaron Reichlin-Melnick, "Trump Administration Begins Sending Asylum Seekers to Guatemala" (American Immigration Council, 20 November 2019), https://www.americanimmigrationcouncil.org/blog/trump-sending-asylum-seekers-to-guatemala/ (in 2018, Guatemala processed 262 asylum claims).

263 UNHCR press release, "Statement on new U.S. asylum policy", 19 November 2019, https://www.unhcr.org/us/news/news-releases/statement-new-u-s-asylum-policy.

264 Yael Schacher et al., "Deportation with a Layover: Failure of Protection Under the U.S.-Guatemala Asylum Cooperative Agreement", Refugees International and Human Rights Watch field report, May 2020, https://d3jwam0i5codb7.cloudfront.net/wp-content/uploads/2023/03/GuatemalaACAReport-May2020-FINAL.pdf.

265 "Cruelty, Coercion, and Legal Contortions: The Trump Administration's Unsafe Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador" (US Senate Committee on Foreign Relations Democratic Staff Report, 18 January 2021), https://www.foreign.senate.gov/press/dem/release/menendez-publishes-new-report-documenting-cruelty-coercion-and-legal-contortions-in-trump-administrations-asylum-agreements.

266 Bill Frelick, "US Terminates Shameful Asylum-Shirking Pacts" (Human Rights Watch, 10 February 2021), https://www.hrw.org/news/2021/02/10/us-terminates-shameful-asylum-shirking-pacts (observing that "a US embassy cable written while the cooperative agreement was being negotiated reported that Guatemala had not processed a single asylum case in more than a year").

267 Complaint for declaratory and injunctive relief (document 3), *U.T. et al. v. Barr et al.* (District Court for the District of Columbia, 1-20-cv-00116 (EGS), 15 January 2020) at para 8, https://storage.courtlistener.com/recap/gov.uscourts.dcd.214396/gov.uscourts.dcd.214396.3.0.pdf.

268 Plaintiff's memorandum of law in support of their motion for summary judgment and permanent injunction (document 38-1), *U.T. et al. v. Barr et al.* (District Court for the District of Columbia, 1-20-cv-00116 (EGS), 28 February 2020) at 15, https://storage.courtlistener.com/recap/gov.uscourts.dcd.214396/gov.uscourts.dcd.214396.38.1.pdf.

immigration judges over decisions to apply an ACA.[269] (The case remains technically active, but has not proceeded on the merits; the parties' next status report is due 6 August 2025.[270])

14. *Externalization*: under the ACAs, the northern triangle states agreed to assume full responsibility for the asylum procedure, and for the protection granted (if any), for nationals of other northern triangle states removed there from the US.

15. *Technology*: there is no particular technological component relating to the northern triangle ACAs.

16. *Other*: n/a

Externalization of asylum processing – summary removals (bespoke agreements)

Summary: In 2025, DHS appears to be implementing summary removals of persons not authorised to remain in the US. Some persons subject to removal are deported to a third country, without a viable legal or practically meaningful opportunity to establish a well-founded fear of removal to that country. The removals take place pursuant to bespoke agreements between the US and the government of the third country, and the deportee might not be aware of their destination until shortly (hours) before they are removed. The deportation agreements are generally not justiciable, but a federal court has ruled that execution of the agreements on the US side deprived persons subject to their operation of their statutory right to a hearing in immigration court where they may request withholding of removal.

This is a new barrier, established after the completion of the initial canvassing and assessment of barriers for this report. The subsections below are placeholders for text to be added after the first version of the report is complete.

1. *Justification*: There could in principle be a legal basis in 8 USC {*etc}, for those persons {*suspected of past or present involvement in crimes}. Administrative channels could run from criminal justice authorities (federal, state or local) to ICE, or via ICE for persons not yet in custody.

Procedural barriers – *preliminary note*

In the US system, criteria for asylum eligibility resemble the international refugee definition, but the actual grant of asylum is an act of executive discretion. The only legally mandatory form of protection is withholding of removal, which amounts to non-refoulement, also more or less matching the international refugee definition. Withholding of removal requires a higher evidentiary standard (viz, more likely than not) for a persecution risk, and generally poses more procedural challenges than asylum. Many of the procedural barriers to asylum have the effect of redirecting applicants from the asylum procedure to immigration removal or expedited removal proceedings. A person who is "ordered removed" via expedited proceedings or after a normal removal proceeding is inadmissible (re-entry ban) for five years.[271] Attempted re-entry during that time results in immediate removal without review,[272] unless an asylum officer determines the person concerned has a "reasonable fear" of persecution.[273]

Procedural barriers – exclusion from the procedure - between border points asylum ban

Summary: a November 2018 DHS and DoJ interim rule barring from asylum any non-citizens who enter the US in violation of a presidential proclamation relating to the southern border, and the simultaneous proclamation suspended all entries except at established border points. A federal District Court issued a

[269] Plaintiff's memorandum of law in support of their motion for summary judgment and permanent injunction (document 38-1), U.T. et al. v. Barr et al. (District Court for the District of Columbia, 1-20-cv-00116 (EGS), 28 February 2020) at 16-21, https://storage.courtlistener.com/recap/gov.uscourts.dcd.214396/gov.uscourts.dcd.214396.38.1.pdf. For the defendants' reply in opposition, see https://storage.courtlistener.com/recap/gov.uscourts.dcd.214396/gov.uscourts.dcd.214396.83.0.pdf.
[270] See https://www.courtlistener.com/docket/16698886/ut-v-barr/ (most recent status update was 10 June 2025).
[271] 8 USC 1182(a)(9)(A) (a second removal, or an aggravated felony conviction, results in a 20 year ban).
[272] 8 USC 1231(a)(5).
[273] https://www.americanimmigrationcouncil.org/fact-sheet/expedited-removal/.

preliminary injunction against the policy, as likely to violate federal legislation (the right of any persons to apply for asylum, 8 U.S.C. 1158(a)(1)) and administrative law (arbitrary and capricious, because it would determine eligibility for asylum based on a criterion – manner of arrival – that is unrelated to asylum), which was upheld by the Circuit Court for the 9th Circuit in February 2020, for these reasons and also with reference to the US's international commitments. An executive order of the president of 2 February 2021 directed DHS and DoJ to review and determine whether to rescind the interim rule.[274] The rule appears not to have been put into effect before the January 2025 executive orders that suspended asylum.

1. *Functioning:* persons attempting to enter the US across the southwestern border between border points were barred from asylum. Instead, expedited removal procedures were applied, which did however entail transfer to the normal removal process including hearing for withholding of removal, if they could demonstrate a "reasonable fear" of refoulement under USC 1231(b)(3) (transposing article 33(1) of the Refugee Convention) or the CAT (other persons in expedited removal hearings remained subject to a lower, "credible fear" standard); "reasonable fear" means "a reasonable possibility" the applicant would be persecuted based on race, religion, nationality, membership in a particular social group or political opinion, or tortured.[275]

2. *Time:* 9 November 2018 (interim final rule and presidential proclamation) until rescinded on 16 May 2023 by the rule "Circumvention of Lawful Pathways" (see barrier "TCTB", below).[276] However, the rule was in effect and enforced only briefly, if at all. It was blocked by District court injunctions from 19 November 2018,[277] and from March 2020 was anyway superseded in practice by the Title 42 policy (see above) that closed the border to all undocumented arrivals, without an exception for asylum requests.

3. *Place:* Mexico/US land border, except at designated crossing points.

4. *Actors:* within DHS, CBP would carry out expedited removals, and USCIS would interview referring persons referred by CBP who had expressed a fear of refoulement based on a "reasonable fear" of persecution or torture. Immigration judges (DoJ/EOIR) would hear withholding of removal cases for those with a positive reasonable fear determination, and would hear appeals against negative reasonable fear determinations.

5. *Interaction:* like several other barriers, this one makes use of the expedited removal procedure enacted by in the 1996 IIRIRA legislation. It also was de facto displaced by the Title 42 policy. Otherwise its main interaction with other barriers may have been that after the courts blocked this asylum ban, the government continued to deploy policies (such as the TCTB, see below) similarly aimed at restricting the availability of asylum (while retaining the possibility of non-refoulement protections).

6. *Development:* the asylum ban rule cited the same legal authority as several other barriers (see eg pushbacks at sea, above), 8 USC 1182(f) and 1185(a)(1),[278] and also relied for implementation of the ban on the institution of expedited removal via the 1996 IIRIRA legislation.[279] The proclamation that activated the rule emphasised that the high numbers of inadmissible arrivals at the southern border (about 520,000 in FY 2018, about ¾ of them between border points), and rising proportion, particularly families, who

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[274] https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration.

[275] See USCIS memo PM-602-0166, "Procedural Guidance", 9 November 2018 at 4, https://www.uscis.gov/sites/default/files/document/memos/2018-11-09-PM-602-0166-Procedural_Guidance_for_Implementing_Regulatory_Changes_Created_by_Interim_Final_Rule.pdf ("In other words, an asylum officer must evaluate whether there is a reasonable possibility that the alien will be persecuted or tortured, not a reasonable possibility that the alien will more likely than not be perscuted or tortured").

[276] See https://www.regulations.gov/docket/EOIR-2018-0001/unified-agenda.

[277] *East Bay Sanctuary Covenant v. Trump* (District Court for the Northern District of California, 18-cv-06810-JST, 19 November 2018), at 34-35.

[278] 83 Fed. Reg. 55,934, 9 November 2018 at 55,934, https://www.govinfo.gov/content/pkg/FR-2018-11-09/pdf/2018-24594.pdf.

[279] 83 Fed. Reg. 55,934, 9 November 2018 at 55,935, https://www.govinfo.gov/content/pkg/FR-2018-11-09/pdf/2018-24594.pdf.

indicated a need for protection. The anticipated *strains on available government resources, and potential safety threats to the US population, led the government to propose to apply expedited removal to everyone who arrived between border points. The rule was first published as an interim final rule, open for public comments before becoming final, but meanwhile took effect upon the accompanying presidential proclamation.

The rule was immediately challenged in the District court for northern California, which enjoined its enforcement with nationwide effect.[280] On land as opposed to at sea, arriving migrants were fully under US jurisdiction and therefore that within the scope of the INA(*check/cite). Congress in IIRIRA had added language in 1158(a) to specify that arriving persons could apply for asylum "whether or not" they arrived at a port of entry (border point),[281] which in line with international law and previous US case law and practice meant the rule likely infringed 8 USC 1158(a) without sufficient legal basis (ie 8 USC 1185(a) cannot be relied on to displace 1158(a) under the facts of this case; the court explicitly declined to reach the 1182(f) question).[282] The 9th Circuit effectively upheld this ruling when it declined the government's request to stay the District court order pending appeal,[283] and again when the government appealed the District court's actual injunction against enforcing the asylum ban.[284] In a separate set of cases addressing similar legal arguments, the District of Columbia District court first acknowledged that the California District court's nationwide injunction had forestalled immediate harm, then ordered the rule vacated as unlawful (contravening 8 USC 1158).[285] The District of Columbia Circuit court held the appeal in abeyance while the government developed new policies following a new executive order of 2 February 2021,[286] and eventually dismissed the case on 3 December 2023 at the government's request.[287] (Both courts also ruled against the government on APA related grounds.)

7. *Rationale:* the main purpose of the rule was, by barring access to asylum between border points, "to channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner".[288] Applying the expedited removal procedure to all persons arriving at the southern border between border points would efficiently utilise CBP resources and would reduce or eliminate the need to parole arriving persons into the US for removal procedures.

8. *Legal Status:* persons subject to the between border points asylum ban were transferred to expedited removal proceedings, where they retained the right to claim a risk of refoulement and potentially, after a positive reasonable fear assessment, a hearing with an immigration judge for withholding of removal.

9. *Specific Impact:* if the asylum ban had taken effect, it would have particularly impacted on persons with particular vulnerabilities that resulted in an immediate need of protection, or would make it unsafe to travel to a border crossing point and wait there for entry to the US.[289] Demographically, the rule largely

[280] *East Bay Sanctuary Covenant v. Trump* (District Court for the Northern District of California, 18-cv-06810-JST, 19 November 2018).
[281] *East Bay Sanctuary Covenant v. Trump* (District Court for the Northern District of California, 18-cv-06810-JST, 19 November 2018), at 19.
[282] *East Bay Sanctuary Covenant v. Trump* (District Court for the Northern District of California, 18-cv-06810-JST, 19 November 2018), at 20-23, https://www.cand.uscourts.gov/filelibrary/3516/3-18-cv-06810-JST_Order_granting_temporary-res.pdf.
[283] *East Bay Sanctuary Covenant v Trump* (9th Circuit, 7 December 2018) (replaced on 25 July 2019 to add an erroneously omitted dissenting opinion).
[284] *East Bay Sanctuary Covenant v Trump* (9th Circuit, 28 February 2020) (amended 21 March 2021).
[285] *O.A. v. Trump & S.M.S.R. v. Trump* (District Court for the District of Columbia, 18-cv-2718 (RDM) & 18-cv-2838 (RDM), 2 August 2019) at 4, https://www.refworld.org/jurisprudence/caselaw/usadc/2019/en/123320.
[286] Executive Order 14010 of February 2, 2021 "Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border", 86 Fed. Reg. 23, 8267 (5 February 2021), https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf.
[287] See https://clearinghouse.net/case/16997/.
[288] 83 Fed. Reg. 55,934, 9 November 2018 at 55,935 {*and 55945}, https://www.govinfo.gov/content/pkg/FR-2018-11-09/pdf/2018-24594.pdf.
[289] {**look through comments to the IFR to see what if anything was highlighted re specific impacts}

responded to the anticipated arrivals of families with children travelling from Central America, who would therefore have been disproportionately impacted by it.

10. *Reach:* the rule was not implemented in practice, but its intended scope was all persons who crossed the southern border of the US. In the fiscal year preceding the rule (2018), USBP encountered about 376,000 such persons.

11. *Source:* DHS/DoJ interim final rule "Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims" (9 November 2018),[290] activated by the presidential proclamation "Addressing Mass Migration Through the Southern Border of the United States".[291] The rule cited as its legislative basis 8 USC 1182(f) (President may suspend entry if entry "would be detrimental to the interests of the United States") and 1185(a)(1) (President's general authority to regulate entry and exit of non-citizens). The "reasonable fear" screening standard was drawn from rules applicable to other classes of persons barred from asylum (such as those subject to reinstatement of a removal order, or convicted of an aggravated felony).[292]

12. *Justification:* the rule cited recent large increases in proportions of arriving persons being referred for credible fear interviews, and receiving positive assessments resulting in their transfer to regular removal procedures,[293] as evidencing increasing demands on surveillance, processing, determination and detention related resources. The situation was considered urgent because "large caravans of thousands of aliens, primarily from Central America, are attempting to make their way to the United States, with the apparent intent of seeking asylum after entering the United States unlawfully or without proper documentation".[294] The presidential proclamation expressed concerns about releasing applicants (particularly families, for whom detention space is limited) into the US, and then possibly failing to appear for hearings or proving difficult to find or remove.[295] It also cited safety risks to both migrants and law enforcement personnel between border points, and creating a pull factor by failing to take action.[296]

13. *Domestic and International Reactions:* the most significant reaction to the asylum ban came via the lawsuits discussed above (see Development), in which coalitions of NGOs and potential asylum applicants quickly challenged the rule and succeeded in having it first enjoined, then vacated, by court orders. The Tahrir Justice Center also quickly released an analysis of the new rule, criticising it on grounds that included those the courts eventually relied on (contravention of federal law requiring access to asylum; arbitrarily conditioning access to asylum on manner of arrival), as well as expressing concerns that it might function as a de facto complete asylum bar (due to difficulties in accessing ports of entry); disproportionate risks for survivors of violence, particularly women and children, and others fleeing gender-based violence; lack of evidence of criminality, unprecedented numbers of arrivals, and other justifications put forth for the rule; lack of a public comment period before promulgating the rule; and general incompatibility with international protection standards.

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[290] 83 Fed. Reg. 55,934, 9 November 2018, https://www.govinfo.gov/content/pkg/FR-2018-11-09/pdf/2018-24594.pdf.

[291] Presidential proclamation 9822, "Addressing Mass Migration Through the Southern Border of the United States", 9 November 2018, https://www.govinfo.gov/content/pkg/FR-2018-11-15/pdf/2018-25117.pdf.

[292] 83 Fed. Reg. 55,934, 9 November 2018 at 55,942, https://www.govinfo.gov/content/pkg/FR-2018-11-09/pdf/2018-24594.pdf.

[293] 83 Fed. Reg. 55,934, 9 November 2018 at 55,935, https://www.govinfo.gov/content/pkg/FR-2018-11-09/pdf/2018-24594.pdf (5% screened in 2008, 40% in 2018; 77% positive in 2008, 89% in 2018).

[294] 83 Fed. Reg. 55,934, 9 November 2018 at 55,935, https://www.govinfo.gov/content/pkg/FR-2018-11-09/pdf/2018-24594.pdf

[295] Presidential proclamation 9822, "Addressing Mass Migration Through the Southern Border of the United States", 9 November 2018, 83 Fed. Reg. 221, 57,661 at 57,661-57,662, https://www.govinfo.gov/content/pkg/FR-2018-11-15/pdf/2018-25117.pdf

[296] Presidential proclamation 9822, "Addressing Mass Migration Through the Southern Border of the United States", 9 November 2018, 83 Fed. Reg. 221, 57,661 at 57,662, https://www.govinfo.gov/content/pkg/FR-2018-11-15/pdf/2018-25117.pdf

14. *Externalization:* there was no particular externalisation dimension to the between border points asylum ban, except insofar as the persons affected were denied entry or expelled and left to either travel to a border point, or seek protection elsewhere.

15. *Technology:* n/a, except for various uses of technology to monitor and patrol the southern border.

16. *Other:* the asylum ban had little practical impact, because courts stopped it before it was widely enforced, after which new asylum rules replaced it. It was however arguably significant in terms of policy development, as it demonstrated that 8 USC 1185(a)(1) and probably 1182(f) as well did not empower the president to disregard the right to apply for asylum for persons within US jurisdiction as granted by Congress via 8 USA 1158(a). This may have encouraged the government to seek other avenues by which to restrict asylum at the southern border, and informed subsequent efforts to enact asylum bars via executive action, such as by recasting the absolute bar as a presumption of non-eligibility (see discussion of CLR rule, below), and invoking the president's responsibility to defend against invasion (see discussion of 'suspension of asylum' aka 'asylum ban 2', below).

Procedural barriers – exclusion from the procedure - STC (Third Country Transit Ban, TCTB)

Summary: in July 2019 DHS/DoJ jointly promulgated an interim rule "Asylum Eligibility and Procedural Modifications" (AEPM), followed by a final rule, that barred from asylum in the US any would-be applicants (except unaccompanied children) who had transited a third country en route without applying for protection there.[297] The possibility to apply for withholding of removal (non-refoulement equivalent) remained unaffected.[298] Litigation ensued from July 2019 in the federal courts, on points of administrative law, but also questioning whether a rule applying what amounts to a STC provision could go into force without a requirement that the government demonstrate the safety of the third country in question. The rule was in effect at times, and at times disapplied by one or another court order,[299] until it was withdrawn and replaced with a new interim rule "Circumvention of Lawful Pathways" (CLP) in May 2023,[300] which replaced the categorical bar to asylum with a rebuttable presumption.[301] Litigation began anew, with the result that CLP remained in dispute but in effect, until the January 2025 executive order suspending the asylum system as a whole.

1. *Functioning*: nationals of states other than Mexico or the US arriving at the southwestern border of the US without a visa or residence status permitting entry could not raise an asylum claim (either affirmative or defensive) unless they fit one of the exceptional categories enumerated in AEPM or, later, could rebut the presumption against asylum raised in CLP. Under pre-existing law, any persons arriving at a border post or encountered within the borders having not been inspected, and unable to prove they had been present in the US for a period of two years, was detained and placed in expedited removal proceedings.[302] Persons in expedited removal who expressed a protection need were assigned to a credible fear interview (CFI) conducted by an asylum officer. Pursuant to the AEPM rule, asylum officers were instructed to determine whether a person was subject to the rule, and if so, to apply a "reasonable fear" test (ie more likely than not) to determine if the person should be placed in normal removal proceedings ("section 240 proceedings"). A person subject to the rule and a negative reasonable fear assessment may appeal both

297 "Asylum Eligibility and Procedural Modifications" (84 Fed. Reg. 33,829, 16 July 2019), https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications. Final rule: 85 Fed. Reg. 243, 82260 (17 December 2020).

298 84 Fed. Reg. 33,829, at 33,834 (https://www.federalregister.gov/d/2019-15246/p-48, and subsequent paragraph).

299 For an outline of the procedural history of the rule, see https://immpolicytracking.org/policies/dhs-and-doj-issue-joint-third-country-asylum-interim-final-rule/.

300 "Circumvention of Lawful Pathways" (CLP) (88 Fed. Reg. 94, 31314, 16 May 2023).

301 CLP, 88 Fed. Reg. 94, 31314 at 31318 (in addition to excepting unaccompanied children, CLP **middle column, and top of right column, go into the exceptions & rebuttals).

302 For an overview of expedited removal, see https://www.americanimmigrationcouncil.org/research/expedited-removal.

determinations before an immigration judge – if the judge finds either determination incorrect, then the person goes to section 240 proceedings, otherwise they are deported without further process.[303]

2. *Time*: 16 July 2019 (AEPM interim rule issues) to 20 January 2025 (executive orders suspending asylum in general). During this time, AEPM was in abeyance due to court orders from 24 July (District Court injunction) to 11 September 2019 (Supreme Court stayed injunction), 30 June (District Court vacated the rule) to 17 December 2020 (final rule issued), and 16 February 2021 (District Court enjoined final rule) to 23 May 2023 (AEPM replaced by CLP). Likewise, CLP was blocked from 23 July (District Court injunction) to 3 August 2023 (Circuit Court stayed injunction). The rule provides for its own expiration after two years, on 11 May 2025.[304]

3. *Place*: southwestern land border (Mexico) and nearby coastal waters. (Third country nationals arriving at the northern border are covered by the US-Canada Safe Third Countries Agreement.)

4. *Actors*: DHS and DoJ jointly issued the rule. DHS (CPB) has competence for border enforcement, while DoJ (Executive Office for Immigration Review) is in charge of the asylum procedures and, separately, immigration courts.

5. *Interaction*: the TCTB and the CBP One app are closely connected. The CLP rule enacted the presumption against asylum for persons who transited a third country (ie Mexico) without applying for protection there, provided for the CBP One app (see above, pushbacks) to include scheduling appointments at border posts to apply for asylum, and excepted persons with such appointments from the general presumption against asylum.[305] The rule also enacted further barriers to asylum, such as the raising of bars to asylum in credible fear interviews,(*) discussed elsewhere in this report. Notably, CLP was announced to coincide with the ending of the Title 42 policy that had barred immigration processing to any arriving persons without a visa or residence status. AEPM was intended in part to work in tandem with the Migration Protection Protocols (MPP, see below) to "to control the flow of aliens into the United States", and to facilitate negotiations with Mexico and other countries regarding cooperation in this effort.[306]

6. *Development*: the interim rule AEPM took effect on 16 July 2019, and was immediately challenged by a coalition of NGOs that work with asylum seekers. The District Court for the Northern District of California issued a preliminary injunction against the rule on 24 July, and declined to stay the injunction pending appeal. On 16 August the Circuit Court for the 9th Circuit upheld the District court's refusal to stay its injunction, but only as far as it applied within the geographic boundaries of the 9th Circuit.[307] However, the Supreme Court on 11 September 2019 stayed the District court's injunction entirely, pending the outcome of its appeal to the 9th Circuit. On 6 July 2020 that Circuit court upheld the District court's preliminary injunction, finding that the plaintiffs were likely to succeed in their claims that AEPM was incompatible with 8 USC 1158, and that its adoption and application violated the APA.[308] In unrelated litigation, on 30 June 2020 the District Court for the District of Columbia had vacated the AEPM rule on administrative law grounds relating to the APA.[309] The interim rule thus remained in abeyance from 30 June 2020 until it was superseded by the final rule, which took effect on 19 January 2021, and was suspended by an interim District Court injunction on 16 February 2021.[310]

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303 AEPM (interim), 84 Fed. Reg. 136, 33829 at 33837-38.
304 "Circumvention of Lawful Pathways" (88 Fed. Reg. 94, 31314 at 31451, 16 May 2023), https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways.
305 CLP, 88 Fed. Reg. 94, 31314 at 31317-18.
306 "Asylum Eligibility and Procedural Modifications" (84 Fed. Reg. 33,829 at 33,842, 16 July 2019), https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications.
307 East Bay Sanctuary Covenant v Barr (9th Circuit, 16 August 2019) (appeal of D.C. No. 3:19-cv-04073-JST).
308 East Bay Sanctuary Covenant v Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)) (appeal of D.C. No. 3:19-cv-04073-JST).
309 Capital Area Immigrants' Rights (CAIR) Coalition et al. v Trump et al. 1:19-cv-2117 (TJK) and I.A. et al. v Barr et al. 1:19-cv-2530 (TJK), D.D.C. 30 June 2020.
310 *East Bay Sanctuary Covenant et al. v Barr et al.* 4:19-04073-JST, N.D.CA 16 February 2021.

The AEPM rule had little practical effect after March 2020, when the Title 42 policy required CBP to summarily return all undocumented arrivals on public health grounds (see Pushbacks, above). Upon termination of the emergency declaration underlying the Title 42 policy in May 2023, the government (DHS/DoJ(EOIR)) issued a new preliminary rule, CLP. The main substantive difference was the replacement of the bar on asylum with a rebuttable presumption that left open the possibility the asylum seeker could show could cause for not having first sought protection in a country of transit, or for not having scheduled an appointment via the CBP One app (see Pushbacks, above). A similar coalition sued to block the rule and on 25 July 2023 the District Court granted summary judgment in their favour, vacating the new rule as "both substantively and procedurally invalid", transgressing both Congressional legislation (see below, Source) and the rulemaking requirements of the APA.[311]

The Circuit Court quickly granted the government's request to stay the vacature order pending appeal,[312] thus apparently leaving the rule in force. Following the executive action suspending lawful pathways to asylum in the US, in April 2025 the 9th Circuit (which had apparently retained jurisdiction, having directed the parties to engage in settlement discussions) vacated the District Court judgment and remanded the case to the District judge to reconsider the rule, 1. in light of a new Supreme Court precedent relating to how organisations can establish standing in court,[313] the organisational plaintiffs had standing to bring the case, and 2. the impact of the ending of lawful pathways pursuant to the January 2025 executive order.[314]

7. *Rationale*: The rationale for AEPM was to reduce a large numbers of meritless asylum that strain the immigration system, "exacerbate the humanitarian crisis of human smuggling," and affect foreign relations.[315] Persons "who transited through another country where protection was available, and yet did not seek protection" may fall within the category of migrants "misusing the asylum system as a tool to enter and remain in" the US, and excluding them would prioritise trafficking victims and others with "no alternative to U.S.-based asylum relief".[316] In presenting AEPM, the government approvingly referenced the Dublin system.[317] In turn, CLP was intended in part to reduce an anticipated surge in asylum claims, adding to already high numbers of border arrivals, following the end of the Title 42 policy that same month of May 2023.[318] Other priorities included addressing a large and growing backlog of asylum cases; reducing human smuggling; and incentivising migrants in need of protection toward lawful pathways.[319]

8. *Legal Status*: persons barred from asylum by either of the TCTB rules retained the right to apply for withholding of removal.

9. *Specific Impact*: Although CLP's rebuttable presumption of protection elsewhere applies to any non-Mexican national claiming asylum at a US southwestern border post, the preamble indicates particular concern about nationals of Cuba, Haiti, Nicaragua and Venezuela "who do not have a valid protection claim" but whom the government lacks a mechanism to remove.[320] The rule excludes unaccompanied

311 *East Bay Sanctuary Covenant et al. v Biden et al.* 4:18-cv-06810-JST, N.D.CA 25 July 2023, at p34.
312 https://cdn.ca9.uscourts.gov/datastore/uploads/cases-of-interest/2023/08/07/23-16032-order-staying-district-court-decision.pdf (order of 3 August, 2023).
313 *Food and Drug Administration v. Alliance for Hippocratic Medicine,* 602 U.S. 367 (2024).
314 *East Bay Sanctuary Covenant et al. v Trump et al.* (9th Circuit, 23-16032, 7 November 2023) (vacated 21 February 2024; resubmitted 10 April 2025), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/04/10/23-16032.pdf.
315 "Asylum Eligibility and Procedural Modifications" (85 Fed. Reg. 243, 82260 at 82260, 17 December 2020), https://www.federalregister.gov/documents/2020/12/17/2020-27856/asylum-eligibility-and-procedural-modifications.
316 "Asylum Eligibility and Procedural Modifications" (85 Fed. Reg. 243, 82260 at 82260 (*?)), 17 December 2020), https://www.federalregister.gov/documents/2020/12/17/2020-27856/asylum-eligibility-and-procedural-modifications.
317 "Asylum Eligibility and Procedural Modifications" (84 Fed. Reg. 33,829 at 33840, 16 July 2019), https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications.
318 "Circumvention of Lawful Pathways" (88 Fed. Reg. 94, 31314 at 31314-15, 16 May 2023), https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways.
319 "Circumvention of Lawful Pathways" (88 Fed. Reg. 94, 31314 at 31315-16, 16 May 2023), https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways.
320 "Circumvention of Lawful Pathways" (88 Fed. Reg. 94, 31314 at 31316, 16 May 2023), https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways.

children from the rebuttable presumption against asylum eligibility.[321] Otherwise, the presumption may be rebutted by showing "by a preponderance of the evidence" (50% probability in US civil jurisprudence) that "exceptionally compelling circumstances exist", such as if the applicant or a family member travelling with them:

"A) Faced an acute medical emergency;

B) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture or murder; or

C) Satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11a."[322]

Persons unable to rebut the presumption of ineligibility for asylum based on the possibility to apply for asylum in Mexico instead, and subsequently removed, would be in the same situation as any other non-Mexican national refused entry. Effects of possible informal living circumstances could place persons with particular vulnerabilities at risk of serious harm.

10. *Reach*: The AEPM order was enforceable for about six months, from September 2019 until the superseding Title 42 policy began in March 2020, limiting its practical effect. The CLP rule was enforceable from May 2023 until May 2025. During the latter period, encounters at the southwest border (the bulk of reported CPB encounters) ranged between 100-200,000 per month until the Presidential Proclamation of June 2024, whereafter they remained in the range of 40-50,000 per month, and since February 2025 around 7,000 per month.[323]

11. *Source*: The DHS/DoJ interim,[324] then final rule "Asylum Eligibility and Procedural Modifications",[325] replaced by the proposed,[326] then final rule "Circumvention of Lawful Pathways".[327] In substance, the rules implement several subsections of Title 8 U.S.C., in particular section 1158(b) and 1231(b), and the departments draw their authority to promulgate rules in this area from various laws made by Congress.[328]

12. *Justification*: The initial justification for the AEPM rule was a large and administratively unmanageable number of asylum applications made by persons arriving at the southern border, very few of them ultimately successful. The aim of the rule was to eliminate a pull factor, reducing dangerous migration journeys and the subsequent strains on the US asylum system.[329] As the end approached of the declared health emergency the Title 42 border closure policy was based on, the government prepared CLP in order to address an expected surge of post-emergency asylum applications. In addition to the aims of the AEPM rule, CLP included an exception to the presumption against asylum for persons who made appointments

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321 "Circumvention of Lawful Pathways" (88 Fed. Reg. 94, 31314 at 31451, 16 May 2023), https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways, 8 CFR section 1208.33(a)(2)(i).
322 "Circumvention of Lawful Pathways" (88 Fed. Reg. 94, 31314 at 31451, 16 May 2023), https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways, 8 CFR section 1208.33(a)(3)(i).
323 https://www.cbp.gov/newsroom/stats/nationwide-encounters.
324 "Asylum Eligibility and Procedural Modifications" (84 Fed. Reg. 33,829, 16 July 2019), https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications.
325 "Asylum Eligibility and Procedural Modifications" (85 Fed. Reg. 243, 82260, 17 December 2020), https://www.federalregister.gov/documents/2020/12/17/2020-27856/asylum-eligibility-and-procedural-modifications.
326 "Circumvention of Lawful Pathways" (88 Fed. Reg. 36, 11704, 23 February 2023), https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways.
327 "Circumvention of Lawful Pathways" (88 Fed. Reg. 94, 31314, 16 May 2023), https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways.
328 See "Circumvention of Lawful Pathways" (88 Fed. Reg. 94, 31314 at 31323-24 (III. Legal Authority), 16 May 2023), https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways.
329 Department of Homeland Security press release, "DHS and DOJ Issue Third-Country Asylum Rule", 15 July 2019, https://www.dhs.gov/archive/news/2019/07/15/dhs-and-doj-issue-third-country-asylum-rule.

using the CBP One app (see above), and was intended to operate in concert with establishing urgent humanitarian relief programmes for citizens of designated countries of origin.[330]

13. *Domestic and International Reactions*: Both the AEPM and CLP rules were challenged in federal courts immediately upon enactment, by a coalition of immigration oriented NGOs who succeeded in arguing that the rules violated federal immigration legislation and were improperly enacted according to the APA (see Development, above).

During the public comment period leading to the final CLP rule, many US organisations and US branches of international organisations raised concerns, many of which focused on the STC presumption. This included public statements and calls for public input against the rule, as well as the organisations' own formal comments for the federal record. For example, the American Immigration Lawyers Association (AILA) urged the President to abandon the interim CLP rule rather than proceed to a final rule, as contrary to US law[331] by applying a STC presumption based on transit through third countries that had not entered into a STC agreement and were not known to actually be safe for asylum seekers, with the legal complexity of rebutting the presumption functioning as a total bar against those unable to secure and pay for legal counsel.[332] The union representing asylum officers and other USCIS staff submitted comments with moral and legal objections to the rule, specifically to the ineligibility presumption; the requirement that officers apply this presumption in credible fear screening interviews (see ** below); and that officers apply a higher "reasonable possibility" threshold test for showing a risk of torture or persecution if removed (see ** below).[333]

Among NGOs, the American Immigration Council objected that CLP would "force asylum seekers to seek protection in countries which even the U.S. government admits are not safe".[334] In comments, HIAS for example urged the government to withdraw the rule, due to its nearly total closure of access to asylum, in violation of federal law and the US's international obligations.[335] According to a review of public comments by Human Rights First,[336] over 51,000 organisations and individuals submitted comments, representing "[a] notably diverse array of administration allies, nonpartisan groups, legal experts, and civil society groups", "the vast majority" opposed to the asylum ban (i.e. CLP). A group of 172 NGOs wrote to the leadership of DoJ and DHS, objecting to the unusually brief period afforded for public comments during rulemaking of CLP (30 days) and requesting it be extended at least a further 30 days.[337]

14. *Externalization*: AEPM and CLP both presumed that persons denied access to the US would be able to request and, if merited, receive international protection in Mexico.

15. *Technology*: neither AEPM nor CLP had a particular technological element, other than the general use of technology around border security and immigration inspection. Note however that the CLP rule incorporated an exception to the 'asylum ban' for persons able to use the CBP One app to schedule an appointment to apply for asylum at the border.

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330 Department of Homeland Security, "Fact Sheet: Circumvention of Lawful Pathways Final Rule", 11 May 2023, https://www.dhs.gov/archive/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule.

331 8 USC 1158(a)(1).

332 American Immigration Lawyers Association, letter to the President 'Re: Forthcoming Notice of Proposed Rulemaking on an Asylum Transit Ban', 17 January 2023, https://www.aila.org/library/letter-to-president-biden-regarding-the-proposed.

333 * 29 March 2023, https://www.regulations.gov/comment/USCIS-2022-0016-12267.

334 https://www.americanimmigrationcouncil.org/news/new-asylum-transit-ban-dangerous-and-shortsighted.

335 https://hias.org/wp-content/uploads/HIAS_Comment_ABNPRM_Final_submitted.pdf (HIAS also observed that the rule differed little in substance from its predecessor, which courts had blocked). More than 5,000 HIAS supporters wrote separately to add their comments to the federal register in opposition to the asylum restrictions in the CLP rule. https://hias.org/news/asylum-ban-proposal-gets-thousands-public-comments-outraged-hias-supporters/.

336 Human Rights First, "Public Comments Urge Withdrawal of Biden Administration's Proposed Asylum Ban", April 2023, https://humanrightsfirst.org/wp-content/uploads/2023/04/Asylum_ban_comments_summary_.pdf.

337 https://immigrantjustice.org/wp-content/uploads/2025/05/Biden-Asylum-Ban-Extension-letter-to-30-days-comment-period-FINAL.pdf.

16. *Other*: The US/Canada Safe Third Countries Agreement (STCA) commits those two countries to accept back asylum applicants who transited the other country and requested asylum at their mutual land border.

Procedural barriers – exclusion from the procedure - MPP ('remain in Mexico')

Summary: a DHS policy (set of guidance documents) from November 2018 required non-citizens of the US or Mexico who arrive at the southern border to remain in Mexico while their removal cases are pending in immigration court (MPP1). The policy was challenged in federal courts, rescinded in early 2021, reinstated later that year by court order (MPP2), until the Supreme Court overturned the order in June 2022. The policy was again reinstated in January 2025, stayed by court order for about half the year, and seems to be formally in effect as of the end of 2025. The program impeded access to protection by drastically reducing the probability that applicants could or would attend scheduled hearings, or could obtain legal counsel, resulting in many claims being dismissed. Having to stay informally in border cities led to severe impacts on individuals, particularly women, children, and those with medical or other vulnerabilities.

1. *Functioning*: MPP applies, at the discretion of individual border officers (CBP), to persons who arrived at the southern border, with certain exceptions. (The main categories not susceptible to MPP include persons subject to expedited removal; Mexican citizens; unaccompanied children; and persons deemed "more likely than not to face persecution or torture in Mexico".) If MPP is applied, the person receives a Notice to Appear (NTA) for removal hearings at a specific border post at a later date, and is meanwhile transported back to Mexico. Persons potentially subject to MPP who "affirmatively state" that they fear persecution or torture go to a screening interview (USCIS) to determine whether this fear is "more likely than not" to be realised – if so, they are not further processed in MPP (other standard procedures remain available, at the discretion of CBP officers). Similarly, when paroled temporarily back into the US for the purposes of a hearing, those who affirmatively state such a fear go to a screening interview, with the possibility of being taken out of MPP, before being returned to Mexico.[338]

2. *Time*: MPP has existed since January 2019, with interruptions due to litigation and the Covid crisis.

MPP was active from 26 January 2019 to 28 February 2020 (except 8 April to 7 May 2019), when a District court, affirmed by the 9th Circuit, issued a temporary injunction against its application pending litigation alleging violation of constitutional and legislatively recognised rights, at first with nationwide effect but reduced a week later to only the territory of that Circuit. However, the Title 42 border closure for public health came into effect the same month of March 2020, making MPP superfluous in practice.[339]

Meanwhile, the government terminated MPP in June 2021. Several states challenged this action and in August 2021 won a District court injunction ordering the government to resume implementing MPP, until the Supreme Court overruled the District court in June 2022. A second case between the same parties in the same District court then resulted in a December 2022 injunction requiring the government to reinstate MPP nationwide. When the Title 42 order was lifted in May 2023, MPP remained nominally in effect, apparently except for the 9th Circuit.

338 CBP Enforcement Programs Division, "MPP Guiding Principles", 28 January 2019, https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf. See generally, * https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols.

339 On 23 March DHS and EOIR announced that hearings for persons waiting in Mexico under MPP were suspended. https://www.dhs.gov/archive/news/2020/03/23/joint-statement-mpp-rescheduling.

DHS announced the reinstatement of the 2019 version of MPP in January 2025.[340] In April 2025, under the understanding that MPP would be reinstated,[341] the District court in the 9th Circuit case issued a temporary injunction against its reinstatement, pending a trial and determination on the merits.[342] In July 2025 the 9th Circuit stayed the District court's stay, except as it applied to the plaintiff NGOs and their individual clients, based on the Supreme Court's ruling in Trump v. CASA (27 June 2025) that District courts may not order nationwide injunctive relief.[343] This leaves MPP available pending determination of its lawfulness, but allows individual petitions against its individual application.

3. *Place*: Mexico/US land border.

4. *Actors*: MPP was established by DHS. The DHS sub-agencies CBP, ICE and USCIS are responsible for various aspects of its implementation. In operational terms, CBP holds the most responsibility. CBP officers determine who MPP is applied to, and CBP transports those persons across the Mexico/US border. ICE transports and detains them within the US.[344] USCIS officers carry out screening interviews of persons who assert a fear of persecution or torture if they are returned to Mexico, to determine whether they "would more likely than not face persecution on account of a protected ground, or torture, [if] returned to Mexico".[345]

5. *Interaction*: beyond the Title 42 policy, MPP interacts with the procedural barrier, exclusionary credible fear interviews (see below). Persons subject to MPP often cross the border repeatedly to attend hearings, and can in principle raise a credible fear of return to Mexico. But rule changes as to how to conduct those interviews make it unlikely such claims would succeed.

6. *Development*: the broad context for the development of MPP was the public and political perception of an emergency situation along the southern border, in particular large numbers of unfounded asylum and other protection (non-refoulement) claims leading to applicants being paroled into the US (if not placed in detention) pending their removal hearings. Citing such concerns, as well as strains on the capacity of the US immigration court system, the Homeland Security Secretary announced MPP on 20 December 2018.[346] On 25 January 2019 the Secretary issued DHS policy guidance to implement MPP, stating that the US would rely on Mexico to uphold its international protection obligations and national laws, which Mexico had indicated it would do.[347] Sub-agency implementation memoranda and guidance documents

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340 *https://www.dhs.gov/news/2025/01/21/dhs-reinstates-migrant-protection-protocols.

341 DHS had announced the reinstatement in January, see https://www.dhs.gov/news/2025/01/21/dhs-reinstates-migrant-protection-protocols, and on 26 March the Title 42 order came into effect, preventing any access to the US border for persons without valid travel or residence documents.

342 *Immigrant Defenders Law Center v. Noem* (District Court for the Central District of California, 2:20-cv-09893-JGB-SHK, 16 April 2025), https://storage.courtlistener.com/recap/gov.uscourts.cacd.799929/gov.uscourts.cacd.799929.405.0.pdf (request for stay of the stay denied by the same court, 12 May 2025).

343 *Immigrant Defenders Law Center v. Noem* (9th Circuit, 25-2581, 18 July 2025 (revised 25 July)), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf (the government petitioned for rehearing en banc in August 2025).

344 ICE memo "Implementation of the Migrant Protection Protocols", 12 February 2019, https://www.ice.gov/doclib/foia/policy/directive11088.1.pdf.

345 USCIS Policy Memorandum PM-602-0169, "Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols", 28 January 2019 at 3, https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf.

346 https://www.dhs.gov/archive/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration.

347 Homeland Security Secretary memo "Policy Guidance for Implementation of the Migration Protection Protocols", 25 January 2019, https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf. On 20 December Mexico's government had acknowledged its protection responsibilities based on its legislation and treaty commitments, and would said it would allow persons given an MPP NTA to remain in the territory pending the outcome of their US removal cases, and to exit and re-enter as needed to attend hearings. Secretary of Foreign Affairs (SFE) of Mexico, "Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act", 20 December 2018, https://www.gob.mx/sre/en/articulos/position-of-mexico-on-the-decision-of-the-u-s-government-to-invoke-section-235-b-2-c-of-its-immigration-and-nationality-act-185795.

were issued on 28 January,[348] and the policy began at the San Ysidro border crossing to Tijuana, Baja California (San Diego Field Office of OFO).[349]

An American Immigration Council fact sheet outlines the development of MPP.[350] After San Ysidro, MPP was implemented at six further southern border crossings (west to east, Calexico, California/Mexicali, Baja California; Nogales, Arizona/Sonora; and across Texas, El Paso/Juarez, Chihuaha; Eagle Pass/Piedras Negras, Coahuila; Laredo/Nuevo Laredo, Tamaulipas; and Brownsville/Matamoros, Tamaulipas). Almost since its inception, MPP has been subject to litigation, and at times suspended or reinstated by court orders or policy changes reflected in new executive action.

On 1 June 2021, while the Title 42 order was in effect, the DHS Secretary ordered the termination of MPP.[351] The states of Missouri and Texas sued and secured orders affirmed by the 5th Circuit directing the reinstatement of MPP; the first of these was reversed by the Supreme Court but the second took effect in December 2021. As reinstated, MPP somewhat expanded the categories of exempted persons; required CBP officers to ask about fear of persecution or torture if returned to Mexico; and lowered the USCIS screening threshold from "more likely than not" to "a reasonable possibility" of persecution or torture.[352] In 2025 DHS announced that MPP would revert to the 2019 version.

7. *Rationale*: in announcing the MPP in December 2018, the Homeland Security Secretary cited a 2,000% increase in credible fear claims at the border, resulting in (presumably defensive) asylum claims, about 90% of them eventually denied by immigration judges.[353] According to the Secretary, MPP would make it impossible for asylum applicants to "disappear into" the US pending determination of their claims, and would reduce "illegal immigration and false asylum claims", allowing resources to be better focused on "assisting legitimate asylum-seekers".[354]

8. *Legal Status*: MPP did not affect legal status, therefore no particular status was assigned to those affected. All persons subject to MPP retained their status as non-US citizens subject to removal orders, entitled to appear in immigration courts and contest their removal. In January 2021 the government stopped new enrollments in MPP, then over the course of the year processed those already in the programme into the US to continue their immigration cases.[355]

9. *Specific Impact*: MPP excluded from its scope unaccompanied children, victims of "severe forms of trafficking", Mexican citizens, and persons who had applied for asylum en route to the US and been denied. The first version of MPP applied only to nationals of mainly Spanish speaking countries, plus Brazilians from 29 January 2020. The policy was designed to deny access to protection in the US to asylum

[348] USCIS guidance memorandum, 28 January 2019, https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf; CBP implementation memorandum, 28 January 2019, https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/Implementation%20of%20the%20Migrant%20Protection%20Protocols.pdf; CBP OFO guidance memorandum, 28 January 2019, https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf.

[349] CBP OFO guidance memorandum, 28 January 2019, https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf.

[350] American Immigration Council fact sheet "The "Migrant Protection Protocols": An Explanation of the Remain in Mexico Program", https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols.

[351] https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

[352] American Immigration Council fact sheet "The "Migrant Protection Protocols": An Explanation of the Remain in Mexico Program" at 8, https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols.

[353] Announcement of the Homeland Security Secretary, "Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration", 20 December 2018, https://www.dhs.gov/archive/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration/.

[354] Announcement of the Homeland Security Secretary, "Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration", 20 December 2018, https://www.dhs.gov/archive/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration/.

[355] American Immigration Council fact sheet "The "Migrant Protection Protocols": An Explanation of the Remain in Mexico Program" at 7-8, https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols.

seekers who arrived at the border as family units or unaccompanied children, statistically the majority of arrivals at the time, disproportionately from El Salvador, Honduras and Guatemala.[356] After reinstatement by court order, MPP was applied to anyone from the western hemisphere, and added exclusions based on pregnancy; advanced age; or at risk of harm in Mexico due to sexual orientation or gender identity.[357] All persons, especially those with vulnerabilities, remained at severe risk of human rights violations or inability to access protection while living informally in Mexico for an indeterminite time between trips to the US for removal hearings. Human Rights First documented targeted attacks against MPP enrolees in Mexico, based on gender, race or ethnicity, and sexuality.[358]

10. *Reach*: about 68,000 persons were returned to Mexico under MPP 1 (January 2019 until suspended, ie June 2021), and a further 7,505 under MPP 2 (December 2021 to August 2022).[359] It is not clear whether it has been applied since the announcement of its reinstatement in 2025.[360]

11. *Source*: MPP was announced on 20 December 2018, then formally initiated by a guidance memorandum of the DHS Secretary on 25 January 2019,[361] and subsequent departmental policy instructions. They purported to implement section 235(b)(2)(C) of the INA, now 8 USC 1225 (b)(2)(C). However federal courts have ruled that that section does not allow the executive to expel applicants for protection from the US while their claims are being determined, and that a policy such as MPP cannot be implemented by unilateral action of the government without following the procedures specified in the APA (see Reactions, below).

12. *Justification*: MPP was one of a series of policies that operated to address public concern over large numbers of persons arriving irregularly at the southern border. The government justified it largely in instrumental terms, as an administrative innovation that would prevent protection applicants from remaining in the US while their claims were assessed, and possibly abandoning that process and remaining in the country informally. Citing a "security and humanitarian crisis on the Southern border", the DHS announcement of the programme essentially describes a tactical response to changing migration patterns, to exclude as many as possible, and a means to disincentivise human smuggling and trafficking.[362] MPP was presented as a way to deter "illegal immigration and false asylum claims",[363] so as to focus resources on "legitimate asylum-seekers and individuals fleeing persecution", and "to better protect [US] sovereignty and the rule of law by restoring integrity to the American immigration system".[364]

13. *Domestic and International Reactions*: as with other barriers to asylum enacted since approximately 2010, MPP quickly attracted criticism and legal challenges. Major issues included flaws in the practical implementation of the programme, risks of violence against MPP enrolees while they lived informally in Mexico, CBP officers' discretion to apply MPP or not on an individual basis leading to separation of

356 DHS, archived document (probably a press release) of 24 January 2019, https://www.dhs.gov/archive/news/2019/01/24/migrant-protection-protocols.

357 American Immigration Council fact sheet "The "Migrant Protection Protocols": An Explanation of the Remain in Mexico Program" at 8, https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols.

358 Human Rights First, "Any Verson of "Remain in Mexico" Policy Would Be Unlawful, Inhumane, and Deadly" (*date) at 2, https://humanrightsfirst.org/wp-content/uploads/2022/09/MPPUnlawfulInhumaneandDeadly.pdf.

359 See American Immigration Council fact sheet "The "Migrant Protection Protocols": An Explanation of the Remain in Mexico Program", https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols.

360 DHS testified in District court at the end of March 2025 that MPP "has been used on a limited basis" and did not then know whether anyone had been removed under the reinstated policy. Immigrant Defenders Law Center v. Noem (District Court for the Central District of California, 2:20-cv-09893-JGB-SHK, 16 April 2025), 29.

361 Memorandum of the DHS Secretary, "Policy Guidance for Implementation of the Migrant Protection Protocols", 25 January 2019, https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

362 DHS, archived document (probably a press release) of 24 January 2019, https://www.dhs.gov/archive/news/2019/01/24/migrant-protection-protocols.

363 https://www.dhs.gov/archive/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration.

364 DHS, archived document (probably a press release) of 24 January 2019, https://www.dhs.gov/archive/news/2019/01/24/migrant-protection-protocols.

families, and numerous obstacles to obtaining legal counsel or otherwise participating meaningfully in removal hearings in the US. The main substantive (vs administrative) legal argument against MPP was that it misapplied federal legislation, transposing an exceptional power to return persons carrying valid travel and entry documents to the country they entered from, onto the equivalent provision for persons without valid documents, which provided for no such exception. A bill to forbid the use of government funds to implement MPP was introduced in the House of Representatives and referred to the Judiciary Committee, but did not progress further.[365]

In August 2019, Refugees International testified at a civil society meeting organised by the Inter-American Commission on Human Rights in Laredo, Texas based on six months' observation of the operation of MPP on both sides of the border at several main crossing points. According to the testimony, for example, opaque and changing procedures and overcrowding in courts left little to no chance that enrolees could be represented at their hearings; CBP officers appeared to make determinations on administrative and logistical rather than humanitarian criteria, with the result that vulnerable persons who should not have been in MPP were nevertheless enrolled, families were separated, enrolees had no choice but to stay unhoused in dangerous conditions or to try to return to the risks they had fled; and the redirection of resources to implement MPP exacerbated strains on both the Mexican and American immigration and asylum systems.[366] A nearly simultaneous Human Rights First report raised similar concerns based on extensive field observations in January and July 2019, adding details such as the US State Department's "level 4" threat assessment for Tamaulipas, the same as applied to Afghanistan, Iraq and Syria at the time, warning US citizens not to go there; that immigration court records indicated 99% of MPP enrolees did not have legal counsel; and labelling the credible fear screening process applied by MPP a "sham".[367]

A group of NGO and individual plaintiffs applied in federal District court for an order setting aside MPP on grounds that it conflated two distinct legal provisions: 8 USC 1225(b)(1) applies to persons without entry permission, while 8 USC 1225(b)(2) applies to "other persons" and permits their removal to a contiguous country. The District court granted a preliminary injunction against applying MPP nationwide on 8 April 2019.[368] On appeal, the 9th Circuit court stayed that order on 7 May 2019,[369] but lifted the stay on 28 February 2020 and affirmed the District court's order,[370] but then on 4 March stayed the original order's nationwide effect, restricting it to the geographical boundaries of the 9th Circuit.[371]

Similar criticisms and litigation followed the December 2021 reimplementation of MPP. National Immigrant Justice Center lawyers working in El Paso reported that nearly all their clients had been harmed or threatened by state actors in Mexico; conditions at CBP detention facilities were inhumane; CBP and USCIS often failed to carry out the administrative steps necessary for lawyers and clients to prepare for or attend hearings or to provide information regarding access to counsel or carry out vulnerability screening. NIJC assessed the flaws in MPP as irreparable and called on the government to end both MPP and the Title 42 programme.[372] ICMC considered MPP directly contrary to the principle of non-*refoulement*, citing reports of about 70,000 persons affected and "nearly 8,000 public reports of kidnappings, sexual assaults, and other violent attacks" against them, and welcomed the "end" of MPP following the June 2022

365 https://www.congress.gov/bill/116th-congress/house-bill/2662.
366 Yael Schacher, "Remain in Mexico Policy is Undermining Asylum and Endangering Asylum Seekers", Refugees Inernational (22 August 2019), https://www.refugeesinternational.org/events-and-testimony/remain-in-mexico-policy-is-undermining-asylum-and-endangering-asylum-seekers/.
367 https://humanrightsfirst.org/library/delivered-to-danger-illegal-remain-in-mexico-policy-imperils-asylum-seekers-lives-and-denies-due-process/.
368 Innovation Law Lab et al. v. Nielsen et al. (District Court for the Northern District of California, 19-cv-00807-RS, 8 April 2019).
369 Innovation Law Lab v McAleenan (9th Circuit, 7 May 2019), No. 19-15716 (appeal of D.C. No. 3:19-cv-00807-RS).
370 Innovation Law Lab v Wolf (9th Circuit, 28 February 2020), No. 19-15716 (appeal of D.C. No. 3:19-cv-00807-RS).
371 Innovation Law Lab v Wolf (9th Circuit, 4 March 2020), No. 19-15716 (appeal of D.C. No. 3:19-cv-00807-RS), 9 (recognising that views of the allowable scope of District court injunctions differed across circuits).
372 https://immigrantjustice.org/press-release/field-update-biden-administrations-migrant-protection-protocols-are-rife-with-due-process-and-human-rights-violations/.

Supreme Court decision that confirmed the government's prerogative to end it.[373] After the District court essentially ordered the government to reinstate MPP (on unrelated grounds), the government of Mexico announced that it would no longer accept MPP enrolees on to its territory, effectively disabling DHS from obeying the court order to reinstate MPP.[374]

There were also reactions against the government's efforts to end MPP, largely arguing that as a matter of border security or preventing humanitarian crises along the border, MPP should remain in place to deter migrants from attempting to reach the US border.[375] The states of Missouri and Texas sued in federal District court, which ruled on 13 August 2021 that the decision to terminate MPP was not properly arrived at according to the APA and contravened 8 USC 1225(b) provisions requiring detention during removal proceedings,[376] "and ordered DHS to implement [MPP] in good faith or to take a new agency action that complied with the law."[377] The 5th Circuit court affirmed this decision on 13 December 2021, as well as the District court's denial of the government's to stay its effect pending appeal.[378] The Supreme Court reversed the 5th Circuit decisions on 30 June 2022,[379] essentially affirming DHS's termination of MPP via the 1 June 2021 memorandum, and on 8 August the District court vacated its injunction.[380] However, on remand, Texas and Missouri argued that a 29 October 2021 memorandum of the DHS Secretary had purported to re-terminate MPP while the 5th Circuit was considering the validity of the 1 June memorandum. On 15 December 2022 the District court temporarily stayed the 29 October memorandum pending a merits judgment on its compatibility with section 706 of the APA, apparently compelling DHS to resume operation of MPP. The government appealed,[381] and the case remained pending on 21 January 2025 when the Homeland Security Secretary announced the reinstatement of MPP.[382] The case was accordingly stayed by request of the parties, to "allow … DHS to assess … how to proceed".[383]

A bill introduced in the House of Representatives on 9 January 2025 would require DHS to reimplement MPP as described in the 2019 DHS policy guidance.[384]{*update?} Anticipating that efforts to reinstate MPP would resume in 2025, organisations such as Human Rights First and Refugees International reiterated their fundamental concerns. In addition to legal arguments (ie that MPP violates immigration legislation and the APA), Human Rights First criticised the lack of realistic access to counsel or practical ability to attend hearings as a "due process charade" where most claims ended in removal orders issued in absentia; a wasteful "drain on resources" according to DHS; and "documented over 2,500 attacks" on MPP enrolees waiting in Mexico.[385] Addressing a Senate committee, Refugees International testified to those same areas of concern, based on 15 field visits to all main crossing points, and on both sides of the

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373 https://connect.icmc.net/what-are-the-migrant-protection-protocols/.

374 https://www.reuters.com/world/americas/mexico-rejects-possible-remain-mexico-revamp-plan-2023-02-07/.

375 See eg, https://www.borderreport.com/immigration/with-remain-in-mexico-over-asylum-seekers-can-stay-in-u-s-as-their-cases-play-out-in-court/; https://www.heritage.org/border-security/commentary/supreme-court-unwisely-lets-biden-end-program-making-illegal-aliens.

376 *Texas v. Biden* (District Court for the Northern District of Texas, 2:21-cv-00067-Z, 13 August 2021) 42-43, https://cases.justia.com/federal/district-courts/texas/txndce/2:2021cv00067/346680/94/0.pdf.

377 *Biden v Texas* (5th Circuit, 21-10806, 13 December 2021 (revised 21 December)) at 2, https://www.ca5.uscourts.gov/opinions/pub/21/21-10806-CV1.pdf.

378 *Biden v Texas* (5th Circuit, 21-10806, 13 December 2021 (revised 21 December)), https://www.ca5.uscourts.gov/opinions/pub/21/21-10806-CV1.pdf.

379 *Biden v Texas* (Supreme Court, 30 June 2022) 20 F. 4th 928, https://www.supremecourt.gov/opinions/21pdf/21-954_7l48.pdf.

380 https://www.dhs.gov/archive/court-ordered-reimplementation-migrant-protection-protocols. See also ** at 7, https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.178.0_6.

381 https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.184.0_1.pdf.

382 https://www.dhs.gov/news/2025/01/21/dhs-reinstates-migrant-protection-protocols.

383 https://iptp-production.s3.amazonaws.com/media/documents/2021.01.31_Texas_v._Biden_No._2-21-cv-00067-Z_N.D._Tex.pdf. On 5 February the case was terminated from the District court's docket. See https://www.courtlistener.com/docket/59815977/state-of-texas-v-joseph-r-biden/?page=2.

384 https://www.congress.gov/bill/119th-congress/house-bill/273. The bill was referred to the Judiciary Committee on the same day.

385 https://humanrightsfirst.org/library/remain-in-mexico-unlawful-and-ineffective/.

border.[386] These and other refugee and immigration oriented civil society actors urged the government, Congress and the courts not to re-establish MPP.

After the DHS Secretary announced the reinstatement of MPP on 21 January,[387] the NGOs and individuals involved in litigation against MPP applied to the District court under administrative law (section 705 of the APA) for a stay of agency action (i.e. the reinstatement).[388] They alleged MPP violated their constitutional rights to communicate with legal counsel and to "a full and fair hearing", and statutory rights to access asylum and legal counsel.[389] In April 2025 the court granted the stay with de facto nationwide effect, but on appeal the 9th Circuit stayed that stay except as it applies to "current or future clients of [Immigrant Defenders]", reasoning that even though the plaintiffs were likely to succeed in their APA claims, a stay prohibiting MPP from taking effect in general would impede the government's ability to carry out the Supreme Court's had recently clarified (albeit in a non-APA context) that a District court should grant relief as appropriate to plaintiffs before the court, but should refrain from staying an agency action more generally in a preliminary proceeding, pending a full trial on the merits.[390] As a result, MPP is in principle operational as originally announced in 2019, but the extent to which it has actually been put into effect is not clear.

14. *Externalization*: MPP entails an implied externalisation. Persons enrolled in MPP had their protection claims assessed in the US, but meanwhile resided in Mexico, reliant on that state for day to day human rights protection. Mexico acknowledged this responsibility. When announcing MPP in January 2019, the DHS Secretary stated that the US would rely on Mexico to uphold its international obligations and national laws, which Mexico had indicated it would do.[391] Reportedly under threat of retaliatory tariffs,[392] the Mexican government released a statement on the same day that restated its human rights obligations under national legislation and international treaties, and affirmed that it would extend humanitarian stay permission to persons registered in MPP, protect their rights and freedoms according to law, and allow them to apply for work permits.[393] Because of the high evidentiary standards and limited scope of withholding of removal in the US, it is likely that many MPP enrolees denied protection in the US might not by then actually have been assessed for asylum by the standards of Mexican law. There is however a degree of coordination necessary between Mexico and the US in order for MPP to function, and it is not clear whether Mexico would agree to resume its participation.

15. *Technology*: there is no particular technological component to MPP, except that it does not apply to persons who have made an appointment to apply for asylum at the border using the app CBP One (discontinued in January 2025).

386 Yael Schacher, "Statement for the Record: Remain in Mexico ", Refugees Inernational (US Senate Homeland Security and Government Affairs Committee, 16 January 2025), https://www.refugeesinternational.org/statements-and-news/statement-for-the-record-remain-in-mexico/.
387 https://www.dhs.gov/news/2025/01/21/dhs-reinstates-migrant-protection-protocols.
388 See *Immigrant Defenders Law Center v. Noem* (District Court for the Central District of California, 2:20-cv-09893-JGB-SHK, 16 April 2025), https://storage.courtlistener.com/recap/gov.uscourts.cacd.799929/gov.uscourts.cacd.799929.405.0.pdf.
389 *Immigrant Defenders Law Center v. Noem* (District Court for the Central District of California, 2:20-cv-09893-JGB-SHK, 16 April 2025), 2.
390 *Immigrant Defenders Law Center v. Noem* (9th Circuit, 25-2581, 18 July 2025), 38-39.
391 Homeland Security Secretary memo "Policy Guidance for Implementation of the Migration Protection Protocols", 25 January 2019, https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf. On 20 December Mexico's government had acknowledged its protection responsibilities based on its legislation and treaty commitments, and would said it would allow persons given an MPP NTA to remain in the territory pending the outcome of their US removal cases, and to exit and re-enter as needed to attend hearings. Secretary of Foreign Affairs (SFE) of Mexico, "Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act", 20 December 2018, https://www.gob.mx/sre/en/articulos/position-of-mexico-on-the-decision-of-the-u-s-government-to-invoke-section-235-b-2-c-of-its-immigration-and-nationality-act-185795.
392 https://www.wlrn.org/news/2021-12-02/u-s-will-resume-remain-in-mexico-policy-for-asylum-seekers.
393 https://www.gob.mx/sre/en/articulos/position-of-mexico-on-the-decision-of-the-u-s-government-to-invoke-section-235-b-2-c-of-its-immigration-and-nationality-act-185795.

16. *Other*: although strictly speaking enrolees were in a procedure that could lead to an approximation of asylum (i.e. withholding of removal), in practice MPP functioned as a barrier. Recognition rates among enrolees were less than 1%, compared to 35% across the asylum seeking population generally. As implemented (and, it is widely argued, intrinsically) MPP made it prohibitively difficult for enrolees to actually attend hearings (despite transportation means being provided), and essentially impossible to access legal counsel.

