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## DIFFUSION OF SOFT IMMIGRATION LAW: EVIDENCE FROM ASYLUM ADJUDICATION IN THE WAKE OF *MATTER OF A-B-*

Patrick Kennedy\*

### I. INTRODUCTION

Former Attorney General Jeff Sessions issued a decision on June 11, 2018, in *Matter of A-B-*,<sup>1</sup> raising the standard of scrutiny immigration judges were to apply to asylum applications based on domestic violence.<sup>2</sup> Domestic violence claims make up a significant portion of claims based upon membership in a ‘particular social group,’ which itself is a large fraction of asylum claims.<sup>3</sup> However, the exact reach of *Matter of A-B-* was and remains unclear, as the decision by its own terms merely reaffirmed the existing standard for asylum claims while reversing factual findings in a single asylum seeker’s case.<sup>4</sup> *Matter of A-B-* involved virtually no findings, so even this fact provides little insight into the relevance of the decision for future immigrants. In fact, in the wake of the decision, influential immigrants’ rights groups like the National Immigrant Justice Center released

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1. 27 I. & N. Dec. 316 (Att’y Gen. 2018).

2. This decision was subsequently overturned during the Biden administration in its entirety, making my window of analysis the only one available. See *Matter of A-B-*, 28 I. & N. Dec. 307, 307 (Att’y Gen. 2021) (“(1) *Matter of A-B-*, 27 I. & N. Dec. 316 (Att’y Gen. 2018) (“*A-B-I*”), and *Matter of A-B-*, 28 I. & N. Dec. 199 (Att’y Gen. 2021), are vacated in their entirety. (2) Immigration judges and the Board should no longer follow [those decisions] when adjudicating pending or future cases. Instead, pending forthcoming rulemaking, immigration judges and the Board should follow pre-*A-B-I* precedent, including *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).”). “The President recently issued an executive order directing the Attorney General and the Secretary of Homeland Security to promulgate regulations ‘addressing the circumstances in which a person should be considered a member of a particular social group.’” *Matter of A-B-*, 28 I. & N. Dec. at 308.

3. See Anne Kalt et al., *Asylum Seekers, Violence and Health: A Systematic Review of Research in High-Income Host Countries*, 103 AM. J. PUB. HEALTH e30 (2013), <https://perma.cc/QQ44-STKJ>. Estimates suggest as much as 76.2% of the asylum-seeking population has experienced sexual violence or domestic violence, although data is quite limited. *Id.* at e39. Unfortunately, country condition information from many nations does not include domestic violence numbers, so it can be difficult to construct more precise estimates. Although the State Department reports for most countries include a section on domestic violence, such information is not universally available. See Barbara R. Barreno, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 232 (2011).

4. Even the office of the Attorney General has since confirmed this: “*Matter of A-B-* did not alter the longstanding ‘unable or unwilling’ standard or implement a new, more stringent test for determining when persecution by third parties may be attributed to the government.” *Matter of A-B-*, 28 I. & N. Dec. at 201.

practice guidelines advising attorneys not to change their strategy substantively.<sup>5</sup> The first question this raises is whether the issuance of the Attorney General's decision, purportedly eliminating asylum claims based on domestic violence, impacted the overall grant and denial rate of asylum. This article asks whether this decision impacted asylum seekers' grant and denial rates as an exemplar for the phenomenon of non-binding decisions and documents exerting curiously strong effects on administrative judges.

To date, empirical analysis of the decision has been scant; in fact, a leading paper suggests empirical analysis may be impossible.<sup>6</sup> On the one hand, this might be because very few immigration attorneys are also empiricists. On the other hand, *Matter of A-B-* was not widely reported outside of legal circles.<sup>7</sup> So, it may be reasonable to conclude that few, if any, empiricists are likely to have heard about the decision.

The extent of adoption of the Attorney General's decision appears to differ from circuit to circuit.<sup>8</sup> In particular, the Ninth Circuit has emphasized that *Matter of A-B-* did *not* change the existing standard applied to the analysis of particular social groups.<sup>9</sup> In contrast, the Second,<sup>10</sup> Fifth,<sup>11</sup> and Eleventh<sup>12</sup> Circuits appear to have adopted a heightened review standard for particular social group cases, especially those based on domestic violence, family membership, or gang membership—the same categories identified for skepticism in *Matter of A-B-*.<sup>13</sup> This raises a second important question: does the impact of an administrative decision, with purportedly nationwide and uniform effect, differ from circuit to circuit? Since the

5. *Asylum Practice Advisory: Applying for Asylum After Matter of A-B-*, NAT'L IMMIGRANT JUSTICE CTR., (June 2018), <https://perma.cc/5DL4-JF7W>.

6. Anne Weis, *Fleeing for Their Lives: Domestic Violence Asylum and Matter of A-B-*, 108 CALIF. L. REV. 1319, 1350 (2020) ("Thus, it is difficult to know exactly what impacts *Matter of A-B-* has had since it was decided in June 2018. So much of immigration adjudication is unpublished, making it difficult to discern how immigration judges have been interpreting and applying *Matter of A-B-*. It is also almost impossible to identify what type of deterrent effect, if any, *Matter of A-B-* has had or will have on asylum seekers fleeing domestic violence. But Sessions's decision in *Matter of A-B-* could have tragic human consequences.").

7. There were several mass media articles about the decision, but there is little evidence of permeation generally into the culture. See *id.* at 1350–51 (collecting articles about the decision).

8. See *De Pena-Paniagua v. Barr*, 957 F.3d 88, 95 (1st Cir. 2020).

9. "In *Matter of A-B-* the Attorney General did not announce a new categorical exception for victims of domestic violence or other private criminal activity." *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1080 (9th Cir. 2020). "[S]everal circuits have rejected this reading of *Matter of A-B-*. Most recently, the Ninth Circuit joined the First and Sixth Circuits in ruling that *Matter of A-B-* heightens the burden of proof required for domestic violence victims to claim asylum, but that domestic violence-based claims for asylum are still legally cognizable." Michael Kareff & Jorge Roman-Romero, *Post-Matter of A-B-, the Ninth Circuit Joins the First and Sixth Circuits in Finding Domestic Violence-Based Asylum Claims Are Still Viable*, 35 GEO. IMMIGR. L.J. 349, 349 (2020).

10. *Scarlett v. Barr*, 957 F.3d 316, 332 (2d Cir. 2020).

11. *Gonzales-Veliz v. Barr*, 938 F.3d 219, 233 (5th Cir. 2019).

12. *Amezcu-Preciado v. U.S. Att'y Gen.*, 943 F.3d 1337, 1344 (11th Cir. 2019).

13. *Matter of A-B-*, 27 I. & N. Dec. 316, 335–36, 338–39 (Att'y Gen. 2018).

Ninth Circuit adopted a more permissive reading of *Matter of A-B-* compared to the Second, Fifth, and Eleventh Circuits, we also have evidence for the comparison between a strong and weak reading of Sessions's opinion and the impact of those readings on overall denial rates of asylum. Accordingly, this article also analyzes whether there is significant heterogeneity by circuit.

This article's analysis fits into two separate and essential areas of empirical legal scholarship. *First*, what is the impact of agency decision-making on agency adjudication. Although there is some scholarship investigating the diffusion<sup>14</sup> of precedents<sup>15</sup> from courts of appeals to lower courts,<sup>16</sup> no studies have examined the same relationship in the agency adjudication process. Immigration is a massive undertaking of agency adjudication,<sup>17</sup> so it serves as a valuable exemplar to investigate that impact.

*Second*, the results provide evidence on the effect of adopting "stricter" rules of proof for asylum seekers. The particular social group ground of asylum is the broadest ground upon which to base an asylum claim.<sup>18</sup> *Matter of A-B-* both directly discussed domestic violence victims as constituting a particular social group as well as broadly cast aspersions on the nexus between membership in *any* particular social group and fear of return to one's country of origin.<sup>19</sup> The goal of the decision was clear from the start: raise the standard of skepticism applied to particular social groups' claims.

This also fits into the existing scholarship on the impact of presidential cultural control on agency adjudication. Notable papers in this area have looked at the theoretical relationship between a president's legal and cultural administrations and agency adjudication.<sup>20</sup> A recent scholar, Catherine

14. See Donald J. Smythe, *Transaction Costs, Neighborhood Effects, and the Diffusion of the Uniform Sales Act, 1906-47*, 4 REV. L. & ECON. 341, 367 (2008) (an early example of fusing empirical methods from social-network analysis and diffusion of statutes).

15. See Laurence A. Benner et. al., *Social-Network Theory and the Diffusion of the Search-and-Seizure Exclusionary Rule Among State Courts Between Weeks and Wolf*, 27 BYU J. PUB. L. 97, 133 (2012) (conducting a diffusion analysis in the context of precedent on the exclusionary rule).

16. See Michal Shur-Ofry et. al., *The Diffusion of Legal Innovation—Insights from Mathematical Modeling*, 52 CORNELL INT'L L.J. 313, 316 (2019) ("[H]undreds of empirical studies of different social networks confirmed that social influence deeply affects the diffusion of various types of innovations.").

17. See Patrick J. Glen, *The Case for Chevron Deference to Immigration Adjudications*, 71 DUKE L.J. ONLINE 1, 3 (2021), <https://dlj.law.duke.edu/2021/10/caseforchevron/>.

18. See B. Robert Owens, *What Is a Social Group in the Eyes of the Law? Knowledge Work in Refugee-Status Determination*, 43 LAW & SOC. INQUIRY 1257, 1260–61 (2018) (stating that "many asylum claims in the United States and internationally turn on the interpretation of that ambiguous and potentially expansive phrase"). "To qualify for asylum an asylum seeker must prove a well-founded fear of persecution based on religion, race, nationality, political opinion, or membership in a specific social group." *Id.* at 1257.

19. 27 I. & N. Dec. 316, 320 (Att'y Gen. 2018).

20. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2306 (2001); see also Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211 (2013); Har-

Kim, has expanded this discussion to encompass immigration courts, particularly in light of the Trump administration's renewed focus on immigration enforcement.<sup>21</sup> These papers examine the relative independence agency adjudicators enjoy from the executive branch's culture and legal policy as a whole, and consider whether there is any relationship between them. For example, Kim's analysis of immigration courts touches on Adrienne Vermuele's theory that conventions and culture shape a great deal of administrative adjudication.<sup>22</sup> Kim points to evidence from attempted political appointments of immigration judges during the second Bush administration as evidence that cultural norms in favor of due process and administrative non-intervention generally are (or were) strong and protect immigration judges.<sup>23</sup>

Despite limited historical evidence suggesting cultural constraints prevented previous administrations from interfering in immigration adjudications directly, there are limits to those constraints. For example, as Kim identifies, the Administration Procedure Act "allows that [an] initial hearing may be conducted instead by the politically appointed leadership of an agency."<sup>24</sup> Such leaders are unlikely to feel the same legal and cultural constraints as career officials selected based on non-partisan criteria. Since the legal barriers may easily fall in the face of motivated decision-makers, arguably a culture of independent adjudication is all that stands in the way of politically motivated immigration removal decisions.<sup>25</sup> Kim suggests there is reason to doubt the efficacy of these cultural norms as well, since "it is not at all clear that these soft norms will be sufficient to counterbalance the President's incentives to control agency adjudications."<sup>26</sup>

Although Kim's article is illuminating, she does not conduct an empirical analysis of the relationship between any particular decision and outcomes in immigration adjudication. To provide some empirical context, this article attempts to fill that gap and determine whether there is any evidence substantiating Kim's concern about the potential for erosion or manipulation of legal and cultural norms of independent adjudication in immigration courts.

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old J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RESV. L. REV. 1083, 1091–1105 (2015).

21. Catherine Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 4–6 (2018).

22. *Id.* at 13–14.

23. "The public outcry over these incidents, as well as the findings of illegality, suggest that both legal barriers and conventions about adjudicative independence imposed meaningful constraints on political interference in agency adjudications." *Id.* at 14–15.

24. *Id.* at 16 (citing 5 U.S.C. § 556(b)).

