"TURN THAT PLANE AROUND!": THE PENDING DECISION ON THE DEPORTATION OF ASYLUM SEEKERS

MICHELLE MOUNT*

I. INTRODUCTION

In *Grace v. Sessions*, the American Civil Liberties Union (ACLU) is challenging Attorney General Sessions' decision *In re A-B-*, which increased legal barriers to asylum and held that victims of domestic violence and gang violence are not the type of "particular social group" that merits protection under the Immigration and Nationality Act (INA). Sessions' policy is an effort to crack down on fraud in the asylum system, but the ACLU argues that implementing it would make a mockery of the process and prevent bona fide asylum seekers from receiving fair hearings.

In a dramatic turn of events, the court discovered, during a jurisdictional hearing, that two of the plaintiffs had been deported that morning. The judge ordered the plane turned around and the plaintiffs returned and threatened to hold Sessions in contempt of court. The case highlights legal and procedural questions in the expedited removal process, which is currently under consideration for wide expansion.[1]

II. FACTS AND PROCEDURAL HISTORY

The core principle in asylum cases is the United Nations General Assembly's 1948 Universal Declaration of Human Rights, which announced that everyone has the right to seek and enjoy asylum from persecution.[2] The United Nations Convention relating to the status of refugees, and the 1967 Protocol, to which the United States is a signatory, mandate protection of people fleeing persecution based on "race, religion, nationality, membership of a particular social group, or political opinion."[3] It is not clear from a strict textual reading that people fleeing widespread gang violence and general

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* Michelle Mount, J.D. Candidate 2020 Georgetown University Law Center, B.S. Finance and Law, Boston University 2006.

1. Exec. Order No. 13,767, 82 Fed. Reg. 8793 § 11 (Jan. 30, 2017).

2. UNHCR, *Introductory Note* to Convention and Protocol Relating to the Status of Refugees, 189 U.N.T.S. 150 (Dec. 2010).

3. Convention and Protocol Relating to the Status of Refugees art. 33, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (codified in INA § 101(a)(28); 8 U.S.C. § 1101 (a)(27)(M)(42)).

violence against women belong under this umbrella. However, US immigration courts have traditionally granted asylum petitions on these grounds[4] — until recently, when the attorney general referred a case to himself for review and overruled a precedential decision of the Board of Immigration Appeals.[5]

The twelve plaintiffs in *Grace v. Sessions* exemplify the many others potentially affected by this policy change. While some of their narratives interweave violence based on race or religion, their main charge is that they were fleeing gang violence and/or domestic violence. For example, Grace[6] is an illiterate member of a Guatemalan indigenous group that is routinely discriminated against by nonindigenous Guatemalans. Her partner of twenty-two years is nonindigenous. Over the course of their relationship, he and his gang-member sons called her names that were racial slurs, stole the title to her home, repeatedly beat her, threatened to kill her, and sexually assaulted her daughter.[7] Another plaintiff, Gio, refused to participate in gang activities and was viciously beaten and terrorized by two rival gangs.[8] He credits his decision to his devout Christian beliefs.

In expedited removal proceedings, all the plaintiffs were issued negative credible-fear determinations and ordered to be removed.[9] The expedited removal system was established by Congress in 1996 to remedy perceived abuses of the process.[10] By offering a truncated removal proceeding, this system helped alleviate the backlog of asylum cases.[11] Those who are without proper documents and who file for asylum after crossing the border must undergo a "credible fear interview," by a Department of Homeland Security (DHS) officer.[12] The interview serves as a pre-screening to determine if "there is a significant possibility . . . that the alien could establish eligibility for asylum."[13] The officer's determination may be reviewed by an immigration judge, but petitioners do not get the full panoply of rights available in immigration court.[14] If they have a credible fear, they go through regular

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4. Compl. for Declaratory and Injunctive Relief at 15, Grace v. Sessions, No. 31- 01853 (D.D.C. filed Aug. 7, 2018) [hereinafter ACLU's Complaint] (recognizing an asylum claim based on female genital cutting (citing *In re* Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996))); *see, e.g.*, *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (recognizing sex as an immutable characteristic).