Procedural barriers – exclusion from the procedure - revocation of TPS bars a 240(A)(a) withholding claim

NB – further review of the BIA decisions and the legislaition referenced indicate that this barrier does not related to asylum or humanitarian protection. Rather, 240(A)(a) and other provisions discussed relate to the right of long term residents to remain in the US. Once placed in removal proceedings, the persons affected would have the opportunity to raise a non-refoulement (withholding of removal) claim in an immigration court. For now, this barrier is not analysed further.

Summary: the Department of Homeland Security may extend temporary protection status (TPS) to citizens or residents of designated countries who are already in the US. The designation is based on armed conflict, natural disasters, or similar generalised dangers. When DHS revokes it, persons whose TPS relied on that country's designation become returnable, without recourse to long term residence exceptions that apply to other categories of immigrants. This reflects binding case law of the Board of Immigration Appeals, as a matter of Congressional intent as expressed in the text of the provision governing cancellation of removal (now 8 U.S.C. 1229(b)). (See Matter of Hernandez-Romero, 28 I&N Dec. 374 (BIA 2021) and Matter of Padilla Rodriguez, 28 I&N Dec. 164 (BIA 2020))

Procedural barriers – structure of the procedure – exclusionary credible fear interviews (several aspects)

Summary: credible fear screening interviews are the first stage in the US process for defensive asylum (or non-refoulement) claims, established by the 1996 IIRIRA (amending the INA). If the interview results in a positive determination, the applicant may continue to a hearing before an immigration judge and raise their protection claims. In expedited removal proceedings, the same process applies, but with only non-refoulement protection potentially available, and with a higher 'reasonable fear' screening standard. Increasingly since the 2010s, and especially since 2019, government regulations and executive orders have modified the procedures and standards applied in credible fear screening. The intended effect is to reduce the proportion of protection applicants able to present their claims in immigration court before being removed from the US. Several cases have been raised against these policies, with mixed results. The aspect of the barrier with the greatest reach is the proliferation of the 'reasonable fear' threshold.

1. *Functioning:* the role and operation of credible fear interviews have evolved since their codification in 1996.

When a person subject to expedited removal raises an asylum request or non-refoulement claim as a defence against removal, they are referred to an asylum officer for a 'credible fear' screening. Showing at least a 10% possibility of persecution on a Convention ground results in a positive credible fear determination and the applicant is transferred to the normal removal process, where withholding can be granted. A supervisory officer confirms the asylum officer's determination. A negative determination can be appealed to an immigration judge; if the judge affirms it, the applicant is removed without further hearings.

Credible fear interviews function as a screen between border enforcement and immigration courts. Especially in tandem with other barriers such as bars to asylum for irregular border crossing (eg TCTB, above), changing the structure and content of the interview process can restrict access to immigration courts. Before 2020, USCIS implemented some procedural changes that due to court challenges and intervening policies (e.g. Title 42 closure) appear to have had limited impacts. Of more lasting effect, executive orders since 2020 have both channelled more applicants toward the expedited removal process, and raised evidentiary thresholds and mandatory bars to asylum or withholding that asylum officers are instructed to apply. A January 2025 memorandum from the acting DHS Secretary instructed the heads of CBP, ICE and USCIS to locate and apply expedited removal to all individuals amenable to it (even if currently in removal proceedings), and to terminate all paroles, insofar as "consistent with applicable statutes, regulations and court orders".[394]

2. *Time:* since 1996 (established by IIRIRA). DHS apparently began implementing structural changes to screening interviews about 2017, and since the lifting of the Title 42 border closure (see pushbacks, above) in 2023 a series of new government regulations has implemented and expanded asylum bars, and raised thresholds of proof for applicants barred from asylum to enter the normal removal process.

3. *Place:* credible fear screenings take place over video link. The applicant is in a detention facility, under the auspices of either ICE or (more recently, in the "enhanced expedited removal" process) CBP. A counsellor may join the interview, and may make a statement at the end. Physically, the applicant is usually located near the border, and the interviewer is probably in an office in a major city in the region.

4. *Actors:* USCIS carries out credible fear screenings, as required by 8 USC 1225(b)(1)(B). After CBP or ICE(?) officers encounter someone who claims a fear of return, they refer then to USCIS. Negative credible fear determinations may be appealed to an immigration judge (EOIR, within DoJ) and if they are affirmed, the applicant is remanded to CBP(/ICE?*) for removal. Positive credible fear determinations result in transfer to ICE custody for normal removal proceedings before an immigration judge, in which a non-refoulement (or if not barred, asylum) claim can be raised.

5. *Interaction:* credible fear screenings are adjunct to the expedited removal process, so any barrier to asylum that applies expedited removal can interact with the screenings barrier. The main such barriers are the automatic application of expedited removal to undocumented arrivals, which increases its reach, and TCTB and similar (presumptive) bars that raise evidentiary thresholds for establishing credible fear. Expedited removal, once carried out, carries with it a 5-year re-entry ban. Thereafter, if the person again attempts to enter the US, they are summarily removable.

6. *Development:* credible fear screening entered the US immigration/asylum system via the 1996 IIRIRA legislation, in what is now 8 USC 1225(b)(1)(B). Its used increased with expedited removal, which initially applied only at border points, then was expanded to sea arrivals in 2002.[395] In 2004, the AG cited the authority granted in 1225(b)(1)(A)(iii)[396] to extend expedited removal proceedings to all undocumented immigrants (ie inadmissible under INA 212(a)(C)(6) or (7) (8 USC 1182(a)(6)[397] or (7)[398])) encountered within 100 miles of a land border who could not show they had been in the US for at least 14 days.[399] After changes to the asylum system via executive orders and rulemaking encountered obstacles in court, DHS implemented modifications to the credible fear screening process through departmental memoranda and other internal documents, which also encountered judicial obstacles and became largely irrelevant in practice during the Title 42 border shutdown. After the lifting of the health emergency in May 2023, a series of new departmental rules were directed in part at heightening probability thresholds necessary to demonstrate credible fear and at assessing the applicability of presumptions or bars against asylum in

[394] https://www.dhs.gov/sites/default/files/2025-01/25_0123_er-and-parole-guidance.pdf.
[395] American Immigration Council, fact sheet "Expedited Removal Explainer", 20 February 2025, https://www.americanimmigrationcouncil.org/fact-sheet/expedited-removal/.
***https://www.americanimmigrationcouncil.org/wp-content/uploads/2017/02/a_primer_on_expedited_removal_0225.pdf
[396] Empowering the AG to apply expedited removal to undocumented persons not admitted or paroled into the US, who are unable to show they have been continuously present in the US for at least the most recent 2 year period.
[397] Present in the US without admission or parole, or arriving other than at a border point designated by the AG.
[398] Immigrants without valid entry documents.
[399] DHS, "Designating Aliens for Expedited Removal", 69 Fed. Reg. 154, 48,877 at 48,880, 11 August 2004, https://www.federalregister.gov/documents/2004/08/11/04-18469/designating-aliens-for-expedited-removal.

screening interviews, as well as in part to further expanding the categories of persons subject to expedited removal proceedings.

The 2023 DHS/DoJ rule "Circumvention of Lawful Pathways" (CLP) established a presumption against eligibility for asylum for persons arriving irregularly between border points who had passed through a third country on the way to the border (ie the TCTB), a complete asylum bar for arrivals between border points having proved infeasible due to limitations declared by courts (see 'asylum ban 1', below(*above?)). The rule instructed asylum officers to, before assessing credible fear, verify that the applicant had rebutted the presumption against asylum (**threshold? See TCTB section). If the applicant had not rebutted the presumption, then the officer should enter a negative credible fear determination and proceed to assess 'reasonable fear' for purposes of statutory or CAT based withholding of removal.[400]

In June 2024, the DHS/DoJ rule "Securing the Border"[401] further required that applicants affirmatively raise a fear of return to be referred for a screening interview, as CBP officers were no longer instructed to ask about it. It also added a new bar to asylum, with certain exceptions (notably for a CBP One appointment), for persons who arrived during a declared border emergency (which the president simultaneously declared), and required asylum officers to assess the applicability of this bar during screenings.[402] Following a negative credible fear determination (as for example if a bar to asylum applied), asylum officers then apply a new, heightened 'reasonable probability' standard for a fear of statutory refoulement or torture.[403]

A further 2024 DHS rule, "Application of Certain Mandatory Bars in Fear Screenings", proposed in May[404] and finalised in December,[405] authorised asylum officers to consider mandatory bars to asylum or statutory withholding (unless the applicant established credible fear of torture) in assessing a credible fear of persecution.[406] Such bars can include {**examples – basically, involvement with serious crime, or an administrative bar eg TCTB}.[407] If there is evidence a bar applies, asylum officers may enter negative determinations unless there is a "significant possibility" the applicant could "establish by a preponderance of the evidence that" it does not.[408] If there is a "reasonable possibility of persecution" in the identified country, and a reasonable possibility that no bars apply (if bars were considered), or a reasonable possibility of torture, then the applicant is transferred to regular removal proceedings.[409]

7. *Rationale:* the increasing application of expedited removal proceedings and more stringent standards for positive credible fear determinations were largely presented as migration control measures and, more recently, as emergency measures to maintain a functioning immigration system in the absence of Congressional action to update it or allocate significantly more resources. The policy aim of the 2004 DHS expedited removals rule was to gain control of the land borders, carry out removals without needing to

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400 Holly Straut-Eppsteiner et al., "Credible Fear and Defensive Asylum Processes: Frequently Asked Questions" (Congressional Research Service R48078, 25 September 2024) at 13, https://www.congress.gov/crs-product/R48078.
401 DHS/DoJ, "Securing the Border", 89 Fed. Reg. 111, 7 June 2024, 48710-48772, https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border.
402 Holly Straut-Eppsteiner et al., "Credible Fear and Defensive Asylum Processes: Frequently Asked Questions" (Congressional Research Service R48078, 25 September 2024) at 13-14, https://www.congress.gov/crs-product/R48078.
403 Holly Straut-Eppsteiner et al., "Credible Fear and Defensive Asylum Processes: Frequently Asked Questions" (Congressional Research Service R48078, 25 September 2024) at 14, https://www.congress.gov/crs-product/R48078 (citing "Securing the Border" rule at 48718 for the procedure, and 8 CFR 208.35(b)(2)(i) defining a 'reasonable probability' as "substantially more than a 'reasonable possibility' but somewhat less than more likely than not").
404 https://www.govinfo.gov/content/pkg/FR-2024-05-13/pdf/2024-10390.pdf.
405 "Application of Certain Mandatory Bars in Fear Screenings", 89 Fed. Reg. 243, 103,370, 18 December 2024, https://www.govinfo.gov/content/pkg/FR-2024-12-18/pdf/2024-29617.pdf.
406 A credible fear is defined as "a significant possibility that the noncitizen can establish eligibility for asylum or withholding".
407 DHS, Notice of Proposed Rulemaking "Application of Certain Mandatory Bars in Fear Screenings", 89 Fed. Reg. 93, 13 May 2024, 41347-41361 at 41348, https://www.govinfo.gov/content/pkg/FR-2024-05-13/pdf/2024-10390.pdf.
408 "Application of Certain Mandatory Bars in Fear Screenings", 89 Fed. Reg. 243, 103,370 at 103,372, 18 December 2024, https://www.govinfo.gov/content/pkg/FR-2024-12-18/pdf/2024-29617.pdf.
409 "Application of Certain Mandatory Bars in Fear Screenings", 89 Fed. Reg. 243, 103,370 at 103,372, 18 December 2024, https://www.govinfo.gov/content/pkg/FR-2024-12-18/pdf/2024-29617.pdf.

parole persons into the US, and deter repeated entry attempts (via the 5 year re-entry ban that accompanies expedited removal). This would "enhance DHS's ability to oversee the border, and to focus its resources on threats to public safety and to national security. DHS also believes that the use of expedited removal will likely interfere with human trafficking and alien smuggling operations".[410]

The next major regulatory update relating to credible fear screenings was the 2023 CLP rule. With the impending end of the Title 42 border closure, the government expected arrivals at the southern border to increase significantly,[411] potentially overwhelming the immigration system. In addition to expanding certain lawful pathways, the proposed CLP rule established a presumption against eligibility for asylum for persons who had transited a third country (see TCTB),[412] to be applied during credible fear interviews. The 2024 rules "Securing the Border" and "Application of Certain Mandatory Bars in Fear Screenings" sought to increase procedural efficiency by allowing asylum officers to apply bars to asylum in credible fear screenings, instead of leaving it to an immigration court to do so later. The latter rule was presented as measure to protect public safety, "increase operational flexibility"; and enhance administrative efficiency,[413] so potentially dangerous criminals would be removed sooner, and the need to refer cases between agencies would decrease. "Securing the Borders" established a new, nearly complete, bar to asylum in light of ongoing "emergency border circumstances" that would otherwise "exceed DHS's capacity to deliver timely consequences to most individuals who [enter the US] irregularly".[414] Despite "record returns and removals" border encounters were still increasing "due to the outdated laws and limited resources … available".[415] The "badly strained "US immigration and asylum system had "become a driver for unlawful migration throughout the region and an increasingly lucrative source of income for dangerous transnational criminal organizations",[416] requiring closure of the border to nearly all undocumented arrivals, which DHS implemented via establishment of a new bar to asylum for use in credible fear screenings.

8. *Legal Status:* since persons in a credible fear screening interview are already in an expedited removal process, a negative determination (unless appealed to an immigration judge and overturned) results in removal without further proceedings. Persons who receive a positive determination are referred to the normal removal procedure, where they may apply for withholding of removal (on 'statutory refoulement' or CAT grounds), or in principle, asylum.

9. *Specific Impact:* some classes of particularly vulnerable applicants are exempted from expedited removal entirely, such as unaccompanied children and victims of particularly severe forms of human trafficking. Otherwise, the main specific impacts reflect the demographics of persons who arrive at the southern US border between border points. In the 2020s, these were disproportionately third country nationals (i.e. not Canadian or Mexican citizens or residents), with significant and increasing proportions of families with children in 2023 and 2024,[417] and disproportionately of Central American citizenship or Indigenous ethnicities. A letter from Members of Congress to the DHS Secretary pointed out that the new rule's

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410 DHS, "Designating Aliens for Expedited Removal", 69 Fed. Reg. 154, 48,877 at 48,879, 11 August 2004, https://www.federalregister.gov/documents/2004/08/11/04-18469/designating-aliens-for-expedited-removal.

411 "Circumvention of Lawful Pathways" (88 Fed. Reg. 36, 11704 at 11705, 23 February 2023), https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways.

412 "Circumvention of Lawful Pathways" (88 Fed. Reg. 36, 11704 at 11705, 23 February 2023), https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways.

413 ** at 41352, available at *.

414 DHS/DoJ, "Securing the Border", 89 Fed. Reg. 111, 7 June 20204, 48710-48772 at 48711, https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border.

415 https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/.

416 https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/.

417 https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.

assignation of discretion over applying bars to individual asylum officers (rather than an immigration court) "opens the door to profiling people on the basis of their nationality, religion, or other characteristics".[418]

10. *Reach:* From 2014 to 2019 about 75% of credible fear screenings resulted in positive determinations, falling in the 2020s to about 60% in 2023 and 2024, in part due to changes introduced by new regulations.[419] According to USCIS figures reported annually to Congress, in the 12 months to 1 January 2025 126,462 credible fear cases were resolved, 47,390 with a positive determination (37.5%), and 13,500 reasonable fear cases were resolved, 3,806 with a positive determination (28.2%). The figures for 31 January 2023 until 31 January 2024 were 96,333 positive credible fear determinations out of 175,087 cases (55%),[420] and 4,430 positive reasonable fear determinations out of 13,146 cases (33.7%).[421] At the end of 2023, there were 221,408 pending cases that had originated with a credible fear screening (about 8% of total pending defensive asylum cases).[422]

11. *Source:* the legislative framework for expedited removal and credible fear screening is the 1952 INA as amended by the 1996 IRRIRA, now 8 USC 1225(b)(1). Pursuant to that provision, the government enacted rules implementing and generally expanding on expedited removal and the scope of screening in 2004,[423] 2023,[424] and 2024[425] (see Development, above). The effective regulations governing expedited removal and credible fear screening are republished as 8 CFR sections 235 and 236.[426]

12. *Justification:* credible fear screenings and expedited removal proceedings have been justified on utilitarian grounds, as a means to reduce irregular border crossings; quickly remove persons without a meritorious asylum claim; make best use of scarce government immigration control resources; and disrupt the business model of dangerous trafficking and smuggling organisations. For example, the proposed CLP rule (2023) acknowledged relatively low recognition rates in immigration courts for persons with a positive credible fear finding (about 15-20%), and proposed to conserve administrative resources and reduce case backlogs by screening for applicable bars during interviews rather than in court.[427] Swift removals would also enhance safety by disincentivising potentially dangerous border crossing attempts, and disrupting human smuggling and trafficking networks. The June 2024 presidential proclamation of a border emergency that accompanied the "Securing the Borders" rule cited as a main justification the absence of Congressional action to significantly update US immigration and asylum legislation since 1996, leaving the responsible agencies under-resourced and unable to apply the requirements of exisitng law in a timely manner.(*) This left the government to modify asylum and immigration procedures as far as possible within their legal remit, to allow the system to function at all.

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418 Delia C. Ramirez et al., letter to the DHS Secretary and the Director of USCIS, 12 June 2024, https://www.uscis.gov/sites/default/files/document/foia/ApplicationofCertainMandatoryBarsinFearScreenings-RepresentativeRamirez.pdf.

419 Holly Straut-Eppsteiner et al., "Credible Fear and Defensive Asylum Processes: Frequently Asked Questions" (Congressional Research Service R48078, 25 September 2024) at 17, https://www.congress.gov/crs-product/R48078.

420 An apparent transcription error in the positive determination numbers USCIS reported for the two week periods ending 31 December 2023 and 15 January 2024 has been corrected.

421 Recent reports are available at https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions.

422 Holly Straut-Eppsteiner et al., "Credible Fear and Defensive Asylum Processes: Frequently Asked Questions" (Congressional Research Service R48078, 25 September 2024) at 9, https://www.congress.gov/crs-product/R48078.

423 DHS, "Designating Aliens for Expedited Removal", 69 Fed. Reg. 154, 48,877, 11 August 2004, https://www.federalregister.gov/documents/2004/08/11/04-18469/designating-aliens-for-expedited-removal.

424 "Circumvention of Lawful Pathways" (88 Fed. Reg. 94, 31314, 16 May 2023), https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways.

425 DHS/DoJ, "Securing the Border", 89 Fed. Reg. 111, 7 June 20204, 48710-48772, https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border; "Application of Certain Mandatory Bars in Fear Screenings", 89 Fed. Reg. 243, 103,370, 18 December 2024, https://www.govinfo.gov/content/pkg/FR-2024-12-18/pdf/2024-29617.pdf.

426 https://www.ecfr.gov/current/title-8.

427 "Circumvention of Lawful Pathways" (88 Fed. Reg. 36, 11704 at 11716, 23 February 2023), https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways.

13. *Domestic and International Reactions*: In addition to widespread public objections from human rights oriented bodies to the 2023 and 2024 rules, civil society organisations submitted detailed comments to the proposed rule "Application of Certain Mandatory Bars in Fear Screenings" that focused in large part on the expanded scope and heightened thresholds in screenings. Human Rights First raised concerns about the factual and legal complexity of assessing whether bars apply, especially in light of due process constraints that arise in interviews, such as short time limits and absence of legal counsel.[428] The Center for Gender & Refugee Studies made similar observations, arguing that assessing bars to asylum in the truncated procedures of a screening interview would lead to refoulement (and that the public comment period for the proposed rule was unjustifiably brief, in light of the complexity of the rule and of the procedures it would affect).[429] The International Refugee Assistance Project further objected to the implementation of multiple regulatory changes at once without explaining their interactions; did not provide evidence for its assertion that applying security related bars earlier in the procedure improves security; and did not consider other possible policy options to meet the rule's stated objectives, among other points.[430] A group of 18 Members of Congress wrote to DHS's leaders echoing these concerns, as well as questioning why DHS was proposing policies that DHS had found two years earlier would violate Congressional intent if implemented, and highlighting the danger that making the application of bars to asylum discretionary opened the way to potential profiling or discrimination.[431]

Two internal DHS actions to modify the conduct of credible fear interviews were challenged in court in 2019, ultimately resulting in judicial orders vacating or enjoining the actions as outside the department's competence as defined in legislation. USCIS training materials applied in May/June 2019 instructed asylum officers to substantially carry out a full asylum assessment, rather than limiting the inquiry to credible fear as previously. The District court for the District of Columbia ruled in October 2020 that this plainly exceeded DHS's authority under the applicable legislation (eg 8 USC 1225(b)(1) governing credible fear screening) and implementing regulations, and vacated the training materials.[432] Also in June 2019, USCIS and CBP entered into the first of a series of memoranda by which USCIS delegated authority to CBP officers to conduct screening interviews and enter credible fear determinations, which the same District court enjoined in August 2020 as violative of 8 USC 1225(b)(1)(E)(1)'s requirement that interviews be conducted by asylum officers with specialised training.[433]

14. *Externalization*: other than potential de facto transfer of protection responsibilities to another state, there is no externalisation aspect to expedited removal or credible fear screening.

15. *Technology*: credible fear screening interviews are carried out by video link.

16. *Other*: whether it is considered narrowly, as credible fear interviews, or more broadly, as the entire expedited removal process, this barrier exists largely as a mechanism available to other barriers essentially as a shunt, a way to quickly dispose of classes of cases identified by those barriers.

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428 Human Rights First Comment, 10 June 2024, https://humanrightsfirst.org/wp-content/uploads/2024/06/USCIS-2024-0005.HRF_.Comment.Application-of-Certain-Mandatory-Bars-in-Fear-Screenings.pdf.

429 Center for Gender & Refugee Studies comment, 12 June 2024 at 10, 12, https://www.refworld.org/legal/natlegcomments/cgrs/2024/en/148509.

430 International Refugee Assistance Project, Comment on *Application of Certain Mandatory Bars in Fear Screenings*, 12 June 2024, https://refugeerights.org/wp-content/uploads/2024/06/IRAP-Comment-NPRM-Asylum-Bars-FINAL.pdf.

431 Delia C. Ramirez et al., letter to the DHS Secretary and the Director of USCIS, 12 June 2024, https://www.uscis.gov/sites/default/files/document/foia/ApplicationofCertainMandatoryBarsinFearScreenings-RepresentativeRamirez.pdf.

432 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872 (KBJ), 31 October 2020), at 53ff, https://www.scribd.com/document/561304750/Kiakombua-v-Wolf.

433 *A.B.-B. et al. v. Morgan et al.* (District Court for the District of Columbia, 20-cv-846 (RJL), 31 August 2020) at 16, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2020cv0846-32.

Procedural barriers – structure of the procedure – border procedures (HARP/PACR)

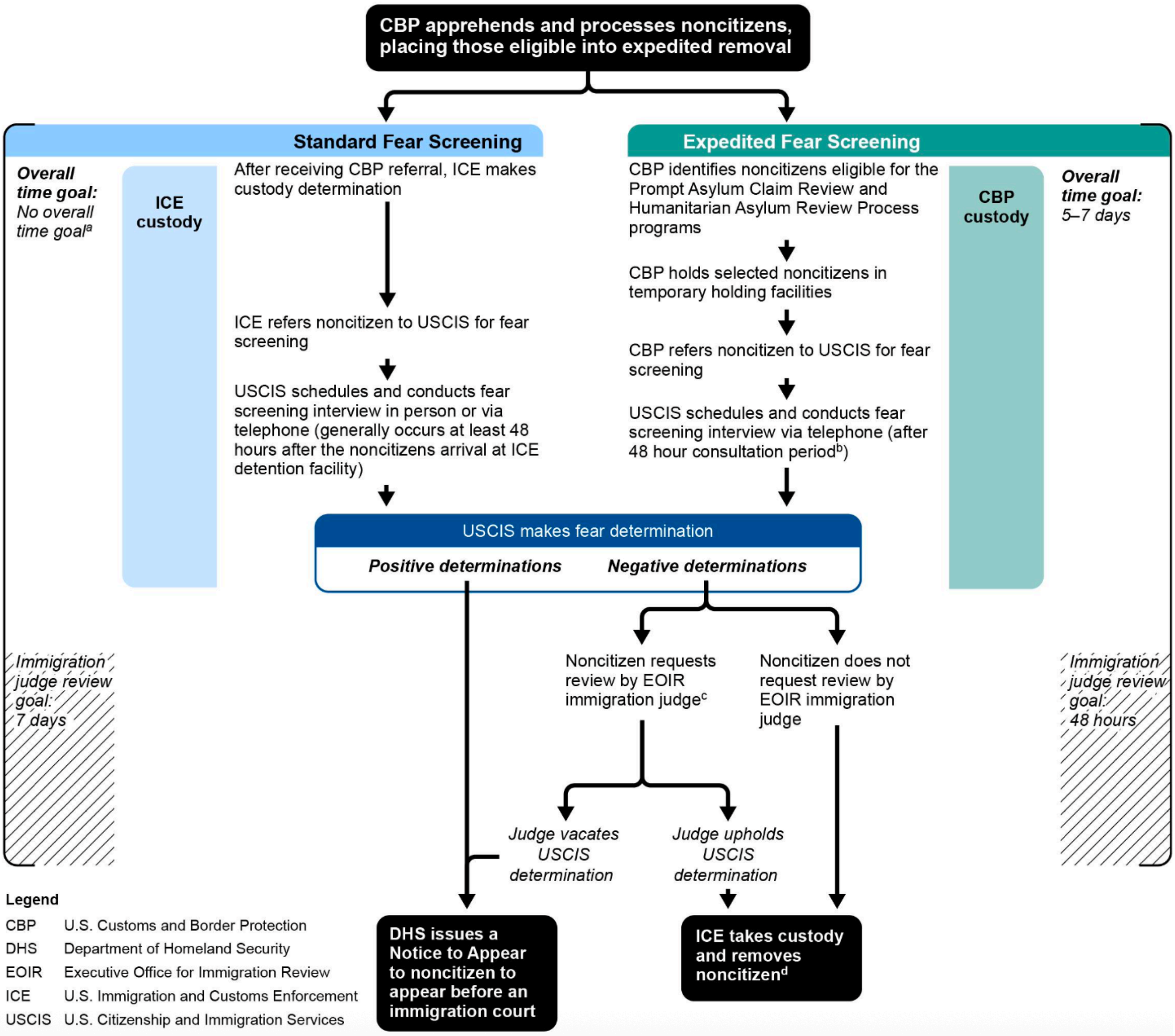
Summary: Humanitarian Asylum Review Process (HARP) and Prompt Asylum Claims Review (PACR) are essentially the same programme, implemented along parts of the Mexico/US border in 2019-2020. They operate within the framework of expedited removal procedures, assigning CBP officers the discretion to apply either PACR/HARP or the regular expedited removal procedure to persons subject to expedited removal who raise a fear of refoulement. HARP applies to Mexican citizens and PACR to third country nationals. They were instituted in October 2019 by DHS guidance memoranda, initially as a pilot programme in the El Paso border sector. After limited expansion of PACR to other sectors as well, PACR/HARP was superseded by the March 2020 Title 42 public health border closure. The US District Court for the District of Columbia ruled in November 2020 that the programmes were lawfully implemented and applied. They were revoked by executive order in February 2021, but a substantially similar set of procedures was reinstated in the spring of 2023, after the end of the Title 42 policy in March.

1. *Functioning*: Under PACR/HARP, in the border sectors where they were piloted, persons arriving at the Mexico/US border (whether at or between border points) who express a fear of return remain in CBP custody pendng their credible fear interviews, rather than being transferred to ICE custody as in the normal expedited removal procedure. The credible fear interview takes place telephonically with a USCIS officer 24 hours after PACR/HARP is applied. During this time the applicant has access to a telephone for 30-60 minutes in order to contact family, locate and consult with legal counsel (counsel may also participate in the interview). Including potential appeals, PACR/HARP is scoped to result in final disposition (removal or transfer to regular removal proceedings) within 5-7 days (72 hours as reinstated in May 2023). PACR applies to all third country nationals except unaccompanied children; HARP applies only to Mexican families.[434]

PACR/HARP function as a barrier to asylum in that they significantly curtail the ability of applicants to prepare for credible fear interviews. A negative credible fear finding can be appealed to an immigration court, but if that court concurs in the negative finding then the applicant is immediately transferred to ICE for removal. The limited time frames for key steps in the removal process and the limitations on communication while in CBP detention significantly increase the risk that a meritorious protection claim would not be fully presented and heard.

[434] https://www.americanimmigrationcouncil.org/blog/dhs-asylum-programs-pacr-harp/ (citing answers provided by DHS in response to queries from US Representativec Veronica Escobar and 28 other members of the House of Representatives).

Figure 1: Comparison of Standard and Expedited Fear Screening Procedures under the Prompt Asylum Claim Review and Humanitarian Asylum Review Process



Source: GAO analysis of Department of Homeland Security and Department of Justice information. | GAO-21-144

[435]

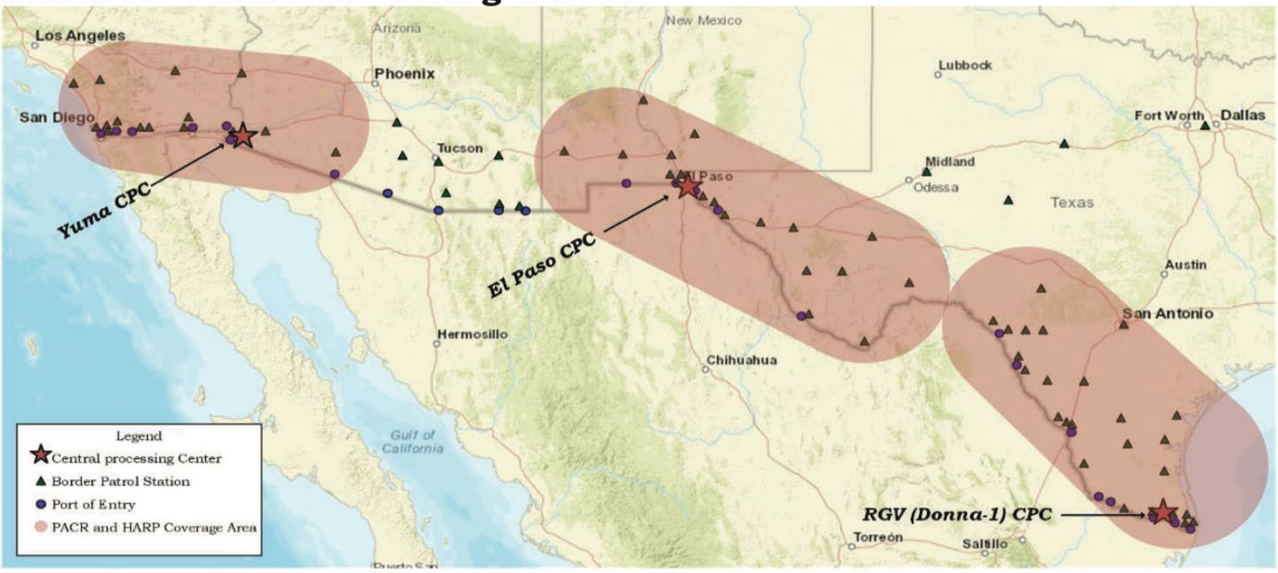
2. *Time*: October 2019 to March 2020, formally ended in February 2021. Reinstated in substance from April/May 2023. The guidance memorandum establishing the PACR pilot programme in El Paso was issued on 8 October 2019, followed by a memorandum establishing HARP on 28 October.[436] CBP "temporarily halted" the programmes following the March 2020 order implementing the Title 42 border closure (see above, within pushbacks).[437] The main substantive elements of PACR/HARP were reinstated

[435] US Government Accountability Office, Report to Congressional Requesters "Southwest Border: DHS and DOJ Have Implemented Expedited Credible Fear Screening Pilot Programs, but Should Ensure Timely Data Entry" (GAO-21-144), January 2021, at 9, https://www.gao.gov/assets/720/711974.pdf.
[436] *Las Americas et al. v. Wolf et al.* (District Court for the District of Columbia, 19-cv-03640 (KBJ), 30 November 2020) at 10-11.
[437] DHS Office of the Inspector General, "DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs" (OIG-21-16, 25 January 2021) at 7-8, https://www.oig.dhs.gov/sites/default/files/assets/2021-01/OIG-21-16-Jan21.pdf.

after the end of the Title 42 closure in March 2023, with credible fear screening interviews resuming on 10 May 2023.[438]

3. *Place*: parts of the Mexico/US border. PACR and HARP were initially piloted in the El Paso, Texas sector, with PACR later expanded to the Rio Grande Valley (encompassing the rest of the Texas border crossings) and Yuma, Arizona.

Figure 1. Southwest Border Map Showing Approximate Coverage of PACR and HARP Central Processing Centers



Source: OIG depiction of CBP data

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4. *Actors*: CBP operates most of the process, and the accompanying detention. USCIS officers conduct the screening interviews, with appeal of a negative determination running to the immigration courts (within EOIR of the DoJ). After a final removal order, ICE carries out the removal.

5. *Interaction*: Because of the TCTB, all non-Mexican citizens arriving at the border {**between points?} who had not requested asylum in Mexico or another third country were (with some exceptions) susceptible to expedited removal, and therefore also to PACR.[440] PACR/HARP also interacted with MPP,[441] particularly to screen those who stated a fear of returning to Mexico to await their next hearing in the US. PACR/HARP interacted with barriers arising due to detention by operating so as to place persons subject to expedited removal in CBP rather than ICE detention, with consequent increased challenges faced in screening interviews and removal hearings, especially greatly decreased opportunities to access legal counsel.

6. *Development*: in October 2019 DHS adopted internal guidance memoranda that initiated first PACR, then HARP, as pilot programmes.[442] In January 2020 the government stated its intent "to expand PACR/HARP

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[438] Elora Mukherjee, "The End of Asylum Redux and Law School Clinics", 133 Yale L. J. F. (2023) 473-98 at 486, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?params=/context/faculty_scholarship/article/5384.

[439] DHS Office of the Inspector General, "DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs" (OIG-21-16, 25 January 2021) at 7, https://www.oig.dhs.gov/sites/default/files/assets/2021-01/OIG-21-16-Jan21.pdf.

[440] Las Americas et al. v. Wolf et al. (District Court for the District of Columbia, 19-cv-03640 (KBJ), 30 November 2020) at 9-10, https://www.govinfo.gov/content/pkg/USCOURTS-dcd-1_19-cv-03640/pdf/USCOURTS-dcd-1_19-cv-03640-0.pdf. {**add url to other references to Las A v Wolf}

[441] ** (citing a statement of the acting Secretary for Homeland Security), https://rollcall.com/2020/02/26/dhs-expands-asylum-programs-that-fast-track-deportations/.

[442] Memorandum in support of motion for preliminary injunction (document 21-1), Las Americas et al. v. Wolf et al. (District Court for the District of Columbia, 1-19-cv-3640 (RDM)) at 8,

borderwide".[443] Suspended in practice from the start of the Title 42 border closure policy in March 2020, the programmes were formally terminated by executive order on 2 February 2021.[444] A substantially similar programme was reinstated in April 2023,[445] and functionally subsumed into the Circumvention of Lawful Pathways (CLP) rule that came into force in May 2023.[446]

7. *Rationale*: the stated goal of PACR was to achieve ""more effective processing" of noncitizens who are subject to the [TCTB]".[447] Presumably, the rationale for HARP was similar, but extended to apply to some noncitizens not subject to the TCTB.

8. *Legal Status*: persons PACR or HARP was applied to held a de facto status of persons seeking protection from refoulement (withholding of CAT protection), until they were either issued a final removal order and removed, or were transferred to the regular removal process (retaining that de facto protection seeker status, but no longer subject to PACR/HARP).

9. *Specific Impact*: unaccompanied children are exempt from PACR/HARP. HARP applies to families, but not to single adults. The conditions of CBP detention (often lacking basic amenities such as bedding; colloquially referred to as 'hieleras' (iceboxes); etc) exacerbate particular vulnerabilities in general. Reportedly, at least some speakers of Indigenous languages have placed in PACR/HARP, with no access to interpreters due in part to the short procedural deadlines.[448]

10. *Reach*: according to the ACLU, by February 2020, "at least 1,000 asylum seekers had been subjected to" PACR/HARP.[449] The GAO found that during their effective lifetime, between October 2019 and March 2020, the programmes were applied to "approximately 5,290 individuals", of whom about 1,220 received positive credible fear determinations and were transferred to normal removal proceedings.[450] Protection applicants subject to PACR or HARP had a significantly lower proportion of positive determinations than did others in the normal expedited removal process.[451] Before PACR/HARP, 74% of credible fear screenings resulted in positive determinations; this rate dropped to 23% for those in

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https://www.aclutx.org/sites/default/files/field_documents/pacr_harp_memo_iso_pi_0.pdf. (The actual guidance memoranda establishing the programmes appear not to be publicly available, but are referenced in this case.)

443 Ruthie Epstein and Shaw Drake, "Ban on Attorney Access for Asylum Proceedings in Inhumane CBP Jails Key to Trump's Attack on Asylum" (ACLU, 26 February 2020), https://www.aclu.org/news/immigrants-rights/ban-on-attorney-access-for-asylum-proceedings-in-inhumane-cbp-jails-key-to-trumps-attack-on-asylum.

444 Executive Order 14010 of February 2, 2021 "Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border", 86 Fed. Reg. 23, 8267 (5 February 2021), section 4(ii)(E), https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf.

445 See https://immigrantjustice.org/blog/obstructed-legal-access-nijcs-findings-from-3-weeks-of-telephonic-legal-consultations-in-cbp-custody/.

446 *Plaintiff's motion for summary judgment (document 37), M.A. et al. v. Mayorkas et al.* (District Court for the District of Columbia, 1-23-cv-01843 (TSV), 28 September 2023) at 5-7, https://www.acludc.org/app/uploads/2023/07/M.A.-v-Mayorkas.037.Plaintiffs-MSJ.pdf.

447 *Las Americas et al. v. Wolf et al.* (District Court for the District of Columbia, 19-cv-03640 (KBJ), 30 November 2020) at 10, https://www.govinfo.gov/content/pkg/USCOURTS-dcd-1_19-cv-03640/pdf/USCOURTS-dcd-1_19-cv-03640-0.pdf.

448 National Immigrant Justice Center, "Obstructed Legal Access: NIJC's Findings From 3 Weeks of Telephonic Legal Consultations in CBP Custody" (25 May 2023) at 4, https://immigrantjustice.org/blog/obstructed-legal-access-nijcs-findings-from-3-weeks-of-telephonic-legal-consultations-in-cbp-custody/.

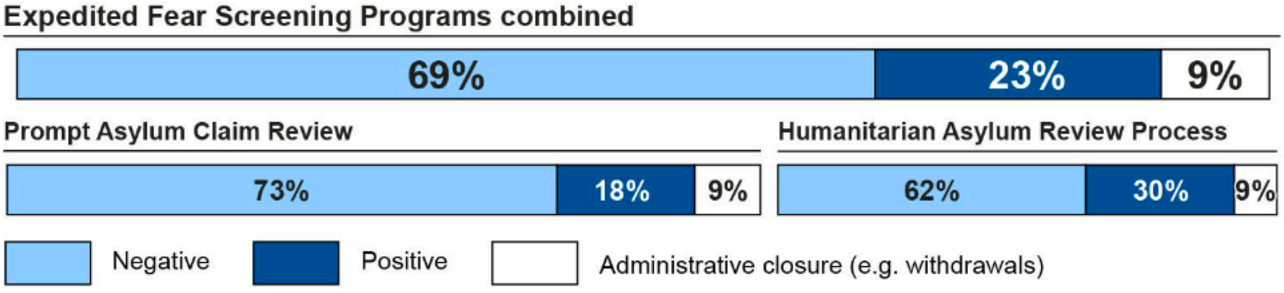
449 Ruthie Epstein and Shaw Drake, "Ban on Attorney Access for Asylum Proceedings in Inhumane CBP Jails Key to Trump's Attack on Asylum", ACLU 26 February 2020, https://www.aclu.org/news/immigrants-rights/ban-on-attorney-access-for-asylum-proceedings-in-inhumane-cbp-jails-key-to-trumps-attack-on-asylum (estimate; at the time, no official statistics on the reach of PACR/HARP had been released).

450 US Government Accountability Office, Report to Congressional Requesters "Southwest Border: DHS and DOJ Have Implemented Expedited Credible Fear Screening Pilot Programs, but Should Ensure Timely Data Entry" (GAO-21-144), January 2021, at unnumbered first page "Highlights", https://www.gao.gov/assets/720/711974.pdf.

451 See Human Rights First, "Human Rights First Condemns Administration's Plan to Fast-Track Asylum Screenings", 27 January 2023, https://humanrightsfirst.org/library/human-rights-first-condemns-administration-plan-to-fast-track-asylum-screenings/.

PACR/HARP.[452] It was reported before a Congressional committee that of over 4,700 persons in PACR/HARP, 31 were able to obtain a lawyer for their credible fear interviews.[453]

Outcomes of Screenings Under Expedited Fear Screening Pilot Programs, October 2019 through March 2020 (as of August 11, 2020)



Source: GAO analysis of USCIS data. | GAO-21-144

Note: Percentages do not total 100 due to rounding.

In the first three months after the reinstatement of procedures similar to PACR/HARP, "perhaps 100" out of "thousands of" persons affected had been able to secure legal counsel for their fear screenings.[454]

11. *Source*: two DHS memoranda issued on 7 and 28 October 2019. The memoranda were not published, and available details are incomplete. Elements such as legislative basis or authorising powers do not appear to have been reported. However, the Secretary of Homeland Security holds ultimate responsibility for DHS acts.

The District of Columbia district court later ruled that the programmes sufficiently reflected the intention of Congress, evident in existing legislation, that persons susceptible to expedited removal who "lack a credible fear of persecution can be removed" without further process; that credible fear interviews are "mere initial screening assessment[s]" with legal consultation "made available in accordance with the policies and procedures of the detention facility"; that it was not "arbitrary for the agency to prioritize efficient processing of the asylum requests of noncitizens subject to expedited removal" over those individuals' ability to consult with counsel; and that according ot the Supreme Court constitutional due process rights are not available to persons who have not yet entered the US.[455]

Formally, PACR/HARP were ended by executive order on 2 February 2021. Their main procedural elements were subsumed into the May 2023 rule Circumvention of Lawful Pathways (CLP).[456]

12. *Justification*: because PACR/HARP was developed as an internal DHS policy, and deployed largely out of public view, it was not announced or highlighted in official communications. Its underlying policy determination was that the Congressional intent (expressed in the 1996 IIRIRA) to quickly remove persons not entitled to stay in the US required changes to the expedited removal procedure. When similar procedures were reimplemented via CLP, their justifications were subsumed within the overall justifications for the rule (see above, TCTB/STC). Large numbers of protection requests along the

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[452] Elora Mukherjee, "The End of Asylum Redux and Law School Clinics", 133 Yale L. J. F. (2023) 473-98 at 485-86, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?params=/context/faculty_scholarship/article/5384.
[453] American Immigration Council, "Asylum Is In Danger After Court Upholds Rushed Screening Process at the Border" (14 December 2020), https://www.americanimmigrationcouncil.org/blog/asylum-pacr-harp-court-decision/.
[454] Elora Mukherjee, "The End of Asylum Redux and Law School Clinics", 133 Yale L. J. F. (2023) 473-98 at 485-86, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?params=/context/faculty_scholarship/article/5384.
[455] Las Americas et al. v. Wolf et al. (District Court for the District of Columbia, 19-cv-03640 (KBJ), 30 November 2020) at 16 (respectively citing 8 USC 1225(b)(1)(A)(i); citing {* *Thuraissigiam*, 140 S. Ct. at 1965*} and citing and quoting 8 USC 235.3(b)(4)(ii); drawing its own conclusions regarding arbitrariness; and again impliedly referencing *Thuraissigiam* on the constitutional due process point).
[456] "Circumvention of Lawful Pathways", DHS/DoJ final rule, 88 Fed. Reg. 94 31314, 16 May 2023.

southern border, few of them ultimately successful, strained the resources and capacity of the border and immigration systems. These procedures were intended to increase the proportions of applicants screened out by the credible fear interviews, and thus removed without a merits hearing.

13. *Domestic and International Reactions*: in the weeks following their first implementation, PACR/HARP were denounced and challenged in court by civil society organisations. After the District court for the District of Columbia ruled the programmes were lawfully enacted and applied, ie the policies were challenged in and found to be within executive powers, civil society attention turned towards practical lapses in the implementation of PACR/HARP, and the resulting risks of violating international rights such as to request asylum or protection from refoulement.

On 5 December 2019, Las Americas Immigrant Advocacy Center and a group of individuals and organisations as plaintiffs challenged PACR/HARP in the District court of the District of Columbia.[457] The plaintiffs alleged violations of "either statutory or regulatory provisions" requiring access to counsel; that the programmes had been "arbitrarily and capriciously" promulgated in violation of the APA; that they "unlawfully frustrate[d]" access to asylum or refoulement protections; and violated constitutional due process rights.[458] The court however ruled that the applicable legislation "does not guarantee or even necessarily facilitate extensive pre-interview preparation", allowing DHS to prioritise efficient processing of protection requests over the applicants' "ability to build a case during the initial stage of the process", and that (constitutional) "due process rights regarding their applications" do not apply to noncitizens who have not entered the US yet.[459] After the District court's decision, the American Immigration Council, for example, criticised the policies the court had let stand as "rush[ing] asylum seekers through the most important interviews of their lives … in freezing and unsanitary facilities [that] are like legal black holes" where visitors are prohibited and even "telephone access to attorneys is extremely limited".[460]

With the overall framework of PACR/HARP apparently being lawful, criticism focuses on their implementation. Civil society lawyers have reported that the CBP does not consistently follow its own guidelines, leading for example to denial of health care to particularly vulnerable persons; lack of information for applicants on the procedures being applied to them; and severe practical challenges in contacting legal counsel.[461] Calling PACR/HARP a "complete hollowing out of the initial asylum screening process",[462] the ACLU led the Las Americas lawsuit on behalf of that organisation and three families (two from El Salvador and one from Mexico),[463] then in January 2021 called on the government to end PACR/HARP because of its apparent severe impact on positive credible fear determination rates, the "horrendous conditions" in CBP detention facilities, and average detention times of "nearly two weeks", approximately double the total duration of the procedures envisaged by PACR.[464]

A January 2021 report of the DHS Inspector General found that:

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457 *Las Americas et al. v. Wolf et al.* (District Court for the District of Columbia, 19-cv-03640 (KBJ), 30 November 2020) at 16 ("exactly 59 days after DHS issued the PACR memorandum").

458 *Las Americas et al. v. Wolf et al.* (District Court for the District of Columbia, 19-cv-03640 (KBJ), 30 November 2020) at 16.

459 *Las Americas et al. v. Wolf et al.* (District Court for the District of Columbia, 19-cv-03640 (KBJ), 30 November 2020) at 20-21.

460 American Immigration Council, "Asylum Is In Danger After Court Upholds Rushed Screening Process at the Border" (14 December 2020), https://www.americanimmigrationcouncil.org/blog/asylum-pacr-harp-court-decision/.

461 Tanvi Misra and Camila DeChalus, "DHS expands programs that fast-track asylum process" (Roll Call, 26 February 2020), https://rollcall.com/2020/02/26/dhs-expands-asylum-programs-that-fast-track-deportations/ (noting also that unlike PACR, HARP does not specify a time limit for the procedure).

462 Ruthie Epstein and Shaw Drake, "Ban on Attorney Access for Asylum Proceedings in Inhumane CBP Jails Key to Trump's Attack on Asylum" (ACLU, 26 February 2020), https://www.aclu.org/news/immigrants-rights/ban-on-attorney-access-for-asylum-proceedings-in-inhumane-cbp-jails-key-to-trumps-attack-on-asylum.

463 https://www.aclutx.org/en/press-releases/aclu-files-lawsuit-challenging-programs-rush-migrants-through-asylum-screenings.

464 https://www.aclu.org/press-releases/aclu-calls-president-biden-end-pacrharp-protocols. {**and check the full statement referenced by a link inside …} Unlike PACR, HARP did not explicitly state an intended duration for the procedure. {*cite! – it's mentioned in one of the NGO reactions}

"Because of rapid implementation and expansion of [PACR and HARP], DHS components did not adequately consider several factors necessary to support their operations. Specifically, our initial review and visit to the El Paso sector disclosed:

> * few metrics were implemented to measure the programs' effectiveness in meeting goals;
>
> * a program goal of 7 to 10-day maximum detention is inconsistent with CBP detention standards and was routinely exceeded;
>
> * due to facility limitations, multiple families were co-located, with limited assurance of privacy and separation of juveniles from unrelated adults;
>
> * consultation areas and legal amenities were not conducive to allowing aliens to prepare for credible-fear screening interviews;
>
> * staff resources were inadequate to manage the programs; and
>
> * data systems were not interoperable, necessitating labor-intensive and error-prone manual efforts to track and share information across components."[465]

When procedures similar to PACR and HARP were first proposed, then reinstituted by the CLP rule in May 2023, civil society organisations raised similar concerns about their impacts on access to asylum, usually in the context of comments and reports criticising CLP as a whole (see TCTB/STC, above).

14. *Externalization*: none. Persons removed consequent to PACR/HARP were returned to their countries of origin. Since May 2023, some third country nationals were returned to Mexico instead of to their home countries (e.g. those enrolled in MPP).

15. *Technology*: there is no particular technological component to PACR/HARP. Credible fear screening interviews are carried out by telephone, with applicants held in CBP detention facilities.

16. *Other*: information specifically on PACR/HARP is incomplete because the key guidance documents remain unpublished, and the procedures were carried out largely inside facilities closed to outside access.

B. Barriers of specific relevance to jurisdiction

Barrier 1: Narrowing the refugee definition (particularly PSG)

<u>Summary:</u> This barrier aggregates several regulatory changes, which have in common that they serve to narrow the available scope for asylum claims, and that their application is not readily susceptible to judicial review. They were however of limited practical effect, as courts enjoined the main changes enacted by executive (DHS/DOJ) rules before they took effect, and those enacted by Attorney General (AG) decisions overturning BIA precedential decisions were themselves vacated by later AG decisions. The AG decisions reduced the scope for domestic violence to qualify as persecution requiring protection, stated that families could not normally fit the definition of a particular social group (PSG), instructed asylum officers immigration judges to closely scrutinise elements of asylum claims, particularly delineations of PSG, and the BIA to review all elements of the claim de novo and to emphasise that threatened or actual harm mus be "on account of" membership in a PSG. The rules would have expanded crime related bars to asylum; and modified procedures, raised thresholds for establishing a risk of persecution, and clarified elements of the definition of persecution resulting in fewer applications granted. Both rules are reflected in current federal regulations, but enjoined as unenforceable by the District court for the Northern District of California, the first (crime related bars) for exceeding legislative authority and the second (procedures etc) for having been approved by a DHS official who had not been properly installed in office and thus lacked the legal authority to issue rules.

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[465] DHS Office of the Inspector General, "DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs" (OIG-21-16, 25 January 2021) at 8, https://www.oig.dhs.gov/sites/default/files/assets/2021-01/OIG-21-16-Jan21.pdf.

1. *Functioning:* the AG opinions narrowing the PSG definition were binding on the BIA and the immigration courts, as well as on asylum officers, affecting asylum decisions made during their currency, especially those turning on a PSG designation related to family or gang violence. The rules expanding the types of crimes barring asylum and reorganising the rules and procedures of the protection inquiry, if effective, would have bound immigration judges and asylum officers in asylum and removal procedures.

2. *Time:* The narrowing of inclusion criteria for PSG and heightened scrutiny on appeal were implemented via three AG decisions, each overturned by a later AG decision. *Matter of A-B-* (11 June 2018) and *Matter of L-E-A-* (29 July 2019), both overturned 16 June 2021, affected the definition of PSG. *Matter of A-C-A-A-* (24 September 2020), overturned 26 July 2021, required the BIA to scrutinise all elements of the protection claim de novo in appeals brought forward during that time.

The rule regarding crime related bars would have taken effect on 20 November 2020, and the broader reorganising rule on 11 January 2021. Both were enjoined by court orders shortly before their effective dates, and apparently remain ineffective (although still reflected in federal regulations).

3. *Place:* insofar as they took effect, the rule and AG decisions that narrowed eligibility for asylum were applicable in asylum determination hearings and immigration courts nationwide, and by the BIA.

4. *Actors:* the changed rules would have been applied by USCIS officers in determining affirmative asylum claims, and by immigration judges (EOIR) in defensive asylum or non-refoulement cases. The AG decisions also bound all DHS officers, as well as immigration courts and the BIA.

5. *Interaction*: there is a potential interaction with the changing role of credible fear screening interviews (the rule enjoined in January 2021 would have implemented similar changes). If those screenings are required to consider bars to asylum in addition to credible fear, then both the crime related bars and the PSG definition could arise. If CBP officers rather than USCIS asylum officers are assigned to carry out those interviews, they might lack sufficient training in these relatively complex aspects of asylum determination. Otherwise, there is no particular interaction with other barriers, except insofar as eg withholding of removal proceedings may be truncated by procedural barriers or detention can impede access to legal counsel.

6. *Development*: the policy changes reflected in the AG decisions and the rules discussed here took place in a general context of shifting demographics in border arrivals, from predominantly single adults, largely from Mexico, to family units (often mothers with children) from Central America.

The first change was the AG's decision in *Matter of A-B-* (11 June 2018), which overruled a 2014 BIA precedential decision that had determined that "married women in Guatemala who are unable to leave their relationship" could constitute a PSG.[466] More broadly, the 2018 decision was read as showing "deep skepticism of any form of persecution by a private actor as a valid basis for asylum", and specifically as significantly curtailing protection based on domestic violence or gang violence.[467] In *Matter of L-E-A-* (29 July 2019) the AG overturned a BIA decision to rule that "most nuclear families are not inherently socially distinct and therefore do not qualify [as a PSG]".[468] A third AG decision, *Matter of* A-C-A-A- (24 September 2020) heightened procedural scrutiny, particularly of the application of the PSG definition, directing the BIA to review all elements of the asylum claim de novo (even if the parties had stipulated to them without argument); emphasising that the feared or actual harm must be "on account of" the membership in a PSG, rather than that being a secondary motivation; and stating that "persecution that results from personal animus or retribution generally does not" qualify.[469]

[466] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), 11 June 2018.
[467] See e.g. Immigrant Legal Resource Center, practice advisory "*Matter of A-B-* Considerations" (October 2018) at 2-3, https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf.
[468] *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), 29 July 2019.
[469] *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020), 24 September 2020.

Meanwhile, DHS/DOJ published a notice of proposed rulemaking on 19 December 2019 that led to the rule "Procedures for Asylum and Bars to Asylum Eligibility" being enacted on 21 October 2020, and a similar notice on 15 June 2020 that led to the enactment of "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" on 11 December 2020. Both rules were set to take effect 30 days after their enactment (ie 30 days after publication in the Federal Register). Both rules would have reduced the proportion of asylum claims granted, the first rule by expanding the crime related bars to asylum and the second rule by narrowing definitions and increasing procedural steps. Courts issued temporary injunctions preventing the rules from taking effect, on 19 November 2020 and 8 January 2021, respectively.

In 2021 the AG overturned all three of the AG decisions *A-B-*, *L-E-A*, and *A-C-A-A-*, the first two on 16 January and the last on 26 July. The stated aim was to return to the status quo ante pending further rulemaking[470] to clarify the application of PSG standards,[471] and to restore the BIA's review practices to their pre-*A-C-A-A-* form.[472]

7. *Rationale*: the overarching theme of the AGs' opinions was that the BIA had adopted too broad a definition of persecution based on PSG in cases involving harms threatened or inflicted by private actors. In that situation an applicant "must establish membership in a particular and socially distinct group that exists independently of the alleged underlying harm, demonstrate that their persecutors harmed them on account of their membership in that group rather than for personal reasons, and establish that the government protection from such harm in their home country is so lacking that their persecutors' actions can be attributed to the government".[473] The BIA's precedential opinion that the AG overturned in A-B- had "caused confusion because it recognized an expansive new category of particular social groups based on private violence".[474] The subsequent AG decisions in L-E-A- and A-C-A-A- also served to direct the BIA towards more scepticism about claims stating a fear of persecution based on PSG membership.

8. *Legal Status*: persons affected by the AG decisions would have been denied asylum, or withholding of removal based on non-refoulement, and would have to demonstrate a "reasonable possibility" of being tortured according to the US law transposing the CAT in order to be granted withholding. Otherwise, their status is simply that of persons unauthorised to enter or remain in the US.

9. *Specific Impact*: the AGs' decisions necessarily had a disproportionate impact on women at risk of domestic violence, by making it much more challenging to define their membership in a PSG.

10. *Reach*: during the time when the AGs' decisions narrowing the refugee definition were in effect, immigration courts decided about 500,000 cases. It is likely that a significant proportion of these cases (perhaps half) were brought by women or families from Central America.

11. *Source:* the *de facto* narrowing of inclusion criteria, especially PSG, took place via the three AG decisions of *A-B-* (2018),[475] *L-E-A-* (2019),[476] and *A-C-A-A-* (2020),[477] all overturned in 2021.

The expansion of crime related bars to asylum was detailed in the DHS/DOJ rule "Procedures for Asylum and Bars to Asylum Eligibility",[478] purportedly based on the AG's prerogative in 8 USC 1158(b)(2)(C) to "by regulation establish additional limitations and conditions, consistent with [8 USC 1158] under which an alien shall be ineligible for asylum under [8 USC 1158(b)(1)]". The US District Court for the Northern District of California issued a nationwide preliminary injunction against implementing the rule, finding it

470 Announced in the president's executive order 14010 of 2 February 2021.
471 *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021), 16 June 2021; *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021), 16 June 2021.
472 *Matter of A-C-A-A-*, 28 I&N Dec. 351 (A.G. 2021), 26 July 2021.
473 *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020), 24 September 2020 at 317.
474 *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020), 24 September 2020 at 319.
475 *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), 11 June 2018.
476 *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), 29 July 2019.
477 *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020), 24 September 2020.
478 DHS/DoJ final rule, "Procedures for Asylum and Bars to Asylum Eligibility", 85 Fed. Reg. 204, 67202 (21 October 2020), https://www.govinfo.gov/content/pkg/FR-2020-10-21/pdf/2020-23159.pdf.

unlikely that 8 USC 1158(b)(2)(C) authorises the AG to expand the list of crime related bars to asylum.[479] The case was administratively closed on 10 January 2025.[480]

The December 2020 rule "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review"[481] would have expanded the scope of the "reasonable possibility" fear threshold;[482] frontloaded bars into the credible fear screening;[483] and generally updated rules around PSG, political opinion, persecution, nexus, internal relocation so as to reduce the scope for granting protection.[484] The same District court issued a nationwide preliminary inunction against the rule, ruling that the acting DHS Secretary was not properly installed in office and thus not lawfully able to enact it.[485] The case did not proceed to the merits, and was administratively closed on 4 February 2022 by request of the parties, who stipulated that the preliminary injunction remains in effect.[486]

Both rules apparently remain nominally on the books, but superseded by events and thus not enforced.

12. *Justification:* it is an act of discretion for the AG to intervene and overrule the BIA. In the cases *A-B-*, *L-E-A-* and *A-C-A-A-* the AG apparently saw the BIA as too ready to use US asylum law to protect against harms inflicted by private actors. The arguments in support of the decisions directed the BIA to be much more sceptical of PSG definitions and the nexus with acts of persecution, in cases involving nonstate actors such as family members or criminal groups. The DHS/DOJ rules were justified more as a general reduction in the availability of asylum, as a matter of administrative resource constraints and border security, as well as on public safety grounds in the case of the rule adding to crime related bars.

13. *Domestic and International Reactions:* unlike agency rules, AG decisions in immigration cases are entirely discretionary and usually become known only upon their publication, so there is no formal scope for public input. Nevertheless, *Matter of A-B-* (2018) attracted considerable criticism, and the subsequent decision to overturn it received corresponding approval.[487] For example, the Center for Gender & Refugee Studies, which represented the plaintiff in the *A-B-* case, said the 2018 "decision harkened back to a dark period when violence against women was seen as a "private" issue", and clashed with asylum practice in other countries as well as with UNHCR guidance.[488] The Immigrant Legal Resource Center (ILRC) issued a practice advisory, observing that while the decision had not altered the basic criteria and tests for demonstrating a risk of persecution based on PSG membership, immigration advocates had expressed concern that its broad language (not always connected to the facts of the case) could be interpreted to provide "a broad license for adjudicators to overly scrutinize and outright deny domestic violence and gang violence-based asylum applications without careful consideration".[489] Since the technically nonbinding language of the AG's decision had nevertheless been reflected in DHS guidance and other documents, ILRC advised practitioners to emphasise "that any social groups must be analyzed on an individual case-by-case basis".[490]

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479 *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 501 F. Supp. 3d 792 (N.D. Cal. 2020), 19 November 2020.
480 See https://www.courtlistener.com/docket/18598743/pangea-legal-services-v-us-department-of-homeland-security/.
481 DHS/DoJ final rule, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review", 85 Fed. Reg. 239, 80274 (11 December 2020), https://www.govinfo.gov/content/pkg/FR-2020-12-11/pdf/2020-26875.pdf.
482 ibid at 80277.
483 ibid at 80278.
484 ibid at 80279-82.
485 *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966 (N.D. Cal. 2021), 8 January 2021.
486 See https://www.courtlistener.com/docket/18763207/pangea-legal-services-v-us-department-of-homeland-security/.
487 For approval of the 2021 overturning of A-B- and L-E-A-, see eg https://www.aila.org/ag-garland-vacates-asylum-precedents.
488 Center for Gender & Refugee Studies, "Matter of A-B-: What is the government doing and why are we challenging it?" (undated), https://cgrs.uclawsf.edu/our-work/litigation/matter-b.
489 See e.g. Immigrant Legal Resource Center, practice advisory "*Matter of A-B-* Considerations" (October 2018) at 2, https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf.
490 See e.g. Immigrant Legal Resource Center, practice advisory "*Matter of A-B-* Considerations" (October 2018) at 3, https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf.

The DHS/DOJ rules each provided for a period of approximately one month for public comment before finalisation (the final rules were closely similar to the proposed rules). US and international organisations generally called for the proposed rules to be withdrawn as detrimental to the right to seek asylum and to refugee rights. For example, Human Rights Watch criticised the rule on crime related bars to asylum for exceeding the internationally understood definition of particularly serious crime; improperly penalising irregular entry into the US; and for relying on outcomes of a flawed criminal justice system.[491] The International Rescue Committee raised similar issues, and observed that US immigration law treats as a particularly serious crime any "aggravated felony", a "vague" term that has allowed the government to deny asylum for already minor crimes such as shoplifting; and the proposed law would require immigration judges to make criminal justice related assessments of evidence and both substantive and procedural criminal law standards.[492] UNHCR further commented that the proposed rule would not be in keeping with the US's obligations under articles 1(F) and 33(2) of the Refugee Convention.[493] Similarly, over 87,000 comments submitted regarding the proposed procedural rule "overwhelmingly opposed" it.[494]

Soon after they were finalised, both rules were challenged in the US District Court for the Northern District of California. First, several non-profit organisations that work with immigrants sued to block the rule adding new crime related bars to asylum from taking effect. They argued against the rule on administrative law as well as substantive grounds, with the court agreeing that the rule exceeded the government's authority under the INA and enjoining it from taking effect.[495] In the second case, regarding the extensive changes to US asylum procedures and standards, organisations that provide services to refugees argued that in several ways the rule had not been properly enacted according to the APA, with the court agreeing that the official who authorised the rulemaking on behalf of DHS was not lawfully installed in office and thus could not undertake legal acts for the agency.[496] On these bases, the rules were preliminarily enjoined, and did not enter into force.[497]

14. *Externalization:* n/a

15. *Technology:* n/a

16. *Other:* the measures taken in 2018-2020 to effectively narrow the refugee definition were nominally unrelated, but appeared to fit a general pattern of using first the AG's authority to intervene in cases, and then administrative rulemaking to attempt to reduce access to asylum.