25. *Id.* at 18 ("The permeability of legal barriers to political influence suggests that the only real protection against presidential interference in agency adjudications may rest on soft 'conventions.'").

26. *Id.*

This article shows that there is a connection between the announcement of *Matter of A-B-* and a decrease of roughly 3%–5% in the asylum rate grant. Given that the mean grant rate is roughly 36%, this suggests between an 8%–10% decrease in effective grant rate. There have been no previous attempts to estimate the impact of such a decision on asylum grant rates, so it is difficult to determine the relative magnitude of this change compared to other, similar changes in asylum law.<sup>27</sup> Nevertheless, given the purported neutrality of the policy announced in *Matter of A-B-*, even a 3% change would be unexpected if immigration judges were not feeling pressure based on the decision.<sup>28</sup>

The remainder of this article proceeds as follows: Part II describes the organization of the immigration courts and the institutional setting of Sessions’s decision in *Matter of A-B-*. Part III describes the decision in *Matter of A-B-* and its place in immigration law and provides context for why the decision is a good vehicle for studying “soft cultural norm” diffusion. Part IV introduces the data. Part V contains descriptive statistics and an event study analysis. Part VI introduces empirical specification and contains results from a series of ordinary least squares regressions. Part VII concludes.

## II. HOW THE ASYLUM SYSTEM FUNCTIONS AND PARTICULAR SOCIAL GROUPS

This section will describe the structure of the immigration court system and the asylum statute before turning to a description of the issues raised and decided in *Matter of A-B-*.

### A. Organization of the Courts

The immigration court system is unlike courts of general jurisdiction in several ways. First, immigration courts are established under the executive branch and are located under the umbrella of the Department of Jus-

27. Kirsten Ruth Lewis, *Abused and Confused: A Call for Asylum Law’s Treatment of Domestic Violence to Catch Up with the Rest of the American Legal System*, 12 DREXEL L. REV. 377, 391 (2020) (internal quotation omitted) (“Because ‘[n]o official statistics exist regarding the number of asylum cases . . . that involve domestic violence as a basis for protection,’ it is essentially impossible to know how many domestic violence victims have plead with immigration judges to grant them asylum.”).

28. This article, unfortunately, cannot identify the number of immigrants who *never* sought asylum as a result of media coverage of *Matter of A-B-* suggesting DV asylum claims were foreclosed. See Weis, *supra* note 6, at 1350–51 (“Although the holding in *Matter of A-B-* was narrow, the media coverage of the case has largely suggested that Sessions stopped domestic violence asylum altogether. This misinformation might lead asylum applicants and attorneys to not petition for asylum based on domestic violence. It also could affect the way that immigration judges decide domestic violence cases because they might interpret *Matter of A-B-* as being broader than it really is.”).

tice.<sup>29</sup> Unlike courts of general jurisdiction, immigration courts do not derive their authority from Article III of the Constitution. Additionally, immigration courts only consider whether aliens before the court can be removed or granted relief from deportation; they do not have broad remedial powers.<sup>30</sup> To pursue broader equitable or legal relief, potential immigrants must seek that relief in a federal or state district court rather than through the immigration courts.<sup>31</sup>

Immigration judges (IJ) preside over removal proceedings in immigration courts, unlike Article III or general jurisdiction federal judges. Instead of having general powers to grant broad relief, IJs are administrative adjudicators with a narrow purview.<sup>32</sup> Unlike Article III judges, IJs' reach is quite circumspect and almost entirely limited to determining whether applicants are eligible for discretionary relief from deportation under specifically enumerated discretionary programs.<sup>33</sup> IJs are not empowered to render broader verdicts and do not set precedent with their decisions.<sup>34</sup>

Should an immigrant face an unfavorable outcome in front of an IJ, she can appeal further within the administrative process to the Bureau of Immigration Appeals (BIA).<sup>35</sup> The BIA is just as much an administrative animal as the IJs. Unlike individual immigration judges, however, the BIA *does* occasionally issue published precedential opinions.<sup>36</sup> Since the BIA reviews all immigration cases regardless of the location from which they originate, the BIA's appellate jurisdiction is geographically broader than each Article III court of appeals.<sup>37</sup> Nevertheless, the BIA can only review the determinations of the individual IJs, which means the BIA only has appellate jurisdiction over the narrow matters appropriate for an IJ, primarily removal and discretionary relief from removal.<sup>38</sup> The BIA process also differs from criminal cases adjudicated by Article III courts because *either*

29. See Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 29 (2013).

30. See Anna Marie Gallagher, *A Primer on Immigration Court Practice*, 08-12 IMMIGR. BRIEFINGS 1 (2008) (describing limited authority of immigration judges).

31. For example, immigrants sometimes file writs of habeas corpus when they have been detained for long periods of time, citing violations of their right to due process. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 684–85 (2001). Such writs are filed in the district court where their detention center sits, rather than in immigration court. See *id.* at 685 (filing in the Eastern District of Louisiana).

32. See Gallagher, *supra* note 30.

33. *Id.*

34. *Id.*

35. 8 C.F.R. § 1003.1(b) (2015).

36. 8 C.F.R. § 1003.1(d).

37. 8 C.F.R. § 1003.1(g)(1) (“Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board and decisions of the Attorney General are binding on all officers and employees of DHS or immigration judges in the administration of the immigration laws of the United States.”).

38. 8 C.F.R. § 1003.1(b) (describing the situations giving rise to BIA appellate jurisdiction).

the government or the alien can seek review of the IJ's decision, whereas the government generally cannot appeal relief from a criminal conviction to an appellate court.

Should the immigrant lose in front of both the IJ and the BIA, and face an order of removal from the country, she can appeal to the Article III court of appeals where her case resided.<sup>39</sup> For example, if an immigrant appeared in immigration court in Dallas, she could appeal her order of removal to the United States Fifth Circuit Court of Appeals, which covers all of Texas. Following review in the United States Circuit Courts, the final avenue for appeal is to the United States Supreme Court on writ of certiorari.<sup>40</sup>

Although this is the typical process, there is one relevant wrinkle: the Attorney General (AG) technically retains the right to review and overturn any immigration judge or BIA decision.<sup>41</sup> Since the statutory language of the Immigration and Nationality Act used to create the immigration courts places the final review authority of all removal and relief decisions in the hands of the AG, they technically have the right to intervene and decide any case before it can be appealed to the Article III courts.<sup>42</sup> The AG typically does not use this process to review cases but has done so on several occasions in the past. Instead, the AG reviews cases when the BIA or Department of Homeland Security refer a critical matter to them.<sup>43</sup> This article concerns one of the most notable recent examples of an AG intervening without such a referral in a case called *Matter of A-B*.<sup>44</sup>

### B. Statutory Criteria for Asylum

To be eligible for asylum, applicants must first demonstrate past persecution or fear of future persecution “on account of” race, religion, nationality, membership in a particular social group, or political opinion.<sup>45</sup> Next, an asylum seeker must demonstrate that she is statutorily eligible for asylum.<sup>46</sup> In order to establish statutory eligibility, an applicant must have filed her application within a year of arriving in the United States, must not have committed a severe crime or persecuted anyone else on account of a protected ground, and must not be a serious national security risk or have been

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39. See Birdsong, *supra* note 29, at 26.

40. See, e.g., *Moncrief v. Holder*, 569 U.S. 184, 189–90 (2013) (describing process of appeals that led to Court taking the case).

41. 8 C.F.R. § 1003.1(h).

42. *Id.* (describing the regulations bringing this component of the Immigration and Nationality Act (INA) into effect).

43. 8 C.F.R. § 1003.1(h)(ii), (iii).

44. *Matter of A-B*, 27 I. & N. Dec. 316, 317 (Att’y Gen. 2018).

45. 8 U.S.C. § 1101(a)(42) (2012).

46. See 8 U.S.C. § 1158(b)(2)(A).



firmly resettled in another country.<sup>47</sup> If she meets all of these conditions, then the judge may grant the applicant asylum as an exercise of discretion.<sup>48</sup> Relevant discretionary factors include general humanitarian considerations, such as the asylum seeker's health or age, as well as the circumstances and actions she took in fleeing her country of origin.<sup>49</sup>

Applicants can only qualify for asylum if they demonstrate either past persecution or a well-founded fear of future persecution on account of one of five protected grounds.<sup>50</sup> If an applicant can show that her home country was unwilling or unable to prevent her past persecution and that it was on account of a protected ground, then she is entitled to a presumption that she has a well-founded fear of future persecution.<sup>51</sup>

Alternatively, apart from past persecution and a rebuttable presumption of future persecution, applicants can also assert an independent claim of a well-founded fear of future persecution.<sup>52</sup> This means that if a judge finds that none of the harm the applicant suffered was sufficient to show she suffered past persecution, she can still set forward a claim for relief based on a showing that she fears being harmed if she is forced to return to her country of origin.<sup>53</sup> To establish a well-founded fear, the applicant must establish either that she was or will be persecuted on account of a protected ground, and that this ground was or will be a central reason for her persecution.<sup>54</sup>

Particular social groups claims are more nebulous than the other statutory ground of eligibility.<sup>55</sup> The success of any particular social group claim an applicant raises depends upon a showing that she belongs to an immutable and socially discrete subset of individuals. To clarify the concept, the BIA has established three requirements: (1) immutability, (2) particularity, and (3) social distinction.<sup>56</sup> In addition to meeting these requirements, the applicant must demonstrate that she, in fact, is a member of the relevant group and that her membership was a "central reason" for her persecution.<sup>57</sup>

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47. *See id.*

48. *See* Matter of Pula, 19 I. & N. Dec. 467, 473–74 (B.I.A. 1987).

49. *Id.* at 474.

50. 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

51. *See* 8 C.F.R. § 208.13(b)(1) (2021) ("An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.")

52. 8 C.F.R. § 208.13(b)(1).

53. 8 C.F.R. § 208.13(b)(2).

54. 8 U.S.C. § 1158(b)(1)(B)(i).

55. *See* Owens, *supra* note 18, at 1260.

56. *See id.* at 1260–61.

57. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(i), 119 Stat. 231 (codified at 8 U.S.C. § 1158(b)(3)(A) (2012)).

To qualify for asylum, our hypothetical asylum seeker must first show that members of her particular social group are united by one or more common, immutable characteristics. As defined in *Matter of Acosta*,<sup>58</sup> an immutable characteristic may be an innate trait such as eye color, or it may be based on past experience, such as former military status.<sup>59</sup> But it “must be one that the members of the group either *cannot* change or *should not* be required to change because it is fundamental to their individual identities or consciences.”<sup>60</sup>

Second, the applicant’s social group must be sufficiently particular. Particularity requires that the group is “sufficiently distinct” to represent “a discrete class of persons.”<sup>61</sup> Both the BIA and the Ninth Circuit look at the outer boundaries defining group membership to identify a “clear benchmark for determining who falls within the group.”<sup>62</sup> Courts reject proposed groups that are “amorphous, overbroad, diffuse, or subjective.”<sup>63</sup> In addition, the BIA has rejected extremely large social groups on the basis of particularity.<sup>64</sup> In the Ninth Circuit, breadth and size are not automatic indicators of particularity or lack thereof.<sup>65</sup>

Third, in addition to immutability and particularity, the applicant must prove social distinction. The social distinction inquiry asks whether “those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way.”<sup>66</sup> “Country conditions reports, expert witness testimony,” and other evidence of historical animosities or discriminatory laws can help establish that a group is “socially distinct within the society in question.”<sup>67</sup>

### III. *MATTER OF A-B-* AND CHANGES TO ‘PARTICULAR SOCIAL GROUP’ DOCTRINE

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

The applicant, A.B., whose name remains unknown because of anonymous filing rules in immigration court, is a Salvadoran citizen.<sup>68</sup> She was apprehended in 2014 and placed in removal proceedings. A.B. requested

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58. 19 I. & N. Dec. 211 (B.I.A. 1985).

59. *Id.* at 233.

60. *Id.* (emphasis added).

61. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 210 (B.I.A. 2014).

62. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 239 (B.I.A. 2014).

63. *Id.*

64. *See, e.g., Matter of W-G-R-*, 26 I. & N. Dec. at 210.

65. *See Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010).

66. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 238.