5. *In re* A-R-C-G-, 26 I. & N. Dec. 338 (B.I.A. 2014), *overruled by In re* A-B-, 27 I. & N. Dec. 316 (U.S. Att'y Gen. June 11, 2018).

6. The names of the plaintiffs used in this article are pseudonyms used in the Complaint.

7. ACLU's Complaint, *supra* note 4, at 6–7.

8. *Id*. at 10.

9. *Id*. at 3, 29.

10. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 5 (2007).

11. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., R41753, ASYLUM AND "CREDIBLE FEAR" ISSUES IN U.S. IMMIGRATION POLICY 8-11 (2011) (illustrating the reduction in defensive asylum claims after the passing of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIPA, P.L. 104-208, amending INA § 235)).

12. 8 U.S.C. §§ 1225(b)(1)(A)(ii), (B); 8 C.F.R. § 235.3(b)(4).

13. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., R41753, ASYLUM AND "CREDIBLE FEAR" ISSUES IN U.S. IMMIGRATION POLICY 4 (2011); INA § 235(b)(1)(B)(v); 8 U.S.C. § 1225.

14. 8 U.S.C. §§ 1225(b)(1)(B)(iii)(II–III); *see also* 8 C.F.R. § 208.30(g)(1) (defining what constitutes a credible fear in different instances); 8 C.F.R. § 1003.42 (defining procedure for review of credible-fear

removal proceedings and an immigration judge may hear the case.[15] If not, the decision is final and they are ordered to be removed.

Typically, removal orders based on a negative credible-fear determination are not appealable. The ACLU was able to file suit under a provision of the INA that gives the United States District Court for the District of Columbia jurisdiction over systemic challenges "to [the] validity of the [expedited removal] system," including regulations and written policies regarding expedited removal.[16] That court also has jurisdiction under 28 U.S.C. § 1331 ("federal question" jurisdiction). The policy change affecting the plaintiffs sprang from Sessions' decision in *In re A-B-*. To decide *In re A-B-* Sessions used a procedural feature of the Code of Federal Regulations that allows the attorney general to refer a case to himself to issue a policy-correcting decision.[17]

III. CHALLENGED OPINION: IN RE A-B-

Sessions' decision *In re A-B-* tightened standards for adjudicating asylum claims related to domestic and gang violence. Later guidance issued by U.S. Citizenship and Immigration Services (USCIS) specified that the new standards should apply in credible-fear determinations, not just in removal proceedings before an immigration judge.[18] First, Sessions redefined one of the grounds for gaining asylum, membership in a "particular social group." Now, applicants seeking asylum on this basis must demonstrate "membership in a particular group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question."[19] Sessions noted that this overturned the Immigration Board's precedential decision *In re A-R-C-G-* recognizing "married women in Guatemala who are unable to leave their relationship" as a "particular social group."[20] He also noted his disapproval of how the Immigration Board had ruled in *In re A-B-*, by relying on the holding of *In re A-R-C-G-*, to find that the situation of an El Salvadorian woman was substantially similar to that of the subjugated married Guatemalan women.[21]

Second, Sessions advised that victims of gang violence generally cannot constitute a "particular social group" because the definition of such a group

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determinations); 8 C.F.R. 208.30(g) (defining procedure for review of a negative credible-fear finding); *see generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-72, GOV'T ACCOUNT OFFICE, ASYLUM: VARIATION EXISTS IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATION COURTS AND JUDGES (2016) (discussing the significant discretionary power of immigration judges).

15. 8 U.S.C.A. § 1229a (West 2006); 8 C.F.R. § 1003.42(f).

16. 8 U.S.C.A § 1252(e)(3) (West 2005).

17. 8 C.F.R. § 1003.1(h)(1)(i).