Barrier 2: Pretermission

<u>Summary:</u> Increasingly in 2025-2026, DHS attorneys are requesting, and immigration courts are granting, "pretermission", in which an applicant's case is dismissed for procedural reasons without receiving merits consideration. Reasons include incompletely filled forms and application of externalisation practices.

This is a new barrier, established after the completion of the initial canvassing and assessment of barriers for this report. The subsections below are placeholders for text to be added after the first version of the report is complete.

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491 "Human Rights Watch Comment on Proposed Asylum Eligibility Bars", 21 January 2020, https://www.hrw.org/news/2020/01/21/human-rights-watch-comment-proposed-asylum-eligibility-bars.
492 International Rescue Committee, comments on proposed rule "Procedures for Asylum and Bars to Asylum Eligibility", 20 January 2020, https://www.rescue.org/sites/default/files/document/4404/irccommentasylumrules.pdf.
493 UNHCR Multi-Country Office Washington, February 2020.
494 See *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.,* 512 F. Supp. 3d 966 (N.D. Cal. 2021), 8 January 2021 at 2-3.
495 *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 501 F. Supp. 3d 792 (N.D. Cal. 2020), 19 November 2020.
496 *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966 (N.D. Cal. 2021), 8 January 2021.
497 The preliminary injunction against the rule regarding crime related bars to asylum presumably expired with the eventual administrative closure of the case in January 2025.

Barrier 3: Fees to continue an asylum application

Summary: Legislation enacted in March 2025 increased various immigration related fees, and imposed new fees to apply for asylum, or for applicants to keep pending asylum applications open.[498]

This is a new barrier, established after the completion of the initial canvassing and assessment of barriers for this report. The subsections below are placeholders for text to be added after the first version of the report is complete.

Barrier 4: Five year entry ban following expedited removal

Summary: removal following a removal or expedited removal proceeding results in a five-year re-entry ban, or 20 years for subsequent removals. (See 8 USC 1182(a)(9)(A)(i))

Barrier: Suspension of asylum ("asylum ban 2")

Summary: in January 2025 a presidential proclamation "Guaranteeing the States Protection Against Invasion" declared a national emergency in the form of an invasion across the southern border. To address this invasion the president suspended entries across the southern border and restricted non-nationals arriving at the southern border from "invoking provisions of the INA that would permit their continued presence in the United States, including, but not limited to" 8 USC 1158, the legislative provision that requires the government to accept and consider asylum applications, and in a separate provision suspended entry across the southern border entirely. The proclamation also extended this restriction to all arriving non-citizens who fail to provide "sufficient medical information and reliable criminal history and background" to demonstrate they do not pose a threat. Litigation ensued. In July 2025 a federal District court issued orders prohibiting government departments from implementing the proclamation, finding it plainly unlawful as it would violate the government's duty to assess asylum (8 USC 1158) and withholding of removal claims (8 USC 1231(b)(3)(A)), as well as the APA {*on what grounds?}, and cannot be justified under the legislation or constitutional provisions the proclamation relies on. This ruling was appealed to the Circuit court, where it remains pending as of September 2025.

1. *Functioning:* persons arriving at the southern border between border points may no longer request protection, or enter the US. Those arriving elsewhere may only request protection if they have a visa, or sufficient medical, criminal history, and other records to satisfy CBP that they do not pose a threat. Arriving persons who proactively assert a fear of torture in the country they would be deported to go to "CAT only" credible fear hearings by USCIS asylum officers, who are instructed to admit the person into withholding of removal proceedings if the person demonstrates to the officer that it is "more likely than not" they would be tortured if sent to that country. Persons who receive a positive credible fear determination are detained for regular removal proceedings.

2. *Time:* 20 January 2025 (promulgation of the proclamation) until at least 16 July 2025, the District court having postponed the effective date of its orders for two weeks to give the government time to appeal, and to prepare to implement the court's orders.

3. *Place:* nationwide, however the complete suspension of entry or protection (other than against torture) applies only to persons who arrive at or cross the southern border.

4. *Actors:* DHS, specifically CBP (OFO at border crossings, USBP between crossings), and USCIS. DHS officers carry out expedited removal proceedings, referring persons who affirmatively express a fear of torture to USCIS for a credible fear screening. Depending on the outcome of that determination, either CBP resumes jurisdiction over the person and removes them, or detains and refers them to the normal removal procedure before an immigration judge.

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[498] For details: https://nipnlg.org/sites/default/files/2025-07/Final-Fee-Increases-HR1.pdf. For the governing rule: https://www.govinfo.gov/content/pkg/FR-2026-01-21/pdf/2026-01012.pdf.

5. *Interaction:* the asylum ban supersedes many of the other barriers. In at least some cases, there is an interaction of sorts in that, if the asylum ban is ended, another barrier will again have a practical impact. For example, the disuse of CBP One for making asylum appointments means asylum would still be inaccessible in practice, and a reinstatement of MPP (announced by the Secretary of Homeland Security in January 2025 but not yet implemented) would again require those contesting their expedited removal on non-refoulement grounds to wait in Mexico for their hearings.

6. *Development:* the January 2025 proclamation was the first official public announcement of the asylum ban. The agencies tasked with implementing it issued internal guidance in the form of emails (USBP), an internal memorandum (OFO), and asylum officer training materials (USCIS).[499] In substance, OFO and USBP received similar instructions: expedited removal of all arrivals, but no longer to inquire about or provide information on asylum or non-refoulement provisions. However, if a person affirmatively states a fear of torture if returned, then refer them to USCIS for credible fear screening. USCIS is instructed to restrict its inquiry to the risk of torture, and to determine whether torture is more likely than not on return, a question previously referred to an immigration court following a USCIS determination of a "significant possibility" that is the case. Unlike in an immigration court, persons in credible fear hearings do not have a right to legal counsel or representation, or a period of preparation.

7. *Rationale:* the proclamation highlighted risks posed by persons entering the US without sufficient verification of their background to sufficiently protect the US population from crime, terrorism, and infectious diseases According to the proclamation, the "sheer number" of arriving persons since 2021 had "overwhelmed the system", such that "millions of aliens who potentially pose significant threats to health, safety and national security have moved into communities nationwide." The proclamation went on to declare a state of invasion across the southern border, assert that the INA does not completely 'occupy the field' of immigration law, and implicitly invoke the President's constitutional duty to protect the nation's borders by largely suspending asylum and withholding of removal.

8. *Legal Status:* persons denied the possibility to apply for protection due to the asylum ban can eventually be granted non-refoulement protection under the legislation that transposed the CAT. Otherwise, they are repatriated or returned to a third country without further procedures.

9. *Specific Impact:* neither the proclamation itself nor the implementing instructions reviewed by the District court provide for exceptions to the procedures they outline. It is possible that pre-existing CBP manuals or other resources would instruct officers to except certain classes such as unaccompanied children, victims of severe forms of trafficking, or those experiencing medical emergencies, as such exceptions are typically found in US immigration rules. As with other exclusionary policies with their main effects along the southern border, the proclamation will have disproportionate racial impacts, and its effects will be particularly severe for particularly vulnerable persons.

10. *Reach:* during the first four full months after the proclamation (February-May 2025), USBP apprehended 29,467 persons entering the US and 3,169 already within the US, and OFO reported 78,550 encounters at border points with 'inadmissible' persons (including those seeking protection).[500] It is reasonable to assume that the procedures outlined in the proclamation and subsequent instructions were applied to all persons apprehended by USBP, and to most of those encountered by OFO (exceptions would include those who brought sufficient documentary evidence that they pose no safety, security or health threat for the OFO officer to admit and detain them for normal removal procedures).

11. *Source:* the stated legal basis for the proclamation is 8 USC 1182(f) and 1185(a)(1), as well as Article II and Article IV, section 4 of the US Constitution. Article II describes the office and powers of the President.

[499] For a brief summary, see Refugee and Immigration Center for Education and Legal Services et al. v. Noem et al. (District Court for the District of Columbia, Civil Action No. 25-306 (RDM), 2 July 2025), at 28-34, https://www.courtlistener.com/opinion/10622063/refugee-and-immigrant-center-for-education-and-legal-services-v-noem/pdf/.

[500] https://www.cbp.gov/newsroom/stats/nationwide-encounters.

Article IV, section 4 requires the US government to protect the states against invasion. The proclamation declares that irregular immigration across the southern border constitutes such an invasion, whereby 8 USC 1182(f) allows the President to restrict or suspend entry into the country by proclamation, if the President finds that such entry would be "detrimental to the interests of the United States". This is buttressed by 8 1185(a)(1) which requires that all entry or departure be carried out "under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe". The US District Court for D.C. ruled in July 2025 that the proclamation and its implementing instructions are irreconcilable with the INA provisions that require persons arriving at the border to have the opportunity to apply for asylum and withholding protections, and vacated it as required by Section 706 of the APA.[501]

12. *Justification:* the public justification for the asylum ban is essentially the same as the proclamation's stated rationale. For most of the 21st century, political discourse has focused on the perception of public safety and terrorism threats posed by undocumented migrants arriving in the US. A policy of immediate removal without hearings or the possibility of asylum or withholding is not far from the pre-2025 political consensus, and indeed was part of the winning presidential campaign's stated platform in 2024.

13. *Domestic and International Reactions:* refugee and immigrant rights organisations unanimously condemned the proclamation as unlawful and immoral and called for its repeal. For example, USCRI called on the government "to restore full access to the asylum system as mandated by law."[502] Four months after the asylum ban went into effect, HIAS cited an 87% decline in persons arriving at the border, and reports of CBP frequently denying access to credible fear screenings, as ways in which the ban violated US law and international obligations.[503]

A group of NGOs and individuals sued in February 2025 in the District Court of D.C. to block the implementation of the policy, and in July obtained court orders vacating it and requiring the government to apply the asylum and withholding of removal provisions of the INA to the individual named plaintiffs who were then still in the US.[504] The court ordered the government to extend similar relief to a class of others similarly situated to the named plaintiffs, and ordered both sides in the case to prepare further briefings on what relief could be ordered for individuals or class members no longer physically in the US.

14. *Externalization:* except in that it requires nearly all potential protection seekers to leave the US without consideration of protection needs, and therefore to seek protection elsewhere, there is no externalisation aspect to this policy.

15. *Technology:* n/a

16. *Other:* RAICES v Noem, the July 2025 District court decision that ordered the government to stop implementing the asylum ban, could become decisive for determining the boundaries of institutional authority over US asylum law and policy. In Trump v CASA (June 2025), the Supreme Court ruled (more or less) that District court injunctions against the implementation of executive orders could no longer extend beyond the plaintiffs in the case. In RAICES v Noem, the District judge ruled instead that the proclamation and its implementing instructions infringed Congressional immigration legislation, and thus were invalid per se according to the APA; and also advanced the process of certifying the plaintiffs as a

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501 *Refugee and Immigration Center for Education and Legal Services et al. v. Noem et al.* (District Court for the District of Columbia, Civil Action No. 25-306 (RDM), 2 July 2025), at 28-34, https://www.courtlistener.com/opinion/10622063/refugee-and-immigrant-center-for-education-and-legal-services-v-noem/pdf/ (section 706 requires vacature of an agency action that is "not in accordance with law").

502 https://refugees.org/executive-order-guaranteeing-the-states-protection-against-invasion-bars-asylum-seekers-and-others-from-entry-at-the-southern-border/.

503 https://hias.org/news/trumps-asylum-ban-and-u-s-mexico-border-what-you-need-know/.

504 *Refugee and Immigration Center for Education and Legal Services et al. v. Noem et al.* (District Court for the District of Columbia, Civil Action No. 25-306 (RDM), 2 July 2025), at **, https://www.courtlistener.com/opinion/10622063/refugee-and-immigrant-center-for-education-and-legal-services-v-noem/pdf/ (section 706 requires vacature of an agency action that is "not in accordance with law").

class, these being two of the (three) avenues indicated in CASA as viable alternatives to pursuing a nationwide injunction. Because the District judge ordered partial pretrial summary judgment in favour of the plaintiffs,[505] that judgment became final and ripe for appeal on the merits. The Circuit court affirmed.[506]

III. SELECTING BARRIERS

Most of the barriers detailed above merit further study. The exceptions are pushbacks at sea; public health emergency; walls/fences. Pushbacks at sea have been unchallenged since the 1990s; the Covid border closure was exceptional and yielded relatively little case law; and walls/fences are of functional interest but not subject to case law regarding access to asylum. Furthermore, the border procedures barrier (HARP/PACR) may be of less relevance as it was carefully adjudicated (2020) and found to be lawful in a final decision (not appealed).

The rest of the barriers concern areas where the law is unsettled or court challenges are ongoing. Three are not presently relevant because of the general cessation of asylum: metering (administrative or via the CBP One app); the Third Country Transit Ban; and the bar on asylum applications between border points. But they remain legally controversial, and could come back into operation if the US asylum system is restarted.

505 *Refugee and Immigration Center for Education and Legal Services et al. v. Noem et al.* (District Court for the District of Columbia, Civil Action No. 25-306 (RDM), 2 July 2025), 116-17, https://www.courtlistener.com/opinion/10622063/refugee-and-immigrant-center-for-education-and-legal-services-v-noem/pdf/ (vacating the DHS guidance and declaring the proclamation suspending asylum unlawful).

506 *Refugee and Immigration Center for Education and Legal Services v. Mullin* (D.C. Circuit, 24 April 2026) https://media.cadc.uscourts.gov/opinions/docs/2026/04/25-5243-2170245.pdf.

PART 2: CASE LAW ANALYSIS

I. IDENTIFICATION OF BARRIERS IN THE CASE LAW

A. Description of the barriers in the case law

Preliminary note: only a few cases concerning the legality of asylum barriers have been adjudicated to a final decision. Most of the decisions and appeals analysed here concern preliminary motions that arise before a case is heard on its merits – for example, whether a court should stay the adoption of an allegedly unlawful rule, or issue an injunction against its application, while the court is deciding the case. Many do not ever come to a final decision, for example, because the policy is withdrawn and replaced, or a superseding policy is put in place, or an unrelated higher court decision changes the landscape of case law. Cases have therefore been selected based on whether they issue binding (even temporary) rulings, or analyse the lawfulness of the barrier even in the context of preliminary motions.

For most barriers, there have been few cases. This is because the barriers are litigated in federal courts rather than immigration courts, and federal courts usually manage litigation so that they do not duplicate work across judicial districts or circuits – instead, they tend to wait and then utilise each other's judgments in their own cases. Exceptions are immigration appeals, which channel through a single appellate body (the BIA), and federal habeas corpus cases concerning release from immigration detention pending a bond hearing.

Pushbacks: metering

1. Definition: administrative metering Number: 2 Type of body: District court
2. Definition: administrative metering Number: 1 Type of body: 9th Circuit
3. Definition: emergency metering Number: 1 Type of body: District court

Detention: detention without bond for removable persons encountered inside the US

1. Definition: IJs have no jurisdiction; detention is mandatory Number: 1 Type of body: BIA
2. Definition: habeas corpus vs unlawful detention Number: 10,000+ Type of body: District courts

Externalization of asylum processing:

1. Definition: application of ACAs Number: 1 Type of body: District court
2. Definition: third country removals Number: 1 Type of body: District court

Procedural barriers:

1. Definition: exclusion from procedure - between border points ban

   Number: 2 Type of body: District courts

   Number: 1 Type of body: Circuit court
2. Definition: exclusion from procedure - suspension of asylum

   Number: 1 Type of body: District court

   Number: 1 Type of body: Circuit court (pending)
3. Definition: exclusion from procedure – STC/TCTB

   Number: 4 Type of body: District courts

   Number: 4 Type of body: Circuit courts

Number: 1 Type of body: Supreme Court

4. Definition: exclusion from procedure - MPP

   Number: 4 Type of body: District courts

   Number: 4 Type of body: Circuit courts

   Number: 1 Type of body: Supreme Court

5. Definition: structure of procedure – expedited removal Number: 2 Type of body: District courts
6. Definition: structure of procedure – border procedure Number: 1 Type of body: District court

Other barriers:

Definition: narrowing refugee definition

Number: 1 Type of body: Board of Immigration Appeals

Number: 4 Type of body: Attorney General

Number: 1 Type of body: District court

No cases related to one or more selected barriers

There have been no asylum access cases regarding walls and fences. (There have been cases, but they have concerned environmental impacts and executive discretion over spending Congressionally allocated funds.) Pushbacks at sea have been litigated, but Sale v Haitian Centers Council Inc (Supreme Court, 1993) settled the law that the US's asylum obligations begin at its borders, so interdiction and pushback at sea is non-justiciable.

For most of the rest of the barriers, there are relatively few cases. Because of the high costs and special expertise needed to litigate in federal courts, cases are brought by legal aid and advocacy NGOs on behalf of groups of clients, and the NGOs coordinate so that they do not duplicate each other's efforts (they also often cooperate as co-plaintiffs in the cases that do go to court).

B. Institutional settings

For the identified barriers, the hierarchy of responsible courts is the same unless otherwise stated. As is discussed further below (Executive), there is a disjunct in the US asylum adjudication system between the immigration courts, which are situated within the Department of Justice, and the constitutionally independent federal ('Article III') courts. Barriers to asylum are generally litigated in the latter courts.

- **First instance judicial or quasi-judicial body**:

United States District Court. There are 94 District Courts in the US, geographically dispersed. Rules of jurisdiction and standing are complex; usually when a barrier is challenged, the plaintiffs are civil society organisations acting in tandem alongside affected named individuals, sometimes also on behalf of a class of individuals affected by the barrier.

- **Second instance judicial or quasi-judicial body**:

United States Circuit Court. There is a right of appeal from District court decisions to a Circuit court, as long as a cognisable error of law on the part of the District court is alleged. There are 12 circuit courts with geographic jurisdictions, and the Federal Circuit Court with responsibility over particular matters (none relevant for this report). In principle, the circuit courts constitute a single body, but their rulings only bind federal courts within their assigned geography. In practice, cases regarding barriers to asylum disproportionately arise in the 9th (California, Arizona, etc) and 5th (Texas, etc), and the District of Columbia Circuit, because cases against government agencies are often filed in the District of Columbia District Court, as the court responsible for the region where most of those agencies are located. (The

Circuit courts also hear appeals from the Board of Immigration Appeals concerning individual cases (see below, Executive).)

- **Third instance judicial or quasi-judicial body**:

United States Supreme Court. Appeal is at the discretion of the court, and most applications to appeal (petitions for certiorari) are denied. The Supreme Court is a policy setting court, not particularly focused on correcting errors in individual cases (a responsibility largely left to the Circuit courts). It tends to take cases where Circuit courts have come to divergent conclusions (circuit split), or when the US government is a party to the case.

- **Constitutional Court**:

The Supreme Court also functions as a constitutional court.

Of the identified barriers, a few (e.g. "narrowing the refugee definition"; "choice of Circuit precedent") have been adjudicated largely in the immigration court system rather than the federal courts. The immigration court system is within the Department of Justice (DOJ), an executive agency. Federal circuit courts have jurisdiction to hear appeals from BIA decisions that result in final removal orders.

- **First instance judicial or quasi-judicial body**: immigration courts (single judge).
- **Second instance judicial or quasi-judicial body**: Board of Immigration Appeals (BIA) (3-member panels).
- **Third instance judicial or quasi-judicial body**: The AG can select and overrule decisions of the BIA. BIA and AG decisions resulting in removal orders are appealable to Circuit courts as final agency actions.
- **Constitutional Court**: US Supreme Court.

Executive bodies involved in asylum access adjudication

Immigration and asylum adjudication is the responsibility of the Executive Office for Immigration Review (EOIR) within the Department of Justice (DoJ), both first instance (Immigration Judges) (IJs) and appeal (Board of Immigration Appeals) (BIA). The decisions of the BIA may be appealed to the US Circuit Court, for exceeding the discretion allowed to an executive agency, except for final removal orders following an expedited removal procedure which are not judicially reviewable.

1. Officers of the US Customs and Immigration Service (USCIS), within the Department of Homeland Security (DHS), carry out credible fear (or in some cases reasonable fear, a higher threshold) screening interviews for potential asylum cases. A negative credible fear determination bars access to asylum as such. A negative reasonable fear determination usually relates to withholding of removal (non-refoulement) rather than asylum, and is appealable to an immigration court (IJ).
2. Officers of Customs and Border Patrol (CBP), also within DHS, encounter persons at or near the border and are responsible to refer them to USCIS screening interviews if they indicate a need for protection. It appears that in some procedures, CBP officers have also assumed responsibility for credible fear screening interviews,[507] although this was ruled unlawful in Kiakombua v Wolf (D. DC, 2020).
3. Depending on the nature of the barrier, other executive agencies may have the authority to activate a barrier to asylum. For example, the US Department of Health and Human Services was given the authority to declare a public health emergency leading to border closure and denial of asylum

[507] This is a supposition of the author based on the apparent absence of USCIS personnel in at least some border locations where expedited removals are carried out, and on the volume of removals carried out in those locations; expert interviewed concurred in this supposition.

access to nearly all arriving persons, and the President has wide powers to declare national security emergencies.

For the most part, asylum access cases are heard in federal Article III courts, with plaintiffs asking for via orders (injunctions, etc) against executive agencies, which are involved as defendants. Therefore except as noted below, the executive bodies involved in asylum access adjudication are in the role of defendant, not adjudicator.

In general:

Dept of Justice (DOJ)

- represents the executive in federal court (in asylum access cases, usually as defendant)
- is itself among the defendants in cases where a DOJ regulation is being challenged
- adjudicates asylum cases and some access cases, as immigration courts and the Board of Immigration Appeals (BIA) are situated within the Executive Office of Immigration Review (EOIR) within DOJ

Dept of Homeland Security (DHS)

- is a defendant in cases where a DHS regulation is challenged
- subagencies are defendants in cases against application of policies within their competences:
  - Customs and Border Protection (CBP) – border enforcement; temporary detention
  - Immigration & Customs Enforcement (ICE) – interior enforcement; removal detention
  - US Citizenship and Immigration Services (USCIS) – asylum and screening interviews

Dept of State (USDOS) can be a defendant in cases that contest an agreement with another country

Specifically:

Pushbacks:

- administrative metering – CBP as defendants for practice; also DHS for a rule challenge
- emergency metering - defendants DOJ, AG, DHS for rule; CBP, EOIR, ICE for practice

Detention: EOIR (adjudicator; defendants in federal court DHS for rule & CBP, ICE for practice)

Externalisation:

- application of ACAs - DOJ (EOIR) and DHS (USCIS) for the rule; DHS Sec. & AG for designations[508]
- third country removals – DHS (ICE, USCIS), DOS (affirming diplomatic assurances received)

Procedural barriers:

- exclusion from procedure - between border points ban – DHS/DOJ as defendants (rule challenged)

[508] Designations is the term plaintiffs in *U.T. v Barr* used to refer to the act of the AG & DHS Secretary of designating a country as having a "full and fair" asylum procedure. See Plaintiff's Motion for Leave to File Second Amended Complaint, U.T. v. Bondi (District Court for the District of Columbia, 20-cv-00116 (EGS), 19 December 2025) 3, fn5.

- exclusion from procedure - suspension of asylum – defendants DHS, DOJ, USDOS, CBP, ICE, USCIS, and the US president
- exclusion from procedure – STC/TCTB – DHS/DOJ as defendants (rule challenged)
- exclusion from procedure - MPP – DHS for the policy; CBP, ICE, USCIS for practice
- structure of procedure – expedited removal – DHS & DOJ for rules; CBP & USCIS for practice
- structure of procedure – border procedure – DHS for the policy

Specific barrier (narrowing refugee definition):

- immigration courts – EOIR & AG as adjudicators;
- federal courts – DHS & DOJ as defendants, on the rule (practice not at issue)

International or regional organizations involved in asylum access adjudication

No. International or regional organisations can intervene in cases as amici, with the permission of the court (if they can demonstrate a cognisable interest in the particular case). US civil society organisations often bring cases in federal court as plaintiffs, or intervene as amici.

International and regional organisations are not involved in any cases studied, except occasionally as *amici*.

C. Legal context and legal system

The US is a mixed jurisdiction, with a federal government of enumerated powers (including borders, immigration, and asylum); specific powers shared between the federal and state governments; and residual powers left to the states. All states have common law systems, except Louisiana which applies a French-derived civil code. Native nations have independent court systems with limited subject matter jurisdiction, unrelated to asylum.

International legal frameworks, sources, and legal grounds

The jurisdiction of federal courts includes treaties the US is party to (US Constitution, art III sec 2), but it would be extremely unusual in practice for a federal court to directly apply a treaty provision in an asylum related case. Instead, the courts decide points of substantive law derived from treaties based on the legislation transposing those treaties.

US immigration law uses three main international sources. The Attorney General may grant asylum to a person who fits the definition of a refugee, derived from the Refugee Convention/Protocol (8 USC 1101(a)(42)(A)). The non-refoulement rule of article 33(1) of the Convention is incorporated as mandatory withholding of removal ('statutory non-refoulement') (8 USC 1231(b)(3)(A)), with exclusions that approximate those in the Convention (8 USC 1231(b)(3)(B)). Article 3 of the Convention against Torture is transposed ('CAT non-refoulement') via the Foreign Affairs Reform and Restructuring Act of 1998 (and implementing regulations, for the definition of torture). Some courts, particularly in the 9th Circuit, reference the Refugee Convention in discussing the purpose of the US legislation transposing it. However, US federal and immigration courts do not treat international sources as binding law or as grounds for their decisions.

Membership in regional treaties that include the right to asylum or the principle of non-refoulement

None noted. The US is not a member of any regional treaty that relates to asylum or non-refoulement. Courts occasionally mention treaties from other regions as illustrative examples (e.g. the Dublin Convention)

Use of foreign cases or legislation

In the 21st century federal courts hearing asylum access cases have rarely referenced foreign case law, but as a general matter foreign law sometimes is invoked for comparative, illustrative or persuasive purposes. For example, some cases concerning STC barriers have discussed the Dublin system as a comparator.

Reference to decisions from international or supranational Courts

Rarely or never. No such references were noted in any of the cases reviewed.

International human rights standards established by supranational courts

International standards are sometimes noted, usually by referring to international treaty commitments of the US. Specific rulings are based on the implementing US legislation or regulations. No instances yet noted of standards set by international or supranational courts being cited as grounds for a ruling.

D. Laws and norms at the domestic level

Refugee Convention and the related New York Protocol

Yes, to the Protocol. Asylum access adjudication turns almost entirely on federal legislation and the constitution, but federal legislation approximates the article 1 refugee definition as the grounds on which the executive may grant asylum, and the article 33(1) non-refoulement rule as requiring withholding of removal to the country where there is a risk of a threat to life or liberty on a protected ground. Particularly the legislative transposition of article 33(1) non-refoulement (8 USC 1231(b)(3)(A)) is a factor in asylum access adjudication, because its application is mandatory rather than discretionary on the AG as asylum is.

The principle of non-refoulement:

Non-refoulement appears in the US system as withholding of removal. The government (AG, thus the DOJ) may not remove a person to a country if their "life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion".[509] The exceptions to this prohibition approximate articles 1F(b) and 33(2) of the Refugee Convention.[510] Withholding of removal is also mandatory according to federal legislation and DOJ regulations that implemented the non-refoulement rule of article 3 of the CAT following the US's accession to CAT.[511] For withholding of removal, an applicant must demonstrate that such persecution or torture would be more likely than not to occur if they are returned.

The District court in *Al Otro Lado v. Mayorkas* (23-cv-1367-AGS-BLM) considered and rejected the argument that non-refoulement (particularly its extraterritorial aspect) is a universally accepted norm of international law, whose violation is capable of engaging the court's jurisdiction under the US Alien Tort Statute (28 USC 1350).[512]

The right to asylum:

The right to apply for asylum is recognised in legislation, 8 USC 1158(a)(1). However the act of granting asylum is within the discretion of the Attorney General, so there is no legal right to be granted asylum (even for refugees).

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509 8 USC 1231(b)(3)(A).
510 8 USC 1231(b)(3)(B).
511 The Foreign Affairs Reform and Restructuring Act of 1998 (Public Law No. 105-277, 112 Stat. 2681-761 (1998)) prohibits expulsion of a person to a place where they would be at risk of torture, and the DOJ rule "Regulations Concerning the Convention Against Torture" (64 Fed. Reg. 8478 (Feb. 19, 1999)) added a definition of torture and other implementing provisions.
512 *Al Otro Lado v. Mayorkas* (District Court for the Southern District of California, 23-cv-1367-AGS-BLM, 30 September 2024), 21-22. {*https://storage.courtlistener.com/recap/gov.uscourts.casd.764598/gov.uscourts.casd.764598.90.0.pdf }

Refugees granted asylum in the US are eligible for employment (8 USC 1158(c)(1)(B)). They have the rights generally available to lawful foreign residents, plus the possibility to apply for some social support programmes (eg Medicaid), and may apply to have family members join them in the US. After one year refugees can become permanent residents ('green card') and after five years, may apply for citizenship.[513] Persons granted withholding of removal have similar rights, except for family reunification, permanent residency, and citizenship.

Main sources of international refugee law that are relevant to asylum access adjudication

The Refugee Convention, and the CAT. The AG may grant asylum to an applicant who meets the RC definition of refugee as it is transposed into US law.[514] Withholding of removal results from the prohibition of refoulement enacted in 8 USC 1231(b)(3)(A), which transposes article 33(1) of the RC, and certain laws and regulations that reflect the non-refoulement provision of the CAT (see non-refoulement response, above in this section D).

Human rights obligations, in addition to the Refugee Convention

US law has incorporated the non-refoulement rule of art 3 CAT. Otherwise, the rights of asylum seekers and refugees in the US derive from US law, including its provisions that transpose article 33 of the RC. The main basis for human rights obligations is the US Constitution or legislation (see below).

Other obligations in addition to the Refugee Convention

Anyone within the US is protected by constitutional rights, including rights of due process. Legislation regulating immigration and asylum establishes further rights and obligations, which largely reflect human rights norms (e.g. right to apply for asylum) and international obligations (e.g. 1967 Protocol, CAT). Whether and under what circumstances a person not yet formally admitted to the US is entitled to the protections of the US Constitution is currently subject to litigation (prior jurisprudence indicates the rights attach soon after crossing the border). The main role of constitutional and legislatively granted rights in asylum access adjudication is on the procedural side, via rights to sue in federal court; to obtain legal representation; to the interviews and hearings specified in immigration legislation; and to remain in an asylum process until its conclusion, appeals, and finalisation.

In most federal court cases concerning barriers to asylum, the legal frameworks binding the government are more prominent than those that apply to asylum seekers. The Administrative Procedures Act (APA) requires the government to provide public notice and opportunity for comment on all prospective regulations before promulgating their final versions,[515] and prohibits executive agencies from interpreting a statute in a manner that is "arbitrary, capricious, or manifestly contrary to [] statute".[516] For example, in *East Bay Sanctuary Covenant v. Trump* (2020), the 9th Circuit granted an injunction against implementing a rule that barred applications from persons who had arrived between border points, ruling that it contravened the clear language of the asylum statute,[517] and treated persons differently based on their place or manner of arrival, which bears little intrinsic relationship to protection needs (therefore such a distinction was arbitrary and capricious).[518]

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513 https://www.americanimmigrationcouncil.org/fact-sheet/asylum-united-states/.

514 8 USC 1158(b)(1), referencing USC 1101(a)(42) for inclusion criteria and some exclusion criteria; 8 USC 1158(b)(2) for exclusion criteria.

515 5 USC 553 (b) (notice), (c) (comment).

516 *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 844 (1984).

517 *East Bay Sanctuary Covenant v. Biden* (9th Circuit, 28 February 2020 (amended 24 March 2021)), 42-43, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf. According to 8 USC 1158(a), any noncitizen "who arrives in the US (whether or not at a designated port of arrival …) … may apply for asylum".

518 *East Bay Sanctuary Covenant v. Biden* (9th Circuit, 28 February 2020 (amended 24 March 2021)), 46-47, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

Member of a regional or other international organization that provides legally binding acts and human rights obligations relevant to asylum

No. The US is a member of the Organization of American States (OAS), but the OAS does not enact legally binding acts. The US is not a party to the OAS's human rights instrument (signed but not ratified), the American Convention on Human Rights, and does not accept the jurisdiction of the Inter-American Court of Human Rights.

Role that soft law

None noted as the basis for decisions.

E. Legal standing

Legal procedures and/or remedies

Individuals and organisations can challenge barriers to asylum in the federal District courts, as unlawful acts of the US government. This amounts to a collateral action rather than a direct appeal from the immigration courts (or from a decision or act of the Attorney General), which are situated within the Department of Justice (DOJ) and thus part of the executive branch. Litigants must show that they are affected by the barrier in question, or allege that their constitutional or legislatively established rights have been violated. Organisations can establish standing by showing that their activities have been impeded, such as their ability to provide advice and representation to protection claimants, or that government action would require them to divert resources, and that this would affect their financial interests.

Federal courts have the power to issue orders enjoining the government from enforcing a policy, or to vacate the policy in question. Which types of remedies the court may apply depends on the circumstances of the case, and which legal basis the policy is challenged under. Until 2025, District courts could issue injunctions with nationwide effect against government (in)actions, however the Supreme Court limited the scope of District court injunctions to the plaintiffs before the court (Trump v. CASA, Inc., 27 June 2025) (unrelated to asylum). Most of the cases reviewed for this report concern such injunctions. Alternatively, injunctions can have nationwide effect if the plaintiffs establish that they represent a class of persons impacted by a policy, and that the class extends nationwide. If plaintiffs demonstrate that the policy in question was ultra vires or improperly enacted according to the APA, then they can ask the District court to vacate it entirely.

F. The influence of international Courts

Influence of supranational courts' rulings

None noted.

Supranational courts shaping procedural protections or the interpretation of access to asylum

None noted. These matters are governed by US constitutional and legislative provisions, and by US federal case law precedent.

G. Comparative insights

Divergences among judicial or quasi-judicial bodies

The most notable divergence appears to be between the District and Circuit courts of the 5th (covering Louisiana, Mississippi, and Texas) and 9th (Arizona, California, seven other western states, and Pacific territories) circuits. (These two circuits cover nearly all of the southern land border.) As far as the court opinions reveal, this appears to be largely based on differing views of the appropriate level of discretion to be afforded to the executive: the 5th circuit tends to afford the executive relatively wide discretion, while the 9th tends toward a broader reading of individual rights. However it is also notable that these tendencies seem to vary depending which political party holds the presidency – e.g. in the MPP cases, the

5th Circuit court of appeals ultimately agreed with state authorities' view that the Biden administration was exceeding its discretion as granted by Congress in legislation. (Federal judges traditionally need the approval of US Senators from the states where they will sit, in order for their nominations to proceed. Senators increasingly exercise this prerogative to the perceived advantage of the party they represent.)

There are also recurring divergences between the BIA and the AG, with the AG tending to more readily override BIA decisions with more restrictive rules from 2018-2020, and again since 2025.

Divergences between national courts and supranational rulings

The US is not subject to the mandatory jurisdiction of a judicial or quasi-judicial body under any treaty or international organisation. In principle international jurisprudence such as rulings of the Inter-American Court on Human Rights or resolutions of the Inter-American Commission on Human Rights can be used to support arguments or rulings in US courts, but this has not appeared in any case studied for this report.

Alignment or divergence from the broader principles established by international bodies

The closest alignment is in the absolute nature of the right to apply for asylum. US courts have consistently ruled that the executive must allow any person who physically enters the US (including border zones) to apply for asylum. The substantive criteria for being granted asylum closely resemble those found in article 1A(2) of the refugee convention, and that convention's exclusion provisions. US law also reflects the absolute nature of CAT's prohibition on refoulement, and also provides for non-refoulement by incorporating the language of article 33(1) of the refugee convention, applicable to any person on US territory.

The most significant divergence is the discretionary nature of asylum. In US law, a person who is found to be a refugee is not entitled to asylum. Instead, the Attorney General (AG) then has discretion whether or not to grant that person asylum. If the AG chooses not to exercise that discretion, then that decision is not reviewable by courts – although the non-refoulement provisions are mandatory. Another important divergence is in thresholds of proof. As now implemented in US executive regulations, allowed by courts, a person asking for *non-refoulement* protection must demonstrate a probability (not possibility) of persecution or torture.

Best practices or lessons learned from the adjudication of asylum barriers

In the US system it is possible to test asylum barriers in courts through class action lawsuits, and by plaintiffs who are not themselves asylum applicants but are affected by a barrier. In a class action, plaintiffs need to demonstrate that they are representative of others in a similar situation, to seek a court order that applies to the individual plaintiffs as well as to other members of the class. An organisational plaintiff can demonstrate a concrete harm to its interests resulting from a barrier to asylum, and seek an order to either remove the barrier (e.g. by nullifying the regulation that created it), or prevent the government from applying it. Both types of actions (class actions and organisational plaintiffs) are subject to complex rules of certification, standing and procedure before they can proceed to the merits of the case. However they do provide a route to potentially challenge barriers to asylum, without requiring the presence of asylum applicants harmed by the barrier.

H. Role of expert testimony

Expert testimony

Since asylum barriers are almost always adjudicated as collateral measures (in federal courts) to the asylum determination process itself (adjudicated in immigration courts within the executive branch), it is rare to have expert testimony in a case concerning asylum barriers (none noted).

Rather, these cases usually receive significant numbers of amicus briefs from NGOs, mostly immigrant, refugee or asylum assisting organisations, but also including civil liberties organisations (e.g. the ACLU) and sometimes associations representing public officials, such as CBP officers. NGOs are also plaintiffs alongside affected individuals in most of the cases concerning asylum barriers, usually based on claims that the barriers materially harm the NGOs' work. It is unusual for amicus briefs to have a noticeable impact on court decisions; their main practical impact seems to be in placing views on the formal record, for possible use in advocacy efforts, or to provide material for future plaintiffs to apply in their briefs.

I. Future Directions

Emerging trends or evolving issues in asylum law

There is an ongoing tension, evident in many cases, between the government's prioritisation of barring from asylum and removing would-be applicants, and especially District courts' adherence to pre-existing rules of jurisprudence concerning legislative construction, judicial precedent, and inherent limits to executive authority.

II. IDENTIFICATION OF LEADING DECISIONS

This Section allows for a deeper analysis of the relevant decisions on barriers to accessing asylum in your jurisdiction. Per each barrier mentioned in "Part 1: Barriers to Accessing Asylum" of the Report, please select at least one or two leading decisions and respond to the questions below. Leading cases for each barrier should be selected according to the following criteria: reasoning; its impact on national legislation, policy, and jurisprudence; impact on other jurisdictions; whether it established a judicial precedent or rule that others have followed or referred to. The selection can also refer to negative or restrictive decisions that are shaping a judicial trend.

Identification information of the selected decisions (e.g. number and/or name of the case):

Pushbacks:

CBP One (app) metering - 3:23-cv-01367-AGS-BLM (Al Otro Lado v. Mayorkas) (S.D. CA, 30 Sep 2024) ('Al Otro Lado v. Mayorkas II')

administrative metering - 22-55988 and 22-56036 (Al Otro Lado v. Mayorkas) (9th Circuit, 23 Oct 2024 (amended 14 May 2025)) ('Al Otro Lado v. Mayorkas I') (reversed and remanded, Mullin v Al Otro Lado, Supreme Court, 25 June 2026)

emergency metering - 1:24-cv-01702-RC (Las Americas Immigrant Advocacy Center v. DHS) (D. DC, 9 May 2025)

Detention:

bond hearing

29 I&N Dec. 216 (BIA 2025) (Matter of Yajure Hurtado) (BIA, 5 Sep 2025)

5:25-cv-01873-SSS-BFM (Maldonado et al. v. Santacruz et al.) (C.D. CA, 20 & 25 Nov 2025)

Externalization of asylum processing:

Asylum Cooperation Agreements (ACAs)

1:20-cv-00116 (EGS) (U.T. v. Barr) (D. DC, pending (amended/re-filed Oct 2025))

summary deportations

1:25-cv-10676 (BEM) (D.V.D. v DHS) (D. MA, 25 Feb 2026)

Procedural barriers:

exclusion from procedure - between border points ban –

18-17274 & 18-17436 (East Bay Sanctuary Covenant v. Biden) (9th Circuit, 28 Feb 2020 (amended 24 Mar 2021))

exclusion from procedure - suspension of asylum –

1:25-cv-00306-RDM (Refugee and Immigration Center for Education and Legal Services (RAICES) v. Noem) (D. DC, 2 Jul 2025)

exclusion from procedure – STC/TCTB –

19-16487 and 19-16773 (East Bay Sanctuary Covenant v. Garland) (9th Circuit, 6 Jul 2020 (amended 8 Apr 2021))

4:18-cv-06810-JST (East Bay Sanctuary Covenant v. Biden) (N.D. CA, 25 Jul 2023) (presumptive exclusion) (*NB this is a procedural continuation of East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 Feb 2020/24 Mar 2021), see above, between border points ban, but the substantive issue has changed*)

exclusion from procedure - MPP –

19-15716 (Innovation Law Lab v. Wolf) (9th Circuit, 28 Feb 2020)

25-2581 (Immigrant Defenders Law Center v. Noem) (9th Circuit, 18 Jul 2025 (amended 24 Jul 2025))

structure of procedure – expedited removal –

19-cv-1872 (KBJ) (Kiakombua v. Wolf) (D. DC, 31 Oct 2020)

20-cv-846 (RJL) (A.B.-B. v. Morgan) (D. DC, 31 Aug 2020)

structure of procedure – border procedure –

19-cv-03640 (KBJ) (Las Americas v. Wolf) (D. DC, 30 Nov 2020)

Other barriers: narrowing the refugee definition

restricting PSG – 28 I&N Dec. 351 (AG 2021) (Matter of A-C-A-A-) (AG, 26 Jul 2021)

expanding exclusion – 20-cv-07721-SI (Pangea Legal Services v DHS) (N.D. CA, 19 Nov 2020)

A. Description of the barriers in the selected decisions

Was the barrier formally or informally established, according to the judicial or quasi-judicial body? What actors were involved in its establishment?

Pushbacks:

CBP One (app) metering – informal (CBP practice)

administrative metering – informal, then quasi-formalised (CBP practice, then DHS memo to CBP[519])

emergency metering – formal (DHS/DOJ rule[520])

Detention:

bond hearing (immigration court) – formal (BIA ruling[521])

[519] See Al Otro Lado, Inc. v Mayorkas (District Court for the Southern District of California, 17-cv-02366-BAS-KSC, 2 September 2021), at 3-7. (Guidance was updated in 2019 and 2020.)
[520] DHS/DoJ, "Securing the Border", 89 Fed. Reg. 111, 7 June 2024, 48710-48772 at 48721-48730, https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border.
[521] Matter of Yajure Hurtado, 29 I&N Dec. 216 (BIA 2025), 5 September 2025.

bond hearing (federal court) – quasi-formal (CBP guidance & memorandum[522])

Externalization of asylum processing:

ACAs – formal (DHS/DOJ rule,[523] implementing international agreements entered into by USDOS)

Summary deportations – formal (guidance document from DHS[524]); DHS and USDOS established

Procedural barriers:

exclusion from procedure - between border points ban – formal (DOJ/DHS rule[525]); DOJ & DHS established

exclusion from procedure - suspension of asylum – quasi-formal (presidential proclamation[526]); DHS (CBP and USCIS) established

exclusion from procedure – STC/TCTB – formal (DOJ/DHS rules[527]); DOJ & DHS established

exclusion from procedure - MPP – quasi-formal (DHS guidance/instructions;[528] later reinstated by DHS according to a press announcement[529])

structure of procedure – expedited removal – quasi-formal (USCIS training materials; USCIS/CBP memorandum of agreement)

structure of procedure – border procedure – quasi-formal (internal DHS guidance memoranda[530])

Other barriers: narrowing the refugee definition

restricting PSG – formal (AG decision,[531] overruling prior AG decision overruling BIA)

expanding exclusion – formal (DHS/DOJ rule[532])

Administrative obstacles faced by the applicant(s) in the cases reviewed

The general answer to this question is similar for all barriers, with a slight variance for the two barriers that appear in BIA jurisprudence (detention - bond hearing; narrowing refugee definition – PSG). There are no undue administrative obstacles noted in federal courts, but federal cases move very slowly. Particularly, the range of preliminary orders available to the court at the request of either party, and the

522 https://www.cbp.gov/sites/default/files/2025-09/memo_-_detention_of_applicants_for_admission_-_final_eac_signed.pdf.

523 DHS and DoJ, "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act" 84 Fed. Reg. 63,994 (19 November 2019), https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.

524 https://immigrationlitigation.org/wp-content/uploads/2025/04/43-1-Exh-A-Guidance.pdf. (Other versions of this guidance appear also to have been disseminated; this one was at issue in the D.V.D. case.)

525 "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims" (83 Fed. Reg. 55,934, 55,952 (Nov. 9, 2018)).

526 https://www.whitehouse.gov/presidential-actions/2025/01/guaranteeing-the-states-protection-against-invasion/.

527 "Asylum Eligibility and Procedural Modifications" (AEPM) (85 Fed. Reg. 243, 82260 (Dec. 17, 2020)); "Circumvention of Lawful Pathways" (CLP) (88 Fed. Reg. 94, 31314 (May 16, 2023)).

528 Memorandum of the DHS Secretary, "Policy Guidance for Implementation of the Migrant Protection Protocols", 25 January 2019, https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

529 https://www.dhs.gov/news/2025/01/21/dhs-reinstates-migrant-protection-protocols.

530 Memorandum in support of motion for preliminary injunction (document 21-1), Las Americas et al. v. Wolf et al. (District Court for the District of Columbia, 1-19-cv-3640 (RDM)) at 8, https://www.aclutx.org/sites/default/files/field_documents/pacr_harp_memo_iso_pi_0.pdf. (The actual guidance memoranda establishing the programmes appear not to be publicly available, but are referenced in this case.)

531 Matter of A-C-A-A-, 28 I&N Dec. 351 (A.G. 2021), 26 July 2021.

532 Pangea Legal Servs. v. U.S. Dep't of Homeland Sec., 501 F. Supp. 3d 792 (N.D. Cal. 2020), 19 November 2020.

fact that those orders are subject to interlocutory appeal followed by remand to the trial court, means that cases can take several years to resolve. While docketing is typically efficient, and deadlines are kept, many cases involving barriers to asylum never reach a final judgment before they become irrelevant (due to e.g. changed circumstances, or superseding rules being enacted). BIA appeals are much simpler; however, the route to the BIA runs through the immigration courts, which due largely to a lack of enough judges can take 2-3 years for a case to begin.

Challenges related to their legal standing or capacity to bring the case

In most of the cases below, the issue is whether NGOs that raised challenges to asylum barriers had standing to do so in federal court. Standing doctrine derives from Article III of the Constitution, and for organisational standing (ie the type at issue here), the governing Supreme Court case is Lujan v. Defenders of Wildlife (1992) which requires that a plaintiff demonstrate1) "an injury in fact" involving a concrete and particularised, imminent or actual, harm to a legally protected interest of theirs, which is a legal interest, that is 2) causally connected to the defendant's alleged conduct; and that it is likely the order requested of the court would redress this injury.[533]

Pushbacks:

CBP One (app) metering - the government contested the NGO plaintiffs' standing to bring the case, but the court ruled (citing East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 Feb 2020 (amended 24 Mar 2021))) that the NGOs had alleged injury in fact that was "fairly traceable" to the policy, and that even though 8 USC 1252(f)(1) prohibits courts from issuing "class-wide injunctive relief", the court still had jurisdiction to rule in the case and issue other types of relief, e.g. declaratory.[534]

administrative metering – Al Otro Lado's standing was uncontested, but the District court had to examine the question in order to ascertain its jurisdiction to hear the case. The court "readily conclude[d]" that Al Otro Lado had sufficient standing based on its showing of "a drain on its resources from both a diversion of its resources and frustration of its mission".[535]

emergency metering - metering was one aspect of a complex case that included two NGOs and 28 individuals as plaintiff, and raised five main claims about the underlying rule.[536] For the first claim, which related to "limitation on asylum eligibility", the court ruled that the uncontested facts alleged by at least three individual plaintiffs satisfied the standing threshold of showing an injury (removed from US without an asylum screening); that unlawful government action caused that injury; and that the court can issue orders to redress that injury (require an asylum screening).[537]

Detention:

bond hearing (immigration court) – there was no question of standing. The applicant appealed by right to the BIA from an immigration court ruling.

bond hearing (federal court) – there was no question of standing. Defendants raised various arguments that the court lacked jurisdiction to hear the case, and that the main issue was moot (the plaintiffs had by then received bond hearings), but the court rejected these arguments.[538]

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533 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).
534 Al Otro Lado v. Mayorkas (District Court for the Southern District of California, 23-cv-1367-AGS-BLM, 30 September 2024), 3-9.
535 Al Otro Lado v. Nielsen (District Court for the Southern District of California, 17-cv-02366-BAS-KSC, 20 August 2018), 13, https://storage.courtlistener.com/recap/gov.uscourts.casd.553300/gov.uscourts.casd.553300.166.0.pdf.
536 Las Americas Immigrant Advocacy Center v. DHS (District Court for the District of Columbia, 24-cv-01702-RC, 9 May 2025), 8-9, https://storage.courtlistener.com/recap/gov.uscourts.dcd.269594/gov.uscourts.dcd.269594.92.0_1.pdf.
537 Las Americas Immigrant Advocacy Center v. DHS (District Court for the District of Columbia, 24-cv-01702-RC, 9 May 2025), 15-16, https://storage.courtlistener.com/recap/gov.uscourts.dcd.269594/gov.uscourts.dcd.269594.92.0_1.pdf.
538 Maldonado v. Santacruz (District Court for the Central District of California, 25-cv-01873-SSS-BFM, 20 November 2025), 4-8.

Externalization of asylum processing:

ACAs – individual plaintiffs asserted standing based on having been unlawfully denied international protection based on the rule implementing the ACAs.[539] Organisational plaintiffs asserted standing based on the additional burdens placed on their activities, such as having to advise clients how to prepare to demonstrate well-founded fear of persecution in the third country they would prospectively be deported to.[540]

summary deportations – there was no discussion of standing in this case.

Procedural barriers:

exclusion from procedure - between border points ban – standing was a key threshold issue in this case, specifically whether the plaintiff NGOs could establish organisational standing to challenge a DHS/DOJ rule (the rule had not yet gone into effect, so there were no individual plaintiffs). The government challenged the NGOs standing on constitutional ('Article III') grounds, asserting they had suffered no cognisable injury and are "outside the zone of interests" protected by the relevant legislation (the INA), and that the NGOs had no legal interest in "maintaining their current organisational structure" or how the rule was applied to third parties.[541] The court ruled that Supreme Court precedent afforded standing to organisations on the same grounds as to individuals, which are injury in fact; the "injury is "fairly traceable" to the defendants' conduct"; and it could realistically be "judicially redressable",[542] a threshold the court found was reached because the rule "perceptibly impaired" their ability to operate by introducing logistical costs; requiring new expertise (care duties near the border instead of legal representation); and jeopardising their funding.[543] These factors also met the "lenient" threshold necessary for the injury in fact component of standing.[544] Once standing had been established, the NGOs were able to argue (successfully) that the rule in question conflicted with binding legislation, viz 8 USC 1158(a)(1) establishing the duty to accept and refer applications for asylum. In addition to being binding within the 9th Circuit, this ruling has become the baseline argument for establishing NGO standing in asylum access cases generally in the federal courts.

exclusion from procedure - suspension of asylum – the government challenged the standing of the individual plaintiffs, but on technical rather than substantive grounds, and without success.[545] The NGOs could assert standing based on harm to them as organisations, but had to also show that the harm amounted to interference with their "core business activities".[546] The court found that standard met via the policy having deprived the NGOs of the opportunity to advise clients who would ordinarily have been

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539 Proposed 2nd amended complaint, U.T. v Barr (D. DC, 19 December 2025), 45-47, https://storage.courtlistener.com/recap/gov.uscourts.dcd.214396/gov.uscourts.dcd.214396.173.1.pdf.

540 Proposed 2nd amended complaint, U.T. v Barr (D. DC, 19 December 2025), 47-51, https://storage.courtlistener.com/recap/gov.uscourts.dcd.214396/gov.uscourts.dcd.214396.173.1.pdf.

541 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 28, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

542 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 29, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

543 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 30-32, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

544 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 38-40, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

545 The issue was whether legislative language stating that federal courts (other than the Supreme Court) may not "enjoin or restrain the operation of" 8 USC 1221 through 1232 {ie subchapter II, part IV of chapter 12, covering "Inspection, Apprehension, Examination, Exclusion, and Removal") (8 USC 1252(f)(1)) meant that there was no judicial remedy available for the plaintiffs' claims. The court firmly disagreed. RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 40-48, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf.

546 RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 50-51 (citing FDA v. All. for Hippocratic Med., 602 U.S. 367, 382 (Supreme Court, 2024)), https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf.

placed in the expedited removal process and otherwise to carry out their core missions.[547] Similarly, the NGOs satisfied the "not … especially demanding" "zone of interests" test, ie that their activities were congruent with the overall legislative purpose to grant asylum to refugees.[548]

exclusion from procedure – STC/TCTB:

In *East Bay Sanctuary Covenant v. Garland* (9th Circuit, 2020), the government defendants raised a pro forma challenge to the plaintiff NGOs' "Article III and statutory standing [but] conced[ed] that its positions are generally irreconcilable with the Ninth Circuit's and this [ie District] Court's rulings in" East Bay Sanctuary Covenant v. Trump (Northern District of California, 2018) (see above, exclusion from procedure – between border points ban).[549] On appeal, the Circuit court also dealt quickly with organisational standing, applying the Supreme Court and 9th Circuit test of "showing that the defendants' conduct resulted in "a diversion of its resources and frustration of its mission", or "caused a substantial loss in organizational funding".[550] The NGO plaintiffs met this standard by showing that the rule in question{*cite} would for example require them to restructure their programmes towards withholding of removal rather than asylum procedures, with attendant expenses.[551]

By the time *East Bay Sanctuary Covenant v. Biden* (N.D. Cal., 2023) arose, the NGOs' standing had become settled jurisprudence. The government newly argued that the Supreme Court in United States v. Texas (2023) had ruled that two US states did not have a cognisable interest in the government's use of its discretionary powers to arrest and prosecute, or to provide legal benefits or status, but the District court ruled that the plaintiffs here had interests in the latter, so had Article III standing.[552]

exclusion from procedure - MPP –

Innovation Law Lab v. Wolf (9th Circuit, 2020) dealt only perfunctorily with standing. The underlying District court order observed that the defendants had stated in a footnote their view that the NGO plaintiffs had no "judicially cognizable interest" in whether or not the government prosecuted a third party, but also acknowledged this argument could not overcome the contrary precedent of East Bay Sanctuary Covenant v. Trump (9th Circuit, 2018), and therefore raised it only to preserve the issue for appeal.[553] The government did not brief the standing issue on appeal. However, the Circuit court observed it has an independent duty to establish its jurisdiction over the case (which includes the plaintiffs' standing), and affirmed Article III standing for all plaintiffs based on the facts from the District court record, and

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547 RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 51-55, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf. The court quickly dismissed the government's argument that the NGOs could still carry on their work at a reduced level of activity, based on precedent requiring only that the allegedly unlawful regulatory action "perceptibly impair" the NGOs' work, and that there be "some attendant expenditure or loss of resources". Id., 55-56.

548 RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 65-66, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf.

549 East Bay Sanctuary Covenant v. Barr (District Court for the Northern District of California, 19-cv-04073-JST, 24 July 2019), 11-12, https://www.courtlistener.com/opinion/7336375/e-bay-sanctuary-covenant-v-barr/.

550 East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 26 (citing Fair Hous. of Marin v. Combs (9th Circuit, 2002) and East Bay Sanctuary Covenant v. Trump (2018), respectively), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf.

551 East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 27 (switching from asylum to withholding was a notable intrusion on the NGOs work, involving retraining, production of new materials, and an increased number of case files because family members cannot apply derivatively for withholding as they can for asylum), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf. The court noted that it had recently found the same plaintiffs had standing for the same harms in a different case concerning a barrier to asylum. Ibid., citing East Bay Sanctuary Covenant v. Trump (9th Circuit, 2020) (concerning the between border points asylum bar, see above).

552 East Bay Sanctuary Covenant v. Biden (District Court for the Northern District of California, 18-cv-06810-JST, 25 July 2023), 10-11. The court also found itself bound by precedent to grant statutory standing, which was apparently uncontested. Ibid., 12, https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.

553 Innovation Law Lab v. Nielsen (District Court for the Northern District of California, 19-cv-00807-RS, 8 April 2019), 11-12, https://storage.courtlistener.com/recap/gov.uscourts.cand.338334/gov.uscourts.cand.338334.73.0.pdf.

the reasoning of East Bay Sanctuary Covenant v. Trump (2018) (while noting the latter was not technically binding, because it was decided by a motions panel, this panel agreed with it).[554]

Immigrant Defenders Law Center v. Noem (9th Circuit, 2025) the government challenged the NGOs' standing in the District court, arguing based on Food & Drug Admin. v. All. for Hippocratic Med. (Supreme Court, 2024) that MPP had not affected plaintiff NGOs' pre-existing services, and that Immigrant Defenders had "voluntarily diverted its resources and took on new activities in response to Defendants' implementation of MPP" rather than having its pre-existing core activities impacted.[555] The District court distinguished Hippocratic Medicine and instead followed Havens Realty Corp. v. Coleman (Supreme Court, 1982) to find that Immigrant Defenders had standing because they were not initiating new core activities but rather taking initiatives to maintain their core activities in the face of new obstacles imposed by MPP.[556] The court also rejected the argument that 8 USC 1252 showed a Congressional intent to allow only the individuals concerned to raise claims relating to removal.[557] On appeal, the Circuit court agreed with the District court that "ImmDef expanded its legal representation across the U.S.-Mexico border to *continue* carrying out its core activities",[558] and followed several Supreme Court judgments and cited Biden v. Texas (5th Circuit, 2022) to rule that 8 USC 1252(f)(1) is narrowly scoped to limit injunctions, and does not bar the issuance of stays under the APA (here, 8 USC 705).[559]

structure of procedure – expedited removal –

There was no challenge to standing, or discussion thereof, in *A.B.-B. v. Morgan* (D. D.C., 2020). All plaintiffs were individuals on the verge of removal following an immigration judge's affirmation of negative credible fear determinations following interviews carried out by CBP agents.[560] (The crux of the case was whether applicable legislation could permit DHS to assign CBP rather than USCIS agents trained in asylum interviews to conduct these interviews.)

In *Kiakombua v. Wolf* (D. D.C., 2020), the court readily found "that Plaintiffs have suffered an injury in fact that is fairly traceable to the challenged Lesson Plan and that is likely to be redressed by a favorable ruling of this Court", which is sufficient for Article III standing.[561] The government defendants argued that the injury (negative credible fear determination) was not traceable to the Lesson Plan, and was not redressible because the plaintiffs likely could not show credible fear in a re-determination.[562] The court dismissed these arguments, finding sufficient causal connection between the Lesson Plan and the

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554 Innovation Law Lab v. Wolf (9th Circuit, 19-15716, 28 February 2020), 13-14, https://cdn.ca9.uscourts.gov/datastore/general/2020/02/28/19-15716_opinion.pdf.

555 Immigrant Defenders Law Center v. Noem (District Court for the Central District of California, 20-cv-09893-JGB-SHK, 16 April 2025), 11, https://storage.courtlistener.com/recap/gov.uscourts.cacd.799929/gov.uscourts.cacd.799929.405.0.pdf.

556 Immigrant Defenders Law Center v. Noem (District Court for the Central District of California, 20-cv-09893-JGB-SHK, 16 April 2025), 12-13, https://storage.courtlistener.com/recap/gov.uscourts.cacd.799929/gov.uscourts.cacd.799929.405.0.pdf.

557 Immigrant Defenders Law Center v. Noem (District Court for the Central District of California, 20-cv-09893-JGB-SHK, 16 April 2025), 14, https://storage.courtlistener.com/recap/gov.uscourts.cacd.799929/gov.uscourts.cacd.799929.405.0.pdf.

558 Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 24 (original emphasis), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

559 Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 27-28, https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

560 A.B.-B. v. Morgan (District Court for the District of Columbia, 19-cv-00846-RJL, 31 August 2020), 2, https://storage.courtlistener.com/recap/gov.uscourts.dcd.216698/gov.uscourts.dcd.216698.32.0_2.pdf.

561 Kiakombua v. Wolf (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 29, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf. The injury was a negative credible fear determination; the Lesson Plan refers to the interviewer's written training and guidance for the credible fear interview; and the redress would be a new credible fear interview. Id., 29-37.

562 Kiakombua v. Wolf (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 30, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

determinations,[563] and that a new interview could redress the injury, which lay not in the final determination (issued by an immigration judge, reviewing the interview record), but in the provision of legally invalid instructions for the interviewers to follow.[564]

structure of procedure – border procedure – the court dismissed the government's arguments against Las Americas' organisational standing, citing Supreme Court precedent for the holding that "only one plaintiff needs Article III standing in order for a claim to be justiciable",[565] and proceeding to analyse the individual plaintiffs' standing. As in Kiakombua v. Wolf (see above), the court ruled that the individual plaintiffs had established a connection between an alleged procedural violation (reduced access to legal counsel) and a harm they had suffered (deportation).[566] The individual plaintiffs also demonstrated a "substantial probability" that the truncated access to counsel had contributed to their negative credible fear determinations, and that absent the alleged procedural violations the agency could have come to a different decision.[567]

Other barriers: narrowing the refugee definition

restricting PSG – *Matter of A-C-A-A-* (AG, 26 July 2021) originated as a Board of Immigration Appeals (BIA) decision denying DHS's appeal of an immigration court's decision in an asylum case.[568] There is no issue of standing: either party can appeal an immigration court decision to the BIA.

expanding exclusion – in its discussion of the "irreparable harm" prong of the test for a preliminary injunction, the court in *Pangea v. DHS* (N.D. Cal., 2020) recounted factors (increased difficulty & expense providing legal services to asylum seeking clients, etc) that could have gone to support a claim for organisational standing.[569] However, the court did not explicitly address standing.

Was the applicant(s) heard by the judicial or quasi-judicial body? If yes, was it an in person or video transmitted hearing?

No applicant was heard by a judicial or similar body in any of the cases studied. Most of the cases took place in federal courts, where individual asylum decisions are not under scrutiny. In these cases, testimony of individual applicants, when it is considered, is presented to the court by the lawyers who are bringing the case, in written form. The applicants are generally not present, and do not testify (they would have testifed, if at all, in a hearing before an immigration judge, usually over video link). In the few cases studied that were heard by the Board of Immigration Appeals (appellate body within the Department of Justice's Executive Office for Immigration Review) the decision is made on the record of the hearing before the immigration judge below, and submissions of the applicant and the government, with no new testimony admitted.

Was there legal aid provided to the applicants? Did this affect the case?

There is no provision for legal aid in US immigration cases, except that the applicant may secure their own legal representation at their own expense. However, in all federal cases studied, asylum applicants were

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563 Kiakombua v. Wolf (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 31-32, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.
564 Kiakombua v. Wolf (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 33, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.
565 Las Americas v. Wolf (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 24, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.
566 Las Americas v. Wolf (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 25, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.
567 Las Americas v. Wolf (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 27, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.
568 See Matter of A-C-A-A- (Attorney General, 28 I&N Dec. 84, 24 September 2020), 84, https://www.justice.gov/d9/2023-11/3995_ed.pdf.
569 Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), 38-40, https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

included in a group of plaintiffs that included NGOs with their own legal teams. In the BIA appeals, pro bono lawyers presented arguments on behalf of individual applicants.

Was the applicant(s) considered vulnerable? Did it influence the adjudication process?