67. *Id.* at 244.

68. *Matter of A-B-*, 27 I. & N. Dec. 316, 321 (2018).

asylum, “withholding of removal,” and relief under the Convention Against Torture.<sup>69</sup> A.B. claimed eligibility for asylum as a member of the social group “El Salvadoran women who are unable to leave their domestic relationships where they have children in common.”<sup>70</sup> A.B. was repeatedly emotionally, physically, and sexually abused “during and after [her] marriage” to her former partner.<sup>71</sup> In 2015, the Immigration Judge denied A.B. all relief and entered a final order of deportation.<sup>72</sup> The BIA reversed the IJ’s determination in 2016, finding the IJ’s adverse inferences about A.B.’s credibility and application of ‘particular social group’ doctrine clearly erroneous.<sup>73</sup> The BIA pointed out that the social group A.B. claimed to be a member of was similar to the group definition it approved of in *Matter of A-R-C-G*,<sup>74</sup> which concerned “married women in Guatemala who are unable to leave their relationship.”<sup>75</sup>

On March 7, 2018, former Attorney General Jeff Sessions referred *Matter of A-B-* to himself and requested briefing on a critical question of asylum law: “Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.”<sup>76</sup> In other words, Sessions referred the case to himself to review whether victims of domestic violence, gang violence, violence because of their family membership, and similar claims, could qualify for asylum.

While Sessions cast aspersions on asylum claims based on “private violence,” he did not categorically eliminate such claims.<sup>77</sup> Instead, he couched his decision carefully, saying, “Although there may be exceptional circumstances when victims of private criminal activity could meet these requirements, they must satisfy established standards when seeking asylum.”<sup>78</sup> Rather than broadly changing the standards applicable in determining particular social group membership in such claims, Sessions ultimately only determined that the precedent established in an earlier case involving intimate partner violence was based on shoddy BIA analysis that failed to consider the applicant’s claim fully.<sup>79</sup>

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69. *Id.* at 320–21.

70. *Id.* at 321.

71. *Id.*

72. *Id.*

73. *Id.*

74. 26 I. & N. Dec. 388 (B.I.A. 2014).

75. *Id.* at 393–94.

76. *Matter of A-B-*, 27 I. & N. Dec. 227 (Att’y Gen. 2018).

77. *Matter of A-B-*, 27 I. & N. Dec. 316, 340 (Att’y Gen. 2018).

78. *Id.* at 317.

79. *Id.* (“Because *Matter of A-R-C-G-* recognized a new particular social group without correctly applying these standards, I overrule that case and any other Board precedent to the extent those other decisions are inconsistent with the legal conclusions set forth in this opinion.”).

The reach of Sessions's opinion was therefore limited in scope: only one asylum seeker was bound by his decision. The applicant in *Matter of A-B-* was the only one whose case was referred directly to the AG and whose records were before Sessions.<sup>80</sup> Since he ultimately determined that the standard of law *did not* need to change, but instead the BIA failed to apply the law in full, the decision in *Matter of A-B-* did not formally change the standard for asylum seekers bringing claims on account of their membership in a particular social group.<sup>81</sup> Sessions ended the introduction to his opinion with a clear statement of the effect of his decision: "While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address."<sup>82</sup>

Although the decision seems to suggest immigration courts should not grant asylum claims based on intimate partner violence, refusal to join a gang, or other "purely personal" violence, that portion of the opinion is not binding on future courts.<sup>83</sup> As Sessions points out himself, he did not decide the legal status of all such particular social group claims in *Matter of A-B-* because that question was not properly before him.<sup>84</sup> Instead, he only decided the asylum case of a single applicant, A. B., and overruled a previous BIA decision as factually deficient without altering the standard for future cases.<sup>85</sup>

### B. Worldwide Confusion

The vagaries of the immigration court system are difficult to untangle at the best of times, so *Matter of A-B-*'s confusing procedural posture and legal effect were met with exasperation.<sup>86</sup> Some were confused about the reach of the decision since the majority of the hard-hitting statements in the decision had no binding effect on the rights of anyone before the AG.<sup>87</sup> In other words, the pronouncements that "victims of private violence" could

80. See *Matter of A-B-*, 27 I. & N. Dec. 227 (Att'y Gen. 2018) (referring the matter); *Matter of A-B-*, 27 I. & N. Dec. 316, 317 (Att'y Gen. 2018) (explaining that *Matter of A-R-C-G-* was overruled).

81. *Matter of A-B-*, 27 I. & N. Dec. 316, 319 (Att'y Gen. 2018).

82. *Id.* at 320.

83. See *id.* at 339 n.10.

84. *Id.* at 320.

85. *Id.* at 319–20.

86. See Daniel M. Kowalski, *Post-Matter of A-B- Victories*, IMMIGR. COURTSIDE, Jan. 17, 2019, <https://perma.cc/35AU-SLLH> (describing the decision as "misleading, inaccurate, and confusing").

87. See *id.* (characterizing the decision as out-of-step with traditional scholarly, legal analysis).

rarely gain asylum were likely not legally binding on future IJs.<sup>88</sup> Nevertheless, the United States Citizenship and Immigration Services (USCIS) issued guidance to its officers and IJs, suggesting they review cases involving domestic violence, gang violence, or any other type of non-governmental violence with renewed skepticism.<sup>89</sup>

Out of the confusion came numerous court challenges to unfavorable IJ opinions. On the one hand, some courts took Sessions at his word and said *Matter of A-B-* “reaffirmed existing standards for establishing membership in a particular social group.”<sup>90</sup> On the other hand, a variety of courts have interpreted *Matter of A-B-* more substantively, suggesting it announced a broader skepticism of all “private violence” claims than existed prior to the opinion.<sup>91</sup> Importantly, however, even Sessions points out that *Matter of A-B-* did not alter the actual legal framework for deciding particular social group asylum claims.<sup>92</sup>

In addition to the direct challenges to IJ opinions, litigants also filed a request for a permanent injunction against USCIS’s policy guidance documents issued to field agents conducting credible fear interviews. In *Grace v. Whitaker*,<sup>93</sup> the district court judge determined that the policy documents suggesting restrictions on “private violence” asylum claims in the wake of *Matter of A-B-* were arbitrary and capricious.<sup>94</sup> *Grace* purportedly abro-

88. See Attorney General Rescinds Two Trump Decisions, Restoring Protection to Many Asylum Seekers, June 21, 2021, <https://perma.cc/4FNS-S8XX> (“Though this was non-binding commentary outside of the ruling in the case, some immigration judges saw the decision as foreclosing asylum for those fleeing persecution because of domestic violence or gang-related harm.”).

89. See Jason Boyd & Greg Chen, *AILA Policy Brief: USCIS Guidance on Matter of A-B- Blocks Protections for Vulnerable Asylum Seekers and Refugees*, AM. IMMIGR. LAWYERS ASS’N, July 23, 2018 (describing the policy document).

90. *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1078 (9th Cir. 2020); *Juan Antonio v. Barr*, 959 F.3d 778, 789–90 (6th Cir. 2020); *Gonzales-Veliz v. Barr*, 938 F.3d 219, 233 (5th Cir. 2019).

91. *Juan Antonio*, 959 F.3d at 791; *Gonzales-Veliz*, 938 F.3d at 233; *Amezcu-Preciado v. U.S. Att’y Gen.*, 943 F.3d 1337, 1344 (11th Cir. 2019). It is not at all clear that the concept of “private violence” passes muster concerning domestic abuse and intimate partner violence: “this dichotomy between private and state-sanctioned violence falls apart upon a closer look at the conditions in the Northern Triangle. The state may not explicitly carry out IPV, but it often implicitly condones it.” Weis, *supra* note 6, at 1344, 1345 (“[T]his idea—that domestic violence results from relationship problems between two people—disregards the cultural underpinnings of IPV. Domestic violence is a manifestation of misogyny perpetrated to maintain traditional gender hierarchies.”).

92. *Matter of L-E-A-*, 27 I. & N. Dec. 581, 588–89 (Att’y Gen. 2019).

93. 344 F. Supp. 3d 96 (D.D.C. 2018).

94. Weis, *supra* note 6, at 1350 (“Following *Grace v. Whitaker*, each credible fear determination requires an individualized assessment of the merits of each asylum seeker’s claim. Rules that automatically deny asylum based on the type of harm suffered fail this standard. *Grace* therefore struck an important blow to the most dangerous aspect of *Matter of A-B-*: the idea that ‘generally’ domestic violence victims do not have viable asylum claims.”).

gated Sessions's decision under the Administrative Procedure Act near the end of December in 2018.<sup>95</sup>

Although *Grace* has since been affirmed in part and reversed in part by the D.C. Circuit,<sup>96</sup> most courts considering the reach of that decision declined to find it binding on them regardless.<sup>97</sup> The *Grace* decision did not directly impact the rights of any litigants outside of the D.C. Circuit since it had no binding effect outside that circuit.<sup>98</sup>

The confusion about the rights of future asylum applicants due to Sessions's finding in *Matter of A-B-* raises a familiar specter in both law generally and administrative law in particular. Many non-binding decisions and documents appear to exert outsized influence on proceedings where they should have little or no effect.<sup>99</sup> Immigration courts determining whether an asylee fleeing domestic abuse qualified as a member of a particular social group were not bound by *Matter of A-B-* in any substantive way,<sup>100</sup> but many observers and practitioners still believed the opinion would hold sway with IJs or asylum officers.<sup>101</sup> To date, no analysis has determined whether this is the case.

This article asks whether empirical methods can shed light on the impact of dicta or non-binding decision-making on future adjudications. The remainder of this article will describe the data and methodology used to analyze whether *Matter of A-B-* actually impacted the grant and denial rates of asylum seekers as an exemplar for the phenomenon of non-binding decisions and documents exerting curiously strong effects on administrative judges.

95. *Grace*, 344 F. Supp. 3d at 131–33. For a full discussion of circuit cases both before and after *Matter of A-B-*, see generally Charles S. Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUM. RTS. L. REV. 441 (2021).

96. *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

97. See, e.g., *Diaz-Reynoso v. Barr*, 968 F.3d 1070 (9th Cir. 2020); *Galeas Figueroa v. U.S. Att'y Gen.*, 998 F.3d 77, 91 n.7 (3d Cir. 2021) (“We are neither persuaded nor bound by that analysis.”).

98. There is also a second limit: “*Grace v. Whitaker* applies only to the credible fear stage. *Matter of A-B-* is still binding on immigration judges and the BIA.” Weis, *supra* note 6, at 1350.

99. This also appears to have been Sessions's intention in *Matter of A-B-*. See Weis, *supra* note 6, at 1343–44 (“Sessions' decision in *Matter of A-B-* reveals much about how he viewed, and the Trump administration continues to view, asylum and domestic violence. Sessions believed asylum should be granted sparingly and asserted that it is an inappropriate remedy for people who are fleeing ‘private’ violence. In *Matter of A-B-*, he identified the ‘prototypical refugee’ as one who ‘flees her home country because the government has persecuted her.’”).

100. The Acting Attorney General even issued a follow-on decision clarifying this: “*Matter of A-B-* did not alter the existing standard for determining whether a government is ‘unwilling or unable’ to prevent persecution by non-governmental actors. The ‘complete helplessness’ language used in *Matter of A-B-* is consistent with the longstanding ‘unable or unwilling’ standard, as the two are interchangeable formulations.” *Matter of A-B-*, 28 I. & N. Dec. 199, 199 (Att’y Gen. 2021).

101. See Boyd & Chen, *supra* note 89.

IV. DATA<sup>102</sup>

There are roughly 55 total immigration courts, although some adjudicate very low numbers of cases. Although there is monthly data for each of the courts on grant rate, number of cases, denial rate, and rate of other relief, this article focuses on the 29 largest courts, where most cases are decided. This data is gathered from the Transactional Records Access Clearinghouse (TRAC),<sup>103</sup> which is a program run through Syracuse University.<sup>104</sup> The TRAC program submits requests under the Freedom of Information Act to the Executive Office of Immigration Review to obtain administrative records for all relevant asylum hearings. TRAC records are broken down monthly and available for each immigration court and judge.<sup>105</sup>

TRAC's database contains virtually all relevant information on immigration court decisions but is only partially available to the public.<sup>106</sup> As a result, each month, city, and dependent variable combination was hand-coded using TRAC's publicly available data into a unique dataset. This dataset includes month, year, immigration court, circuit in which the immigration court sits, rate of denial of asylum claims, number of asylum claims, and rate of grant of asylum claims. The grant and denial rates also include a specific breakout for immigrants with attorney representation in their removal proceedings.

