

UNSETTLED: Seeking Refuge in America

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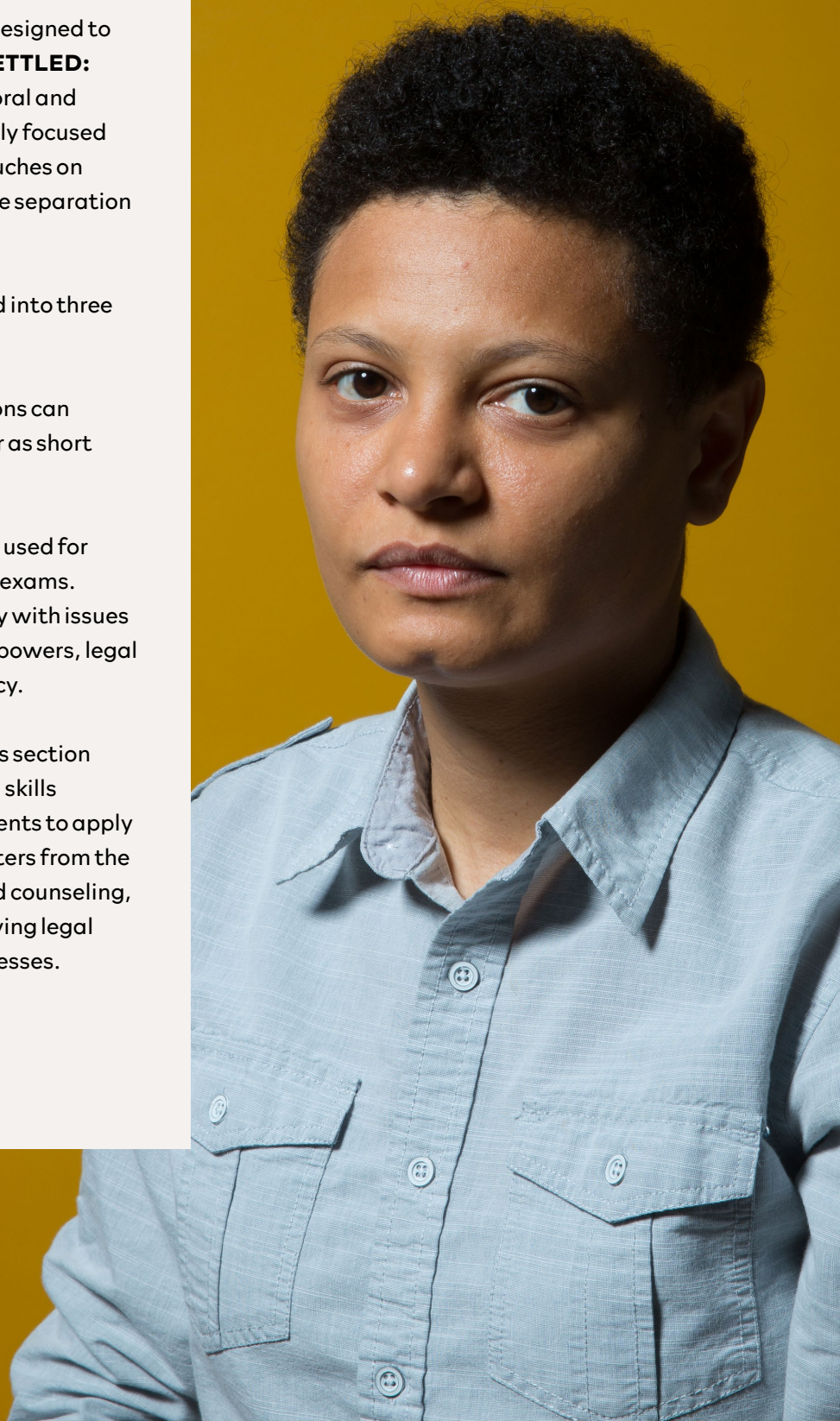
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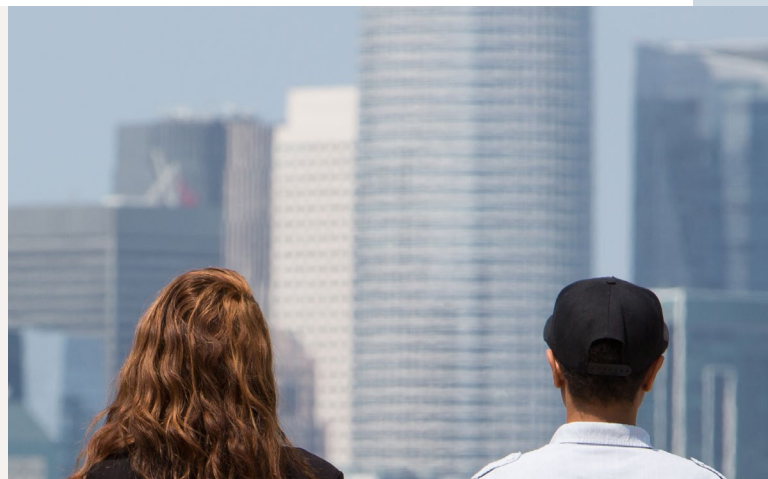
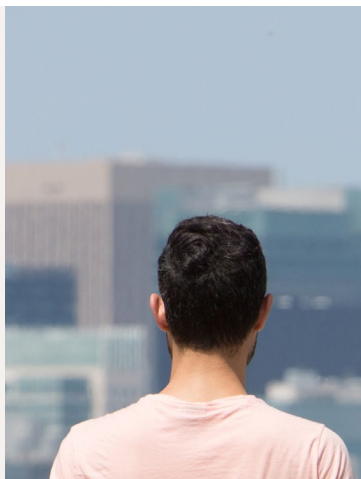
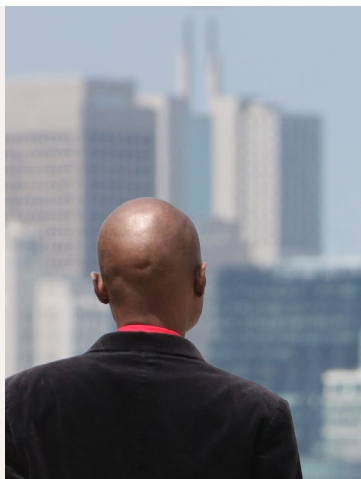
About this Guide