18. U.S. CITIZENSHIP AND IMMIGRATION SERV'S, PM-602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH MATTER OF A-B- at 8-9 (July 11, 2018) [hereinafter USCIS Guidance on A-B-].

19. *In re* A-B-, 27 I. & N. Dec. 316, 320 (U.S. Att'y Gen. 2018).

20. *Id*. at 317 (overruling *In re* A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014)).

21. *Id*.

would be people vulnerable to private criminal activity, which could include "broad swaths of society" without any distinguishing characteristic or concrete identifiable trait.[22] Additionally, criminals "are motivated more often by greed or vendettas" than by an intent to persecute persons with a particular trait."[23] Establishing that the persecution was based on an immutable characteristic is critical to asylum eligibility under the INA.

Third, Sessions instructed that if an asylum applicant is persecuted by a private actor, he or she must show that the "government condoned the private actions or at least demonstrated a complete helplessness to protect the victim."[24] This is a more stringent standard than showing that the government was "unable or unwilling" to help them, as the statute states.[25] In his decision Sessions states that this is to avoid cases where the local police used prosecutorial discretion to decline to investigate a particular report.[26] He noted that even in the United States, there are many reasons that crimes are not successfully investigated or prosecuted.[27] The immigration judge must also consider whether the applicant could relocate to a safer part of their country.[28]

Finally, victims of private crime must show that being in a "protected social group" was the central reason for their persecution.[29] For example, Grace would probably not meet this standard, as her persecution resulted mainly from domestic violence rather than her ethnicity. Nor would Gio, whose persecution resulted mainly from gang violence, not from his Christian faith. Sessions noted that private crime affects a large number of people, not all of whom can show that they were specifically targeted because of their race, religion, nationality, protect social group, or political opinion.

IV. PROTECTION FOR SURVIVORS OF GANG VIOLENCE AND DOMESTIC ABUSE

The ACLU asks the court to enjoin the policies set out in *In re A-B-* and other similar guidance issued by the attorney general as being in violation of the INA, Refugee Act, APA separation of powers clause, and due process clause.

The ACLU takes issue with Sessions' statement in his first and second instructions that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[30] It argues that the fundamental purpose of the Refugee Act is ensuring that claims are adjudicated fairly and that large groups of people

22. *Id*. at 335.
23. *Id*. at 337.
24. USCIS Guidance on A-B-, *supra* note 18 at 8 –9 (citing *In re* A-B-, 27 I. & N. Dec. at 337).
25. 8 U.S.C. § 1101(a)(42) (2018).
26. *In re* A-B-, 27 I. & N. Dec. at 337–38.
27. *Id*.
28. *In re* A-B-, 27 I. & N. Dec. at 320, 344 (U.S. Att'y Gen. 2018) (citing *In re* M-E-V-G-, 26 I. & N. Dec. 227, 243 (B.I.A. 2014)).
29. *In re* A-B-, 27 I. & N. Dec. at 338.
30. ACLU's Complaint, *supra* note 4, at 22.

are not categorically barred from asylum. The *In re A-B-* decision keeps victims of domestic violence and gang violence out of the adjudication process. It is inappropriate to reject these applications at the credible-fear determination stage, which Congress intended to be a low threshold that would not screen out any potentially valid claims.[31] Instead, the ACLU contends, an impartial judge should be allowed to decide claims based on their specific facts.