Pushbacks:

CBP One (app) metering – the court noted by way of example that one individual plaintiff turned away for lack of a CBP One appointment would "reputedly face "perilous conditions in Mexico," including "cramped and unsanitary" shelters, "abuse from local police and cartels," and even "kidnapping," "torture," and "rape.""[570] However the motion was decided on technical grounds, with no indication of influence due to vulnerability.

administrative metering – the District court recounted some of the dangers the individual plaintiffs had fled, including women with children fleeing rape and death threats from gang or domestic violence, and persons threatened with murder by gangs that had killed their close relatives all of whom remained at risk while in Mexico.[571] In ruling that the CBP's metering practice was not a reasonable interpretation of its statutory duties (Chevron standard), the District court also referred to evidence of severe dangers and hardships based on the vulnerable status of waiting near the border for an (apparently ephemeral) appointment.[572] In outlining the facts, the Circuit court noted instances of "persecution and crime", and inadequate food or shelter, while waiting in Mexico, including murder; extreme risks to cross the border; and persons, "including young children" who drowned trying to cross the Rio Grande.[573] The main influence on the adjudication process appears to be to demonstrate that the plaintiffs had satisfied the "irreparable harm" part of the judicial test for deciding whether to grant a preliminary injunction.[574]

emergency metering – insofar as it concerned metering, the case did not discuss vulnerability. However the part of the case that focused on interview conditions and the removal of the requirement to proactively ask arriving persons if they fear return raised the question of whether CBP officers were sufficiently prepared to identify indicators of trauma.

Detention:

bond hearing (immigration court) – there was no indication of particular vulnerability.

bond hearing (federal court) – there was no indication of particular vulnerability.

Externalization of asylum processing:

ACAs – there were indicators of vulnerability for several individual plaintiffs. The case has not yet proceeded to any kind of adjudication, but it is unlikely that vulnerability would affect that adjudication.

summary deportations – there were indicators of vulnerability for several individual plaintiffs, but they were simply presented as part of the court's recounting of the factual record, without affecting adjudication.

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[570] Al Otro Lado v. Mayorkas (District Court for the Southern District of California, 23-cv-1367-AGS-BLM, 30 September 2024), 2 (quoting the plaintiff's submissions).

[571] Al Otro Lado v. Nielsen (District Court for the Southern District of California, 17-cv-02366-BAS-KSC, 20 August 2018), 5-6, https://storage.courtlistener.com/recap/gov.uscourts.casd.553300/gov.uscourts.casd.553300.166.0.pdf.

[572] Al Otro Lado v. Mayorkas (District Court for the Southern District of California, 17-cv-02366-BAS-KSC, 2 September 2021), 32, https://storage.courtlistener.com/recap/gov.uscourts.casd.553300/gov.uscourts.casd.553300.742.0_1.pdf.

[573] Al Otro Lado v. Noem (9th Circuit, 23 October 2024 (amended 14 May 2025)), 13, https://cdn.ca9.uscourts.gov/datastore/opinions/2025/05/14/22-55988.pdf.

[574] See Al Otro Lado v. McAleenan (District Court for the Southern District of California, 17-cv-02366-BAS-KSC, 19 November 2019), 32-33, https://storage.courtlistener.com/recap/gov.uscourts.casd.553300/gov.uscourts.casd.553300.330.0.pdf (ruling based on the evidence submitted that the test had been met). The court further characterised the government's administrative handling of the plaintiffs as "at best, misleading, and at worst, duplicitous". Ibid., 33.

Procedural barriers:

exclusion from procedure - between border points ban – because the case involved NGOs rather than individual plaintiffs, there was no discussion of specific vulnerable applicants. However the Circuit court observed, in interpreting 8 USC 1158(a)(1) to require asylum applications be accepted regardless of where the border was crossed, that "[t]he most vulnerable refugees are perhaps those fleeing across the border through the point physically closest to them" (and therefore it was arbitrary for the rule to deny asylum depending on where the applicant arrived).[575] {*also re UAMs,[576] and more re UAMs in Paez/Fletcher JJs concurrence in the decision not to rehear the case en banc[577]}

exclusion from procedure - suspension of asylum – there was no indication of particular vulnerability.

exclusion from procedure – STC/TCTB –

In *East Bay Sanctuary Covenant v. Garland* (9th Circuit, 2020), refuting the government's contention that the District court's review below had shown that "Mexico has a robust refugee-protecting system", the Circuit court reprised sections of that review that had (inter alia) cited a Medicine Sans Frontieres regional report that 17% of men and 31% of women transiting Mexico from Central America had been sexually abused, and UNHCR documents on obstacles to accessing the asylum system in Mexico stating that "[w]omen and girls in particular are at risk of sexual and gender-based violence", and detention of "particularly children and other vulnerable persons", as well as media reports of abuse of gay and trans persons transiting Mexico by criminal gangs.[578] Despite legislative provisions excepting unaccompanied children from the safe third country asylum bar and mandating a non-adversarial first asylum screening for them, the "third country transit ban" rule at issue applied the same blanket bar, denying asylum to anyone who had transited Mexico without applying and being denied asylum there.[579] The court ruled that this showed the government had "entirely failed to consider an important aspect of the problem" the rule aimed to resolve.[580] Both of these factors – that the administrative record clearly showed Mexico is not a safe country for asylum seekers, and that the government did not consider the effect of the rule on unaccompanied children – led the court to conclude the rule was arbitrary and capricious, and thus invalid according to the APA.[581]

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575 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 46-47, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

576 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 30-31, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

577 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 73ff (Paez & Fletcher, JJ., concurring in the full court's decision not to rehear the case en banc), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

578 East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 39-43 (quoting the District court's conclusion: "Yet, even though this mountain of evidence points one way, the agencies went the other – *with no explanation*" (original emphasis)), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf. The District court cited further reports within the administrative record that refugees or migrants transiting Mexico face many, serious risks, exacerbated for persons with particular vulnerabilities. East Bay Sanctuary Covenant v. Barr (District Court for the Northern District of California, 19-cv-04073-JST, 24 July 2019), 37-38, https://www.courtlistener.com/opinion/7336375/e-bay-sanctuary-covenant-v-barr/.

579 East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 47-48, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf.

580 East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 48 (quoting the Supreme Court in Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983)), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf.

581 East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 38-39, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf. See also ibid., 59-60 (Miller, J., concurring in part and dissenting in part) (the government's own record showed eg that non-Mexican women faced particularly severe dangers in Mexico, and lengthy detention in poor conditions deterred children from seeking asylum there).

The court in *East Bay Sanctuary Covenant v. Biden* (N.D. Cal., 2023) highlighted some of the plaintiffs' concerns about the difficulty of accessing protection in Mexico and the dangers of waiting near the border, especially for "victims of gender-based violence and indigenous, LGBT, and HIV-positive individuals, who are particularly vulnerable to violence en route to the United States and are likely to have "great difficulty accessing protection" in transit countries".[582] The administrative record reflected similar concerns (eg US State Department and NGO reports documenting "gender-based violence against migrants", and specifically "against LGBTIQ+ and Black migrants" in northern Mexico and "against Venezuelan women and LGBTIQ+ migrants in southern Mexico").[583] The court applied this evidence to help establish that the administrative record "undermined the Rule's finding that Belize, Colombia and Mexico present viable, safe options for many asylum seekers".[584]

<u>exclusion from procedure</u> - MPP –

There was little discussion of particular vulnerabilities in *Innovation Law Lab v. Wolf* (9th Circuit, 2020), except on one point. The court detailed several sworn declarations plaintiffs had submitted to the District court, that they would be in severe danger or had already been attacked in Mexico, targeted as Central American migrants, or by those they had fled from.[585] The effect was to provide support for the determination that the "balance of hardships" (one of four relevant factors) weighed in favour of granting the plaintiffs' request for a temporary injunction against MPP pending a determination on the merits.[586] The District court had noted the reasons some plaintiffs had fled their home country, including "extreme violence" due to ethnicity or sexual orientation, and ongoing violence and threats in Mexico.[587] Unaccompanied children and persons with "known physical [or] mental health issues" are excepted from MPP.[588] {**see also, motions opinion p17 (concurring)}

There was no discussion relating to vulnerability in *Immigrant Defenders Law Center v. Noem* (9th Circuit, 2025), except for brief acknowledgements by the District and Circuit courts of the hardships applicants faced while in Mexico waiting for their protection applications to be decided.[589]

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582 East Bay Sanctuary Covenant v. Biden (District Court for the Northern District of California, 18-cv-06810-JST, 25 July 2023), 9-10 (quoting from East Bay Sanctuary Covenant's submissions), https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.

583 East Bay Sanctuary Covenant v. Biden (District Court for the Northern District of California, 18-cv-06810-JST, 25 July 2023), 27 (quoting from the various reports), https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.

584 East Bay Sanctuary Covenant v. Biden (District Court for the Northern District of California, 18-cv-06810-JST, 25 July 2023), 28, https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.

585 Innovation Law Lab v. Wolf (9th Circuit, 19-15716, 28 February 2020), 41-45, https://cdn.ca9.uscourts.gov/datastore/general/2020/02/28/19-15716_opinion.pdf. One applicant observed that Honduran migrants are identifiable as such – thus at heightened risk – by appearance and accent. Ibid., 45.

586 Innovation Law Lab v. Wolf (9th Circuit, 19-15716, 28 February 2020), 18 (the four factors are that the plaintiff is likely to succeed on the merits; is likely to "suffer irreparable harm" without an injunction; that the "balance of equities" is in their favour, "and that an injunction is in the public interest" (quoting the Supreme Court in Winter v. Nat. Res. Def. Council, Inc. (2008)), https://cdn.ca9.uscourts.gov/datastore/general/2020/02/28/19-15716_opinion.pdf.

587 Innovation Law Lab v. Nielsen (District Court for the Northern District of California, 19-cv-00807-RS, 8 April 2019), 24, https://storage.courtlistener.com/recap/gov.uscourts.cand.338334/gov.uscourts.cand.338334.73.0.pdf.

588 Innovation Law Lab v. Wolf (9th Circuit, 19-15716, 28 February 2020), 11, https://cdn.ca9.uscourts.gov/datastore/general/2020/02/28/19-15716_opinion.pdf.

589 Immigrant Defenders Law Center v. Noem (District Court for the Central District of California, 20-cv-09893-JGB-SHK, 16 April 2025), 29 ("In Mexico, MPP clients faced extraordinary risks to their personal safety; some were kidnapped, tortured, raped, sexually and/or physically assaulted, and had no meaningful shelter access while waiting for their hearings"), https://storage.courtlistener.com/recap/gov.uscourts.cacd.799929/gov.uscourts.cacd.799929.405.0.pdf; Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 36 (reiterating the District court's findings, and adding that

<u>structure of procedure</u> – expedited removal –

The plaintiffs in *A.B.-B. v. Morgan* (D. D.C., 2020) were mothers with young children, from Ecuador, Honduras and Mexico, who had suffered rape, death threats and domestic violence and were at risk of further abuses from crime gangs, police officials, or both.[590] The court referred back to these allegations in assessing whether the plaintiffs would suffer "irreparable harm" without an injunction preventing their removal,[591] as well as noting with regard to the public interest and balance of equities (merged) prongs of the injunction test, that "the public has an interest "in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm"".[592]

The five *Kiakombua v. Wolf* (D. D.C., 2020) plaintiffs were women, one from Angola fleeing domestic violence from a boyfriend in the military, one identified as an opponent of the regime in Cuba, and the rest fleeing domestic and gang violence in El Salvador.[593] The court noted the vulnerability inherent in detention, which was applied to all plaintiffs as they were in the expedited removal procedure, as showing the importance of non-adversarial screening interviews and thereby adding weight to the argument that the DHS instructions to the contrary violated the INA.[594] The court cited the applicants' specific claims of persecution as demonstrating the fear of removal and potential for irreparable harm absent a new credible fear determination conducted in line with applicable law.[595]

<u>structure of procedure</u> – border procedure – The court recounted some of the hardships faced by the individual plaintiffs (women or families with young children) in trying to find legal assistance in a compressed time frame and undergo credible fear screening telephone interviews while in CBP detention.[596] Although " cognizant of the hardships that certain noncitizens who arrive at the southern border seeking asylum face",[597] the court ruled that the plaintiffs had not established that the programmes in question contravened the INA or the APA. The plaintiffs' vulnerability does not appear to have influenced the adjudication process.

<u>Other barriers</u>: narrowing the refugee definition

<u>restricting PSG</u> – in the 2020 decision, the AG described the applicant as a Salvadoran woman aged 29, who had claimed asylum based on past persecution by her parents, and the risk of future persecution by her former partner, gangs, or the police, based on her membership in a particular social

they matched conditions reported about the 2019 implementation of MPP by Human Rights Watch), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

590 A.B.-B. v. Morgan (District Court for the District of Columbia, 19-cv-00846-RJL, 31 August 2020), 7-10, https://storage.courtlistener.com/recap/gov.uscourts.dcd.216698/gov.uscourts.dcd.216698.32.0_2.pdf. One plaintiff was "threatened and beaten" because of her lesbian identity as well. Id., 9.

591 A.B.-B. v. Morgan (District Court for the District of Columbia, 19-cv-00846-RJL, 31 August 2020), 20-21, https://storage.courtlistener.com/recap/gov.uscourts.dcd.216698/gov.uscourts.dcd.216698.32.0_2.pdf.

592 A.B.-B. v. Morgan (District Court for the District of Columbia, 19-cv-00846-RJL, 31 August 2020), 22 (quoting Nken v. Holder (Supreme Court, 2009)), https://storage.courtlistener.com/recap/gov.uscourts.dcd.216698/gov.uscourts.dcd.216698.32.0_2.pdf.

593 Kiakombua v. Wolf (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 13-16, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

594 Kiakombua v. Wolf (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 57, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

595 Kiakombua v. Wolf (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 92-93 (citing Nken v. Holder (2009)), https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

596 Las Americas v. Wolf (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 13-15, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.

597 Las Americas v. Wolf (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 59, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.

group of "Salvadoran females".[598] Neither of the AG decisions discussed vulnerability as such, focusing instead on whether the BIA should review the elements of the applicant's claim (persecution nexus etc) de novo, or may accept parties' stipulations on elements they have agreed not to contest.[599]

expanding exclusion – all plaintiffs in Pangea v. DHS (N.D. Cal., 2020) were organisations not individuals, bringing a case against a government regulation on their own behalf. There was no discussion of vulnerability.[600]

B. Impact of the judicial or quasi-judicial body's decision

Pushbacks:

CBP One (app) metering – the influence of the 'Al Otro Lado II' rulings has been minimal. The parties agreed on 4 September 2025 to dismiss the case,[601] by which time the CBP One app had been discontinued as part of the January 2025 executive actions to suspend the operation of the asylum system.

administrative metering – 'Al Otro Lado I' is an influential case. Broadly, it established that metering is irreconcilable with the statutory requirement (8 USC 1158(a)(1)) that all persons arriving at the border have the opportunity to apply for asylum, and that this holds true even if the person is stopped just short of the border. (The latter ruling was controversial, with several of the Circuit judges dissenting from the collective decision not to re-hear the case en banc, as it appears to be in tension with the Supreme Court's ruling in Thuraissigiam (2020) that statutory due process rights do not engage until the US border is crossed.) Although these rulings are only binding on District courts within the geography of the 9th Circuit, they may be used as persuasive precedent elsewhere. The D.C. District court evaluating metering based on a determination of a border arrivals emergency (see below) cited its agreement with the Al Otro Lado I District court (among others) in ruling that the INA (8 USC 1252(f)(1)) bar on the use of injunctions in immigration cases other than those related to individuals in removal proceedings did not extend so far as to prohibit a District court from vacating a federal immigration rule.[602]

emergency metering – the decision has had little influence. It is on appeal to the D.C. Circuit. The rule it centered on remains nominally in force, but has been superseded in practice since the US ceased accepting asylum applications entirely in January 2025.

Detention:

bond hearing (immigration court) – as a BIA decision, Matter of Yajure Hurtado is binding precedent for all immigration judges. The rule it states (detention pending removal is mandatory for deportable noncitizens apprehended inside the US, under 8 USC 1225(b)), prohibits immigration judges from hearing bond requests for release from detention while the immigration case is in progress. This interpretation is now also the standard argument the government presents against release from immigration detention in habeas corpus cases in District courts.

bond hearing (federal court) – this case was one of tens of thousands decided in District courts in 2025-2026.[603] The influence on subsequent case law or practice is not entirely clear (the case discussed

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[598] Matter of A-C-A-A- (Attorney General, 28 I&N Dec. 84, 24 September 2020), 87, https://www.justice.gov/d9/2023-11/3995_ed.pdf.

[599] See also Matter of A-C-A-A- (Attorney General, 28 I&N Dec. 351, 26 July 2021), https://www.justice.gov/eoir/page/file/1415401/dl.

[600] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

[601] https://storage.courtlistener.com/recap/gov.uscourts.casd.764598/gov.uscourts.casd.764598.110.0.pdf.

[602] Las Americas Immigrant Advocacy Center v. DHS (District Court for the District of Columbia, 24-cv-01702-RC, 9 May 2025), 48, https://storage.courtlistener.com/recap/gov.uscourts.dcd.269594/gov.uscourts.dcd.269594.92.0_1.pdf.

[603] For a database of approximately 17,200 immigration detention habeas cases decided in federal courts from July 2025 to July 2026, see https://www.politico.com/news/2026/05/13/mandatory-detention-ice-cases-rulings-database-00913988 (registration required).

here was decided in late November 2025). However all of them turn on statutory construction, and all (including the BIA case above) follow one or the other of the two patterns; plaintiffs are either "applicants for admission" and thus 1225 and mandatory detention apply, or they are simply uninspected deportable noncitizens, so 1226 and bond hearings. In 2026 several Circuit courts have decided appeals on this question, but have their rulings have diverged, creating a "circuit split" of the type that the Supreme Court will almost certainly have to resolve in 2027. As of July 2026, panels of the 5th Circuit[604] and the 8th Circuit[605] had ruled that the DOJ policy of mandatory detention is lawful, and panels of the 6th Circuit[606] and the 11th Circuit[607] had ruled that it is not. Appeals on the point remain pending in other circuits as well.

Externalization of asylum processing:

ACAs – U.T. v Barr is a unique case, in that it is challenging the only regulation that purports to implement ACAs. Since it has not yet come to any decisions, preliminary or final, it has had no impact on other cases.

summary deportations – D.V.D. v DHS is also unique, in that it is the only case to challenge DHS guidance that purported to allow third country removals outside the context of an APA and without a real opportunity to raise non-refoulement claims about those removals. It is also a new case. However its ruling awarding a preliminary junction was cited approvingly by a factually similar case (removals pursuant to a finding of membership in a Venezuelan gang that the US government declared had invaded the US) for the proposition that it does not unduly burden the US government to be ordered to facilitate the return to the US of individuals who are "not held by any foreign government".[608]

Procedural barriers:

exclusion from procedure - between border points ban – the 9th Circuit court's opinion in East Bay Sanctuary Covenant v. Biden (February 2020, amended March 2021) had significant influence on 2020s asylum access case law (in addition to being binding precedent within the 9th Circuit). Its ruling on organisational standing became standard in such cases. It was also one of the first Circuit cases to rule explicitly that Congressional legislation (8 USC 1158(a)(1)) requires border authorities to accept and refer all requests for asylum made at the border, regardless of whether the border crossing was at a designated border crossing point, or irregular. Particularly on the latter point, several subsequent asylum access cases in other Circuits have cited East Bay as persuasive precedent.{*cite}

exclusion from procedure - suspension of asylum – it appears that RAICES v. Noem is the only case challenging the border closure and asylum suspension resulting from the president's January 2025 pronouncement of an invasion across the US/Mexico border. The District court's orders constituted final judgment on the merits, and its opinion was phrased apparently in anticipation of Supreme Court review, factors that would motivate courts outside that circuit (the District of Columbia) to stay any related cases pending such review.[609]

exclusion from procedure – STC/TCTB –

East Bay Sanctuary Covenant v. Garland (9th Circuit, 2020/2021) has been influential, albeit more by building on its predecessor East Bay Sanctuary Covenant v. Biden (9th Circuit, 2020/21)

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604 Covarrubias v. Vergara (5th Circuit, 6 February 2026), https://s3.documentcloud.org/documents/26884355/ca5detention.pdf.

605 https://ecf.ca8.uscourts.gov/opndir/26/03/253248P.pdf.

606 https://s3.documentcloud.org/documents/28113282/raycraft.pdf.

607 https://media.ca11.uscourts.gov/opinions/pub/files/202514065.pdf.

608 J.G.G. v Trump (D. DC, 22 December 2025), 42, https://www.courtlistener.com/docket/69741724/215/jgg-v-trump/ (citing D.V.D. v DHS (D. MA, 23 May 2025) https://clearinghouse.net/doc/160451/).

609 Issuing a final merits judgment forecloses the possibility of interlocutory orders, and the opinion makes noticeably frequent reference to recent opinions of the current Supreme Court, and to opinions (including dissents) of the late Justice Scalia, a former colleague and mentor of several sitting justices.

than as a leading case in its own right. Both decisions constitute binding precedent for federal courts within the 9th Circuit. Unlike the prior East Bay Sanctuary Covenant cases, this one concerned a rule akin to a safe third country rule, which the court declared unlawful because, as far as the 9th Circuit is concerned, asylum seekers are under no duty to seek asylum in the first country of arrival (see C., below).[610] Otherwise, it reiterated and reinforced the main rulings of East Bay Sanctuary Covenant v. Biden (2020/2021), the between border points asylum ban, applying them essentially mutatis mutandis to the de facto STC rule at issue here.

The subsequent decision in *East Bay Sanctuary Covenant v. Biden* (N.D. Cal., 2023), by contrast, had little or no influence. The 9th Circuit quickly stayed the District court's orders pending appeal,[611] eventually placed the case into abeyance at the joint request of the parties,[612] and finally vacated and remanded for the District court to consider the impacts of a 2024 Supreme Court ruling (that concerned organisational standing) and the January 2025 executive order that terminated the lawful pathways the rule had presented as an alternative to asylum.[613] The rule self-terminated on 11 May 2025, but the parties re-briefed the case at the District court in August 2025,[614] and the case remains nominally active.

exclusion from procedure - MPP – *Innovation Law Lab v. Wolf* (9th Circuit, 2020) eventually had almost no influence. After the court upheld the District court's stay on the implementation of MPP, the Supreme Court in turn stayed that stay, pending a petition for certiorari.[615] Certiorari was granted, but before the case was heard the government had first suspended, then rescinded MPP.[616] All rulings were vacated as moot.[617] *Immigrant Defenders Law Center v. Noem* (9th Circuit, 2025) has also had little or no influence, largely because it is so recent; notably, the dissenting judge argued that it is an unreliable decision because (among other reasons) the Supreme Court had previously granted a stay of the District court's decision in Innovation Law Lab v. Wolf, a case the judge characterised as having "raised far stronger procedural and merits arguments"; the Supreme Court had indicated that even in that case, the government was likely to prevail against the challenges to MPP.[618]

structure of procedure – expedited removal – neither *A.B.-B. v. Morgan* (D. D.C., 2020) nor *Kiakombua v. Wolf* (D. D.C., 2020) has significantly influenced subsequent jurisprudence. A.B.-B. focused narrowly on the compatibility with the INA of the USCIS/CBP memorandum assigning CBP officers to carry out credibile fear screening interviews. It is occasionally referenced, but not for its main holdings (which address issues that have not yet arisen in other cases). Kiakombua has had more influence, being

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[610] East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 45, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf ("the 9th Circuit's longstanding caselaw makes clear that "the failure to apply for asylum in a country through which an alien has traveled has no bearing on the validity of an alien's claim for asylum in the United States").

[611] East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 3 August 2023), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.21.0_1.pdf.

[612] East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 21 February 2024), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.84.0.pdf.

[613] East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 10 April 2025) 2-3 (citing Food and Drug Administration v. Alliance for Hippocratic Medicine (Supreme Court, 2024) and Executive Order 14165, "Securing Our Borders", 20 January 2025 (sections 7(a), (b))), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.135.0_1.pdf.

[614] Defendants' brief is available at https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.222.0.pdf; plaintiffs' reply: https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.223.0.pdf.

[615] Wolf v. Innovation Law Lab (Supreme Court, 19A960, 11 March 2020) (stay order). See https://www.supremecourt.gov/docket/docketfiles/html/public/19a960.html.

[616] See https://www.supremecourt.gov/docket/docketfiles/html/public/19-1212.html.

[617] Innovation Law Lab v. Mayorkas (9th Circuit, 19-15716, 6 August 2021), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/06/19-15716.pdf.

[618] Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 40ff, https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

effectively applied as a template in Las Americas v. Wolf (D. D.C., 2020) (see border procedure, below), and cited in several cases. For example, Castellar v. Mayorkas (S.D. Cal., 2022) cited Kiakombua for policy guidance documents being justiciable under the expedited removal statute, if they had a close enough nexus to the expedited removal procedure to be deemed to be "implementing" it; and Las Americas v. DHS (D. D.C., 2025) cited Kiakombua for its holding that based on Supreme Court precedent, an injunction can require the government to return an applicant who was removed following a legally invalid removal procedure.[619]

structure of procedure – border procedure – *Las Americas v. Wolf* (D. D.C. 2020) has had little influence, due largely to its reapplying much of the Kiakombua analysis to a different policy. It is occasionally cited in district court decisions, for example by the District Court for New Jersey for the finding that certain provisions of the INA read together show that Congress expected the government to utilise a variety of types of facilities for detention;[620] and by the D.C. District court itself for the holding that the statute directing cases questioning expedited removal policies to the D.C. District court applies to APA challenges as well as questions about the compatibility of policies with other provisions of the INA.[621]

Other barriers: narrowing the refugee definition -

restricting PSG – the influence of *Matter of A-C-A-A-* has been confusing. Formally, it sets a binding precedent that immigration courts must follow. However, it was issued in 2018 (BIA), overturned in 2020 (AG),[622] and overturned again in 2021 (AG),[623] as part of a 21st century process of "legal ping-pong" whereby "immigration precedent is subject to change every four or so years".[624]

expanding exclusion – *Pangea v. DHS* (N.D. Cal., 2020)[625] was a narrow decision about a particular barrier (an administrative rule purporting to expand the crime-related exclusions from asylum). It was occasionally cited for its discussion of the appropriate comment period for a preliminary federal regulation, but overall has not had significant influence on subsequent case law or practice.

C. Consistency with previous jurisprudence

Is the specific decision(s) in line with the previous jurisprudence or does it diverge from it?

Pushbacks:

CBP One (app) metering – the court followed its own recent metering case, and the 9th Circuit's binding precedent in East Bay Sanctuary Covenant v. Biden (28 February 2020, amended 24 March 2021), in the course of dismissing several of the government's preliminary arguments contesting the court's jurisdiction. The court ruled that the plaintiffs' claims were not moot, despite all individual plaintiffs having by then been processed for asylum, because the plaintiffs or others similarly situated could "reasonably expect to again face" the CBP One turnback policy, and thus fit the "capable of repetition, yet evading review" exception applied in the administrative metering case (same court, different judge).[626] The court also declined to allow the government to relitigate "whether CBP's border intake and processing decisions are unreviewable" as acts of administrative discretion, the prior judge having ruled that any such discretion

[619] Las Americas v. DHS (District Court for the District of Columbia, 24-cv-1702-RC, 28 July 2025), 8-9, https://storage.courtlistener.com/recap/gov.uscourts.dcd.269594/gov.uscourts.dcd.269594.99.0.pdf.
[620] CoreCivic, Inc. v. Murphy (District Court for the District of New Jersey, 23-cv-0967-RK-TJB, 29 August 2023).
[621] Coal. for Humane Immigrant Rights v. Noem (District Court for the District of Columbia, 25-cv-0872-JMC, 1 August 2025).
[622] Matter of A-C-A-A- (Attorney General, 28 I&N Dec. 84, 24 September 2020), https://www.justice.gov/d9/2023-11/3995_ed.pdf.
[623] Matter of A-C-A-A- (Attorney General, 28 I&N Dec. 351, 26 July 2021), https://www.justice.gov/eoir/page/file/1415401/dl.
[624] Edwards v. United States AG (11th Circuit, 19-15077, 6 March 2024), 97 F.4th 725, 747-48.
[625] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.
[626] Al Otro Lado v. Mayorkas (District Court for the Southern District of California, 23-cv-1367-AGS-BLM, 30 September 2024), 9-10.

must yield to the statutory "duty to inspect and refer asylum seekers".[627] It applied the 9th Circuit's reasoning in East Bay Sanctuary Covenant, mutatis mutandis, to rule that the policy's impact on the NGOs' activities, requiring them to divert resources to assist persons affected by the policy, satisfied the "injury in fact" prong of the standing test;[628] and that these activities, because they had the aim of helping individuals to obtain asylum, fell within the "zone of interests" protected by 8 USC 1158(a)(1) and thus the NGOs could plausibly claim relief under the APA.[629]

administrative metering – Al Otro Lado I was the only case where an appellate court ruled on the substance of metering. The 9th Circuit's rulings affirmed the key points of the District court's decision below. In that sense, the courts were aligned. More important, Al Otro Lado I set a precedent that required later 9th Circuit cases to align on at least those points. (See B., above.) However there was also divergence of opinions among the 9th Circuit judges, with a dissenting judge on the panel and other 9th Circuit judges dissenting from the decision not to rehear the case en banc (see divergences, below).

emergency metering – this was a case of first impression in the D.C. District court. The Al Otro Lado cases were still in progress in the 9th Circuit at the time, so not available to the D.C. court. However, the D.C. court reasoned to a similar conclusion (everyone arriving at the US border may request asylum) based on other federal cases, including the East Bay Sanctuary Covenant cases concerning asylum barriers.[630]

Detention:

bond hearing (immigration court) – although it acknowledged the case as one of first impression for a precedential immigration appeal, the BIA presented its decision as in line with its recent decision in Matter of Q. Li that deportable noncitizens arrested without a warrant are arrested under 8 USC 1225(b) and therefore ineligible for release on bond under 8 USC 1226(a).[631]

bond hearing (federal court) – in the federal court system as a whole, this decision appears to be in line with previous jurisprudence. However, the previous jurisprudence although abundant, also arose in 2025. This decision is in line in the sense that it reflects the reasoning of the vast majority of the District courts that ruled on the bond hearing issue in habeas corpus cases in 2025. The issue all{*probably?} the cases centred on arose in {*April?} 2025, when DHS changed its policy so as to apply 8 USC 1225(b) rather than 8 USC 1226(a) when arresting deportable noncitizens within the US.{*cite} The 5th Circuit court ruled in line with the minority of District courts, the BIA (see above) and the 2025 DHS policy, applying 1225(b) to hold that immigration judges may not hear requests for bond in lieu of detention.{*cite} Further appellate jurisprudence will emerge in 2026.

Externalization of asylum processing:

ACAs – no decision has yet been made in this case.

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[627] Al Otro Lado v. Mayorkas (District Court for the Southern District of California, 23-cv-1367-AGS-BLM, 30 September 2024), 13.

[628] Al Otro Lado v. Mayorkas (District Court for the Southern District of California, 23-cv-1367-AGS-BLM, 30 September 2024), 3-5.

[629] Al Otro Lado v. Mayorkas (District Court for the Southern District of California, 23-cv-1367-AGS-BLM, 30 September 2024), 14.

[630] Las Americas Immigrant Advocacy Center v. DHS (District Court for the District of Columbia, 24-cv-01702-RC, 9 May 2025), 30-31, https://storage.courtlistener.com/recap/gov.uscourts.dcd.269594/gov.uscourts.dcd.269594.92.0_1.pdf (citing EBSC v. Trump (Northern District of California, 2018), EBSC v. Biden (9th Circuit, 2021), EBSC v. Biden (Northern District of California, 2023)).

[631] Matter of Yajure Hurtado, 29 I&N Dec. 216 (BIA 2025), 5 September 2025, 226-27 (the Q. Li decision that warrantless arrests fall under 1225(b) does not mean that a warrant transforms the legal basis to 1226(a)).

summary deportations – the decision in D.V.D. v DHS aligns with previous jurisprudence of US District courts that generally recognises that no person can be deported without an notice of the destination and an opportunity to raise a claim for withholding of removal.

Procedural barriers:

exclusion from procedure - between border points ban – the 9th Circuit court supported its ruling on organisational standing via several of its own prior judgments, as well as binding Supreme Court precedent.[632] In assessing the plaintiffs' prospects for success on the merits, the court did not apply precedent in determining the rule invalid, reasoning instead based on the plain text of the statute,[633] supported by reference to BIA decisions indicating the means of entry is a discretionary rather than dispositive factor in an asylum assessment.[634] The court opinion purported to follow previous binding case law (9th Circuit and Supreme Court), but did not consider itself bound by a previous panel's rulings (on a motion for a temporary restraining order) in the same case;{*cite} however the concurring judge on the current panel considered those rulings binding.[635] Six judges who dissented from the full court's decision not to rehear the case argued that while the panel's rulings did not diverge from recent 9th Circuit jurisprudence, that jurisprudence had been in error regarding organisational standing and by interfering in the executive's "discretion to regulate eligibility for asylum".[636]

exclusion from procedure - suspension of asylum – the court followed Supreme Court and D.C. Circuit precedent for organisational standing, applying the resulting framework to the facts here.[637] The court cited its duty to "“exercise [its] independent judgment" in interpreting the law" (rather than defer to executive interpretations),[638] and its own prior judgment recognising a long line of Supreme Court jurisprudence establishing that "the legality of Presidential action can ordinarily be obtained in a suit" against the president's officers in the executive branch.[639] On the merits, the court largely followed its own prior jurisprudence, particularly the D.C. Circuit's binding precedent in Huisha-Huisha v Mayorkas (2022), with one significant exception. The court ruled in accordance with Huisha-Huisha that the executive must comply with non-refoulement legislation, even during an emergency border closure and suspension of entry into the US.[640] The court also distinguished Huisha-Huisha (which concerned the Covid pandemic), which had appeared to authorise expulsions of persons who had already entered the US as resting on a different legal basis (42 USC 265, "suspension of the right to introduce" persons or property into the US to protect against a communicable disease) than that cited in the January 2025 presidential proclamation of emergency measures to protect against an invasion (8 USC 1182(f), empowering the president to "by

632 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 28-30, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

633 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 43 ("[the government's] argument is unconvincing. We avoid absurd results when interpreting statutes" (citation omitted)), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

634 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 45-46, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

635 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 67 (Fernandez, J., concurring), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

636 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)) , 85-91 and 92-97 (Bumatay et al., JJ., dissenting from the full Circuit's decision not to rehear the case), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

637 RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 49-51, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf.

638 RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 37, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf (citing Loper Bright v. Raimondo (Supreme Court, 2024)).

639 RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 38, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf (quoting Chamber of Commerce of the US v. Reich (D.C. Circuit, 1996) and noting its further citations).

640 RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 98-100, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf.

proclamation … suspend the entry" of persons without residence or visiting rights in the US "or impose on [their] entry any restrictions he may deem to be appropriate"); while it was reasonable to argue that failure to 'read in' the power to expel persons already present could disable the efficacy of measures to prevent disease from spreading, there was nothing to suggest that the latter provision also had such effect, particularly as it appears in the same title of the US code that categorically requires that non-refoulement and asylum protections be available via removal hearings.[641] Similarly, the court distinguished its earlier ruling in O.A. v. Trump (2019) (same judge) that declined to issue an injunction to buttress its vacatur of the rule in question there (the between border points asylum ban, see above), stating that by contrast in RAICES the government had suggested that regardless of vacatur it would still be required by the presidential proclamation "to operate outside the ordinary bounds of the [Immigration and Nationalities Act], even if the implementing guidance is set aside", justifying the unusual further relief of an injunction.[642] Some divergence appeared on the question of whether the government was within its powers to categorically deny the opportunity to apply for asylum (as distinct from non-refoulement protections) pursuant to a presidential proclamation of emergency. In Huisha-Huisha, the D.C. Circuit court had ruled that the proclamation and regulations that suspended the asylum system due to the Covid pandemic were lawful, except insofar as they purported to deny the possibility to request withholding of removal (non-refoulement protection). In RAICES, the D.C. District court was bound to follow this ruling, but distinguished the case from Huisha-Huisha (see below) and ruled against the government's 2025 suspension of asylum.[643] In this, the District court also followed its own prior ruling in O.A. v Trump (2019) that the language in 8 USC 1158(b)(2)(C) permits the Attorney General and DHS Secretary to ""establish additional limits and conditions" of eligibility for asylum, but only to the extent those limitations are "consistent with"" section 1158, which allows any noncitizen who is present in or arrives in the US to apply for asylum.[644] The D.C. Circuit panel that heard the government's motion for a stay pending appeal of the District court's orders split, with two judges applying Huisha-Huisha to find that the suspension of asylum (but not of non-refoulement protections, etc) was likely a valid exercise of government powers according to the discretionary nature of asylum,[645] and one judge in favour of the District court's interpretation.[646]

<u>exclusion from procedure</u> – STC/TCTB –

East Bay Sanctuary Covenant v. Garland (9th Circuit, 2020/2021) closely followed the 9th Circuit's prior East Bay Sanctuary Covenant cases (which involved the same plaintiffs and similar, but not identical barriers). Main points of alignment included organisational standing and the primacy of US asylum legislation (8 USC 1158) over executive measures such as administrative rules that purport to bar asylum applications based on arbitrary criteria (ie, unrelated to the applicant's individual circumstances). The court followed its own precedents to find that the NGO

[641] RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 80-84, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf.
[642] RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 124-25, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf ("The injunction, of course, will not run against the President").
[643] RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 89-97, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf.
[644] RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 21, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf (citing O.A. v. Trump, 404 F. Supp. 3d 109 (D.D.C. 2019). The court also noted that it had previously ruled that the "additional conditions and limitations" language in 1158(b)(2)(C) could not support the restrictions on applying for asylum enacted in the government's June 2024 rule (see metering, above). Ibid., citing Las Americas Immigrant Advoc. Center v. DHS (D.D.C. 9 May, 2025).
[645] RAICES v. Noem (D.C. Circuit, 1 August 2025), 33-34 Millett, J. (concurring in part and dissenting in part) (basing this conclusion on discretion implied in the asylum provision itself, 8 USC 1158(a), in agreement with the equivalent ruling in Huisha-Huisha); ibid. 2 Katsas, J. (concurring in part and dissenting in part).
[646] RAICES v. Noem (D.C. Circuit, 1 August 2025), Pillard, J (concurring in part and dissenting in part).

plaintiffs had standing per the US Constitution ('Article III standing').[647] On the further statutory standing test, that court ruled similarly, that the NGOs' interests fell "within the zone of interests protected by the law invoked" (here, the INA), explicitly following the 9th Circuit in East Bay Sanctuary Covenant v. Trump (2018, republished 2019), which had affirmed the same conclusions by the same District judge in a case raised by the same NGOs concerning the same statutory provisions.[648] On the substantive claims, the District court cited a long line of 9th Circuit precedent establishing that it is "unreasonable" to assume, as the rule at issue did, that an individual's decision not to apply for asylum en route "is sufficiently probative that the alien should be denied asylum",[649] a conclusion likewise left undisturbed on appeal. Similarly, the District court closely followed two of its own prior opinions (same judge) in East Bay Sanctuary Covenant v. Trump (both from 2018), for showing irreparable harm (ie not compensable by monetary damages) absent an injunction,[650] and the 9th Circuit again (East Bay Sanctuary Covenant v. Trump (2018)) to find that the NGOs had shown that the balance of equities and public interest also weigh in favour of the extraordinary remedy of a preliminary injunction against a rule's enforcement.[651] The District court also referenced the latter case as binding precedent for the appropriateness of nationwide injunctions in immigration related cases, while acknowledging jurisprudential debate on that point.[652] On this, the nationwide scope of the District court's injunction against applying the TCTB rule, there was dissent on both of the 9th Circuit panels involved (the first panel stayed the District court's preliminary injunction pending appeal, insofar as it applied outside the 9th Circuit,[653] the second affirmed the preliminary injunction itself and restoring its nationwide scope[654]). Both panel majorities and both dissenters argued that their interpretation aligned with 9th Circuit jurisprudence.[655] (See divergences, below, for both viewpoints.) One judge on the merits panel also dissented from the court's holding "that the rule exceeds the Attorney General's authority under 8 U.S.C. 1258" (the asylum statute), considering it unnecessary to decide that issue (the conclusion that the rule was "arbitrary and capricious [was] sufficient to resolve the case").[656]

[647] East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 26-27 (citing East Bay Sanctuary Covenant v. Trump (9th Circuit, 7 December 2018)) (see above - between border points ban); ibid., at 27 (citing East Bay Sanctuary Covenant v. Trump (9th Circuit, 28 February 2020) (amended 24 March 2021) (see above - between border points ban)). See also the underlying District court opinion, East Bay Sanctuary Covenant v. Barr (District Court for the Northern District of California, 19-cv-04073-JST, 24 July 2019), 12 (citing East Bay Sanctuary Covenant v. Trump (District Court for the Northern District of California, 18-cv-06810-JST, 19 November 2018 (presumably))).

[648] East Bay Sanctuary Covenant v. Barr (District Court for the Northern District of California, 19-cv-04073-JST, 24 July 2019), 12-13, https://www.courtlistener.com/opinion/7336375/e-bay-sanctuary-covenant-v-barr/. The Circuit court had affirmed the judgments without reviewing these particular rulings, upholding them by implication.

[649] East Bay Sanctuary Covenant v. Barr (District Court for the Northern District of California, 19-cv-04073-JST, 24 July 2019), 24, https://www.courtlistener.com/opinion/7336375/e-bay-sanctuary-covenant-v-barr/.

[650] East Bay Sanctuary Covenant v. Barr (District Court for the Northern District of California, 19-cv-04073-JST, 24 July 2019), 41, (citing East Bay Sanctuary Covenant v. Trump (District Court for the Northern District of California, 18-cv-06810-JST, 19 November 2018)), https://www.courtlistener.com/opinion/7336375/e-bay-sanctuary-covenant-v-barr/.

[651] East Bay Sanctuary Covenant v. Barr (District Court for the Northern District of California, 19-cv-04073-JST, 24 July 2019), 41-44 (citing and following East Bay Sanctuary Covenant v. Trump (9th Circuit, 2018)), https://www.courtlistener.com/opinion/7336375/e-bay-sanctuary-covenant-v-barr/.

[652] East Bay Sanctuary Covenant v. Barr (District Court for the Northern District of California, 19-cv-04073-JST, 24 July 2019), 45, https://www.courtlistener.com/opinion/7336375/e-bay-sanctuary-covenant-v-barr/.

[653] East Bay Sanctuary Covenant v. Barr (9th Circuit, 16 August 2019), https://cdn.ca9.uscourts.gov/datastore/opinions/2019/08/16/19-16487.pdf.

[654] East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)) {*link}.

[655] East Bay Sanctuary Covenant v. Barr (9th Circuit, 16 August 2019) (motions panel), 7-11, https://cdn.ca9.uscourts.gov/datastore/opinions/2019/08/16/19-16487.pdf. "In sum, our decision to partially grant the stay simply upholds the law of our circuit by ensuring that injunctive relief is properly tailored to the alleged harm", ibid. 11 (but see ibid., 12-15 (Tashima, J., dissenting in part); East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 51-56, {*link} (but see ibid., 57 (Clifton, J., concurring) and 63-69 (Miller, J., concurring in part and dissenting in part)).

[656] East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 58, {*link} (Miller, J., concurring in part and dissenting in part).

East Bay Sanctuary Covenant v. Biden (N.D. Cal., 2023) closely followed the 9th Circuit's precedents, particularly East Bay Sanctuary Covenant v. Garland (2020) and East Bay Sanctuary Covenant v. Trump (2018) – it was procedurally a continuation of the latter case, albeit redirected at a new executive agency rule. The court followed both these precedents on organisational standing,[657] as well as statutory standing ('zone of interests' test),[658] and the 2018 precedent to dismiss the defendants' challenge to it based on United States v. Texas (Supreme Court, 2023) (see standing, above).[659] The court also followed 9th Circuit precedent (East Bay Sanctuary Covenant v. Biden (2021) and East Bay Sanctuary Covenant v. Trump (2018)) in dismissing several arguments by the defendants that statutory bars deprived the court of jurisdiction to hear this case.[660] The court again followed those two cases as having established that under the applicable legislation,[661] asylum access may not be conditioned on where the person arrives (2018 case) or whether they were refused protection in transit (2021 case),[662] and applied them to determine that the same must be true when categorical bars are replaced by rebuttable presumptions.[663] The court also cited its own prior ruling in Pangea Legal Servs. v. DHS (N.D. Cal., 19 Nov 2020) as observing that the government's internal orders state that the period for public notice and comment during rulemaking "should generally be at least 60 days" (compared to 30 days here).[664] The decision did not diverge from 9th Circuit precedent, however there was disagreement on procedural aspects among the 9th Circuit judges who reviewed the case at various stages (see below).

<u>exclusion from procedure</u> - MPP –

The majority ruling in *Innovation Law Lab v. Wolf* (9th Circuit, 2020) was aligned with previous jurisprudence of the 9th Circuit. MPP was then a novel programme, so had not been tested in court before, but several issues were similar to others the 9th Circuit and other federal courts had faced. All judges concurred that legislation prohibits the government refouling anyone to face persecution or torture,{*}{*eg[665]} in accordance with the mainstream. The judges debated considerably over the dispositive issue of whether MPP is permitted by its purported governing statute, with two 9th Circuit panels coming to opposite conclusions (see below), however this was presented purely as a matter of statutory interpretation rather than argued on precedent (the provision at issue is complex).{*cite} There was further debate on points of procedure, such as whether a motions panel ruling binds a subsequent merits panel handling the same appeal (or in

[657] East Bay Sanctuary Covenant v. Biden (District Court for the Northern District of California, 18-cv-06810-JST, 25 July 2023), 7-8, https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.
[658] East Bay Sanctuary Covenant v. Biden (District Court for the Northern District of California, 18-cv-06810-JST, 25 July 2023), 11-12, https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.
[659] East Bay Sanctuary Covenant v. Biden (District Court for the Northern District of California, 18-cv-06810-JST, 25 July 2023), 11, https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.
[660] East Bay Sanctuary Covenant v. Biden (District Court for the Northern District of California, 18-cv-06810-JST, 25 July 2023), 12-14 (citing the 2021 case to establish that certain bars to judicial review or relief against rules implementing expedited removal (parts of 8 USC 1252(a), (e), (f)) were insufficiently related to asylum to apply here, and quoting the 2018 case to support the proposition that Congress had explicitly included some such limits in the IIRIRA 1996 Act, so the failure to explicitly bring asylum under these bars indicated a lack of intent that the bars should apply to asylum), https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.
[661] 8 USC 1158(a)(1).
[662] East Bay Sanctuary Covenant v. Biden (District Court for the Northern District of California, 18-cv-06810-JST, 25 July 2023), 16-17, https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.
[663] East Bay Sanctuary Covenant v. Biden (District Court for the Northern District of California, 18-cv-06810-JST, 25 July 2023), 17, https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.
[664] East Bay Sanctuary Covenant v. Biden (District Court for the Northern District of California, 18-cv-06810-JST, 25 July 2023), 30-31, https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.
[665] Innovation Law Lab v. McAleenan (9th Circuit, 19-15716, 7 May 2019), 17-18, https://cdn.ca9.uscourts.gov/datastore/opinions/2019/05/07/19-15716.pdf.

future cases), and the availability and appropriateness of injunctions against government actions or court orders as a form of interim relief.{*cite}

The majority in *Immigrant Defenders Law Center v. Noem* (9th Circuit, 2025) reasoned similarly to Innovation Law Lab v. Wolf (9th Circuit, 2020) on procedural matters, including affirming the District court's ruling that Immigration Defenders had standing. Because the 2020 case was vacated, the court reasoned instead from general precedents of administrative and procedural law. On the recurring question of standing, the courts' ruling was in line with the bulk of previous 9th Circuit jurisprudence.[666] However, the Circuit court diverged with its prior jurisprudence in restricting the scope of the stay granted by the District court, to current or future ImmDef plaintiffs (rather than staying MPP entirely, or at least within the geography of the 9th Circuit) (see below).[667] A dissenting judge acknowledged that the court's ruling on standing followed 9th Circuit precedent, but argued that precedent had been wrongly decided and was ripe for Supreme Court review,[668] and that even if ImmDef had standing, it had not shown it was sufficiently likely to prevail on claims of violations of speech rights (1st Amendment), right to access counsel, and right to apply for asylum, to warrant issuance of an injunction.[669]

<u>structure of procedure</u> – expedited removal –

As analysed by the District court, *A.B.-B. v. Morgan* (D. D.C., 2020) mostly entailed assessing the facts of the case, with the subsequent application of law being a straightforward exercise in statutory interpretation and application of leading administrative law cases. The court followed Winter v. Nat. Res. Def. Council, Inc. (Supreme Court, 2008) for the four-factor test of whether to grant the "extraordinary remedy" of a preliminary injunction,[670] and Nken v. Holder (Supreme Court, 2009) for guidance on their application in a removal case, especially the irreparable harm and equities and public interest test.[671] The court aligned with its previous jurisprudence on credible fear interviews in the expedited removal context, following Grace v. Barr (D.C. Circuit, 2020)[672] in support of the proposition that immediate removal to "face significant risk of physical harm" is irreparable harm, and being "life-and-death consequences[,] weigh heavily in favour of preliminary injunctive relief".[673]

Kiakombua v. Wolf (D. D.C., 2020) closely followed Grace v. Barr (D.C. Circuit, 2020),[674] which had presented "substantially similar legal questions" of the lawfulness of DHS instructions

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666 *Immigrant Defenders Law Center v. Noem* (9th Circuit, 25-2581, 18 July 2025), 24-25 (finding standing due to ImmDef's having to expend resources to counteract the impacts of MPP on its core activities), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf. The court followed *East Bay Sanctuary Covenant v. Trump* (9th Circuit, 2018) for treating a stay as an injunction in similar procedural circumstances. Id., 15-16.

667 I*mmigrant Defenders Law Center v. Noem* (9th Circuit, 25-2581, 18 July 2025), 39, https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

668 *Immigrant Defenders Law Center v. Noem* (9th Circuit, 25-2581, 18 July 2025), 56-61 (Nelson, J., dissenting), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

669 *Immigrant Defenders Law Center v. Noem* (9th Circuit, 25-2581, 18 July 2025), 61-70 (Nelson, J., dissenting), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

670 *A.B.-B. v. Morgan* (District Court for the District of Columbia, 19-cv-00846-RJL, 31 August 2020), 15 (the plaintiff must establish: likelihood of success on the merits; likelihood of irreparable harm without the injunction; that the balance of equities favours them; and "that an injunction is in the public interest"), https://storage.courtlistener.com/recap/gov.uscourts.dcd.216698/gov.uscourts.dcd.216698.32.0_2.pdf.

671 *A.B.-B. v. Morgan* (District Court for the District of Columbia, 19-cv-00846-RJL, 31 August 2020), 21-22, https://storage.courtlistener.com/recap/gov.uscourts.dcd.216698/gov.uscourts.dcd.216698.32.0_2.pdf.

672 See https://cases.justia.com/federal/appellate-courts/cadc/19-5013/19-5013-2020-07-17.pdf.

673 *A.B.-B. v. Morgan* (District Court for the District of Columbia, 19-cv-00846-RJL, 31 August 2020), 21-22, https://storage.courtlistener.com/recap/gov.uscourts.dcd.216698/gov.uscourts.dcd.216698.32.0_2.pdf. The court also cited Grace as support for there being little public interest in allowing "unlawful agency action" to continue. Id., 22.

674 *Grace v. Barr* (D.C. Circuit, 19-5013, 17 July 2020), https://cases.justia.com/federal/appellate-courts/cadc/19-5013/19-5013-2020-07-17.pdf.

for credible fear screening interviews, and clarified several of the statutory (INA) terms concerned.[675] Framing the credible fear interview as a "screening interview" that "poses a "low bar" for asylum applicants" (*DHS v. Thuraissigiam* (Supreme Court, 2020)),[676] the court followed Grace's holding that allegedly unlawful procedural changes to credible fear interviews could, because of the potential consequences (persecution), satisfy the injury in fact test for standing to challenge an agency action.[677]

The court also followed Grace v. Barr in finding that the legislation that disapplied District court jurisdiction over expedited removal orders, also authorises the D.C. District court to undertake "more traditional judicial review on challenges of validity of the system, including agency policies governing credible-fear interviews".[678] Like the policy guidance at issue in Grace, the training materials here represent an "implementation" of the expedited removal provision, and therefore are justiciable qua policies in the D.C. Circuit,[679] and as in Grace, the documents' explanation of ""persecution" is not based on a reasonable interpretation of the agency's stated "unable or unwilling" standard, leaving asylum officers undue discretion to vary that standard in practice.[680] The court referenced O.A. v. Trump[681] as support for its holding that the government does not deprive the court of 1252(e)(3) jurisdiction by subsequently transferring the applicant(s) to regular removal proceedings.[682]

On remedies, the court followed Grace v. Barr in holding the statutory provision divesting District courts of jurisdiction to order injunctions or other equitable remedies in expedited removal cases inapplicable to challenges to the expedited removal system itself, which is specifically authorised by another provision.[683] The court noted that *A.B.-B.* (see above) had recently ordered vacature as a remedy in the credible fear interview context,[684] and cited Grace for the court's authority to order the government to retrieve persons already removed and "provide them with new credible fear determinations consistent with the immigration laws",[685] and for the necessity of

675 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 23, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf. The court had stayed the case pending the anticipated rulings of the D.C. Circuit in Grace. Id.

676 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 7, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

677 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 30, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

678 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 43 (applying 8 USC 1252(e)(3), citing Grace v. Barr at 891), https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

679 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 44-49, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

680 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 75, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

681 *O.A. v. Trump & S.M.S.R. v. Trump* (District Court for the District of Columbia, 18-cv-2718-RDM & 18-cv-2838-RDM, 2 August 2019), https://storage.courtlistener.com/recap/gov.uscourts.dcd.201831/gov.uscourts.dcd.201831.92.0_1.pdf.

682 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 39-40, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

683 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 79-80 (8 USC 1252(e)(1)(A) prohibits such remedies "except as specifically authorized in a subsequent paragraph of this subsection", and 1252(e)(3)(A)(ii) authorises the D.C. District court to hear challenges to the validity of the system, including whether documents issued under the AG (or DHS)'s authority comply with applicable legislation), https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

684 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 86, https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

685 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 39 (quoting Grace v. Whitaker (D. D.C. 2018), 105), https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf; ibid., 94.

an injunction to protect the plaintiffs from potential future removal (without an adequate hearing).[686]

structure of procedure – border procedure – *Las Americas v. Wolf* (D. D.C., 2020) aligned with D.C. Circuit precedent, although its final ruling differed from those of the main cases it followed for procedural and standing issues, Grace v. Barr (D.C. Circuit, 2020), Make the Rd. New York v. Wolf (D.C. Circuit, 2020), and *Kiakombua*, in that it ruled in favour of the defendants, that the government policy at issue was lawfully within the parameters established by statute.[687] The court followed these cases to establish its subject matter jurisdiction over challenges to a written policy that implements the expedited removal statute.[688] Given the similarity to the plaintiffs' circumstances in *Kiakombua*, the court found as it had in that case that the individual plaintiffs had shown sufficient connection between alleged procedural failures and their subsequent removal to establish standing.[689] The court used rulings from *Kiakombua* and the District court decision in Make the Road, as well as O.A. v. Trump (D. D.C., 2019) to illustrate that Congress's intent in establishing expedited removal was to speed up removals by instituting a screening process with relatively few procedural safeguards, as the first step in a two step process for requesting asylum.[690] Similarly the court cited *Kiakombua*, *Thuraissigiam* and *O.A.* in establishing that the low threshold of a "significant possibility" of establishing eligibility for asylum and the availability of legal consultation but not legal representation (as in full removal proceedings) for expedited removal showed a congressional intent to balance protection obligations with efficiency of removals, for which purpose PACR/HARP was a reasonable agency policy.[691] The decision in this case is in part unreliable, because it relied on Chevron deference to determine that the PACR/HARP programmes were based on a reasonable interpretation of the expedited removal provision, 8 USC 1225(b).[692]

Other barriers: narrowing the refugee definition

restricting PSG – the AG's 2020 decision in *Matter of A-C-A-A-* diverged with prior BIA/AG jurisprudence, overturning a precedential BIA decision.[693] This was overturned by the AG's 2021 decision, returning BIA jurisprudence to its pre-2018 status quo.[694] Although the 2021 decision anticipated an executive rulemaking process to resolve by regulation the issues raised by *A-C-A-A-* and related *BIA/AG* cases (*A-B-* (AG, 2018), *L-E-A-* (AG, 2019)),[695] such rules have not yet emerged. The 2021 decision – in line with pre-2018 BIA jurisprudence - is the most recent published authority, however its ongoing relevance is questionable, particularly as the two decisions it effectively reinstated (*Matter of A-R-C-G-* (BIA,

686 *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), 92-93 (citing Grace v. Whitaker (D. D.C. 2018)), https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf; ibid., 94.
687 *Las Americas v. Wolf* (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 59-60, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.
688 *Las Americas v. Wolf* (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 21-23 (referencing 8 USC 1252(e)(3) and 1252(a)(2)(A)), https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.
689 *Las Americas v. Wolf* (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 24-25, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.
690 *Las Americas v. Wolf* (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 33-34, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.
691 *Las Americas v. Wolf* (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 42-43, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.
692 *Las Americas v. Wolf* (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 40-44, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.
693 See *Matter of A-C-A-A-* (Attorney General, 28 I&N Dec. 84, 24 September 2020), https://www.justice.gov/d9/2023-11/3995_ed.pdf.
694 *Matter of A-C-A-A-* (Attorney General, 28 I&N Dec. 351, 26 July 2021), https://www.justice.gov/eoir/page/file/1415401/dl.
695 *Matter of L-E-A-* (Attorney General, 28 I&N Dec. 304, 16 June 2021), 304-305, https://www.justice.gov/eoir/page/file/1404791/dl.

2014) and *Matter of L-E-A-* (BIA, 2017)) were overruled again in 2025.[696] In sum, the 2021 decision aligned with pre-2020 jurisprudence of the BIA, but diverged from the 2020 AG (highest instance) decision that overruled the BIA.

expanding exclusion – *Pangea v. DHS* (N.D. Cal., 2020) closely aligned with previous 9th Circuit jurisprudence, especially the East Bay Sanctuary Covenant (EBSC) decisions.[697] All three of the rules in question in these cases (two EBSC, plus Pangea) relied for their legal basis on 8 USC 1158(b)(2)(C), which authorises the Attorney General to "by regulation establish additional limitations and conditions, consistent with [section 1158]," of ineligibility for asylum. The Pangea court signaled alignment with the EBSC precedents by quoting those precedents at length to demonstrate how the EBSC cases had addressed the compatibility of the rules concerned with the INA (specifically 8 USC 1158).[698] Like the EBSC courts, the Pangea court applied the Winter test to award a preliminary injunction, examining the plaintiffs likelihood of success on the merits; and of "irreparable harm" without the injunction; that the plaintiff holds the "balance of the equities"; and that an injunction is in the public interest.[699] It supplemented this with 9th Circuit precedent that alternatively, plaintiffs could raise "serious questions going to the merits" and that the "balance of hardships tips sharply in [their] favor", if the other Winter factors are also met, and that the factors are "evaluated on a sliding scale".[700] The court further cited the EBSC cases to rebut the government's reliance on the AG's acknowledged discretion to deny asylum even to eligible applicants, as "different from discretion to prescribe criteria for asylum eligibility",[701] as the rule purported to do. The court followed ESBC on the other Winter prongs as well: the rule was arbitrary and capricious because it bars applicants from asylum for reasons that do not relate to its stated purpose of protecting the US from serious crime;[702] the NGOs would suffer irreparable harm prong in the form of higher costs of their programmes and numbers of clients impacted;[703] and it is in the public interest to not deport applicants to a risk of persecution.[704] The court acknowledged the government's "compelling interest" in "efficient administration of the immigration laws", but when (as here in Pangea) the rule in question is contrary to statutory law, this factor weighs ""sharply" in the plaintiffs' favor" (ie in favor of

[696] See *Matter of S-S-F-M-* (AG, 29 I&N Dec. 207, 2 September 2025) (overruling *Matter of A-B-* (AG, 2021)), https://www.justice.gov/eoir/media/1412696/dl, and Matter of R-E-R-M- & J-D-R-M- (AG, 29 I&N Dec. 202, 2 September 2025) (overruling Matter of L-E-A- (AG, 2021)), https://www.justice.gov/eoir/media/1412686/dl.

[697] See East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)) (between border points ban) and East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)) (third country transit ban, TCTB), both discussed above.

[698] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 14 November 2020), 17-18, https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

[699] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 14 November 2020), 14 (citing East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)) and quoting Winter v. Nat. Res. Def. Council (Supreme Court, 2008)), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

[700] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 14 November 2020), 14 (quoting All. for the Wild Rockies v. Cottrell (9th Circuit, 2011) and East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021))), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

[701] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), 20 (quoting East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021))), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

[702] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), 27 (quoting East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021))), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

[703] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), 38-39 (citing both of the EBSC cases), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

[704] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), 42 (citing East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021))), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

granting an injunction).[705] Finally, the court followed EBSC v. Biden (2020/2021) for remedies, as ordinarily when a rule is invalid under the APA it is vacated, and furthermore especially in the immigration context universal injunctions are appropriate.[706] The plaintiff NGOs operate in several regions nationwide, and "[o]ne fewer client … results in a frustration of purpose".[707] Pangea had no significant divergences from 9th Circuit precedent.

Reasons and extent of these differences

Pushbacks:

CBP One (app) metering – the District court diverged slightly from one of its prior rulings on administrative metering. A court may review only a "final agency action" under the APA (5 USC 704). Previously, the court had ruled that that requirement does not apply to a case alleging an agency failure to act under 5 USC 706(1).{*cite} This court ruled instead that "each turnback was a final action", so it is not necessary to decide whether such an exception applies.[708]

administrative metering – the dissenting judge on the 9th Circuit panel argued that according to a plain reading of statutory and case law, persons who have not physically entered the US have not "arrived in the US" or "at a designated port of arrival", the language that triggers the obligation to receive and refer an asylum request under 8 USC 1158(a)(1); and the court's decision had unduly interfered with the executive branch's prerogative to manage the border.[709] On the same grounds{*right?}, a further 12 (of about 30) judges of the 9th Circuit dissented from the court's decision not to rehear the case en banc.[710]

emergency metering – there has only been one case regarding the metering aspect of this rule, before one judge. That judge's rulings align with those of other federal courts that have considered metering or the categorical nature of the statutory requirement that all persons arriving in the US may apply for asylum.

Detention:

bond hearing (immigration court) – the BIA referred to Matter of Yajure Hurtado as the first precedential appeal to address "the Immigration Judge's authority to hold a bond hearing for an alien present in the United States who has not been admitted after inspection".[711] Therefore, there was no prior jurisprudence on this point to diverge from.

bond hearing (federal court) – the as yet unresolved divergence within the federal difference is the same as was argued in Matter of Yajure Hurtado: whether, on a plain reading of the statutory language (ie without needing to delve into arguments regarding legislative intent, etc), 8 USC 1225(b) or 1226(a) applies to deportable noncitizens encountered in the interior of the US. The former is the conclusion of DHS (as attested in memoranda and pursued in court), the DOJ (in the form of the BIA), about 5% of the approximately 3,000 District court rulings on the point, and one Circuit court ruling (5th Circuit, 6 February 2026). The remaining District judgments have ruled that 8 USC 1226(a) is the applicable provision, which

[705] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), 42-43 (quoting and citing East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021))), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.
[706] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), 44-45 (citing East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021))), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.
[707] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), 45 (quoting East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021))), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.
[708] Al Otro Lado v. Mayorkas (District Court for the Southern District of California, 23-cv-1367-AGS-BLM, 30 September 2024), 19.
[709] Al Otro Lado v. Noem (9th Circuit, 23 October 2024 (amended 14 May 2025)), 50 (Nelson, J. dissenting).
[710] Al Otro Lado v. Noem (9th Circuit, 23 October 2024 (amended 14 May 2025)), 107 (Bress, J. dissenting).
[711] Matter of Yajure Hurtado, 29 I&N Dec. 216 (BIA 2025), 5 September 2025, 216.

requires DHS/DOJ to provide bond hearings (asking to post monetary bond in lieu of detention) before an immigration judge to deportable persons arrested inside the US.