This discussion and activity guide is designed to be used with documentary film **UNSETTLED: Seeking Refuge in America** by doctoral and clinical law professors. While primarily focused on refugee and asylum law, it also touches on aspects of administrative law and the separation of powers.

The educational activities are divided into three sections:

- **Discussion Questions:** These questions can be posed during in-class discussion or as short answer assignments.
- **Essay Questions:** This section can be used for take-home essays/papers or in class exams. These questions engage more broadly with issues of administrative law, separation of powers, legal interpretation, and immigration policy.
- **Legal Skills/Practice Questions:** this section targets asylum clinics and other legal skills classes. It provides exercises for students to apply lawyering skills to events and characters from the film, including client interviewing and counseling, trauma-informed lawyering, identifying legal issues, and working with expert witnesses.





About the Film

UNSETTLED: Seeking Refuge in America is a feature-length documentary film by Tom Shepard and Jen Gilomen. that revealing the untold stories of LGBTQ refugees and asylum seekers who have fled intense persecution from their home countries and who are resettling in the U.S. The film follows four new arrivals, each of whom have escaped potential peril in their native countries for being different. They've landed in the purported "gay mecca" of San Francisco, yet even there, building a new life in an adopted nation is a precarious undertaking. As new leadership in America continues to restrict immigrants and drastically cut the flow of refugees and asylum seekers, **UNSETTLED** sheds light on a group about which few people know. What are the costs persecuted immigrants pay for seeking refuge? And how are everyday Americans stepping forward to help those most in need?

In their home countries, Subhi, Cheyenne, Mari and Junior were targets of death threats, harassment and discrimination because of who they are and who they love. These four are among the many LGBTQ+ refugees and asylum seekers who have fled persecution to resettle in the U.S.

FOR MORE INFORMATION, VISIT [UNSETTLED.FILM](https://www.unsettled.film)



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Introduction

In the wake of the human rights abuses and displacements of World War II, the international community drafted a series of documents aimed at addressing these abuses, including the 1948 Universal Declaration of Human Rights (UDHR)¹ and the 1951 Refugee Convention.² The Refugee Convention established the international definition of a refugee: an individual with a “well-founded fear” of persecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion,” who is “outside the country of his nationality” and is unable or unwilling to seek the protection of his country.³ The types of harms that were targeted for protection emerged from events in Europe. They also reflected Cold War divisions as the West grew concerned about political and religious persecution in the Soviet Union while discounting the socioeconomic concerns emphasized in the Communist Bloc and in the developing world.

