

ASYLUM'S REVOLVING DOOR: THE FUTURE OF DOMESTIC VIOLENCE CLAIMS POST -A-B-

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ABSTRACT

As global migration reaches unprecedented levels, the United States' immigration system is struggling to keep up with the growing demand. Prior to June 2018, a number of domestic violence victims, particularly from the most dangerous parts of Central America, sought and received asylum in the United States. However, after the Attorney General issued his decision in Matter of A-B-, thousands of domestic violence victims were precluded from claiming asylum, leaving many victims without any options for relief. Although domestic violence may not easily fit within the statutory scheme of asylum as interpreted by the Attorney General, a modified version of Temporary Protected Status, a statute currently in effect, may provide a legal pathway to deserving victims and provide relief to already overwhelmed immigration courts.

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I. INTRODUCTION

Maria Sanchez¹ is a mother of three from El Salvador who endures severe weekly beatings and sexual assaults at the hands of her husband. Maria knows that there are few places to hide in El Salvador, due in part to the size of the country and the lack of resources that protect women who endure domestic violence. Maria successfully received a restraining order from a local El Salvadoran court, but the police department is neither able nor willing to help in terms of enforcing the order. Widespread corruption and gang influence over governmental agencies render the government unwilling

¹ Maria Sanchez is a completely fictional character not based in any part on an actual person.

or unable to enforce laws and make it easy for prisoners to communicate with the outside world. If Maria's husband goes to jail, it would be easy for him to organize a retaliatory attack on her for enforcing the restraining order. Lack of government resources coupled with a general cultural belief that domestic matters should remain private creates a culture of tolerated violence toward women. Maria's reality is unfortunate, for a culture that tolerates domestic violence enables it.

After a beating leaves her hospitalized, Maria decides to move her children to safety. Maria flees to the United States, paying \$4000 to a "coyote" to guide her and her family on their dangerous journey through the Mexican desert.² When she arrives in the United States, Maria approaches an immigration officer and requests asylum for her and her children. After an interview, Maria and her family are found removable for illegally entering, but she applies for asylum because returning to the abuse is not an option. Maria complies with the United States Immigration Court, supplying medical bills and police reports to support her asylum application. Her testimony of abuse is heard in court, but the immigration judge's hands are bound by *Matter of A-B-*, a decision handed down by the United States Attorney General that severely limits asylum claims based on domestic violence.³

Unfortunately, Maria's story is not uncommon. Domestic violence is defined as "any behaviour by a current or former partner or spouse that causes physical, sexual or psychological harm."⁴ According to the United Nations (U.N.), domestic violence is the most common form of violence experienced by women globally.⁵ Rampant domestic violence, particularly in Central America, is forcing women to flee their homes.⁶ In El Salvador, 26% of women experience lifetime physical and/or sexual intimate partner violence.⁷ In Honduras, 22% and in Guatemala 18% of women will experience such violence.⁸ And these are just those who spoke up.

² *Human Smuggling Fees*, OPEN BORDERS: THE CASE, <https://openborders.info/human-smuggling-fees/>.

³ *Matter of A-B-*, 27 I. & N. Dec. 316 (Op. Att'y Gen. 2018).

⁴ *Intimate Partner Violence*, U.N. WOMEN, <http://interactive.unwomen.org/multimedia/infographic/violenceagainstwomen/en/index.html#intimate-2>.

⁵ *Id.*

⁶ Anastasia Moloney, *Domestic Violence Pushes Central American Women to Flee for Their Lives: U.N.*, THOMPSON REUTERS (May 24, 2017 12:07 PM), <https://www.reuters.com/article/us-latam-migrants-refugees-idUSKBN18K2FJ>.

⁷ *Global Database on Violence Against Women: El Salvador*, U.N. WOMEN, <http://evaw-global-database.unwomen.org/en/countries/americas/el-salvador#4>.

⁸ *Global Database on Violence Against Women: Honduras*, U.N. WOMEN, <http://evaw-global-database.unwomen.org/en/countries/americas/honduras>; *Global Database on Violence Against Women: Guatemala*, U.N. WOMEN, <http://evaw-global-database.unwomen.org/en/countries/americas/guatemala>.

Although domestic violence is a global issue, countries that have a “machismo” patriarchal culture leave women particularly vulnerable.⁹ Machismo refers to a cultural division of men and women, two distinct classes where men are superior to the latter.¹⁰ In 2017, U.N. Women and the U.N. Development Programme classified Latin America, particularly Central America and the Caribbean, as one of the most violent regions in the world for women.¹¹ “Femicide,” the killing of women, occurs on a “devastating scale” in Central America, with the U.N. estimating that two out of three women were murdered because of their gender.¹² This has created a hidden refugee crisis that is evidenced by a 156% increase of domestic violence asylum claims at the United States-Mexican border since 2015.¹³

Domestic violence has forced thousands of women and children to funnel through Mexico from Central America.¹⁴ Since Mexico is a party to the “U.N.” Convention,¹⁵ some question why more asylum seekers aren’t staying in Mexico; however, that is not the focus of this note. The focus is what has caused this massive upturn in migration from Central America. The U.N. found that Honduras, El Salvador, and Guatemala are particularly dangerous countries for women to live in, with violence against women reaching “epidemic levels.”¹⁶ Although twenty-four of the thirty-three countries in Latin America and the Caribbean have laws against domestic violence, a “plague” of violence towards women remains, leaving questions about whether enforcement of laws designed to protect women are working.¹⁷ The U.N. recommended strengthening institutions and policies in the region to address violence against women.¹⁸ Further, the U.N. advised against “patriarchal” cultural norms that inherently continue gender inequality.¹⁹ Central America is experiencing a level of violence that has marked it the most dangerous part of the world not in a war zone.²⁰ Civil wars in the 1980s

⁹ Katherine M. Culliton, *Finding a Mechanism to Enforce Women’s Right to State Protection From Domestic Violence in the Americas*, 34 HARV. INT’L L.J. 507 (1993).

¹⁰ Patricia M. Hernandez, *The Myth of Machismo: An Everyday Reality for Latin American Women*, 15 ST. THOMAS L. REV. 859, 860 (2003).

¹¹ *Latin America is World’s Most Violent Region for Women: UN*, HINDU BUSINESS LINE (Nov. 23, 2017), <https://www.thehindubusinessline.com/news/world/latin-america-is-worlds-most-violent-region-for-women-un/article9970381.ece> (last updated Jan. 9, 2018).

¹² *Id.*

¹³ Moloney, *supra* note 6.

¹⁴ *Id.*

¹⁵ Kausha Luna, *Mexico’s Refugee Law*, CTR. FOR IMMIGR. STUD. (June 24, 2018), <https://cis.org/Luna/Mexicos-Refugee-Law>.