<u>Externalization of asylum processing</u>: none of the externalisation related cases has diverged from prior case law.

<u>Procedural barriers</u>:

<u>exclusion from procedure</u> - between border points ban – the two points of divergence between the 9th Circuit panel majority and the judges who voted to rehear the case related to organisational standing and the executive's prerogative to regulate eligibility for asylum. On organisational standing, the dissenters perceived that US courts in the second half of the 20th century had moved away from their original role as arbiters of disputes between impacted parties towards permitting what amount to public interest lawsuits, and admonished that the rule at issue did not regulate the NGOs' activities or harm their own interests and thus they could not show a right of theirs that had been harmed by the rule, as required by "traditional standing principles".[712] On asylum regulation, the dissenting judges argued that the government is not required to grant asylum under any circumstances (see 8 USC 1158(b)),[713] and may set ""additional conditions and limitations" on asylum eligibility",[714] so was within its discretion to enact a rule that, during the border arrivals crisis, persons who arrive between border points are "eligible to apply for asylum … but applicants must come in through a port of entry to *successfully* gain asylum".[715] By contrast, the panel majority had read 8 USC 1158(a) as requiring that asylum applications be accepted ("[section 1158] begins by stating that an undocumented migrant may apply for asylum when she is "physically present in the United States" or "arrives in the United States (whether or not at a designated port of arrival)""), and the rule as purporting to preclude applications from being accepted between border points during a declared border emergency ("The Rule requires migrants to enter the United States at ports of entry to preserve their eligibility for asylum").[716]

<u>exclusion from procedure</u> - suspension of asylum – the main point of divergence between the four judges who reviewed the case was whether the ruling from Huisha-Huisha on the executive prerogative to suspend asylum applications due to emergency circumstances also applied here. According to the District court and one of the three Circuit judges hearing the government's motion for a stay pending appeal of the District judgment, the circumstances of RAICES v. Noem differed from Huisha-Huisha in the key aspect that the orders from Huisha-Huisha were grounded in public health related rather than immigration related legislation, which could justify the need to remove applicants from the country without a time consuming asylum proceeding.[717] The other two Circuit judges who reviewed the government's motion for a stay of the District court's orders ruled to the contrary, that the Huisha-Huisha precedent required the part of the orders that required the government to resume accepting asylum applications to be stayed,

712 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 85-87 (Bumatay et al., JJ., dissenting from the full Circuit's decision not to rehear the case), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

713 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 94-95 (Bumatay et al., JJ., dissenting from the full Circuit's decision not to rehear the case), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

714 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 97 (Bumatay et al., JJ., dissenting from the full Circuit's decision not to rehear the case) (quoting 8 USC 1158(b)(2)(C)), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

715 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 96 (Bumatay et al., JJ., dissenting from the full Circuit's decision not to rehear the case) (original emphasis), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

716 East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 February 2020 (amended 24 March 2021)), 42-43, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/18-17274.pdf.

717 RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 82-84, 91-93, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf; RAICES v. Noem (D.C. Circuit, 1 August 2025), Pillard, J (concurring in part and dissenting in part), 6-8.

as the government would likely be able to show on appeal that, as in Huisha-Huisha, the proclamation and instructions in question made reference to the asylum statute (8 USC 1158(a)(1)) and that because granting asylum is an act of executive discretion, the executive had "already made the asylum decision" by foreclosing access to section 1158; the Circuit judges applied Huisha-Huisha to rule similarly, that "categorical and upfront rejections of asylum are permissible in emergency situations for limited periods of time".[718] That order therefore remains suspended, pending the outcome of the merits phase of the appeal to the DC Circuit (expected to rule in early 2026).

exclusion from procedure – STC/TCTB –

The judges who heard *East Bay Sanctuary Covenant v. Garland* (6 July 2020) and the underlying District court case diverged among themselves over whether a nationwide injunction against applying the rule in question was an appropriate remedy. The District judge issued a nationwide preliminary injunction; two of three Circuit judges who heard the government's motion for a stay of that injunction pending appeal (motions panel) limited its effects to the 9th Circuit; two of the three who heard the appeal against the injunction itself (merits panel) restored its nationwide effect. The District court considered itself bound to follow East Bay Sanctuary Covenant v. Trump (9th Circuit, 2018), which held that injunctive relief should go only as far as necessary to redress the plaintiffs' claims, but that factors such as the need for uniformity in immigration policy can justify nationwide injunctions,[719] the government having failed to distinguish this case from that precedent.[720] The motions panel majority held that the District judge had erred by "fail[ing] to discuss whether a nationwide injunction is necessary to remedy Plaintiffs' alleged harm",[721] and on the later merits panel the concurring judge explicitly declined to agree with the reasoning behind the 9th Circuit decisions that permitted nationwide injunctions, but agreed they constituted binding precedent,[722] while the dissenting judge argued that the injunction should only cover clients of the plaintiff NGOs, because while 9th Circuit precedent permits nationwide injunctions it does not require them, and the plaintiff NGOs' injuries (except as related to assisting specific clients) were unlikely to outweigh the government's interest in a narrower injunction.[723] In contrast, the merits panel majority held that in order to deliver "complete relief", the court's orders would have to extend beyond the territory of the 9th Circuit, as the NGOs assist clients elsewhere too, and the APA (5 USC 706(2)) requires courts to set aside unlawful agency action.[724] Previously, the dissenting judge on the motions panel had argued that a motions panel should not review factual determinations, and since the panel had found that the rule in question was likely unlawful, a

718 RAICES v. Noem (D.C. Circuit, 1 August 2025), Millett, J. (concurring in part and dissenting in part) 34-36. See also ibid., Katsas, J. (concurring in part and dissenting in part) 2 (if "the "asylum decision ha[d] already been made," the government also likely could bar those aliens from filing "futile" asylum applications" (citing Huisha-Huisha at 731)).

719 East Bay Sanctuary Covenant v. Trump (9th Circuit, 25 July 2019) (replacing same, 7 December 2018, to rectify a clerical error), 59-60.

720 East Bay Sanctuary Covenant v. Barr (District Court for the Northern District of California, 19-cv-04073-JST, 24 July 2019), 45, https://www.courtlistener.com/opinion/7336375/e-bay-sanctuary-covenant-v-barr/.

721 East Bay Sanctuary Covenant v. Barr (9th Circuit, 16 August 2019), 8, https://cdn.ca9.uscourts.gov/datastore/opinions/2019/08/16/19-16487.pdf.

722 East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 57 (Clifton, J., concurring) (citing East Bay Sanctuary Covenant v. Trump (9th Circuit, 2020) and Innovation Law Lab. V. Wolf (9th Circuit, 2020)), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf.

723 East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 66-68 (Millet, J., concurring in part and dissenting in part) (citing Innovation Law Lab. v. Wolf (9th Circuit, 2020) and noting that the injunction affirmed in that case was at the time stayed by the Supreme Court) https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf. The judge also noted the potential alternative of undertaking the "rigorous analysis" necessary to certify a class action. Ibid., 64 (citing Wal-Mart Stores, Inc. v. Dukes (Supreme Court, 2011)).

724 East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 53-54 (quoting East Bay Santuary Covenant v. Trump (9th Circuit, 2020) and generally following Innovation Law Lab. v. Wolf (9th Circuit, 2020)), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf.

nationwide injunction was justified.[725] The merits panel considered itself not bound by the motions panel's ruling because a motions panel is "predicting the likely success of the appeal", whereas the merits panel had to "consider whether the district court abused its discretion in granting the preliminary injunction".[726] The only other notable point of divergence was on the merits panel, where the dissenting judge would not have reached the issue of whether the rule in question exceeded the authority granted to the AG by statute (8 USC 1158), as "[t]he court's conclusion that the rule is arbitrary and capricious is sufficient to resolve this case".[727]

Divergence in *East Bay Sanctuary Covenant v. Biden* (N.D. Cal., 2023) arose not in the decision itself, or appeals on its substance, but in subsequent procedural steps on appeal to the 9th Circuit (and eventual remand back to the District court, where the case apparently remains). The 9th Circuit granted a stay of the District court's summary judgment and order to vacate the rule ("Circumvention of Lawful Pathways"), then placed the case in abeyance so the parties could negotiate a settlement, then denied a motion to intervene by five US states, then vacated both its stay and the underlying judgment in light of new jurisprudence and policy developments.[728] One Circuit judge (out of three on the panel) dissented from most of these rulings (concurring in the last), arguing that precedent (the earlier East Bay Sanctuary Covenant cases) required the initial stay be denied, because the rule in question was "indistinguishable from [the earlier] rules in any way that matters" and the 9th Circuit had declined to stay the same District judge's orders vacating those rules;[729] then (on the abeyance order) that the Circuit panel, government, and plaintiffs were disingenuously manoeuvering the case to avoid a potential merits appeal to the Supreme Court;[730] that denying the states' intervention motion disregarded the change in the government's litigation position (to one the states claimed would harm their interests);[731] and finally concurring in the remand to the District court, but stating that the case demonstrated "how one or two lower court judges can set long-term policy decisions on major national issues for a very long time with little to no input from the Supreme Court", to the detriment of a coherent legal system.[732] The issue of the states' prerogative to intervene, whether by right or by leave of the court, was the subject of substantial debate on the panel. The debate between the panel majority and dissent about the

[725] East Bay Sanctuary Covenant v. Barr (9th Circuit, 16 August 2019) (motions panel), 12-13 (Tashima, J., dissenting in part), https://cdn.ca9.uscourts.gov/datastore/opinions/2019/08/16/19-16487.pdf.
[726] East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 51-52, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf.
[727] East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 58 (Miller, J., concurring in part and dissenting in part) (analysis of the ruling about 8 USC 1158 would probably require a Chevron (Supreme Court, 1984) analysis, even though the government did not put forth an argument grounded in Chevron, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf.
[728] East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 3 August 2023), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.21.0_1.pdf; East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 21 February 2024), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.84.0.pdf; East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 22 May 2024) (denying requests to intervene by Alabama, Kansas, Georgia, Louisiana and West Virginia), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.112.0.pdf; East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 10 April 2025) 2-3 (citing Food and Drug Administration v. Alliance for Hippocratic Medicine (Supreme Court, 2024) and Executive Order 14165, "Securing Our Borders", 20 January 2025 (sections 7(a), (b))), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.135.0_1.pdf.
[729] East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 3 August 2023), 3 (VanDyke, J., dissenting), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.21.0_1.pdf
[730] East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 21 February 2024), 2-3 (VanDyke, J., dissenting), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.84.0.pdf.
[731] East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 22 May 2024) 13-16 (VanDyke, J., dissenting), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.112.0.pdf.
[732] East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 10 April 2025) 12-15 (VanDyke, J., concurring), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.135.0_1.pdf.

appropriateness of allowing the states to intervene at the appellate stage (despite not having done so at trial) was jurisprudentially interesting, and on both sides involved building on rulings from other circuits, but did not engage with any substantive issues relating to barriers to asylum.[733]

<u>exclusion from procedure</u> - MPP –

There was not so much divergence in *Innovation Law Lab v. Wolf* (9th Circuit, 2020), as a continuation of some debates within the 9th Circuit and the federal courts more broadly that have not yet reached a consensus conclusion. The main point of controversy was a question of first impression, whether US legislation governing inspection of applicants for admission could be read to permit the government to compel applicants to wait in Mexico during assessment of their claim. The statute in question essentially treats persons arriving at the border in two categories: those arriving or arrived without inspection, and "other". Persons in the first category who are inadmissible for lack of documents or fraudulent documents are subject to expedited removal.[734] The others are subject to regular removal,[735] and at the Attorney General's discretion may be required to wait in a bordering country (ie Canada or Mexico).[736] The judges disagreed on whether those categories come into being prior to inspection, or upon the immigration officer's decision.{*} If they are already formed, then persons in the applicants' position are subject to expedited removal, which carries procedural protections against refoulement. If an immigration officer determines which category applies.[737] then persons classified as "other" are subject to ordinary rather than expedited removal, but may be made to wait across the border while their case is assessed. The motions panel preferred the latter interpretation, whereas the later merits panel ruled that an immigration officer must apply expedited removal to persons arriving without valid documents (thus, MPP is unlawful). Both panels asserted theirs was the only coherent reading of the statute in question. The merits panel and one of the concurring judges on the motions panel also raised the risk of refoulement arising from MPP, in violation of US legislation and international undertakings, points not addressed in the motions panel's per curium{*sp?} opinion.

The various opinions also reflected ongoing disagreement among the 9th Circuit judges over whether rulings of motions panels are binding on future panels that face the same question the appropriate scope of injunctions in immigration related cases. The question of whether a merits panel (or a panel in a future case) is bound by rulings of an earlier motions panel was dispositive; the merits panel followed East Bay Sanctuary Covenant v. Trump (9th Circuit, 28 February 2020), decided the same day by the same panel, in reasoning that a motions panel must decide quickly, without benefit of a full review of the facts and law, and thus does not bind a later panel of the same court that has the opportunity for such a full review. The panels also differed in how they appeared to weigh the government's versus the plaintiffs' interests in the "irreparable harm" prong of the test for granting a preliminary injunction: the motions panel cited the prospect of removing from DHS a "congressionally authorized measure[]" for managing an influx of migrants,[738] whereas the merits panel emphasised the evidence of risks of harm to the plaintiffs if made to wait in Mexico.[739] A later panel restricted the District court's injunction against applying MPP to the

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[733] East Bay Sanctuary Covenant v. Biden (9th Circuit, 23-16032, 22 May 2024) 7-12 (majority opinion) & 12-28 (VanDyke, J., dissenting), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.112.0.pdf.
[734] 8 USC 1225(b)(1).
[735] 8 USC 1225(b)(2) (referencing 8 USC 1229a, removal proceedings).
[736] 8 USC 1225(b)(2)(C).
[737] Innovation Law Lab v. McAleenan (9th Circuit, 19-15716, 7 May 2019), 9 ("an applicant is eligible for expedited removal only if the immigration officer determines that the individual is inadmissible on [grounds of] fraud or misrepresentation … or lack of documentation"), https://cdn.ca9.uscourts.gov/datastore/opinions/2019/05/07/19-15716.pdf.
[738] Innovation Law Lab v. Wolf (9th Circuit, 19-15716, 28 February 2020), 14-15, https://cdn.ca9.uscourts.gov/datastore/general/2020/02/28/19-15716_opinion.pdf.
[739] Innovation Law Lab v. Wolf (9th Circuit, 19-15716, 28 February 2020), 49.

territory of the 9th Circuit, out of caution in view of the then-current uncertainty about the appropriate scope of injunctions in immigration related cases.

Divergences arose in *Immigrant Defenders Law Center v. Noem* (9th Circuit, 2025), both with respect to prior case law and in the form of disagreement within an appellate panel. In limiting the scope of the District court's stay, the court found "useful guidance" in the Supreme Court's ruling in Trump v. CASA (2025) that the "complete-relief principle" is satisfied by an injunction that applies only "*to the plaintiffs before the court*" (ie, ImmDef's clients).[740] In the view of the dissenting Circuit judge, the fact that the Supreme Court had stayed the District court's orders and agreed to hear the government's appeal of Innovation Law Lab v. Wolf (9th Circuit, 2020) raised a strong possibility that the programme was not unlawful.[741] On organisational standing, the majority and dissent read the precedent differently with respect to the impact of MPP on ImmDef's activities. The majority distinguished the Supreme Court ruling in FDA v. All. for Hippocratic Med. (2024) where the plaintiffs' core activities had amounted to policy advocacy, whereas MPP had made ImmDef's core activities such as assisting clients in asylum or removal cases measurably more difficult and resource intensive.[742]{*cite} The dissenting judge would instead have applied Hippocratic Medicine to rule that ImmDef lacked standing because it had argued that MPP had required it to divert resources and frustrated its mission, rather than that MPP interfered with ImmDef's "core business activities".[743] The court left undisturbed the District court's finding that MPP arguably violated ImmDef's constitutional (1st Amendment) speech right to advocate for their clients' legal rights,[744] and affirmed its rulings that the burdens MPP imposed on access to counsel amounted to denial of that right,[745] and that the contiguous removal provision must be read harmoniously with the provisions governing asylum and removal.[746] The dissent argued that rather than impeding lawyers' speech rights, any such impediments were merely incidental to MPP's regulation of conduct.[747] The dissent also read the statutory right to asylum, subject to conditions laid out in the expedited removal provisions, as encompassing the provision permitting

[740] Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 39 (quoting Trump v. CASA (original emphasis)), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

[741] Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 40 (Nelson, J., dissenting), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

[742] Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 23-25 (Hippocratic Medicine had explicitly not overturned an earlier Supreme Court decision, Havens Realty (1982) which provided for standing where a policy affected an organisation's "core business activities"), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

[743] Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 58-59 (Nelson, J., dissenting), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

[744] Immigrant Defenders Law Center v. Noem (District Court for the Central District of California, 20-cv-09893-JGB-SHK, 16 April 2025), 23-24, https://storage.courtlistener.com/recap/gov.uscourts.cacd.799929/gov.uscourts.cacd.799929.405.0.pdf.

[745] Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 32-33 (citing and following East Bay Sanctuary Covenant v. Trump (9th Circuit, 2018)), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

[746] Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 32-33 (citing and following East Bay Sanctuary Covenant v. Trump (9th Circuit, 2018)), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

[747] Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 35, https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf; see Immigrant Defenders Law Center v. Noem (District Court for the Central District of California, 20-cv-09893-JGB-SHK, 16 April 2025), 25-26, https://storage.courtlistener.com/recap/gov.uscourts.cacd.799929/gov.uscourts.cacd.799929.405.0.pdf.

the government to require asylum seekers to wait outside the US,[748] and argued that "inconveniencing the right to counsel is different from" denying that right.[749]

structure of procedure – expedited removal – the court in *A.B.-B. v. Morgan* (D. D.C., 2020) reasoned largely based on statutory interpretation and Supreme Court administrative law precedent (see above), with no noticeable divergences from D.C. Circuit jurisprudence in relation to asylum access. Likewise, *Kiakombua v. Wolf* (D. D.C., 2020) aligned closely with D.C. Circuit precedents, particularly Grace v. Barr (2020) which contemplated closely similar issues, viz the compatibility of DHS training or guidance documents with the statutory provisions governing expedited removal and credible fear screening interviews. Neither decision diverged from prior jurisprudence of the D.C. Circuit (other circuit courts lack jurisdiction to hear such cases).

structure of procedure – border procedure – *Las Americas v. Wolf* (D. D.C., 2020)[750] diverged from prior D.C. Circuit and District jurisprudence only in that it determined that the arguably exclusionary asylum policy in question was properly enacted within the agency's discretion according to law. The court reached this result through straightforward application of D.C. Circuit and Supreme Court precedent, and analysis of the policy's compliance with legislation according to the Chevron framework. In that sense, it did not diverge.

Other barriers: narrowing the refugee definition

restricting PSG – the main subject of divergence between the BIA and successive AGs in *Matter of A-C-A-A-* was the level of scrutiny the BIA (and immigration courts) should apply to the elements of an asylum claim, especially whether family relationships can ground a finding of a particular social group, and how close the nexus between the reason for persecution and membership in that group must be in order for the applicant to qualify for asylum. Specifically, A-C-A-A- (AG, 2020) required the BIA to 1) examine de novo whether the immigration judge's factual findings fulfil all statutory elements needed to show asylum eligibility; 2) if asylum was granted, not accept the parties' "stipulations to, or failures to address" elements, but rather "meaningfully examine" all elements; 3) deny asylum if the harm threatened or suffered based on PSG was not "on account of" membership in that group; and 4) require that PSG membership is the persecutor's main motive, which means that "persecution that results from personal animus or retribution generally does not support eligibility for asylum".[751] The AG's 2021 decision vacated its 2020 predecessor, restoring the status quo ante, because the proper scope of PSG was then the subject of ongoing executive rulemaking, and for reasons of efficiency (the BIA need not consider aspects of the asylum claim that the parties had not disputed).[752]

expanding exclusion – there were no notable divergences from Supreme Court or 9th Circuit jurisprudence in *Pangea v. DHS* (N.D. Cal., 2020).[753]

Both the US federal courts and the immigration courts follow strict rules of binding precedent. Appellate courts indicate if a decision is to be published or not; if it is published, then lower courts must follow it.

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[748] Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 65-66 (Nelson, J., dissenting) (citing 8 USC 1158(a) referencing 1225(b), and applying 1225(b)(2)(C), the contiguous territory provision), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

[749] Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 70 (Nelson, J., dissenting), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf.

[750] Las Americas v. Wolf (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.

[751] See Matter of A-C-A-A- (Attorney General, 28 I&N Dec. 84, 24 September 2020), 84, https://www.justice.gov/d9/2023-11/3995_ed.pdf.

[752] Matter of A-C-A-A- (Attorney General, 28 I&N Dec. 351, 26 July 2021), 351-52, https://www.justice.gov/eoir/page/file/1415401/dl.

[753] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), *pg, https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

In the federal system, District courts must follow precedents set by the Circuit court responsible for their region, and by the Supreme Court. In the immigration system (within the EOIR), immigration judges must follow precedents set by the BIA, and the AG has discretion to overrule BIA decisions and thereby set a higher precedent. Decisions of the BIA and the AG that result in removal orders may be appealed to Circuit courts as final agency actions, which can enjoin those orders if an applicant "show[s] by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law".[754] Because Circuit court rulings only bind courts (including immigration courts) within their geographic scope, while BIA and AG decisions bind all immigration courts, this can lead to situations where some immigration judges must follow a Circuit court's interpretation, while the rest remain bound to follow the BIA or AG decision that that Circuit court overturned.

The following were higher instance decisions:

Al Otro Lado v. Mayorkas (9th Circuit 2024) – administrative metering - the main rulings that CBP must process and accept asylum applications from persons presenting at the border, even if they are encountered prior to arriving at the physical border, were binding on District courts in the 9th Circuit until overruled by the Supreme Court in June 2026.

Matter of Yajure Hurtado (BIA 2025) – no bond hearings for deportable persons encountered and detained while in the US – this is binding precedent for immigration courts.

Covarrubias v. Vergara (5th Circuit 2026[755]) – this is not among the selected cases, but it was the first of the Circuit decisions on the issue of bond hearings. It rules opposite to the selected case, but does not overrule it per se, because the selected case is from a different circuit (9th) thus not bound to follow this ruling.

East Bay Sanctuary Covenant v. Biden (9th Circuit 2020/2021) – asylum bar for between border points arrivals – the main rulings about organisational standing and the categorical nature of the duty to accept and refer asylum requests, in addition to rulings regarding various procedural thresholds {*anything else?}, are binding on District courts in the 9th Circuit.

RAICES v. Noem (D.C. Circuit 2025) – this is not among the selected cases. Rather, it is a ruling on the government's motion for a stay pending appeal of the orders following RAICES v. Noem (D.C. District 2025). The Circuit court stayed the orders in part, narrowing the class of persons the orders applied to to those present in the US while the underlying presidential emergency proclamation (Proclamation 10888, determining the existence of an invasion across the southern border of the US) who would otherwise apply for asylum or withholding of removal, and staying the District court's order that required the government to resume accepting asylum applications. The latter ruling, if reflected by the subsequent merits appeal panel, would bind the D.C. District court and would thus allow the government to continue to categorically refuse to accept asylum applications during the proclaimed emergency.

East Bay Sanctuary Covenant v. Garland (9th Circuit, 2020) presents a somewhat complex case in terms of binding precedent. A Circuit court panel decision is binding on all federal courts within that circuit. However in this case two different panels of the same Circuit court confronted the same issues (first a 'motions panel', then a 'merits panel'), and on one of those issues (the appropriateness of the District court's issuance of a nationwide injunction against applying the rule in question) the panels ruled opposite to each other, and there was dissent within each panel (see above). Because a motions panel decision is not binding,[756] formally the merits decision (affirming the nationwide nature of the injunction) is the superior decision. However, the prior motions panel decision and particularly the dissenting opinion on

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[754] 8 USC 1252(f)(2).

[755] Covarrubias v. Vergara (5th Circuit, 6 February 2026), https://s3.documentcloud.org/documents/26884355/ca5detention.pdf.

[756] East Bay Sanctuary Covenant v. Garland (9th Circuit, 6 July 2020 (amended 8 April 2021)), 51-52, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf.

the merits panel provided material for a future 9th Circuit ruling to potentially overturn this one. However, in the meantime the Supreme Court ruled (Trump v. CASA, 27 June 2025) that District judges may not award injunctions with wider scope than the parties before the court (essentially the same position as the dissenting judge on the merits panel had put forth here, albeit with different reasoning), so the issue appears to be resolved, and the 9th Circuit decision (merits panel) is no longer precedential.

Innovation Law Lab v. Wolf (9th Circuit, 2020) stood as binding precedent only very briefly. Within two weeks, it was stayed by the Supreme Court, which then granted certiorari to review it, essentially eliminating its precedential weight pending final determination. Before that determination was made, the government ended the programme, so the Supreme Court ordered the cases below vacated, eliminating their force as precedent.

Immigrant Defenders Law Center v. Noem (9th Circuit, 2025) is binding precedent within the 9th Circuit. Its main divergence from prior 9th Circuit case law, restricting the effects of an injunction to the parties before the court, was not strictly required by Trump v. CASA (Supreme Court, 2025) (because CASA did not implicate the APA, which was central to ImmDef) but was a logical application of it. Otherwise, its rulings on standing; the rights to access asylum and to legal counsel; and the possibility of raising constitutional free speech concerns around impediments to the provision of legal advice, stand as precedents at least until the case is heard on its merits.

Each of the BIA and AG decisions in *Matter of A-C-A-A-* (AG, 2021) (AG, 2020; BIA, 2019) established a binding precedent the BIA and all immigration judges must follow. Since they overturned each other, the most recent decision (AG, 2021) in principle prevails, but it is not clear whether it actually remains in force.

Align with or differ from rulings on similar barriers

Pushbacks (metering): the three District court decisions (two from the Southern District of California, one from the District of Columbia) align in their main rulings, most of which pertained to points of interpretation of administrative or procedural law. The courts also converged on the substantive view that 8 USC 1158(a)(1)'s requirement that CBP receive and refer all requests for asylum is not susceptible to administrative exceptions. In '*Al Otro Lado I*', the 9th Circuit upheld the California District court's main rulings that CBP owe a duty to inspect for admission (8 USC 1225) and accept and refer asylum applications (1158(a)(1)) to any noncitizen who presents at the border, even if they are encountered prior to arriving at the border, and that failure to act on that duty violated the APA (5 USC 706(1)). Strong dissents among the 9th Circuit judges may indicate that other Circuits could, if an equivalent case were to arise and proceed to appeal, rule differently on these issues.

Detention:

bond hearing (immigration court) – the BIA's decision differs from most District courts that have considered the same issue, which have tended to construe arrests of deportable non-citizens as carried out not under 8 USC 1225 but 1226, which carries a due process right to a bond hearing (see below).

bond hearing (federal court) – this decision aligns with the vast majority of other rulings on this barrier by US District courts. It differs with BIA's view (see above) and the February 2026 ruling of the 5th Circuit court,[757] however the latter ruling is only binding within its Circuit. The core of the dispute is whether or not a deportable noncitizen who is arrested in the interior of the country without having been inspected by a border officer after entry is an "applicant for admission".

Externalization of asylum processing:

ACAs – there has been no ruling yet in U.T. v Barr.

[757] Covarrubias v. Vergara (5th Circuit, 6 February 2026), https://s3.documentcloud.org/documents/26884355/ca5detention.pdf.

summary deportations – D.V.D. v DHS generally aligns with US federal jurisprudence. There have not been any closely similar cases (the most similar is J.G.G. v Trump (D. DC, 22 Dec 2025)), but the main principles informing the decision are widely shared by US District courts. Specifically, the court ruled based on legislation (and noting it was not necessary to also examine the constitutional due process aspect) that applicants must have notice and an opportunity to raise fears of persecution or torture before they are removed from the US.

Procedural barriers:

exclusion from procedure - between border points ban – *East Bay Sanctuary Covenant v. Trump* (February 2020) was the first appellate decision regarding a categorical bar on asylum based on where the person arrived at the US border. With few if any prior rulings on similar barriers in existence, the East Bay court reasoned based on longstanding rules of statutory interpretation, the Chevron doctrine of deference to reasonable interpretations of ambiguous statutes by executive agencies, and constitutional principles of standing. Other than the use of Chevron (which had little effect as both the majority and dissenting judges considered the statutory text unambiguous) the resulting rulings were controversial, with several judges opining that the applicable jurisprudential rules had been misapplied in pursuit of a policy based decision (see above). Other, later US federal courts have tended to agree with the core elements of East Bay, which is widely cited in asylum access cases for its two main rulings (organisational standing and the categorical nature of the duty to accept asylum applications from arriving noncitizens, regardless of how they arrive).

exclusion from procedure - suspension of asylum – in its main substantive rulings of law, the RAICES District court aligned with East Bay Sanctuary Covenant (9th Circuit 2019) and the Circuit judges unanimously agreed. The same is true on organisational standing (ie that NGOs may sue in their own interests in asylum access cases); the primacy of statutory and CAT non-refoulement protections; and the general rule that all persons physically present or arriving in the US may apply for asylum.[758] Insofar as two D.C. Circuit judges disagreed with the District judge and their colleague (panel, 2-1) on substantive law, it was in preferring to apply the ruling of the D.C. Circuit in Huisha Huisha,[759] that since granting asylum is a discretionary decision of the Attorney General, "categorical and upfront rejections of asylum are permissible in emergency situations for limited periods of time", rather than requiring the government to accept "futile" applications.[760] The District court had ruled to the contrary (see above), and the dissenting Circuit judge agreed with the District court's disapplication of Huisha-Huisha by distinguishing its facts (see above).[761] On the procedural side, the District court followed what has become mainstream federal jurisprudence in ruling that the legislative provision that limits the federal courts' jurisdiction to issue injunctions in cases concerning "inspection, apprehension, examination, exclusion, and removal" of non-citizens (except for individuals in removal proceedings)[762] does not preclude other forms of relief such as declaratory relief or vacature of government rules (or similar measures). The court agreed with federal courts in other jurisdictions on this point, including the Southern District of California in Al Otro Lado (2022) (metering case).[763] The District court further cited Biden v. Texas (Supreme Court, 2022) (on 'Remain in Mexico') for the proposition that, contra the government's apparent argument, the provision

[758] 8 USC 1158(a)(1).
[759] Huisha-Huisha v. Mayorkas, 27 F. 718 (D.C. Cir. 2022), 4 March 2022.
[760] RAICES v. Noem (D.C. Circuit, 1 August 2025), Millett, J. (concurring in part and dissenting in part), 34.
[761] RAICES v. Noem (D.C. Circuit, 1 August 2025), Pillard, J (concurring in part and dissenting in part), 6-8 (Judge Pillard also argued that even if 8 USC 1158(a) envisaged that the government could override it and decline to accept asylum applications, the government here had done so through a proclamation and subsequent internal DHS documents, rather than following the required administrative rulemaking procedures).
[762] Heading of 8 USC chapter 12, subchapter II, part IV, which covers articles 1221-1232 inclusive, referenced in 8 USC 1252(f)(1).
[763] RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 47, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf (grounding the ruling in Salinas v. U.S. R.R. Ret. Bd. (Supreme Court, 2021).

at issue, 8 USC 1252(f)(1), does not "concern[] subject matter jurisdiction at all".[764] The Circuit panel did not address these rulings.

exclusion from procedure – STC/TCTB – in the main, both *East Bay Sanctuary Covenant v. Garland* (9th Circuit, 2020) and *East Bay Sanctuary Covenant v. Biden* (N.D. Cal., 2023) aligned with the general stances of the federal courts towards barriers to asylum that either barred applications for asylum from arbitrary categories of applicants (ie based on a categorical distinction unrelated to protection needs), or bypassed non-refoulement protections, or both. Nearly all federal courts that have confronted these issues have ruled as the 9th Circuit did here, that the government may not make rules or practice so as to bar persons from applying for asylum, or from consideration for mandatory withholding of removal (non-refoulement protection) based on criteria unrelated to their individual protection needs. The main exception was Huisha Huisha v. Mayorkas (D.C. Circuit, 2022) which identified a circumstance, a public health emergency declared by the Surgeon General invoking 42 USC 265, under which these procedures could be temporarily suspended.

exclusion from procedure - MPP –

Innovation Law Lab v. Wolf (9th Circuit, 2020) did not implicate the asylum statute (persons enrolled in MPP were in a protection determination process), and US courts are broadly in agreement regarding non-refoulement, so on the substance there are no very comparable barriers (no other cases have confronted the question of whether persons arriving at the border without proper documents who ask for protection can be compelled to stay outside the US until their claims are determined). The other main rulings in Innovation Law Lab concerned points of precedent and procedure in a specifically 9th Circuit context. Otherwise, the 5th Circuit ruled on textual grounds that the government must reinstate MPP because under the reading of the text as authorising immigration officers to classify persons arriving without valid documents as "other" arrivals (see above), detention was mandatory and the government was paroling applicants for lack of detention space (Biden v. Texas, 2021), but the Supreme Court overturned that decision, as the legislative language purportedly authorising MPP by providing for applicants to wait in a contiguous country is permissive ("may") rather than mandatory ("shall") (Biden v. Texas, 2022).[765]

For the most part, the rulings in *Immigrant Defenders Law Center v. Noem* (9th Circuit, 2025) align with 9th Circuit rulings on similar barriers, in that the 9th Circuit has consistently recognised standing for refugee assisting NGOs, and ruled against government policies that impede the statutory right to apply for asylum. There are some tensions with rulings in other circuits. For example, the District of Columbia District Court ruled that the truncated access to legal advice and counsel under the PACR/HARP border procedures (see below) did not violate the right to legal counsel of one's choosing.{*cite, and to 1158(a)(1)} However, the ImmDef court also cited and agreed with the 5th Circuit (Texas v. United States, 2022) that the bar on lower courts issuing injunctions against policies implementing inspection and removal provisions did not extend to other remedies such as stays or vacatur.[766] The divergent ruling that the stay on MPP applies only to ImmDef and its clients is novel, but reflects the reasoning of Trump v. CASA (Supreme Court, 2025), so the 9th Circuit's ruling here could be understood as a response to correction, rather than a divergence.

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764 RAICES v. Noem (District Court for the District of Columbia, 25-cv-00306-RDM, 2 July 2025), 47, https://storage.courtlistener.com/recap/gov.uscourts.dcd.277039/gov.uscourts.dcd.277039.71.0.pdf (grounding the ruling in Salinas v. U.S. R.R. Ret. Bd. (Supreme Court, 2021).

765 Biden v. Texas (Supreme Court, 21-954, 30 June 2022), 13-14, https://www.supremecourt.gov/opinions/21pdf/21-954_7l48.pdf.

766 Immigrant Defenders Law Center v. Noem (9th Circuit, 25-2581, 18 July 2025), 28, https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf. See 8 USC 1252(f)(1) (prohibiting any but the Supreme Court from "enjoin[ing] or restrain[ing] the operation of the provisions of part IV of" subchapter II of Chapter 12, ie 8 USC 1221-1232).

structure of procedure – expedited removal – the law that enacted expedited removals, the 1996 IIRIRA, limited judicial review such that procedures relating to expedited removal, such as the applicable credible fear screening interviews as in *A.B.-B. v. Morgan* (D. D.C., 2020) and *Kiakombua v. Wolf* (D. D.C., 2020), can only be challenged in the D.C. District court.[767]

structure of procedure – border procedure – like A.B.-B. and Kiakombua (see above), Las Americas v. Wolf (D. D.C., 2020) and other cases that challenge policies that implement the expedited removal provision (8 USC 1225(b)) could not be heard in any other court.[768] Therefore there are no other rulings on similar barriers.

Other barriers: narrowing the refugee definition

restricting PSG – [769] the question of whether an applicant is a member of a judicially cognisable PSG usually resolves within the immigration court system, where the rulings of the BIA and the AG set policy. Therefore in practice there is little case law on this issue from the federal courts, and the discordant rulings come from the same body at different times. {*maybe canvas the circuit courts for PSG cases}

expanding exclusion – among courts outside the 9th Circuit, *Pangea v. DHS* (N.D. Cal., 2020)[770] more resembled the jurisprudence of the D.C. Circuit than the 5th Circuit, insofar as those two Circuit courts have ruled on administrative barriers to asylum. Like the Pangea court, the D.C. federal courts have taken a deferential (in the Chevron sense) approach to statutory interpretation, but since 2018 have usually concluded that the rule in question violates a statute (INA or APA) (Las Americas v. Wolf (D. D.C., 2020) (see above) being a significant exception). Courts of the 5th Circuit have also relied extensively on exercises in statutory interpretation, but have at times come to apparently more innovative rulings on that basis (e.g. Texas v. Biden (5th Circuit, 2021); Covarrubias v. Vergara (5th Circuit, 2026).

Current (evolutive/restrictive) approach to asylum barriers

The US court system is in principle unitary. However, only a small fraction of federal cases reach the Supreme Court, leaving the Circuit courts to set binding precedent for District courts in their respective regions. This means the law can evolve in different directions in different circuits, until the Supreme Court intervenes, and this appears to be increasingly happening with regard to asylum barriers. Therefore, it is not clear what the current approach of the federal judiciary is. As a general matter in the 21st century, the federal courts have tended to restrain the executive from implementing new, more restrictive policies under existing laws. There seems to be a difference in general approaches between the two Circuit courts whose jurisdictions cover most of the Mexico/US land border (5th and 9th), with the 5th Circuit tending to support a more restrictive approach towards asylum, and the 9th Circuit more consistently restraining the executive's restrictive rules and policies. The D.C. District and Circuit courts also hear a significant fraction of asylum barrier cases, as the political actors and agencies who develop and apply the barriers are mostly headquartered in Washington, D.C.; its rulings tend to be more permissive towards the executive than those of the 9th Circuit, but not as asylum-restrictive as the 5th.

Pushbacks: the three metering cases fit the general approach of the federal courts to the government's (here, CBP's) duty under 8 USC 1158(a)(1) to accept and examine all applications for asylum. The 9th Circuit court clarified that, according to the applicable statutory provisions,{*cite – 1225 etc} this duty must extend also to persons encountered upon arrival at, but not yet having physically crossed, the border.

Detention:

bond hearing (immigration court) – the Yajure Hurtado ruling seems to be in line with the recent trend toward more restrictive rulings of the BIA. The BIA characterised the plaintiff as having "unlawfully

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767 8 USC 1252(e)(3)(A).

768 8 USC 1252(e)(3)(A).

769 Matter of A-C-A-A- (Attorney General, 28 I&N Dec. 351, 26 July 2021), *pg, https://www.justice.gov/eoir/page/file/1415401/dl.

770 Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

enter[ed] the United States without inspection … successfully evad[ing] apprehension for more than 2 years”,[771] but did not appear to consider it significant that he thereafter was granted temporary protection status (as a Venezuelan national) from 2024 until that status expired in April 2025.[772]

bond hearing (federal court) – this decision aligns with a noticeable tendency among federal courts, particularly District courts, in the 2020s to assert the limits placed on executive authority by legislation or the Constitution. It also may reflect a growing divergence of policy views between the courts of the 5th Circuit and those of other Circuits, particularly the 9th, with the 5th tending to take a more expansive view of the prerogative of the executive to interpret and apply immigration legislation.

Externalization of asylum processing:

ACAs – no decision has yet issued.

summary deportations – the decision in D.V.D. fits with the generally evolutive approach of US courts toward externalisation. While it maintains the reluctance of courts to intervene in US relations with other states, it also maintains the consistent view of US federal courts that executive action cannot eliminate legislative or constitutional mandates that a person subject to removal has a statutory (or constitutional due process) right to raise a fear of persecution or torture and have that claim considered by an asylum officer or immigration judge.

Procedural barriers:

exclusion from procedure - between border points ban – in the developing split between different parts of the federal judiciary, East Bay Sanctuary Covenant v. Trump (February 2020) is one of the leading decisions on the ‘evolutive’ side. The majority of federal courts have tended to rule in favour of plaintiffs in asylum barrier cases since about 2017, when faced with tension between regulatory action and enacted legislation or constitutional rules, as happened in East Bay. However in the US system, regardless of whether a ruling makes access to asylum more or less likely, a 21st century federal court making such a ruling will seek to ground it, as East Bay did, in (mostly) textual rather than purposive reasoning, and prior rulings of federal appellate courts (whether or not related to asylum).

exclusion from procedure - suspension of asylum – RAICES v Noem engages on issues where the current approach of the federal courts is not clear. The District court’s opinion poses a strong challenge to the government’s proclamation and assumption of emergency powers due to an invasion as a legal basis for closing the border, refusing to acccept asylum applications, and carrying out summary returns (both from the border and from within the borders) without a return process that includes non-refoulement protections. On the categorical refusal to accept asylum applications, in the absence of binding precedent the District court explicitly followed the 9th Circuit (East Bay Sanctuary Covenant, 2020/21) as persuasive precedent. On all but that point, the three D.C. Circuit judges who ruled on whether to stay the District court’s orders pending appeal agreed. On that point, two of those judges disagreed with the District court and would have stayed the order to resume accepting asylum applications. assertion of authority to categorically refuse to accept asylum applications, referring frequently to 9th Circuit precedent. This may indicate there are three different general approaches evolving in the US judiciary, from the 5th, 9th, and D.C. circuits. It appears to be likely that the Supreme Court will have to intervene, in 2026-27.

exclusion from procedure – STC/TCTB – the main rulings in *East Bay Sanctuary Covenant v. Garland* (2020) and *East Bay Sanctuary Covenant v. Biden* (2023) were well in line with the 9th Circuit’s generally evolutive approach. Other than differing on procedural issues, the 9th Circuit has consistently held (as have most other federal courts that have addresssed barriers to asylum, often explicitly citing the 9th, particularly the various East Bay Sanctuary Covenant rulings) that NGOs that provide legal advice and services to asylum seekers can demonstrate standing to challenge a barrier to asylum in court independently of any

[771] Matter of Yajure Hurtado, 29 I&N Dec. 216 (BIA 2025), 5 September 2025, 228.
[772] Matter of Yajure Hurtado, 29 I&N Dec. 216 (BIA 2025), 5 September 2025, 216-17.

affected individuals; absent some emergency circumstances the government may not deny the opportunity to apply for asylum based on arbitrary (non-protection related) criteria; statutory and CAT non-refoulement protections are mandatory (consequently all applicants must be allowed at least a withholding of removal hearing before an immigration judge); and government departments must follow the procedures outlined in the APA in order to write enforceable rules.

exclusion from procedure - MPP – the two merits panels and the panel that affirmed its ruling in *Innovation Law Lab v. Wolf* (9th Circuit, 2020) followed the more evolutive strains of 9th Circuit jurisprudence. This is more noticeable in results than in reasoning. Both the motions panel and the later merits panel majorities grounded their rulings in textual analysis of the applicable statute, supplemented by a weighing of the likelihood and magnitude of irreparable harm to the parties. On both measures, the panels' conclusion diverged with the motions panel more restrictive, in line with the government's arguments and interests, and the merits panel more evolutive, typical of recent 9th Circuit (and to a lesser extent, other courts') rulings that tend to be sceptical of innovative government interpretations of statutes cited to support the implementation of major changes to longstanding inspection or removal procedures.

> *Immigrant Defenders Law Center v. Noem* (9th Circuit, 2025) continues in the broadly evolutive line of 9th Circuit jurisprudence. That circuit has consistently found in favour of independent standing for refugee assisting NGOs to raise claims against barriers to asylum, as has the D.C. Circuit,{*right? *cite!} although the impact of Hippocratic Medicine (Supreme Court, 2024) is not yet clear in the D.C. Circuit.{*right? *cite!} Similarly, like other 9th Circuit panels, the court determined that if cases came to the merits, the plaintiffs would likely succeed in showing that administrative rules that constrict or nullify the statutory right to apply for asylum are invalid (whether due to eg incompatibility with the legislation; incorrect understanding of the legislation; or failure to follow rulemaking processes, etc).

structure of procedure – expedited removal –the decisions in *A.B.-B. v. Morgan* (D. D.C., 2020) and *Kiakombua v. Wolf* (D. D.C., 2020) could be seen as evolutive, in that they nullified adverse credible fear findings based on the application of procedures held to be legally invalid. They align with the D.C. Circuit's approach to cases regarding the expedited removal system, by enforcing the statutory limits placed on the executive's discretion to develop and apply expedited removal procedures via written DHS guidance, or similar agency documents.(8 USC 1225(b) for expedited removal, and 8 USC 1252(f) for truncated jurisdiction of the federal courts). The decisions fit the general approach of the D.C. Circuit to diligently examine claims that the executive's exercise of administrative authority had transgressed the legislative of that authority.

structure of procedure – border procedure[773] – *Las Americas v. Wolf* (D. D.C., 2020) could be seen as restrictive, in that it allowed a border procedure with highly truncated procedural rights to stand unchanged. However as with A.B.-B. and Kiakombua (see above), the court made this decision following a careful assessment of the applicable legislation and binding judicial precedent. It is possible to speculate that a 9th Circuit panel might have made a more evolutive decision, or that a 5th Circuit panel would have decided the same was as the D.C. District court did here. However, only the D.C. District court has jurisdiction to hear challenges against expedited removal policies.

Other barriers: narrowing the refugee definition

restricting PSG – *Matter of A-C-A-A-* switches periodically between an evolutive and a restrictive approach to the refugee definition as applied in the US. The BIA had tended to recognise asylum claims based on domestic or gang violence related to family ties, as persecution based on PSG membership. The

[773] Las Americas v. Wolf (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), *pg, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.

2021 AG decision upheld this approach,[774] whereas the 2020 AG decision it overturned had overruled the BIA, resulting in a more restrictive interpretation of PSG and of its nexus to persecution, as well as requiring closer scrutiny of the elements of the asylum claim on appeal.[775] As far as federal courts have addressed similar barriers recently, most of the decisions have come out of the 9th Circuit which has tended to take a more expansive view of asylum than courts in the 5th Circuit, so it is likely 9th Circuit jurisprudence would align more with the pre-A-C-A-A- (relatively evolutive) approach than with the more restrictive approach represented by the 2020 AG decision.

expanding exclusion – broadly speaking, *Pangea v. DHS* (N.D. Cal., 2020)[776] can be seen as fitting with an evolutive approach to barriers characteristic of the US District courts as a whole. This approach tends to read legislation strictly, though at times courts of the 5th or 9th Circuits will read a statute more expansively than for example tends to be true of the D.C. Circuit (the D.C. Circuit has main jurisdiction over federal agency rules, so appears to have developed specialised expertise in such exercises leading to detailed, technical opinions).

[774] Matter of A-C-A-A- (Attorney General, 28 I&N Dec. 351, 26 July 2021), https://www.justice.gov/eoir/page/file/1415401/dl.
[775] See Matter of A-C-A-A- (Attorney General, 28 I&N Dec. 84, 24 September 2020), https://www.justice.gov/d9/2023-11/3995_ed.pdf.
[776] Pangea Legal Services v. DHS (District Court for the Northern District of California, 20-cv-07721-SI, 19 November 2020), https://storage.courtlistener.com/recap/gov.uscourts.cand.368242/gov.uscourts.cand.368242.69.0_1.pdf.

PART 3: SOCIO-LEGAL FACTORS

This third part of the Report is divided into four sections: I) Procedures in asylum access adjudication; II) Judicial or quasi-judicial bodies in asylum access adjudication; III) Other actors in asylum access adjudication; IV) Socio-political context.

I. PROCEDURES IN ASYLUM ACCESS ADJUDICATION

A. Access to judicial or quasi-judicial bodies

Barriers to accessing asylum whose legality cannot be assessed by judicial bodies

Pushbacks: under a 1993 Supreme Court decision, *Sale*, the immigration jurisdiction of US courts ends at the US borders. Therefore, pushbacks at sea are not justiciable. A 2020 Supreme Court decision, *Thuraissigiam*, established that habeas corpus and constitutional due process rights do not attach until the person has made "effective entry" to the US, which generally means inspection by a border official. Otherwise, land based pushbacks, such as metering or emergency border closures, are susceptible to litigation in District court.

Walls and fences: it is practically impossible to challenge a physical barrier based on asylum access, because the persons concerned would be deemed outside US jurisdiction. Court cases challenging border barriers sound instead in separations of powers between branches of government; private property rights in the borderlands; and the DHS Secretary's exercise of discretion to forego environmental impact reports.

Detention: depending on which procedure an applicant is in, detention can be mandatory and non-justiciable. Persons in expedited removal proceedings who claim asylum and pass a credible fear screening interview "shall be detained for further consideration of the application for asylum".[777] Other "applicant[s] for admission" are detained for regular removal proceedings.[778] The DHS Secretary may conditionally release (parole) an applicant for admission into the US pending their asylum hearings.[779] Deportable persons arrested within the US are either considered to be undocumented applicants for admission and therefore subject to mandatory detention,[780] or arrested by warrant of the AG, who detains or "may release" them on bond or conditionally parole them.[781] Thus immigration detention per se is not justiciable. However, the latter case invokes the discretion of the AG, which as a matter of due process arguably entitles applicants to a bond or parole hearing before an immigration judge, as representative of the AG, at which DHS would have to justify ongoing detention. If such a hearing is denied, federal courts can hear habeas corpus cases and order an applicant's release pending a hearing, however in 2025-26 DHS and DOJ have argued that immigration judges to not have jurisdiction to hear requests for bond or parole in lieu of detention, and federal circuit courts have split on the question; until a case reaches the Supreme Court, the availability of such a hearing may depend on the geographical location of the immigration court.

Externalization of asylum processing: agreements the government makes with other states are generally outside the jurisdiction of US courts. Instead, it is possible to challenge externalisation pursuant to pseudo-STC agreements such as the ACAs between the US and the El Salvador, Guatemala and Honduras, by challenging the administrative rules implementing them on the US side. Bespoke deportation agreements, such as those reached since 2025 with several states in Africa and Latin America, apparently cannot themselves be challenged; instead, persons subject to them can in principle raise individual withholding of

[777] 8 USC 1225(b)(1)(B)(ii). Persons arriving at the border without valid visa and travel documents will be placed in expedited removal proceedings. 8 USC 1225(b)(1)(A)(i), referencing 8 USC 1182(a)(7).
[778] 8 USC 1225(b)(2)(A) (a person seeking admission who is "not clearly and beyond a doubt entitled to be admitted … shall be detained for a proceeding under section 1229a", ie a removal proceeding).
[779] 8 USC 1182(d)(5).
[780] {*recent DHS guidance}, referencing 8 USC 1225(b)(2)
[781] 8 USC 1226(a).

removal cases based on statutory or CAT non-refoulement. If the opportunity to raise such claims in an immigration court is denied, then a federal District court can order a stop to the deportation.

Procedural barriers: all the procedural barriers are justiciable. They are implemented in the form of rules or departmental guidance, which fall within the general jurisdiction of US District courts over administrative law. There are however limitations on this jurisdiction, as for example final removal orders are not appealable to a Circuit court if issued following an expedited removal procedure;[782] any cases relating to expedited removal must concern the system itself, and must be brought in the District court for D.C.[783] Standing can also present difficulties, as any plaintiff must show that their interests have been affected by a given policy, and some of the procedural barriers have the effect of placing the individuals concerned outside the territory of the US, therefore outside the jurisdiction of federal courts.

Other barriers: (narrowing the refugee definition)

restricting PSG – narrowing the definition of PSG as a matter of DOJ policy (exercised as instructions to the EOIR) is not justiciable in the federal courts. Individual cases resulting in removal orders can be appealed to the Circuit court as a final agency action. However, this can result in circuit splits, as each immigration court is bound by the law of the Circuit in whose jurisdiction it sits.

expanding exclusion – as with procedural barriers, above, the rule expanding the types of crimes resulting in exclusion from asylum was justiciable in a federal court applying administrative law.

Time as a challenge

Most asylum access cases arise as collateral challenges to laws or policies that impact the ability to apply for asylum, rather than originating in individual cases concerning immigration, removal or protection. Most of these cases focus on government policy so are brought in the federal courts, typically alongside or on behalf of affected persons by coalitions of NGOs. In immigration appeals (ie to the BIA within the Department of Justice, rather than in the federal courts), a pro bono lawyer usually represents the applicant. Time can be an important factor in that a court might have to act swiftly to prevent an unjustified deportation, but rarely in the sense of an individual applicant being faced with an unreasonable deadline or similar.

Time in this latter sense is a challenge in asylum access cases in the immigration courts system. Short timeframes and limited opportunity to obtain legal counsel, and the strong legal presumptions established by administrative decisions taken during the first steps of the procedure, make it very difficult for many applicants to have their asylum (withholding of removal) claims fully heard. Depending which procedure is applicable (asylum, removal, expedited removal, etc), an applicant may have less than 24 hours to prepare for their first hearing, a credible fear screening interview by a USCIS or CBP officer.[784] The result of that interview largely determines which procedure they are placed in. For example, a negative credible fear determination raises the threshold of fear the applicant must demonstrate from "credible fear" to a stricter "reasonable fear" standard for a second screening and immigration court review prior to removal.

Specific examples are indicated below.

Pushbacks: the cases concerning pushbacks (metering) did not entail any time challenges. They were subject to normal filing deadlines and scheduling for federal court cases.

Detention: insofar as there is access to a proceeding regarding detention, it is either a bond hearing before an immigration judge, or a habeas corpus case in a federal District court, grounded in a claim of improper denial of access to such a hearing. There is no particular time related challenge in either type of case. Detention can, however, interact with and exacerbate time challenges that originate in procedural barriers. In the limited time frames specified by those procedures (see below), detention impedes communications

[782] 8 USC 1252(a)(2)(A)(i).
[783] 8 USC 1252(e)(3)(A).
[784] Until 2025 this competence rested with USCIS. In 2025-26 it is not clear which agency is responsible.

and makes it more difficult to obtain and consult with legal counsel during the removal procedures. These challenges can vary considerably depending on the particular detention facility; which agency operates it; and whether it is operated directly by the agency or by a private contractor.

Externalization of asylum processing: there is no time factor in the (very limited) externalisation cases.

Procedural barriers: for most of the procedural barriers, the main time issue is lack of sufficient time to obtain and consult with legal advisors or representatives, before a hearing which will significantly influence the outcome of the procedure. The practical effect of the between border points ban[785] and the third country transit ban rules was to expand the classes of applicants expedited removal procedures apply to, with its compressed time frame (normally 24 hours from the credible fear interview).[786] The barriers that relate to conduct of credible fear interviews within the expedited removal procedure do not appear to have a time related effect. The border procedures PACR/HARP entailed particularly short deadlines (credible fear screening after 24 hours, and "a total timeline of five to seven days for removal"),[787] while in short term CBP detention with limited communications access. Although all applicants can have their protection claim heard by an immigration court, the practical challenges to obtaining advice or time to prepare, combined with the adverse presumption established by a negative initial credible fear determination, pose significant obstacles. The MPP (remain in Mexico) programme does not formally create an asylum access barrier, because the persons concerned remain in asylum or normal removal proceedings (they enter what amounts to an expedited removal procedure if they express a fear of return to Mexico to await their next hearing, but this does not affect their status in their main asylum/removal proceeding). However, in practice the often severe difficulties that result in very low recognition rates for persons in the MPP include time related difficulties such as receiving notice of or attending hearings in the US (MPP claims are disproportionately denied for failure to appear), and communicating with legal advisors.

Other barriers: (narrowing the refugee definition)

restricting PSG – there is no time factor, because the barrier has a substantive, not procedural effect.

expanding exclusion – there is no time factor, because the barrier has a substantive, not procedural effect.

Costs for legal representation

In the federal courts, very few asylum applicants can pursue cases on asylum barriers, due to the complexity of the system and the costs of legal representation. Instead, NGOs usually lead such cases, with individual applicants taking part as co-plaintiffs or as clients of the NGOs' legal staff.

In the immigration courts, applicants are entitled to legal advice and representation, at their own expense. Depending on the type of procedure (eg regular vs expedited removal), applicants might not have sufficient time to find a lawyer or resources to pay them. (However, {*what %??} of applicants {*in which procedure?} secure free legal aid.) Recognition rates are much lower for unrepresented applicants.

Spatial and geographical issues

Spatial and geographical issues do not noticeably impede access to the federal courts, as long as at least some of the plaintiffs are located in the US (versus eg having been denied entry or deported). Most federal asylum access cases focus on whether a government agency action or policy exceeds its constitutionally or

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785 Persons subject to the bar "automatically receive negative credible-fear determinations in expedited-removal proceedings". East Bay Sanctuary Covenant v. Biden (9th Circuit, 19 November 2020 (amended 14 March 2021)), 23.

786 An applicant may request review by an immigration judge of a negative credible fear determination, which is to "be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after" the initial credible fear determination by an asylum officer. 8 USC 1158(b)(1)(B)(iii).

787 *Las Americas v. Wolf* (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 10-11, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.

legislatively authorised powers, without requiring the individual named plaintiffs (applicants) to testify or to appear in court. Courts are less able to order remedies for plaintiffs located outside the US.

By contrast, several of the barriers studied significantly impact access to the asylum adjudication itself. Complex procedures, short deadlines, detention and limited access to legal counsel reduce the likelihood that an applicant's case will receive a full and careful hearing. Typically, this still leaves the applicant able to be heard in immigration court, but in the position of having to overcome adverse administrative presumptions or high standards of proof in order to reach a review on the merits of their case.

Specifically:

Pushbacks: if a person was pushed back, ie removed before entering the physical territory of the US, then they do not have the right to be inspected by a border official, and thus cannot claim asylum or withholding of removal. The exact point at which the right to request asylum attaches has been subject to judicial debate, either physical presence on US soil, or first encounter with a US officer, or both. Persons subject to administrative pushbacks, ie metering, will have encountered a US officer, but have not yet "arrive[d] in the United States" and thus cannot claim asylum or non-refoulement protections.[788] Therefore, persons encountered outside the physical boundaries of the US – such as in a queue waiting to approach a border post – can neither apply for asylum nor access a removal procedure where they could request protection.

Detention: immigration detention is essentially non-justiciable, except as a habeas corpus action in federal District court. Access to that court depends on location and conditions of detention, particularly access to legal counsel or resources.

Externalization of asylum processing: only one court case, *U.T. v Barr*, has arisen concerning the regulations implementing ACAs or other externalisation agreements. No rulings or decisions have issued yet in that case. The externalisation agreements themselves, if any, are not justiciable. Applicants subject to removal have, as a general matter, the right to a hearing before an immigration judge at which they may request withholding of removal, either on statutory non-refoulement (transposition of art. 1A of the RC), or CAT non-refoulement grounds. However, particularly under bespoke externalisation agreements, there are allegations {**and cases?} of deportations without the opportunity to raise such claims, and the persons concerned physically removed without sufficient notice for a court to act, or in disregard of court orders to halt the deportation.

Procedural barriers: the Migrant Protection Protocols (MPP) significantly reduce the likelihood an applicant can gain legal representation while making it more likely they will miss hearings. Returning to Mexico between hearings complicates contact with lawyers and requires applicants to wait indefinitely in potentially unsafe conditions in areas near the border. Although they are in an asylum procedure, factors such as remoteness and their being in a different country to where courts and most lawyers are based, undermine applicants' ability to pursue their cases to the point where the requirement to wait in Mexico functions as a barrier to the asylum process itself. The PACR/HARP border procedures can affect access to an immigration judge, indirectly. Because the procedure is so brief, applicants remain in CBP rather than ICE detention. CBP detention is usually more remote, and not equipped for video calls, private consultation spaces, etc, as ICE detention is. Applicants in an expedited removal proceeding with a negative credible fear determination (as with PACR/HARP, the between border points ban, and the TCTB) have access to a removal hearing with an immigration judge, but from CBP detention it is conducted telephonically, often without interpretation or legal counsel, and the burden remains on the applicant to show a "reasonable possibility" of persecution or torture if they are removed.

Other barriers (narrowing the refugee definition): both barriers (restricting PSG and expanding exclusion) concern the substantive refugee definition, so do not relate to access to a judicial or similar body.

Practices to overcome these challenges

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[788] *Mullin v Al Otro Lado* (Supreme Court, 25 June 2026) (overruling *Al Otro Lado v Mayorkas* (9th Circuit, 23 October 2024)).

Most asylum access adjudication cases in the federal courts are brought by NGOs representing their own interests or those of applicants or would-be applicants affected by a barrier to asylum. These cases are brought as class actions (specific named plaintiffs, plus unnamed plaintiffs similarly situated), or as claims for nullification of a government policy, or both simultaneously. Often they are supported by advocacy networks such as the ACLU as amici. Pooling of resources among groups of NGOs and plaintiffs' lawyers shares costs and expertise, and makes a federal case practicable. NGOs have also raised cases in the federal courts regarding barriers to accessing the asylum adjudication system (e.g. MPP). They might also provide practical support aiding applicants to attend their hearings.

In access to asylum itself, i.e. individual cases, applicants are allowed to have legal advice and representation, but the state does not provide for free legal aid. NGOs in the main border regions provide advice and lawyers and law firms donate their services.

Pushbacks: Persons excluded by pushback (metering) have no recourse to immigration or other US courts because they have neither entered US territory, nor been inspected by a US border officer. However, NGOs have at time succeeded in demonstrating their own standing to challenge the barrier.

Detention: immigration detention is now mandatory for nearly all persons arriving irregularly in the US or at its border, until their removal or until protection is granted. However, if a deportable person is arrested on a warrant and detained pending removal, they may have a right to a bond hearing (this question is currently under litigation). If the immigration courts do not permit a bond hearing, a remedy lies in a habeas corpus action in a federal District court, which can order the DOJ to either hold a bond hearing in an immigration court, or release the applicant (with conditions) pending status determination.

Externalization of asylum processing: it is nearly impossible for asylum seekers or NGOs to access justice in the externalisation context. If an ACA is applied, then the person concerned has no further recourse following a negative credible fear determination, and the threshold for that determination is to demonstrate a probability of persecution or torture in a state the AG has already certified as safe. If the deportation is undertaken in the context of a bespoke agreement with the third country, then the person concerned often receives notice of their removal within less than a day before the removal takes place, and while they are in detention. Under these circumstances, intervention is practically impossible unless they are already in close contact with legal counsel; even in that case, and even if an emergency court order issues to halt the deportation, the administration has reportedly carried out such deportations in violation of court orders (sometimes arguing that the flight is already outside US airspace, therefore the court lacks jurisdiction).

Procedural barriers: the main issue facing persons subject to the between border points ban or TCTB is their immediate placement in expedited removal proceedings (this issue is further exacerbated in the PACR/HARP context). Measures adopted by asylum seekers or those seeking to aid them therefore merge into the measures employed to address difficulties accessing justice in the increasingly stringent expedited removal system. These include NGOs establishing offices on both sides of the border; keeping legal advisors on call and ready to respond quickly to calls from asylum seekers or their associates (eg family members); establishing collaborations with NGOs based in Mexico; and posting observers near enough to border points (albeit rarely if ever between border points, due to largely inaccessible terrain) to see crisis situations as they develop. In the MPP case, increased placement of US NGO offices in or near border cities in Mexico and cooperating with NGOs in Mexico was particularly important, given the ongoing protection needs for persons waiting in Mexico between hearings.

Other barriers: (narrowing the refugee definition) there is no particular process available to asylum seekers or other actors to overcome either the restricting PSG or the expanding exclusion barrier, except to mount challenges in federal courts. Since the statutory language leaves wide discretion to the AG to interpret PSG, and the AG has confirmed the DOJ interpretation in a decision that supersedes BIA jurisprudence, the only way to challenge it is case by case in federal Circuit courts after the issuance of a final removal order. The expanding exclusion barrier was successfully challenged in District court (*Pangea Legal Services v DHS, ND California*), which issued a preliminary injunction in 2020.