Unfortunately, it is not possible to directly observe the basis for any particular IJ's ruling as IJs do not generally publicly announce the particular ground on which they base their grant of an asylum claim.<sup>107</sup> Instead, IJs simply grant or deny asylum based on an applicant's submission, which could include arguments for multiple different theories justifying relief.<sup>108</sup> For example, an asylum applicant could claim to qualify for asylum on the basis of gender-based violence as a member of a particular social group of Mexican women, but also on the basis of her political opinion in favor of

102. All data used to compile the Tables and Figures in this Paper and Appendix are from *TRAC Immigration*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (updated through Sept. 2021), <https://perma.cc/35V6-DA84>.

103. *Id.*

104. See Birdsong, *supra* note 29, at 27 (discussing and using TRAC data to discuss patterns in asylum decisions).

105. See *TRAC Immigration*, *supra* note 102.

106. See *id.*

107. Weis, *supra* note 6, at 1350 ("Thus, it is difficult to know exactly what impacts *Matter of A-B* has had since it was decided in June 2018. So much of immigration adjudication is unpublished, making it difficult to discern how immigration judges have been interpreting and applying *Matter of A-B*. It is also almost impossible to identify what type of deterrent effect, if any, *Matter of A-B* has had or will have on asylum seekers fleeing domestic violence. But Sessions's decision in *Matter of A-B* could have tragic human consequences.").

108. *Id.*

reforming policing against domestic violence in Mexico.<sup>109</sup> Although the facts for both claims would largely overlap, the legal arguments in favor of each are different in important ways: political opinions are not immutable characteristics<sup>110</sup> and require an applicant to prove she was subject to persecution on account of those opinions, which could be more difficult to connect.<sup>111</sup> Nevertheless, the IJ could grant asylum to the applicant without choosing which of these grounds she accepts.<sup>112</sup> Instead, she can grant asylum on the basis of the submission and enter a finding that the asylum applicant was credible generally.<sup>113</sup>

This limitation is the exigency for this article's analyses: the inability to observe the direct relationship between *Matter of A-B*- and grant rate for domestic violence, gang affiliation, and family membership claims directly, so the only way to investigate the impact of the decision on asylum grants is to investigate indirectly.<sup>114</sup>

To be sure, evidence from Central American asylum seekers,<sup>115</sup> particularly the Northern Triangle region,<sup>116</sup> suggests escaping gang violence,<sup>117</sup>

109. See, e.g., *Fisher v. I.N.S.*, 79 F.3d 955, 960 (9th Cir. 1996) (explaining a previous remand to the BIA to consider both a political opinion and a religion argument for granting asylum to a liberal Iranian woman).

110. See *Sangha v. I.N.S.*, 103 F.3d 1482, 1488–90 (9th Cir. 1996) (cataloguing the methods for establishing persecution on account of political opinion, none of which require establishing that the applicant's opinion has not changed in the past).

111. See *Fisher*, 79 F.3d at 962–63 (describing lack of evidence that Fisher spoke out about her opposition to Iran's oppressive dress code or otherwise articulated her beliefs as political opposition).

112. See Anjum Gupta, *Nexus Redux*, 90 IND. L.J. 465, 487 (2015) (“Courts continue to face difficulties assessing claims involving mixed or multiple motives, resulting in inconsistent rulings. This Article sets forth a proposal for determining nexus in these claims that will lead to more consistent and fair results. What follows is an examination of the asylum case law on mixed motives or multiple motives before and after enactment of the REAL ID Act.”).

113. See *Sample Removal*, IMMIGR. JUDGE BENCHBOOK II(B)(4) (DOJ Exec. Off. for Immigr. Rev.), available at [https://web.archive.org/web/20170429183059/https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/ROP\\_Worksheet\\_Sample1.pdf](https://web.archive.org/web/20170429183059/https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/ROP_Worksheet_Sample1.pdf) (providing an example of the form IJ's use to make adjudications, with a simple “grant or deny” order at the end).

114. See Barreno, *supra* note 3, at 230 (discussing the difficulty in determining trends without published decisions).

115. See Rebekah Morrissey, *Avoiding the Rabbit Hole: Formulating Better Requirements for Domestic Violence-Based Asylum Claims*, 43 MCGEORGE L. REV. 1121, 1125 (2012) (“Guatemala typifies the country that yields asylum applicants basing their claims on domestic violence. Countries that, for a variety of reasons, struggle with rampant violence against women and fail to adequately address or reduce that violence create perfect conditions for asylum claims.”).

116. Weis, *supra* note 6, at 1326 (“This is because gender-based violence is ubiquitous in the Northern Triangle countries and because of the stigma associated with speaking about domestic violence. Guatemala's Public Prosecutor's Office provides one clue: more than 76 percent of the cases of violence against women received by the police in 2013 were perpetrated by a current or former partner.”).

117. *Id.* (gang violence is often interrelated with femicide and domestic violence: “[G]ang members in these countries routinely force young women to be their ‘girlfriends’ and assault or kill them if they don't comply. The sexual and physical victimization of girls and women, many of whom are forced into coercive relationships with gang members, is weaponized as a tool of control and intimidation by the gangs that run rampant in some Northern Triangle neighborhoods.”).



domestic violence,<sup>118</sup> and violence targeting women<sup>119</sup> and children each play a huge part in the upswing in claims<sup>120</sup> over the past decade.<sup>121</sup> Since homicide and violent crime rates in these countries have also increased significantly over the past decade, more applicants began to seek asylum in the United States claiming fear of gangs and gender-based violence.<sup>122</sup> Although the exact number is unclear, the push factors leading up to the swell in applications as well as interviews conducted with applicants both point to a greater proportion of immigrants making particular social group claims based on these factors.<sup>123</sup> When no other statutory ground of eligibility clearly applies, asylum seekers may be forced to use particular social group claims to make their cases<sup>124</sup> that they should qualify while attempting to escape this violence.<sup>125</sup> This situation applies to many fleeing violence in Mexico<sup>126</sup> and Central America.<sup>127</sup> Accordingly, there is strong reason to believe that a sufficient proportion of claims deal with particular social group membership.

118. *Id.* at 1325 (“Violence against women is particularly severe and pervasive in the Northern Triangle countries of Honduras, Guatemala, and El Salvador. Many asylum seekers in the United States, including women fleeing domestic violence, come from the Northern Triangle. In recent decades, civil war and gang violence have ravaged all three of these countries. The trio share the distinction of being among the most dangerous places to live for women and girls, with all three in the top five countries in the world for rates of femicide.”).

119. Morrissey, *supra* note 115, at 1123–24 (“Scholars refer to this extreme level of violence against women as ‘femicide,’ indicative of a larger cultural normalization of violence against women. Sexual violence in Guatemala is a ‘growing phenomenon,’ with a thirty percent increase in the number of reported rapes between 2003 and 2007.”) (quoting Karen Musalo et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN’S L.J. 161, 168 (2010)).

120. Kareff & Roman-Romero, *supra* note 9, at 350 (“Given the high volume of domestic violence-based applications, immigration advocates feared that hundreds of domestic violence victims, who would face persecution upon return to their country of origin, would not have viable asylum claims. In 2015, the United Nations High Commissioner for Refugees conducted a study examining migration patterns of domestic violence victims and found a worrisome fivefold increase in domestic violence asylum seekers arriving to the United States from the Northern Triangle region, composed of El Salvador, Guatemala, and Honduras.”).

121. See Silvia Mathema, *They Are (Still) Refugees: People Continue to Flee Violence in Latin American Countries*, CTR. FOR AM. PROGRESS (June 1, 2018), <https://perma.cc/NK79-3FM4>.

122. *Id.*

123. Appendix B displays the number of asylum applicants from the three Northern Triangle countries, as well as Mexico, and shows that there was a significant increase in applications corresponding to the reported upswing in violence against women in the 2015 UN report. See *infra* app. B.

124. See Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim’s Particular Social Group*, 49 LOY. L. REV. 287, 292 (2003).

125. See Rachel Gonzales Settlege, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of “a Particular Social Group,”* 30 GEO. IMMIGR. L.J. 287, 290 (2016).

126. See Linda Kelly Hill, *The Gangs of Asylum*, 46 GA. L. REV. 639, 641 (2012) (describing use of particular social groups to make gang asylum claims).

127. Barreno, *supra* note 3, at 229 (“Domestic violence victims regularly base their asylum claims on ‘membership in a particular social group’ because their claims do not directly fall under the other statutorily protected grounds of race, religion, nationality, or political opinion.”).

## V. DESCRIPTIVE STATISTICS

Immigration courts do not grant asylum at the same rate. Courts sit in different circuits, which impacts the applicable law,<sup>128</sup> but they also attract different immigrants and have different IJs rendering discretionary decisions. Table 1 shows the mean grant rate for each immigration court included in the analysis.

TABLE 1 – MEAN GRANT RATE BY IMMIGRATION COURT

<b>Court</b>	<b>Mean Grant Rate</b>
New York	0.7130
Miami	0.1849
LA	0.2465
San Francisco	0.6990
Houston	0.1123
Orlando	0.1787
Baltimore	0.5122
Arlington	0.5003
Boston	0.6070
Chicago	0.4671
Newark	0.5195
Seattle	0.3179
San Diego	0.2139
Philadelphia	0.5367
Memphis	0.2146
Detroit	0.2104
Miami - Krome	0.0829
Dallas	0.1355
San Antonio	0.2451
Cleveland	0.1993
Adelanto	0.1999
Denver	0.4272
Bloomington	0.2452
Atlanta	0.0356
Elizabeth	0.3847
Tacoma	0.2911
Hartford	0.3357
Las Vegas	0.0766
Kansas City	0.1986

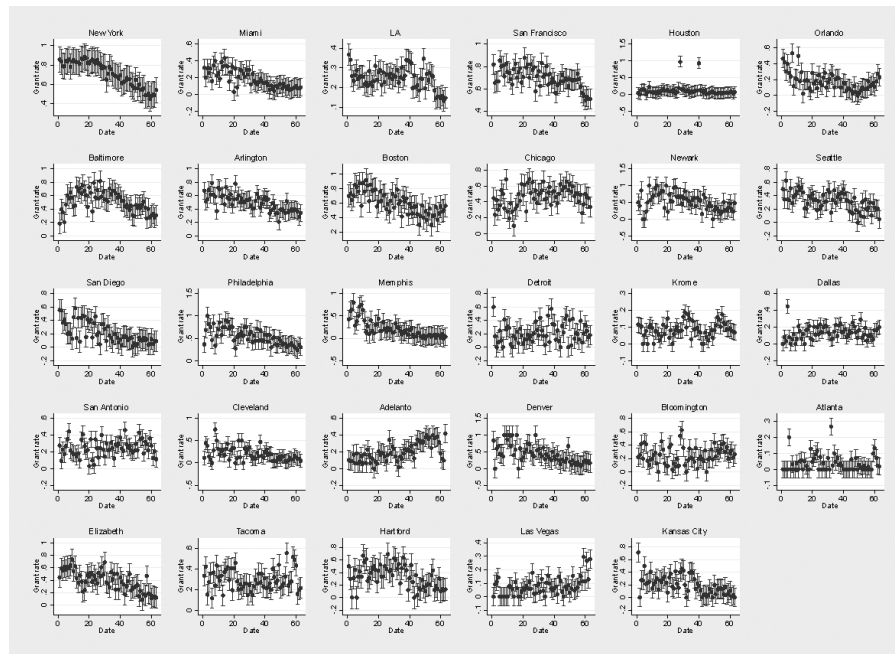
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128. See Birdsong, *supra* note 29.