¹⁶ HINDU BUSINESS LINE, *supra* note 11.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Rocio Cara Labrador & Danielle Renwick, *Central America’s Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS, (June 26, 2018), <https://www.cfr.org/background/central-america-violent-northern-triangle> (last updated Oct. 1, 2019).

have left a legacy of fragile institutions infested with corruption, drug trafficking, and gang violence.²¹ Although there have been domestic police and judicial reformation in the region, including aid from the United States, some analysts believe U.S. immigration policies have exacerbated threats to regional security.²²

In 2018, the Trump Administration declined to extend the Temporary Protected Status Program (TPS) designations²³ for El Salvador, Haiti, Nicaragua, and Sudan, leaving nearly 400,000 TPS beneficiaries without legal protections.²⁴ Subsequent filings for injunctive relief followed, and as of 2019, TPS designation is still available for these countries.²⁵ If TPS designation is revoked, it is believed that over the next few years upwards of 350,000 immigrants from Central America will lose their legal status in the U.S. and be forced to return to Central America, thereby potentially increasing economic distress and other regional problems.²⁶ Whether there is one or multiple factors contributing to the large migration through Mexico, the U.N. projects this will continue unless the underlying cause, domestic violence, is addressed.²⁷

Prior to June 2018, women were able to claim domestic violence as a basis for establishing asylum in the United States, so long as they presented sufficient evidence.²⁸ However, on June 11, 2018, former Attorney General Sessions issued an opinion, *Matter of A-B-*, that significantly raised the evidentiary burden of proof to establish an asylum claim based on domestic violence.²⁹ Although *Matter of A-B-* does not explicitly reject the grant of asylum claims based on domestic violence, its strong language begs the question of whether the door is in fact completely shut to such claims. This topic is particularly relevant due in part to the large shift in worldwide

²¹ *Id.*

²² *Id.*

²³ TPS designations are made by the U.S. Attorney General to provide for individuals from countries suffering from civil war, climate change, and other issues. TPS provides unlawfully present individuals temporary lawful immigration status.

²⁴ Melissa Etehad, *The Trump Administration Wants More than 400,000 People to Leave the U.S. Here's Who They Are and Why*, LOS ANGELES TIMES, (July 19, 2018 6:55 PM), <https://www.latimes.com/nation/la-na-tps-revoked-20180720-story.html>.

²⁵ See *Ramos v. Nielsen*, No. 18-cv-01554 (N.D.Cal. 2018) (enjoining the Department of Homeland Security from terminating TPS for Sudan, Nicaragua, Haiti, and El Salvador, pending further litigation); *Bhattarai v. Nielsen*, No. 19-cv-731 (N.D.Cal.) (holding the TPS designation terminations will not go into effect while appeals are pending in *Ramos v. Nielsen*); *Saget v. Trump*, No. 18-cv-01599 (E.D.N.Y. 2019) (enjoining the designation termination of TPS for Haiti, pending a final decision).

²⁶ Labrador & Renwick, *supra* note 20.

²⁷ Moloney, *supra* note 6, at 13.

²⁸ See *Matter of A-R-C-G-*, 26 I. & N. 227 (BIA 2014) (finding “married women in Guatemala who are unable to leave their relationship” as a valid particular social group to establish an asylum claim).

²⁹ *Matter of A-B-*, 27 I. & N. Dec. at 316.

migration and the implications for the United States immigration system. Part I of this note explores the historical context and original intent of creating asylum. Part II explains the asylum application process, detailing the procedures and alternative forms of relief for asylum seekers. Part III discusses the shift in the United States' immigration policy in recent years. Part IV explores how evidence of domestic violence has played into asylum determinations in the past and where they are currently. Finally, Part V proposes an alternative solution to asylum for victims of domestic violence through amendment of the Temporary Protected Status statute.

II. "REFUGEE" DEFINED AND ITS HISTORICAL CONTEXT

In 1948, the U.N. issued the Declaration of Human Rights, recognizing for the first time a list of certain inalienable rights including the right of persons around the world to seek asylum protection from persecution in other countries.³⁰ Twenty-six countries attended the U.N. 1951 Convention, ultimately producing a universal legal definition of "refugee."³¹ A refugee, defined by the U.N., is a person who is unable or unwilling to return to her home country due to past persecution or a well-founded fear of being persecuted in the future on account of race, religion, nationality, membership in a particular social group, or political opinion.³² Originally, asylum was limited to victims of the Holocaust but was later amended during the 1967 Protocol to include anyone who met the criteria.³³ The Treaty acknowledges that persons may want to leave their home countries for "reasons of persecution" and thus are "entitled to specific protection" as a result.³⁴ The Treaty is considered the instrumental "centerpiece for international refugee protection."³⁵ As of 2019, there are 146 State Parties and 19 signatories to the U.N. Convention relating to the Status of Refugees.³⁶ Additionally, 147 State Parties have signed the 1967 Protocol recognizing asylum rights.³⁷

The United States joined the 1967 Protocol in 1968, formally joining the international agreement to recognize and admit refugees.³⁸ Using the

³⁰ U.N. GAOR, *Universal Declaration of Human Rights*, (Dec. 10, 1948).

³¹ AMERICAN IMMIGRATION COUNCIL, *ASYLUM IN THE UNITED STATES*, (May 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf.

³² Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 152.

³³ G.A. Res. 2198 (XXI), at 48 (Dec. 16, 1966).

³⁴ Convention Relating to the Status of Refugees, *supra* note 32, at 146.

³⁵ U.N. Refugee Agency, *Convention and Protocol Relating to the Status of Refugees: Introductory Note from U.N. High Commissioner for Refugees (UNHCR)*, 1, 2 <http://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

³⁶ Convention Relating to the Status of Refugees, *supra* note 32, at 137.

³⁷ *Id.*

³⁸ STEPHEN H. LEGOMSKY & DAVID B. THRONSON, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1145-46, (Saul Levmore et al. eds., 11th ed. 2018).

U.N.'s definition of a refugee from the 1951 Refugee Convention and 1967 as a template, Congress passed the 1980 Refugee Act to implement legislation for refugee protection.³⁹ To qualify for asylum, an applicant must be a non-United States citizen and physically present without previous permission to enter.⁴⁰ The burden of proof lies with the applicant to establish that she is a refugee within the definition provided in the statute, and that the persecution she has suffered is on account of one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.⁴¹ Such persecution does not have to be by the government; it can be a non-governmental agent that the government is unable or unwilling to protect against.⁴² The applicant's testimony alone may be enough to sustain her claim, and the candor and credibility of her testimony are highly relevant.⁴³ A spouse or child of an applicant that has met her burden of proof may also be granted asylum through the sponsored party.⁴⁴ An asylee, although not a United States citizen, is given the right to obtain gainful employment and other rights consistent with legal status.⁴⁵

III. APPLYING FOR ASYLUM

Applying for asylum can be a long and complicated process. Generally, there are two different avenues of applying for asylum, affirmatively or defensively.⁴⁶ Although the burden of proof is the same whether the applicant applies affirmatively or defensively,⁴⁷ both avenues contain unique processes to the United States immigration system.

A. Affirmative Asylum Process

A person who is not placed in removal proceedings by the Department of Homeland Security (DHS) may apply for asylum through the United States Citizenship and Immigration Services (USCIS), a division of the DHS.⁴⁸ An applicant may affirmatively apply for asylum once she physically presents herself in the United States so long as she has not been unlawfully

³⁹ AN OVERVIEW OF U.S. REFUGEE LAW AND POLICY, AMERICAN IMMIGRATION COUNCIL (June 18, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/an_overview_of_us_refugee_law_and_policy.pdf.

⁴⁰ 8 U.S.C. § 1158 (2018).