The language of the Convention reflects states’ unwillingness to be bound by broad obligations to take in refugees. The UDHR established a right to seek and enjoy asylum (Article 14). Three years later, the Refugee Convention contained

no corresponding right to asylum. Instead, Article 33 held that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

Today, there are almost 80 million displaced people in the world and the struggle over who should bear the burden for taking in refugees continues. In the developing world, refugees are confined to refugee camps, where they are forced into a liminal existence in which they cannot fully enjoy the rights of citizens to work, study, and engage in society. Wealthier countries enter into agreements with their less well-off neighbors to prevent movement and keep refugees in the poorer countries. The EU members, for example, have made agreements with Libya and Turkey, while the US has made agreements with the Northern Triangle countries (El Salvador, Honduras, and Guatemala) to limit movements, even as individuals are fleeing these countries seeking protection. While media attention focuses on the refugee crisis in the US and Europe, the reality is

¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

² Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 137

³ Article 1. The 1951 Convention contained geographical and temporal limits. These limits were removed in the 1967 Protocol. 1967 Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.



that the overwhelming majority of refugees remain in their regions of origin, with 85% of refugees located in developing countries. The top refugee hosting countries include Turkey, Pakistan, and Uganda.⁴ Lebanon hosts the largest number of refugees relative to its national population.⁵

The refugee definition in the Convention reflects a particular historical period. Since then, the factors giving rise to flight have changed. Civil wars, the rise of non-state actors such as ISIS, Boko Haram, and MS-13, and environmental and humanitarian disasters whose effects cannot be separated from broader governance issues and political struggles, have produced mass displacements. The refugee definition established over 50 years ago did not envision these developments and the large-scale displacements that would emerge. Nor can such mass displacements be accommodated under individual-based refugee determinations. Additionally, the international community

established the refugee definition during a time in which it categorized gender-based harms as private, a categorization that excluded them from international protection. Since then, the international human rights and humanitarian framework has evolved to recognize the public nature of these harms and the need to protect against them.

In the refugee sphere, recognition of the public nature of gender-based harms has been mixed. In addition to the public/private split that may make gender-based claims more difficult to establish, LGBTQ refugees and asylum seekers face other challenges. Many refugees and asylum seekers flee with their families. LGBTQ refugees and asylum seekers, by contrast, are often fleeing from abusive family situations as well as broader societal and state persecution. LGBTQ refugees and asylum seekers are more likely to be isolated in their country of refuge, both because they are

⁴UNHCR Figures at a Glance: [UNHCR.ORG/EN-US/FIGURES-AT-A-GLANCE.HTML](https://www.unhcr.org/en-us/figures-at-a-glance.html)

⁵UNHCR Global Trends: [UNHCR.ORG/GLOBALTRENDS2019/](https://www.unhcr.org/globaltrends2019/)

likely to arrive alone, and also because they are less likely to tap into existing social networks. Research has shown that social networks are an essential component of migrant success.⁶ LGBTQ refugees and asylum seekers are inhibited from connecting with communities of migrants from their home country for fear of continued discrimination. Their fear of discrimination and the effects of trauma from their past persecution can lead to feelings of isolation, depression, low self-worth, and other mental health issues. Having experienced rejection in their home communities, LGBTQ asylum seekers may struggle to reveal their sexual orientation to strangers. All of these factors may prevent them from applying for protection right away. As a result, LGBTQ asylum seekers may miss the one-year deadline that the US places on asylum applications, creating additional barriers. Moreover, the time lag may affect their memory of certain details around the persecution, making

it more difficult to establish the extensive record needed for a successful asylum claim.