Implications of difficulties accessing justice in asylum access adjudication

For asylum access adjudication (federal courts) the main challenges to accessing justice are financial costs, and establishing jurisdiction and standing. The asylum access cases studied in this report would have been too expensive for individual applicants to pursue (hundreds of thousands of dollars in legal fees), so an applicant can only challenge a barrier with the support of a large NGO or similar. A basic requirement for standing in a federal court is that the would-be plaintiff can show a material harm (loss) to a legal right protected by federal law. This is not particularly difficult in such cases, because most of the NGOs involved are also active in providing legal aid to individuals seeking asylum – so they can argue a barrier will harm them by making delivering that aid more difficult or expensive. Parties denied standing were either individuals not (or no longer) under US jurisdiction, or states attempting to intervene. There is some controversy around organisational standing for NGOs, but in all cases studied to date the scepticism over standing was confined to dissenting opinions within multi-judge panels.

Access to justice is much more difficult in the asylum process itself. From initial screening interviews through to merits hearings and final decisions, short deadlines; cost and accessibility of legal services; and detention locations and conditions are significant barriers to accessing justice (see above). The prevalence of expedited removal proceedings means that many applicants have a 'reasonable fear' screening interview 24 hours or less after their first encounter with a border officer, the result of which establishes a (rebuttable) presumption as the basis for their first hearing in an immigration court. Interviews and hearings are usually carried out electronically{*right?}, with the applicant in detention. Overall, each applicant will get a hearing before an IJ, but facing complex procedures and possibly a high burden of proof needed to overcome an adverse presumption of ineligibility, and probably without legal advice.

B. Legal aid

Procedural aspects in law and in practice for obtaining legal representation

In asylum access adjudication, there is no particular procedure for obtaining legal representation. Several NGOs, particularly in the western US, provide ongoing support to refugees and asylum seekers, and become aware of barriers to asylum access. Typically, the NGOs and affiliated lawyers initiate the legal action, with their clients or other affected persons as co-plaintiffs.

For asylum adjudication (immigration courts), obtaining legal representation can present severe challenges.[789] Applicants in expedited removal proceedings "may consult with [persons of their] choosing prior to the [credible fear] interview or any review thereof, according to regulations prescribed by the Attorney General",[790] and those in regular removal proceedings "shall have the privilege of being represented … by counsel of [their] choosing", but not at government expense.[791] Asylum applicants are informed "of the privilege of being represented by counsel", and provided with a list of "persons … who have indicated their availability" to represent asylum applicants pro bono.[792] In practice, access to legal counsel in immigration proceedings can be challenging. The widening use of expedited removal via administrative barriers to asylum means that on average, asylum applicants have correspondingly less time to secure representation. Among the more extreme examples are expedited procedures near the borders, where an applicant might have as little as 30-60 minutes of telephone access before the first hearing (which also might fall on a weekend), and cannot have in person meetings meanwhile.

[789] {*Cross reference to part 1}.
[790] 8 USC 1225(b)(1)(B)(iv).
[791] 8 USC 1229a(b)(4)(A).
[792] 8 USC 1158(d)(4)(A), (B).

Pushbacks: persons subjected to pushbacks cannot access the US justice system until they are able to enter the US. NGOs can and do however establish offices in Mexico, from where they can provide consultation to affected persons, and potentially raise cases in federal courts against the pushback barrier.

Detention: detained persons can in principle access legal counsel. In immigration detention, lists are provided of immigration lawyers who work in the region. Contacting these lawyers (or NGOs) can be challenging, especially in expedited removal or other rapid processing, where the applicant may have only very limited access to a telephone or other communication means, and deadlines are short.

Externalization of asylum processing: persons subject to externalisation practices have similar challenges obtaining representation as faced by those in detention (as they are also probably in detention), but with added difficulties of even shorter deadlines, and highly truncated hearing procedures. Deportees may only be informed of their deportation and destination a day or less before departure. In principle there should be an opportunity for at least a credible fear determination, followed by an immigration court hearing if that determination is negative, unless an ACA is in place. Under the implementation of ACAs, the destination country is presumed safe so there is no guarantee of an immigration court hearing if the initial credible fear screening results in a negative determination.

Procedural barriers: by law, applicants have the right to obtain legal representation for immigration court hearings. They may also consult legal counsel before credible fear screening interviews (counsel may listen to the interview and make a statement afterwards, but do not participate). The process for securing representation or counsel depends in significant part on the rules of the particular detention facility,{*} with a baseline that the applicant is provided with a list of pro bono lawyers, and access to a telephone. Persons affected by the between border points or third country transit bans are in expedited removal proceedings, with short time frames (e.g. normally 24 hours for an immigration judge to review a credible fear determination),[793] and normally detained for the duration of the proceedings. The PACR/HARP border procedures entail still shorter time frames, referring persons subject to expedited removal who raise a fear of persecution for a credible fear screening interview to take place within 24 hours, with "a total timeline of five to seven days for removal".[794] PACR/HARP detention is in CBP rather than ICE facilities, which further complicates access to legal counsel, such as by limiting phone access to 30-60 minutes with no return calls, and "not provid[ing] a mechanism way for attorneys to to locate [clients] in CBP custody".[795] MPP also in principle affords the right to obtain legal representation, but in practice impedes notifications and communications, in that obstacles such as financial hardship, difficulties in travelling,[796] lack of housing or a fixed address in Mexico render access to representation or counsel illusory for most applicants. Changes to the conduct of the credible fear screening interview itself do not impact the possibility to obtain legal representation.

Other barriers (narrowing the refugee definition): the operations of the barriers restricting PSG and expanding exclusion are unrelated to procedures for obtaining legal representation.

Free legal aid

There is no entitlement to free legal aid. Applicants are provided with lists of local pro bono lawyers who have indicated availability, and means by which to contact them (telephone access, normally from a detention centre). Legal associations and NGOs provide free legal aid according to their capacity.

Main challenges asylum seekers face in obtaining legal representation

[793] 8 USC 1225 (b)(1)(B)(iii)(III) (review "shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after" the credible fear determination).

[794] *Las Americas v. Wolf* (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 10, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.

[795] *Las Americas v. Wolf* (District Court for the District of Columbia, 19-cv-3640-KBJ, 30 November 2020), 12, https://storage.courtlistener.com/recap/gov.uscourts.dcd.213388/gov.uscourts.dcd.213388.76.0_2.pdf.

[796] {*applicants can for example be removed from the country at one border point, with instructions to return for their next hearing to a different border point}

Asylum seekers would not normally seek legal representation for asylum access adjudication, which nearly always takes place in the federal courts. When they are represented, it is usually at the initiative of an NGO already participating in the case, who already works with the asylum seeker or proactively contacts them.

In the immigration court system, asylum seekers have to find and pay for their own legal representation. NGOs in the US and Mexico provide free legal aid, but for logistical and financial reasons cannot represent all who would benefit from it. The accessibility of communications means to benefit from legal counsel depends considerably on the type of facility the applicant is detained in (eg CBP or ICE), or if the applicant is paroled into the US or required to remain in Mexico (except for hearings) pending the case's outcome.

Implications of the availability, quality, and accessibility of legal aid

The main factor is the actual ability to secure legal assistance. There is no provision in US law for representation or legal aid in asylum or immigration cases, only the assurance that applicants have the right to secure it for themselves. In cases regarding barriers, this is rarely an issue: federal access cases are usually targeted litigation on behalf of a class of plaintiffs, or questioning the validity of a rule the government is applying in asylum cases, and individual plaintiffs will usually be represented through the efforts of the NGOs or lawyers who represented them in immigration court. In immigration court cases, administrative barriers that impede the applicant's access to communications, or impose deadlines that leave too little time for effective consultation before determinative hearings, impact the most on the ability to secure legal assistance. As of May 2026, there were about 3.2 million persons with pending removal cases in US immigration courts, of whom 53% were unrepresented by council, and a further 28,000 in detention pending removal hearings, of whom 47% were unrepresented.[797]

C. Lodging the appeal

Procedural aspects regarding the registration/lodging of the appeal

In federal courts, where most asylum access cases are heard, notice of appeal is filed with the clerk of the District court.[798] The court record is transferred to the Circuit court, whose clerk dockets the case. The Circuit court then directs the parties when to file their submissions and attend hearings.

Administrative appeals against asylum decisions must be filed within 30 days of the decision, or of the completion of (regular) removal proceedings, whichever is later.[799] In a removal context, upon rendering a decision the IJ informs the applicant of the right to appeal to the BIA, and asks if they choose to reserve it. The BIA Practice Manual, chapter 4.4 outlines the general rules for appeal.[800] Either party may appeal IJ decisions to the BIA, by notice to the BIA clerk within 30 days of the decision.[801] The BIA can receive the appeal physically, or electronically depending on the case (electronic filing is mandatory in some cases). Once the BIA schedules briefing, the parties generally have 21 days to file their briefs.[802] (To challenge a BIA decision, an applicant can file a motion for reconsideration with the BIA, or file an action in federal Circuit court.)

There do not appear to be significant issues with filing appeals in federal (asylum access) cases, except costs of obtaining legal counsel. Any party may appeal a District court ruling to the regional Circuit court.

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797 For further details, see https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative/immigration-court-legal-representation-dashboard.

798 Federal Rules of Appellate Procedure, Rule 4(a)(1)(B).

799 8 USC 1158(d)(5)(A)(iv), (v).

800 https://www.justice.gov/eoir/reference-materials/bia/chapter-4/4. {**nb – dead link!}. See Board of Immigration Appeals Practice Manual (5 October 2020 {*is there a more recent one?}), 4.4, https://www.justice.gov/eoir/foialibrary/BIAPM01122021/dl.

801 See Board of Immigration Appeals Practice Manual (5 October 2020 {*is there a more recent one?}), 4.5(a) (the party must first serve notice on the opposing party, then file Form EOIR-26 with the BIA clerk; a fee is due, but the applicant may request a waiver), https://www.justice.gov/eoir/foialibrary/BIAPM01122021/dl.

802 See Board of Immigration Appeals Practice Manual (5 October 2020 {*is there a more recent one?}), 4.7(a), https://www.justice.gov/eoir/foialibrary/BIAPM01122021/dl.

In asylum appeals, BIA procedures are straightforward and consistent, but applicants without legal representation might have difficulty in meeting the detailed documentary requirements of an appeal. Short deadlines for filing appeals to the BIA, especially in expedited removal and other time-constrained procedures, can also pose significant challenges, especially for unrepresented applicants.

D. Hearing

Applicants are not involved in hearings in asylum access cases in the federal courts. Instead, lawyers argue the case (motions, briefs & oral arguments) based on an evidentiary record drawn from documents, which might include records of individual plaintiffs' immigration cases, including transcriptions of their testimony in asylum hearings or of oral depositions. District courts are single judge; Circuit courts sit as three-judge panels, unless rehearing a case en banc. The Supreme Court sits en banc.

In individual asylum cases, the role and nature of hearings depend on the type of procedure applied (asylum, removal, expedited removal, etc). Each applicant can in principle be heard at least once by an immigration judge, after a preliminary credible fear assessment by an asylum officer. Individual BIA members review appeals, and refer those that raise issues requiring further review to 3-judge BIA panels for decisioning.[803] BIA decisions that result in final removal orders can be appealed to the Circuit court.

An applicant who raises an affirmative asylum claim has a non-adversarial in person, private interview with a USCIS asylum officer, to which they may bring "an attorney or accredited representative", and must bring a translator if they cannot proceed in English.[804] Absent exceptional circumstances, an affirmative applicant normally receives an "initial hearing or interview" within 45 days of filing the application,[805] and the first instance procedure (decision of the asylum officer) should be complete within 180 days.[806] If the officer determines the applicant is not eligible for asylum, the applicant is referred to an immigration judge for removal proceedings.

Defensive asylum claims arise in the course of a removal procedure, or expedited removal. Deportable persons arrested in the interior of the US, or persons in expedited removal who receive a positive credible fear determination, are also placed in removal proceedings.[807] The removal hearing takes place either in person or by video,[808] or by telephone conference if the applicant consents after being informed of their right to a video or in person hearing.[809] If both parties agree, then the hearing can be held without the applicant.[810] An immigration judge may also waive the applicant's appearance "for good cause", if they are represented by counsel.[811] The applicant (or their lawyer) may review the evidence against them, present their own evidence, and cross-examine witnesses.[812]

Expedited removal is applied to all persons arriving in the US without an unambiguous right to enter the country. If a person in expedited removal proceedings indicates a wish to apply for asylum or a fear of persecution, they are interviewed by an asylum officer (in person or via telephone) to determine whether they have a "credible fear of persecution"; if so, they are placed in regular removal proceedings.[813] Otherwise, they are subject to immediate removal,[814] but may request "prompt review" of that

[803] A 2026 interim final rule of the EOIR purported to revise this procedure, but was vacated in part and remanded to the EOIR for reconsideration by the D.C. District court. See subsection F (review of decisions), below.
[804] https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process (see "STEP 5: Interview").
[805] 8 USC 1158(d)(5)(A)(ii).
[806] 8 USC 1158(d)(5)(A)(iii).
[807] 8 USC 1226a (arrest in the interior), 8 USC 1225(b)(1)(B)(ii)(credible fear determination in expedited removal).
[808] 8 USC 1229a(b)(2)(A)(i), (iii).
[809] 8 USC 1229a(b)(2)(A)(iv), 1229a(b)(2)(B).
[810] 8 USC 1229a(b)(2)(A)(ii).
[811] 8 CFR 1003.25(a).
[812] 8 USC 1229a(b)(4)(B).
[813] 8 USC 1225(b)(1)(A)(ii), (B)(i), (ii). "Credible fear" means "a significant possibility". 8 USC 1225(b)(1)(B)(v).
[814] 8 USC 1225(b)(1)(B)(iii)(I).

determination, which the AG must provide, including "an opportunity … to be heard and questioned by the immigration judge, either in person or by telephonic or video communication".[815] Appeals to the BIA are conducted on the written record, with lawyers allowed to argue, but no further testimony or questioning of the applicant. Circuit courts review removal orders based on the administrative record.[816]

Pushbacks: the metering policies had the effect of rerouting potential asylum applicants to the expedited removal procedure, and raised the threshold for overturning a negative credible fear determination (from "reasonable possibility" to "reasonable probability" of persecution if returned), but did not affect the nature of the interview or the hearing.

Detention: detention does not alter the conduct of asylum related hearings, and the fact of detention does not prevent applicants from attending hearings. The resources available vary from one detention facility to another, with the result that some applicants with a right to a video or in person removal hearing might only be able to attend telephonically. During 2025-26 bond hearings are increasingly cursory, and bond or conditional release is almost always denied. The availability of a bond hearing before an immigration judge, for release from detention while the removal case is pending, is in judicial controversy. If bond release is not permissible, then potential disadvantages in the main proceeding due to the applicant being in detention cannot be avoided. The BIA has concluded that a persons arrested in the interior of the country as deportable who raise defensive claims for asylum or withholding may not have a bond hearing pending a decision in their removal case.[817] This is in line with the legal position of DHS, but many federal courts have disagreed with it, ruling that such persons must have the opportunity to request conditional or bond release. This has resulted since 2025 in some thousands of habeas corpus cases in federal District courts, most of which took the view that a bond hearing is required, but the two Circuit courts to rule thus far (5th and 8th) have aligned with the DOJ's interpretation.

Externalization of asylum processing: the rule that implements ACAs in US administrative law, which is currently subject to challenge in District court, purports to apply a pre-screening procedure to asylum applicants, whereby they are extremely unlikely to be able to access the protections of the expedited removal procedure. In effect, persons subject to the ACAs will not have access to a judicial or quasi-juricial hearing.

Procedural barriers: the between border points bar and the TCTB have no effect on the conduct of hearings; rather, they expand the classes of persons subject to expedited removal. The barriers that manifested in changes to training materials and staffing for credible fear interviews had considerable such effects. The nominal availability and conduct of an eventual hearing before an immigration judge remained unchanged, but assigning CBP officers lacking appropriate training (rather than duly trained USCIS officers) to conduct the preliminary interview, or requiring applicants to essentially demonstrate their eligibility for withholding of removal in that interview (rather than showing that they could demonstrate such eligibility), increases the likelihood the applicant would enter that interview needing to overcome adverse presumptions on the credible fear test, before proceeding with a full merits hearing. Similarly, PACR/HARP leaves in place formal access to a hearing before an immigration judge, but considerably increases the obstacles to entering such a hearing without a negative credible fear determination (see below). The MPP does not affect the does not change the role or conduct of hearings, but it creates significant practical difficulties for applicants to attend their hearings (see below).

Other barriers (narrowing the refugee definition): neither of these barriers (restricting PSG or expanding exclusion affects the availability or conduct of hearings. Rather, they affect the substantive standards applied in asylum determination procedures.

[815] 8 USC 1225(b)(1)(B)(iii)(III) (the review should "be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the determination").
[816] 8 USC 1252(b)(4)(A).
[817] Matter of Yajure Hurtado, 29 I&N Dec. 216 (BIA 2025), 5 September 2025.

Implications of the procedure regarding the hearing on asylum access adjudication

Individual applicants are not involved in asylum access hearings. Asylum access cases that arise in federal court are procedurally disconnected from individual asylum adjudications. If individuals are affected (rather than eg a policy being challenged prior to its implementation), then the case is argued based on the administrative record of their submissions, interviews, and hearings before immigration judges. Access cases decided by the BIA or the AG will also be based on that record.

In asylum cases, by law, all individual applicants attend and testify in at least one hearing before an immigration court prior to their removal. Applicants who have been paroled into the US will appear in person, whereas those in detention participate by video, or by telephone. If an applicant does not attend a hearing (and the parties have not previously agreed to proceed without the applicant), then the application is denied. Some barriers to asylum can interfere with an applicant's ability to attend hearings, or require them to attend without meaningful legal advice or at a significant procedural disadvantage, thus reducing their likelihood of obtaining a full and fair hearing. Significant practical challenges arise in access to legal counsel or representation, and with participating in video or telephonic hearings. Preliminary interviews ('credible fear' or 'reasonable fear') considerably influence the later course of hearings in immigration courts, if asylum is initially denied.

Pushbacks: metering barriers do not affect the conduct of hearings or applicants' access to them. Their main effect is to deny applicants access to the entire asylum procedure, shunting them instead into expedited removal, where the hearing takes place under much less favourable conditions to the applicant.

Detention: the fact of detention, and the conditions, can impede applicants' ability to access legal counsel or to prepare for hearings. However, access to removal hearings is provided to persons in detention, and the conduct of those hearings is unchanged, except they may be conducted via telephone or video link.

Externalization of asylum processing: the externalisation rule and practices operate to prevent access to any asylum or removal proceedings, unless the applicant can meet a heightened threshold for demonstrating credible fear if deported to the partner state. This means that in practice, applicants affected by the ACAs or ad hoc externalisation agreements are very unlikely to be able to access a hearing before an immigration judge, except for the minimal review afforded a negative credible fear determination.

Procedural barriers: the between border points bar and the TCTB operate to expand the classes of persons subject to expedited removal, with its impediments to presenting a successful case for withholding for removal at a hearing before an immigration judge. The PACR/HARP border procedures exacerbate this effect through shorter time frames and limited access to communications (telephone only). Barriers implemented as changed training standards and staffing profiles for credible fear interviews have a similar effect; the changes to the interviews make it much less likely applicants will receive a positive credible fear determination, therefore more applicants will arrive at their final hearing before an immigration judge needing to first refute that determination before they may proceed to the full merits of the asylum or withholding claim. MPP has a significant effect on the conduct of hearings and on asylum adjudication outcomes, by impeding the ability of applicants to contact and communicate with legal counsel, and exposing applicants to practical barriers to attending hearings such as failure to receive notice, long distances (with different hearings possibly in different locations), and residence, possibly informal, in physically dangerous regions. Failure to appear at a hearing results in dismissal of the application, which is a disproportionately common outcome for cases of applicants subject to MPP while their claim is determined.

Other barriers (narrowing the refugee definition): these barriers do not affect the conduct or availability of hearings, but rather, the substantive criteria for demonstrating eligibility for asylum.

E. Deliberation

Asylum access adjudication in the federal courts proceeds through the District courts. A single judge conducts factual inquiries, makes rulings of law, and issues orders based on decisions. The parties may appeal adverse rulings to the Circuit court with jurisdiction over the case. The Circuit court sits as a 3-judge panel, assigned per a rota, and can affirm or overrule substantive or procedural rulings of the District court, or rule that it erred or exceeded its discretion in assessing evidence. The Circuit court remands the case to the District court, which continues to hear the case until reaching a conclusion on the merits, which may also be appealed to the Circuit court. All these courts generally issue written opinions, including dissenting opinions of Circuit judges.

Further appeal from a Circuit court ruling is discretionary, and exercise of that discretion is unusual. If a majority of all judges in that Circuit agree, the Circuit court can re-hear an appeal en banc. The Supreme Court can hear appeals from lower courts (or the highest courts of the states, on questions of federal law), by vote of four Justices. In practice, the complexities of federal court procedures and of the cases that have arisen around barriers to accessing asylum, as well as litigation strategies and policy changes, mean that cases can continue for five or more years, often without reaching a conclusion or even an assessment of the merits.

For asylum adjudication, and asylum access adjudication insofar as it runs through the immigration courts, immigration judges (IJs) hear appeals against determinations made by asylum officers (a negative credible fear determination or denial of an affirmative asylum claim), and removal cases in which asylum or non-refoulement claims can arise. Their decisions can be appealed to the Board of Immigration Appeals (BIA).

Immigration court cases are conducted like ordinary court cases. The parties submit briefs and evidence, and hearings are held for witness testimony, including the applicant's, and for the lawyers (or the applicant, if appearing pro se), to argue the case. Government officials and accredited lawyers must file immigration court documents electronically; others may file electronically but if they do, they must continue to use electronic filing throughout the case.[818] Parties submitting foreign language documents in immigration court must provide a certified translation.[819] An immigration judge has discretion to schedule hearings either in person or by video, or by telephone, but the applicant must give informed consent before providing evidence telephonically (in contrast to credible fear determination reviews).[820] The court provides interpreters if needed. Immigration courts are generally open to the public, subject to space limitations and some exceptions.[821]

Implications of the procedures regarding the deliberation on asylum access adjudication

In the sense of deliberating to decide a case, there is little comparability across procedures. This is true in both the federal courts and the immigration courts. All first instance judicial decisions are made by a single judge, and all appeals are heard by three-judge panels. First instance and appellate courts are separate entities, so first instance judges do not participate in appellate panels and vice versa. The only deliberation that takes place beyond a single judge's assessment comes via diverging opinions within an appeal panel, whether Circuit court or BIA. A noticeable influence on decision making at the federal level has been the involvement of specific Circuit judges on panels, especially in the 9th Circuit, to establish precedents setting boundaries around the executive's discretionary powers in implementing immigration and asylum laws.

In the sense of judicial deliberation about questions of law, there are ongoing dialogues about barriers to asylum among federal courts, and between the federal courts and the BIA/AG. The structural separation between the two court systems (one in the judicial branch, the other in the executive), and the geographical boundaries between Circuit courts, can lead both to exchanges of ideas and to unresolved disagreements that can fragment the interpretation of law as it operates in first instance asylum cases around the US.

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818 8 CFR 1003.31(a).
819 8 CFR 1003.33.
820 8 CFR 1003.25(c).
821 8 CFR 1003.27.

F. Review of decisions

Federal District courts hear asylum access cases that challenge government regulations or practice, so appeal is to a Circuit court. In individual asylum cases, appeal runs from an immigration court to the BIA, then to a Circuit court, except for expedited removals, where an immigration court's review of an asylum officer's negative credible fear determination is final.

In federal appeals, the procedural framework is the Federal Rules of Appellate Procedure.[822] Notice of appeal must be filed with the District court within 60 days of entry of a judgment or order.[823] The appellant (ie party lodging the appeal) then has 14 days to order parts of the trial transcript that are not already on file with the Circuit court or to certify that they will not order a transcript,[824] indicate the issues to be appealed if only a partial transcript is ordered,[825] and arrange to pay for the cost of the transcript,[826] and the lawyer who files the notice of appeal must indicate which parties they represent.[827] "Oral argument must be allowed", unless the three judge Circuit panel unanimously agrees it is unnecessary.[828] The Rules cover further aspects of the appeal, but these appear to be the most relevant. All individual applicants in the federal cases studied were represented by NGO-provided (or similar pro bono) lawyers, with NGOs also party to several cases.

In an expedited removal context, after a negative credible fear determination, an immigration judge carries out a de novo review of whether there is a "significant possibility" the applicant "could establish eligibility for [asylum or withholding of removal]".[829] This review is expected to be complete within 24 hours, but no more than 7 days after administrative confirmation of the credible fear determination,[830] and includes a hearing where the applicant testifies in person, or by video or telephone, at the judge's discretion (the court provides an interpreter if needed).[831] The applicant is not represented, but may bring legal counsel, who may make a statement to the court at the close of the hearing. If the immigration judge affirms the negative determination, then there is no further review or appeal,[832] and a final removal order issues.

Otherwise, either party may appeal a decision of an immigration judge by Notice of Appeal to the BIA,[833] within 30 days, except for denials of asylum based on STC, or failure to claim asylum within one year of arrival in the US or as subsequent applications (unless changed circumstances), for which the deadline is 10 days from the decision.[834] Appeals to the BIA have suspensive effect (and the decision is automatically suspended until the deadline for filing notice of appeal), unless the right to appeal is waived.[835] The BIA may waive filing fees "upon a showing that the filing party is unable to pay the fee".[836] In June 2025 the Brennan Center for Justice estimated that in 2023-2025 less than 10% of IJ decisions were appealed to the BIA, and "generally . . . between 15 and 20 percent" of BIA decisions were further appealed to circuit courts.[837]

[822] https://www.law.cornell.edu/rules/frap.
[823] Federal Rules of Appellate Procedure, Rule 4(a)(1)(B).
[824] Federal Rules of Appellate Procedure, Rule 10(b)(1).
[825] Federal Rules of Appellate Procedure, Rule 10(b)(3)(A). The appellee may require the appellant to fulfil this responsibility, or order the transcript itself. Ibid., Rule 10(b)(3)(B), (C).
[826] Federal Rules of Appellate Procedure, Rule 10(b)(4).
[827] Federal Rules of Appellate Procedure, Rule 12(b).
[828] Federal Rules of Appellate Procedure, Rule 34(a)(2).
[829] 8 CFR 1003.42(d).
[830] 8 CFR 1003.42(e).
[831] 8 CFR 1003.42(c).
[832] 8 CFR 1003.42(f)(2) (the AG may review the decision sua sponte).
[833] 8 CFR 1003.3(a)(1).
[834] 8 CFR 1003.38(b).
[835] 8 CFR 1003.6(a).
[836] 8 CFR 1003.8(a)(3).
[837] https://www.brennancenter.org/our-work/research-reports/immigration-court-system-explained.

At the BIA, individual Board members review and either decide appeals, or refer them to three-member panels for hearing and decision if they raise raise debatable questions of law or the IJ's factual determinations appear to be unreasonable. (In March 2026, a new EOIR interim final rule took effect, instructing the BIA to summarily dismiss all appeals from immigration judge decisions (with a few exceptions largely unrelated to asylum), unless the examining BIA member refers an appeal to the full board which then votes that a panel should review it.[838] However, the rule was challenged in the D.C. District court, which vacated key provisions, particularly a 10-day deadline for the BIA to hear an appeal or allow its summary dismissal, as having been enacted without a mandatory public notice and comment period.[839]) BIA panels review findings of fact on a clear error standard, and the IJ's interpretation and application of law de novo.

A final removal order, except one issued in an expedited removal proceeding,[840] can be appealed within 30 days to the Circuit court for the circuit where the immigration court originally heard the case,[841] as final agency actions. The appellant must file the accompanying brief within 40 days of the removal order.[842]

Implications of the functioning of judicial review mechanisms on asylum access adjudication

The system of precedent that operates in the immigration and federal courts means that higher courts exercise control over lower courts' interpretations of law, within a given jurisdiction. Lower courts must follow any precedential ruling of a higher court – this generally refers to an interpretation of law, which the lower courts must follow when facing a similar factual situation. Lower courts can explore alternative interpretations, or frame cases so as to follow a different precedent, but the resulting decisions are also subject to control by appellate bodies. There is also a degree of influence across circuits, whereby for example the District court for the District of Columbia might cite a court in the 9th circuit as persuasive on a point of law the Circuit court for the District of Columbia has not yet ruled on.

In the immigration courts system, the BIA may declare its decisions precedential, binding on all IJs in future cases. The AG can intervene sua sponte and issue decisions overruling BIA decisions. The centralised immigration court system, located within the executive branch and with all appeals going to the BIA, is less conducive to influences across jurisdictional boundaries than the federal court system is.

G. Procedures in decentralized states

Since immigration and asylum are federal rather than state competences, in principle there are no procedural differences across territories. All immigration related legislation and administrative rules apply nationwide. Therefore federalism and the governing powers of US states and tribal nations are unrelated to immigration and asylum, or access to asylum. Among the asylum access cases reviewed, there were no instances of a territorially dependant variance in asylum procedures.

However, the substance of the applicable law can diverge by territory. The division of the US Circuit court into 13 coequal circuits, 12 with general appellate jurisdiction over a particular state or federal territory,[843] can lead to divergences of law based on geography. A Circuit court's rulings set precedent, binding on District courts and immigration courts within its geographic reach. (According to BIA precedent,[844] the BIA must also apply the interpretations of the circuit where the immigration judge was located (rather

[838] DOJ (EOIR), "Appellate Procedures for the Board of Immigration Appeals", 91 Fed. Reg. 25, 6 February 2026, 5267-5278 at 5277, https://www.govinfo.gov/content/pkg/FR-2026-02-06/pdf/2026-02326.pdf. The potentially asylum relevant were for decisions on pre-removal "bond, parole or detention" (see 8 CFR 1236A) and "continued detention of removable aliens" (see 8 CFR 1241.14). Id., referencing 8 CFR 1003.1(b) (5), (6), (7), (14).

[839] Amica Center for Immigrant Rights v. EOIR (District Court for the District of Columbia, 26-cv-0696-RDM, 8 March 2026), 46, 72-73, https://storage.courtlistener.com/recap/gov.uscourts.dcd.289845/gov.uscourts.dcd.289845.32.0.pdf.

[840] 8 USC 1252(a)(1), referencing 8 USC 1225(b)(1).

[841] 8 USC 1252(b)(1), (2).

[842] 8 USC 1252(b)(3)(C).

[843] The Federal Circuit court of appeals has specialised subject matter jurisdictions, unrelated to asylum.

[844] See *Matter of Garcia*, 28 I&N Dec. 693 (BIA 2023), at 695 (citing *Matter of U. Singh* (BIA 2012) and *Matter of Anselmo* (BIA 1989)).

than the interpretation of the circuit most favourable to the applicant, as previously).) Unless the Supreme Court intervenes, this can lead to circuit splits, whereby judges in different regions would be required to rule differently on the same facts. In asylum related cases, such splits have mostly concerned points of substantive rather than procedural law, but a significant split is under way in 2025-26 concerning bond hearings for detainees.

There is no significant difference across federal judicial circuits in terms of asylum or asylum access adjudication procedures, but a split has developed on whether or not immigration courts may hear requests of persons arrested in the US interior as deportable for release from detention on bond or conditions. The apparent effect is that in several circuits, if applicants do not receive a bond hearing, then District courts must order them released in response to habeas corpus petitions.

H. Influence of procedures in practice and the role of courts

As far as concerns judicial or quasi-judicial procedures, practices align closely with formal procedures. The main divergence between policy and practice come in areas outside the adjudication process itself, such as border enforcement practices, or detention conditions.

Jurisprudence shaping procedural protections or the interpretation of asylum rights

Supranational decisions have had no significant influence in the US. However the decisions of US federal courts, and to a lesser extent of the EOIR (BIA/AG), have considerably influenced procedural protections regarding asylum and non-refoulement. The courts' influence on procedural protections consists largely of enforcing the limits placed on governmental discretion by legislation, leading at times to a later government policy aimed at similar ends, but with sufficient changes to its operation or purported legal basis to render the prior legal challenge moot. Federal courts recognise that legislative and constitutional provisions imply considerable deference to executive rules, and limit their enforcement to cases where legislation or the constitution establishes clear boundaries that a policy exceeds, or when rules or practices are improperly established according to the APA. The two main bases for disallowing a rule for APA violations are when the rule is deemed arbitrary and capricious (usually because the executive did not provide justification for its policy choice), or when rulemaking procedures specified in the APA were not properly followed.

Jurisprudence of supranational courts shaping procedural protections or the interpretation

There has been no noticeable influence of supranational or foreign courts on asylum rights or procedures in the US. However, federal courts do at times discuss international treaties (especially the Refugee Convention and CAT) in some detail, as illustrative of the purposes for which Congress originally enacted the US legal and regulatory frameworks governing asylum and non-refoulement.

II. JUDICIAL OR QUASI-JUDICIAL BODIES IN ACCESS TO ASYLUM

Consider all judicial or quasi-judicial bodies already listed in Section II(B) of part two of the Report. For some questions, experts are asked to reply according to the adjudication stage (first instance, second instance, third instance, etc). If replies do not vary according to stages of appeals, specify it and write your response only in the first box (first instance judicial or quasi-judicial body/bodies). If, at one stage, more than one judicial or quasi-judicial body is responsible for asylum access adjudication, consider all of them by stressing their commonalities and differences (if any). Additionally, in the replies always specify potential divergences according to the selected barriers to accessing asylum discussed in Part one of the Report.

A. Institutional configuration

<u>Federal article III courts</u>:

The federal courts are constitutionally independent courts of general jurisdiction to interpret and apply federal law, including civil and criminal law, and administrative appeals. Most cases concerning barriers to accessing asylum are heard in federal courts, in the form of challenges to the establishment or application of a US government rule.

- First instance judicial or quasi-judicial body/bodies: 94 District courts
- Second instance judicial or quasi-judicial body/bodies: 11 Circuit courts with jurisdiction over federal courts in groups of states; a District of Columbia Circuit court; and a specialised Federal Circuit court (whose jurisdiction does not relate to asylum or access to asylum)
- Third instance judicial or quasi-judicial body/bodies: US Supreme Court

Article III courts are financed through annual appropriations by Congress. Their judges are appointed by the president and confirmed by majority vote of the US Senate. Federal judges have lifetime tenure (unless impeached and removed for serious misconduct). The Judicial Conference functions as a management board and regulatory monitor for the federal court system. The Chief Justice of the US chairs the Conference, which includes the chief judge of each circuit, and one district judge elected by the circuit and district judges of that circuit. The Conference meets annually to review needs and coordinate allocation of judicial resources; monitor and update court rules and procedures; and may exercise disciplinary authority over judges in response to complaints against them (or establish a standing committee for that purpose).[845]

Immigration courts operate within the Executive Office of Immigration Review (EOIR), a subagency of the Department of Justice (DOJ):

- First instance judicial or quasi-judicial body/bodies: immigration courts (immigration judges).
- Second instance judicial or quasi-judicial body/bodies: Board of Immigration Appeals (BIA)
- Third instance judicial or quasi-judicial body/bodies:
    - Attorney General (head of the DOJ). The AG may overrule BIA decisions, as well as having administrative authority over the EOIR.
    - US Circuit court (see above). The circuit courts hear appeals against finalised removal orders, for abuse of discretion by a federal agency.

The EOIR has a director appointed by the AG, a deputy director, and several departments, of which the BIA and the Office of the Chief Immigration Judge relate to the EOIR's quasi-judicial functions.[846] The director supervises the management and administrative operations of the EOIR, and performance evaluation and quality oversight of BIA members and immigration judges, "while fully respecting their roles as adjudicators".[847] The BIA consists of 15 Appellate Immigration Judges, appointed by the AG; the AG also appoints one of these AIJs to serve as chair of the BIA and Chief Appellate Immigration Judge.[848]

Implications of the institutional configurations

The Article III (federal) courts are in principle entirely independent of the government, while the immigration courts are within the government, under the direction of the Attorney General. A main guarantee of courts' independence is the lifetime tenure of their judges, once appointed by the executive and confirmed by the US Senate. Because the Supreme Court has final interpretive authority over federal law including the Constitution, its decisions can shape the relative powers of the executive, legislative and judicial branches of government. It relies on the executive to enforce its judgments. In individual asylum cases DOJ (EOIR) renders final decisions, which DHS implements. DOJ and DHS jointly promulgate the main federal regulations that relate to asylum or access to asylum.

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845 28 USC 331 (referencing 28 USC chapter 16, ie 8 USC 351-364).
846 8 CFR 1003.0(a).
847 8 CFR 1003.0(b)(1)(v).
848 8 CFR 1003.1(a).

Recent asylum access cases in the federal courts have turned largely on the legality of administrative rules or practices implemented by the government. Courts are asked to decide whether the executive branch, in its rulemaking or policies, has exceeded its allowable discretion under Congressionally enacted legislation or the Constitution. In the 21st century, federal courts have tended to allow the exercise of executive discretion unless it clearly contradicts legislative or constitutional text, or binding case law of higher courts. A more recent (since about 2018) pattern has been for the government to eventually withdraw policies challenged in court, but later to implement mostly similar policies, leading to renewed litigation.

Power/competences of the judicial or quasi-judicial bodies

Federal article III courts:

Federal court decisions are binding on the government. However, District courts do not address the merits of individual asylum or removal cases. Rather, their general federal jurisdiction includes the competence to hear claims that a government rule or policy was improperly enacted, and to issue orders accordingly. Most such cases sound in federal administrative law (the Administrative Procedures Act, APA). In asylum access cases, typical orders would be to cease or refrain from practices that conflict wih federal legislation or constitutional rights; or to allow applicants to start or renew their immigration cases; or the court can vacate improperly formed regulations.

- *First instance judicial or quasi-judicial body/bodies:* the District court is a court of first instance, with competence to make all decisions and rulings. This includes both rulings of law and factual findings. However, because asylum access cases are usually collateral suits against government agency action, the evidence developed in a related immigration case can be part of the factual record.
- *Second instance judicial or quasi-judicial body/bodies:* the Circuit court can overrule any ruling or order of the District court, but must defer to findings of fact by the District court, overruling them only if the District court exceeded its discretion or erred on a point of evidence or procedure. After issuing its opinion, the Circuit court normally remands to the District court for further proceedings. Rulings of a Circuit court are binding precedent for all federal courts (and immigration judges) located within that circuit.
- *Third instance judicial or quasi-judicial body/bodies:* the Supreme Court has discretionary appellate jurisdiction over lower (Circuit or District) court decisions. Usually it will rule on a point of law, then remand to lower courts to apply that ruling. Supreme Court decisions and rulings form binding precedent for all US federal or immigration courts.

Immigration courts:

Immigration courts are within the DOJ, but subagencies of DHS carry out parts of the asylum and removal processes. Their main jurisdiction regarding asylum is to review DHS officers' decisions to deny asylum or negative credible fear determinations, and to adjudicate removal cases.

- *First instance judicial or quasi-judicial body/bodies:* immigration courts hear appeals against negative credible fear or reasonable fear determinations by a DHS official (usually an asylum officer from USCIS) following a screening interview. (In case of a positive determination, the applicant is transferred to an asylum procedure rather than an immigration court.) The immigration judge proceeds based on the interview record and the parties' testimony, reviewing factual findings de novo, and may overrule DHS determinations. Depending on the IJ's decision, an applicant is transferred to one of various subagencies of the DHS for further processing (removal, implementing protection, etc).
- *Second instance judicial or quasi-judicial body/bodies:* applicants whose withholding of removal claim is denied by an IJ may appeal to the Board of Immigration Appeals. The BIA reviews the record below de novo, and reviews the IJ's decision for legal error or "clearly erroneous factual

determinations".[849] The BIA declares some of its decisions as precedential (for example those that interpret regulatory language, or rule on points where Ijs have diverged, etc). Very few asylum decisions are appealed beyond the BIA to the federal courts.

- *Third instance judicial or quasi-judicial body/bodies:* once a final removal order issues, the applicant may appeal that order to the Circuit court with jurisdiction over the region where the IJ was located. Within its limited scope of review a final administrative action,[850] the Circuit court can overrule the BIA and issue orders to DOJ and DHS accordingly. The AG has the prerogative to select and overturn BIA decisions, or previous AG decisions, establishing a new precedent.

Implications of the available types of remedies on asylum access adjudication

Federal article III courts can rule on the lawfulness of government action, under federal legislation or the Constitution. For asylum access related cases, this can mean ordering (enjoining) the government from applying a rule or policy; vacating (nullifying the legal basis for) a rule; or vacating an asylum determination and ordering that a new procedure be undertaken. Essentially their role is to monitor the limits of the powers granted to the executive by the legislature, and the rights of individuals and states vis-à-vis the federal government (all branches).

Immigration courts only have authority to make determinations or rulings in individual asylum (removal) cases. Appellate instances (BIA or AG) can issue precedential rulings that are binding on future immigration courts facing similar cases. Because the BIA interprets and applies regulations that pertain to DHS as well as to DOJ, the BIA's rulings can result in orders to both these agencies.

B. Independence

The federal judiciary is an independent branch of government, per Article III of the Constitution. Other than impeachment by the Senate, there is no mechanism for removing a federal judge from office.

The immigration courts must follow duly enacted laws and authoritative rulings of US courts, but are themselves part of the executive branch, within the DOJ's EOIR. This places immigration courts fully under the authority of the Attorney General, within a legal and regulatory framework established by Congress and the DOJ respectively (regulations enacted by the DOJ can be challenged in court, usually under the APA). Immigration judges and appellate immigration judges are appointed by the AG. They are tasked to decide cases without interference, but as DOJ employees are subject to dismissal and enjoy standard civil service protections.[851] DOJ traditionally operates independently of the rest of the executive branch, with broad policy guidance from the president, however this is not legally mandated.

Autonomy

The federal courts are a politically and administratively autonomous branch of the federal government. The judiciary is funded by annual Congressional appropriations, and all members of its governing authority, the Judicial Conference (see above), have lifetime tenure in their judicial office. The Chief Justice of the US, in addition to the judicial role, is the head of the managing authority of the federal judiciary.

Immigration courts are situated within the executive branch, within DOJ's Executive Office for Immigration Review (EOIR). The Attorney General appoints the Director of that office; the Chief Appellate Immigration Judge; the Chief Immigration Judge; and, through officers exercising the AG's delegated authority, all immigration judges. The Office of the Chief Immigration Judge, supervised by the

[849] https://www.justice.gov/sites/default/files/eoir/legacy/2002/08/29/BIARulefactsheet.pdf.

[850] Administrative findings of fact cannot be reviewed unless "any reasonable adjudicator would be compelled to conclude to the contrary". 8 USC 1252(b)(4)(B). Decisions of the AG to grant or deny asylum to an eligible applicant are only reviewable if "manifestly contrary to the law and an abuse of discretion". 8 USC 1252(b)(4)(D). Similarly, the initial decision that a person is ineligible for admission (and thus removable if they do not request asylum or raise a fear of persecution) is reviewable only for "manifestly contrary to law". 8 USC 1252(b)(4)(C).

[851] See https://www.justsecurity.org/107708/purges-doj-fbi-civil-service-laws/.

Director, is responsible for operational and docket management; scheduling, training and performance evaluation of the immigration judges; and adjudicating cases as an individual immigration judge.[852]

DHS officers who conduct asylum interviews (USCIS) or credible fear screening interviews (usually USCIS, allegedly also CBP) perform a quasi-judicial function in that their recommendations establish the presumptions from which the immigration judge will proceed to assess the removal case. Each officer's recommendation is reviewed and confirmed by a supervisor in the responsible local office. As they are producing a recommendation rather than a final decision, local offices have relatively wider autonomy than immigration courts in carrying out their duties, but are subject to a common set of rules and training materials, and centralised administrative supervision within their DHS subagency.

Financial independence

Both the federal court system and the immigration court system within the DOJ are funded by Congressional appropriations. The Judicial Conference requests, and Congress establishes, the annual budget for the federal courts, which then spend and manage the funds.

The immigration courts and the other DHS and DOJ subagencies involved in asylum (eg EOIR, CBP, ICE) are similarly funded by annual Congressional appropriations.{**cite report listing EOIR, CBP, ICE, etc, annual expenditures?} These appropriations, separately enacted but reflecting a budget framework agreed between Congress and the President, are detailed to the subagency level and further. Once appropriated, fiscal management responsibility lies with the respective agency and subagency directors. Congress retains oversight authority over the use of allocated funds.

Human resource

The federal and the immigration court systems both operate independently in terms of human resource decisions, except for staffing and oversight where the immigration courts are largely under executive branch control. Both have a central, internal management body led by a chief judge. The executive branch has little structural influence over the federal courts, apart from nominating new judges as needed, due to the courts' constitutional independence and the lifetime tenure in office of the judges, particularly the Chief Justice. As the EOIR is part of the DOJ, the AG as a presidential appointee has discretion to intervene in its operations, including assigning or dismissing immigration judges.

Federal judges are nominated by the president, and confirmed by a majority vote of the Senate.[853] Once seated, federal judges may only be removed via impeachment by Congress.[854] Otherwise, the Judicial Conference and analogous conferences in each Circuit are responsible for investigating complaints of judicial incapacity or conduct detrimental to operation of the courts,[855] and can temporarily stop assigning cases to a judge, or issue public or private censure or reprimands, or ask an incapacitated judge to retire.[856] In general there is no question of promotion or transfer for federal judges, due to lifetime appointment to a particular court, though the president may nominate them to another, higher instance court. Assignment of judges to cases is a responsibility of the various Circuit and District courts, supervised by the circuit council if needed.

Immigration Judges and Appellate Immigration Judges, as well as other DOJ and DHS officers involved in asylum access and adjudication, are executive branch employees, with standard civil service employment protections. They are however answerable to a management hierarchy headed by a cabinet secretary (here, the AG and the DHS Secretary). Once that secretary is confirmed in office (by majority Senate vote), their authority over the department is plenary within the limits of the law. Immigration Judges are appointed by

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852 8 CFR 1003.9(b).
853 There is an unwritten norm that the two senators from the state where the judge would sit should acquiesce in the nomination before it is formally sent to the judiciary committee for evaluation and recommendation, then to the full Senate for confirmation.
854 See US Constitution Articles 1(2) (House of Representatives impeaches), (3) (Senate holds a trial, with 2/3 vote needed for conviction and removal from office), 3(1) (federal judges "hold their Offices during good Behaviour").
855 28 USC 351(a).
856 28 USC 354(a)(2).

the AG to exercise the delegated powers of the AG but also to "exercise their independent judgment and discretion".[857] The responsibilities of the Chief Immigration Judge include providing "appropriate training" for immigration judges and other staff, directing the administrative management of the immigration court dockets and judicial assignments, and performance evaluations of the courts and other activities of the Office.[858]

Internal independence

Immigration judges and federal judges are independent in the sense that they are tasked with using their independent judgment to interpret and apply the law, and share (with their fellow judges) administrative management authority over the courts where they serve. Their judicial decisions are subject to review by appellate bodies (Circuit courts and the BIA), which can overturn their decisions and impose interpretations of law on first instance judges. Immigration court judges exercise less independence than federal District judges, as in addition to having to follow precedent set by higher judicial instances, immigration judges are bound by instructions and guidelines promulgated from time to time by the DOJ.

Implications of various aspects of independence

Federal courts remain formally and to a considerable degree in fact independent of the other branches of the US government, or of any international authority. They have tended to show deference to the executive's interpretations of law in the area of asylum access, as in other areas of administrative regulation and practice. The courts have however mostly declined to follow novel reinterpretations of asylum related statutes relied on by the executive to enact new barriers to asylum, and have continued to require the executive to adhere to the procedural requirements of the APA in developing aslyum related policies, for the most part even under purportedly urgent circumstances. Such external influence as is exerted on the federal courts comes from the political nature of the judicial appointment process, whereby the party in control of the political branches tries to install judges sympathetic to its policy priorities, and from the courts' reliance on the executive branch to obey and enforce their orders.

In the asylum determination system, all actors are within the executive branch and responsible to political leadership, in the persons of the AG and the DHS Secretary. The Secretary has ultimate authority over the procedures immigration and asylum officers follow, while the AG has both procedural and administrative authority over the immigration court system, as well as final authority over interpretations of law to be applied by the BIA and the immigration courts. The governing regulations concerning asylum procedures are usually promulgated by the two departments (DHS and DOJ) in tandem. This can lead to a structural tendency for the immigration courts to approve interpretations of law and applications of policy put forward by DHS. The AG can also influence adjudication through the profile of the lawyers selected to serve as immigration judges, indicated for example by their professional backgrounds, or simply by the rates at which they grant protection.

Independence of the whole judicial system

The federal judicial system is independent, while the immigration judicial system is much less so. The federal courts are at times a locus of pressure from the political branches, but in asylum related jurisprudence as in other fields, the judges seem to continue to operate independently according to their own understandings of law. Whatever political influence they are subject to comes mostly in the form of judges having been selected for nomination due to their judicial approach matching the political priorities of the president then in power.

Immigration judges are also expected to exercise independent judicial reasoning, but as representatives of the Attorney General they can be overruled, and as employees can be removed and replaced. The AG has increasingly exercised these prerogatives, to the point where BIA policy and DHS/DOJ positions taken in federal court regarding new asylum barriers are often similar. For example, the BIA has issued a

[857] 8 CFR 1003.10(a), (b).
[858] 8 CFR 1003.9(b).

precedential decision that immigration judges may no longer hear requests for release from detention on bond, reiterating the legislative interpretation proposed by DHS lawyers in federal court. Approximately 100 of 700 immigration judges were removed from their posts in 2025-26, and there are about 25% fewer in post in early 2026 than there were at the end of 2024.[859] Regulatory changes introduced in August 2025 authorise the hiring of lawyers without immigration related experience as temporary immigration judges.[860]

C. Centralization/decentralization

Federal article 3 courts:

- *First instance judicial or quasi-judicial body/bodies:* there are 94 District courts, each with general federal law jurisdiction within all or part of a state. They are distributed around the country more or less according to population, with at least one District court located in each state or territory.[861]
- *Second instance judicial or quasi-judicial body/bodies:* the 12 geographic (coequal) Circuit courts hear appeals from District courts located within their circuits. Circuits do not cross state lines.[862]
- *Third instance judicial or quasi-judicial body/bodies:* the US Supreme Court in Washington DC has final appellate jurisdiction over US federal law.

Immigration courts:

- *First instance judicial or quasi-judicial body/bodies:* there are 72 immigration courts located around the US and its territories, mostly in major cities or near border regions.[863]
- *Second instance judicial or quasi-judicial body/bodies:* the Board of Immigration Appeals (BIA) is located within the headquarters of the EOIR in Virginia, near Washington D.C.
- *Third instance judicial or quasi-judicial body/bodies:* BIA decisions denying asylum can be appealed, as final administrative actions, to the federal Circuit court with jurisdiction over the circuit where the first instance immigration judge was based.

Implications of the centralization/decentralization

Although the US political system is decentralised (federal), immigration and asylum are federal (central government) competences. The federal and immigration court systems are geographically dispersed but centrally administered and financed, and follow systems of binding judicial precedent whereby higher instance courts can overrule lower courts, with a central highest instance body. There are some variances in resource allocation (due for example to changes in staffing levels, or regional economic factors) that can potentially affect the quality of procedures, but the main implication of decentralised courts is the possibility for Circuit courts to diverge. District courts must follow the precedent set by their own Circuit court, and while the Supreme Court prioritises the resolution of circuit splits, especially in a changing policy landscape it is possible for federal courts applying the same laws to come to different conclusions in factually similar cases, based on their geographic location.

There is no variance across states in the structure of federal courts or immigration courts.

Implications of variations of structures between federal states/regions

Asylum access cases fall under federal jurisdiction, whether in the federal courts or immigration courts, so structures and procedures are similar nationwide. There may be some impact of political decentralisation on the appointment of federal judges: by tradition (rather than as legal obligation), federal judges have a

[859] See https://www.opb.org/article/2026/02/23/the-numbers-behind-trump-s-dismissals-of-immigration-judges/.
[860] {*see https://www.govinfo.gov/content/pkg/FR-2025-08-28/pdf/2025-16573.pdf}.
[861] https://www.uscourts.gov/about-federal-courts/court-role-and-structure/court-website-links#id-us-district-and-bankruptcy-courts.
[862] https://www.uscourts.gov/about-federal-courts/court-role-and-structure/court-website-links.
[863] https://www.justice.gov/eoir/immigration-court-administrative-control-list.

professional (and likely personal) background in the state or region where they are appointed to the federal courts. Over time, if regional political loyalties remain consistent, the members of the federal judiciary may tend to reflect those loyalties.

D. Specialization

The immigration courts within the EOIR/DOJ are specialised in immigration adjudication, including asylum. USCIS officers who conduct asylum interviews and credible fear screenings are specialised in asylum and immigration. But for asylum access adjudication in the federal courts, there is no specialisation. Federal District courts hold general jurisdiction over federal law. For asylum access adjudication, their most relevant area of expertise is US administrative law and immigration law, with constitutional law increasingly relevant as well. In practice, if cases are related, such as through involving some of the same parties and similar issues, courts will often assign the same judges who heard the earlier, related cases. Over time, this can lead to especially some Circuit judges developing a specialisation in US asylum law.

Access to specialized training in asylum

Training of adjudicators is the responsibility of the chief judges of the federal and immigration court systems. The Chief Justice of the US, as chair of the Judicial Conference, holds this responsibility as head of the federal courts. The Chief Immigration Judge (CIJ) and the Chair of the BIA are responsible for training of immigration judges and appellate immigration judges, respectively.[864] In addition to training for judges and other court staff, both court systems also make learning materials available to practitioners. The Office of the CIJ publishes the Immigration Court Practice Manual as a non-authoritative but comprehensive guide to practicing before the immigration courts; however, it may be out of date.[865]

The Federal Judicial Center, established by Congress, provides research and educational support to the federal courts.[866] One role of the Center is to develop and provide continuing education training for judges and other staff involved in court proceedings “whose participation … would improve the operation of the judicial branch”.[867] Training is provided for federal judges, including orientation training for new District judges, but this does not include specifically asylum related training.[868] The Center publishes some educational materials,[869] but training is available only to adjudicators and other staff of the federal courts.[870] The Legal Education and Research Services Division within the EOIR’s policy office implements judicial training for the immigration courts.[871] Training, including in immigration law, is mandatory for newly appointed immigration judges, with ongoing education thereafter.[872]

The executive agencies responsible for assessing affirmative asylum claims and for credible fear screening interviews prior to adjudication (USCIS), and for inspection and referrals at the border (CBP), also provide staff training programmes. Federal law requires that asylum officers have “professional training in country conditions, asylum law and interview techniques”, and be supervised by an officer who additionally “has had substantial experience adjudicating asylum applications”.[873] Accordingly, the USCIS Asylum Division requires all asylum officers to first complete a basic training programme that covers topics such as international refugee law, US asylum law, interview techniques and other asylum determination practices,[874]

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[864] 8 CFR 1003.9(b)(2) (Chief Immigration Judge); 8 CFR 1003.1(a)(2)(i)(B) (BIA Chair).
[865] https://www.justice.gov/eoir/media/1052736/dl (released 20 February 2020).
[866] 28 USC 620(b).
[867] 28 USC 620(b)(3).
[868] {*See https://www.fjc.gov/education/programs-and-resources-judges#ODJ.}
[869] See https://www.fjc.gov/education/manuals-monographs-guides.
[870] See https://www.fjc.gov/education/education-programs.
[871] https://www.justice.gov/eoir/page/file/1513996/dl. For further details of IJ training, see https://www.justice.gov/eoir/page/file/1513996/dl.
[872] See https://www.justice.gov/eoir/page/file/1513996/dl.
[873] 8 USC 1225(b)(1)(E).
[874] See https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-division-training-programs. However, this source is old (2016); it is unclear what the current status of these trainings is.

and publishes a comprehensive manual for its officers for affirmative asylum procedures.[875] CBP provides initial and ongoing training to its officers via its Field Operations Academy,[876] hosted at DHS's Federal Law Enforcement Training Center (FLETC), but the curriculum offerings focus on investigations and anti-crime enforcement, with no asylum related offerings noted in the FLETC curriculum or catalogue.[877]

Specialization of adjudicators and other professionals involved in asylum access adjudication

The specialisations of adjudicators and other lawyers (including clerks) reflect those of their courts. All lawyers employed by the federal courts must be law school graduates in good professional standing, and those who take a role in the proceedings (eg public defenders) must have federal and state bar admissions. It is typical for lawyers hired for the federal courts to have previously served as clerks for federal judges. In the immigration courts, the basic qualifications are similar, but adjudicators and supporting lawyers should have demonstrated practice experience and expertise in immigration law.

Institutionally, the actual specialisations match those indicated by law and regulations. There appears to be a discrepancy developing in 2025-26 whereby new immigration judges have professional specialisations relating to law enforcement rather than immigration law.

Implications of the (lack of) specialization for asylum access adjudication

Despite the federal courts having no particular specialisation in asylum or asylum access, the quality of their decisions regarding asylum access is generally high. These cases turn on questions of whether the government followed proper administrative procedures in enacting regulations, or whether those regulations exceeded the prerogatives granted the government by legislation, areas where federal courts often adjudicate. The circuit courts, with their panel format, and sometimes by revisiting cases at various procedural stages, ensure that multiple judges review the first instance court's main legal rulings. If questionable reasoning persists through a circuit court, it is likely that other circuits will follow a different path of reasoning in similar cases, thus inviting the Supreme Court's intervention.

Most immigration court decisions are not published, making it difficult to assess overall quality or consistency. Recognition rates appear to vary considerably across immigration judges, even those who work in the same courts.[878] Immigration courts are relatively specialised in asylum, through the significant portion of their dockets that deal with claims for withholding of removal. However the asylum specialisation as such rests with USCIS. USCIS's role in asylum having effectively ceased, but for credible fear interviews, the immigration court system as it faces the asylum seeker now has less expertise in asylum than previously. It appears the immigration courts' expertise in asylum or immigration may also be decreasing, as judicial vacancies created by 2025 removals are being filled in part by lawyers without prior immigration law experience, including assignment of military lawyers as temporary immigration judges.

E. Human resources

Historically, the demographics of the federal judiciary have tended towards male, white (European descent), lawyers. In 1990, 74 Article III judges were female (7%) and 980 male (93%); six identified as Asian American, 56 Black (5.3%), 30 Hispanic (2.8%), one Native American and 960 white (91.1%).[879] As of 2024, 484 were female (33.2%) and 973 male (66.8%); 61 Asian American (4.2%), 172 Black (11.8%), 110 Hispanic (7.5%), five Native American (0.3%), 28 mixed ethnicity or other (1.9%) and 1,081 white (74.2%).[880] In 2024, the average age of a newly appointed Article III judge was 51 years, and the average

[875] https://www.uscis.gov/sites/default/files/document/guides/AAPM.pdf.
[876] See https://www.help.cbp.gov/s/article/Article-1258.
[877] See https://www.fletc.gov/training-catalog.
[878] See https://tracreports.org/immigration/reports/judgereports/. For example, very approximately (based on author's scan of the numbers), variances in large courts appear to indicate a standard deviation in rejection rate around +/- 15%.
[879] See https://www.fjc.gov/history/exhibits/snapshots-federal-judicial-history-1790-1990.
[880] See https://www.americanbar.org/news/profile-legal-profession/; https://www.americanbar.org/news/profile-legal-profession/judges/. See also the ABA's more detailed 2023 report, https://www.americanbar.org/content/dam/aba/administrative/news/2023/potlp-2023.pdf.

age of Article III judges overall was about 68.[881] The median age range for District judges is 60-64 years, and for Circuit judges 70-74.

Immigration judge hiring increased fairly steadily (excluding 2021, due to the Covid-19 pandemic) from 56 in 2016 to 104 in 2022, then 133 in 2023 and 46 in 2024, when the total number of immigration judges peaked at 735.[882] In October 2025 the EOIR announced the hiring of 36 new immigration judges (11 permanent and 25 temporary), 31 male and 5 female (all temporary).[883] A large majority of the new IJs had prior experience with DHS, the military, or federal or state prosecution offices; a few (less than 10%) had experience as public defenders or private lawyers.[884] Hiring since FY 2025 has fallen short of replacement level, with 557 immigration judges in place as of Q1 FY 2026, 25 of them installed in 2025-26.[885]

Selection and appointment

Federal article III judges are nominated by the President and confirmed by the Senate (majority vote). The American Bar Association provides a recommendation on the capabilities of nominees; it is not a formal part of the process but is usually given serious consideration by the President and Senate. The process is similar for circuit and Supreme Court judges. Magistrate judges, who hear some civil cases by consent of the parties and otherwise preside over pretrial motions and make recommendations to the court, are selected and appointed by the separate District courts.

The AG hires lawyers to serve as administrative law judges, to exercise the AG's delegated powers in immigration courts.[886] Hiring is centralised at the DOJ's Office of Attorney Recruitment & Management,[887] which advertises for Immigration Judge and Appellate Immigration Judge positions along with job advertisements for its other departments, followed by a normal civil service hiring process. Lawyers hired as immigration judges (including appellate) must have a degree in law; be members in good standing of the bar of the US or one of its states or territories; and have additional experience as litigators or adjudicators in adversarial proceedings in an civil, criminal or military administrative law context.[888]

Implication of the characteristics of adjudicators and their appointment system

Historically, federal judges have predominantly been white men, appointed by a president and confirmed by a senate with similar demographic characteristics. Doctrinally they have tended to favour textualist canons of legal interpretation, and until the late 1930s the Supreme Court consistently invoked the Constitution to restrain efforts to expand the powers of the political branches of the federal government over economic and social governance. From about 1950 to 1980 the federal courts acted more to expand political and social rights, particularly in matters of civic equality, at times in tandem with efforts by the political branches, and in times leading policy development. Since about 1980 the courts have reverted more towards textualism and restraint, albeit still with much more deference towards Congress than before 1940, and increasingly since about 2000 with noticeable deference also towards the office of the President. Diversification of the federal bench has increased since the 1950s, alongside experimentation with more expansive (purposive) interpretations of law, however since about 1980 the trends have diverged, with demographic diversity continuing to increase but jurisprudence reverting in a more traditional, textualist direction. Since about 2010 demographic diversity has increased during the Obama and especially the Biden administrations, while decreasing during the Trump administrations. The connection of these trends to asylum access adjudication is tenuous, as at the federal level the questions before the courts focus more

881 See https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges.
882 https://www.justice.gov/eoir/media/1344911/dl.
883 DOJ/EOIR Notice, "EOIR Announces 11 Immigration Judges and 25 Temporary Immigration Judges", 24 October 2025, https://www.justice.gov/eoir/media/1415981/dl.
884 DOJ/EOIR Notice, "EOIR Announces 11 Immigration Judges and 25 Temporary Immigration Judges", 24 October 2025, https://www.justice.gov/eoir/media/1415981/dl.
885 https://www.justice.gov/eoir/media/1344911/dl.
886 8 CFR 1003.10(a).
887 https://www.justice.gov/oarm.
888 See https://www.justice.gov/legal-careers/opportunities-experienced-attorneys.

on the appropriate degree to which the executive may exercise powers within the broad restraints imposed by the Constitution and legislation, than on asylum or immigration as such.

In the immigration courts, appointments and jurisprudence more closely reflect the priorities of the Attorney General (a presidential appointee). Historically, immigration judges have tended to be lawyers with prior experience in immigration law, whether through private practice, NGOs, or in other government departments. In the 21st century, this profile has grown to increasingly reflect immigration law enforcement backgrounds, until diversifying somewhat from 2021-2023.[889] Empirical studies have correlated gender, professional background, and ideological convergence with the executive administration with case results: women tend to grant protection more frequently than men; IJs with a background in immigration enforcement deny protection more ofthen than those without that background; and IJs' decisions appear to be influenced by the policy preferences of the administration in power at the time.[890]

Clerks, or experts supporting the adjudication function

Federal courts employ judicial clerks for one or two year terms, as well as career staff attorneys. Judges select their own clerks, who are usually recent JD graduates or early career attorneys. Staff attorneys are experienced lawyers, permanent employees of the US Courts. The Administrative Office of the United States Courts (AO) manages the recruiting and hiring of federal judicial clerks and staff attorneys, via the OSCAR online portal.[891] Typically, clerks assist their judges in writing judicial opinions, while staff attorneys consult to judges, performing legal research tasks or advising on unclear points of law. Staff attorneys also assess incoming case files based on the issues raised and case complexity, and oversee judicial clerks assigned to draft more challenging opinions.

