Immigration Law Update:

Examining Recent Developments

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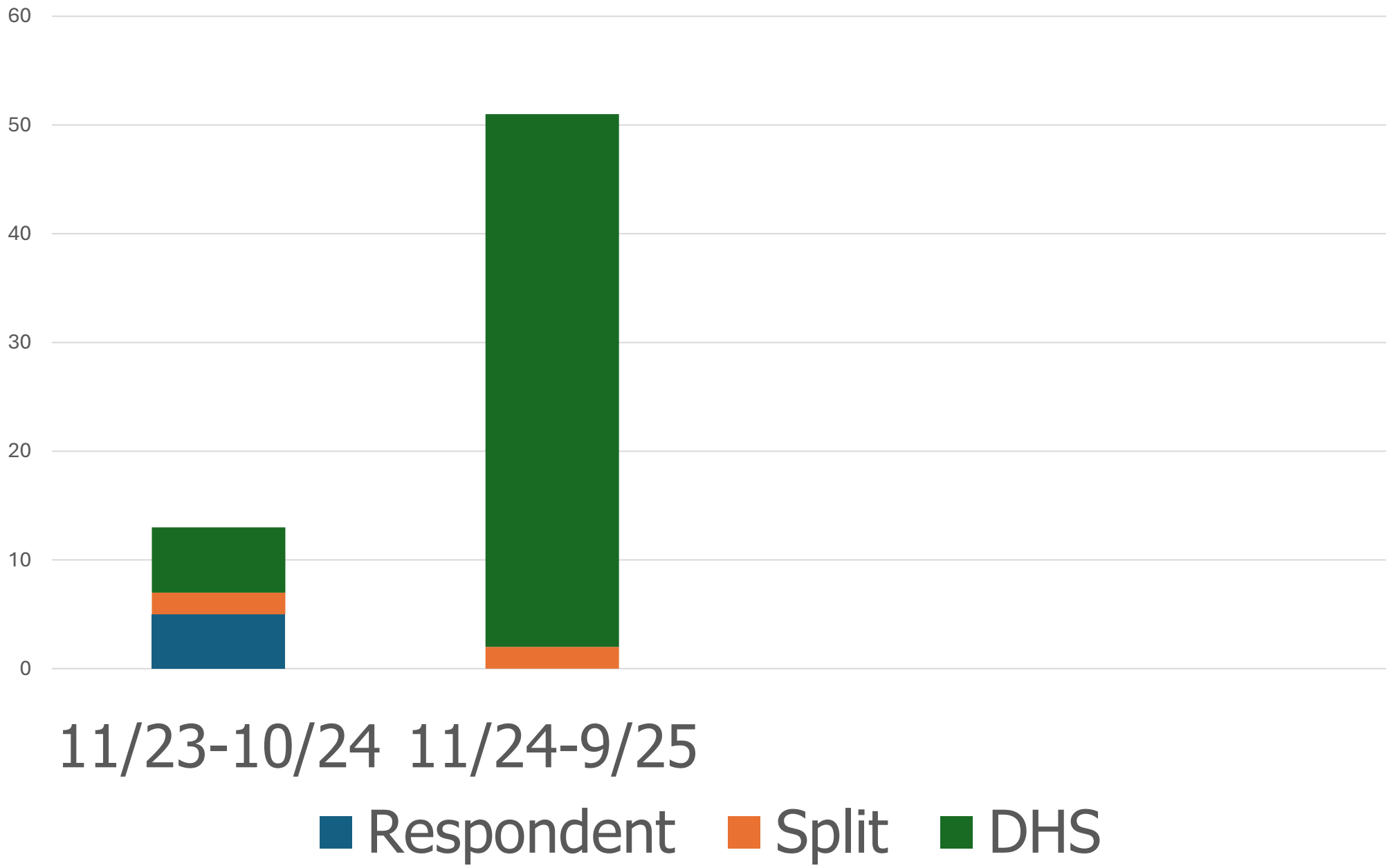
Topics

1. Case law updates
2. Crimmigration updates
3. Litigating detention issues
4. Practicing in a shifting landscape
5. Q&A

1. Case Law Updates
since Nov. 2024


BIA/AG

Agency Precedent Cases



A.G. Decisions/Designations

Since Last Case Law Update

Khan Larios-Gutierrez de Pablo & Pablo-Larios Dominguez Reyes Arciniegas-Patino Baeza-Galindo De Jesus Platon C-A-R-R- Dor Iskandarani O-A-R-G- A-A-R- Choc-Tut F-B-G-M- & J-E-M-G- M-S-I- Q. Li Bain Beltrand-Rodriguez N-N-B- D-E-B- Lopez-Ticas B-N-K- E-Y-F-G- Roquez-Izada Mayorga Ipina C-I-R-H- & H-S-V-R- A-A-F-V- E-Z- Gonzalez Jimenez S-S- C-M-M- K-E-S-G- Felix-Figueroa Akhmedov Garcia Martinez Salas Pena G-C-I- Buri Mora O-Y-A-E- J-F-A-S- R-E-R-M- & J-D-R-M- S-S-F-M- Dobrotvorskii Yajure Hurtado Garcia-Flores H-A-A-V- Landers McDonald J-A- Frias Ulloa Cotrufo L-A-L-T-

Bond

Bond Eligibility

Q. Li, 29 I&N Dec. 66

- Arriving aliens placed in removal proceedings are detained under section 235(b) and ineligible for bond, regardless of whether detention was at a POE.
- Detainees released on parole that is subsequently terminated are returned to custody under section 235(b) pending completion of removal proceedings.

