

From Refuge to Restriction: Tracing the Evolution  
of US Asylum Policy and its Contemporary  
Challenges

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## **Abstract:**

Fulfilling a fundamental campaign promise, the Trump administration imposed harsh restrictions on all types of entry by foreign nationals into the United States. Pursuant to its anti-immigrant platform, the national system for granting asylum status was scaled back drastically, especially for a handful of Latin American states. Primarily working within the bounds of existing policy, the presidency managed to roll back or hinder decades of asylum legislation. From 2015 to 2020 the number of individuals granted asylum fell by more than half while the mechanisms for barring their entry remained the same or based on previous strategies. This paper will analyze the political precedent that allows for the dereliction of the asylum system. First, we analyze how the initial mistreatment of Haitian asylum seekers following the passage of the 1980 Refugee Act set a foundation for detention and denial strategies that have become integral to rejecting and disincentivizing asylum claims. Next, we give an in-depth analysis of the rise of ‘safe-third country’ policies and their effect on asylum seekers as well as the state’s that house them. Finally, we examine the Attorney General’s power over the Board of Immigration Appeals as a mechanism which allows the executive branch to alter asylum policy regardless of pre existing legislation.

## **Haitian Neglect and the Foundations of Discrimination Within American Asylum Policy**

In 1980, about 100,000 Cubans, and 15,000 Haitians fled oppressive regimes to seek asylum in the United States.<sup>1</sup> On paper, the Cubans and Haitians had a similar case. Both populations experienced deteriorating economic conditions and rampant human rights abuses throughout the 60s and 70s. But a McCarthyist precedent divided the two groups. While the

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<sup>1</sup> Charles Lindskoog, “The Refugee Crisis of 1980: Forging the Detention Tool,” in **Detain and Punish: Haitian Refugees and the Rise of the World’s Largest Immigration Detention System**, (Gainesville: University of Florida Press, 2018), 35.

United States Immigration and Naturalization Service (INS) was sympathetic to Cuban exiles, classifying them as political refugees and fast-tracking their protected status, Haitian immigrants were labeled economic migrants and denied protection.<sup>2</sup> Until that year, political asylum was solely attainable for persons fleeing communist regimes. The 1980 Refugee Act sought to end that precedent, bringing American refugee policy up to par with the standards of international law, guaranteeing the universal right to seek refuge from political prosecution.<sup>3</sup> Furthermore, the Carter administration openly sought to reform U.S. foreign policy to place a greater emphasis on human rights. Embracing the holistic nature of the refugee act, Carter advocated for a policy of ‘open arms,’ going so far as to issue an executive order that stressed the equality of Haitian and Cuban refugees – invoking the Refugee Education Assistance Act in order to ask the Secretary of State to oversee the processing of both migratory groups immediately<sup>4</sup>. Local courts were also beginning to take the side of the Haitians, with District Judge James Lawrence King ruling that the INS’s practices were discriminatory and self-contradictory between the years of 1978 and 1979, in the 1980 class-action suit *Haitian Refugee Center vs. Civiletti*, With legislative, executive and judicial branches of government all aligning to recognize the validity of the Haitian’s claim to asylum, one might perceive it to be a forgone conclusion that the 1980 boat refugees would be admitted into the country, and any divide between the treatment Cuban and Haitian refugee would greatly minimized.

Yet by 1981, policy had not only reverted but grown stronger in the opposing direction. While Haitian refugees who entered between April 21 and June 19 were allowed equal status to Cuban refugees as ‘entrants,’ subsequent asylum seekers would be subjected to permanent

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<sup>2</sup> John Scanlan and Gilbert Loesher, “Human Rights, U.S. Foreign Policy, and Haitian Refugees,” **Journal of Interamerican Studies and World Affairs**, vol. 26 no. 3 (1984), 342.

<sup>3</sup> Jaya Ramji-Nogales et al, **The End of Asylum** (Washington DC: Georgetown University, 2021), 6.

<sup>4</sup>“Executive Order 12246 of October 10, 1980, Cuban and Haitian Entrants,”

<https://www.presidency.ucsb.edu/documents/executive-order-12246-cuban-and-haitian-entrants>

detention and deportation.<sup>5</sup> Instead of equalizing the treatment of the two groups, actions taken by the federal government under the Carter administration effectively set a new basis of inequality, normalizing the practice of barring asylum seekers through legal means. This paper will examine how the treatment of Haitian immigrants in the 1980s set a standard of discrimination in American asylum seeker policy. Outlining two strategies used to deny Haitian refugees asylum-seeker status, I will show how the 1980 Refugee Act left too much room for executive bias, allowing for the continuation of discrimination in American immigration policy. I will then connect these strategies to later administration's refugee policies, showing how the initial steps taken against Haitians were codified, institutionalized and used as precedent to deny the right to asylum for later groups. Finally, I will analyze how the Trump administration's complete decimation of the American asylum system hinged on these same strategies, an extreme continuation of the previous norm of selectively granting asylum status on the basis of political motivations.

### **A Brief History of Pre-1980 Refugee Policy**

After World War II, the inadequacy of American refugee and asylum policy had been made clear by the atrocities committed against certain ethnic groups by the Nazi regime, and a raised domestic awareness of the brutality of authoritarianism. At that point, American immigration was based on a racist quota system which mandated a fixed number of immigrants per ethnic group.<sup>6</sup> This led to multiple refusals to take in Jewish asylum seekers in the 1930s and 1940s. Franklin Delano Roosevelt famously sent St. *Louis* and its load of more than 900 Jewish passengers back to Nazi-controlled territory in 1939.<sup>7</sup>

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<sup>5</sup> Lindskoog, 38.

<sup>6</sup> As opposed to nationality— a German born in Poland would be counted as a German

<sup>7</sup> Daniel A. Gross, "The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies," **Smithsonian Mag**, November 18, 2015.

Harry S. Truman went on to loudly advocate for reform and refugee acceptance in the postwar period. Presenting America as a champion of democracy and freedom he argued that the nation should assume a role as a beacon of liberty for all those unrighteously persecuted across the globe. He succeeded in pushing through legislation and bending the quota system to accept 500,000 refugees from Eastern Europe, signing the first ever legislation to address refugees with the Displaced Persons Act of 1948.<sup>8</sup> However, a xenophobic congress would not play ball with the idealistic Truman administration for much longer. In 1952, the Immigration and Nationality Act was passed, codifying national quotas on an explicit racial bias, promoting 'Nordic' lineages' right to immigrate above others.<sup>9</sup> The act made no mention of refugees, effectively lumping them in with the rest of the immigration pool fighting for limited spots, leaving no space for asylum seekers whatsoever.

But the refugees still came. The fall of the iron curtain in Eastern Europe and the success of Mao's Revolution in China forced the hand of President Eisenhower. Desperate for a mechanism to address the refugee crisis, he turned to a provision of the '52 Act which allowed the Attorney General to parole refugees on an *ad hoc* basis. Refugee admission thereby became a discretionary process to be addressed only so far as a particular crisis met the benchmark of a given president's political concern and attention. Practically speaking, refugees were entirely disregarded by the system with occasional exceptions for those fleeing communist countries. The line between asylum seeker and refugee is murky here. The Attorney General used the same legal mechanism to accept refugees, protect affirmative asylum-seekers and prevent the deportation of defensive asylum-seekers.

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<sup>8</sup> Vernon M. Briggs, **Mass Immigration and the National Interest** (Armonk: M. E. Sharpe Inc, 1992), 88.

<sup>9</sup> *Ibid*, 89.

The Immigration and Nationality Act of 1965 reformed the system in line with the Civil Rights focus of its era. Seeking to abolish the discriminatory, racist nature of the previous system, the act adjusted quotas to be equal between Eastern and Western hemispheres and capped at 20,000 people per country. Still, the act left little room for refugees, prioritizing family reunification above all other interests. This was included as a compromise between progressive groups who wanted equal immigration rights and conservatives who wanted to maintain the racial selectivity of the previous policy.<sup>10</sup> Consideration for refugees was included in the bill, but limited the government to accepting only 17,400 refugees per year.<sup>11</sup> The definition of a ‘refugee’ was strictly limited on a political basis, accepting only people “(I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East.”<sup>12</sup>

Two major exceptions to the parole-as-necessary policy occurred in Cuba, following the rise of Castro, and in Indochina, following U.S. intervention in Vietnam, Laos, and Cambodia. In Cuba, the United States differed from its quota policy and later its ‘equal immigration’ policy by passing the Cuban Adjustment Act, which guaranteed a path to citizenship for any Cuban refugees able to reach American shores.<sup>13</sup> Lyndon Johnson’s support of the bill essentially signaled that a political victory of a geopolitically enemy was more important than the supposed policy of equality he had been promoting until that point. While Castro would eventually shut off the release valve, banning all flights to the United States and barring sea passages, the sixties and

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<sup>10</sup> Ibid, 111

<sup>11</sup> Edward M. Kennedy, **U.S. Immigration Law and Policy**, report prepared for the use of the Committee on the Judiciary United States Senate, 96th Cong., 1st sess., 1979, Committee Print 96, 80.