The highest mean grant rate comes from New York, where just over 71% of asylum seekers receive asylum. New York also has the highest number of total cases; the high rate of successful applications strongly influences the overall grant rate nationwide. In contrast, Atlanta, Las Vegas, and Miami's Krome facility have grant rates under 10%. This may, partly, be because many of the asylum applicants in these courts are detained, making it more challenging to secure counsel or collect evidence. The nationwide mean moved from 50% in 2015 to 30% in 2021. The average nationwide grant rate over the sample is 36.7%.

To get a better sense of the time trends in grant rate across courts, the figure below shows the time trends in grant rates for asylum applicants from 2015–2020.

FIGURE 1 – GRANT RATES OF ASYLUM OVER TIME, 2015–2020 BY MONTH

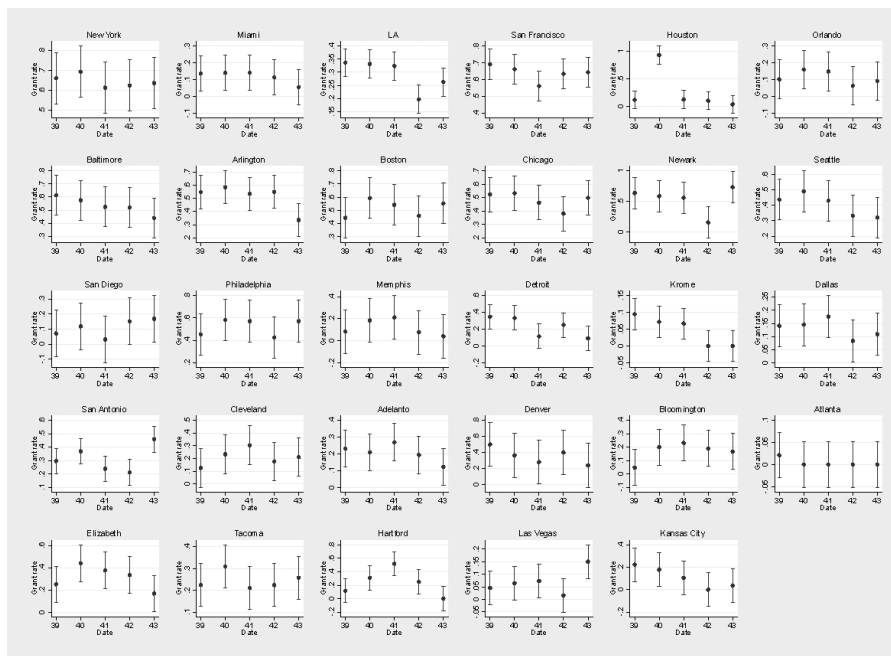


The grant rate of asylum is relatively stable in many of the courts across the entire observation period, with a few exceptions. Several courts saw a decline in grant rate after the 2016 election, likely due to the change in administration and immigration policy focus. Given the Trump adminis-

tration's relatively restrictive approach to asylum,<sup>129</sup> this is expected, assuming that IJs are responsive to changes in administration policy.

This analysis focuses on the date of the decision's announcement to determine any difference between the predicted grant rate and the actual grant rate within one year of the *Matter of A-B-* decision. Figure 2 displays the months preceding and following the announcement of *Matter of A-B-*, showing whether there is any noticeable trend.

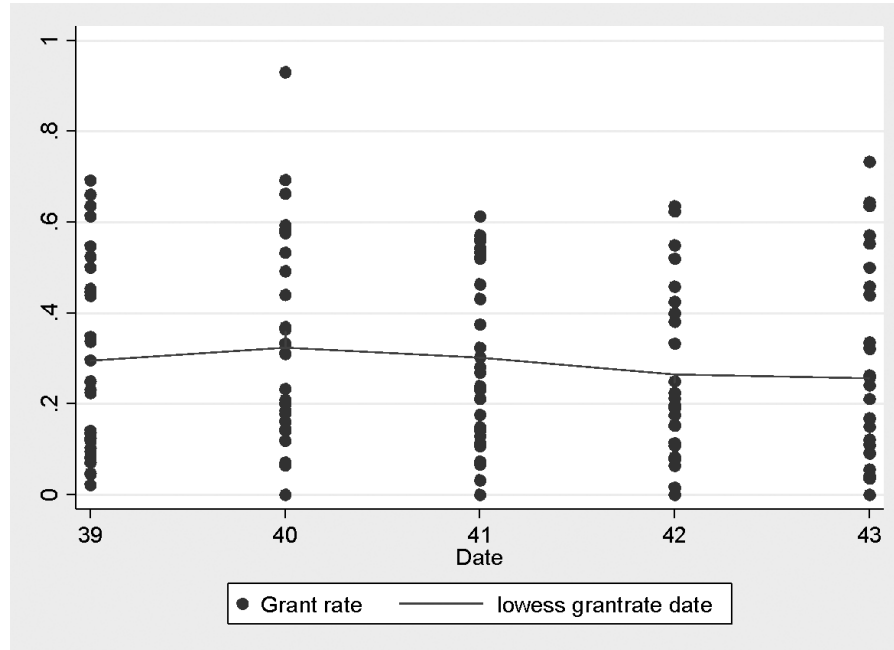
FIGURE 2 – GRANT RATES OF ASYLUM OVER TIME, TWO MONTHS EITHER SIDE OF *MATTER OF A-B-*



Most of the courts have relatively flat grant rates, although several have noticeable trends. The most evident trends are in Detroit and Hartford. The majority of other courts show some movement month-to-month, but not apparent trends up or down. For example, New York and San Francisco show some movement after the decision but appear otherwise relatively flat.

129. See Marcia Brown, *The Loneliness of the Immigration Lawyer*, PROSPECT (Oct. 29, 2020), <https://perma.cc/3YD8-G3V2> (describing the various restrictions and barriers to effective representation implemented during the Trump administration).

FIGURE 3 – GRANT RATES OF ASYLUM OVER TIME, COMBINED, TWO MONTHS EITHER SIDE OF *MATTER OF A-B-*



## VI. MODEL

My econometric model below attempts to estimate the impact of the decision in *Matter of A-B-* by looking at the change in denial or grant rate of asylum applications after the decision was announced, accounting for as many other factors as plausible. This specification is represented as:

- (1) Asylum outcome<sup>130</sup> [grant or denial] month, year, court = post-decision indicator + court fixed effect + time trend + total case load month, year, court.

Assignment to a particular court is based on the location of the immigrant at the time a Notice to Appear (NTA) is issued.<sup>131</sup> An NTA is usually

130. I have three different outcome variables to test whether the results are sensitive to how the data are collected. I have included the asylum grant rate by month by immigration court, which is calculated as total asylum grants/total asylum cases decided in each month in each immigration court. I also have the denial rate, specified symmetrically. Finally, I have a total number of asylum grants, which is a simple count of the number of asylum grants in each court in each month.

131. See 8 C.F.R. § 1003.14(a) (2018) (“Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by [ICE].”). Also, immigrants are often randomly placed in a detention facility far from where they were initially detained. Adrienne Pon, Note, *Identifying Limits to Immigration Detention Transfers and Venue*, 71 STAN. L. REV. 747, 752 (2019). For example, one of the largest facilities is in McAllen, Texas. Immigration law is unique in that venue is *not* required to be in any particular district. Instead, venue is proper nationwide.

issued in the same place as the immigrant is picked up for non-detained immigrants, but detained immigrants can be transferred prior to issuance of the NTA.<sup>132</sup> It is possible that assignment is systematically related to grant or denial, although this is most likely to be the case for detained immigrants since non-detained immigrants usually are placed in the nearest court. If there is bias, it would arguably be picked up in the time trend or court fixed effects since there is no clear evidence that transfer patterns changed over 2018.<sup>133</sup> In addition, immigrants are almost always transferred into the Fifth Circuit when their transfer crosses circuit boundaries.<sup>134</sup>

The largest factor that should vary is the difference in readings of *Matter of A-B* between the circuit courts.<sup>135</sup> The Ninth Circuit clarified that it interprets *Matter of A-B* at its word as it says that nothing in the opinion changes the standard for particular social groups. In contrast, the Second, Fifth, and Eleventh Circuits err on the side of more stringent policing of the particular social group standard asylum cases. Nevertheless, most of the impact should be relatively uniform since the *Matter of A-B* decision was not strictly binding on any future determination of any party's rights.

Since immigrants do not choose the immigration court they are required to report to, it is reasonable to expect little sorting of immigrants between courts based on differences in precedent.<sup>136</sup> In order to remove an immigration deportation case from one circuit to another, an immigrant must not be in detention, must file a motion to transfer his case to the location where he currently resides, and must have the motion granted by his IJ in the original location. Immigrants likely do not choose their place of residence with an eye towards the standards of enforcement for removal proceedings, given that asylum law may be complex and opaque to the uninitiated.<sup>137</sup> Not only that, but finding an attorney is enough of a struggle *after*

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ICE can move immigrants to whichever detention facilities have availability. This is not always the closest facility to an immigrant's pick-up location.

132. When detainees are transferred prior to issuance of an NTA, jurisdiction vests in the venue of the *new* detention facility. Pon, *supra* note 131, at 753–54.

133. Evidence suggests, in fact, that the transfer pattern changed around the early 2000s. *Id.* at 756–58.

134. *Id.* at 757; Alison Parker, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, HUMAN RTS. WATCH (June 14, 2011), <https://perma.cc/BSP9-UFA8>.

135. See Birdsong, *supra* note 29 (explaining that the differences in case law between circuits overrides precedential decisions of the BIA).

136. Venue for immigration is established at the time and in the court where ICE issues an official NTA which formally lays out the charges and opens a removal proceeding. Detained immigrants are disproportionately moved into the Fifth Circuit, although this may be simply because the Fifth Circuit has the greatest number of detention beds. Otherwise, transfers of venue are uncommon.

137. Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1002–04 (2015). Further, immigrants may not know whether they will be detained if and when they enter removal proceedings. Even savvy

an immigrant has entered removal proceedings that it defies belief that immigrants moving to or around the United States would consult an attorney about the potential immigration benefits of relocating to a particular geographic area with favorable circuit court precedent for a non-existent removal proceeding, although it is technically possible. Affirmative and defensive asylum applications were split to assuage any potential concerns about sorting, and the regression was re-run, limited to defensive asylum grants. Affirmative applicants are far more likely to have sorted<sup>138</sup> because they apply for asylum without having any removal proceedings initiated against them.<sup>139</sup> In other words, these are the asylum seekers that set out to claim asylum and might have behaved strategically in setting up their application. On the other hand, defensive applicants apply as an affirmative defense to removability after a NTA has been issued.<sup>140</sup> Since venue is established at the time an NTA is issued, defensive applicants have virtually no influence over the venue of their removal proceedings.<sup>141</sup>

To directly investigate the relationship between the total number of claims, grant rate, and the announcement of *Matter of A-B*-, the following regression was re-run:

- (2) Total claims court, month = grant rate court, month + court fixed effect + date fixed effect if pre/post-decision.

There was a clear and statistically significant difference in the results between the two coefficients on the grant rate variable.

TABLE 2 – REGRESSION RESULTS FROM EQUATION (2)

	Pre-decision	Post-decision
<b>Grant rate coefficient</b>	-2.83	-121.02
<b>Standard error</b>	6.683	39.56

immigrants could find themselves moved from a favorable circuit to an unfavorable one, so it is difficult to see this factor overwhelming more traditional sorting factors. In addition, many applicants do not know they may be eligible for asylum before entering removal proceedings. Applicants that apply for asylum at the border usually have their NTA issued in the location where they attempt to cross the border and claim asylum.

138. For example, students may not be randomly assigned to teachers, so one cannot properly estimate the impact of teachers on student earnings by simply looking at which teacher a student is assigned to; instead, the unbiased estimate needs to account for the fact that students with outcome-relevant unobservable characteristics such as motivation may force their assignment to specific teachers. See Jesse Rothstein, *Student Sorting and Bias in Value-Added Estimation: Selection on Observables and Unobservables*, 4 EDUC. FIN. & POL'Y 537, 537–38 (2009) (explaining the process of sorting in the context of teachers being assigned to students).