⁴¹ 8 U.S.C. § 1158(b)(1)(B)(i).

⁴² *See Hor v. Gonzales*, 421 F.3d 497, 502 (7th Cir. 2005) (holding asylum claims based on private actors are precluded unless the government either condones the action or is helpless to prevent it).

⁴³ 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii).

⁴⁴ 8 U.S.C. § 1158(b)(3)(A).

⁴⁵ 8 U.S.C. § 1158(c)(1)-(3).

⁴⁶ AMERICAN IMMIGRATION COUNCIL, *supra* note 31.

⁴⁷ *See* 8 C.F.R. §§ 208. 2, 209.2(f) (2019).

⁴⁸ *Id.*

present for longer than one year.⁴⁹ After filling out and turning in an I-589, the application for asylum and withholding of removal, the USCIS will confirm receipt of the application and send a Notice to visit a local support center to submit fingerprints (also referred to as biometrics).⁵⁰ Next, the applicant is scheduled for an asylum interview, where she is able to tell her story and present evidence and witnesses to establish her asylum claim.⁵¹

From there, the asylum officer will determine whether the applicant meets the statutory requirements for asylum, followed by a review of the officer's determination by a supervisor within the USCIS.⁵² According to the USCIS, decisions are available to be picked up within two weeks of the applicant's interview, although process times could be longer if additional security checks are required.⁵³ An asylum officer will either grant the application for asylum or refer the matter to an immigration judge (IJ) for further proceedings.⁵⁴ A denied applicant may not directly appeal the asylum officer's decision within the asylum office; however, she may reapply for asylum with sufficient evidence of changed circumstances that affect her eligibility.⁵⁵

B. Defensive Asylum Process

Alternatively, an individual who unlawfully enters the United States, overstays her visa, or who has been previously removed will likely have to defensively apply for asylum.⁵⁶ Additionally, if an individual applying affirmatively for asylum is denied, it is likely she will be placed in removal proceedings and can renew her asylum request through the defensive process.⁵⁷ The defensive asylum process means that the DHS has begun the process of deportation through removal proceedings that take place within the immigration court system.⁵⁸ This process is "defensive" because the applicant is applying "as a defense against removal from the U.S."⁵⁹

⁴⁹ DEP'T OF HOMELAND SECURITY, U.S. Citizenship and Immigr. Serv., *The Affirmative Asylum Process*, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process> (last updated Apr. 19, 2019).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ DEP'T OF HOMELAND SECURITY, U.S. Citizenship and Immigr. Serv., *Types of Asylum Decisions*, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions> (last updated June 16, 2015).

⁵⁵ *Id.*

⁵⁶ AMERICAN IMMIGRATION COUNCIL, *supra* note 31.

⁵⁷ 8 C.F.R. §§ 208.2, 208.13-14 (2019).

⁵⁸ AMERICAN IMMIGRATION COUNCIL, *supra* note 31.

⁵⁹ *Id.*

When an individual is found unlawfully entering the United States, she is asked a series of questions about why she entered without legal permission.⁶⁰ Individuals that arrive at the border are generally subjected to expedited removal.⁶¹ Maria, for example, unlawfully entered the United States at the border and will have to go through the defensive asylum process, beginning with a “credible fear” interview.⁶² In compliance with international treaties, this initial interview is designed to make sure an individual is not being returned to a country where his or her life or liberty would be at risk.⁶³

During her credible fear interview, an asylum officer considers any evidence Maria provides, including testimony about her past persecution to determine whether there is a “significant possibility” she will be able to meet her burden to establish an asylum claim.⁶⁴ At the conclusion of the initial interview, the asylum officer has the discretion to deny asylum or refer her to an IJ.⁶⁵ Asylum officers are vested with the discretionary power over the initial referral and denial of asylum claims.⁶⁶ The asylum officer determines, by a preponderance of the evidence, whether circumstances in Maria’s native country have changed such that there is no longer a well-founded fear of persecution, or if she could relocate to another part of El Salvador and avoid persecution.⁶⁷ If credible fear is not established, the DHS has the discretion to initiate removal proceedings against Maria.⁶⁸ Prior to removal, however, Maria has an opportunity to present her case to an IJ.⁶⁹

C. Withholding of Removal as an Alternative Form of Relief

Maria may apply for an alternative form of relief, withholding of removal, concurrently with her asylum application.⁷⁰ Withholding of removal protects the applicant who does not otherwise qualify for asylum from removal to her native country on the basis that her life or freedom would be threatened because of one or more of the protected grounds.⁷¹ If Maria wishes to apply for withholding of removal, she will have a reasonable fear determination.⁷² The reasonable fear determination is an interview conducted

⁶⁰ *Id.* at 3.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 4.

⁶⁵ 8 C.F.R. § 208.9(b) (2019).

⁶⁶ *Id.*

⁶⁷ 8 C.F.R. § 208.13(b)(1)(i)(A)-(B).

⁶⁸ AMERICAN IMMIGRATION COUNCIL, *supra* note 31.

⁶⁹ *Id.*

⁷⁰ 8 C.F.R. § 208.31(b).

⁷¹ 8 U.S.C. § 1231(b)(3)(A) (2019).

⁷² 8 C.F.R. § 208.31(b).

within ten days of an unlawful entry into the United States.⁷³ Maria's interview is to be conducted in a private, non-adversarial manner in her requested language.⁷⁴ At the conclusion of the interview, the officer shall review the information and determine whether she has demonstrated a reasonable fear of persecution or torture if she were to return to El Salvador.⁷⁵

If the asylum officer determines Maria has established a reasonable fear, she will be issued a Notice of Referral to an IJ for full consideration of different forms of relief, including withholding of removal under section 241(b) of the Immigration and Nationality Act (INA).⁷⁶ Withholding of removal prevents deportation whether or not asylum is granted.⁷⁷ Maria holds the difficult burden of proving that it is more likely than not that her life or freedom would be threatened if returned to the native country.⁷⁸ The Supreme Court has held that withholding of removal requires proof of a more than 50% chance of persecution whereas asylum only requires a 10% chance.⁷⁹ Withholding of removal does not grant the residency rights of asylum, but will nevertheless keep Maria and her family from being deported back to El Salvador. Although withholding of removal is an option, the burden of proof is exceedingly difficult to satisfy, partly because the DHS has discretion to remove Maria to a third country if it is deemed safe.⁸⁰ Ultimately, asylum is the best option for Maria's family, but withholding of removal can serve as safety net.

D. Referral to an Immigration Judge

If both interviewers conclude Maria does not qualify for asylum or withholding of removal, Maria can present her case to an IJ.⁸¹ If Maria is referred to an immigration judge, she is given a Notice to Appear (NTA), which typically states she will have a court date at a time "to be determined."⁸² The NTA is of particular significance because an asylum

⁷³ *Id.*

⁷⁴ 8 C.F.R. § 208.31(c).

⁷⁵ *Id.*

⁷⁶ 8 C.F.R. § 208.31(e).

⁷⁷ 8 C.F.R. § 208.16(a).

⁷⁸ 8 C.F.R. § 208.16(b)(2).