Globally, the United Nations High Commissioner for Refugees (UNHCR) oversees refugee camps and governs refugee recognition in some countries. Refugee determinations in the camps are often group-based rather than based on an individual determination. UNHCR also manages refugee resettlement for those refugees who are at risk in their current locations. Less than 1% of all refugees are resettled. Although already low, resettlement numbers began falling both globally and in the US in 2017.⁷ By the end of 2019, the number of people forcibly displaced due to war, conflict, persecution, and human rights violations had grown to 79.5 million, the highest number on record according to available data.⁸ From 1980 until 2017, the US led the world in refugee resettlement, resettling 3 million of the more than 4 million



⁶ See, e.g., Loren B. Landau & Marguerite Duponchel, *Laws, Policies or Social Position? Capabilities and the Determinants of Effective Protection in Four African Cities*, 24 (1) J. REFUGEE STUDIES 1 (2011).

⁷ Pew Research Center: [PEWRESEARCH.ORG/FACT-TANK/2018/07/05/FOR-THE-FIRST-TIME-U-S-RESETTLES-FEWER-REFUGEES-THAN-THE-REST-OF-THE-WORLD/](https://www.pewresearch.org/fact-tank/2018/07/05/for-the-first-time-u-s-resettles-fewer-refugees-than-the-rest-of-the-world/)

⁸ UNHCR Global Trends: [UNHCR.ORG/GLOBALTRENDS2019/](https://www.unhcr.org/globaltrends2019/)

refugees resettled globally.⁹ Under President Obama, refugee admissions averaged around 69,000 a year. In his last year in office, President Obama set the cap at 110,000.¹⁰ Refugee admissions have fallen drastically under President Trump. On October 1, 2020, President Trump set the refugee cap at a record low of 15,000.¹¹

US refugee and asylum practice is set out in the Refugee Act of 1980. The legislation adopts the international refugee definition and guarantees the right to apply for asylum to those entering or physically present in the country, regardless of the manner of entry. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) narrowed access to asylum and due process by expanding detentions and introducing expedited removal, among other provisions.

The Trump administration has further narrowed access to asylum, largely through executive order and administrative changes. These changes include expanded detentions, narrowed legal interpretations around asylum eligibility, heightened evidentiary standards and thresholds, increased enforcement, and barriers to entry at the border. In 2019, the administration introduced a rule preventing individuals at the Southern border from applying for asylum if they passed through another country during their journey. The Migrant Protection Protocols (MPP, also known as Remain in Mexico), introduced in January 2019, force individuals to live in dangerous conditions in tent camps on the Southern border until they

are brought for hearings at tent courts on the US side of the border. At the time of writing, several additional proposed rules sought to further limit access to asylum, including a June 2020 draft regulation¹² that could eliminate gender-based asylum and affect the viability of claims based on LGBTQ status.

The US is not alone in limiting asylum access and refugee protection. Countries around the world are seeking ways to restrict movement and limit their obligations under the Refugee Convention. The evolution of refugee protection since World War II raises a host of questions for contemplation:

- Why are certain harms privileged over others?
- Are refugee rights human rights?
- Is refugee/asylum status a policy question or a legal determination?
- How do political considerations affect refugee protection?
- How does refugee protection intersect with state sovereignty?
- How do we reconcile restrictions on migration with a right to movement?
- Does the international refugee system provide protection for particular categories of vulnerable migrants such as unaccompanied minors or LGBTQ migrants?

⁹ Pew Research Center: [PEWRESEARCH.ORG/FACT-TANK/2018/07/05/FOR-THE-FIRST-TIME-U-S-RESETTLES-FEWER-REFUGEES-THAN-THE-REST-OF-THE-WORLD/](https://www.pewresearch.org/fact-tank/2018/07/05/for-the-first-time-u-s-resettles-fewer-refugees-than-the-rest-of-the-world/)

¹⁰ American Immigration Council: [AMERICANIMMIGRATIONCOUNCIL.ORG/RESEARCH/OVERVIEW-US-REFUGEE-LAW-AND-POLICY](https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy)

¹¹ Washington Post: [WASHINGTONPOST.COM/IMMIGRATION/TRUMP-CUTS-REFUGEE-CAP/2020/10/01/A5113B62-03ED-11EB-8879-7663B816BFA5_STORY.HTML](https://www.washingtonpost.com/immigration/trump-cuts-refugee-cap/2020/10/01/A5113B62-03ED-11EB-8879-7663B816BFA5_STORY.HTML)

¹² Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review: [FEDERALREGISTER.GOV/DOCUMENTS/2020/06/15/2020-12575/PROCEDURES-FOR-ASYLUM-AND-WITHHOLDING-OF-REMOVAL-CREDIBLE-FEAR-AND-REASONABLE-FEAR-REVIEW](https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review)

Discussion Questions

01

Some of the individuals featured in **UNSETTLED** were refugees, while others were asylum seekers and asylees. What is the difference, and what are some of the advantages/disadvantages of each in terms of obtaining protection?