<sup>12</sup> **An Act To Amend the Immigration and Nationality Act, and for other purposes**, Public Law 89-236, *U.S. Statutes at Large* (1965): 911-922.

<sup>13</sup> **The Cuban Adjustment Act of 1966**, Library of Congress - Research Guides, <https://guides.loc.gov/latinx-civil-rights/cuban-adjustment-act>

early seventies saw about 677,158 Cubans enter the United States, nearly all receiving legal status as refugees.<sup>14</sup>

The situation in Indochina was somewhat different. While the mechanism of parole was the instrument used to usher in refugees, the groups of people admitted were of unprecedented size and Presidents Gerald Ford and Jimmy Carter as well as their Attorney General's expressed uneasiness using their discretionary power to direct such a massive portion of American immigration.<sup>15</sup> The parole provision was never meant to allow for the acceptance of large groups, much less the 210,000 refugees per month admitted between July 1, 1979 and September 20, 1980.<sup>16</sup> Members of Congress grew frustrated with their lack of agency in directing American refugee policy and by 1980, all branches of government agreed that new legislation and institutions were necessary to create a just, cohesive refugee policy in-line with international law.

### **Refugee Act of 1980**

Negotiations between the Carter administration and congress yielded an agreement to accept 50,000 refugees per year between 1980 and 1982, subject to change in the case of an emergency wherein legislative and executive branches agree to raise the cap.<sup>17</sup> The Act changed the definition of refugees to be more inclusive and in-line with international standards, intentionally depoliticizing the prior definition. Now any person “unwilling or unable to avail himself or herself of the protection of that country because of persecution or a well-founded fear or persecution due to race, religion, nationality, *membership in a particular group, or political opinion*” could be admitted as refugees by the President.<sup>18</sup> Who exactly was permitted to obtain

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<sup>14</sup> Briggs, 122.

<sup>15</sup> U.S. Congress Senate Committee on the Judiciary, **Review of Refugee Resettlement Programs and Policies**, 96th Cong., 1st sess., 1979, U.S. Government Printing Office, 14.

<sup>16</sup> Briggs, 124.

<sup>17</sup>Congress.gov. **S.643 - 96th Congress (1979-1980): Refugee Act of 1979**, March 17, 1980. <https://www.congress.gov/bill/96th-congress/senate-bill/643>.

<sup>18</sup> Ibid

refugee status was left to the discretion of the President. The law requires the President to preallocate a set number of refugees for each geopolitical region, in order to prevent another 'Cuba situation' where one country 'stole' all the available visas.

A crucial flaw of the Refugee Act was its scant asylum policy. Idealistically assuming that refugees would patiently wait in their home countries to be processed and approved for entry, the 96th Congress failed to consider that A) many refugees are not able to securely wait in their home country and B) many immigrants would affirmatively claim asylum as a means of obtaining legal protection. Without considering these factors, the 1980 Act authorized the attorney general in the vaguest possible terms to 'establish a procedure for granting asylum to refugees.' It's only specification in regards to asylum status was that those applying for asylum status must meet the Refugee Act's definition of a refugee and of those granted asylum-status, 5000 could be granted permanent resident status per year. The latter figure gives an indication of how unequipped the United States government was for the ensuing crisis.

### **Haitian Migrants & The Swift Return of Discrimination**

As mentioned above, the Mariel Boat Crisis represented a huge test to the new refugee policy adopted by the United States. Despite legislative, executive and judicial incentives to move towards more equitable refugee policy, the unprecedented scale of sudden entry into U.S. territory altered the political gains possible from an 'Open Arms' policy. In an effort to save face, President Carter accepted the entrants of the Mariel boat crisis under a special classification, but this only applied for a period of six months. After that six months, the Reagan administration began to deploy a variety of tactics that ensured Haitian refugees were almost entirely barred from the country while Cubans continued to be allowed under the 1966 Cuban Adjustment Act. Between 1981 and 1991, 8 Haitians were granted asylum status while tens of thousands of



Cubans received protection as refugees or asylum seekers<sup>19</sup>. This discrepancy existed despite the passage of the Immigration Reform and Control Act of 1982 (IRCA) which established a more official asylum adjudication policy that guaranteed migrants with the opportunity to present their case to several levels of government officials. Analyzing the failure of the state to recognize asylum status for Haitian migrants reveals a struggle to balance the humanitarian intent of the Refugee Act of 1980 with the political interests of subsequent administrations. Finding loopholes around the language of the refugee act, the treatment of Haitian asylum seekers became a blueprint for future asylum seeker policy. Isolating two trends, denial of access to the asylum adjudication system and the use of detention as a deterrent, we can see how the treatment of Haitian migrants created a precedent which erased the original intent of the 1980 Refugee Act, and led to modern policies which fail international commitments to protect asylum seekers.

#### *Interdiction/Denial of Access*

By the beginning of the Reagan administration, a series of legal battles had already begun to protect the Haitian refugees against the most direct abuses of the asylum system. Groups like the Black Caucus and Haitian Immigrant Center went through the Floridian district courts to stop the practices of mass denials of asylum applications without trial and won judgements that demanded stronger consideration for Haitian refugee and asylum claims.<sup>20</sup> Without strong legal backing to continue denying asylum claims, the Reagan administration decided to prevent those claims from being filed in the first place. In September of 1981, an executive directive asked the Coast Guard to interdict any migrant boats originating from Haiti and send the migrants back to Port-au-Prince without consideration of refugee status. By October the first boats were patrolling the Haitian coast, frequently picking up boats full of migrants and promptly shipping them back

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<sup>19</sup>Briggs, 133.

<sup>20</sup> Scanlan, 345.

to Haiti's capital. While members of the Coast Guard were technically instructed to interview all of the migrants and bring the one's with evidence of a reasonable fear of persecution into the U.S, there is little evidence to suggest that this actually occurred. Of the 22,940 Haitians captured at sea, only 11 were given asylum status, far below the average asylum grant rate.<sup>21</sup>

The interdiction strategy amounted to the first attempt to deny certain groups of asylum-seekers, not on the basis of their eligibility to make a claim, but on their undesirability as an ethnic/national group. While publicly justified on the basis of the Haitians being 'economic migrants,' the use of action to prevent claims themselves indicates a knowledge that a significant portion of those claims would be seen as legitimate if they made it to court, especially in Southern Florida given the *Civiletti* precedent. Skipping the entire process of asylum adjudication, interdiction and repatriation would prove to be an enticing option for future Presidents. This was most clearly seen following a coup in September 1991, which saw the first popularly elected President of Haiti, Jean-Bertrard Aristide, overthrown after only eight months in office. In the following months, thousands of Haitians who had supported the democratic government fled out of fear of retribution by the new regime.<sup>22</sup> No longer could the Haitians be reasonably labeled as 'economic migrants,' as the State Department reported on human rights abuses in the country and the United States enacted an embargo on the country.<sup>23</sup> Initially the Bush administration attempted to screen the asyumes at Guantanamo Bay, but as refugees continued to flee, he called for Haitians to be returned to their home country as a means of

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<sup>21</sup> U.S. Library of Congress, Congressional Research Service, **U.S. Immigration Policy on Haitian Migrants**, by Ruth Ellen Wasem, RS21349 (2005), 3.

<sup>22</sup>Constitutional Rights Foundation, **BRIA 10 2 b Haiti and the Boat People**, <https://www.crf-usa.org/bill-of-rights-in-action/bria-10-2-b-haiti-and-the-boat-people#:~:text=With%20the%20country%20in%20turmoil,at%20Guantanamo%20Bay%20in%20>

<sup>23</sup> Oswald Johnston, **U.S. Puts Squeeze on Haiti With an Embargo : Sanctions : Bush signs an order aimed at forcing military coup leaders to restore Aristide to power**, *LA Times*, October 20, 1991, <https://www.latimes.com/archives/la-xpm-1991-10-30-mn-667-story.html>

disincentivizing asylum seekers.<sup>24</sup> During his campaign for the presidency in 1992, Clinton loudly advocated for the refugees and called for a stop to forced repatriation.<sup>25</sup> However, his administration failed to act on such promises, reverting to the Bush administration's policy soon after the election, continuing the repatriation policy until 1994.<sup>26</sup>

While interdiction is perhaps the most flagrant policy denying access to the asylum system, it would not be the most impactful. The Illegal Immigration Reform and Responsibility Act (IIRRA) was passed in 1996 for the expressed purpose of clamping down on immigration.<sup>27</sup> Among other changes to the way illegal immigrants are handled within the court system, the IIRRA introduced the policy of expedited removal. After the passage of the act, any immigrants intercepted by border patrol officials within the United States must ask migrants whether they fear return to their home country. If they do claim fear they are subject to a 'credible fear interview' wherein they must adequately demonstrate a high-risk of persecution in their home country. If they do not claim fear, they are deported immediately. The procedure fast-tracked deportation and stripped back many of the legal rights previously guaranteed to immigrants. Despite the policy's caveat for those facing 'credible fear' the act bars asylum seekers from the adjudication process in several ways.<sup>28</sup> Because the expedited removal process only applies to those without documentation, those rapidly fleeing their home country due to persecution are