⁷⁹ *See e.g.*, *I.N.S. v. Stevic*, 467 U.S. 407, 429-30 (1984) (holding an applicant for withholding of removal must establish "more likely than not" that his life or freedom would be threatened on account of a protected ground); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (holding a "well-founded fear" can be as little as a 10% chance of persecution).

⁸⁰ 8 C.F.R. § 208.15(f).

⁸¹ *See* 8 C.F.R. § 208.2(b).

⁸² DEP'T OF HOMELAND SECURITY, U.S. Citizenship and Immigr. Serv., *USCIS Updates Notice to Appear Policy Guidance to Support DHS Enforcement Priorities*, (July 5, 2018), <https://www.uscis.gov/news/news-releases/uscis-updates-notice-appear-policy-guidance-support-dhs-enforcement-priorities> (last updated July 5, 2018).

applicant is statutorily barred from applying if she fails to apply for asylum within one year of the date that she entered listed on the NTA.⁸³ In 2018, the Supreme Court held in *Pereira v. Sessions* that an NTA that does not contain a specific time and date is not sufficient within INA § 1229(a).⁸⁴ Since the Court's decision in *Pereira*, insufficient NTAs provide new avenues for attorneys to file for different forms of relief, whether through cancellation of removal or withholding of removal.⁸⁵

After Maria receives her court date with the immigration judge, she is given a series of instructions about the immigration process, including an advisory hearing of her rights by the IJ.⁸⁶ She may retain legal representation at no cost to the United States government, and is given a list of low cost or free legal services.⁸⁷ She is then scheduled for a Master Calendar hearing before the IJ, where he receives her application and schedules an individual merits hearing of her claim.⁸⁸ Every applicant receives her hearing and is given the opportunity to submit evidence and bring forth witnesses to establish her burden of proof.⁸⁹

At first blush, it looks like a streamlined, efficient process, but Maria could wait years to make it to her merits hearing. As of March 2018, the backlog of cases in immigration courts across the U.S. reached more than 690,000 with cases pending on average for more than 718 days.⁹⁰ In response, the Trump Administration appointed over 100 new IJs to address the backlog.⁹¹ Additionally, the Attorney General has placed suggested quotas on caseloads to help decrease wait times.⁹² Although the Trump Administration is attempting to streamline, the number of pending cases continues to climb. As of August 2019, there were approximately 1,007,155 cases pending cases across the United States, averaging approximately 696 days for a hearing.⁹³ Maria will receive her day in court but it will likely be

⁸³ 8 U.S.C. § 1158(a)(2)(B) (2018).

⁸⁴ *Pereira v. Sessions*, 138 S.Ct. 2105, 2128 (2018).

⁸⁵ Dan Desselbrenner et al., *Practice Advisory: Challenging the Validity of Notices to Appeal Lacking Time-and-Place Information*, NAT'L IMMIGR. COUNCIL, IMMIGRANT DEF. PROJECT (July 5, 2018), http://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2018_5July_PereiraAdvisory.pdf.

⁸⁶ DEP'T OF JUSTICE, *Immigration Court Practice Manual*, 1, 64 (Aug. 2, 2018), <https://www.justice.gov/eoir/page/file/1084851/download>.

⁸⁷ *Id.*

⁸⁸ *Id.* at 73.

⁸⁹ *Id.* at 86.

⁹⁰ AMERICAN IMMIGRATION COUNCIL, *supra* note 31.

⁹¹ U.S. Att'y Gen. Jeff Sessions, *Remarks to the Executive Office for Immigr. Rev. Legal Training Program*, DEP'T OF JUSTICE (June 11, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal>.

⁹² *Id.*

⁹³ TRAC, *Immigration Court Backlog Tool*, SYRACUSE UNIVERSITY (Mar. 6, 2019), https://trac.syr.edu/phptools/immigration/court_backlog/.

years after she has arrived.⁹⁴ Delayed proceedings means that Maria and her children may remain in the United States for years until her case has been adjudicated.⁹⁵ If Maria is detained during removal proceedings, her case will be adjudicated faster but she will remain detained until she receives a final agency determination.⁹⁶ If Maria ultimately loses her case and is found removable to El Salvador, she will have to uproot her entire family after years of living an established life within the United States.

IV. THE GREAT SHIFT IN IMMIGRATION POLICY

The legislature, through the INA, vested the United States Attorney General with a large amount of control over immigration and naturalization.⁹⁷ The Attorney General may establish immigration regulations, review administrative determinations in immigration proceedings,⁹⁸ and delegate such authority.⁹⁹ In 2003, Congress passed legislation establishing the Executive Office for Immigration Review (EOIR), which is subject to the direction and regulation of the United States Attorney General.¹⁰⁰ The EOIR is located within the Department of Justice and is headed by a Director appointed by the Attorney General.¹⁰¹ The EOIR contains an appellate-like review court, the Board of Immigration Appeals (BIA).¹⁰² The BIA operates as a court of appeals, reviewing questions of law arising from appeals from across the country.¹⁰³ The BIA has the discretion to select which opinions will serve as precedent and such decisions bind all members of the EOIR and the DHS.¹⁰⁴

Although the BIA acts as an appellate court, it is still subject to the discretion of the Attorney General,¹⁰⁵ and since the BIA is not independently

⁹⁴ Zuzana Celpla, *Fact Sheet: U.S. Asylum Process*, NAT'L IMMIGR. F. (Jan. 10, 2019), <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/>.

⁹⁵ *The U.S. Immigration Court: A Ballooning Backlog that Requires Action*, HUM. RTS. FIRST, <http://www.humanrightsfirst.org/sites/default/files/HRF-Court-Backlog-Brief.pdf> (explaining that delays due to backlogs in the immigration court cause stress on families).

⁹⁶ *Id.*

⁹⁷ 8 U.S.C. § 1103(g)(2) (2018).

⁹⁸ The Framers aimed to prevent tyranny through a structural separation of powers among co-equal branches. According to Founder James Madison, the separation of powers amongst three branches established the structural elements to provide an added layer of security for liberty. The Legislature, in delegating immigration law authority, has given the Executive branch large control over immigration policy. There are concerns about separation of powers, particularly the Executive branch's ability to create immigration law, prosecute, and adjudicate immigration matters. These concerns, however, are not discussed in this article.

⁹⁹ 8 U.S.C. § 1103 (g)(2).

¹⁰⁰ 6 U.S.C. § 521(a) (2018).

¹⁰¹ 8 C.F.R. § 1003(a) (2019).

¹⁰² 8 C.F.R. § 1003.1(a)(1).