139. See Gallagher, *supra* note 30.

140. *Id.*

141. See *id.*

It is possible that immigrants intentionally adopted strategic behavior and moved their cases to locations with higher grant rates after the announcement of the *Matter of A-B-* decision. As a result, the analysis of defensive and affirmative applications was split below.

Since grant rates are the most important outcome for those seeking asylum, *grant rate* serves as the most valuable outcome variable. IJs do not publish a specific ground on which they grant or deny asylum, so it is impossible to break cases down further than observable in the data. Therefore, the accessible data is as good as is feasible to get.

## VII. RESULTS

This section analyzes the results from the main specifications before turning to several robustness checks. Ultimately, there is a clear and statistically significant effect of the decision in *Matter of A-B-* on asylee outcomes, regardless of the specification used, although the magnitude changes somewhat depending on the model. The consistency of the results suggests some robustness in these findings.

### A. Main Specifications

The initial results are presented in Table 3 below. This table includes the preferred specification, in addition to several robustness checks.

TABLE 3 – REGRESSION RESULTS FOR EQUATION (1)<sup>142</sup>

Model Components	Model (1)	Model (2)	Model (3)
Denial Rate	0.0873***	0.0266	0.0266***
Grant Rate	0.0823***	0.0305***	0.0305***
Represented Denial Rate	0.1184***	0.0376**	0.0377***
Court Fixed Effects	N	N	Y
Year Fixed Effects	N	Y	Y

142. All models contain 1827 observations. Asterisks relate to standard errors:  $p < 0.01$  is \*\*\*,  $p < 0.05$  is \*\*,  $p < 0.1$  is \*; David W. Peterson & John M. Conley, *Of Cherries, Fudge, and Onions: Science and Its Courtroom Perversion*, 64 LAW & CONTEMP. PROBS. 214, 213, 219 (2001), <https://perma.cc/HH28-EJEX> (“Assuming the truth of what is called the ‘null hypothesis,’ a p-value is the probability that evidence would arise that contradicts the null hypothesis at least as strongly as the evidence at hand contradicts it . . . A small p-value indicates that the observed data are inconsistent with the null hypothesis—the smaller the p-value, the greater the inconsistency. Hence, a small p-value is evidence that the null hypothesis is not true.”).



Although Model 3 reflects the preferred specifications with two variations on the time-fixed effects, the results appear relatively robust to the choice of specification. The standard errors are robust<sup>143</sup> and clustered<sup>144</sup> by immigration courts. Although the exact magnitude of the effect of the *Matter of A-B-* decision changes slightly, the decision's impact is clear. The results in Model 3 should be interpreted as suggesting the introduction of the *Matter of A-B-* decision resulted in a 2.6% increase in the denial rate after demeaning each observation by its court and year average. The other two outcome variables tell the same story: Sessions's decision decreased the grant rate by roughly 3.05% and increased the denial rate for represented applicants by 3.77%. Since the mean grant rate is 66%, and the mean denial rate is 36.7%, this is a significant finding, particularly considering that *Matter of A-B-* putatively did not change the standard for evaluating what constitutes a particular social group. Scaled against this mean grant rate, the decrease in grant rate of 3.05% represents a change of 8.3%.

Although one might expect counsel to mitigate the impact of the Attorney General's decision, the opposite is found here. This is because immigration attorneys operate in a relatively constrained environment.<sup>145</sup> One of the areas where attorneys have the greatest flexibility is in the definition of particular social groups since it is conceptually the most flexible eligibility category for asylum.<sup>146</sup> Removing flexibility from the definition of particular social group would tend to restrict the effectiveness of attorneys in securing asylum in a way individuals would be hard-pressed to replicate without an attorney (although some surely do). Thus, the decision should have the greatest effect on the represented subsample of asylees.<sup>147</sup>

One would expect the grant and denial rates to be roughly, but not perfectly, symmetrical since, in most cases, asylum is either granted or de-

143. See Clay Ford, *Understanding Robust Standard Errors*, UNIV. OF VA. LIBR. SERV. (Sept. 27, 2020), <https://perma.cc/HH28-EJEX> (explaining that robust standard errors modify the assumptions of the ordinary least squares model to allow for non-constant variance, including, as here, different variances based upon a characteristic).

144. See A. Colin Cameron & Douglas L. Miller, *A Practitioner's Guide to Cluster-Robust Inference*, 50 J. OF HUM. RES. 1, 1 (2015) ("One leading example of 'clustered errors' is individual-level cross-section data with clustering on geographical region, such as village or state. Then model errors for individuals in the same region may be correlated, while model errors for individuals in different regions are assumed to be uncorrelated.")

145. See Brown, *supra* note 129 (describing the various restrictions and barriers to effective representation).

146. See Owens, *supra* note 18, at 1260–61 (asserting that "many asylum claims in the United States and internationally turn on the interpretation of that ambiguous and potentially expansive phrase").

147. Karen Berberich & Nina Siulc, *Why Does Representation Matter? The Impact of Legal Representation in Immigration Court*, VERA INST. OF JUSTICE (Nov. 2018), <https://perma.cc/J3CJ-2ZGX> ("This is not the result of lawyers choosing to represent stronger cases; the impact of representation is substantial even in cases that may initially appear weak. In other words, merits-blind universal representation also improves chances of a successful outcome.")

nied.<sup>148</sup> Nevertheless, there are cases where asylum was neither granted nor denied included in the data,<sup>149</sup> which explains the discrepancy between the results. The difference in the effect of the *Matter of A-B-* decision on grant rate appears higher than the effect on denial. This is in some sense unsurprising since *Matter of A-B-* casts aspersions on granting asylum but does not bind IJs to reject claims out of hand. One possible solution would be for judges to difference split and provide some alternative form of relief. If judges behaved this way, we would expect grant rates to depart slightly from denials.

The diffusion of an administrative decision could differ between judicial circuits since the courts of appeals can review the Attorney General's immigration decisions under the Immigration and Nationality Act (INA). Indeed, this is precisely the development of the law in the Ninth, Second, Fifth, and Eleventh Circuits.<sup>150</sup> The Ninth Circuit took *Matter of A-B-* literally when it purported to reaffirm the existing standards for determining asylum.<sup>151</sup> In contrast, the Second, Fifth, and Eleventh Circuits all interpreted *Matter of A-B-* as an implicit repudiation of overbroad interpretations of what constitutes a particular social group.<sup>152</sup> If this model captures at least partially the real impact of the decision on asylum grants and denials, the results are likely to be clearly lower for courts in the Ninth Circuit.

Table 4 shows Model 3 re-run with the results split according to circuit. Although cases interpreting the reach of *Matter of A-B-* do not exist in all circuits, the general expectation of how a court of appeals might rule could produce some expected effect on IJs sitting in the circuit. As expected, the Ninth Circuit shows a small and imprecise effect relative to circuits that more stringently interpreted the decision, perhaps because the court interpreted *Matter of A-B* most narrowly. The Seventh Circuit also shows a counter-intuitive *increase* in grant rate following the decision, although the results are not statistically significant. Overall, the results suggest a relatively uniform decline in grant rate following the decision, even accounting for vagaries of each specific circuit.

$$(3) \text{ Asylum Grant}_{\text{month, court}} = \text{Post} - \text{decision indicator} + \text{Year Fixed Effect} + \text{Total case load}_{\text{month, court}} + \text{Circuit} + \text{Circuit} \times \text{Post} - \text{decision indicator}$$

148. See Gallagher, *supra* note 30 (“If the Asylum Office declines to grant asylum at the affirmative level, the application is then referred to the immigration judge who may grant or deny.”).

149. See *TRAC Immigration*, *supra* note 102.

150. See Birdsong, *supra* note 29, at 26 (stating that “circuit splits have arisen because of inconsistent rulings among the circuit courts regarding the same legal issue”).

151. See *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1080 (9th Cir. 2020).

152. See Kareff & Roman-Romero, *supra* note 9, at 349.

TABLE 4 – REGRESSION RESULTS FROM EQUATION (3)<sup>153</sup>

Circuit	Coefficient on Post	P Value
1st Circuit	-0.1000	0.096
2nd Circuit	-0.1209	0.057
3rd Circuit	-0.0786	0.214
4th Circuit	-0.1245	0.009
5th Circuit	-0.1020	0.02
6th Circuit	-0.0803	0.127
7th Circuit	0.0121	0.86
8th Circuit	-0.1514	0.041
9th Circuit	-0.0442	0.339
10th Circuit	-0.0709	0.598
11th Circuit	-0.0446	0.145

The Eighth Circuit shows the most marked decline in grant rates. This is unsurprising for two reasons. First, the Eighth Circuit is a relatively conservative district on immigration issues.<sup>154</sup> Second, the Eighth Circuit had a concurrent change to asylum law that made it slightly harder to qualify, discussed in more detail below. Hearteningly, the Eighth Circuit's confounding variable problem is isolated to that circuit and suggests that even missing a confounding circuit court opinion would not necessarily change the interpretation of the results, only their magnitude to a limited extent.

The Second, Fifth, and Eleventh Circuits show significant effects from the *Matter of A-B-* decision, although the Eleventh Circuit effect is not statistically significant. The decrease in those circuits is larger than the general effect, which suggests these circuits may be driving the results. This makes sense since these circuits clearly interpret *Matter of A-B-* more strictly than other circuits. The circuits without a decision applying *Matter of A-B-* are harder to explain since we do not know how individual IJs interpret the decision within those circuits. Nevertheless, the magnitude and significance of the effects in the First and Fourth Circuits suggest a similar decision may have been expected based on those circuits' previous decisions.

153. Yellow highlighted circuits had a case directly affirming *Matter of A-B-*, while red highlighted circuits had a case directly challenging the impact of *Matter of A-B-*.

154. See *Asylum Manual: Sources of Law*, IMMIGR. EQUALITY, <https://perma.cc/PK2Y-4QEU> (last visited Feb. 10, 2022).

These results suggest a kind of Hawthorne effect from non-binding administrative decisions and guidance.<sup>155</sup> The mere fact that IJs know that higher authorities in the administration are now paying attention to their determinations of whether an asylum seeker falls into a particular social group could exert an outsized pull on an IJ. Whereas before, the IJ might have simply granted claims based on flight from intimate partner violence with relatively little thought about the possibility of reversal on appeal, *Matter of A-B* might flag greater concerns in the IJ's mind. Even though the legal standard was merely "reiterated," the mere fact of calling attention to and highlighting skepticism about such PSG claims was somehow enough to induce greater denials from IJs.

On the one hand, this could be read as an unsurprising development since a great number of agency actions are taken using guidance documents.<sup>156</sup> These documents do not receive the same legal deference as official rules that follow Administrative Procedure Act requirements and give stakeholders the opportunity to object.<sup>157</sup> Nevertheless, there is much debate about the reach and impact of these documents, with some suggesting they do exert roughly parallel influence as legally codified agency rules.<sup>158</sup>

Another reason these results fit with IJs, in particular, is that IJs do not have lifetime appointments. Unlike Article III judges, who are confirmed to a lifetime appointment by the Senate, administrative judges are appointed in a merit-based system administered by the Department of Justice (DOJ).<sup>159</sup> Since DOJ attorneys are responsible for both selecting IJs and deciding when to enforce immigration law, we might expect DOJ guidance documents to exert significant influence over IJs.<sup>160</sup> Notably, the person with the ultimate authority to determine whether an IJ keeps their job is the AG.<sup>161</sup>

155. Kendra Cherry, *The Hawthorne Effect and Behavioral Studies*, VERYWELLMIND, <https://perma.cc/MSZ9-6595> (last updated Oct. 13, 2020) ("The term is often used to suggest that individuals may change their behavior due to the attention they are receiving from researchers rather than because of any manipulation of independent variables.").

156. See, e.g., Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1469 (1992) (describing the vast difference in number of Federal Aviation Administration guidance documents and rules).

157. See Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763–65 (Jan. 23, 2007) (describing guidance as: "an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.").

158. See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (criticizing expansive use of guidance documents at the expense of "notice and comment" rulemaking).