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<sup>24</sup>Constitutional Rights Foundation, **BRIA 10 2 b Haiti and the Boat People**, <https://www.crf-usa.org/bill-of-rights-in-action/bria-10-2-b-haiti-and-the-boat-people#:~:text=With%20the%20country%20in%20turmoil,at%20Guantanamo%20Bay%20in%20>

<sup>25</sup>Don Nickles, **Gov. Clinton's Haitian Policy**, *Washington Post*, December 10, 1992, <https://www.washingtonpost.com/archive/opinions/1992/12/10/gov-clintons-haitian-policy/3178f835-dde7-476b-abba-2416464123d1/>

<sup>26</sup>Constitutional Rights Foundation, **BRIA 10 2 b Haiti and the Boat People**, <https://www.crf-usa.org/bill-of-rights-in-action/bria-10-2-b-haiti-and-the-boat-people#:~:text=With%20the%20country%20in%20turmoil,at%20Guantanamo%20Bay%20in%20>

<sup>27</sup> **Illegal Immigration Reform and Immigration Responsibility Act**, Cornell Legal Information Institute, [https://www.law.cornell.edu/wex/illegal\\_immigration\\_reform\\_and\\_immigration\\_responsibility\\_act#:~:text=The%20Illegal%20Immigration%20form%20and,statutorily%20defined%20periods%20of%20time](https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act#:~:text=The%20Illegal%20Immigration%20form%20and,statutorily%20defined%20periods%20of%20time)

<sup>28</sup>Michele R. Pistone and John J. Hoeffner Esq., "Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers," **Villanova University Charles Widger School of Law Working Paper Series**, (2006), 167-211.

disproportionately affected. Additionally, a lack of oversight and complete deferral to individual border patrol officers has led to a failure to properly implement adequate protection for asylum seekers. A 2006 report by Michele R. Pristone analyzed interactions between inspectors and migrants and found that the expedited removal process is plagued by wide gaps in communication due to language barriers and lack of knowledge of the IIRRA itself, leading to the deportations of thousands of legitimate asylum seekers.<sup>29</sup>

The Trump Administration notably used the expedited removal process as a means of increasing deportations and removing migrants as quickly as possible. In 2017, the administration requested an expansion of expedited removal “to its full statutory extent.”<sup>30</sup> This led to expedited removal to become 35% of all removals in 2019.<sup>31</sup> This is in large part due to a change in the instruction given to border patrol officers. Instead of simply asking the question of whether a migrant fears return, the Trump Administration authorized officers to ask for evidence and prompted them to remove migrants if evidence was either nonexistent or insufficient.<sup>32</sup>

The infamous Migrant Protection Protocols, aka the ‘Remain in Mexico policy,’ acts as another notable Trump directive based on a denial of access strategy. In 2019, the Trump Administration worked with the Mexican government to remove more than 28,000 of its asylum seekers from the US and bring them to overcrowded camps in Mexico to await trial.<sup>33</sup> Under MPP, migrants, even those seeking asylum, could be completely barred from the country for indefinite periods of time. An article published by the Migration Policy Institute suggests the

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<sup>29</sup> Ibid

<sup>30</sup> **A Primer on Expedited Removal**, American Immigration Council, July 22, 2019, <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>

<sup>31</sup> Ibid

<sup>32</sup> Jaya Ramji-Nogales et al, 50.

<sup>33</sup> Kennji Kizuka, **Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process**, Human Rights First, August 8, 2019, <https://humanrightsfirst.org/library/delivered-to-danger-illegal-remain-in-mexico-policy-imperils-asylum-seekers-lives-and-denies-due-process/>

precedent for upholding such an extreme policy can be found in rulings about the treatment of Haitian refugees in 1991, arguing that previous court rulings which enforced a lax interpretation of the Refugee Protocol allowed for Remain in Mexico to have a reasonable degree of legal backing.<sup>34</sup>

### *Detention*

The practice of detaining migrants in prison-like conditions emerged only after the passage of the 1980 Refugee Act and the entrance of thousands of Haitian asylum seekers. Before, asylum seekers were protected by volunteer host families or in many cases their real families.<sup>35</sup> As many of the immigrants were related to U.S. citizens, as per the preference for family reunification under the 1965 Immigration and Nationality Act, the system worked well to help new residents join communities early as their asylum claim was being processed.<sup>36</sup> Following the Mariel Boat Crisis, President Carter decided to shift away from the host-family strategy, asking the Bureau of Prisons to prepare facilities for the processing of immigrants.<sup>37</sup> These initial facilities, often old hospitals or schools, were surrounded by fences, staffed with prison guards and maintained with poor energy, food preparation and water systems that resulted in miserable conditions for migrants unfortunate enough to be placed in them. However, not all migrants had to worry. While thousands of Haitian refugees stayed locked in shoddy prisons for years at a time, Cuban refugees were treated under the old policy based on the fact that they were assumed to have families that could “assure placement.”<sup>38</sup>

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<sup>34</sup>Muzaffar Chisti and Jessica Bolter, **Remain In Mexico Plan Echoes Earlier U.S. Policy to Deter Haitian Migration**, Migration Policy Institute, March 28, 2019, <https://www.migrationpolicy.org/article/remain-mexico-plan-echoes-earlier-us-policy-deter-haitian-migratio>

<sup>35</sup> Lindskoog, 35.

<sup>36</sup> Briggs, 93.

<sup>37</sup> Lindskoog, 35.

<sup>38</sup> Ibid 36

Advocates for the Haitians began a series of legal battles arguing that the practice of detention was being used in a discriminatory manner against Haitian refugees, and that the policy therefore promoted discrimination in the asylum system. In 1985, *Jean v. Nelson* would effectively end this argument on a 7-2 Supreme Court decision upholding the legality of detaining the Haitian migrants.<sup>39</sup> Although ruled to be a legal practice, detention centers carried multiple negative impacts on the likelihood of success for any given asylum application. The government intentionally constructed detention centers to be as detached as possible from federal immigration courts, dating back to the remodeling of Fort Allen in Puerto Rico to house Haitians as authorized by the Carter administration.<sup>40</sup> Distance from federal courts made it near-impossible for entrants to contact or consult lawyers about their asylum cases, frequently leaving them in the dark until the day of their trial.<sup>41</sup> The centers also acted as a deterrent to those expecting to find salvation in the United States. Poor conditions and a chance of family separation continue to make asylum seekers less likely to affirmatively declare themselves out of fear of long-term detainment.<sup>42</sup>

President Carter's use of detention facilities founded a practice now essential to the way the United State handles immigration. Subsequent administrations both expanded the use of holding centers and increased their ability to deter asylum seekers. In response to an increase in the number of Salvadoran and Guatemalan immigrants fleeing civil wars, Reagan authorized the construction of several detention facilities along the Southern border. At these centers, border patrol officers were instructed to give detainees misleading information regarding their ability to claim asylum, saying that extensive evidence of participation as a guerrilla was necessary to file

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<sup>39</sup> **Jean v. Nelson**, 472 U.S. 846 (1985)

<sup>40</sup> Lindskoog, 34.

<sup>41</sup> Philip G. Shrag, **Baby Jails: The Fight to End the Incarceration of Refugee Children in America**, (Oakland: University of California Press, 2020), 74.

<sup>42</sup> Lindskoog, 41.

a claim.<sup>43</sup> The Reagan years also saw the first widely-publicized use of child detention as a means of deterring families from entry. The case *Flores v. Meese* examined the detention of Jenny Flores and concluded that the taking of children as bait for parents was unconstitutional and cruel.<sup>44</sup> However, the practice would continue to be molded into a less legally-vulnerable form, crystallizing into the Trump-era child separation policies that dominated news cycles for much of his presidency.

Since Reagan, each president has nominally expanded the use of detention centers. As previously mentioned, Bush Sr. transformed Guantanamo into a massive migrant processing center for Caribbean migrants continuing the policy of selective incarceration for undesirable migrants.<sup>45</sup> Clinton continued the Bush policy and signed the IIRRA, which stipulated that immigrants awaiting ‘credible fear’ decisions must be held in detention while their case was being decided.<sup>46</sup> Both Bush and Obama built multiple new detention centers using private prison contractors across the state of Texas during their administrations, enhancing the capability of the INS to hold asylum seekers for longer periods of time.<sup>47</sup>

## **Conclusion**

The immediate workarounds to the 1980 Refugee Act in response to the Haitian refugee crisis normalized and institutionalized discrimination within the American asylum system. Strategies of detainment and application denial pioneered to deal with the original influx of Haitian migrants have become integral to the modern asylum system. Interdiction policies laid the groundwork to export American asylum burdens to other nations and deny rights on the basis of keeping people from entering U.S. territory. Detainment initiatives have led to a massive

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<sup>43</sup> Susan Gzesh, **Central Americans and Asylum Policy in the Reagan Era**, Migration Policy Institute, April 1, 2006, <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>

<sup>44</sup> Shrag, 19.

<sup>45</sup> Wasem, 4.

<sup>46</sup> Ibid.