¹⁰³ 8 C.F.R. § 1003.1(d)(3)(ii).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

established by the INA, the Attorney General has ultimate oversight and control.¹⁰⁶ The Attorney General may review administrative determinations,¹⁰⁷ and per regulations, the BIA must refer cases to the Attorney General if he so directs.¹⁰⁸ If the Attorney General refers a case to himself, the resulting decision issued creates binding immigration law.¹⁰⁹ Such power is discretionary and may be invoked at any time upon demand.¹¹⁰

The migrant exodus from Central America to the United States has caused many concerns about border security within the Trump Administration.¹¹¹ During former Attorney General Sessions's appointment from 2017-2018, he used his referral power six times to certify decisions to himself, making sweeping changes to immigration precedent.¹¹² In contrast, the Obama Administration's Attorneys General used four referrals from 2009-2017.¹¹³ At the beginning of former Attorney General Sessions's term, he spoke to the EOIR, emphasizing that adjudication within the immigration court system is "broken," and the Administration aims to "close loopholes" within asylum laws.¹¹⁴ Immigration has been a focus of the Trump administration, which has issued numerous executive orders changing existing policies and procedures in attempts cut down the backlog.¹¹⁵

V. THE EXTENT TO WHICH THE DOOR IS OPEN TO DOMESTIC VIOLENCE VICTIMS POST *MATTER OF A-B-*

In a post-*Matter of A-B-* world, there is a large cloud of fog surrounding whether women will be able to use evidence of domestic violence as a means of establishing asylum eligibility. If women are not allowed to use evidence

¹⁰⁶ Laura S. Trice, *Adjudication by Fiat, The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 NYU L. REV. 1766, 1769 (2010).

¹⁰⁷ 8 U.S.C. § 1103(g)(2).

¹⁰⁸ 8 C.F.R. § 1003.1(h)(1)(i).

¹⁰⁹ 8 C.F.R. § 1003.1(h)(2).

¹¹⁰ 8 C.F.R. § 1003.1(d)(3)(ii).

¹¹¹ Michael D. Shear & Eileen Sullivan, *Trump Suspends Some Asylum Rights, Calling Illegal Immigration 'a Crisis'*, THE NEW YORK TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/us/politics/trump-asylum-seekers-executive-order.html?module=inline>.

¹¹² See e.g., *Matter of M-G-G-*, 27 I. & N. Dec. 469 (Op. Att'y Gen. 2018); *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (Op. Att'y Gen. 2018); *Matter of L-A-B-R- et al.*, 27 I. & N. Dec. 405 (Op. Att'y Gen. 2018); *Matter of A-B-*, 27 I. & N. Dec. 316 (Op. Att'y Gen. 2018); *Castro-Tum*, 27 I. & N. Dec. 271 (Op. Att'y Gen. 2018); *Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (Op. Att'y Gen. 2018).

¹¹³ *Chairez and Sama*, 26 I. & N. Dec. 796 (Op. Att'y Gen. 2016); *Silva-Trevino*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015); *Dorman*, 25 I. & N. Dec. 485 (Op. Att'y Gen. 2011); *Compean, Bangaly & J-E-C-*, 25 I. & N. Dec. 1 (Op. Att'y Gen. 2009).

¹¹⁴ U.S. Att'y Gen. Jeff Sessions, *Remarks to the Executive Office for Immigr. Rev.*, DEP'T OF JUSTICE (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

¹¹⁵ U.S. Att'y Gen. Jeff Sessions, *Remarks to the Executive Office for Immigr. Rev. Legal Training Program*, DEP'T OF JUSTICE (June 11, 2018) <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal>.

of domestic violence to establish such claims, the question becomes whether a woman who suffers domestic violence at the hands of a private actor is included within the statutory scheme of asylum. Based on current law, if a woman is attempting to establish an asylum claim based on domestic violence, she must do so by showing she is unwilling or unable to return to her country based upon a well-founded fear of persecution on account of her participation in a particular social group (PSG).¹¹⁶

Since there is no statutory definition of a PSG, the definition has evolved through immigration case law. It is well established that each case should be analyzed on a case-by-case basis with particular attention paid to specific facts.¹¹⁷ Although *Matter of A-B-* does not expressly preclude individuals from claiming asylum based on domestic violence, it places a heavier burden on applicants to show that the government is unable or unwilling to protect them from what it deems “private actors.”¹¹⁸ Generally, domestic violence begins within the “private” home¹¹⁹ and as many as 38% of all murders of women globally are committed by intimate partners. These alarming statistics suggest a lack of effective government protection and a larger, more public issue.

A. Asylum Claims Based on Domestic Violence Pre-*Matter of A-B-*

Domestic violence claims were originally recognized in *Matter of R-A-*, where the BIA initially held that the respondent failed to show that victims of spousal abuse were recognized as a PSG within Guatemalan society and that her abuse was “on account of” her membership in that PSG.¹²⁰ The Attorney General vacated the decision of the BIA and remanded

¹¹⁶ 8 U.S.C. § 1158(b)(i) (2018).

¹¹⁷ Brief of Amicus Curiae the National Immigrant Justice Center, 6-7, Apr. 16, 2018 (“See, e.g., *Matter of Acosta*, 19 I. & N. Dec. 211, 232-33 (BIA 1985) (“The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis”); see also *Matter of L-E-A-*, 27 I. & N. Dec. 40, 42 (BIA 2017) (“A determination whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis”); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 395 (BIA 2014) (“In particular, the issue of nexus will depend on the facts and circumstances of an individual claim”); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (BIA 2014) (“We emphasize that our holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs...Social group determinations are made on a case-by-case basis”); *Matter of J-S-*, 24 I. & N. Dec. 520, 537-38 (Op. Att’y Gen. 2008) (“The Board and Immigration Judges shall cease to apply the per se rule of spousal eligibility...and shall instead engage in a case-by-case assessment of whether a section 601(a) applicant...can demonstrate that (i) he or she qualifies as a refugee”); cf. also *Matter of Monreal*, 23 I. & N. Dec. 56, 63 (BIA 2001) (“Each case must be assessed and decided on its own facts”).”

¹¹⁸ *Matter of A-B-*, 27 I. & N. Dec. at 337.

¹¹⁹ *Violence Against Women*, WORLD HEALTH ORG. (Nov. 29, 2017), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

¹²⁰ In re *R-A-*, 22 I. & N. Dec. 906, 907 (BIA 2001).

the case for reconsideration.¹²¹ Ultimately, the BIA issued an opinion jointly with the DHS stipulating that the respondent was eligible for asylum; however, no formal rule was ever issued.¹²²

In the years following *Matter of R-A-*, immigration courts continued to interpret the meaning of PSG on a case-by-case basis, defining the group to help resolve ambiguities. In 2014, membership in a PSG was formally defined by the BIA as, “1) composed of members who share a common immutable characteristic, 2) defined with particularity, and 3) socially distinct within the society in question.”¹²³ Specifically, the BIA looked to the legislative intent of the Refugee Act of 1980 and determined that Congress intended to follow the United Nations Refugee Convention and Protocol.¹²⁴ Recognizing that membership within a “particular social group” is not defined in the Refugee Act of 1980, the BIA first interpreted this phrase in *Matter of Acosta*.¹²⁵ Employing methods of statutory construction, the BIA determined that membership in a PSG should be interpreted to mean that an individual is persecuted on account of membership in a “group of persons all of whom share a common, immutable characteristic.”¹²⁶ This immutable characteristic is one that the member of the group cannot change or should not be required to change because it is “fundamental to their individual identities or consciences that it ought not be required to be changed.”¹²⁷ Further, the BIA found the interpretation of membership in a PSG “does not occur in a contextual vacuum” and the “proper interpretation . . . can only be achieved when it is compared with the other enumerated grounds of persecution (race, religion, nationality, and political opinion), and when it is considered within the overall framework of refugee protection.”¹²⁸

Subsequently, *Matter of A-R-C-G-* opened the door to recognizing female victims of domestic violence as valid PSGs.¹²⁹ The BIA recognized “married women in Guatemala who are unable to leave their relationship” as a valid PSG.¹³⁰ The BIA found that the victim was a part of a group composed of members who share the common immutable characteristic of gender.¹³¹ Further, the BIA found that marital status can be an immutable characteristic where the individual is unable to leave the relationship.¹³² Although the DHS

¹²¹ *Id.* at 907.