Immigration courts:

- *First instance judicial or quasi-judicial body/bodies:* immigration courts are chronically under-resourced, and this extends also to human resources. Each immigration court is managed by an Assistant Chief Immigration Judge. Immigration judges have clerks, usually one (occasionally two) per immigration judge in the larger courts in major metropolitan areas (a new IJ might share a clerk temporarily with another IJ).[892] In smaller courts in more remote locations, clerks may rotate among IJs, or might assist multiple IJs, or legal administrative specialists might at times support judges in a clerk's role.[893]
- *Second instance judicial or quasi-judicial body/bodies:* BIA members are supported by clerks, known as Attorney Advisors. These are qualified lawyers, with a juris doctor (JD) degree and a license to practice in at least one state or federal jurisdiction.[894] They are hired by the DOJ on the national civil service scale, under the budget authorised by the Director of the EOIR.[895] Duties include analysing case records, researching and addressing questions of law or procedure posed by BIA members, and drafting proposed BIA opinions.[896]

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889 Musalo, K., et al., With fear, favor, and flawed analysis: Decision-making in U.S. Immigration Courts, 65 *Boston College Law Review* 2743-2800 at 2755-56 (2024) (until 2021 "a majority of judges" were previously employed by DOJ and DHS and its predecessor agencies, whereafter about 1/3 came from a governmental background not related to immigration, and about 1/4 each from immigration enforcement and private practice).
890 See Musalo, K., et al., With fear, favor, and flawed analysis: Decision-making in U.S. Immigration Courts, 65 *Boston College Law Review* 2743-2800 at 2759-64 (2024).
891 See https://oscar.uscourts.gov/about.
892 For a staff directory of the immigration courts, provided by the American Immigration Law Association (AILA) in April 2022, see https://www.aila.org/library/eoir-provides-ocij-staff-directory. Temporary sharing of clerks can be inferred from a March 2023 staff directory available at https://www.aila.org/files/o-files/view-file/FBC05E9B-45F6-4660-A3F1-DC5FF86ABE9C.
893 See https://www.aila.org/library/eoir-provides-ocij-staff-directory.
894 See https://www.usajobs.gov/job/872911200.
895 8 CFR 1003.1(a)(6).
896 See https://www.usajobs.gov/job/872911200.

Interpretation service

The AO is required by law to determine necessary standards for certified interpreters,[897] "in judicial proceedings instituted by the United States".[898] However in asylum access cases in the federal courts interpretation is generally not necessary, as individual applicants do not participate in hearings.

Interpretation is provided at government expense in immigration courts, to persons whose English language ability "is inadequate to fully understand and participate in removal proceedings".[899] Those who anticipate needing interpretation must request it at the main calendar hearing, orally or by written motion.[900] In practice, immigration interpretation has been criticised as inadequate to the task, attributed in part to the absence of certification programmes equivalent to those the federal courts require.{*cite} Time and resource pressures, inadequate training specifically for asylum interpretation, lack of translators for uncommon languages, and the use of remote interpretation particularly by telephone, all can reduce the effectiveness of interpretation in immigration courts. The impact is compounded by the fact that subsequent review by immigration judges and appellate instances do not take new testimony, but rather proceed from a written record of the previous hearings, as interpreted into English.

Quality and availability of human resources

As a general matter, the federal courts experience caseload and resource pressures, but outside of a few discrete case types (barriers), these pressures do not particularly come from asylum access related litigation. The exceptions are habeas corpus claims relating to detention (right to a bond hearing), and claims of arbitrary arrest or denial of due process rights. Otherwise, cases challenging barriers to accessing asylum do not make up a significant proportion of the work of federal District courts. Federal courts also are not subject to the time limits and guidelines applied to immigration courts by legislation and DOJ regulations. Employment as clerks or attorneys in the federal court system is seen as a significant professional accomplishment, which ensures the federal courts of a high quality pool of applicants to hire from. The judges in each court location have some ability to tailor specialisation to anticipated needs, such as in immigration and asylum law, due to their relative autonomy in hiring clerks and (per court location) attorneys, and through training programmes.

The US immigration courts have been chronically under-funded throughout the time period studied in this report. Among other issues, this has limited the availability of human resources, both IJs and supporting staff. In 2018, the Attorney General introduced metrics for IJs to achieve, for example requiring each judge to complete at least 700 cases annually, with a remand rate less than 15%, in order to receive a satisfactory annual performance evaluation.[901] Despite this directive aimed at enhancing speed and quality of decisions, immigration court backlogs continued to increase. Especially since 2025, alongside reductions in experienced staff and a general degradation in the qualifications of lawyers available to the DOJ as a whole, a significant proportion of immigration judges have left or been removed from their posts, and availability of supporting staff has concurrently decreased. Nominally, IJs and their supporting legal staff are specialised in immigration law or US administrative law. Since 2025, however, the mission of the immigration courts has shifted towards explicit instructions to order deportations, reflected in a marked change in the professional backgrounds of IJs and staff towards a prosecutorial approach and expertise in logistics, better suited to those with experience as lawyers in DHS or military branches. Time lags between departures of staff and securing replacements have further contributed to shortages of experienced human resources that have contributed to persistently high case backlogs.

[897] 28 USC 1827.
[898] For details see https://www.uscourts.gov/court-programs/federal-court-interpreters.
[899] EOIR Policy Manual, Part II, 3.10, https://www.justice.gov/eoir/policy-manual-eoir/part-II/icpm/chapter-3-10.
[900] EOIR Policy Manual, Part II, 3.14(o)(1), https://www.justice.gov/eoir/policy-manual-eoir/part-II/icpm/chapter-3-14.
[901] https://www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf.

Implications of human resources

Federal courts and immigration courts both face challenges relating to shortages of human resources. These challenges are considerably more severe in the immigration courts. The independent status of the federal judicial branch has engendered a level of stability in staffing that, alongside the ability of the Judicial Conference to periodically rebalance judicial and staff assignments to reflect caseloads across the various courts, mitigates the impact of persistently high caseloads and limited budgets authorised by Congress. The federal court system is nonetheless strained by some aspects of asylum related litigation, such as the many thousands of habeas corpus cases raised in response to the DOJ's 2025 policy change removing IJs' jurisdiction to hear applicants' requests for release from detention pending the outcome of their immigration cases.

Immigration courts are far more impacted by staff shortages and relative lack of subject matter expertise. With no significant changes in funding for the EOIR over the period studied in this report, alongside large increases in numbers of persons applying for asylum or subject to removal proceedings, the quality of proceedings has declined significantly even as the case backlog has grown. Removal hearings are impeded by insufficient support from interpreters, administrative staff, and clerks or lawyers to support the IJs' work. Studies of decision quality in the 2020s have found that decisions are often cursory, lacking in relevant legal reasoning; federal judges have levelled such criticisms in appellate opinions for as long as the immigration court system has been in place, but insofar as IJ decisions have been made publicly available, the issue seems to be increasingly pertinent in recent years. Partly demonstrative of the inconsistent quality of decisions, the variance in recognition rates between individual IJs, even those who work in the same location, can be extreme.[902] Since 2025 there has been a marked tendency for IJs with relatively high recognition rates to be removed from their posts.

F. Tools supporting adjudication

First instance judicial or quasi-judicial body/bodies: Immigration courts

The primary case management platform for the immigration courts is ECAS (EOIR Courts & Appeals System), introduced in July 2018 and now mandatory for all parties. ECAS supports the full case life cycle including electronic filing, maintaining electronic Records of Proceedings (eROPs), preparing case information, and conducting hearings.[903] ECAS provides a Case Portal for attorneys and accredited representatives, a DHS Portal for government counsel, and a Respondent Access Portal for unrepresented applicants.[904]

Interagency information sharing is facilitated through MOUs/MOAs — notably between ICE and other federal agencies — while programmes such as the Criminal History Information Sharing (CHIS) and the Biometric Identification Transnational Migration Alert Program (BITMAP) feed information into immigration proceedings, though judges have limited visibility into how that information was gathered or verified.[905]

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[902] For year-by-year tables of asylum denial rates of individual immigration judges, see https://tracreports.org/immigration/reports/judgereports/.

[903] EOIR – ECAS Information Page https://www.justice.gov/eoir/ECAS; EOIR – ECAS for Attorneys and Accredited Representatives https://www.justice.gov/eoir/ecas-attorneys-and-accredited-representatives.

[904] EOIR – ECAS for Attorneys and Accredited Representatives https://www.justice.gov/eoir/ecas-attorneys-and-accredited-representatives.

[905] IRS – ICE MOU on Taxpayer Information Sharing https://www.irs.gov; FOIA – Cornell LII https://www.law.cornell.edu/uscode/text/5/552.

Immigration courts use Westlaw and LexisNexis for research, with AI features in these platforms currently disabled for judicial users.[906] Country conditions databases (US State Department Country Reports, UNHCR guidance) are consulted but are not integrated into ECAS.[907]

Second instance judicial or quasi-judicial body/bodies: Board of Immigration Appeals

The BIA uses ECAS for filing and records management, but its adjudication is fundamentally paper-based: the BIA decides appeals through written record review, hearing oral arguments only rarely.[908] The majority of cases are decided by a single Board Member under streamlining procedures adopted in 2002.[909] Legal research tools (Westlaw/LexisNexis) are available under the same restrictions as at first instance.[910] Like the first instance immigration courts, the BIA is part of the EOIR (DOJ), so participates in the same information sharing within DOJ and with DHS. There is no independent information exchange mechanism with bar associations except for attorney discipline purposes.

Third instance judicial or quasi-judicial body/bodies: Federal Circuit courts

The backbone IT system for the federal courts is CM/ECF (Case Management/Electronic Case Files) and PACER (Public Access to Court Electronic Records), containing over one billion retrievable documents across all federal courts.[911] Federal courts operate under separate agreements for courthouse security (with the US Marshals Service, Federal Protective Service, and the General Services Administration).[912] International information sharing is facilitated through Mutual Legal Assistance Treaties (MLATs) (which the US has with 65 individual countries, plus an EU-wide agreement), with the Attorney General serving as Central Authority on the US side.[913] Letters rogatory are available once formal proceedings have commenced, while the CLOUD Act (2018) modernised cross-border data access.[914]

Among these tools, describe the functioning, role, and implementation of IT tools supporting asylum access adjudication.

First instance judicial or quasi-judicial body/bodies: Immigration Courts

ECAS is the central IT tool, managing all electronic filing and record keeping since its full implementation across immigration courts.[915] Hearings technology includes video teleconferencing (VTC) systems for detained respondents appearing from remote facilities, and digital audio recording as the official hearing record (there is no court reporter in the usual sense).[916] Electronic evidence presentation systems are available but less sophisticated than in Article III courts. No AI adjudication tools are formally deployed

906 IAPP – US Federal Judges Discuss AI (2025) https://iapp.org/news/a/us-federal-judges-discuss-the-intersection-of-emerging-technology-ai-with-the-legal-system.
907 American Immigration Council – Computer Malfunction in Immigration Courts (2015) https://www.americanimmigrationcouncil.org/blog/immigration-courts-computer-malfunction-slows-an-already-crowded-system.
908 EOIR – Board of Immigration Appeals https://www.justice.gov/eoir/board-of-immigration-appeals.
909 EOIR – Board of Immigration Appeals https://www.justice.gov/eoir/board-of-immigration-appeals.
910 IAPP – US Federal Judges Discuss AI (2025) https://iapp.org/news/a/us-federal-judges-discuss-the-intersection-of-emerging-technology-ai-with-the-legal-system.
911 Electronic Filing (CM/ECF) – US Courts https://www.uscourts.gov/court-records/electronic-filing-cm-ecf.
912 IRS – ICE MOU on Taxpayer Information Sharing https://www.irs.gov.
913 DOJ – Mutual Legal Assistance Treaties https://www.justice.gov/criminal-oia/file-foreign-evidence-request/mutual-legal-assistance-treaties-mlats.
914 CLOUD Act – Public Law 115-141 (2018) https://www.congress.gov/115/plaws/publ141/PLAW-115publ141.pdf.
915 EOIR – ECAS Information Page https://www.justice.gov/eoir/ECAS; EOIR – ECAS for Attorneys and Accredited Representatives https://www.justice.gov/eoir/ecas-attorneys-and-accredited-representatives.
916 American Immigration Council – Computer Malfunction in Immigration Courts (2015) https://www.americanimmigrationcouncil.org/blog/immigration-courts-computer-malfunction-slows-an-already-crowded-system.

within immigration courts themselves; however, AI is used upstream by DHS in biometric screening, facial recognition, and application risk scoring.[917]

First instance judicial or quasi-judicial body/bodies (access): District Courts

Federal courts use CM/ECF/PACER, which is independently administered by the Administrative Office of the US Courts.[918] Federal courtrooms are equipped with electronic evidence presentation systems (document cameras, monitors, TrialDirector/Sanction software), real-time transcription feeds, video conferencing, and digital audio recording, all held to SOC-2-Type-2 and ISO 27001 compliance standards.[919]

Second instance judicial or quasi-judicial body/bodies: BIA

The BIA relies on ECAS for filing and records but conducts no courtroom proceedings — its adjudication is entirely through review of the written record.[920] There are no hearing-specific IT tools comparable to the first instance. No AI tools are deployed in BIA adjudication. By Q3 FY2025, the BIA had over 186,000 pending appeals and a reduced number of permanent Board Members, intensifying pressure on existing IT capacity.[921]

Third instance judicial or quasi-judicial body/bodies: Circuit courts

Like federal District courts, Circuit courts use CM/ECF/PACER. The federal judiciary's interim AI guidance (July 2025) explicitly cautions against delegating core adjudicative functions to AI.[922] However, AI experimentation is more advanced in the Circuit courts than at lower instances: the Fifth Circuit is testing whether AI could evaluate motions for extensions of time and timeliness of appeals, and several First Circuit judges are piloting AI features in Westlaw and LexisNexis.[923]

Implications of organizational tools (especially IT tools)

The organisational and IT architecture of US asylum adjudication carries several significant implications for the quality and fairness of proceedings. Its impact is less significant in the federal courts that hear asylum access cases, as those cases rarely entail presentation of witness testimony or other than documentary evidence.

First, the reliance on VTC and telephonic hearings at first instance — the level at which credibility determinations central to asylum adjudication are made — raises serious due process concerns. Research by immigration attorneys indicates that these technologies provide what has been described as an illusion of procedural fairness rather than genuine due process, with persistent problems in audio quality, connectivity, and the inability to observe non-verbal communication.[924] When combined with telephonic

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917 Columbia Undergraduate Law Review – AI and Immigration Adjudication https://www.culawreview.org/journal/surveillance-beyond-borders-how-courts-can-check-the-power-of-ai-within-the-immigration-system.

918 Electronic Filing (CM/ECF) – US Courts https://www.uscourts.gov/court-records/electronic-filing-cm-ecf.

919 US Courts – Cybersecurity Budget FY2025 https://www.uscourts.gov.

920 EOIR – Board of Immigration Appeals https://www.justice.gov/eoir/board-of-immigration-appeals.

921 BIA Appeal Timeline 2025 https://www.chidoluelaw.com/bia-appeal-timeline-2025-what-to-expect; IAPP – Judges Discuss AI (2025) https://iapp.org/news/a/us-federal-judges-discuss-the-intersection-of-emerging-technology-ai-with-the-legal-system.

922 Bloomberg Law – US Courts Experiment with AI (2025) https://news.bloomberglaw.com/us-law-week/us-courts-cautiously-experiment-with-ai-to-speed-up-their-work.

923 Bloomberg Law – US Courts Experiment with AI (2025) https://news.bloomberglaw.com/us-law-week/us-courts-cautiously-experiment-with-ai-to-speed-up-their-work.

924 Barak (2021) – Attorney Perceptions of Interpretation and Technology in Immigration Court https://journals.sagepub.com/doi/10.1177/23315024211034740.

interpretation — which is the default for indigenous languages — the compounding technical limitations can fundamentally compromise the quality of testimony upon which asylum claims depend.[925]

Second, sharing of IT infrastructure between EOIR (the adjudicator) and DHS (the prosecuting party) raises structural judicial independence concerns. This institutional IT dependency encodes the broader independence deficit: the executive branch entity that prosecutes removal cases and the quasi-judicial body that adjudicates them are not structurally separated at the information systems level.

Third, the discontinuity between IT systems at the transition from second to third instance (ECAS to CM/ECF) creates risks. Any deficiencies in the record generated through ECAS — including those caused by VTC failures, poor interpretation, or inadequate digital audio recording — travel into the appellate record and are only partially correctable at third instance, where the factual record is already frozen.[926]

Fourth, the absence of AI-assisted adjudication tools within immigration courts, coupled with the upstream deployment of AI by DHS for surveillance and risk-scoring, creates an asymmetry: AI shapes which cases reach the immigration court and how they are framed, but immigration judges themselves lack comparable analytical tools to interrogate or contextualise this information.[927]

Finally, the document sharing architecture of ECAS, while a significant modernisation from paper filing, does not integrate country conditions databases or legal research platforms into the case management workflow, requiring judges to navigate multiple unlinked systems — a limitation that compounds the pressures of a backlog exceeding 1.87 million pending cases.[928]

G. Management

As a general matter, the federal courts are self-managing as an independent branch of government, while the immigration courts are under executive authority, ultimately the Attorney General. Federal Article III judges hold lifetime appointments. Each federal District or Circuit court has a Chief Judge who, in addition to their judicial duties, serves as the administrative director of that court.

The EOIR Director, appointed by the Attorney General, serves as the senior manager overseeing all immigration court operations. The EOIR structure includes administrative personnel responsible for docket management, case scheduling, and judicial efficiency. However, the authority relationships and specific titles of these middle managers are not extensively documented in academic literature. The system operates with chief judges or hearing office administrators who oversee court operations at individual immigration court locations, though their specific management functions, authority over individual judges' dockets, and influence on case outcomes remain largely undocumented in the scholarly record.

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925 Center for American Progress – Language Access in the US Asylum System https://www.americanprogress.org/article/improving-language-access-in-the-u-s-asylum-system/; Brown Political Review – Telephonic Interpretation in Immigration Courts https://brownpoliticalreview.org/misheard-and-misunderstood/.

926 US Courts – Federal Court Interpreters https://www.uscourts.gov/services-forms/federal-court-interpreters.

927 Musalo, K., Law, A., Daher, A., Donato, K., & Meiners, C. (2024). With fear, favor, and flawed analysis: Decision-making in u.s. Immigration courts. *Boston College Law Review*. https://doi.org/10.70167/dfmv7851; Raman, V., Vera, C., & Manna, C. J. (2022). Bias, consistency, and partisanship in u.s. Asylum cases: A machine learning analysis of extraneous factors in immigration court decisions. *Conference on Equity and Access in Algorithms, Mechanisms, and Optimization*. https://doi.org/10.1145/3551624.3555288; Columbia Undergraduate Law Review – AI and Immigration Adjudication https://www.culawreview.org/journal/surveillance-beyond-borders-how-courts-can-check-the-power-of-ai-within-the-immigration-system.

928 Kerwin, D.M., & Millet, E. (2023). The US immigration courts, dumping ground for the nation's systemic immigration failures: The causes, composition, and politically difficult solutions to the court backlog. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024231175379; American Immigration Council – Computer Malfunction in Immigration Courts (2015) https://www.americanimmigrationcouncil.org/blog/immigration-courts-computer-malfunction-slows-an-already-crowded-system.

Bodies' managers and middle managers

- *First instance judicial or quasi-judicial body/bodies:* Immigration Courts

Each immigration court location is headed by an Assistant Chief Immigration Judge (ACIJ) who oversees daily court operations, while the national system is coordinated by the Chief Immigration Judge (CIJ), responsible for the general supervision and direction of all immigration courts. Both roles are additional to their ordinary duties as immigration judges.

- *Second instance judicial or quasi-judicial body/bodies:* Board of Immigration Appeals

The BIA is also housed within the Department of Justice's EOIR structure, maintaining the same organizational location and legal classification constraints as first-instance immigration courts.[929] The BIA is headed by a Chair, who serves as the chief administrative officer of the Board, appointed by the Attorney General. The Chair assigns cases to individual Board members or three-member panels, determines based on Board members' recommendations which cases merit panel review versus single-member summary disposition, and establishes internal operating procedures. Vice Chairs assist the Chair and may assume the Chair's functions in their absence. Individual Board members (appellate immigration judges) review and decide appeals. In addition to judges, the BIA has administrative personnel who manage caseload, scheduling, and administrative functions.

- *Third instance judicial or quasi-judicial body/bodies:* federal Circuit courts

Federal circuit courts maintain distinct management structures with chief judges, circuit executives, and case management offices responsible for docket administration. Each circuit is headed by a Chief Judge — the most senior active judge under 65 years of age who has served at least one year — who presides over administrative matters, chairs the judicial council, and manages circuit operations. A Circuit Executive serves as the chief administrative officer, responsible for personnel management, budgeting, facilities, and court operations. Clerk of Court offices manage case docketing, scheduling, and procedural compliance. Staff Attorneys (also known as central staff or motions attorneys) screen incoming petitions for review, prepare memoranda for judges, and in some circuits (notably the Ninth Circuit) perform an initial "inventory" by weighing cases by type, issue, and difficulty after briefing is complete.

Direct or indirect influence on asylum access adjudication

- *First instance judicial or quasi-judicial body/bodies:* Immigration Courts

Immigration court managers' direct influence operates through docket management, case scheduling, and administrative directives. The dedicated docket system, introduced by the Biden administration to expedite asylum case processing, exemplifies explicit managerial intervention: managers set time limits for asylum case decisions, constrain judicial capacity allocation, and route cases to create administrative efficiency. Research demonstrates that this system achieves speed objectives, but at the expense of fairness and accuracy, with cases on the dedicated docket experiencing substantially lower asylum grant rates.[930] Administrative decisions about judge assignment to specific dockets, allocation of support staff, and availability of interpreters constitute further direct interventions affecting case outcomes. Docket management authority is particularly significant because IJs' lack of standard judicial authorities prevents immigration judges from managing their own dockets effectively and creates dependencies on administrative personnel for scheduling, delay management, and case flow.[931] Administrative decisions about case scheduling, hearing frequency, and docket composition directly affect applicants' access to

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929 Krishnan, J. K. (2022). Facts versus discretion: The debate over immigration adjudication. *Social Science Research Network*. https://doi.org/10.2139/ssrn.4206176.

930 Freund, D., & Weng, W. (2024). The dedicated docket in U.S. immigration courts: An analysis of fairness and efficiency properties. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3670865.3673541.

931 Kerwin, D.M., & Millet, E. (2023). The US immigration courts, dumping ground for the nation's systemic immigration failures: The causes, composition, and politically difficult solutions to the court backlog. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024231175379.

counsel, preparation time, and likelihood of successful representation—factors that substantially influence asylum outcomes.[932]

Immigration judges experience indirect managerial influence through career advancement, assignment patterns, and potential sanctions based on decision patterns. Judges with law enforcement backgrounds or higher denial rates may receive favourable assignments or implicit expectations that their decision making aligns with executive branch enforcement priorities.[933] The threat of reassignment or reassignment itself—a documented practice affecting immigration judges—constitutes an indirect management mechanism influencing decision making.[934]

A 2022 analysis of approximately 6 million immigration court proceedings found that 58.54% of decision variability could be explained through partisanship and inter-judge cohort consistency—factors that indicate judges' responses to political and administrative pressures rather than case specific merits.[935] This finding contradicts fundamental commitments to independence and due process, suggesting that managerial and administrative pressures shape substantive asylum decisions,[936] and that judges may respond to perceived administrative and political expectations regarding appropriate grant rates.[937]

- *Second instance judicial or quasi-judicial body/bodies:* Board of Immigration Appeals

When an appeal is made to the BIA, a preliminary administrative decision by an individual Board member determines whether it will receive full panel review versus summary disposition. This decision directly affect appellants' opportunity for substantive reconsideration of their case. However, academic literature does not provide specific documentation of explicit management policies affecting case disposition.

BIA managers, designated and supervised by the Chair, can influence asylum outcomes through case assignment patterns, panel composition, and prioritisation decisions affecting which cases receive full appellate review. Assignment of judges to panels reviewing particular types of cases (e.g., persecution claims, particular country conditions) enables managers to influence outcomes through selective judge assignment.

The absence of documented performance metrics suggests less potential for administrative pressure at the BIA than on immigration courts, though the BIA's hierarchical position allows managers to establish review standards and deference expectations affecting appellate outcomes. Academic literature does not document explicit performance based reassignments at the BIA level, but the organizational hierarchy creates opportunities for indirect influence.

- *Third instance judicial or quasi-judicial body/bodies:* federal Circuit courts

Circuit courts manage their caseloads through procedural mechanisms including briefing schedules, oral argument assignment, and opinion assignment to judges. Panels are assigned in part for efficiency, so judges with experience with a particular set of parties or issues are more likely to be assigned to similar

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932 Services, R. (2015). *Unlocking human dignity: A plan to transform the US immigrant detention system.* https://doi.org/10.14240/JMHS.V3I2.48.

933 Musalo, K., Law, A., Daher, A., Donato, K., & Meiners, C. (2024). With fear, favor, and flawed analysis: Decision-making in u.s. Immigration courts. *Boston College Law Review.* https://doi.org/10.70167/dfmv7851.

934 Kerwin, D.M., & Millet, E. (2023). The US immigration courts, dumping ground for the nation's systemic immigration failures: The causes, composition, and politically difficult solutions to the court backlog. *Journal on Migration and Human Security.* https://doi.org/10.1177/23315024231175379.

935 Raman, V., Vera, C., & Manna, C. J. (2022). Bias, consistency, and partisanship in u.s. Asylum cases: A machine learning analysis of extraneous factors in immigration court decisions. *Conference on Equity and Access in Algorithms, Mechanisms, and Optimization.* https://doi.org/10.1145/3551624.3555288.

936 Raman, V., Vera, C., & Manna, C. J. (2022). Bias, consistency, and partisanship in u.s. Asylum cases: A machine learning analysis of extraneous factors in immigration court decisions. *Conference on Equity and Access in Algorithms, Mechanisms, and Optimization.* https://doi.org/10.1145/3551624.3555288.

937 Raman, V., Vera, C., & Manna, C. J. (2022). Bias, consistency, and partisanship in u.s. Asylum cases: A machine learning analysis of extraneous factors in immigration court decisions. *Conference on Equity and Access in Algorithms, Mechanisms, and Optimization.* https://doi.org/10.1145/3551624.3555288.

panels. Unlike immigration courts and the BIA, federal courts are not subject to executive branch performance metrics.

Professional performance measures in place

Article III judges (District, Circuit, Supreme) are part of a constitutionally independent branch of government and hold lifetime appointments. They are not subject to performance oversight except by higher federal instances, and by the Judicial Conference for allegations of serious misconduct.

Immigration judges are subject to performance metrics emphasising speed (and possibly rejection rate, informally), and embedded within a law enforcement agency with institutional interests in restrictive immigration enforcement. Managers at the first instance exercise direct influence through docket management and administrative directives, as well as indirect influence through career implications and implicit performance expectations.[938] The Board of Immigration Appeals, though not subject to performance metrics, is also constrained in its independence by its location within the EOIR (DOJ). Judges of either instance can be appointed or replaced at the discretion of the AG.

- *First instance judicial or quasi-judicial body/bodies:* Immigration Courts

Explicit performance measurement systems in immigration courts focus on case completion rates and processing speed. The system's emphasis on "judge teams" and productivity metrics reflects administrative concerns about eliminating the backlog of pending cases rather than adjudication quality.[939] The EOIR tracks "judge productivity" metrics including cases decided per judge per year, average days to disposition, and backlog reduction targets.[940] These metrics dominate performance assessment, with limited measurement of decision quality, consistency, reversal rates, or appellate success. This creates administrative pressure on judges to process cases rapidly, incentivizing decisions that reduce docket delays regardless of complexity or applicant circumstances.[941] Studies examining IJ decision making patterns identify incompetence, bias, and failure to analyse applicable legal standards,[942] patterns potentially exacerbated by performance metrics discouraging thorough analysis.

The dedicated docket system intensified the use of performance metrics, establishing target timeframes for asylum case decisions and measuring success by speed of disposition.[943] Judges face incentives to issue decisions rapidly, potentially sacrificing thorough fact finding or legal analysis.[944] Administratively imposed speed targets correlate with reduced asylum grant rates, and limit applicant access to counsel,[945] showing

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[938] Kerwin, D.M., & Millet, E. (2023). The US immigration courts, dumping ground for the nation's systemic immigration failures: The causes, composition, and politically difficult solutions to the court backlog. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024231175379; Musalo, K., Law, A., Daher, A., Donato, K., & Meiners, C. (2024). With fear, favor, and flawed analysis: Decision-making in u.s. Immigration courts. *Boston College Law Review*. https://doi.org/10.70167/dfmv7851.

[939] Kerwin, D., & Kerwin, B. (2024). What will it take to eliminate the immigration court backlog? Assessing "judge team" hiring needs based on changed conditions and the need for broader reform. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024241226645.

[940] Kerwin, D., & Kerwin, B. (2024). What will it take to eliminate the immigration court backlog? Assessing "judge team" hiring needs based on changed conditions and the need for broader reform. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024241226645.

[941] Kerwin, D., & Kerwin, B. (2024). What will it take to eliminate the immigration court backlog? Assessing "judge team" hiring needs based on changed conditions and the need for broader reform. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024241226645.

[942] Musalo, K., Law, A., Daher, A., Donato, K., & Meiners, C. (2024). With fear, favor, and flawed analysis: Decision-making in u.s. Immigration courts. *Boston College Law Review*. https://doi.org/10.70167/dfmv7851.

[943] Freund, D., & Weng, W. (2024). The dedicated docket in U.S. immigration courts: An analysis of fairness and efficiency properties. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3670865.3673541.

[944] Freund, D., & Weng, W. (2024). The dedicated docket in U.S. immigration courts: An analysis of fairness and efficiency properties. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3670865.3673541.

[945] Freund, D., & Weng, W. (2024). The dedicated docket in U.S. immigration courts: An analysis of fairness and efficiency properties. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3670865.3673541 (legal advocacy groups characterise this approach as a "denial of justice").

that performance metrics affect substantive asylum outcomes. The administrative target to issue decisions quickly necessarily reduces the level of case analysis judges can provide, directly affecting adjudication quality.[946]

The threat of reputational consequences—informal pressure based on deviation from expected productivity or grant rate norms—affects judicial behaviour even without formal sanctions. Immigration judges' status as DOJ employees means they remain vulnerable to administrative reassignment or other career consequences if their decisions significantly deviate from administrative expectations. Judges who take time for detailed case analysis or grant asylum at rates substantially above administrative expectations may face pressure to modify their decision patterns.[947] The absence of documented quality assessment metrics contributes to perverse incentives: judges can achieve high productivity ratings by issuing denials quickly (typically requiring less analysis than approvals involving discretionary determinations), even when cases involve credible persecution claims.[948]

- *Second instance judicial or quasi-judicial body/bodies:* Board of Immigration Appeals

The BIA does not operate under performance metrics comparable to immigration court completion targets. The absence of explicit performance measures suggests that BIA adjudication operates with less administrative pressure toward rapid disposition compared to immigration courts, though the BIA's location within DOJ still constrains institutional independence regardless of performance measurement systems. However, implicit performance expectations may operate through caseload management pressures: the BIA must process large caseloads with limited resources, creating conditions where speed necessarily affects decision thoroughness.

- *Third instance judicial or quasi-judicial body/bodies:* federal Circuit courts

As article 3 judges, federal Circuit judges are not subject to performance measures, scrutiny or oversight, except in cases of severe misconduct, which can result in sanction by the Judicial Conference or impeachment by Congress.

H. Caseload and delays

- *First instance judicial or quasi-judicial body/bodies:* Immigration Courts

The U.S. immigration court system, operating under the Executive Office for Immigration Review (EOIR) within the Department of Justice, bears the first instance caseload for asylum adjudication. It represents one of the most overwhelmed judicial systems in the country. Immigration courts receive less than two percent of the combined funding provided to Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) — the very agencies that feed cases into the courts — creating a fundamental mismatch between case volume and available resources.[949] Immigration judges lack the standard judicial authorities vested in Article III judges, constraining their ability to manage dockets effectively, close cases, or encourage parties to settle.[950]

[946] Freund, D., & Weng, W. (2024). The dedicated docket in U.S. immigration courts: An analysis of fairness and efficiency properties. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3670865.3673541.

[947] Raman, V., Vera, C., & Manna, C. J. (2022). Bias, consistency, and partisanship in u.s. Asylum cases: A machine learning analysis of extraneous factors in immigration court decisions. *Conference on Equity and Access in Algorithms, Mechanisms, and Optimization*. https://doi.org/10.1145/3551624.3555288.

[948] Musalo, K., Law, A., Daher, A., Donato, K., & Meiners, C. (2024). With fear, favor, and flawed analysis: Decision-making in u.s. Immigration courts. *Boston College Law Review*. https://doi.org/10.70167/dfmv7851.

[949] Services, R. (2015). *Unlocking human dignity: A plan to transform the US immigrant detention system*. https://doi.org/10.14240/JMHS.V3I2.48.

[950] Kerwin, D.M., & Millet, E. (2023). The US immigration courts, dumping ground for the nation's systemic immigration failures: The causes, composition, and politically difficult solutions to the court backlog. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024231175379.

- *Second instance judicial or quasi-judicial body/bodies:* Board of Immigration Appeals

The BIA reviews immigration judge decisions and faces its own substantial caseload pressures. In 2024, the Board decided roughly 44,785 appeals yet still had approximately 138,672 appeals pending. By Q3 of FY 2025, over 186,000 appeals were pending.[951] DOJ reduced the number of permanent BIA members by nearly half in early 2025, further concentrating pressure on remaining adjudicators and IT capacity.

- *Third instance judicial or quasi-judicial body/bodies:* federal Circuit courts

Federal Circuit courts provide review of certain BIA decisions, functioning as the third instance for asylum related appeals, managing asylum related petitions for review within their broader appellate caseloads. Research examining over 4,000 cases decided by the Circuit courts between 2002 and 2017 found that repeat exposure to asylum cases over time emboldens federal judges to assert independent judgment, even when legal doctrine would suggest deference to administrative expertise.[952] However, the Supreme Court's decision in *Patel v. Garland* substantially narrowed federal court jurisdiction, eliminating Article III review of factual findings in discretionary relief cases, effectively reducing the third-instance caseload while shifting adjudicatory authority toward the administrative bodies with weaker independence protections.[953]

Implications of caseload on asylum access adjudication

Immigration courts' caseload affects both the pace and the quality of judicial decision making. Research analysing serial position effects across nearly 400,000 asylum decisions reveals that decisions become more lenient as judges work through their daily docket,[954] reflecting judges' motivation to maintain consistency in their own adjudication rather than fatigue effects. Institutional capacity constraints create different decision-making environments that influence judicial schemas and baselines:[955] immigration judges operating under pressure to maintain case processing quotas may develop different approaches to evidence assessment and credibility determination than judges with adequate time for thorough case review.

The relationship between caseload and access to legal representation can degrade justice quality. Legal counsel represents one of the most important factors — even more important than the strength of the underlying legal claim — in influencing asylum case outcomes.[956] Yet expanding caseloads create severe barriers to representation. The dedicated docket problem exemplifies this: when lawyers face insufficient time to represent all asylum seekers, they must triage their efforts, leaving applicants on accelerated tracks to proceed unrepresented.[957] By 2017, 50% of student-run asylum clinics reported that forensic evaluation requests exceeded their capacity, up from 33% in 2016.[958]

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951 BIA Appeal Timeline 2025 https://www.chidoluelaw.com/bia-appeal-timeline-2025-what-to-expect; IAPP – Judges Discuss AI (2025) https://iapp.org/news/a/us-federal-judges-discuss-the-intersection-of-emerging-technology-ai-with-the-legal-system.

952 Stobb, M., & Kennedy, J. B. (2023). Judicial specialization and deference in asylum cases on the U.S. Courts of appeals. *American Political Science Review*. https://doi.org/10.1017/S0003055423001144.

953 Krishnan, J. K. (2022). Facts versus discretion: The debate over immigration adjudication. *Social Science Research Network*. https://doi.org/10.2139/ssrn.4206176.

954 Plonsky, O., Chen, D. L., Netzer, L., Steiner, T., & Feldman, Y. (2022). Motivational drivers for serial position effects: Evidence from high-stakes legal decisions. *Journal of Applied Psychology*. https://doi.org/10.1037/apl0001064.

955 Leibovitch, A. (2020). Institutional design and the psychology of the trial judge. *Law and Mind*. https://doi.org/10.2139/ssrn.3630325.

956 Services, R. (2015). *Unlocking human dignity: A plan to transform the US immigrant detention system*. https://doi.org/10.14240/JMHS.V3I2.48.

957 Freund, D., & Weng, W. (2024). The dedicated docket in U.S. immigration courts: An analysis of fairness and efficiency properties. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3670865.3673541.

958 Sharp, M. B., Milewski, A., Lamneck, C., & McKenzie, K. (2019). Evaluating the impact of student-run asylum clinics in the US from 2016–2018. *Health and Human Rights: An International Journal*. https://www.semanticscholar.org/paper/d1398a1fa6671dcf918d548799531e98fdfc0d01.

The majority of BIA cases are decided by a single Board member under streamlining procedures established by 2002 regulatory amendments, a procedural economy measure driven directly by caseload pressures.[959]

Delays and backlogs

Federal Article III courts address asylum access, usually via District courts hear challenges to asylum related policies or practices, or Circuit courts hearing appeals against decisions in those cases or (unusually) decisions of the BIA. Federal courts experience backlogs, but not as severely as the immigration courts; delays in federal asylum access cases result more often from procedural maneuvering by the parties, and from the wider toolset of procedural measures and orders available to federal judges, each of which can potentially be appealed to a Circuit court.

- *First instance:* Immigration Courts

There is significant backlog in the immigration courts.[960] As of 2017, the backlog of affirmative asylum cases before USCIS had increased sixfold in three years, while the overall immigration court backlog surpassed half a million cases.[961] The court backlog reached 1.87 million pending cases in the first quarter of FY 2023, representing a dramatic increase from historical levels.[962] By FY 2023, the total backlog had grown to approximately 2.5 million pending cases,[963] and 3.2 million in May 2026. Cases routinely take years to resolve.

Multiple systemic factors drive this backlog: visa processing backlogs, USCIS application processing delays, and bottlenecks in legal immigration channels feed cases into the courts; Congressional failure to pass comprehensive immigration reform has prevented policy-level solutions; the absence of a statute of limitations for civil immigration offences means cases can remain pending indefinitely; and past failures to maintain enforcement priorities have allowed enforcement surges to overwhelm the adjudicatory system.[964] The dedicated docket system, intended to expedite processing, demonstrates a fundamental trade-off: mathematical modelling shows that any two-docket system satisfying fairness criteria must be Pareto-dominated by a single-docket system, meaning unfairness between dockets becomes a necessary condition for efficiency improvement.[965]

A further perverse dynamic arises in the affirmative asylum system: applicants obtain work permits while awaiting asylum interviews, creating incentives for even applicants with weak claims to file applications to secure years of lawful work authorisation.[966] USCIS's response — Last In First Out (LIFO) scheduling —

[959] EOIR – Board of Immigration Appeals https://www.justice.gov/eoir/board-of-immigration-appeals.

[960] See eg, https://tracreports.org/phptools/immigration/backlog/ and https://tracreports.org/immigration/quickfacts/eoir.html.

[961] Acer, E., & Byrne, O. (2017). *How the illegal immigration reform and immigrant responsibility act of 1996 has undermined US refugee protection obligations and wasted government resources*. https://doi.org/10.14240/JMHS.V5I2.88.

[962] Kerwin, D.M., & Millet, E. (2023). The US immigration courts, dumping ground for the nation's systemic immigration failures: The causes, composition, and politically difficult solutions to the court backlog. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024231175379.

[963] Kerwin, D., & Kerwin, B. (2024). What will it take to eliminate the immigration court backlog? Assessing "judge team" hiring needs based on changed conditions and the need for broader reform. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024241226645.

[964] Kerwin, D.M., & Millet, E. (2023). The US immigration courts, dumping ground for the nation's systemic immigration failures: The causes, composition, and politically difficult solutions to the court backlog. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024231175379.

[965] Freund, D., & Weng, W. (2024). The dedicated docket in U.S. immigration courts: An analysis of fairness and efficiency properties. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3670865.3673541.

[966] Freund, D., Hausman, D., & Weng, W. (2025). Regulating wait-driven requests in queues. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3736252.3742527.

controls backlog size but abandons the principle that earlier arrivals receive earlier service, raising its own fairness concerns.[967]

- *Second instance:* Board of Immigration Appeals

The BIA's backlog has grown sharply, from approximately 138,672 pending appeals in 2024 to over 186,000 by Q3 FY 2025.[968] The reduction in permanent BIA members compounds this pressure. Because the BIA adjudicates almost exclusively through paper review, with oral arguments heard only on rare occasions,[969] the backlog translates into extended waiting periods for appellants seeking review of first instance decisions. The streamlining procedures allowing single-member disposition — a direct response to caseload pressures — raise questions about the thoroughness of appellate review, particularly for complex asylum claims.

Implications of backlog and delays in asylum access adjudication

Impact on asylum seekers: Delays create years of legal limbo for applicants, many of whom spend this time separated from family members abroad in dangerous situations, unable to plan their futures or achieve permanent legal status.[970] The extended waiting periods distort incentive structures: individuals without meritorious claims may file applications to obtain work permits during lengthy processing, while those with genuine protection needs remain potentially exposed to persecution. Long backlogs thus simultaneously erode system integrity and prevent timely protection for valid claimants.[971]

Impact on legal representation: The backlog compounds an already severe representation deficit. When caseloads exceed lawyers' capacity, they allocate effort to cases with better success prospects, leaving dedicated docket cases and other expedited tracks without adequate representation.[972] Legal representation increases court appearance rates and leads to more efficient proceedings,[973] so its absence generates downstream inefficiencies: unrepresented respondents are more likely to miss hearings, receive inadequate notice, and fail to present available evidence, creating additional procedural burdens for the courts.

Impact on judges and decision quality: backlogs (2.5 million pending cases as of fiscal year 2023) create administrative pressure on judges to process cases rapidly, incentivizing decisions that reduce docket delays regardless of complexity or applicant circumstances,[974] and potentially sacrificing thorough fact-finding or legal analysis. Empirical research correlates administratively imposed speed targets with reduced asylum grant rates.[975] The absence of quality metrics creates perverse incentives: judges can achieve high productivity ratings by issuing denials quickly — typically requiring less analysis than grants involving discretionary determinations — even when cases involve credible persecution claims.[976] The dedicated

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[967] Freund, D., Hausman, D., & Weng, W. (2025). Regulating wait-driven requests in queues. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3736252.3742527.

[968] BIA Appeal Timeline 2025 https://www.chidoluelaw.com/bia-appeal-timeline-2025-what-to-expect; IAPP – Judges Discuss AI (2025) https://iapp.org/news/a/us-federal-judges-discuss-the-intersection-of-emerging-technology-ai-with-the-legal-system.

[969] EOIR – Board of Immigration Appeals https://www.justice.gov/eoir/board-of-immigration-appeals.

[970] Acer, E., & Byrne, O. (2017). *How the illegal immigration reform and immigrant responsibility act of 1996 has undermined US refugee protection obligations and wasted government resources*. https://doi.org/10.14240/JMHS.V5I2.88.

[971] Acer, E., & Byrne, O. (2017). *How the illegal immigration reform and immigrant responsibility act of 1996 has undermined US refugee protection obligations and wasted government resources*. https://doi.org/10.14240/JMHS.V5I2.88.

[972] Freund, D., & Weng, W. (2024). The dedicated docket in U.S. immigration courts: An analysis of fairness and efficiency properties. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3670865.3673541.

[973] Services, R. (2015). *Unlocking human dignity: A plan to transform the US immigrant detention system*. https://doi.org/10.14240/JMHS.V3I2.48.

[974] Kerwin, D., & Kerwin, B. (2024). What will it take to eliminate the immigration court backlog? Assessing "judge team" hiring needs based on changed conditions and the need for broader reform. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024241226645.

[975] Freund, D., & Weng, W. (2024). The dedicated docket in U.S. immigration courts: An analysis of fairness and efficiency properties. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3670865.3673541.

[976] Musalo, K., Law, A., Daher, A., Donato, K., & Meiners, C. (2024). With fear, favor, and flawed analysis: Decision-making in u.s. Immigration courts. *Boston College Law Review*. https://doi.org/10.70167/dfmv7851.

docket illustrates this directly: administrative targets to decide cases quickly necessarily reduce the level of case analysis judges can provide.[977]

Impact on evidence collection: While delays could theoretically facilitate the collection of additional evidence, in practice the opposite effect predominates. Prolonged proceedings degrade the quality of available evidence: witness memories fade, country conditions change, and documentary evidence from countries of origin becomes harder to obtain. Forensic evaluation capacity is already exceeded — 50% of student-run asylum clinics reported demand outstripping capacity by 2017[978] — and the growing caseload strains this resource further. The delays also prevent timely credible fear determinations and protection assessments, allowing enforcement actions to continue against individuals with potentially valid claims.

Systemic reform implications: Scholars and practitioners broadly agree that addressing the backlog requires comprehensive structural reform, including expanded funding and staffing of immigration courts, government-funded legal representation for indigent respondents in removal proceedings,[979] establishment and maintenance of enforcement priorities and prosecutorial discretion,[980] and elimination of counterproductive asylum barriers accumulated since IIRIRA 1996.[981] Without such reform, immigration courts will continue to function less as venues for fair asylum adjudication and more as bottlenecks preventing access to protection.

I. Influence of judicial or quasi-judicial bodies on access to asylum

Impact of case law in the field of asylum access adjudication on legislation

The legislative framework for asylum, subsumed into immigration, has not changed significantly since 1996. Such refugee related legislation as has been enacted since then has focused on incremental steps towards securitisation, with little noticeable influence of case law. Prior to 2025, the REAL ID Act of 2005 clarified that the burden of proof rests on the applicant to demonstrate a nexus between persecution and a protected characteristic, and the Trafficking Victims Protection Reauthorization Act of 2008 added some protections for children in the asylum process.[982] In 2025, the Laken Riley Act expanded the classes of persons subject to mandatory immigration detention,[983] and provided a civil right of action for US states to apply in federal District court for "appropriate injunctive relief" if the DHS Secretary grants parole for temporary entry or discretionary release following immigration arrest, or fails to impose mandatory detention adjunct to expedited removal proceedings or during final removal, and harm to the state's citizens results.[984] The latter provisions were arguably in reaction to the Supreme Court's decision in *Biden v. Texas* (2022) that had acknowledged executive discretion whether to detain or release persons subject to expedited removal.

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977 Freund, D., & Weng, W. (2024). The dedicated docket in U.S. immigration courts: An analysis of fairness and efficiency properties. *ACM Conference on Economics and Computation*. https://doi.org/10.1145/3670865.3673541.

978 Sharp, M. B., Milewski, A., Lamneck, C., & McKenzie, K. (2019). Evaluating the impact of student-run asylum clinics in the US from 2016–2018. *Health and Human Rights: An International Journal*. https://www.semanticscholar.org/paper/d1398a1fa6671dcf918d548799531e98fdfc0d01.

979 Services, R. (2015). *Unlocking human dignity: A plan to transform the US immigrant detention system*. https://doi.org/10.14240/JMHS.V3I2.48; Nash, L. C. (2019). Universal representation: Systemic benefits and the path ahead. *Journal on Migration and Human Security*. https://doi.org/10.1177/2331502419866814.

980 Kerwin, D.M., & Millet, E. (2023). The US immigration courts, dumping ground for the nation's systemic immigration failures: The causes, composition, and politically difficult solutions to the court backlog. *Journal on Migration and Human Security*. https://doi.org/10.1177/23315024231175379.

981 Acer, E., & Byrne, O. (2017). *How the illegal immigration reform and immigrant responsibility act of 1996 has undermined US refugee protection obligations and wasted government resources*. https://doi.org/10.14240/JMHS.V5I2.88.

982 See https://www.congress.gov/crs-product/R48802.

983 See https://nipnlg.org/sites/default/files/2025-02/Alert-Laken-Riley-Act.pdf (DHS must detain deportable noncitizens subject to law enforcement actions for theft, or assault on a law enforcement officer, or "any crime that results in death or serious injury to another person").

984 https://www.congress.gov/bill/119th-congress/senate-bill/5/text.

Impact of case law in the field of asylum access adjudication on asylum policies

Federal regulations on asylum access have evolved in reaction to case law, particularly since 2010. With asylum procedures left largely to the discretion of the AG to develop in the absence of legislative guidance, successive executive administrations have sought to introduce more restrictive immigration policies, until they encounter judicial resistance. Case law therefore shapes policy in the negative sense, blocking an executive policy, rather than ordering the government to take positive action. The policy initiative remains with the executive, who can elect to discontinue the policy, or to modify or replace it. For example, after the third country transit ban (TCTB) was ruled unlawful,[985] the underlying policy was withdrawn and replaced with a new one that raised a rebuttable presumption of ineligibility for asylum instead of an outright ban, still on the basis of transiting a third country (later ruled unlawful).[986] Metering, previously declared unlawful as a practice,[987] was apparently reinstated by rule in the form of the CBP One app,[988] then again in the context of a border emergency declaration.[989] By contrast, the MPP ("remain in Mexico") policy was found unlawful, discontinued, reinstated by court order, then discontinued again when that order was overturned, then reinstated in its original form and allowed to stand, provisionally.[990]

Impact of case law in the field of asylum access adjudication on executive practices

In practice, that is, without enacting regulations pursuant to rulemaking processes, executive bodies have reacted to judicial rulings in asylum access cases by obeying the rulings, but also by altering practices so as to purportedly eliminate the courts' jurisdiction, and reportedly at times by evading or defying court orders. When the D.C. District court invalidated practices that were based on policy memoranda and internal agency instructions, specifically issuing training materials that conflated the credible fear interview with the asylum determination itself;[991] assigning CBP officers to perform credible fear interviews;[992] and metering,[993] the executive apparently ended those practices (although later sought to reinstate metering policies, by regulation). In 2025-26, several District courts have found that the executive improperly violated court orders to halt deportation flights on due process grounds (lack of removal hearings), or disingenuously sent flights out of US airspace before such orders could issue.

J. Judicialization of politics

In the 21st century, and increasingly over the past 10-15 years, questions of immigration and asylum policy have been debated in public but decided in the judicial system. Conflict concerning access to asylum runs along two main lines: executive vs judiciary, and within the judiciary. Judges rarely participate in public

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[985] *East Bay Sanctuary Covenant v. Garland* (9th Circuit, 6 July 2020 (amended 8 April 2021)), 45, https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf ("the 9th Circuit's longstanding caselaw makes clear that "the failure to apply for asylum in a country through which an alien has traveled has no bearing on the validity of an alien's claim for asylum in the United States").

[986] *East Bay Sanctuary Covenant v. Biden* (9th Circuit, 23-16032, 3 August 2023), https://storage.courtlistener.com/recap/gov.uscourts.ca9.344586/gov.uscourts.ca9.344586.21.0_1.pdf.

[987] *Al Otro Lado v. Noem* (9th Circuit, 23 October 2024 (amended 14 May 2025)), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/05/14/22-55988.pdf.

[988] *Al Otro Lado v. Mayorkas* (District Court for the Southern District of California, 23-cv-1367-AGS-BLM, 30 September 2024), {*https://storage.courtlistener.com/recap/gov.uscourts.casd.764598/gov.uscourts.casd.764598.90.0.pdf }

[989] *Las Americas Immigrant Advocacy Center v. DHS* (District Court for the District of Columbia, 24-cv-01702-RC, 9 May 2025), https://storage.courtlistener.com/recap/gov.uscourts.dcd.269594/gov.uscourts.dcd.269594.92.0_1.pdf.

[990] *Immigrant Defenders Law Center v. Noem* (9th Circuit, 25-2581, 18 July 2025), https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/18/25-2581.pdf. Applicants represented by the NGO that brought the suit are excepted from the application of MPP; the Circuit court narrowed the original orders of the District court, which had enjoined MPP entirely, following the Supreme Court's ruling in *Trump v. CASA* (2025).

[991] *Kiakombua v. Wolf* (District Court for the District of Columbia, 19-cv-1872-KBJ, 31 October 2020), https://storage.courtlistener.com/recap/gov.uscourts.dcd.208674/gov.uscourts.dcd.208674.84.0.pdf.

[992] *A.B.-B. v. Morgan* (District Court for the District of Columbia, 19-cv-00846-RJL, 31 August 2020), https://storage.courtlistener.com/recap/gov.uscourts.dcd.216698/gov.uscourts.dcd.216698.32.0_2.pdf.

[993] *Al Otro Lado v. Nielsen* (District Court for the Southern District of California, 17-cv-02366-BAS-KSC, 20 August 2018), https://storage.courtlistener.com/recap/gov.uscourts.casd.553300/gov.uscourts.casd.553300.166.0.pdf.

debate, but public perception of the courts can be instrumentalised in electoral politics, and thereby (i.e. by winning control of the executive by election) in executive policies. It is relatively common for political leaders, whether in the legislature or the executive branch, to criticise the judiciary, usually for impeding policy initiatives. In 2024, the Chief Justice's year end report discussed a climate of attempted intimidation of judges including several murders,[994] as well as online threats and doxing, attacks on the integrity of judges by public officials, and defiance of courts' judgments by other branches of government.[995] For the most part, sitting judges do not engage with public criticisms, or make public statements about political matters (some do so after they retire from the bench). Instead, judges express their views about the interpretations of law put forth by officers and lawyers from the executive branch, and by other judges, in their judicial opinions and in their rulings and orders.[996] These patterns are visible across many areas of US law and policy, and have become particularly pronounced around asylum and immigration. Unusually, in 2025-26, the Chief Justice has publicly admonished that the appropriate route for the executive to disagree with an adverse court ruling is to appeal it, not call for the judge's impeachment,[997] and warned against political leaders criticising judges in personal terms, rather than critiquing their judicial opinions.[998]

Restriction or expansion of the jurisdiction or competence

There has been no general update to asylum and immigration legislation since the 1996 IIRIRA. Changes enacted in 2005 and 2025 marginally restricted federal courts' jurisdiction over asylum and removals.[999] More significant changes in courts' competences and jurisdiction have come about via the judicial system, in the form of Supreme Court decisions in the areas of administrative law and general powers of the judiciary. *Loper Bright Enterprises v. Raimondo* arguably expanded federal courts' jurisdiction in administrative law (which includes immigration law), by obliging them to interpret ambiguous statutory language de novo, rather than deferring to an agency's reasonable interpretation, when assessing the lawfulness of agency action.[1000] *Trump v. CASA* removed a significant judicial competence by ruling that federal courts lack the authority to issue injunctions against government policy or action with general effect, and must restrict their orders to the parties before the court or to a court-certified class of similarly situated plaintiffs.[1001]

The overall effect has been mixed, with *CASA* removing from the judicial toolkit a remedy (universal injunctions) that had often been used to strike down barriers to asylum enacted by the executive, but Loper Bright arguably expanding federal judges' scope to review executive agencies' interpretations of law.

Legislative changes since 1996 have been much less consequential. The 2005 REAL ID Act removed courts' jurisdiction to review an immigration judge's determination that the applicant should corroborate their testimony of a fear of persecution, unless "a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable",[1002] and clarified that the truncation of federal court jurisdiction over the application of expedited removal in individual cases extends to District court actions in habeas or to compel action by an officer of the US, or to issue a writ, and that appeal to a Circuit court

[994] See e.g. Chief Justice, 2024 Year End Report of the Federal Judiciary, 5, https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf.
[995] See e.g. Chief Justice, 2024 Year End Report of the Federal Judiciary, 7, https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf.
[996] See e.g. Chief Justice, 2024 Year End Report of the Federal Judiciary, 7, https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf ("judges typically speak only through their decisions").
[997] **https://www.scotusblog.com/2025/03/chief-justice-rebukes-trumps-call-for-judicial-impeachment/.
[998] **https://apnews.com/article/supreme-court-threat-roberts-trump-judges-a79db51d40411b6f4113b431ed92c677 (or see https://www.theguardian.com/us-news/2026/mar/17/john-roberts-hostility-toward-judges).
[999] This assertion is based on a comprehensive review of legislative changes from 1996 through 2014 (the limit of the readily available online trackers). No further asylum-related legislative changes have arisen in the various other sources consulted, until the 2025 amendments discussed here.
[1000] 603 U.S. 369 (2024).
[1001] 606 U.S. 831 (2025). The court was unable to find such a power in either the 1789 Judiciary Act (the legal basis of the federal court system) or the traditional equitable jurisdiction of the English judiciary.
[1002] REAL ID Act of 2005 101(e), Public Law 109-13 (11 May 2005), 119 Stat. 302, 305 (appending to 8 USC 1252(b)(4)), https://www.govinfo.gov/content/pkg/STATUTE-119/pdf/STATUTE-119-Pg231.pdf.

is the “sole and exclusive means” for judicial review of individual CAT non-refoulement claims.[1003] The 2025 Laken Riley Act slightly expanded courts’ jurisdiction, but only so fas as to empower courts to set aside decisions to release an individual from detention or to grant bond or parole, leaving decisions to impose detention or revoke bond or parole non-justiciable.[1004]

Ways to influence policy outcomes in the field

Courts have played a strong role in shaping policy, but it is not a proactive role. Courts generally cannot compel specific action by the executive.[1005] Instead, in response to executive overstep (rules or policies that are ultra vires, or improperly enacted) the federal courts can block executive acts via vacature, or injunctions against taking action with respect to specific plaintiffs or classes of plaintiffs. In principle, this compels the executive to modify or rescind the errant policy; in practice, most federal court rulings on barriers to asylum are handed down at preliminary stages of litigation, meaning they could be superseded at a later stage, which would effectively reinstate the rule or policy. Insofar as federal courts influence policy outcomes, it is by blocking policy avenues until the executive either abandons a prospective policy, or modifies its litigation strategy or the policy such that the courts agree it is lawful, or attempts to recast it in a non-justiciable form.

Since 2025, judicial efforts to assert courts’ (negative) influence on policy outcomes relating to asylum have merged into a general debate over the limits of executive powers. The pattern of executive actions being interdicted by courts, and executive reluctance to acquiesce in the courts’ interpretations of law, is widespread but more prevalent around migration and asylum than in most other fields. There is also a developing interplay between judicial decisions and executive interpretations of law, with some courts and judges tending to espouse interpretations that agree with executive positions or, often in dissent, to suggest arguments that the executive might later raise in other courts.

Influence policy outcomes in practice

Except for habeas corpus proceedings aimed at securing bond hearings or conditional release from detention, the volume of asylum related cases in federal courts is fairly small. Since habeas applicants remain in an asylum process regardless of detention, these cases only relate to asylum access to the extent that the effects of detention, particularly on access to legal advice or representation, can degrade the quality of the asylum process to where it is arguably a sham. The immigration courts, where case volumes are high, do not exercise independent policy influence.

More broadly, by causing the executive to abandon asylum related policies, federal courts have had influence in practice. Examples include the bar on asylum applications by persons who entered the US between border points; the ‘remain in Mexico’ policy (MPP); and efforts to structurally modify asylum screening interviews and assign border enforcement officers to conduct them, all ceased following court orders. The legal effect of these and similar decisions has been to reaffirm the absolute nature of the non-refoulement provisions in US law and of the right to apply for asylum with subsequent due process, but the practical effect has been limited by subsequent executive decisions to suspend the asylum system entirely, and to engage third countries to accept persons deported from the US, rendering non-refoulement protections at best difficult to engage (litigation over both these practices is ongoing in the federal courts). In terms of law, there is little difference between general practices and immigration and asylum; in the

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1003 REAL ID Act of 2005 106(a)(1)(A) (referencing 28 USC 1361 (compelling an officer of the US to perform their duty) and 1651 (writs)), (B), Public Law 109-13 (11 May 2005), 119 Stat. 302, 310, https://www.govinfo.gov/content/pkg/STATUTE-119/pdf/STATUTE-119-Pg231.pdf. These restrictions do not affect the jurisdiction of Circuit courts under 8 USC 1252(e) to apply limited habeas review or for the D.C. District court to hear claims against the validity of the expedited removal system. Ibid., 106(a)(1)(B).

1004 2025 Laken Riley Act, 3(b)(1). This provision modified 8 USC 1226(e) to remove the bar in that provision on federal courts’ discretion to review decisions of the AG to release or grant bond, leaving the bar in place to prohibit courts from reviewing decisions to detain or to revoke bond or parole.

1005 {**case cite}

federal courts, civil cases with the government as a party usually sound in administrative law or legislative interpretation or separations of powers, regardless of the substantive field of law.

Assessing the judicialization of politics in the country

Modern judicialization of politics in the US manifests largely as judicial intervention to define the limits of executive action. Its mirror image is the politicisation of the judiciary, by which executive administrations seek to install federal judges who will advance their appointing executive's political agenda. Both are widespread across policy fields, but the judicialization of politics is particularly notable in immigration and asylum. {*In the US system, much of asylum access policy is assigned to the AG, and thus fully in the executive purview (albeit still justiciable in federal courts, to an extent). The executive also holds the power to nominate federal judges (Senate votes to/not to confirm), so over time an executive administration can increase the proportion of judges in the federal courts who are prone to agree with that executive's interpretations of asylum law and the lawfulness of asylum barriers. Political pressure directed towards immigration therefore can lead to policy responses that put pressure on the machinery of the immigration courts that apply due process to removals, and on the federal courts' capacity and willingness to maintain the availability of civil redress against unlawful or unlawfully enacted government policies.

The long term trend underlying these developments is the de facto aggrandization of power to the executive branch, enabled by the evidently decreasing ability of Congress to enact significant legislation; the ongoing restructuring of electoral districts to ensure that they remain in the control of one party; and the growing norm that the members of Congress should await and obey guidance from a president of their own party rather than initiating legislation independently (and conversely, should strongly oppose any legislative initiative emanating from a president or legislators representing the opposing political party).

III. OTHER ACTORS IN ASYLUM ACCESS ADJUDICATION

A. Bodies of the executive branch in asylum access adjudication

The main executive departments involved in asylum access are DOJ and DHS. Both are large, multi-role law enforcement agencies with divisions specialised in asylum and migration, and in human rights (understood here as US civil and constitutional rights). Since its establishment in 2002, DHS has been responsible for border security and immigration and asylum processing, while DOJ retains responsibility for adjudication, in the EOIR. Within DHS, the main subagencies engaged with asylum and immigration are CBP (border processing), ICE (inland immigration enforcement) and USCIS (asylum determination and credible fear screening interviews). Because implementing immigration policies usually requires DHS and DOJ to cooperate, most asylum related regulations are co-promulgated by the two departments.

Within DOJ, the EOIR is specialised in immigration and asylum. It contains the immigration courts (under the Office of the Chief Immigration Judge, OCIJ) and the BIA, all under a Director and Deputy Director and alongside a supporting administrative structure. The latter includes Offices of Administration, General Counsel, Information Technology, and Policy, and the Office of the Chief Administrative Hearing Officer,[1006] which adjudicates claims of administrative infractions of immigration laws by third actors such as employers or facilitators of irregular migration.[1007] Immigration judges and appellate immigration judges are licensed lawyers, usually with courtroom experience in immigration or similar fields of administrative law (see above). The AG appoints and supervises the Director and Deputy Director, who hold general responsibility over the EOIR. The Chief Immigration Judge and the Chief Appellate Immigration Judge are usually experienced immigration judges, exercising powers over their respective courts akin to those of a chief judge in a federal court, except that they are under the supervision of the Director and hold additional duties of performance review and oversight, and issuing implementing instructions for

[1006] EOIR, FY 2027 Performance Budget Congressional Justification (March 2026), 5, https://www.justice.gov/jmd/media/1434716/dl.