<sup>47</sup> Jaya Ramji-Nogales et al, 27.

expansion of migrant prisons along the U.S. border, making it incredibly difficult for asylum seekers to seek legal assistance. Such policies continue to be used disproportionately against certain groups of asylum seekers, while favoring refugees from geopolitical enemies such as Russia and China. To create a more durable and just asylum policy, the Biden administration should look to assure open access to and resources for asylum application, codify which abuses of the state allow for asylum to be claimed and devise a more efficient and humane processing system that limits time spent in detention centers.

### **Status of US Immigration Today**

Today, little has changed. May of 2022 saw nearly 100 million people globally, forcibly displaced – roughly equivalent to one third of the United States' population. In 2021, 27 million displaced people were refugees and 4.6 million sought asylum. In that same year, the United States accepted only 11,411 refugees, even though they have the largest immigration detention system which detains, on average, 37,000 people daily. Since 1980, America's asylum policy has shifted through phases of anti and pro-refugee sentiment. Since Donald Trump's Presidency and the COVID-19 pandemic, however, the asylum system has morphed into an inaccessible, dangerous, and inhumane political system which has remained largely unchanged since the pandemic's slowdown. It is necessary to analyze the United States' treatment of asylum seekers at the southern border and especially how it has impacted Mexican people and Mexican policy since.

The USA and Mexico have a unique relationship – with nearly 2,000 miles of shared border, the nation's frequent trade work, products, and a flow of people. The United States is the most important trading partner for Mexico, American citizens often boost the Mexican tourism



industry, and the US annually holds hundreds of thousands of Mexican migrants. America even sends millions of dollars to Mexico in the form of aid to train military apparatuses and prop up governmental institutions.

But, when it comes to asylum seeking, Mexico and the United States share a much more complicated relationship – and much of it stems from the asylum process which occurs on America’s southern border. The development of United States immigration policy has long impacted Mexican migration patterns. In 1982, as Mexico underwent a massive economic crisis and peso devaluation, migrants searched for labor in the United States, a move which was supported by a US Supreme Court case that year, *Plyler v Doe*. The case ultimately assured that undocumented children could access basic education within the United States (guaranteeing basic education regardless of legal immigration status). In the mid-1980s, accompanying the increase in Maquiladoras (foreign-controlled factories in Mexico and along the US-Mexican border) expanded to produce goods for US markets, boosting the population of Mexican migrants. It also increased the number of apprehended, undocumented Mexican immigrants in the US).

As the 1990s emerged, the American government developed new systems to monitor the US southern border such as Operations Hold-the-Line, Gatekeeper, and Safeguard. Operation Hold-the-Line emerged in El Paso, Texas as a way to stop crossing into the United States through the border with Mexico. With this program, Border Patrol agents were stationed on the border, visible to migrants attempting to enter. This program greatly decreased the number of migrants who attempted crossing the border, decreasing migrant apprehensions in El Paso by 70%. This system served as the standard to compare other Border patrol operations. After the implementation of Hold-the-Line, Operation Gatekeeper was created in San Diego, California

and acted to encourage migrants to enter the US more west than California in areas where Border Patrol had “strategic advantage” over border crossers. Operation Safeguard in Arizona worked toward a similar goal.

America has also implemented more recent measures to discourage migration into the country through Mexico. In 2006, for example, Congress passed the Secure Fence Act which authorized barriers along the US southern border. In 2015, this culminated in a 652-mile-long border fence separating the United States and Mexico. Due to the geographic proximity and history of shared economic activity, migration, and governmental cooperation, between the United States and Mexico, the latter is vastly impacted by shifts in American immigration policy, especially asylum policy. In recent years, a record number of migrants aim to enter the United States through its shared border with Mexico. In 2021, the United States Customs and Border Protection recorded over 1.6 million encounters with migrants on the US Southern border. This increase in migrant activity impacting Mexico and the United States emerged alongside massive alteration of existing American immigration policy, notably that of President Trump’s tenure and the shifts made due to the COVID 19 pandemic. This research aims to analyze the recent developments in asylum policy and analyze how the new conditions catalyzed a humanitarian crisis at the shared US-Mexican border.

### **Pre-Trump Asylum Policy**

Asylum is a class of protection for foreigners in the United States or arriving in the US who fit the legal international definition of a refugee. Refugees, according to the widely adopted United Nations (UN) standards, are individuals who are unable to return to their home country and cannot receive protection in that home country because of prior persecution or fear of

persecution due to “race, religion, nationality, membership in a particular social group, or political opinion.” In the United States, there are, as of now, typically two paths to apply to asylum within United States borders, affirmative or defense asylum. The affirmative asylum process occurs for individuals who are not involved in any procedures for removal from the United States. These individuals can proactively seek asylum through the American government through the US Citizenship and Immigration Services (USCIS). This process also includes unaccompanied children (even if they are in proceedings for removal).

If, in this process, the USCIS denies the affirmative asylum seeker’s request for lawful US status, they will go to immigration court for removal (where they can request asylum in front of the judge, using the second approach to asylum, the defensive process). In the defensive asylum process, people in removal proceedings can apply for asylum by filling out an application with an immigration judge. The asylum, here, acts as a defense against being removed from the United States. But, in this immigration court, while asylum seekers have the right to an attorney, unlike in the US citizen criminal courts, the government does not provide asylum seekers with counsel (even if the seeker cannot obtain or afford an attorney on their own).

Many of the changes in American immigration law are made legislatively. Since 1980, a handful of laws have impacted the US asylum and immigration systems, forcing it to evolve accordingly. The Refugee Act of 1980, which emerged after challenges resettling refugees in the late 1970s without sufficient funding or resources. President Jimmy Carter signed the measure into law which raised the annual ceiling for refugees in America and changed the definition of a refugee to match the UN’s. The Act worked to standardize all refugee resettlement to the United States and serves as the legal foundation for The Office of Refugee Resettlement and the federal assistance for refugees. This legislation likewise established two pathways to seek refugee status

in the United States either from abroad as a refugee or within the United States as an asylum seeker. Although America has a legal obligation to protect refugees, asylum is not always guaranteed. Since the status is discretionary, even if an individual qualifies as a refugee, they can still be denied asylum.

Asylum law was expanded in the United States with the Immigration act of 1990 which expanded the definition of persecution, protecting persecution caused by non-state actors like organized crime groups. This shift in policy allowed asylum seekers from Mexico, where non-state violence from cartel groups is rampant and acted with impunity. Additional developments occurred when Congress established the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 created new barriers to seek asylum in the United States. It allowed Customs and Border Protection (CBP) to detain, admit, or deport immigrants (in an expedited removal process) who arrive at official entry ports at the US border without providing them a court hearing or judicial review. This expedited removal process also applied to asylum seekers. The Act additionally established processes to deport migrants such as expedited removal, a process which blocks asylum petitioners from accessing immigration courts unless they pass an initial screening and contributes to the accumulation of backlog in immigration courts. In fact, between 2004 and 2020 this was expanded and the US Department of Homeland Security initiated an expedited removal process for most non-citizens who seek asylum in the US. This is because the removal process was expanded to include individuals found within 100 miles from the US border and within 14 days of illegal entry in the US.

To protect against deporting people legitimately fleeing prosecution in their home country, Congress introduced the screening process of credible fear (and reasonable fear) under the umbrella of expedited removal. Credible fear screenings occur after an asylum seeker tells a

border patrol official that they fear persecution, torture, etc. in their home country (that they wish to apply for US asylum).

Under older processes, asylum seekers who pass the credible fear interview go on to complete the defensive asylum process (people who are not granted asylum under the newer process also go through this cycle). But newer expedited processes have refugees who pass the credible fear interview to have a separate “asylum merits interview” process where a USCIS officer will, within 21-45 days, decide whether to grant the individual asylum. Individuals who have no credible fear are removed from the US, though they may appeal their decision. Many asylum seekers have credible fear. In the 2019 fiscal year, around 75,000 individuals were found to have credible fear by the USCIS, a drastic increase from when the process was first recorded in 2005.

A similar process occurs with reasonable fear. Asylum seekers who reenter the US after a previous removal are subject to a different removal process; Either their removal will be reinstated or, if they express reasonable fear to return to their home country, they are interviewed by an asylum officer. They must show that there exists a reasonable chance that they will be persecuted or injured if returned to their country of origin -- though the standard is much harder to prove than credible fear. A mere 3,300 people were found to have reasonable fear by the USCIS in 2019. The CBP does not always follow the reasonable and credible fear process, however, and the Department of Homeland Security holds the right to detain asylum seekers during the credible fear assessment.

### **Trump-Era Asylum Policy Alterations**

As President Donald Trump geared up to take office, and during his tenure, there were a myriad of shifts in US asylum policy which impacted migration and asylum seeking from Mexico. The Migrant Protection Protocols (MPP) developed by the Trump Administration and the formalization of metering procedures created a humanitarian crisis at the US southern border. These policies created new restrictions on the number of migrants who could access asylum processes per day. As early as 2016, however, under the Obama administration, the informal practice of metering was used as a CBP tactic to deter asylum seekers at the US southern border, especially concerning Haitian refugees around the San Ysidro entry port in California. Metering was initially used for Haitian asylum petitioners who were given a spot in line from Mexican officials to seek asylum at the American border. Because fewer individuals sought asylum at the start of Trump's presidency, metering became notably less popular in 2017 and was soon replaced by a new policy.