The ACLU argues that the third instruction imposes a significantly harsher burden on applicants who were persecuted by nongovernment actors and that this instruction did not interpret the previous policy; rather, it drastically departed from the policy by creating a new test.[32] The previous test, based solely on the words of the statute, required an applicant to prove that the government was "unable or unwilling" to protect them, whereas under the new test, the applicant must prove that the government "condones or is completely helpless" to protect them.[33] The new standard overturns decades of settled law and contradicts the Refugee Act and the INA.[34]

The ACLU also warns that Sessions' fourth instruction carries grave consequences. Asking asylum applicants during credible-fear determinations to specify what social group they belong to and what protected category is the nexus of their claim is unreasonable because these are difficult legal questions.[35] Also, as with Grace and Gio, categories, groups, and reasons for persecution overlap. The ACLU notes that determining a social group is "one of the most complex and difficult question in asylum law, one frequently requiring expert testimony and extensive documentary evidence."[36] The reason for the low evidentiary threshold at the credible-fear stage is the complexity of asylum claims. Furthermore, credible-fear proceedings occur within days of arrival and involve applicants with little or no legal knowledge who have little legal assistance and no opportunity to examine witnesses or gather evidence, and who are detained.[37] Increasing the evidentiary burden may result in bona fide asylum seekers being summarily removed.[38]

Finally, the ACLU looks at Sessions' later guidance on what constitutes binding law and argues that it presents a separation-of-powers issue. "[The defendants] require asylum adjudicators to ignore any federal court of appeals decisions that conflict with the new credible-fear policies, thus purporting to make the immigration authorities the ultimate arbiters of the law and undermining both Congress's lawmaking authority and the Article III

31. *Id*. at 4, 25.
32. *Id*. at 22–23.
33. USCIS Guidance on A-B-, *supra* note 18 at 8-9 (citing *In re* A-B-, 27 I. & N. Dec. at 337).
34. ACLU's Complaint, *supra* note 4, at 22-23.
35. *Id*. at 4, 25.
36. *Id*. at 25 (citing Immigration and Naturalization Service, Asylum and Withholding Definitions, 65 Fed. Reg. 76588-01 (Proposed Dec. 7, 2000) ("Membership in a particular social group is perhaps the most complex and difficult to understand" of the five protected grounds for asylum.))
37. ACLU's Complaint, *supra* note 4, at 18.
38. *Id*.

judiciary's duty to 'say what the law is.'"[39] The guidance also posits that only law from the relevant circuit court should be considered in credible-fear determinations.[40] Typically, because of the screening interview function of credible-fear determinations, the most favorable circuit court ruling is applied.[41]

V. NATIONAL SECURITY AND IMMIGRATION SYSTEM CAPACITY CONCERNS

In 2017, the number of people forcibly displaced from their homes worldwide hit a record high of an average of 44,400 people fleeing from terror every single day.[42] And in 2017, the United States received more new asylum claims than any other country, which was double the number of claims in previous years.[43] The United States uses specialists at the UN Refugee Agency (UNHCR) to identify the most vulnerable refugees and extensively vet, document, and investigate them, with the help of eight government agencies.[44] This detailed process can take up to two years.[45] But for the many who cross the US border without undergoing this process, asylum applications are subject to expedited removal proceedings. In 2016, refugees from El Salvador, Guatemala, and Honduras ("the Northern Triangle") and Mexico accounted for one-third of all those granted asylum.[46] The UNHCR reported in 2015 that applications from people from the Northern Triangle and Mexico "have skyrocketed thirteenfold since 2008," greatly straining the system.[47]

The glut of asylum seekers clogs the bureaucracy of a resource-constrained system to the point of standstill. In the last four years, the number of pending cases has doubled to almost 700,000,[48] which must be decided by (currently) 350 immigration judges.[49] Human Rights First attributes the backlog partly to the expanded use of expedited removal proceedings by persons fleeing violence and persecution in the Northern Triangle.[50] In 2015, 88 percent of families passed their credible-fear determinations, a passage rate which some