¹²² *Id.* at 928.

¹²³ *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014).

¹²⁴ *Id.* at 230.

¹²⁵ *Id.*

¹²⁶ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

¹²⁷ *Id.* at 212.

¹²⁸ *Matter of M-E-V-G-*, 26 I. & N. Dec. at 234.

¹²⁹ *Matter of A-R-C-G-*, 26 I. & N. Dec. at 389.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 392-93.

conceded the group was defined with particularity, the BIA found this group is socially distinct within society because of un rebutted evidence of Guatemala's culture of family violence and machismo.¹³³ Ultimately, the BIA pointed out that cases that arise in the context of domestic violence are more unique than other PSG determinations, and each case will depend on facts and evidence.¹³⁴

B. *Matter of A-B-*: A Denial of Domestic Violence Asylum Claims

From the time that *Matter of A-R-C-G-* was decided in 2014 to *Matter of A-B-* in 2018, domestic violence could be used as evidence to establish eligibility for asylum, so long as the applicant met her burden under the INA by showing her home government was unable or unwilling to protect her. On June 11, 2018, former Attorney General Sessions issued *Matter of A-B-*, a case that he referred to himself from the BIA.¹³⁵ On the day that *Matter of A-B-* was published, former Attorney General Sessions stated he “correct[ed] the interpretation of the law . . . [to] advance[] the original intent and purpose of the INA.”¹³⁶ *Matter of A-B-* overruled *Matter of A-R-C-G-*, finding that it was “wrongly decided and should not have been issued as a precedential decision.”¹³⁷ Citing multiple concessions by the DHS, *Matter of A-B-* concludes that the BIA performed “only a cursory analysis” of the factors required to establish a particular social group.¹³⁸ Citing the Fourth and Eleventh Circuit’s criticisms of the DHS’ concessions in *A-R-C-G-*, former Attorney General Sessions concluded the IJ created an “expansive new category of [a PSG] based on private violence.”¹³⁹ Further, a PSG definition should avoid being “too broad to have definable boundaries and too narrow to have larger significance in society.”¹⁴⁰

The opinion recognizes the widespread issue of domestic violence in El Salvador and acknowledges the “vile abuse” the applicant endured at the hands of her husband.¹⁴¹ The decision acknowledged an understanding of why women, like the abused in *A-B-*, flee to the United States, but emphasized that the “asylum statute is not a general hardship statute,”¹⁴² nor did Congress intend for the asylum statute to be a “catch-all” for “solving

¹³³ *Id.* at 393.

¹³⁴ *Id.* at 395.

¹³⁵ *Matter of A-B-*, 27 I. & N. Dec. at 331.

¹³⁶ U.S. Att’y Gen. Jeff Sessions, *Remarks to the Executive Office for Immigr. Rev. Legal Training Program*, DEP’T OF JUSTICE (June 11, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal>.

¹³⁷ *Matter of A-B-*, 27 I. & N. Dec. at 316.

¹³⁸ *Id.* at 331.

¹³⁹ *Id.* at 319.

¹⁴⁰ *Id.* at 336.

¹⁴¹ *Id.* at 346.

¹⁴² *Id.*

every heart-rending situation.”¹⁴³ Although former Attorney General Sessions assures the decision does not mean that violence inflicted by nongovernmental actors may never form the basis for asylum, generally such claims will not meet the statutory requirements.¹⁴⁴ The opinion made note of *A-R-C-G*'s negative cultural stereotype, machismo, stating such stereotype may not contribute to an analysis of the particularity requirement or analysis of whether a PSG is sufficient to establish an asylum claim.¹⁴⁵

Although *Matter of A-B-* did not outright ban all asylum claims based on domestic violence, it instructed IJs, asylum officers, and the BIA to consider certain factors when evaluating an application for asylum.¹⁴⁶ First, an individual seeking asylum or withholding of removal must state on the record and before the IJ, the “exact delineation of any proposed” PSG;¹⁴⁷ however, it is already a necessary element required to establish a particular social group.¹⁴⁸ Secondly, the IJ and BIA are responsible for ensuring that the PSG is clear on the record and fully developed.¹⁴⁹ Further, the BIA cannot sustain an applicant's appeal based on a “newly articulated social group” that has “not been presented before or analyzed by the immigration judge.”¹⁵⁰ This is particularly troublesome for pro se applicants that do not know how to articulate a PSG during an initial hearing, because the BIA will be unable to review any modification of the PSG if she retains legal representation on appeal.

The decision makes the point that victims of private violence must face the “additional challenge” of showing that internal relocation within their native country is not an option,¹⁵¹ reasoning that when an applicant suffers harm at the hands of only a few, specific individuals, internal relocation seems more reasonable than if the applicant was persecuted broadly by her country's government.¹⁵² The decision concludes by emphasizing alternative, proper and legal channels for seeking admission into the United States other than defensively applying for asylum.¹⁵³ Further, the former Attorney General asserts that individuals seeking entry should take advantage of existing channels without illegally entering.¹⁵⁴ Although most may agree that

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 320.

¹⁴⁵ *Id.* at 336 n.9.

¹⁴⁶ *Id.* at 344.

¹⁴⁷ *Id.*

¹⁴⁸ See *Matter of A-B-*, 27 I. & N. Dec. at 344 (requiring an applicant seeking asylum based on a PSG to state the “exact delineation” of the PSG); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 252 (BIA 2014) (requiring the PSG be defined with particularity).

¹⁴⁹ *Matter of A-B-*, 27 I. & N. Dec. at 344.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 345.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

promoting legal immigration is ideal, challenges to the reasoning for restricting domestic violence evidence have filtered through the court system.

C. The Aftermath of *Matter of A-B-*

Since the ruling in *Matter of A-B-*, it is unclear whether a domestic violence claim will be sufficient to meet the statutory requirements of asylum. The language within *Matter of A-B-* suggests that the door is not shut to domestic violence claims, but there is a high burden that may be almost impossible to meet. Based on the *Matter of A-B-*, a woman who is being abused by a non-government actor (her husband or partner) would have a heavy burden of showing that the government was unable or unwilling to help her.¹⁵⁵ Would Maria be able to show that the government is unable or unwilling to help her if the restraining order was enforced against her husband, but her husband hired someone from jail to harm her? Or would the police have to come to Maria's home and watch her husband abuse her? The watermark for such burden is unclear.