Nonetheless, in 2018, President Donald Trump formalized the metering policy to divert asylum seekers from the United States border. Metering is a system which works around existing asylum law to turn away migrants. US asylum law holds that anyone who enters the US can petition for asylum. So, Border Patrol stations individuals at border crossing areas and turns them away from US soil, forcing asylum seekers to put their names on a waitlist and sending them back into Mexico to wait for their time to request asylum. The CBP officers would not even record which people came to a border to seek asylum before being metered for doing so would necessitate processing them in official immigration proceedings.

The list that asylum seekers join after the CBP turns them away, however, is not uniformly maintained. In Tijuana in 2019, the city which held the most waitlisted asylum seekers, the list that metered people were marked on was a physical notebook (though it was

later digitized). Comparably, other municipalities had government-maintained lists, lists tended by private shelters, or by asylum seekers themselves. The processing of asylum seekers on waitlists due to metering is often incredibly slow. Once an individual was called from the waitlist they could travel to a port of entry and start their process to seek asylum. But, at some ports of entry along the southern border, it would take days to call a single person off the waitlists.

Metering, as formalized by the Trump administration, acted as a mechanism to greatly decrease the number of asylum seekers who could petition for entry into the United States.

Another asylum policy addition from the Trump Administration was a border policy of family separation. In El Paso, Texas, the DHS initiated a pilot program to separate parents from their children at the border. Many separations occurred because there was a movement to criminally prosecute people who illegally entered the country or reentered America after a previous removal from the country. But this policy often impacted children whose parents sought asylum at the border and cannot be legally prosecuted.

Another policy addition from the Trump administration was the MPP, also known as Remain in Mexico, which impeded on and altered existing processes concerning credible and reasonable fear. Mexican President Andres Manuel Lopez Obrador (AMLO) worked alongside President Trump to develop the program. Under the MPP, non-Mexican asylum seekers are not accepted at the US border and are returned to Mexico, in often dangerous locations, until it is their turn to be heard in the US immigration system. Rather than having migrants go through the credible or reasonable fear screening process, they went through the court system which allowed the US to send asylum seekers to wait in Mexico. The DHS itself reported on the MPP concerning the purpose of MPP:

MPP will reduce the number of aliens taking advantage of U.S. law and discourage false asylum claims. Aliens will not be permitted to disappear into the U.S. before a court issues a final decision on whether they will be admitted and provided protection under U.S. law. Instead, they will await a determination in Mexico and receive appropriate humanitarian protections there. But the humanitarian protections in Mexico are far from guaranteed.

After Remain in Mexico emerged, asylum seekers who were returned to Mexico are at risk for kidnapping, sexual violence, extortion, or other violence. Many are denied access to basic health care services or education. Although the DHS standards hold that people with “special circumstances” including “known physical/mental health issues” will not be forced back to Mexico, the standards are inconsistently applied. There are numerous reports of pregnant people and individuals with illnesses or disabilities falling victim to MPP protocols. Also, while the program only applies to Spanish speaking migrants, there are cases of Portuguese speaking asylum seekers from Brazil being told to remain in Mexico. A study from the US Immigration Policy Center of the University of California San Diego found that around 25% of asylum seekers who were sent from the US border to Mexicali or Tijuana because of MPP were threatened with violence while waiting on the United States immigration system for their hearings.

### **Title 42, COVID-19, and Asylum Policy**

With the COVID-19 pandemic, American asylum policy became strict in the light of public health concerns. Title 42 is a section of US code which emerged just before the end of World War II and is seldom utilized. The statute allows federal health bodies to prohibit immigration into the US if such prevention can hinder the spread of a disease, like COVID-19.



By its nature, Title 42 violates US immigration and asylum law, the Trafficking Victims Protection Reauthorization Act, and various international protections for refugees.

The alternative policy to Title 42 is Title 8, the less absolute border enforcement policy which accepts credible and reasonable fear and does not expel asylum seekers who fear persecution.

Out of the 2.9 million migrant encounters between April 2020 and March 2022, 61% were expelled from the United States under Title 42 and the other 1.1 million encounters were detained or apprehended under Title 8.

In March 2020, the Centers for Disease Control initiated a Title 42 emergency order which then CDC Director Robert Redfield used to suspend any noncitizens from “COVID impacted areas” entering the United States through its northern border with Canada or Southern border with Mexico. The introduction of people from COVID impacted areas into the US. Border Patrol officers used public health as a justification to remove migrants from the shared US-Mexico border, even if the individuals were asylum seekers who possessed credible or reasonable fear. Since Title 42 is public health policy rather than immigration law, asylum seekers are not typically exempt from expulsion. However, a 2022 lawsuit created exceptions for this process if individuals who arrive at the border as a family group seek asylum and fear persecution in their home country.

When migrants are expelled from the United States per title 42, they are often returned to their home country or the most recent county of travel. So, most migrants are expelled from the United States into Mexico, where the US expects them to be reexpelled to their country of origin. In fact, six in ten migrants expelled because of Title 42 are from Mexico. An additional unforeseen impact of Title 42 policy is the number of migrants who reenter the United States after an initial expulsion. While the number of migrants encountered at the Southern border

greatly increased during the pandemic the number of encounters with individuals is much lower. This is because of migration recidivism. Unlike with Title 8, where migrants would face detention in the United States, under Title 42, migrants who reenter the United States are expelled but not otherwise punished. So, many migrants are expelled from the US, returned to Mexico, and soon try to reenter.

While Title 42 was invoked, in part, because of the overcrowding and public health concern which immigration facilities posed. Immigration detention facilities are unsanitary and high-risk locales for communicable diseases. With limited access to hygiene, mumps and flu outbreaks are historically common in these centers. Since COVID is notably more lethal than the flu (around 10 times more lethal), these areas represented weaknesses in public health planning and COVID response.

But critics see the public health policy as eclipsing its intention to stop the spread of COVID-19 to restrict migration at the US-Mexico border. They view the claim that detention facilities create higher public health risks as a pathway for strict immigration and asylum policy. Furthermore, public health experts held that while migrants and asylum seekers were expelled from the US, other travelers were permitted to enter America without a testing or quarantine mandate. Per a July 2021 letter from numerous public health experts, the knowledge for COVID-19 which the scientific community found did not support the expulsion of migrants. They considered Title 42 as an act which undermined the Centers for Disease control's trust. The expulsion process also is a root of concern for public health experts. With an expulsion under Title 42, immigrants and asylum seekers are held in crowded facilities for a short period of time, without COVID testing. They are then expelled from America in a crowded transport vehicle – another risky environment for spreading COVID-19.

Further humanitarian concerns arose from Title 42 as well. Since children (unaccompanied minors) cannot be expelled under Title 42, the measure has forced the separation of many families. Incidentally, there are also reports of smugglers who arrange trips from various Central American countries, costing thousands of dollars, to send a family's children to the US. On the side of expelled migrants, the flooding of existing systems is overextending medical care and hospital systems. There are also concerns over the sanitation offered to migrants waiting in cities like Tijuana and other pandemic-related criticisms of the Title 42 implementation.

The updates in asylum and immigration policy in light of Title 42 have also impacted conditions for expelled migrants in Mexico. In Tijuana, there was much crowding for migrants which accompanied increases in certain medical issues for young children and infants (malnutrition, diseases, lack of water, etc.). Migrants turned away from the US because of Title 42 also were fearful of the states they were expelled to. In Mexico, interviewed migrants reported receiving no access to protection from the Mexican state authorities. Many migrants were offered asylum in Mexico after it was denied to them from the US, but because they would not be protected from violence, some refugees find Mexican asylum unsafe. Several migrants even reported robbery and extortion from Mexican officials, a frequent occurrence with around 1/3 of Mexico being ungoverned territory run by non-state actors and, in 2021, 25% of surveyed Mexicans recalling bribery from a police officer.

### **Current Updates:**

In April 2022, President Biden's CDC Director no longer found a public health justification for Title 42 sufficient and announced that it would be lifted. Multiple states soon

after filed a lawsuit to challenge the administration's move, leaving the measure in place. Later in November of the same year, a U.S. District Court ruled that Title 42 did not represent the stage of the pandemic America was in and demanded the Biden administration dissolve the policy. Nearly 20 states then challenged the decision, and it eventually went to the Supreme Court where they decided to keep Title 42 in place while they considered the states' challenge to the previous lower court decision. Nonetheless, the Biden Administration (who in 2022 dissolved the MPP), plans to end the Title 42 public health emergency declaration on May 11, 2023, which would allow asylum seekers to enter the United States to petition for entry for the first time in years.

It is necessary to consider the unique working of federal immigration and asylum law alongside the public health emergencies in the past few years. American asylum policy has shifted through recent decades, and the COVID-19 pandemic's impact on US-Mexico relations concerning immigration has created a humanitarian crisis at the border. While US asylum law guarantees protection for refugees who present credible or reasonable fear, the pandemic has stopped such processes from occurring. So, amid a battle for asylum, a battle between the sovereignty of US law is duly fought.