39. *Id*. at 5 (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)).
40. USCIS Guidance on A-B-, *supra* note 18, at 8.
41. ACLU's Complaint, *supra* note 4, at 5.
42. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2017 at 2 (June 25, 2018), http://www.unhcr.org/globaltrends2017/. "By the end of 2017, about 3.1 million people were awaiting a decision on their application for asylum, about half in developing regions."
43. *Id*. at 39–40. In 2017, 331,700 new asylum application were lodged in the United States.
44. *See* UNHCR, U.S. RESETTLEMENT FACTS (2018), http://www.unhcr.org/us-refugee-resettlement-facts.html.
45. *See id*.
46. *See* AM. IMMIGRATION COUNCIL, ASYLUM IN THE UNITED STATES 6 (May 14, 2018), //www.americanimmigrationcouncil.org/research/asylum-united-states.
47. Press Release, UNHCR, UNHCR Warns of Looming Refugee Crisis as Women Flee Central America and Mexico (Oct. 28, 2015).
48. *See* DEP'T OF JUSTICE, Q2 IMMIGRATION COURT STATISTICS FOR FISCAL YEAR 2018 (2018), //www.justice.gov/opa/press-release/file/1060936/download.
49. David A. Martin, *How to Fix the Crisis Caused by Central American Asylum Seekers — Humanely*, VOX (July 4, 2018, 10:44 AM), //www.vox.com/the-big-idea/2018/7/2/17524908/asylum-family-central-america-border-crisis-trump-family-detention-humane-reform.
50. HUMAN RIGHTS FIRST, IN THE BALANCE: BACKLOGS DELAY PROTECTION IN THE U.S. ASYLUM AND IMMIGRATION COURT SYSTEMS 8–9 (April 2016).

attribute to the severity of the crisis in the Northern Triangle.[51] UNHCR in their 57-page, report called the Northern Triangle "one of the most dangerous places on earth."[52] The attorney general believes the high passage rate reflects the abuse of a loophole in the asylum system.[53]

The current administration has prioritized reducing fraud in the immigration system. In his speech to the Executive Office for Immigration Review, the attorney general linked fraud and people who arrive in the US "[t]hrough illegal border entries" and highlighted the need for expedited removal procedures.[54] "Obviously, the U.S. cannot provide a jury trial every time an immigrant is caught illegally entering the country, nor was it ever intended. But also over the years, smart attorneys have exploited loopholes in the law . . . to substantially undermine the intent of Congress." He cited the high credible-fear interview passage rates as evidence that case law expanded the concept of asylum and "created even more incentives for illegal aliens to come here and claim a fear of return," calling the system "terribly abused" and "fatally flawed." Additionally, high passage rates lead to more people illegally residing in the United States because some who pass their credible-fear interviews "simply disappear." In 2017, 40,000 people never showed up for their immigration hearings.[55] To reduce baseless or fraudulent asylum applications, Sessions advocates an expanded use of expedited removal and an elevated standard of proof in credible-fear determinations.

Section 208 of the INA gives the attorney general the authority to interpret the INA. Furthermore, it grants him authority to "review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out" his duties related to the immigration and naturalization of aliens.[56] This authority includes the power to refer cases for review.[57] Additionally, if the court agrees with Sessions' argument that "membership of a particular social group" in the INA is ambiguous, that argument may warrant *Chevron* deference.[58]

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51. *Id*. at 18.

52. UNHCR, *Executive Summary* to WOMEN ON THE RUN, FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO at 2 (Oct. 2015).

53. Jeff Sessions, Attorney Gen., Dep't of Justice, Remarks to the Executive Office for Immigration Review at Falls Church, VA (Oct. 12, 2017) *in* DEP'T OF JUSTICE, JUSTICE NEWS, Oct. 13, 2017, //www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

54. *Id*.

55. *Id*.

56. 8 U.S.C. § 1103(g)(2).

57. 8 C.F.R. § 1003.1(h)(1) (2018).