[1007] {*See https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer.}

regulatory changes.[1008] EOIR has 2,700 full time staff, of whom 1,400 are attorneys, and a budget of $844 million.[1009] These represent no change from 2025, and about a 36% reduction in staff (about 21.5% reduction in attorneys) and a 2% reduction in budget since 2023.[1010] However the 2027 budget request indicates that in 2026 there were 2,200 staff, of whom 950 attorneys, and a budget of $800 million, while requesting an increase to 2,700 staff (1,080 attorneys) and a budget of $899 million.[1011]

Within DHS, USCIS is multifaceted immigration agency with one directorate specialised in asylum (RAIO).[1012] USCIS asylum officers carry out credible fear screening interviews (within the expedited removal process),[1013] and asylum merits interviews for affirmative asylum applicants or those referred after a positive credible fear determination.[1014] The Associate Director of RAIO is responsible for ensuring that asylum officers receive specialised training in "international human rights law, no adversarial and other relevant national and international refugee laws and principles", and for maintaining and disseminating to asylum officers country of origin information and other relevant information.[1015] Out of a total 2025-26 USCIS budget of roughly $7 billion,[1016] the "Application Processing" line item within the "Operations and Support" budget provided about $160 million to fund 492 staff positions (460 full time equivalent).[1017] This line item was eliminated in the budget law enacted on 30 April, 2026.[1018]

Two other DHS agencies, CBP and ICE, are responsible for enforcement of immigration law. CBP's responsibilities include border security and controls among other duties,[1019] and ICE carries out immigration enforcement within the US. CBP staffs border posts (OFO - entry points) and patrols border areas (USBP - between entry points), interdicting those who attempt to enter the US irregularly. Persons encountered by CBP who do not have a clear right to enter the US are detained for expedited removal. The largest component of ICE, Enforcement and Removal Operations (ERO), is responsible for identifying, detaining and removing persons who lack permission to be in the US.[1020] CBP (USBP) is allocated about $8.3 billion annually for border security operations, $7.3 billion of which funds about 24,000 staff positions, and the rest funds supporting technology, facilities and vehicles.[1021] Another $4

1008 8 CFR 1003.1(a)(2) (Chief Appellate Immigration Judge), 1003.9(b) (Office of the Chief Immigration Judge).
1009 DOJ, Fiscal Year 2026 Budget and Performance Summary (13 October 2025), 45, https://www.justice.gov/media/1403736/dl.
1010 DOJ, Fiscal Year 2026 Budget and Performance Summary (13 October 2025), 45 (see chart), https://www.justice.gov/media/1403736/dl.
1011 DOJ, FY 2027 Budget and Performance Summary, Part II, chapter "Executive Office for Immigration Review" (see chart on first page), https://www.justice.gov/jmd/media/1433166/dl. See https://www.justice.gov/doj/fy-2027-budget-and-performance-summary for the full set of documents.
1012 See organisational chart at https://www.uscis.gov/sites/default/files/document/charts/USCIS-Org-Chart%201.pdf. Asylum falls within the RAIO, see https://www.uscis.gov/about-us/organization/directorates-and-program-offices/refugee-asylum-and-international-operations-directorate-raio.
1013 See https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/credible-fear-screenings.
1014 See https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process.
1015 8 CFR 208(1)(b).
1016 DHS, USCIS Budget Overview – Fiscal Year 2027 Congressional Justification, at CIS-4, https://www.dhs.gov/sites/default/files/2026-04/26_0403_ocfo_fy27-budget-uscis.pdf (taking an approximate average of the 2025 enacted and 2026 continuing resolution numbers).
1017 DHS, USCIS Budget Overview – Fiscal Year 2027 Congressional Justification, at CIS-O&S-3, https://www.dhs.gov/sites/default/files/2026-04/26_0403_ocfo_fy27-budget-uscis.pdf. This category covers asylum interviews and USCIS's other asylum and refugee related work. Ibid.
1018 Homeland Security and Further Additional Continuing Appropriations Act, 2026 (H.R. 7147), 22, https://www.congress.gov/119/bills/hr7147/BILLS-119hr7147enr.pdf. The amount approved under Operations and Support closely approximates the president's budget request, which eliminated this funding. See DHS, USCIS Budget Overview – Fiscal Year 2027 Congressional Justification, at CIS-O&S-3, https://www.dhs.gov/sites/default/files/2026-04/26_0403_ocfo_fy27-budget-uscis.pdf.
1019 See https://www.cbp.gov/border-security, and USBP 2025-2029 strategy, https://www.cbp.gov/sites/default/files/2025-09/25_0919_us-border-patrol-strategy.pdf.
1020 See https://www.ice.gov/ero.
1021 {**, CBP – OS – 45-46, *link}

billion goes to OFO domestic operations, employing a similar number of personnel.[1022] Together these two agencies comprise about 75% of the CBP budget. ERO is allocated about $6 billion for about 7,800 personnel and supporting costs, comprising about 60% of ICE's annual budget. (However, both the overall DHS FY 2026 budget and, separately, the CBP and ICE enforcement line items, remain in dispute and not funded as of May 2026.) arrested or detained by CBP or ICE who indicate a protection need are detained and referred for credible fear screening interviews. CBP officers are trained predominantly in border monitoring and interdiction, with little or no emphasis on asylum or human rights, and ICE officers are similarly prepared to focus on making arrests.

Involvement, efforts, and interests that executive bodies display in asylum access adjudication

The main executive bodies involved in asylum access adjudication are subdepartments of the DOJ and DHS. In federal court cases, one or more typically both will be a defendant against claims of improper executive action. In immigration courts, DHS takes the prosecutorial role through the Office of the Principal Legal Advisor (OPLA), a subdivision of ICE, and DOJ the judicial role (discussed above). Both executive bodies display dedicated involvement with litigation, due in significant part to the adversarial nature of US court systems, and clear presidential direction to exclude noncitizens as a matter of policy.

When challenged in District court, DHS and DOJ usually defend their policies vigorously, in close collaboration. In exceptional cases, a change in executive policy can lead to a change of posture in ongoing cases. Within the Enforcement and Litigation directorate of OPLA, the District Court Litigation Division represents ICE in civil cases in District courts.[1023] On the DOJ side, the Office of Immigration Litigation – General Litigation and Appeals section (OIL-GLA) has broad responsibility for immigration related cases in federal courts, including supporting and cooperating with CBP, ICE, and USCIS in litigation.[1024] DHS and DOJ have demonstrated their interest in federal asylum access cases, by for example diligently pursuing interlocutory appeals against interim orders suspending or enjoining executive policies.

Among its main tasks OPLA, with about 1700 attorneys and 300 other staff, litigates all removal cases on behalf of the government (DHS) in immigration court.[1025] As of February 2025, about 1300 OPLA attorneys based in 25 field offices were tasked with such litigation.[1026] In each location, a Chief Counsel oversees litigation in local immigration courts and before the BIA.[1027] At the appellate level, OPLA's Immigration Law and Practice Division (ILPD) is responsible for "zealously advocating on ICE's behalf … before the [BIA] and the Attorney General, ensuring consistency in OPLA's litigation positions before the nation's immigration courts".[1028] When a petition is raised from an immigration appeal to the Circuit court, the DOJ's OIL-GLA defends the government.[1029] ICE attorneys have discretion to drop removal cases, but rarely exercise it in cases originating in border regions (versus in the interior of the US). Otherwise, to the extent its resources allow, ICE generally pursues removal cases with dedication.

Role of executive bodies and their implications in asylum access adjudication

For most of the barriers studied, the role of executive bodies in federal court has been as the defendant in a case alleging improper administrative action. As such, the DHS and DOJ subagencies participate in federal cases as defendants. There is no noticeable impact on the courts' decision making, but the executive defendants are able to some extent to control the course of litigation through raising interlocutory motions

1022 {**, CBP – 7, *link}
1023 https://www.ice.gov/opla/enforcement-litigation.
1024 https://www.justice.gov/civil/general-litigation-appeals-section.
1025 https://www.ice.gov/opla. Organisational chart available at https://www.ice.gov/doclib/about/offices/opla/oplaOrgChart.pdf.
1026 https://www.aila.org/library/featured-issue-representing-clients-before-ice. For locations of OPLA field offices, see https://www.ice.gov/doclib/about/offices/opla/oplaMap.pdf.
1027 https://www.ice.gov/opla#FLO.
1028 https://www.ice.gov/opla/enforcement-litigation.
1029 https://www.justice.gov/civil/general-litigation-appeals-section.

and appeals, and when needed by reformulating policies on new legal bases, in order to moot prior or anticipated judicial decisions.

Adjudication in the immigration courts involves two executive bodies, DHS and DOJ, in quasi-prosecutorial and quasi-judicial roles, and an applicant for asylum or withholding of removal. Immigration judges are duty-bound to exercise their independent judgment, and are qualified lawyers. The centralisation of docket management and performance review in the Office of the Chief Immigration Judge provide potential means for that Office to motivate judges. In 2025-26, immigration enforcement (including ICE), law enforcement, and military backgrounds have become more common among immigration judges. Even a carefully objective decision maker could be subject to unconscious bias, in the form of confidence in the evidence presented, or the interpretations of law, put forward by DHS attorneys. Considering that the senior leadership of both executive bodies are presidential appointees, political leaders can facilitate a convergence in views in immigration court decisions and procedures between DHS and DOJ.

B. International or regional organizations

Other than amicus curiae briefs in federal court cases, usually by UNHCR, international organisations have no role in asylum access adjudication in the US.

Involvement, efforts, and interests that international and regional organizations

The main involvement of international and regional organisations in US asylum adjudication is as amici curiae. This usually comes in federal courts, rather than immigration courts which are fundamentally administrative bodies. The BIA occasionally solicits amicus briefs from the public,[1030] but only on discrete questions it considers it needs advice on. In federal courts, UNHCR files amicus briefs relatively frequently. Otherwise, other international organisations such as the OAS occasionally do so, particularly on issues where the Inter-American Commission has already expressed a view. UNHCR briefs in the cases studied here focus predominantly on the compatibility of US legislation and regulations with international law, including treaties as well as sometimes customary law, and with UNHCR guidance documents. This level of involvement is due essentially to there being no other realistic avenue for UNHCR or other international or regional organisations to participate in US asylum access adjudication.

Role of international or regional organizations and their implications

International and regional organisations have only marginal or indirect influence on asylum access adjudication. Their briefs are sometimes cited in federal asylum access cases, usually to illustrate the legislative purposes of Congressional enactments of treaty based refugee and human rights norms. Of the cases studied here, only the East Bay Sanctuary Covenant line of cases discussed UNHCR's briefs to any significant extent.

C. NGOs and bar associations

Many NGOs in the US are involved in asylum access cases. Most of them are specialised in asylum and assistance to refugees and other migrants. In most of the asylum access cases in federal courts studied here, NGOs are among the plaintiffs, either on their own or alongside other NGOs or impacted individuals. Additionally, lawyers from NGOs frequently provide representation in these cases (private law firms do so as well, but are not listed here; similarly, university law clinics are not listed). Bar associations are less prominent, occasionally intervening as amici curiae.

[1030] See https://www.justice.gov/eoir/amicus-briefs. See also BIA Practice Manual, Chapter 2.10, https://www.justice.gov/eoir/foialibrary/BIAPM01122021/dl. For an example of an invitation for amicus briefs, see https://www.justice.gov/eoir/media/1444251/dl (inviting briefs on questions regarding whether 2025 legislation requiring payment of annual fees for pending asylum applications to remain under consideration should apply to withholding of removal petitions as well; referencing 8 USC 1802).

Only the organisations that were plaintiffs or amici in the cases identified in part 2 of this report are listed here (there are many other asylum/migration or human rights organisations in the US). They are:[1031]

Al Otro Lado (plaintiff, *Al Otro Lado v. Mayorkas* (S.D. CA, 30 Sep 2024); plaintiff, *Al Otro Lado v. Mayorkas* [Noem] (9th Circuit, 23 Oct 2024 (amended 14 May 2025); plaintiff, *East Bay Sanctuary Covenant v. Biden* (9th Circuit, 28 Feb 2020 (amended 24 Mar 2021)); plaintiff, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023); plaintiff, Innovation Law Lab v. Wolf (9th Circuit, 28 Feb 2020))

American Civil Liberties Union (ACLU) (amicus, *Al Otro Lado v. Mayorkas [Noem]* (9th Circuit, 23 Oct 2024 (amended 14 May 2025))

ACLU of Northern California (amicus, *Al Otro Lado v. Mayorkas [Noem]* (9th Circuit, 23 Oct 2024 (amended 14 May 2025);)

ACLU of Southern California (amicus, *Al Otro Lado v. Mayorkas [Noem]* (9th Circuit, 23 Oct 2024 (amended 14 May 2025);)

American Gateways (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023); plaintiff, East Bay Sanctuary Covenant v. Biden (N.D. CA, 25 Jul 2023))

American Immigration Council (representation, *Al Otro Lado v. Mayorkas* (S.D. CA, 30 Sep 2024); amicus & movant, Las Americas v. Wolf (D. DC, 30 Nov 2020))

American Immigration Lawyers Center (amicus & movant, *Las Americas v. Wolf* (D. DC, 30 Nov 2020))

American Resource Center of Northern California (plaintiff, *Innovation Law Lab v. Wolf* (9th Circuit, 28 Feb 2020))

Amica Center for Immigrant Rights (plaintiff, *Amica Center for Immigrant Rights v. EOIR* (D. DC, 8 March 2026))

Amnesty International (amicus, *Al Otro Lado v. Mayorkas [Noem]* (9th Circuit, 23 Oct 2024 (amended 14 May 2025);)

Asian Law Alliance (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Bet Tzedek (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Brooklyn Defender Services (plaintiff, *Amica Center for Immigrant Rights v. EOIR* (D. DC, 8 March 2026))

Capital Area Immigrants' Rights Coalition (plaintiff, *Pangea Legal Services v. DHS* (N.D. CA, 19 Nov 2020))

CASA (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Catholic Legal Immigration Network, Inc. (plaintiff, *Pangea Legal Services v. DHS* (N.D. CA, 19 Nov 2020))

Center for Constitutional Rights (representation, *Al Otro Lado v. Mayorkas* (S.D. CA, 30 Sep 2024))

Center for Gender and Refugee Studies (CGRS) (representation, *Al Otro Lado v. Mayorkas* (S.D. CA, 30 Sep 2024))

Central American Refugee Center (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Central American Resource Center (plaintiff, *East Bay Sanctuary Covenant v. Biden* (9th Circuit, 28 Feb 2020 (amended 24 Mar 2021)); plaintiff, *East Bay Sanctuary Covenant v. Garland* (9th Circuit, 6 Jul 2020 (amended 8 Apr 2021)); plaintiff, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Centro Legal De La Raza (plaintiff, *Innovation Law Lab v. Wolf* (9th Circuit, 28 Feb 2020))

[1031] List may be incomplete. Amici curiae not yet located for East Bay Sanctuary Covenant v. Biden (9th Circuit, 28 Feb 2020 (amended 24 Mar 2021), East Bay Sanctuary Covenant v. Garland) (9th Circuit, 6 Jul 2020 (amended 8 Apr 2021); Innovation Law Lab v. Wolf (9th Circuit, 28 Feb 2020); Immigrant Defenders Law Center v. Noem (9th Circuit, 18 Jul 2025 (amended 24 Jul 2025)); Kiakombua v. Wolf (D. DC, 31 Oct 2020); A.B.-B. v. Morgan (D. DC, 31 Aug 2020)).

City Bar Justice Center (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Council Migration Services, Inc. of Philadelphia (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023) (jointly with HIAS))

Dolores Street Community Services (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023); plaintiff, *Pangea Legal Services v. DHS* (N.D. CA, 19 Nov 2020))

East Bay Sanctuary Covenant (plaintiff, *East Bay Sanctuary Covenant v. Biden* (9th Circuit, 28 Feb 2020 (amended 24 Mar 2021)); plaintiff, *East Bay Sanctuary Covenant v. Garland* (9th Circuit, 6 Jul 2020 (amended 8 Apr 2021)); plaintiff, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Empire Justice Center (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Florence Immigrant & Refugee Rights Project (plaintiff, *RAICES v. Noem* (D. DC, 2 Jul 2025); plaintiff, *Amica Center for Immigrant Rights v. EOIR* (D. DC, 8 March 2026))

Haitian Bridge Alliance (plaintiff, *Al Otro Lado v. Mayorkas* (S.D. CA, 30 Sep 2024); amicus, *Al Otro Lado v. Mayorkas [Noem]* (9th Circuit, 23 Oct 2024 (amended 14 May 2025);

Her Justice (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

HIAS (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023) (jointly with Council Migration Services, Inc. of Philadelphia); plaintiff, *Amica Center for Immigrant Rights v. EOIR* (D. DC, 8 March 2026))

Hope Border Initiative (movant, *Las Americas Immigrant Advocacy Center v. DHS* (D. DC, 9 May 2025))

Human Rights First (movant, *Las Americas Immigrant Advocacy Center v. DHS* (D. DC, 9 May 2025))

Immigrant Defenders Law Center (movant, *Las Americas Immigrant Advocacy Center v. DHS* (D. DC, 9 May 2025); (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023)); plaintiff, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023); plaintiff, *Immigrant Defenders Law Center v. Noem* (9th Circuit, 18 Jul 2025 (amended 24 Jul 2025)); *Pangea Legal Services v. DHS* (N.D. CA, 19 Nov 2020) (representation is listed for "Immigration Legal Services Organizations" collectively)).

Immigrant Justice Corps (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Immigrant Legal Resource Center (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Immigration Equality (movant, *Pangea Legal Services v. DHS* (N.D. CA, 19 Nov 2020))

Immigration Reform Law Institute (amicus, *RAICES v. Noem* (D. DC, 2 Jul 2025); amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Innovation Law Lab (plaintiff, *East Bay Sanctuary Covenant v. Biden* (9th Circuit, 28 Feb 2020 (amended 24 Mar 2021)); plaintiff, *East Bay Sanctuary Covenant v. Garland* (9th Circuit, 6 Jul 2020 (amended 8 Apr 2021)); plaintiff, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023); plaintiff, *Innovation Law Lab v. Wolf* (9th Circuit, 28 Feb 2020); amicus & movant, *Las Americas v. Wolf* (D. DC, 30 Nov 2020))

International Refugee Assistance Project (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Jewish Family Service of San Diego (plaintiff, *Immigrant Defenders Law Center v. Noem* (9th Circuit, 18 Jul 2025 (amended 24 Jul 2025)))

Kids in Need of Defense (amicus, *Al Otro Lado v. Mayorkas [Noem]* (9th Circuit, 23 Oct 2024 (amended 14 May 2025);)

Kino Border Initiative (movant, *Las Americas Immigrant Advocacy Center v. DHS* (D. DC, 9 May 2025))

Las Americas Immigrant Advocacy Center (plaintiff, *Las Americas Immigrant Advocacy Center v. DHS* (D. DC, 9 May 2025); plaintiff, *U.T. v. Barr* (D. DC, pending (amended/re-filed Oct 2025)); plaintiff, RAICES v. Noem (D. DC, 2 Jul 2025); plaintiff, *Las Americas v. Wolf* (D. DC, 30 Nov 2020))

Latino Justice PRLDEF (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Legal Aid Society of New York (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Legal Services for Children, Inc. (amicus, *Al Otro Lado v. Mayorkas [Noem]* (9th Circuit, 23 Oct 2024 (amended 14 May 2025);

Loyola Immigrant Justice Clinic (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Make the Road New York (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

National Center for Lesbian Rights (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023); plaintiff, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

National Immigrant Justice Center (plaintiff, *Amica Center for Immigrant Rights v. EOIR* (D. DC, 8 March 2026))

National Citizenship and Immigration Services Council 119 (amicus/movant, *Las Americas Immigrant Advocacy Center v. DHS* (D. DC, 9 May 2025); amicus, *U.T. v. Barr* (D. DC, pending (amended/re-filed Oct 2025)); amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

New York Immigration Coalition (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Northwest Immigrant Rights Project (amicus, *Al Otro Lado v. Mayorkas [Noem]* (9th Circuit, 23 Oct 2024 (amended 14 May 2025))

Pangea Legal Services (plaintiff, *Pangea Legal Services v. DHS* (N.D. CA, 19 Nov 2020))

Public Citizen, Inc. (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Public Law Center (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Refugee and Immigrant Center for Education and Legal Services (RAICES) (plaintiff, *Las Americas Immigrant Advocacy Center v. DHS* (D. DC, 9 May 2025); amicus, *U.T. v. Barr* (D. DC, pending (amended/re-filed Oct 2025)); plaintiff, *RAICES v. Noem* (D. DC, 2 Jul 2025))

Refugees International (movant, *Las Americas Immigrant Advocacy Center v. DHS* (D. DC, 9 May 2025); amicus, *U.T. v. Barr* (D. DC, pending (amended/re-filed Oct 2025)))

Safe Passage Project (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Tahirih Justice Center (plaintiff, *U.T. v. Barr* (D. DC, pending (amended/re-filed Oct 2025)); amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023); plaintiff, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023); plaintiff, *Innovation Law Lab v. Wolf* (9th Circuit, 28 Feb 2020))

The Legal Project (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Torture Abolition Survivors Support Coalition (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

UnLocal, Inc. (amicus, *East Bay Sanctuary Covenant v. Biden* (N.D. CA, 25 Jul 2023))

Involvement, efforts, and interests that NGOs and bar associations display

As the incomplete list above suggests, there are many immigration focused NGOs in the US, many of which focus to a considerable degree on access to asylum and on representing clients in asylum or removal cases. Individual representation starts in immigration courts. It can proceed also in federal courts; in this configuration, individual plaintiffs represented by NGOs were usually initially encountered via providing representation in their immigration cases. In federal access to asylum cases, NGOs can and do achieve standing in their own right, for example based on the anticipated or actual harm to their own core activities stemming from an asylum barrier.

When NGOs support individual litigants, it can be through the NGOs' own dedicated legal staff. However, especially for immigration court practice, it is also common practice for an NGO to collaborate with an immigration lawyer or firm who provides services pro bono (or for a fee paid by the NGO). NGOs and, less commonly, state bar associations also intervene particularly in federal cases as amici curiae. Many NGOs are regionally focused, but especially in complex cases that concern multiple geographic regions they will collaborate, at least as far as sharing advice or submitting amicus briefs, but also as co-litigants where they are able to establish standing. NGOs that participate in asylum access litigation, such as most of those listed above, tend to be large and well-resourced, especially if involved in federal cases.

Bar associations and NGOs also provide specialised training in a range of topics, including asylum. For example, the American Immigration Law Association provides an online asylum course,[1032] and the National Immigrant Justice Center provides asylum law training for pro bono lawyers.[1033]

Role of NGOs and bar associations and their implications in asylum access adjudication

NGOs and bar associations generally are not involved in asylum access adjudication except as plaintiffs, amici, or representing clients. However they will often submit public comments to proposed administrative rules (executive regulations), including many of those discussed in this report as barriers to asylum that resulted in litigation (typically the issues commented on persist into the enacted rules).

Organized or formal involvement of civil society, apart from NGOs

Other than NGOs, the main involvement in asylum access cases is from law firms, in their pro bono practices. It is generally expected that US law firms will donate a portion of their otherwise billable hours for pro bono work. The American Bar Association model rules specify 50 hours per lawyer per year.[1034] Lawyers with an immigration practice will donate this time for low-income clients, including forced migrants seeking protection or NGOs engaged in complex litigation such as regarding asylum barriers.

D. Supranational courts

No influence of rulings of supranational (or international) courts was noted in the court cases studied.

E. Other actors

None noted.

IV. THE SOCIO-POLITICAL CONTEXT

A. Migratory routes and entry points

In the 2010s, migration from Central America to the US increased rapidly, becoming "particularly visible in 2014 with significant arrivals of unaccompanied minors from El Salvador, Guatemala, and Honduras".[1035] By mid-2023 the main origin regions of immigrants in the US were Latin America (52%) and Asia (27%), with Mexico (22%), India (6%) and China (6%) the most common countries of origin.[1036] Between 2020-25, immigration increased to unprecedented levels (in absolute numbers), with increasing proportions (2021-23 compared to 2015-19) from South America (20% vs 13%) and Europe/Canada (12% vs 9%), and declining proportions from South and East Asia (24% vs 29%) and sub-Saharan Africa (5% vs 8%); the most common countries of origin in 2021-23 being Mexico (11%), India (8%), Venezuela (7%), Cuba (6%) and Colombia (5%).[1037] Most authorised migrants travel by air, and most irregular

1032 https://elearning.aila.org/products/aila-asylum-online-course#tab-product_tab_overview.
1033 https://immigrantjustice.org/for-attorneys/resources/asylum-training-for-pro-bono-attorneys/.
1034 https://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1/.
1035 https://www.migrationpolicy.org/article/latin-america-caribbean-new-migration-era.
1036 https://www.pewresearch.org/short-reads/2025/08/21/key-findings-about-us-immigrants/.
1037 https://www.pewresearch.org/short-reads/2025/08/21/key-findings-about-us-immigrants/.

migrants arrive across the southwest land border, either directly from Mexico or having travelled to Mexico from the east, across the Caribbean Sea, or from the south, overland from Central or South America. The June 2024 and January 2025 policy initiatives aimed at restricting unauthorised migration across the southwestern US border led to "a steady decline in northbound migration" through Mexico to the US.[1038]

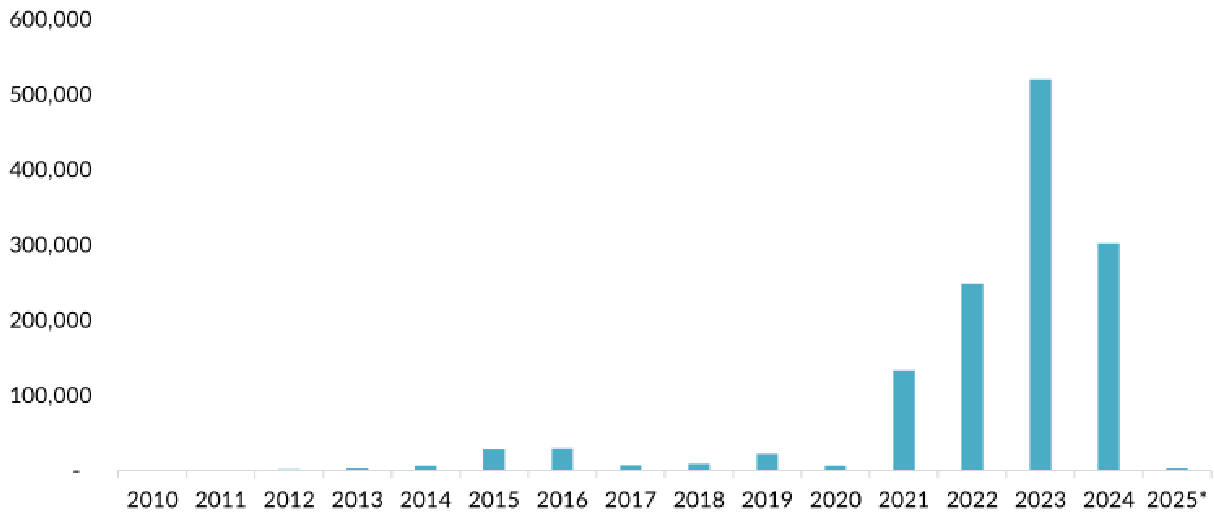
Forced migration routes

Forced migration routes towards the US are in flux. Since about 2010, the profile of migration across the Mexico/US border has shifted towards predominantly forced migration along the Central American route, coming at first from the Northern Triangle states (El Salvador, Guatemala, Honduras) and since 2021, from Haiti and Venezuela as well before continuing northward. With any access to the US sharply curtailed in 2024, and effectively ceasing in 2025-26, forced migrants who arrive in Mexico hoping to continue on to the US now either stay there, or seek safety elsewhere in the region; in 2025-26, more individuals who cross the Darien Gap (see below) travel south, than north.

[1039]

[1038] https://www.migrationpolicy.org/article/latin-america-caribbean-new-migration-era.
[1039] https://weblog.iom.int/worlds-congested-human-migration-routes-5-maps. (*date unspecified, but between 15 May and 31 December 2015)

As the Covid pandemic receded in 2021, migration through the Darien Gap, a 100km long, roadless section of the Colombia/Panama ithsmus, toward the US increased significantly.[1040] From an average of about 11,000 per year in the 2010s, about 130,000 persons crossed the gap in 2021; 250,000 in 2022; and more than 500,000 in 2023, before declining to about 300,000 in 2024 and almost ceasing in 2025.[1041]



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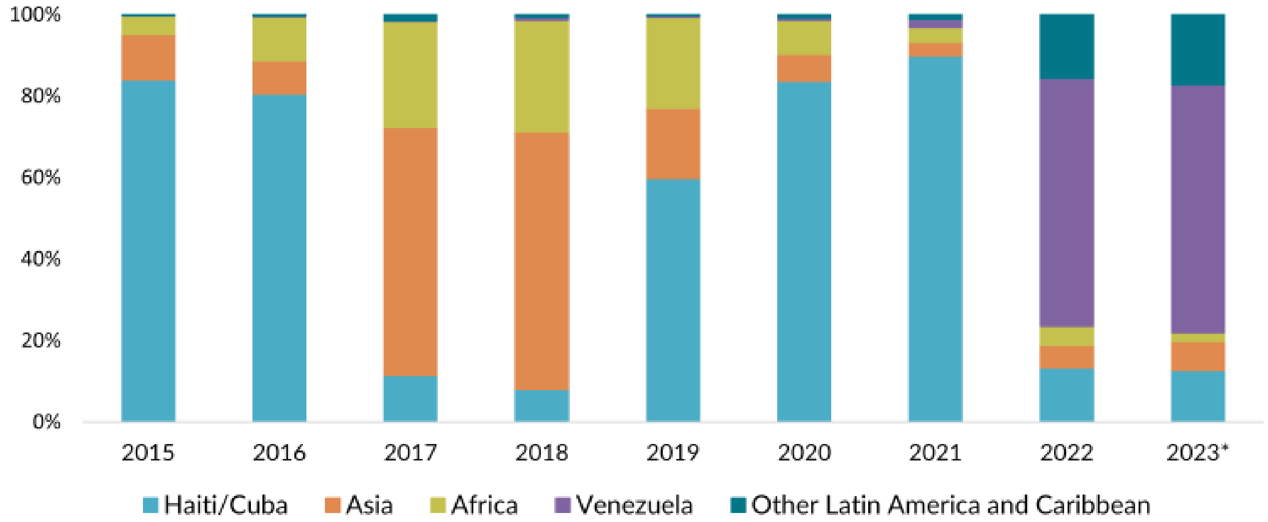
The nationalities of persons transiting the Darien Gap from 2021-24 generally reflected the distribution of forced migration crises in the Americas, alongside some extra-regional migrants as well (mixed).[1043]



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Main entry points in the country since 2010

Since 2010 the main entry points to the US have been along the land border with Mexico (with relatively few arrivals across the land/water border with Canada), at international airports around the country, and

[1040] https://www.migrationpolicy.org/article/latin-america-caribbean-new-migration-era ("large numbers of Central Americans, South Americans, Haitians, and others began traversing the remote Darien Gap straddling Colombia and Panama, often bound for the United States").
[1041] https://www.migrationpolicy.org/article/darien-gap-migration-crossroads.
[1042] https://www.migrationpolicy.org/article/latin-america-caribbean-new-migration-era (figure 2).
[1043] https://www.migrationpolicy.org/article/darien-gap-migration-crossroads.
[1044] https://www.migrationpolicy.org/article/darien-gap-migration-crossroads (figure 2).

almost no spontaneous arrivals by sea. Nearly all irregular arrivals and asylum applicants arrive at the land border with Mexico, either at or between designated border points.

CBP operates 328 ports of entry,[1045] with at least one in each state or territory.[1046] CBP divides the northern and southern land borders into sectors, with additional sectors established in potential zones of sea arrivals in Florida, Louisiana and Puerto Rico; each sector hosts several border stations, where arriving persons can be processed for entry.[1047] All border crossing points are secured by armed officers and some form of barriers. Along the southern border, there are extensive walls, surveillance systems, and military equipment. Arriving persons are inspected for a right to enter the US (visa, passport or other documentation of citizen or resident status), and denied entry if lacking proper documents. Persons allowed to request asylum or assert a fear of persecution if returned are registered and taken to CBP detention facilities, preparatory to either expedited removal or transfer to longer term ICE detention.

Implications that migratory routes towards the country have on the judiciary

The most notable implication of migratory routes for how (quasi-)judicial institutions assess the legality of barriers is the increasing innovation in exclusion or control measures that leads to questions of first impression arising in federal courts. Most of the procedural barriers discussed in this report emerged as reactions by the executive to perceived migration pressure along the southern US border, in the face of apparently absolute rights to non-refoulement and to request asylum attaching to anyone who arrives at a US border. Relationships with neighbouring countries affect (quasi-)judicial decision making in a few discrete areas, such as when political, administrative, and security authorities in neighbouring or third countries cooperate with their US counterparts to carry out pushbacks or removals. Courts have limited jurisdiction to assess the legality of such arrangements, due to longstanding doctrines of judicial non-intervention in diplomatic or other international relations, which are competences reserved almost entirely to executive discretion. There is little or no noticeable impact on judicial decision making except when the cooperation itself is integrally related to the barrier under adjudication (eg MPP).

Implications that entry points in the country have on what occurs in the courts

Entry point affects access to asylum in two main ways: by the entry point's legal classification (whether or not it is a designated border point), and by which state it is in (the US states along the border with Mexico are Texas, New Mexico, Arizona and California). Different procedures apply depending on the type of entry point, and binding interpretations of law can vary depending which circuit the first instance immigration court is located in (Texas is 5th Circuit; New Mexico 10th; Arizona and California 9th).

Federal district courts assessing the lawfulness of barriers to asylum usually assess the barrier itself, rather than via the context of an individual asylum case (habeas corpus relief in detention cases is the exception). Generally, irregular immigrants who arrive between border points, rather than presenting at a designated border crossing point, are placed in expedited removal, which provides lower procedural protections than ordinary removal or an asylum assessment. Crucially, removal orders following expedited removal, unlike other immigration court removal orders, cannot be appealed beyond the BIA to the federal circuit courts. Therefore, an asylum seeker who enters between border points will enter the assessment adjudication in a disadvantageous procedural posture compared to other asylum seekers, even though the right to apply for asylum and the substantive standard applied to determine whether to grant protection are the same. Geography can also impact asylum determination itself, as individuals inspected between border points are often detained in smaller facilities in relatively remote locations, with limited access to legal counsel.

The location of entry can also affect the substantive interpretations of law applied in an asylum procedure. According to BIA precedent, immigration judges and the BIA must apply the law of the federal circuit where DHS initially filed charging documents in immigration court, unless the judge of that court grants

[1045] https://www.cbp.gov/border-security/ports-entry.
[1046] See https://www.cbp.gov/about/contact/ports.
[1047] See https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors.

a motion for change of venue.[1048] In the border regions, this will generally occur close to where the border crossing occurred.

B. Composition and spatial distribution of forced migration population

The US subdivides forced migrants as asylum seekers, asylees (those granted asylum) and refugees (resettled). Here, only the first two of these categories are discussed. In general, the Migration Policy Institute provides information and statistics on migration to the US.[1049]

In the ten years through FY 2023, the US granted asylum to "nearly 316,500" persons, with the peak in FY 2023, at almost 54,400.[1050] During these 10 years, China was the most common country of origin of asylees, at about 17%, with Afghanistan the most common country of origin in 2023 at about 26%.[1051]

Affirmative Asylees			Defensive Asylees			Total Asylees		
Origin	Number	Percent	Origin	Number	Percent	Origin	Number	Percent
TOTAL	22,300	100.0%	TOTAL	32,050	100.0%	TOTAL	54,350	100.0%
Afghanistan	14,330	64.3%	China	3,510	11.0%	Afghanistan	14,470	26.6%
China	1,360	6.1%	Venezuela	2,940	9.2%	China	4,870	9.0%
Turkey	1,020	4.6%	El Salvador	2,850	8.9%	Venezuela	3,770	6.9%
Venezuela	830	3.7%	India	2,630	8.2%	El Salvador	2,980	5.5%
Iran	480	2.2%	Guatemala	2,370	7.4%	India	2,710	5.0%
Egypt	470	2.1%	Honduras	1,970	6.1%	Guatemala	2,580	4.7%
Ethiopia	280	1.3%	Russia	1,800	5.6%	Honduras	2,120	3.9%
Russia	260	1.2%	Nicaragua	1,020	3.2%	Russia	2,060	3.8%
Syria	250	1.1%	Ecuador	1,010	3.2%	Turkey	1,490	2.7%
Guatemala	210	0.9%	Colombia	970	3.0%	Colombia	1,140	2.1%
Other	2,810	12.6%	Other	10,980	34.3%	Other	16,160	29.7%

[1052]

By September 2025, there were over 3.9 million pending asylum applications, of which 2.4 million in the immigration courts (about 62% of all immigration court cases) and 1.5 million with USCIS.[1053] Although detention is in principle mandatory for persons arriving at the border who lack documented permission to enter but request asylum or withholding of removal, DHS retains discretion to parole (conditionally release) them into the US pending their removal proceedings.[1054] In 2023 and 2024, about 936,500 persons used the CBP One phone app to schedule appointments for parole into the US.[1055]

Implications that the number of asylum seekers and refugees has on what occurs in the courts

The main effect of numbers of arriving asylum seekers is to influence the establishment of barriers and the political climate. Large numbers are portrayed as a crisis for political advantage, and the government in office establishes barriers to limit access to asylum. This results in court challenges. Because federal courts are equipped to for example consider class actions or issue declaratory rulings or vacate policies, the number of persons concerned does not necessarily affect adjudication or outcomes.

1048 *Matter of Garcia*, 28 I&N Dec. 693 (BIA 2023), at 703.
1049 https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2025.
1050 https://www.migrationpolicy.org/article/refugees-and-asylees-united-states.
1051 https://www.migrationpolicy.org/article/refugees-and-asylees-united-states.
1052 https://www.migrationpolicy.org/article/refugees-and-asylees-united-states.
1053 https://www.migrationpolicy.org/article/refugees-and-asylees-united-states.
1054 Johnson, K., 'Humanitarian Immigration Programs of US', in Gatta, F.L. and Savino, M. (eds), Visas in Migration and Asylum Law: The Key that Opens the Door (Routledge, 2027) 331-48 at 346.
1055 https://www.migrationpolicy.org/article/refugees-and-asylees-united-states.

Fluctuating numbers of asylum seekers also has little apparent effect on the operation of immigration courts, but for different reasons. These courts have faced a significant backlog of cases for more than ten years, so contemporary changes in numbers of asylum applicants have little immediate impact on the conduct of proceedings. Instead, nearly all newly arriving applicants are detained and placed in expedited removal proceedings, which can result in a hearing before an immigration judge prior to removal. There has been a concomitant acceleration in the conduct of removal hearings in 2025-2026 (hearings are increasingly cursory and often do not reach the merits of a case), but it is more related to a shift in policy than to changing numbers of arrivals. USCIS has sought to address delays in processing affirmative asylum applications through a "last in first out" policy, but again this is unrelated to numbers of arrivals.

Implications that the number of asylum seekers and refugees has on the courts

The main relationships between categories of vulnerable persons and asylum assessments and assessments of the legality of barriers concern families, unaccompanied children, and women fleeing situations of domestic violence. US statutory law of immigration excepts unaccompanied children from standard removal and expedited removal processing, placing them instead within the responsibility of the Office of Refugee Resettlement.[1056] There is little discussion of legal norms relating to vulnerability in either asylum or asylum access cases, although in the latter, judges will often relate the factual circumstances of the case, which include discussion of vulnerability and past persecution. One exception is the construction of particular social groups based on persecution by private actors (state authorities' failure to protect), which centres around women from Central America, usually with children, subject to domestic violence.

Displaced persons in the selected jurisdiction who are not asylum seekers or recognized refugees

There are no significant populations of internally displaced persons in the US. Since 1990 the US has extended Temporary Protection Status (TPS) to nationals of 28 countries who are unable to return to their countries due to conflict or natural disasters.[1057] The powers of the executive to revoke TPS are a matter of significant judicial controversy,[1058] but since recipients are already in the US when TPS is granted, barriers to accessing asylum have no impact. There are also approximately 11.8 million irregularly present noncitizens who are outside the asylum or refugee systems.[1059] Here, there is a significant impact of the detention-related barrier to accessing asylum. If a person irregularly present is arrested within the US for an immigration violation, then until 2025 they had a right to a bond hearing before an IJ to determine whether they could be released from detention pending their removal hearings. A 2025 DHS policy change and a corresponding BIA precedential decision determined that Ijs do not have jurisdiction to hold such hearings; this has resulted in many (up to 100,000) habeas cases in District courts; a split among Circuit courts; and now a pending appeal to the Supreme Court.

Distribution within the territory

In general, a majority of immigrants to the US live in California, Florida, New York and Texas, and a majority in 12 major urban areas.[1060] State by state, the American Immigration Council estimates there are about 11.8 million undocumented persons in the US, of which 2.28 million in California; 2.1 million in Texas; 1.17 million in Florida; 616,000 in New York; 530,000 in New Jersey; 527,000 in Illinois; 410,000 in Georgia; 342,000 in North Carolina; 289,000 in Washington; 287,000 in Arizona; 259,000 in Virginia; 240,000 in Maryland; 199,000 in Nevada; 196,000 in Pennsylvania; 169,000 in Colorado; 157,000 in Tennessee; 151,000 in Massachusetts; 122,000 in Indiana; 119,000 in Ohio; 113,000 in Utah; 111,000 in Michigan; and 110,000 in South Carolina, with other states hosting fewer than 100,000 each.[1061]

[1056] https://acf.gov/orr/programs/refugees/urm.
[1057] https://www.migrationpolicy.org/article/refugees-and-asylees-united-states.
[1058] See https://www.supremecourt.gov/opinions/25pdf/25-1083_f204.pdf.
[1059] See https://map.americanimmigrationcouncil.org/locations/national/.
[1060] https://www.pewresearch.org/short-reads/2025/08/21/key-findings-about-us-immigrants/.
[1061] See https://map.americanimmigrationcouncil.org/locations/national/ (state by state estimates available under 'Select Location').

Temporary Protection Status (TPS) has been ended for most nationalities in 2025-26.[1062] As of 31 March 2023, "the largest populations of [then 610,000 total] TPS holders live in Florida (197,485), Texas (69,840), California (60,420), New York (54,010) and Virginia (24,090)"; regional concentrations included most Hondurans being in urban areas around New York, Miami, or Houston, and most Haitians around Miami, New York, or Boston.[1063] By the end of 2023 there were more than 870,000 TPS holders in the US, with at least 300,000 others eligible for TPS.[1064]

Reliable information on the spatial distribution of asylum seekers in the US is not easy to find. It is reasonable to suppose, as a first approximation, that they are all in detention. This means that their spatial distribution would match the locations of detention centres, approximately in proportion to those centres' capacity. Under those assumptions, the majority of asylum seekers in the US would be located in Texas, another significant concentration in Louisiana, and further groups in large detention centres near to major urban areas (see part 1 for details on the location and size of detention centres). Expedited removal has been the standard procedure for persons arriving at the border since mid-2024 and was already widespread before then. In January 2025 the acting DHS secretary issued a memorandum instructing DHS to review the status of anyone unable to demonstrate that they have been present in the US for two years, including those already in removal proceedings, and apply expedited removal.[1065] Since USCIS now categorically rejects all asylum applications, any applicant whose case is reviewed would be placed in removal proceedings. Separately, DOJ and DHS have instituted a practice of "pretermitting" withholding cases, thus rendering applicants eligible for removal (which DHS interprets as expedited removal) immediately following their attendance at a previously scheduled hearing in immigration court. It is therefore likely that only a relatively small proportion of asylum (or withholding) applicants in the US are not in detention.

Implications that the spatial distribution has on asylum access adjudication

There is generally no impact of spatial distribution of asylum applicants or other forced migrants on asylum access adjudication, which usually takes place in federal article III courts rather than immigration courts. Caseloads and types are also not generally a factor in asylum adjudication. Immigration courts are disproportionately located in major urban areas; in border regions; and close to large detention centres.[1066] Staffing levels generally reflect the geographical distribution of cases,[1067] resulting in relatively little variance in backlog or processing time from one court to another (relative to the size of the court). As applicants relocate (including transfers from one detention centre to another) during the course of their proceedings, venue will transfer to the nearest immigration court. As DOJ employees, immigration judges can be transferred temporarily to new locations if necessary to balance caseloads. The most significant impacts of spatial distribution are on the quality of asylum hearings. In remoter locations, especially applicants detained during expedited removal hearings may have only the option to participate in their removal hearings telephonically, rather than in person or by video link. Access to counsel is also challenging in remote locations; NGO resources are concentrated near borders, urban areas, and major detention centres, but especially in light of short notice periods before hearings (as little as 24 hours), it can be quite challenging for an applicant and a legal service provider to mutually make contact and have any time to prepare before a potentially decisive hearing begins.

1062 https://forumtogether.org/article/temporary-protected-status-fact-sheet/. The TPS designations for Haiti and Syria were stayed by court order, but the Supreme Court lifted that order in June 2026. https://www.supremecourt.gov/opinions/25pdf/25-1083_f204.pdf.

1063 https://forumtogether.org/wp-content/uploads/2023/10/TPS-Fact-Sheet_October-2023.pdf.

1064 Johnson, K., 'Humanitarian Immigration Programs of US', in Gatta, F.L. and Savino, M. (eds), Visas in Migration and Asylum Law: The Key that Opens the Door (Routledge, 2027) 331-48 at 346.

1065 https://www.dhs.gov/sites/default/files/2025-01/25_0123_er-and-parole-guidance.pdf.

1066 See list of locations at https://www.justice.gov/eoir/immigration-court-administrative-control-list.

1067 See 2023 staff directory at https://www.aila.org/files/o-files/view-file/FBC05E9B-45F6-4660-A3F1-DC5FF86ABE9C.

C. Political and public debate in the country

The political debate is cast in terms of "illegal immigration" rather than asylum. Category distinctions between refugees, asylum applicants, and undocumented immigrants are not carefully maintained in public statements, either by policymakers or in news media. Migrants are frequently associated with crime, an association that is reported on more than it is questioned by news media. Policies are proposed based on deterrence and punishment models for controlling migration, and results are assessed largely based on how many are deported. Deliberate disinformation appears to play a significant role in the discourse.

Barriers discussed in this report have been central to US political debate throughout the time period studied (2010-present), and increasingly so. The debate is carried on in broad terms rather than details of specific barriers, but the themes are evident. Other issues have been central to national elections from time to time, such as health care; economic growth and price inflation; concerns over election integrity; and responses to the Covid crisis, but immigration and border security has been a leading issue throughout. For at least 10 years, candidates have competed on alternative approaches to "securing the border" with electoral debates narrowing to focus on alternative means of implementing an implicitly agreed overall aim (exclusion), between tightening regulations versus physical, even violent expulsions. Since 2015 or earlier, the political agenda has evolved monotonically towards excluding potential asylum applicants, as successive federal executive administrations "have taken structural steps to thwart asylum seekers without regard to the merits of their claims for protection".[1068]

Relevance of the topic of access to asylum in public debate

Access to asylum, in the sense of the relationship between border controls and international or other humanitarian protection, has been a major topic in US public debate for most of the 21st century. The terrorist attacks of September 2001 were a watershed event, quickly connected in the media and other public fora to the idea of insecure borders and insufficiently thorough vetting of visa recipients. Asylum did not at first play a major role in this debate, but soon came to be portrayed as a potential gap in border security, especially in light of fluctuating but often significant mixed migration levels across the (then) relatively unmonitored southern land border of the US.

By 2009, an extensive empirical study of the impact of US media on policy making on immigration found that the topic had become pervasive, divisive, and its treatment in both traditional and new media had contributed to an inability to make any policy at all.[1069] Even at the time of publication, according to the report, the basic outlines of the policy debate had remained largely unchanged for decades. Facing rising competition from new media, traditional media too has increasingly catered to polarised and essentially static views on immigration policy, contributing to an environment in which blocking a policy initiative is easier than seeking consensus on a new policy – "the triumph of "no!"". Across all media, immigration related news coverage has narrowed its focus to irregular immigration and the government's efforts to control it, casting the issue in terms of "crime, crisis or controversy". In the resulting environment of polarisation and fear, it has become prohibitively difficult to enact significant changes to immigration policies.[1070] In this environment, executive action has become the only viable tool for policy changes.

A more recent example of this phenomenon is concern over "asylum fraud", reflected in public statements and journalistic publications alleging widespread misuse of the asylum system by economic migrants, countered by other publications and NGO reports finding that such fraud is extremely rare.[1071] This relatively minor episode did however demonstrate the turn of public debate to focus specifically on asylum.

1068 Johnson, K., 'Humanitarian Immigration Programs of US', in Gatta, F.L. and Savino, M. (eds), Visas in Migration and Asylum Law: The Key that Opens the Door (Routledge, 2027) 331-48 at 338-39.

1069 https://www.brookings.edu/wp-content/uploads/2012/04/0925_immigration_dionne.pdf.

1070 https://www.brookings.edu/wp-content/uploads/2012/04/0925_immigration_dionne.pdf.

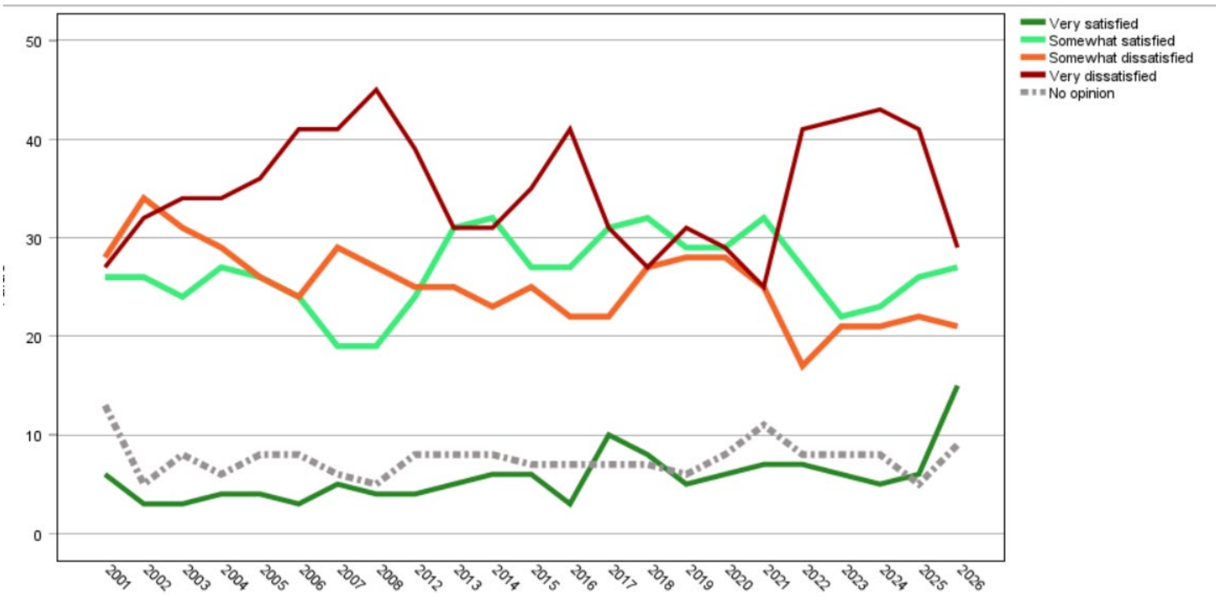
1071 Johnson, K., 'Humanitarian Immigration Programs of US', in Gatta, F.L. and Savino, M. (eds), Visas in Migration and Asylum Law: The Key that Opens the Door (Routledge, 2027) 331-48 at 337-38 (noting that in 2014 immigration judges granted asylum to 8,775 individuals, while opening seven investigations into potentially fraudulent applications).

By the 2020s, debate had ossified into a prevalent view that prioritised exclusion of any undocumented persons at the borders, with little allowance made for the forced nature of some migration. However, as this view reached its logical conclusion in terms of executive policy (i.e. total exclusion), events of 2025-26, and media coverage thereof, seem to be raising the profile of the view that migrants are not necessarily criminals, and some are deserving of protection (there is still relatively little exploration of the potential role US policies and actions have played as a causal factor in forcing the migration that reaches the US).

Relevance of the topic of access to asylum in public opinion

Public opinion about access to asylum, and specific barriers, tracks closely with public opinion on the more general topics of immigration in general, and irregular immigration in particular (with some variance relating to forced migration). Polling by the market research company YouGov shows a steady increase from 2.1% in 2012 to 14.6% in the proportion of registered voters who named immigration as the single most important issue facing the US (except for a decrease in 2021 during the Covid pandemic).[1072]

Gallup polling since 2001, asking about satisfaction with the current level of immigration in the US:[1073]

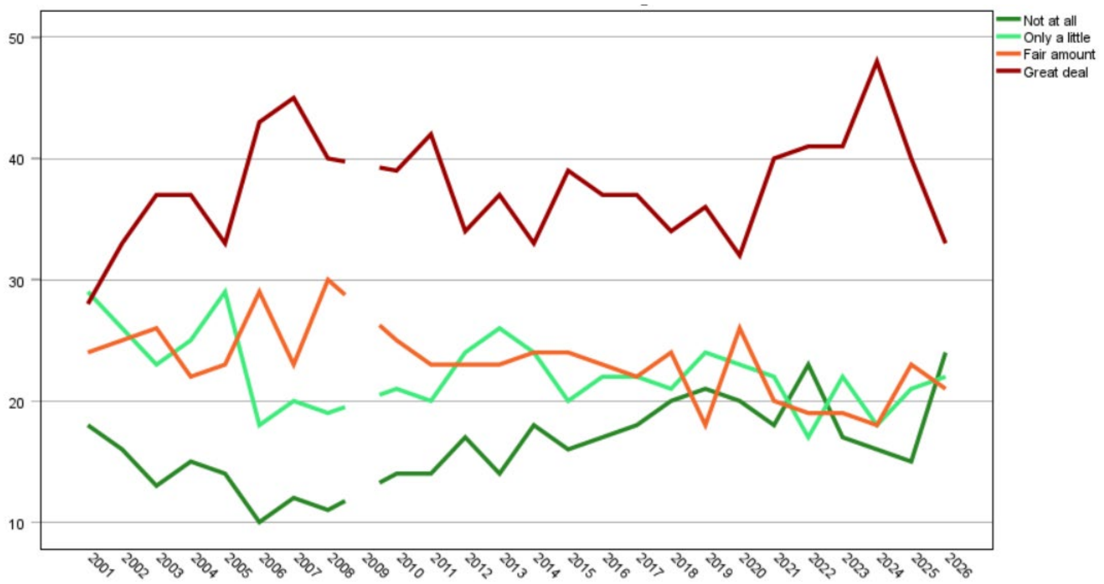


Gallup polling since 2001, asking how much subjects "worry about illegal immigration":[1074]

1072 As reported by https://www.as-coa.org/articles/poll-tracker-attitudes-immigration-2024-us-elections (4.8% in 2009, 2.1% in 2012, 6.9% in 2015, 10.7% in 2018, 9.2% in 2021, 14.6% in 2024). Surveys taken in early October (US elections are held in early November).

1073 Data available at https://news.gallup.com/poll/1660/immigration.aspx. Graph created by ACCESS team.

1074 Data available at https://news.gallup.com/poll/1660/immigration.aspx. Graph created by ACCESS team.



According to Gallup, from 2021-2024,[1075] about 80% of those surveyed annually considered "[l]arge numbers of immigrants entering the [US] illegally" to be an important or critical "threat[] to the [country's] vital interests", peaking at 86% in 2024 (with 55% considering this a critical threat). In June 2024, 63% either favoured or strongly favoured empowering the DHS secretary "to temporarily prohibit individuals from seeking asylum when the Southwest border is overwhelmed". In June 2016, about 1/3 favoured building a wall along the entire Mexican border, with about 59% of white adults and 82% (each) of black and Hispanic adults opposed.[1076] However, subsequent surveys asking about "[s]ignificantly expanding the construction of walls" along that border showed increased support in June 2018 (41%) and January 2019 (40%),[1077] reaching 53% in June 2024,[1078] then declining to 45% in June 2025 (with noticeable racial disparity in answers).[1079] June surveys taken in 2016 and 2025 also showed disparity of opinion depending on the race of the persons surveyed regarding deporting all irregularly present immigrants to their countries of origin, but within an overall pattern of increased support for deportation and greater polarisation of opinions.[1080] Approval for "[h]iring significantly more border patrol agents" rose from 75% in January 2019 to 76% in June 2024,[1081] before receding to 59% in June 2025,[1082] following a large increase in hiring

1075 All survey data cited in this paragraph are available at https://news.gallup.com/poll/1660/immigration.aspx. Graph created by ACCESS team.

1076 Overall, 18% strongly favour, 15% favour, 25% oppose, 41% strongly oppose. Non-Hispanic white, 23% strongly favour, 18% favour, 21% oppose, 38% strongly oppose. Black, 8% strongly favour, 10% favour, 27% oppose, 55% strongly oppose. Hispanic, 7% strongly favour, 9% favour, 42% oppose, 40% strongly oppose.

1077 June 2018: 24% strongly favour, 17% favour, 23% oppose, 34% strongly oppose. January 2019: 26% strongly favour, 14% favour, 21% oppose, 39% strongly oppose. Results not subdivided by race.

1078 34% strongly favour, 19% favour, 23% oppose, 23% strongly oppose. Results not subdivided by race.

1079 Overall, 27% strongly favour, 18% favour, 20% oppose, 34% strongly oppose. Non-Hispanic white, 32% strongly favour, 17% favour, 15% oppose, 34% strongly oppose. Non-Hispanic black, 13% strongly favour, 20% favour, 27% oppose, 36% strongly oppose. Hispanic, 15% strongly favour, 20% favour, 28% oppose, 33% strongly oppose.

1080 In 2016, overall, 14% strongly favour, 18% favour, 35% oppose, 31% strongly oppose; non-Hispanic white, 16% strongly favour, 20% favour, 33% oppose, 29% strongly oppose; black, 11% strongly favour, 12% favour, 36% oppose, 40% strongly oppose; Hispanic, 9% strongly favour, 12% favour, 46% oppose, 32% strongly oppose. In 2025, overall, 21% strongly favour, 17% favour, 26% oppose, 33% strongly oppose; non-Hispanic white, 26% strongly favour, 18% favour, 23% oppose, 31% strongly oppose; black, 13% strongly favour, 21% favour, 22% oppose, 41% strongly oppose; Hispanic, 12% strongly favour, 11% favour, 39% oppose, 35% strongly oppose. The surveys conducted in January 2019 and June 2024 were not subdivided by race: in January 2019, 17% strongly favour, 20% favour, 31% oppose, 30% strongly opposed deporting all irregularly present immigrants; in June 2024, 26% strongly favour, 21% favour, 27% oppose, 24% strongly oppose. June 2024 represented the peak of support for deporting all irregularly present immigrants during the time periods surveyed.

1081 January 2019: 34% strongly favour, 41% favour, 16% oppose, 8% strongly oppose. June 2024: 44% strongly favour, 32% favour, 15% oppose, 8% strongly oppose.

1082 29% strongly favour, 30% favour, 21% oppose, 17% strongly oppose.

for both CBP – border patrol – and ICE (which was however accompanied by a lowering of qualification standards). Of these, only the 2025 survey was subdivided by race of the respondents, which showed 65% of non-Hispanic white, 55% of black, and 43% of Hispanic adults favouring “[h]iring significantly more border patrol agents”.[1083]

Implications that political debate and public opinion have on what occurs in the courts

Judges and courts are largely insulated from public opinion and political debate. Federal courts are insulated by their status as an independent branch of government, and immigration courts are in a sense insulated by their administrative location within a federal law enforcement agency, exercising the discretion of the attorney general. Instead, influence comes through structural factors and second order effects. Structurally, the executive’s prerogative to nominate federal judges[1084] can lead to judges being appointed based on their known policy views (usually as expressed in their judicial decisions and other writings), however usually focusing on general views of executive powers or the proper role of courts, than immigration as such. Immigration judges are required to follow the precedential decisions of the BIA, and ultimately the AG if the AG overrules the BIA. Because the AG is a political appointee, this can mean that the legal norms IJs must enforce fluctuate from one presidential administration to the next.

D. Corruption

There is little or no evidence of corruption on the part of US officials, in terms of trading favourable treatment for money or other inducements. There have been widespread reports of mistreatment of arrested or detained persons, and that DHS enforcement agents, particularly ICE officers, are paid bonuses out of DHS discretionary funds per person they arrest and deliver into detention (regardless of how that person’s case then proceeds).

Relevant sources focusing on corruption in asylum access adjudication

None noted that focused on corruption as generally understood, ie affecting individual cases rather than influencing public policy or misusing allocated funds.

There appears to no influence of corruption on asylum access adjudication or asylum processing. NGOs have at times raised concerns about the implications of the potential for private companies to both benefit from immigration-related contracts (notably by providing detention services) while donating to political parties or candidates for office. Similarly, testimony in federal immigration related cases has also indicated that DHS utilises technologies provided by private companies whose leadership donates to political committees and candidates to guide searches for potential targets for immigration arrest. However the main alleged impacts are on government policy and practice, not on decision making in judicial or similar bodies, and at present the identified activities do not appear to violate any US laws.

E. Other socio-political factors

Immigration and asylum have been prominent in political discourse and election campaigns in the US for most of the 21st century. Successive governments have responded to this discourse by enacting policies aimed at controlling or preventing immigration. In the absence of significant legislative updates since 1996, it is left to the judicial branch to clarify whether a given policy is permitted under existing law. This can place courts and judges under a degree of political pressure when deciding asylum access cases.

[1083] Non-Hispanic white, 34% strongly favour, 31% favour, 18% oppose, 13% strongly oppose. Black, 25% strongly favour, 30% favour, 21% oppose, 19% strongly oppose. Hispanic, 16% strongly favour, 27% favour, 31% oppose, 25% strongly oppose.

[1084] The Constitution establishes the Supreme Court, and empowers Congress to establish further federal courts by legislation. Congressional legislation determines how many judges serve on each court.

Acronyms:

ACLU – American Civil Liberties Union (civil society organisation)

AEDPA – Antiterrorism and Effective Death Penalty Act (1996)

AG – Attorney General (head of DoJ)

APA – Administrative Procedures Act

CBP – US Customs and Border Protection, part of DHS

CFR – Code of Federal Regulations, the annual compendium of rules/etc published in the federal register

CLP – DHS rule, "Circumvention of Lawful Pathways" (interim(*?) 11 May 2023; final (when*?))

DHS – US Department of Homeland Security

DoJ or DOJ – US Department of Justice

EOIR – Executive Office for Immigration Review, part of DoJ (oversees immigration courts)

GAO – Government Accounting Office (auditing arm of the US Congress)

HIAS – Hebrew Immigrant Aid Society (civil society organisation)

HIS – Homeland Security Investigations

IACHR – Inter-American Commission on Human Rights

ICE – Immigration and Customs Enforcement, part of DHS

IIRIRA – Illegal Immigration Reform and Immigrant Responsibility Act (1996)

INA – Immigration and Naturalization Act (1952)

OFO – Office of Field Operations, part of CBP (responsible for border points)

USBP – US Border Patrol, part of CBP (responsible between border points)

USCG – US Coast Guard, part of DHS (maritime security in territorial & international waters)

USCIS – US Citizenship and Immigration Service, part of DHS (responsible for asylum determination)

USCRI – US Committee for Refugees and Immigrants (civil society organisation).