In addition to Title 42 and the Migrant Protection Protocols, the Trump administration utilized a lesser-known rule to significantly restrict asylum. This rule allows the Attorney General to self-refer Board of Immigration Appeals decisions and make new decisions. By giving the AG the power to interpret immigration policy and overrule the Board's rulings, this rule highlights an immigration system that is subject to the preferences of its overseer, rather than a consistent and impartial process that treats immigrants and asylum seekers equitably.

## **Background**

The US asylum process is overseen by the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR).

The primary mission of the Executive Office for Immigration Review (EOIR) is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. Under delegated authority from the Attorney General, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings.<sup>48</sup>

The EOIR is composed of seven offices and the Board of Immigration Appeals (BIA). At issue is the ability of the Attorney General to self refer BIA decisions for review. Following the passage of the Homeland Security Act of 2002, the Department of Homeland Security (DHS) was established and enforcement of immigration law put under its purview. DHS contains U.S. Customs and Border Protection (CBP)<sup>49</sup>, U.S. Immigration and Customs Enforcement (ICE)<sup>50</sup>, and U.S. Citizenship and Immigration Services (USCIS)<sup>51</sup>. CBP enforces immigration law at all U.S. ports of entry and along the U.S. border, ICE conducts detention and removal of immigrants within the US, and USCIS manages aspects of immigration such as applications for immigration, work authorization, citizenship etc<sup>52</sup>. However, the Homeland Security Act left immigration courts under the purview of the DOJ.

At the heart of the issue is the power that allows for the Attorney General to refer decisions made by the Board of Immigration Appeals to themselves for review.<sup>53</sup> In review, the

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<sup>48</sup> "About the Office," The United States Department of Justice, May 18, 2022, <https://www.justice.gov/eoir/about-office>.

<sup>49</sup> Homeland Security Act of 2002, sec. 411.

<sup>50</sup> *Ibid.* sec. 441.

<sup>51</sup> *Ibid.* sec. 451.

<sup>52</sup> "What We Do," USCIS, February 27, 2020, <https://www.uscis.gov/about-us/mission-and-core-values/what-we-do>.

<sup>53</sup> 8 CFR 1003.1(h)(1), ".The Board shall refer to the Attorney General for review of its decision in all cases that: (i) The Attorney General directs the Board to refer to him".

attorney general can vacate Board of Immigration Appeals' decisions, remand cases back to the courts, interpret specific language, overrule decisions, or issue general directives. The ability of the attorney general to self-refer cases has no defined procedural process an attorney general must follow to self-refer a case. An Attorney General can self-refer any decision the Board of Immigration Appeals makes, for any reason. There is no language in the Code of Federal Regulations binding an attorney general to self-referring cases based on a specific guideline and, furthermore, no language that stipulates that the attorney general needs to notify the parties involved that their case is up for review.

The lack of procedure presents several problems. First, because the attorney general does not have to notify any of the parties involved that their case is under review, affected parties have no opportunity to adjust legal strategy or provide the attorney general with feedback. This, coupled with the fact that the attorney general can change longstanding understanding of immigration policy without a defined process invites concerns about due process, more specifically, procedural due process. Procedural due process requires that the Federal Government follow procedure before revoking a person's right to life, liberty, or property.<sup>54</sup> These procedures are generally understood to be advanced notice, opportunity for a hearing, etc. Immigrants and asylees wait months and even years for a final decision in their respective cases yet the policies that govern the immigration process and even their final decisions could be changed without notice. Thus, the lack of requirements for the attorney general to notify affected parties seems to constitute a due process violation. And in a larger context, seems to undermine the EOIR mission to adjudicate cases fairly and uniformly.

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<sup>54</sup> "Amdt14.S1.3 Due Process Generally - Constitution.congress.gov," Constitution Annotated, accessed April 14, 2023, [https://constitution.congress.gov/browse/essay/amdt14-S1-1/ALDE\\_00013743/](https://constitution.congress.gov/browse/essay/amdt14-S1-1/ALDE_00013743/).

Additionally, the review power presents a problem in the realm of jurisdiction on policy between DHS and DOJ. The Homeland Security Act moved the bulk of immigration enforcement and policy away from the DOJ yet the attorney general can issue binding decisions that DHS must follow<sup>55</sup>. In response to Attorney General Sessions self-referring the Matter of A-B-, the Department of Homeland Security filed motions with the Attorney General to allow the Board of Immigration Appeals to suspend the briefing schedules until the BIA could act on a certification order and clarify the question posed in the Matter of A-B-, Attorney General Sessions denied both requests.<sup>56</sup> AG Sessions then unilaterally overruled a previous matter, the Matter of A-R-C-G-, which established a particular social group for women fleeing domestic violence.<sup>57</sup> The Attorney General's actions in this matter upended years of precedent and bound DHS to a new standard surrounding the asylum process. The referral rule was intended to allow the Attorney General to rectify issues of policy and ensure consistency in adjudication. However, the rule has been used more consistently in recent years to pursue the political objectives of the administration in power.

### **Referral and Review and Asylum under the Trump Administration**

The various Attorney Generals and acting Attorney Generals of the Trump administration have been the most prolific users of the referral and review power. Over the course of the Trump administration, Trump appointed attorneys general self-referred a total of seventeen cases, issuing decisions on sixteen.<sup>58</sup> March of 2018 saw the first referral by Attorney General Jeff

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<sup>55</sup> 8 CFR 1003.1(g)(1), "In general, Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board and decisions of the Attorney General are binding on all officers and employees of DHS or immigration judges in the administration of the immigration laws of the United States."

<sup>56</sup> Matter of A-B- 27 I&N Dec. 247 (A.G. 2018).

<sup>57</sup> Matter of A-R-C-G- 26 I&N Dec. 388 (BIA 2014) "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal...".

<sup>58</sup> "Volume 27," The United States Department of Justice, January 25, 2023, <https://www.justice.gov/eoir/volume-27>.

Sessions in the Matter of E-F-H-L- and the beginnings of the use of the referral power to limit the asylum process.

### **Matter of E-F-H-L-**

In Matter of E-F-H-L- an Immigration Judge denied an applicant's application for asylum and withholding of removal. The Immigration Judge found that the applicant did not establish prima facie eligibility for either and so denied a hearing. The applicant appealed the judge's decision and the BIA remanded the case to the judge and issued Matter of E-F-H-L-, stating that an applicant is entitled to a hearing regardless of whether they established prima facie eligibility.<sup>59</sup> AG Sessions vacated the decision on the grounds that the matter had been mooted due to the fact that the applicant had withdrawn his application with prejudice.<sup>60</sup> Given the Trump Administration's tough stance on immigrants and asylees, it seems that the attorney general's decision was designed to increase the speed with which an Immigration Judges could decide asylum and withholding of removal cases before them by not having to wait for an evidentiary hearing.<sup>61</sup>

### **Matter of A-B-**

Following the referral and vacation of Matter of E-F-H-L-, AG Sessions then referred Matter of A-B- where he overruled Matter of A-R-C-G-. Both matters dealt with the concept of a Particular Social Group, one of the five categories asylees can claim as grounds for asylum. The Matter of A-R-C-G- specifically clarified whether "married women in Guatemala who are unable to leave their relationship" qualified as a Particular Social Group for the purpose of granting asylum.<sup>62</sup> The BIA found that it did qualify due to the fact that the group passes a three part test

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<sup>59</sup> Matter of E-F-H-L- 26 I&N Dec. 319 (BIA 2014).

<sup>60</sup> Matter of E-F-H-L- 27 I&N Dec. 226 (A.G. 2018).

<sup>61</sup> "Immigration," National Archives and Records Administration (National Archives and Records Administration), accessed April 19, 2023, <https://trumpwhitehouse.archives.gov/issues/immigration/>.