02

Subhi, Junior, Mari and Cheyenne all talked about persecution from their families. Is this sufficient to establish an asylum claim?

03

Do LGBTQ refugees and asylum seekers face greater barriers to establishing an asylum claim than other types of asylum seekers?

04

Junior had refugee status in South Africa. But his *de jure* protection did not provide him with *de facto* protection. What are the promises and limitations of legal protections?

05

Do LGBTQ refugees and asylees remain more vulnerable than other categories of refugees once they have reached their countries of protection?

06

The non-refoulement provision of the Refugee Convention bars states from returning an individual to a country where he or she would face persecution. What additional obligations do states have with respect to asylum seekers and refugees?

07

Is there a right to asylum? Where is this right found?

08

LGBTQ asylum seekers often do not fall into the classic understanding of the political refugee fleeing state persecution. As a result, they are more likely to advance an asylum claim on the basis of their membership in a particular social group. Does this make it more challenging for them to obtain asylum?

09

South Africa's Refugee Act includes sexual orientation in its definition of social group. How did this affect Junior's efforts to obtain protection?

10

Unlike South Africa, the US does not define specific categories that constitute a social group. Does this create barriers or opportunities for obtaining protection based on membership in a particular social group?

11

Other than death threats, what are additional types of persecution that LGBTQ asylum seekers might face? What constitutes persecution?

12

Subhi fled during the civil war in Syria, but he also experienced persecution based on his LGBTQ status. If an individual flees the violence in Syria, is this sufficient to get asylum in the United States?

13

Could a female asylum seeker develop an asylum claim based on her status as a woman living under Isis?

14

Who do you think would have a stronger asylum claim in the US—Subhi (based on LGBTQ status) or a woman fleeing Syria (based on gender)? Is your assessment based on legal or sociopolitical considerations? Does *Matter of A-B* affect one category more than another?

15

In the film, we see Subhi address the UN Security Council, placing the issue of LGBTQ persecution before this body for the first time. What is the significance of this event? The Security Council is a political body. How might political developments affect legal interpretations, both globally and in the US?

16

Do the US restrictions on asylum through the third-country transit ban, the Migrant Protection Protocols, and the consideration of the manner of entry in asylum applications violate either the Refugee Convention or the US Refugee Act?

17

The Attorney General may direct the Board of Immigration Appeals to refer any case to him for review (8 C.F.R. § 1003.1(h)(1)(i)). In 2007, an immigration judge in San Francisco granted asylum to a former Bangladeshi military official (*Matter of A-M-R-C-*). In June 2020, Attorney General Barr certified the case to himself. News reports suggested that pressure from the Bangladeshi government contributed to the decision to reopen the case. How does the Attorney General's review authority affect the fundamental fairness of the asylum process, including concepts such as judicial independence and *res judicata*. What is the relationship between political and legal considerations in asylum?

Essay Questions

A. State vs Non-state Persecution and Administrative Law



In Matter of A-B-, then Attorney General Jeff Sessions reversed advances in asylum protection for victims of gang and domestic violence, rejecting the expansion of such protection into what he deemed private violence. Some key statements from the decision include:

- “The prototypical refugee flees her home country because the government has persecuted her.”
 - “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”
 - “An alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family or other personal circumstances. Yet the asylum statute does not provide redress for all misfortune.”
 - “The applicant must show that the government condoned the private actions ‘or at least demonstrated a complete helplessness to protect the victims.’” [citing *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)]
- 01 How do you think this decision impacts the claims of LGBTQ asylum seekers?
 - 02 Matter of AB overturns years of precedent upheld by every circuit court. As a member of the executive branch, what is the Attorney General’s authority to overturn judicial precedent?
 - 03 Does Matter of AB remake the law? Is this within the scope of the Attorney General’s power? Are asylum officers bound by judicial precedent or by AG decisions?
 - 04 If you were defending an LGBTQ asylum seeker, what arguments would you use to counter the government’s argument based on Matter of A-B-?