Responding to the *Matter of A-B-*, the American Civil Liberties Union filed a complaint in the District Court for the District of Columbia.¹⁵⁶ The complaint asks for declaratory and injunctive relief for violation of the Refugee Act, INA, Administrative Procedure Act (APA), separation of powers and due process violations.¹⁵⁷ Specifically, the complaint alleges that *Matter of A-B-* is being used "as a vehicle to articulate new legal standards" for the adjudication of asylum claims.¹⁵⁸ Further, the complaint alleges a separation of powers violation, claiming that the ruling essentially instructs asylum officers to follow *Matter of A-B-* and disregard all contrary federal court rulings.¹⁵⁹

On December 19, 2018, Judge Sullivan of the United States District Court for the District of Columbia issued a Memorandum Opinion holding that several of the credible fear policies articulated in *Matter of A-B-*, as well as the subsequent Policy Memorandum issued by the DHS, violate the APA and INA.¹⁶⁰ Specifically, the new credible fear policies, "unlawfully and arbitrarily imposed a heightened standard [to] credible fear determinations."¹⁶¹ Finding the changes in credible fear determinations inconsistent with the "intent of Congress" found in the INA, Judge Sullivan stated it is the "will of Congress—not the whims of the Executive—that

¹⁵⁵ *Id.* at 317.

¹⁵⁶ Complaint for Declaratory and Injunctive Relief, *Grace v. Sessions*, No. 1:18-cv-01853 (D.D.C. filed Aug. 7, 2018).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 18.

¹⁵⁹ *Id.* at 32.

¹⁶⁰ *Grace v. Whitaker*, 344 F. Supp. 3d 96, 105 (D.D.C. 2018).

¹⁶¹ *Id.* at 105.

determines the standard for expedited removal . . . ”¹⁶² The DOJ filed a motion to stay the court's orders while the DHS appealed.¹⁶³ The EOIR issued an interim EOIR policy consistent with the district court's injunction.¹⁶⁴ Until the issue is resolved, IJs may not affirm a negative credible fear determination based solely on a claimed fear of domestic or gang violence.¹⁶⁵ Although it seems like a small victory for women wishing to present evidence of domestic violence to support an asylum claim, the future of such claims is shrouded in mystery and a more permanent solution should be considered to protect domestic violence victims seeking asylum.

VI. TEMPORARY PROTECTED STATUS: AN ALTERNATIVE SOLUTION

In 2016, the U.N. formally acknowledged a historical increase in human mobility.¹⁶⁶ In 2015, migrant movement across the world surpassed 244 million, most moving without incident.¹⁶⁷ However those numbers include “65 million forcibly displaced persons, including over 21 million refugees, 3 million asylum seekers and over 40 million internally displaced persons.”¹⁶⁸ The U.N.'s formal acknowledgement included an important distinction between migrants and refugees.¹⁶⁹ One crucial distinction is that refugees, as defined by international law, are protected because there are involuntary and dangerous events that cause them to flee their country of origin.¹⁷⁰ Migrants, alternatively, may be moving from hardships or other natural disasters but are not persecuted based on one of the five protected grounds as recognized by the U.N.¹⁷¹

Refugees garner international protection because the situation in their country makes it dangerous for them to go home without facing persecution.¹⁷² Classifying “migrants,” “refugees,” and “immigrants” within the same category can have serious consequences for the lives and safety of

¹⁶² *Id.*

¹⁶³ Tom Hals, *Court Rules in Favor of Asylum Seekers, Against Trump Policy*, THOMPSON REUTERS (Dec. 19, 2018 1:00 PM), <https://www.reuters.com/article/us-usa-immigration-asylum/judge-rejects-trump-curbs-on-asylum-for-domestic-abuse-victims-idUSKCN1OI2BI>.

¹⁶⁴ *Grace v. Whitaker-USCIS Guidance Re Grace*, AM. CIVIL LIBERTIES UNION, (2018), <https://www.aclu.org/legal-document/grace-v-whitaker-uscis-guidance-re-grace-injunction>.

¹⁶⁵ *Id.*

¹⁶⁶ U.N. GAOR, *New York Declaration for Refugees and Migrants: Resolution Adopted by the General Assembly*, Res. 71/1 (Oct 3, 2016), <https://www.refworld.org/docid/57ceb74a4.html>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ U.N.H.R.C., “*Refugees*” and “*Migrants*” *Frequently Asked Questions* (Aug. 31, 2018), <https://www.refworld.org/docid/56e81c0d4.html>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

people fleeing true persecution or conflict.¹⁷³ However, as technology evolves and the world's mobility increases, the United States immigration system is overwhelmingly challenged with the task of keeping up with the increasing flows of migration.¹⁷⁴ In a post-9/11 world, national security is a concern for every American. That said, asylum—adopted by the Congress following the aftermath of World War II—was and should be used as a form of relief where few other alternatives exist. However, thousands of women, like Maria, endure daily violence and may not have an alternative form of relief other than applying for asylum under the current law.

A solution may lie within a modified version of relief that already exists: Temporary Protected Status (TPS).¹⁷⁵ Under the authority of the INA, the United States Attorney General may designate foreign nationals temporary protected status from a recognized foreign state suffering from a natural disaster, an ongoing armed conflict, or other “extraordinary and temporary conditions.”¹⁷⁶ An individual may apply for TPS if she is physically present in the United States since the day of country designation and she has no significant criminal history.¹⁷⁷ Benefits of gaining TPS include a bar from removal so long as the individual remains in good standing, permission to attain gainful employment, and travel authorization.¹⁷⁸ Once granted, country designations last for a period of six to eighteen months.¹⁷⁹ At the end of the designation period, the Attorney General must review country conditions, consult with different governmental agencies and determine whether to extend the country's designation status.¹⁸⁰ As of March 2019, there are ten countries designated for TPS: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen.¹⁸¹

Although TPS has benefits, there are significant defects in the length of designations, eligibility requirements, and pathway to future immigration status that prevent the program from reaching its full potential.

¹⁷³ U.N. Human Rights Council, *Asylum and Migration*, THE U.N. REFUGEE AGENCY, <https://www.unhcr.org/en-us/asylum-and-migration.html>.

¹⁷⁴ See generally Haley Sweetland Edwards, *The Stories of Migrants Risking Everything for a Better Life*, TIME (Jan. 25, 2019), <https://time.com/longform/migrants/>.

¹⁷⁵ 8 U.S.C. § 1254a (2018).

¹⁷⁶ 8 U.S.C. § 1254a(b)(1)(A)-(C).

¹⁷⁷ 8 U.S.C. § 1254a(c)(1)(A)(i)-(iv).

¹⁷⁸ 8 U.S.C. § 1254a(f)(1)-(4).

¹⁷⁹ 8 U.S.C. § 1254a(b)(2)(A)-(B).

¹⁸⁰ 8 U.S.C. § 1254a(b)(3)(A).

¹⁸¹ DEP'T OF HOMELAND SECURITY, U.S. Citizenship and Immigration Services, *Temporary Protected Status*, <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated Aug. 1, 2019).

A. Issue #1: Length of Designations

Designations must be renewed by the Attorney General every six to eighteen months.¹⁸² Since TPS is intended to provide relief to foreign nationals in times of temporary crisis,¹⁸³ the time span should not be infinite. There are, however, two issues with setting such a short designation period. First, most ongoing armed conflicts, natural disasters or other extraordinary circumstances are rarely resolved within eighteen months. Yemen, for example, initially received its designation in 2015.¹⁸⁴ Due to ongoing armed conflict claiming the lives of more than 28,000 civilians, Yemen's TPS designation has been extended through 2020 and it is unclear when the conflict will end.¹⁸⁵ Yemen is just one example of how TPS designations will require continued designation beyond the eighteen-month maximum, costing the United States government money and leaving TPS holders vulnerable to removal after statutorily mandatory reviews conducted by the Attorney General reveal the country is now "safe."