159. See Birdsong, *supra* note 29 (describing appointment of immigration judges).

160. See *id.*

161. See *id.* at 30 ("While asylum decisions should always be fair and impartial, this is not always the case given the wide discretion immigration judges are given in deciding such cases, the lack of precedential decisions, and the fact that many of the immigration judges have come from the enforcement arm of the immigration service, and that are all hired by the Attorney General of the United States.").

Therefore, it is not surprising to find IJs following the AG's opinion more closely than legally necessary. Still, there is significant heterogeneity in this effect by circuit, which fits with the hypothesis that local decision-makers exert pull when choosing IJs for individual courts. If that is the case, then the politics of the particular circuit might play a larger role than the influence of the AG in guiding IJs interested in keeping their position.

These results do not suggest anything final about the debate on the effect of guidance documents, but they do suggest an outsized influence from a seemingly insignificant decision. On its face, nothing in the asylum system changed, but somehow more cases were denied following the decision, even correcting for time patterns and the vagaries of immigration courts.

These results also provide evidence on the effect of adopting "stricter" rules of proof for asylum seekers. The particular social group ground of asylum is the broadest ground upon which to base an asylum claim.<sup>162</sup> The *Matter of A-B-* decision both directly discussed domestic violence victims as a particular social group as well as broadly cast aspersions on the nexus between membership in *any* particular social group and fear of return to one's country of origin. The goal of the decision was clear from the start: raise the standard of skepticism applied to particular social group claims.

In this goal, Sessions clearly succeeded: the rate of asylum denials rose and is robust to every specification included here. Although the broader implications of this analysis—agency adjudicators are sensitive to non-binding policy guidance from political appointees or representatives—will likely incur some skepticism, it is quite clear that *Matter of A-B-* did achieve its particular end goal. Advocates and attorneys that believed *Matter of A-B-* would negatively affect the rights of displaced people were correct: even a relatively narrow decision caused a noticeable decline in asylum grant rates.

## B. Robustness Checks

### 1. Potentially Confounding Changes<sup>163</sup>

Determining whether there are confounding changes in asylum law can be quite difficult, given the multifaceted nature of immigration law and the

162. To qualify for asylum, an asylum seeker must prove a well-founded fear of persecution based on religion, race, nationality, political opinion, or membership in a specific social group.

163. See Andrea C. Skelly, Joseph R. Dettori & Erika D. Brodt, *Assessing Bias: The Importance of Considering Confounding*, 3 EVIDENCE-BASED SPINE CARE J. 9, 9 (2012) ("Confounding is often referred to as a 'mixing of effects' wherein the effects of the exposure under study on a given outcome are mixed in with the effects of an additional factor (or set of factors) resulting in a distortion of the true relationship.").

fact that several different actors can exert influence on operative law.<sup>164</sup> Beyond the Attorney General, the Board of Immigration Appeals, IJs, Congress, circuit courts, the Supreme Court of the United States, and the President can all take actions impacting immigration adjudications. There is reasonable concern that a change attributed to the AG's decision in *Matter of A-B-* might come from a contemporaneous change in asylum law.

Although there is not a ready-made quantitative method to analyze that claim, the data in this article is sourced from a comprehensive database of all changes to immigration law during the Trump administration to analyze whether there were other contemporaneous changes to the law that might confound these results.<sup>165</sup> The largest relevant change that might confound these results was the announcement of *Matter of Negusie*.<sup>166</sup> No other major changes to asylum law or policy occurred in the months immediately before or after the announcement of *Matter of A-B-*, although there were various changes to eligibility for Temporary Protected Status and Refugee screening policy.

Table 5 shows the regression re-run within the three months on either side of the decision in *Matter of A-B-*. These results are roughly in line with the results from Model 2, which most closely matches the specification used here. Note that time-fixed effects could not be included because month effects were collinear with the post indicator and all observations were within the year 2018.

TABLE 5 – REGRESSION RESULTS FROM MODEL (4)

Model Components	Model (4)
Denial Rate	0.0471***
Grant Rate	-0.0587***
Represented Denial Rate	0.0479***
Court Fixed Effects	Y
Year Fixed Effects	N
Month Fixed Effects	N

In *Matter of Negusie*, the BIA discussed the standard of the so-called persecutory bar to asylum claims. This bar prevents a person who has persecuted others from qualifying for asylum.<sup>167</sup> Although there are some mo-

164. See Birdsong, *supra* note 29, at 36 (discussing potential avenues for political influence).

165. The 'Trump Policy Tracker' is available for preliminary download. See Lucas Guttentag, *Trump Administration Immigration Changes* (2020), <https://perma.cc/Q3ZR-TAVW>.

166. 27 I. & N. Dec. 347 (B.I.A. 2018).

167. *Id.* at 348.

ments in history where this bar has been quite important,<sup>168</sup> it is not relevant to many current asylum claims. The decision in *Matter of Negusie* did slightly narrow the exception to the persecutor bar for self-defense. It held that an asylum seeker must demonstrate: (1) that they acted under an imminent threat of death, (2) had no reasonable opportunity to escape, and (3) knew that the harm they inflicted was not greater than the threatened harm to self or others to qualify for an exception.<sup>169</sup> This BIA decision impacted an exception to an exception that impacts a very small subset of asylum claims. Accordingly, although there is no quantitative evidence to demonstrate *Matter of Negusie* is not responsible for the changes found in asylum grant and denial rates, there is little practical reason to believe that would be the case.

Any other changes to immigration case law would be picked up in circuit court precedent impacting asylum adjudications. All changes to asylum law during 2018 were surveyed to determine whether there were any likely confounding decisions. During this period, the major decisions on asylum law concerned the reach and impact of *Matter of A-B-* itself. Therefore, they are endogenous to the research question, not confounding. Any variation in these results is reflected in the circuit heterogeneity analysis above.

The majority of other decisions during the relevant window were either procedural in nature, such as declining to grant a motion to reopen a closed removal proceeding,<sup>170</sup> or denying judicial review of a BIA decision.<sup>171</sup> A few decisions did deal with the reach of asylum law in a way that could potentially impact the interpretation of these results. For example, in *Dhakal v. Sessions*,<sup>172</sup> the Seventh Circuit ruled that “particular social group” does not include Ukrainian small business owners. Technically, this

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168. The bar was applied uniformly to members of the Nazi Party, for example. See Martine Forneret, *Pulling the Trigger: An Analysis of Circuit Court Review of the “Persecutor Bar,”* 113 COLUM. L. REV. 1007, 1011–12 (2013) (“The first piece of American legislation to confront the issue was the Displaced Persons Act of 1948 (DPA), which . . . adopted an exclusionary principle to bar the entry of Nazi war criminals . . . The INA was amended through the Refugee Act of 1980 to deny asylum to applicants who ‘ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, national origin, or political opinion.’ The INA later added ‘particular social group’ as a protected class. At the time, the contemplated persecutors were former Nazis.”).

169. *Matter of Negusie*, 27 I. & N. Dec. at 363.

170. See, e.g., *Payeras v. Sessions*, 899 F.3d 593, 598 (8th Cir. 2018) (holding the BIA abused its discretion in denying alien’s motion to reopen her removal proceedings when it failed to address her contentions); see also *Lara-Aguilar v. Sessions*, 889 F.3d 134, 135–36 (4th Cir. 2018) (alien was ineligible for asylum based on reinstatement of prior order for his removal, even though he was granted withholding of removal).

171. See, e.g., *Nicursor-Remus v. Sessions*, 902 F.3d 895, 900 (9th Cir. 2018) (Court of Appeals lacked jurisdiction over alien’s petition for review of order which, in an asylum-only proceeding, denied his asylum application).

172. 895 F.3d 532 (7th Cir. 2018).

contemporaneous change could be the cause of all the variation we see from the Seventh Circuit. Nonetheless, this would be counter-intuitive since most asylum applicants come from the Americas.<sup>173</sup> Similarly, a few cases ruled that particular facts did not establish the required nexus between membership in a particular social group and persecution to allow a grant of asylum.<sup>174</sup> For example, *Sosa-Perez v. Sessions*<sup>175</sup> dealt with a woman robbed at knifepoint who attempted to attribute the robbery to her membership in her nuclear family. Far from disputing whether a family or robbery could qualify for asylum, the First Circuit simply pointed to the lack of evidence relating the two on the record in affirming the BIA's denial of asylum. This sort of fact-bound precedent is very unlikely to explain these results since such cases primarily deal with the insufficiency of a particular record.

One case does stand out as a possible confounder, although only for the smallest immigration court in this analysis. The Eighth Circuit's decision in *Rivas v. Sessions*<sup>176</sup> suggested that "targeted gang girlfriends" was not sufficiently particular to constitute a particular social group.<sup>177</sup> Since gang asylum claims are relatively common, and some of those claims do deal with sexual abuse or advances gang members make on asylum-seeking women, this could potentially explain some or part of the variation in grant and denial rates occurring in the Kansas City immigration court. No other court is within the Eighth Circuit. The regression was re-run, excluding the Kansas City court, to determine whether this case is driving these results—resulting in no significant difference. Even the most directly relevant change to asylum law appears to have had no real impact on the results.

Finally, a possible confounder is the appointment of new IJs. Little data exists on the appointment of new IJs, although there is data about the grant rates of sitting judges after they have amassed a record of more than 100 cases. There was a large influx of new IJs in August of 2018,<sup>178</sup> which could potentially explain some changes in the interpretation of *Matter of A-B-* after the new judges began hearing cases. To screen out the effects of those new appointments and determine any change in results Model 4 focused on the window three months before and after the decision. Conve-

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173. See *supra* Part IV and associated notes.

174. See, e.g., *Martinez-Perez v. Sessions*, 897 F.3d 33, 40 (1st Cir. 2018) (finding insufficient evidence of past persecution existed for asylum claim of a disabled woman who had previously received a single death threat).

175. 884 F.3d 74, 80 (1st Cir. 2018).

176. 899 F.3d 537 (8th Cir. 2018).

177. *Id.* at 541.

178. Paul Wickham Smith, *EOIR Announces 23 New Immigration Judge Appointments—Trend of Appointing Largely from Government Backgrounds Continues*, IMMIGR. COURTSIDE, Aug. 15, 2018, <https://perma.cc/BL8B-Y2LU>.



niently, this window corresponds to the window used to determine the impact of changes in circuit precedent, so the analysis did not differ.

If the DOJ is intentionally manipulating the selection of IJs to replace the highest asylum granting judges with more restrictionist jurists, one might expect the results to overstate the impact of *Matter of A-B* in the sense that it is not only the decision itself but also the jurists applying the decision that changed. On the other hand, the intentional replacement of IJs who will abide by the AG's desired legal interpretations even when not required to do so is arguably part of the effect this article attempts to identify. It is not obvious that the appointment of new judges is a separate phenomenon from the AG attempting to influence IJs through the circulation of decisions that are largely dicta, such as *Matter of A-B*. Accordingly, the AG's power to appoint judges in a politicized fashion is directly related to the AG's control over legal precedent and its diffusion into the lower immigration courts.<sup>179</sup> Accordingly, one of the mechanisms the AG can use to ensure that his decisions are readily implemented is the replacement of IJs; therefore, the replacement of non-independent decision-makers should not be considered a separate phenomenon for the purposes of this analysis.<sup>180</sup>

## 2. *Potential Sorting of Immigrants*

To determine whether immigrants are sorting to particular locations to take advantage of relatively lax immigration courts, the main specification was re-run focusing on asylum seekers filing defensive applications only. An asylum seeker only files a defensive application *after* an NTA has been issued, which means that the applicant is already locked into a particular circuit's law at the time of the application. In contrast, affirmative applicants that lodge an asylum claim before the U.S. Immigrations and Customs Enforcement (ICE) enters them into a removal proceeding. These applicants may enter on another visa and then file their claim while in the country, which gives them more opportunity to sort to the best available circuit.

Table 6 shows the results split according to affirmative or defensive applications. Although the results are not statistically significant, the results for defensive applications match the results for all applicants from Model 3, while the results for affirmative only are an order of magnitude smaller. This could be because affirmative applicants are engaged in sorting behavior, but the congruency of the results for the defensive applicant subsample is encouraging.