B. Courts, Asylum Offices and Justice

It took Mari and Cheyenne 9 months to find a lawyer. Many asylum seekers are forced to go through the asylum process without a lawyer. Studies show that representation has a significant effect on an asylum seeker's likelihood of legal success. Mari and Cheyenne were also able to apply affirmatively, meaning that they could lodge their initial application with the local office of the U.S. Citizenship and Immigration Services (USCIS). An asylum officer with USCIS hears affirmative asylum claims in a non-adversarial process. Individuals who are in removal proceedings, by contrast, are forced to apply for asylum defensively, as a defense against removal. Defensive asylum applications take place before an immigration judge in an adversarial process in which the US government is represented by an attorney from Immigration and Customs Enforcement (ICE).

The complexity of the asylum process, the need to develop the record and advance often in-depth and technical legal arguments, the high demand and limited time to argue an asylum claim, and the dire consequences for someone fleeing persecution prompted Immigration Judge Dana Leigh Marks to describe her job as "doing death penalty cases in a traffic court setting." Individuals applying for asylum defensively are often forced to do so from detention, creating additional barriers in putting on an effective case.

01

The US guarantees a right to counsel in criminal cases. On what basis do the courts assert this right? What parallels or distinctions can you make in the asylum context to assert or reject a similar right to counsel?

02

Immigration court statistics show great variations in success rates by location. What are the justice implications of such variations?

03

Immigration courts are housed in the executive branch. What are the implications of having the prosecutorial and judicial arm overseen by the same Department?

04

The Attorney General has exercised increasing control over the immigration court system, including imposing high case quotas, reassigning cases to get desired outcomes, and limiting practices that judges employed to manage their dockets, such as continuances and administrative closure. What are the arguments for and against keeping immigration courts within the Executive Branch? What are the implications for due process, judicial independence, fundamental fairness, and other core legal concepts?



C. Immigration Policy and Practice

President Trump has fundamentally altered the asylum and immigration landscape through things such as the immigration ban, record low refugee caps, the Migrant Protection Protocols/Remain in Mexico program, and increasing restrictions on asylum access and eligibility.



01

If you were advising a new administration, what changes would you prioritize and how would you justify such changes?

02

Are there long-term implications from the changes under Trump?

03

How quickly and easily can Trump's immigration and asylum policy be reversed?

04

Are there changes you could put in place to provide greater consistency across administrations? What are the barriers to achieving such consistency?

Legal Skills/Practice Questions

- 01** Choose a character from Unsettled and develop an asylum argument on the basis of membership in a particular social group. Are there any additional grounds that could be used to develop an asylum argument for an LGBTQ asylum seeker?
- 02** What are some important considerations regarding trauma when dealing with LGBTQ asylum seekers? How will this affect how you assist a client? What are some of the continuing challenges an LGBTQ asylum seeker might face once in the United States?
- 03** Develop an interview plan for an LGBTQ asylum seeker. What information do you need to obtain? How will you approach sensitive questions that the asylum seeker may be uncomfortable talking about?
- 04** Asylum seekers are often coming from areas where there is a fear or distrust of authority. Additionally, as discussed above, they may be suffering the effects of trauma. In light of these factors, how you would prepare an asylum seeker for an asylum hearing? How might trauma affect their testimony? What is the role that a psychological evaluation could play?
- 05** In order to bolster Mari and Cheyenne's asylum claim, you need to submit country conditions as evidence. What sources would you use? When might you need testimony from a country conditions expert? Where would you turn to find such an expert? What instructions would you give this expert in preparing an affidavit?
- 06** Junior had refugee status in South Africa, but he was not safe. In the film, he sought protection through UNHCR and was resettled. Imagine instead that he had fled South Africa on his own and arrived in the United States to pursue an asylum claim. How would the fact that he had refugee status in South Africa affect his asylum claim? What would you need to show to overcome this potential barrier? How could you use a country expert?
- 07** As you saw in the film, Junior had psychological effects from his experience that resulted in his drinking. How would you address this in developing an asylum claim for him? Would you rely on an expert? What instructions would you give such an expert?

Glossary of Terms:

US ASYLUM AND REFUGEE LAW

Affirmative asylum application: a non-adversarial asylum application process with U.S. Immigration and Citizenship Services (USCIS) for individuals who are present in the US and not in removal proceedings. There is generally a one-year deadline on affirmative asylum applications.