<sup>62</sup> Matter of A-R-C-G- 26 I&N Dec. 388 (BIA 2014).



established by Matter of M-E-V-G-: a group shares an immutable characteristic, is defined with particularity, and is socially distinct within the respective society.<sup>63</sup> In the same decision, AG Sessions vacated the Matter of A-B-, a decision that granted asylum to a woman fleeing domestic violence because her claim did not qualify her as a member of a Particular Social Group. By doing so AG Sessions blocked asylum being granted to women fleeing domestic violence writing, “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”<sup>64</sup>

By overruling Matter of A-R-C-G- and vacating Matter of A-B, Attorney General Sessions undid four years of precedent regarding the understanding of what constitutes a particular social group and made it virtually impossible for domestic violence victims to be granted asylum in the United States. The effects of AG Sessions actions can be seen in the asylum grant rates for immigrants from El Salvador, Guatemala, and Honduras. Refugees from these countries are fleeing gang violence and, women specifically, high rates of domestic violence.<sup>65</sup>

## **Figure 1**

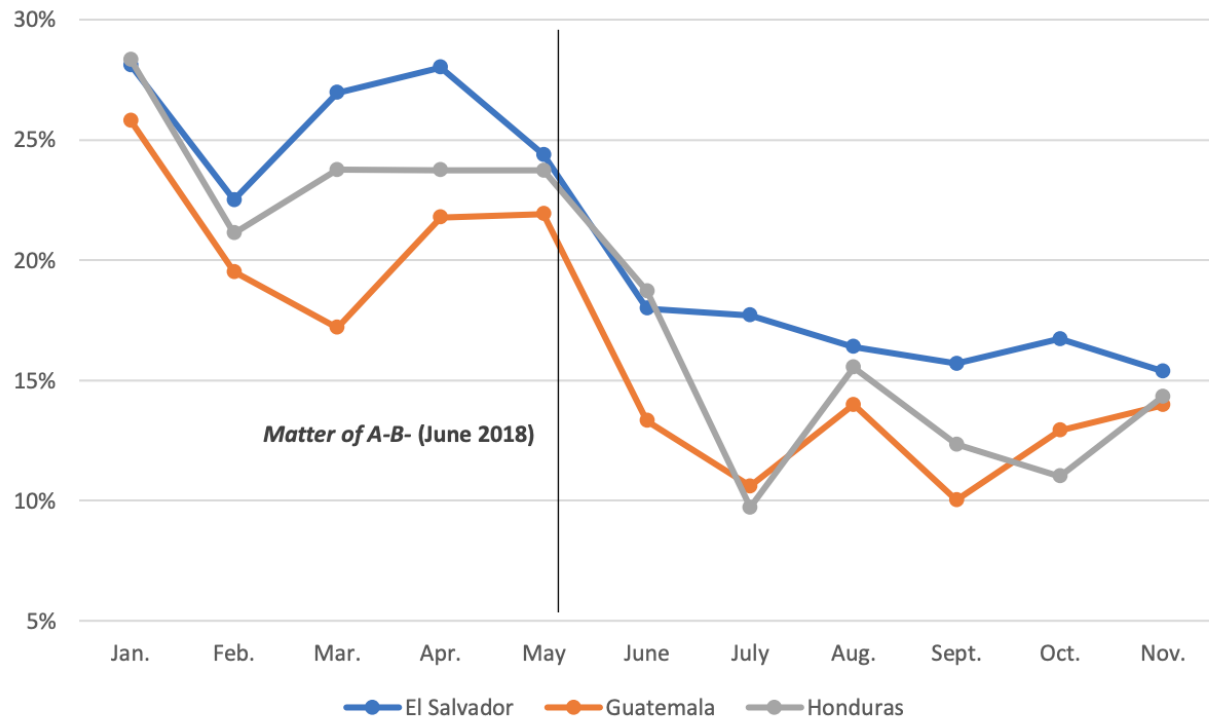
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<sup>63</sup> Matter of M-E-V-G- 26 I&N Dec. 227 (BIA 2014).

<sup>64</sup> Matter of A-B- 27 I&N Dec. 316 (A.G. 2018).

<sup>65</sup> “Women on the Run,” UNHCR, 2015, <https://www.unhcr.org/media/women-run>.

**2018 Immigration Court Asylum Grant Rates for El Salvador, Guatemala, and Honduras**



Source: TRAC Asylum Decision Tool

“Central Americans Were Increasingly Winning Asylum Before President Trump Took Office”

Human Rights First, January 2019, 2, fig. 1.

The average asylum grant rate fell from 23.9 percent grant rate to an average of 14.4 percent after the Matter of A-B-. In contrast, all other countries saw nowhere near as dramatic a change.

Their grant rate fell from 47.1 percent to 46.6 percent during the same time period.<sup>66</sup>

### **Matter of M-S-**

Following the reviews of Matter of E-F-H-L- and A-B-, Trump Administration attorneys general self-referred five other cases dealing with asylum. 2018 saw the referral of the Matter of M-S-, a case that examined whether immigration judges could hold bond hearings for

<sup>66</sup> “Central Americans Were Increasingly Winning Asylum before President ...,” January 2019, [https://humanrightsfirst.org/wp-content/uploads/2022/11/Asylum\\_Grant\\_Rates.pdf](https://humanrightsfirst.org/wp-content/uploads/2022/11/Asylum_Grant_Rates.pdf), 2.

immigrants who passed credible fear interviews and were then transferred from expedited to full removal hearings, an authority granted to immigration judges from the Matter of X-K-.<sup>67</sup> In Matter of M-S-, Attorney General Barr overruled Matter of X-K- and wrote that an alien who established credible fear was ineligible for bond until the conclusion of their removal hearings.<sup>68</sup> By overruling Matter of X-K-, AG Barr left parole as the only option for these specific immigrants to be released from detention. However, the courts found in *Damus v. Nielsen* that the parole grant rate had fallen from approximately 90% to about 0%.<sup>69</sup> A preliminary injunction was initially granted for the M-S- decision but the Supreme Court vacated the injunction in *Padilla v. ICE* leaving the attorney general's review in effect.<sup>70</sup> As a result, immigrants in the unique position of having passed credible fear interviews after being transferred from expedited to full removal hearings, were detained for the entirety of their removal proceedings with no recourse or avenue to leave detention. Given the lengthy time it takes for a decision to be made by an immigration judge, an average of 1,030 days in 2019, these immigrants could be detained for anywhere between days to years.<sup>71</sup>

### **Matter of L-E-A-**

Matter of L-E-A-, in 2019, also saw a significant revision to what qualifies as a Particular Social Group. In Matter of L-E-A- the BIA agreed with an asylum applicant's claim that his membership to his immediate family constituted membership to a Particular Social Group. In the case, the applicant was targeted by a gang because his father would not sell a cartel's drugs out of the family store. In response to the denial, the gang began targeting the applicant to force the father to agree. These specific circumstances qualified under the three part test that determines

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<sup>67</sup> Matter of X-K- 23 I&N Dec. 731 (BIA 2005).

<sup>68</sup> Matter of M-S- 27 I&N Dec. 509 (A.G. 2019).

<sup>69</sup> *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.C. 2018).

<sup>70</sup> *Padilla v. ICE* No. 20-234 (U.S. Supreme Court, January 11, 2021).

<sup>71</sup> "Record Number of Asylum Cases in FY 2019," Record number of asylum cases in FY 2019, January 8, 2020, <https://trac.syr.edu/immigration/reports/588/>.

what a Particular Social Group is; however, the BIA dismissed the applicants appeal for asylum. The BIA dismissed the asylum request because the applicant could not demonstrate that his family relationship was “at least one central reason for the claimed harm.”<sup>72</sup> AG Barr overruled the Matter of L-E-A- writing that, in most cases, nuclear families are not socially distinct and so cannot constitute a Particular Social Group.<sup>73</sup> Barr’s referral is unique here because his overruling of L-E-A- did not change the outcome for the initial applicant. Rather, Barr’s decision just made it significantly more difficult for asylum seekers to be granted asylum on the grounds that the persecution they face is a result of membership to their immediate family.

### **Matter of A-C-A-A-**

Matter of A-C-A-A- further complicates an immigrant's path to asylum by requiring the BIA to examine the facts of an appeal de novo, meaning from the beginning or anew.<sup>74</sup> The uncontested aspect of the Matter of A-C-A-A- was the status of the applicant as a member of a Particular Social Group. A-C-A-A- originated with an El Salvadoran woman who claimed that if she returned to El Salvador she would face violence at the hands of local gangs, the police, a former boyfriend, and her parents due to her gender. DHS appealed an immigration judge’s initial decision to grant the woman asylum on the grounds that she had not established a nexus between the violence she faced and her Particular Social Group. The BIA dismissed the appeal because they found “no clear error in the Immigration Judge's determination...”<sup>75</sup> The DHS appeal did not contest the woman's membership to the social group and as a result, the Board did not reexamine that aspect of the appeal. Barr took issue with this because the Board’s decision seemed to depart from the precedent set in Matter of A-B-. Barr wrote, “we [Attorneys General

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<sup>72</sup> Matter of L-E-A- 27 I&N Dec. 40 (BIA 2017).

<sup>73</sup> Matter of L-E-A- 27 I&N Dec. 581 (A.G. 2019).

<sup>74</sup> Matter of A-C-A-A- 28 I&N Dec. 84 (A.G. 2020).

<sup>75</sup> Ibid. 84.

Sessions and Barr] have explained that victims of private violence, including domestic violence, will not usually satisfy the requirements for asylum on the basis of those particular circumstances.”<sup>76</sup> The requirement for appeals to be considered *de novo* forces the Board to examine each aspect of a case, even if an aspect is uncontested in an appeal. This places not only increased strain on the Board’s time and resources, but also significantly increases the chance that an appeal is not granted.