58. *In re* A-B-, 27 I. & N. Dec. 316, 326-27 (A.G. 2018) (relying upon the principle that federal courts are compelled to defer to a federal agency's interpretation of an ambiguous or unclear statute, decided in Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

VI. "TURN THAT PLANE AROUND" NIMBLE RESPONSES IN A CUMBROUS SYSTEM

The dramatic removal of two plaintiffs, Carmen and her daughter, on the morning of a jurisdictional hearing, was likely due to a logistical mistake. The previous day, the defendants had agreed to postpone the removal of Carmen and her daughter until midnight the following day (August 9).[59] They agreed that this would give the judge more than twenty-four hours to decide whether he had jurisdiction over the case.[60] To accommodate the tight timeline, Judge Sullivan set an expedited briefing schedule, with briefs due at 1:00 a.m. the following day, and scheduled a hearing for that morning (August 9).[61] The morning of the hearing, he said that "everyone's been working extremely hard around the clock, literally, to address these very significant issues under significant time constraints."[62]

After hearing from both parties, Judge Sullivan recessed and returned with the determination that the plaintiffs should not be removed while the court was determining its jurisdiction.[63] Before he could issue his opinion, though, he learned of the plaintiffs' removal.[64] He ordered the defendants to "turn that plane around and bring those people back to the United States. It's outrageous."[65] He made it clear that any delay in complying with the order would result in government officials being subject to contempt-of-court proceedings, starting with the attorney general.[66]

The confusion likely stemmed from immigration subdepartments' use of the same database to record temporary stay requests.[67] USCIS had halted the removal to reconsider its negative credible-fear determination.[68] Simultaneously, Immigration and Customs Enforcement (ICE) had briefly halted the removal process for the hearing upon a request from attorneys at the Department of Justice (DOJ).[69] Possibly, the USCIS stay was not properly recorded and the ICE stay was, so when USCIS requested its stay order be removed, an officer inadvertently removed the ICE stay order.

Despite many levels of government between the attorney at the DOJ in Washington, D.C., and the deportation officer in Dilley, Texas, communication appeared to be efficient. Within two hours of ICE officials informing the facility to stay the deportation, the email had been forwarded to eight people

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59. Tr. of TRO Proceedings at 25, Grace v. Sessions (D.D.C. heard Aug. 8, 2018) (No. 18-1853), //www.aclu.org/legal-document/grace-v-sessions-hearing-transcript.
60. *Id*.
61. *Id*.
62. *Id*. at 41.
63. *Id*. at 45.
64. *Id*. at 39–41.
65. *Id*. at 46.
66. *Id*.
67. *See* Status Report at 3, Grace v. Sessions (D.D.C. filed Aug. 13, 2018) (No. 18-1853), //www.aclu.org/legal-document/grace-v-sessions-status-report-responding-courts-minute-order.
68. Decl. of Daniel Bible ¶ 10, Grace v. Sessions (D.D.C. filed Aug. 13, 2018) (No. 18-1853), //www.aclu.org/legal-document/grace-v-sessions-daniel-bible-declaration.
69. *Id*.

and confirmed with phone verification.[70] Also, two minutes after the DHS officer received a call from the pro bono attorney notifying him of Carmen's inadvertent removal, the officer contacted Air Operations to arrange for her return.[71]

VII. FUTURE IMPLICATIONS

The United States immigration system consists of six departments with numerous agencies that all need to work together to some extent, but no single agency is responsible for coordination and assessing effectiveness.[72] The last major legislation to address this issue was Bush's Homeland Security Act, which reorganized the massive INS into three agencies.[73] Despite everyone's best efforts, an immigration system that is drastically overburdened, understaffed, and increasingly relying upon faster deportation processes will inevitably make mistakes. New policies that reduce the number of eligible cases could increase efficiency and accuracy, mitigate fraud, and shorten the amount of time applicants reside in jail-like detention conditions awaiting their hearings.

70. *Id.* ¶¶ 4–9.
71. *Id.* ¶¶ 11–13.
72. Megan Davy et al., *Who Does What in U.S. Immigration*, MIGRATION POLICY INSTITUTE: THE ONLINE JOURNAL (Dec. 1, 2005), //www.migrationpolicy.org/article/who-does-what-us-immigration.
73. *Id.*