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179. See Birdsong, *supra* note 29, at 30–37.

180. See *id.*

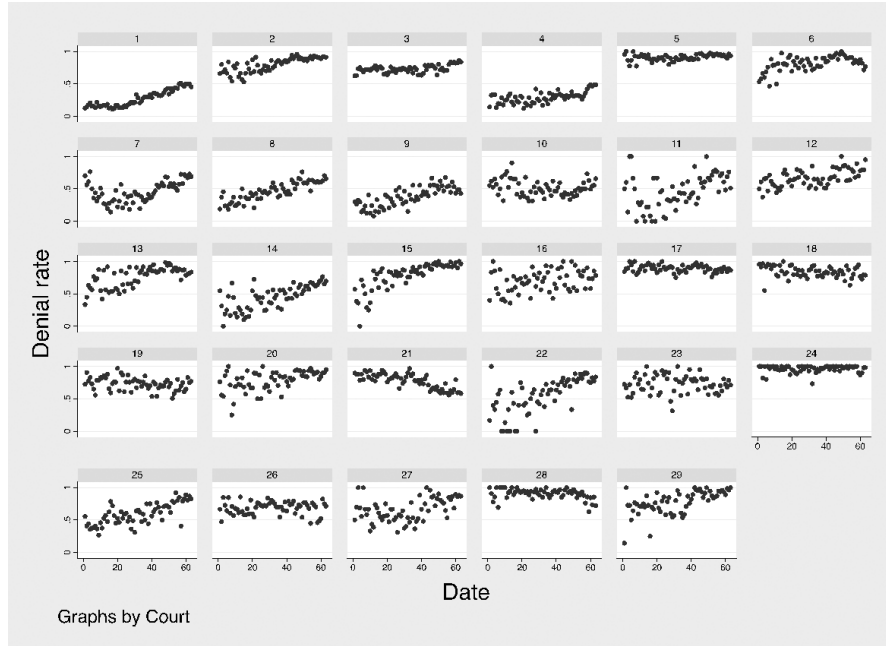
TABLE 6 – REGRESSION RESULTS FROM MODEL (3) SPILT BY  
AFFIRMATIVE VS. DEFENSIVE APPLICATION

Model Components	Defensive only	Affirmative only
Grant Rate	-0.06392	-0.005419
Court Fixed Effects	Y	Y
Year Fixed Effects	Y	Y
Month Fixed Effects	N	N

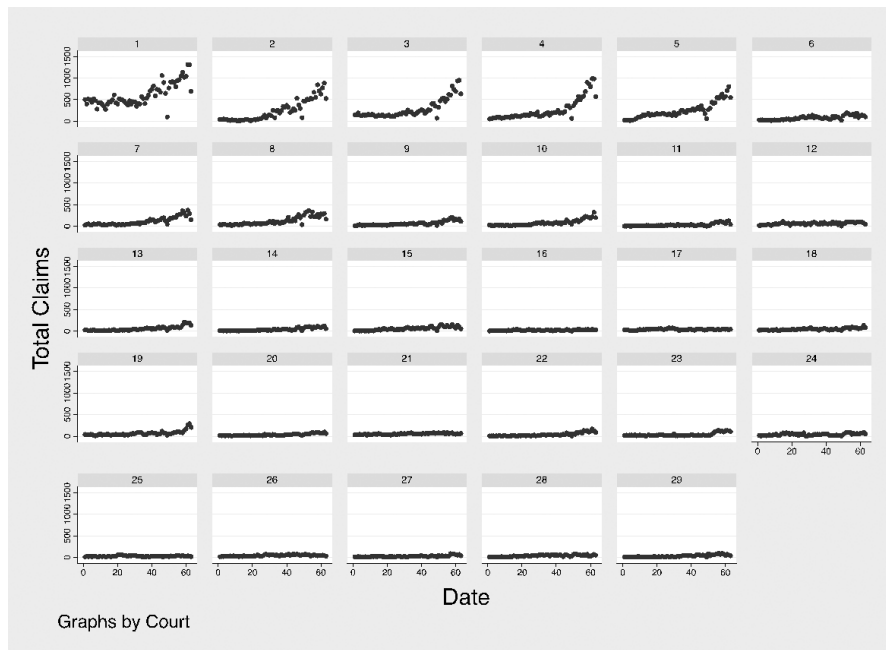
## VIII. CONCLUSION

*Matter of A-B-* was a highly controversial decision despite changing very little about asylum law. Like many administrative decisions, it did not bind future parties and did not change the standard of law applied in other cases. Nevertheless, the decision did reduce the asylum grant rate, even accounting for a number of other potential sources of variation. This suggests even non-binding precedent can raise the stakes for lower administrative adjudicators and influence the decision-making process. Finally, these results show that skeptics who argued *Matter of A-B-* would do nothing to change asylum law were likely incorrect. Even a carefully couched decision casting aspersions on existing asylum law was enough to increase the rate of asylum denials at least 2.6% nationwide. The shadow of administrative decisions may be longer than was initially perceived.

IX. APPENDIX A  
DENIAL RATE BY DATE, 2015–2020, BY MONTH

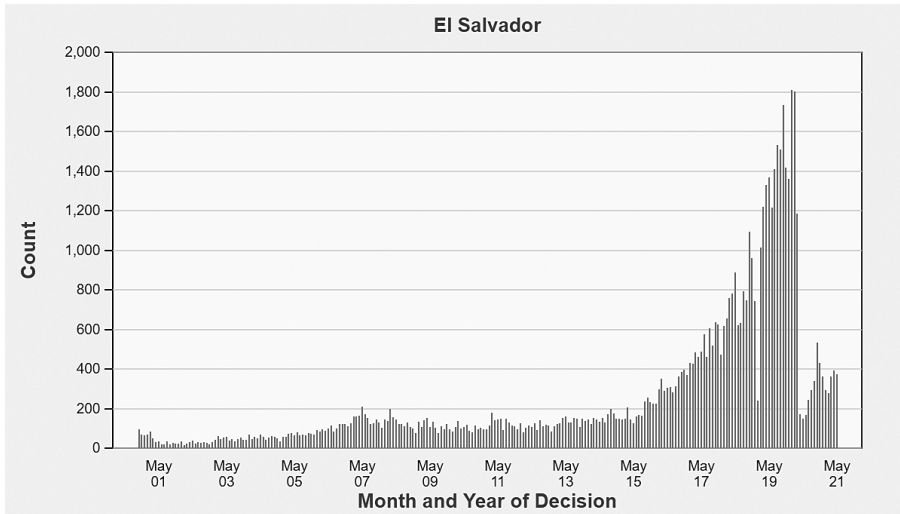


TOTAL CLAIMS BY DATE, 2015–2020, BY MONTH

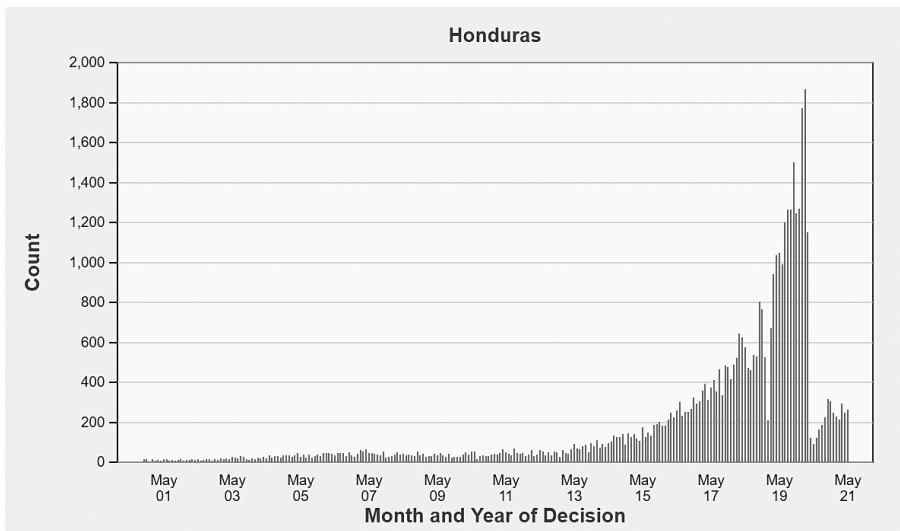


X. APPENDIX B: NORTHERN TRIANGLE ASYLUM APPLICATIONS (FROM TRAC)

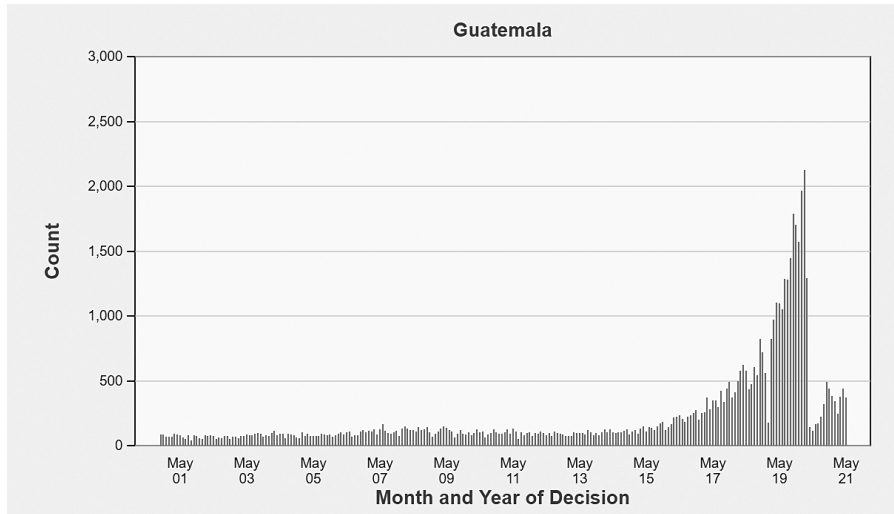
ASYLUM APPLICANTS FROM EL SALVADOR, 2001–2021



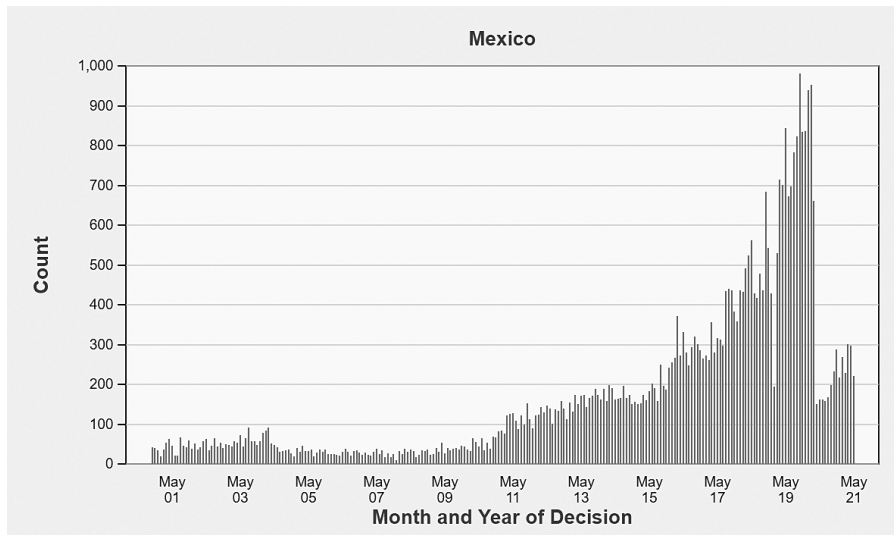
ASYLUM APPLICANTS FROM HONDURAS, 2001–2021



ASYLUM APPLICANTS FROM GUATEMALA, 2001–2021



ASYLUM APPLICANTS FROM MEXICO, 2001–2021



2022

*DIFFUSION OF SOFT IMMIGRATION LAW*

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## TOTAL ASYLUM APPLICANTS BY NATIONALITY, 2001–2021

Nationality	Total
All	618,149
China	111,723
El Salvador	62,735
Guatemala	55,385
Honduras	43,976
Mexico	41,922
Haiti	32,192
Colombia	25,811
India	20,574
Indonesia	10,690
Albania	10,534
Venezuela	9,039