### **Matter of A-M-R-C-**

The underlying case behind Matter of A-M-R-C- is one of a Bangladeshi man who was tried in absentia for crimes of conspiracy and murder surrounding one of the many coups Bangladesh experienced in the 1970s. An immigration judge granted the individual asylum due to the fact that the applicant had credible fear of returning to Bangladesh due to his conviction. DHS appealed the judge's decision because they believed that the judge did not give proper consideration to the fact that the applicant was a convicted criminal. The BIA dismissed the DHS appeal and reaffirmed the immigration judges decision on the grounds that under *Esposito v. INS* “A petitioner may present evidence that calls into question the fundamental fairness of the proceedings which generated an *in absentia* conviction.”<sup>77</sup> DHS argued that the applicant did not meet the threshold to prove that the conviction was unfair and so should not have been granted asylum due to his conviction. Ultimately, the Attorney General did not issue a decision on the Matter of A-M-R-C- due to the change in administration but considering the pattern of Trump attorneys general referral and reviews limiting and making more difficult the asylum process for asylees, it seems likely that the Matter of A-M-R-C- would have, in some manner, overruled or vacated the Board’s decision. In doing so, the Board would be required to consider or give

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<sup>76</sup> *Ibid.* 85.

<sup>77</sup> “Amrc\_1\_redacted\_0.PDF,” The United States Department of Justice, accessed April 18, 2023, <https://www.justice.gov/eoir/page/file/1287366>.

weight to an asylum applicant's criminal record regardless of the fairness to the conviction. This case is also unique because the original decision by the BIA was issued in 2006. Attorney General Barr referred the case to himself in 2020. Barr would have undone 14 years of precedent, all unilaterally and without any kind of regulation.

### **Matter of NEGUSIE**

Matter of NEGUSIE dealt with a BIA decision that established a limited exception to the persecutor bar of the Immigration and Nationality Act, a rule that blocks an immigrant from asylum eligibility if the individual participated in the persecution of others. The Board established a limited duress exception to the bar for cases where an asylum applicant could prove that the persecution they engaged in was done under duress. Attorney General Barr referred the matter to himself and vacated the BIA's duress exception. The decision continues the pattern of Trump Administration attorneys general making the asylum process more difficult, or in this case, impossible, for asylees.

In total, the sum of Trump Administration attorney general's referrals and reviews paints a picture of an administration determined to limit the path to asylum for migrants, specifically those from Central and South America. When one considers the unprecedented amount of self-referrals in the Trump administration and the pattern of making the asylum process more difficult, the mission of the EOIR to provide fair adjudications of asylum cases seems remarkably shaky. Attorneys General of the Trump Administration demonstrated a consistent willingness to undo years of established precedent. The Matter of A-M-R-C- serves as a particularly insidious example of a system that allows essentially ex post facto adjudication on a completely arbitrary basis. The end result of these unilateral decisions was an asylum process that was vastly different and much more difficult for asylum seekers; for reference, the asylum

denial rate was 71% in 2020.<sup>78</sup> The decisions also demonstrate a clear link between the goals of the administration in the White House affecting the immigration process in a pervasive and biased way.

### **Referral and Review and Asylum under the Biden Administration**

Attorney General Garland has self-referred only seven cases for his review. Of these, six referrals were of decisions issued by Trump attorneys general.<sup>79</sup> Of these, five have been vacations of Trump era decisions and one is still under review. The seventh referral vacated an Obama era BIA decision. Regarding asylum, Garland vacated the Trump attorney general's interpretations of L-E-A-, A-B-, and A-C-A-A-. The Matter of NEGUSIE is still under review. In making these vacations, AG Garland has largely returned the asylum process to its preexisting condition. In the specific cases of El Salvador, Guatemala, and Honduras, asylum grant rates increased following the vacation of A-B-. El Salvador's grant rate went from a 28.8% grant rate before the vacation to 42.2% after, Guatemala's grant rate went from a 22.1% grant rate to 29.5%, and Honduras' grant rate went from 24.3% to 31%.<sup>80</sup> More broadly, following the vacations and restoration of the asylum process, overall asylum grant rates under the Biden Administration rose from 29% to 37% in 2021 and today stands at 47.2%.<sup>81</sup>

### **Analysis**

It's clear that the partisan beliefs of the executive branch has an extreme amount of influence over asylum decisions, and the referral and review power enables that influence. The data from asylum grant rates for El Salvador, Guatemala, and Honduras saliently reflects the

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<sup>78</sup> Asylum grant rates climb under Biden, November 10, 2021, <https://trac.syr.edu/immigration/reports/667/>.

<sup>79</sup> "Volume 28," The United States Department of Justice, March 24, 2023, <https://www.justice.gov/eoir/volume-28>.

<sup>80</sup> Immigration Court Asylum Decisions, accessed April 22, 2023, <https://trac.syr.edu/phptools/immigration/asylum/>.

<sup>81</sup> Ibid.

prevailing anti-immigrant attitudes of the Trump administration. When the grant rates for these countries are considered after Attorney General Garland largely restored the asylum process to its pre-existing state, it becomes abundantly clear that the attitudes of the executive branch can directly affect asylees chances of being granted asylum. The referral and review power, while enumerated in the Homeland Security Act, gives the attorney general the power to arbitrarily change the asylum system to achieve political goals. The original purpose of the referral power was to allow the attorney general to rectify issues where policy, precedent, and adjudication clashed. Instead, under the Trump Administration, the power was used to uproot years of precedent and keep specific groups from being granted asylum in the United States. For example, 2017 and 2018 saw the formation of several migrant caravans headed to the United States from Central America. These caravans largely originated in the Central American countries of El Salvador, Guatemala, and Honduras.<sup>82</sup> The very countries that the Matter of A-B- had such a large impact on. In the lead up to the midterm elections the migrant caravans began to gain a lot of press, leading President Trump to vilify them.<sup>83</sup> Upon reaching the US-Mexico Border, President Trump issued a proclamation “Addressing Mass Migration Through the Southern Border of the United States.”<sup>84</sup> The proclamation suspended eligibility for asylum for any migrant that entered the country between official ports of entry. Federal courts were quick to

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<sup>82</sup> “Key Facts about the Migrant and Refugee Caravans Making Their Way to the USA,” Amnesty International, October 11, 2021, <https://www.amnesty.org/en/latest/news/2018/11/key-facts-about-the-migrant-and-refugee-caravans-making-their-way-to-the-usa/>.

<sup>83</sup> Hope Yen and Colleen Long, “Ap Fact Check: President Trump's Rhetoric and the Truth about Migrant Caravans,” PBS (Public Broadcasting Service, November 2, 2018), <https://www.pbs.org/newshour/politics/ap-fact-check-president-trumps-rhetoric-and-the-truth-about-migrant-caravans>. “...These are tough people in many cases; a lot of young men, strong men and a lot of men that maybe we don't want in our country. ...This isn't an innocent group of people. It's a large number of people that are tough. They have injured, they have attacked.”

<sup>84</sup> “Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States,” National Archives and Records Administration (National Archives and Records Administration), accessed April 23, 2023, <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/>.



block the proclamation because it violated existing U.S. law. However, Matter of A-B- had already been in effect for five months when President Trump tried to limit all asylum. The Administration saw that it had greater success limiting asylum with the review power than executive action, issuing no further executive directives that attempted to directly limit the asylum process.

The ability for the administration in the White House to alter the asylum process is also fundamentally unfair to immigrants who have passed credible fear interviews but not yet received their final asylum decision. At the time of Matter of A-B- 's issuance, there were 105,818 pending affirmative cases in the Immigration Court asylum backlog. That means that 105,818 asylum applicants had the process changed suddenly, as a result of the political preferences of the Trump administration. The asylum process cannot be fair if there is the ability for one individual to change established precedent to benefit the political leanings of the administration they serve. The referral rule was intended to allow the Attorney General to rectify issues of policy and ensure consistency in adjudication. Instead, the rule has been used to issue sweeping decisions that could arbitrarily decrease the likelihood of an applicant from a particular country to be granted asylum. Not only that but the rule has caused the asylum process to seesaw between the Trump and Biden Administrations. The Biden Administration rightly has returned the asylum process to its pre-existing condition but that does not change the fact that for years the process was changed unilaterally, and it certainly does not mean that the process could not be changed again in the future to achieve political goals.

### **Possible Solutions**

The fact that the Trump Administration was able to alter virtually the entire asylum process without the say of Congress is alarming and should not be possible. The foremost

solution to rectify the effects of the referral and review power would be to introduce actual guidelines on when an attorney general may self-refer a case. For example, language stipulating that the attorney general can only refer themselves a case when there are conflicting precedents or decisions, recurring questions about language, etc. Better yet, Congress could enact legislation that would make immigration courts independent from the Department of Justice. Doing so would enable courts to adjudicate cases fairly and without the possibility of precedent being changed unilaterally.

## **Conclusion**

The modern US asylum process falls short from the EOIR's mission of "adjudicate[ing] immigration cases by fairly, expeditiously, and uniformly."<sup>85</sup> The asylum process in recent years has seen a level of change and departure from precedent that points to an asylum process that is detrimentally partisan. Responsible for much of the changes the asylum process has been subject to is the attorney general's ability to refer Board of Immigration Appeals cases to themselves for review. The referral power has no guidelines under which it can be used and so has been abused to reshape the US asylum process in such a way that reflects the attitudes of the administration in the White House. Though the asylum process has been largely restored to what it was before the Trump Administration, the potential for further meddling exists.

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<sup>85</sup> "About the Office," The United States Department of Justice, May 18, 2022, <https://www.justice.gov/eoir/about-office>.

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