The second issue with renewal constraints is the unpredictability of changing immigration policies during the shift of presidential administrations. From 2017 to 2018, President Trump issued several executive orders, including the termination of TPS designations for Sudan, Nicaragua, Haiti, El Salvador, Nepal, and Honduras.¹⁸⁶ The Trump Administration reasoned that the aforementioned countries recovered enough for migrants to return safely.¹⁸⁷ Following the executive orders, TPS beneficiaries filed a motion for a preliminary injunction barring the termination of TPS designations for Haiti, Sudan, Nicaragua, and El Salvador.¹⁸⁸ In October 2018, the United States District Court for the Northern District of California granted the injunction, citing violations of the APA and the Equal Protection Clause of the United States Constitution.¹⁸⁹ Although court injunctions have prevented the termination of benefits, changing political climate leave TPS holders vulnerable.

¹⁸² 8 U.S.C. § 1254a(b)(2).

¹⁸³ *Id.*

¹⁸⁴ DEP'T OF HOMELAND SECURITY, U.S. Citizenship and Immigration Services, *Temporary Protected Status Designated Country: Yemen* (June 6, 2019), <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-yemen>.

¹⁸⁵ EXTENSION OF THE DESIGNATION OF YEMEN FOR TEMPORARY PROTECTED STATUS, 83 FED. REG. 40, 307 (Aug. 14, 2018).

¹⁸⁶ Clair Felner & Amanda Shendruk, *What is Temporary Protected Status?*, COUNCIL ON FOREIGN RELATIONS (May 8, 2018), <https://www.cfr.org/article/what-temporary-protected-status>.

¹⁸⁷ *Id.*

¹⁸⁸ Order Granting Plaintiffs' Motion for Preliminary Injunction, *Ramos v. Nielsen*, No. 18-cv-01554 (N.D.Cal. 2018)

¹⁸⁹ *Id.* at 2.

B. Issue #2: Eligibility Requirements

In order to apply for TPS, an applicant has to be within the United States at the time of designation.¹⁹⁰ However, this requirement is problematic for two reasons that operate in tandem. First, an individual who would otherwise be eligible for TPS is unable to apply for the status simply because she is not physically present when the country designation is made. As a result of technicalities, and with few options remaining, she will probably resort to applying for asylum. The second issue coincides with the first: since the applicant is unable to apply for relief that she is otherwise eligible for, she is placed at the end of a massive line for immigration court proceedings, further increasing the case backlog.

C. Issue #3: Future Permanent Legal Status

The INA provides benefits to TPS holders, including employment benefits and protection from removal, but it does not give holders lawful entry status.¹⁹¹ This is problematic because a requirement of obtaining Lawful Permanent Resident (LPR) status is that an individual must have a lawful entry. For example, some eventual TPS recipients may be lawfully present on a nonimmigrant tourist visa, but if the TPS holder was unlawfully in the United States at the time of designation, the applicant is unable to apply for LPR status at a later date.¹⁹² Only the Ninth Circuit has held that a grant of TPS, itself, constitutes a lawful admission for adjustment of status eligibility,¹⁹³ but this holding has not yet been adopted by the other circuits or adopted by Congress. Affording an individual TPS from situations outside of the holder's control should not be used against them at a later date. Additionally, after several years, many TPS recipients have put down roots in the protection of the U.S. while their home country remains weak. Assuming such an individual commits no crimes and contributes to society, why not allow a pathway to citizenship? For example, a Yemeni woman who is granted TPS for her and her children should be allowed, but the option of applying for LPR status after a certain amount of time and provide proof that she is a productive member of society. A lawful path to citizenship is the type of immigration that should be encouraged, and TPS should not be viewed as a way for applicants to "jump the line." Rather, it should be recognized that individuals from designated countries do not have the option to wait.

¹⁹⁰ 8 U.S.C. § 1254a(c)(1)(A)(i)-(iv) (2018).

¹⁹¹ 8 U.S.C. § 1254a(c)(5).

¹⁹² 8 U.S.C. § 1254a.

¹⁹³ *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017).

VII. THE PROPOSAL: AMENDING TPS

TPS is a program that is not living up to its potential and could be used to help give relief to individuals who otherwise fit the description, promote legal immigration, and reduce the cost of court proceedings from asylum claims. This note proposes a three-part solution.

First, Congress should amend the TPS statute and extend the renewal of designations beyond eighteen months to a period of three to five years. A designation period of three to five years is a more realistic time frame for designated countries to recuperate from a temporary crisis. Additionally, extending the renewal period will also save time and money because country designations will not be reviewed as frequently. Having more persons eligible for TPS will mean fewer asylum claims added to the backlog. After five years, the TPS holder's status may be eligible for a one-time renewal, pending no significant criminal history, for additional time if the TPS designation is still current. At the end of ten years, a TPS holder may apply, should she choose, for LPR status pending no aggravated felonies or other serious crimes. On average, the wait time for a visa can extend anywhere from two to twenty years, depending on immigration policies at the time. A pathway to LPR status after ten years of established residency in the United States is a compromise and should be available to those who have shown they are productive members of society.

The second and third proposals are to amend the language of the TPS statute to include a catch-all phrase, such as "humanitarian crisis," and allow TPS holders an avenue to attain permanent legal status. The purpose of enacting the asylum statute is to protect individuals from persecution within their home countries. Due to changing world conditions, global migration is at an all-time high and is unlikely to change anytime soon. Accepting individuals fleeing humanitarian crises, including natural disasters, poverty, and violence under TPS fits within the humanitarian spirit of the Refugee Act and promotes positive immigration. Further, amending the language of the statute to formally recognize TPS holders lawfully entering the country so they can later attain other forms of permanent residence, promotes the aforementioned policy while saving money at the expense of the government through the immigration courts. This amendment will also help decrease the number of asylum applications by individuals who have no other options when fleeing dangerous situations and reduce attempted entries without inspection.

Changing world conditions have made domestic violence, particularly in Central America, a major issue that cannot and should not be ignored. In accordance with international treaties, the United States has a duty to allow every asylum seeker to state their case, whether it's to an asylum officer or an immigration judge. Pursuant to pending litigation and a lack of statutory

definition, it is unclear whether individuals that experience domestic violence from private actors fall within the PSG category. What is clear, however, is the large number of individuals seeking refuge in the United States, whether from natural disasters or other conflicts across the globe, must be addressed. Instead of denying asylum to some of the most vulnerable, like Maria and her children, the Attorney General should have the power to grant this class of persons TPS. Granting TPS to victims of domestic violence could potentially decrease asylum claims and give women and children an opportunity to enter the United States to create a better life for their family.

VIII. CONCLUSION

Not all applicants are eligible for asylum, but there should be an alternative way to allow individuals who face dangers at home to enter the United States for their own protection. The existing legal channels for victims like Maria are ineffective. Providing TPS to individuals that suffer at the hands of private actors affords deserving individuals an alternative to asylum that promotes legal immigration and justice.