Asylee: an individual who meets the definition of a refugee and has been granted asylum by the United States

Asylum seeker: a person applying for protection within the United States

Credible fear: the standard individuals subject to expedited removal must meet to be put in removal proceedings and obtain an asylum hearing. The individual must show a significant possibility of establishing an asylum claim in a full hearing.

Convention Against Torture (CAT) protection: a limited form of protection that prevents the US from removing an individual to a country where they face a reasonable fear (more likely than not) of being tortured. This protection may be terminated if there is no longer a risk. The US may remove an individual with CAT protection to a safe third country.

Defensive asylum application: an adversarial asylum application process used as a defense against removal for individuals in removal proceedings. Defensive asylum applications take place before an Immigration Judge with opposing counsel from Immigration and Customs Enforcement (ICE) representing the government.

Firm resettlement: a bar on asylum protection in the US based on the fact that an individual previously had an offer of permanent resettlement in another country. 8 C.F.R. § 208.15.

Migrant Protection Protocols (MPP)/Remain in Mexico Program: a policy implemented by the Department of Homeland Security on January 25, 2019 in which asylum seekers at the US-Mexico border are forced to wait in Mexico for the duration of their asylum proceedings.

Nexus: the required showing that persecution is on account of one of the protected grounds.

Non-refoulement: a principle of international and US law that prevents the return of an individual to a country where their life or freedom is at risk on account of one of the five protected grounds.

Particular social group: in the US, this is defined by meeting three elements: 1) the group is based on immutable traits or a trait so fundamental to their character that they should not be required to change it; 2) the group is socially distinct; 3) the group is particular.

Reasonable fear: the more likely than not standard that applies to withholding of removal and Convention against Torture (CAT) claims.

Refugee: an individual who has obtained international protection and applies for entry (resettlement) from outside of the United States

Resettlement: the process by which refugees outside of the US apply through UNHCR to gain permanent settlement in the US (or elsewhere).

Well-founded fear: a showing of a 10% chance of persecution (*INS v Cardoza-Fonseca*, 480 U.S. 421 (1987)) based on a subjective fear that has some basis in the objective reality.

Withholding of removal: a lower standard of protection that is available to some individuals who may be barred from applying for asylum. Individuals must meet the higher threshold of a reasonable fear of persecution (more likely than not) on account of one of the protected grounds.

More Information & Resources

Universal Declaration of Human Rights (UDHR): <https://www.un.org/en/universal-declaration-human-rights/>

1951 Refugee Convention and 1967 Protocol: <https://www.unhcr.org/en-us/1951-refugee-convention.html>

UNHCR Figures at a Glance: <https://www.unhcr.org/en-us/figures-at-a-glance.html#>

UNHCR Global Trends: <https://www.unhcr.org/globaltrends2019/>

PEW Research Center stats on refugee resettlement: <https://www.pewresearch.org/fact-tank/2018/07/05/for-the-first-time-u-s-resettles-fewer-refugees-than-the-rest-of-the-world/>

Human Rights First: <https://www.humanrightsfirst.org/topics/refugee-protection>

Catholic Legal Immigration Network, Inc. (Clinic): <https://cliniclegal.org/>

Human Rights Watch: <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program>

American Immigration Council: <https://www.americanimmigrationcouncil.org/>

Matter of A-B-: <https://www.justice.gov/eoir/page/file/1070866/download>

Matter of A-M-R-C-: <https://www.justice.gov/eoir/page/file/1286356/download>

Mental Health Challenges of LGBT Forced Migrants: <https://www.fmreview.org/sogi/shidlo-ahola>

For a catalog of changes under the Trump Presidency: <https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency>

Additional Resources for Assistance

Jewish Family and Community Services of the East Bay <https://jfcs-eastbay.org>

Hebrew Immigrant Aid Society (HIAS) <https://www.hias.org>

International Rescue Committee <https://www.rescue.org>

Organization for Refuge, Asylum, and Migration (ORAM) <https://oramrefugee.org>

Oasis Legal Services <https://www.oasislegalservices.org>

Immigration Equality <https://immigrationequality.org>

The LGBT Asylum Project <https://www.lgbtasylumproject.org>

African Human Rights Coalition <https://www.africanhrc.org>