Yajure Hurtado, 29 I&N Dec. 216

- Aliens present without admission ineligible for bond.

**235 = 8 USC 1225*

But See

American Immigration Council, Practice Advisory, "Detention under INA § 235(b): The Statutory Scheme and Strategies for Release" (Sept. 2025)

Maldonado Bautista v. Noem, Case No. 5:25-cv-01873-SSS-BFM (C.D. Cal.) (pending nationwide class action challenging the *Yajure Hurtado* interpretation)

Flight Risk

E-Y-F-G-, 29 I&N Dec. 103 - grant of withholding of removal that is pending on appeal

C-M-M-, 29 I&N Dec. 141 - "extensive and lengthy history of immigration law violations"

Akhmedov, 29 I&N Dec. 166 - significant discrepancies re: address and past failure to file timely change of address

Dobrotvorskii, 29 I&N Dec. 211

- existence of valid, reliable, credible sponsor is relevant
- all relevant evidence may be considered no matter who files it

Dangerousness

Choc-Tut, 29 I&N Dec. 48 - While IJ may consider State court's decision as to dangerousness and amount of bail set in criminal proceedings, IJ does not owe State court custody order deference in immigration bond proceedings.

Beltrand-Rodriguez, 29 I&N Dec. 76 - subjected person particularly vulnerable because of her age (12) and her familial relationship (half-sister) to unlawful sexual conduct

Salas Pena, 29 I&N Dec. 173 - recent arrest for trafficking in a large quantity of cocaine (charge pending)

Cotrufo, 29 I&N Dec. 264 - recent convictions for unlawful sexual conduct with minor plus probation officer's report

Notices to Appear

Larios-Gutierrez de Pablo & Pablo-Larios, 28 I&N Dec. 868

- *Matter of Fernandes* (objection to noncompliant NTA generally timely if raised prior to close of pleadings) applies retroactively.

Lopez-Ticas, 29 I&N Dec. 90

- Lack of time and place information does not render untrue or incorrect admission to factual allegations or invalidate charges of removability and therefore is not a proper basis for granting motion to withdraw pleadings.

Crimmigration

Crimes Involving Moral Turpitude

Khan, 28 I&N Dec. 850 - when gov't must prove sentencing elements beyond a reasonable doubt, they're combined with underlying crime & all elements are considered as one crime.

Baeza-Galindo, 29 I&N Dec. 1 - two CIMTs based on separate acts with different goals, neither of which was committed during the other, constitute separate schemes of criminal misconduct regardless of proximity in time.

Mayorga Ipina, 29 I&N Dec. 110 - conviction for indecent exposure in VA is a CIMT because requirement of "obscene display or exposure" necessarily involves lewd intent.

Aggravated Felonies

Dominguez Reyes, 28 I&N Dec. 878

- For purposes of assessing whether an offense constitutes a money laundering aggravated felony, the circumstance-specific approach applies to the requirement that the "amount of the funds exceeded $10,000."

Controlled Substances Act

Dor, 29 I&N Dec. 20 - The time of conviction is the point for deciding whether a State conviction is for a controlled substance offense, not the time removability is adjudicated.

Felix-Figueroa, 29 I&N Dec. 157 - A respondent who argues that a State drug conviction is categorically overbroad based on differing substance or isomer definitions must demonstrate a realistic probability that the State prosecutes substances falling outside the Federal definition.

Frias Ulloa, 29 I&N Dec. 259 - N.J. Section 2C:35-5(b)(4) is divisible by substance; under modified categorical approach, record of conviction shows fentanyl, a controlled substance.

Docket Management

Administrative Closure

B-N-K-, 29 I&N Dec. 96

- Whether there are persuasive reasons for a case to proceed and be resolved on the merits is the primary consideration in determining whether administrative closure is appropriate.
- A pending TPS application generally will not warrant a grant of administrative closure.

Termination

Roque-Izada, 29 I&N Dec. 106

- Termination is not warranted to permit a respondent to seek adjustment of status under the Cuban Adjustment Act with USCIS based on speculation that USCIS will grant the respondent parole.

Continuances

J-A-F-S-, 29 I&N Dec. 195

- An Immigration Judge generally should not continue an individual hearing based on a respondent's speculative assertion that he or she may be eligible for a new form of relief from removal not previously raised.

Filing

Garcia Martinez, 29 I&N Dec. 165

- A non-detained alien represented by private counsel is presumed to have the ability to pay any requisite filing fee before the IJ and BIA.
- A fee waiver request from a non-detained adult with zeros in all income blocks is presumptively invalid.

Landers, 29 I&N Dec. 240

- Circumstantial evidence of similarities in allegedly pro se filings and suspended counsel's involvement in mailing of documents to the Immigration Courts and DHS can be clear and convincing evidence that counsel practiced law in violation of a disciplinary order of suspension.

See Also

ILRC, Practice Advisory, “HR1 Fees at USCIS and EOIR” (Sept. 2025)

I-589s

rt A.III. Information About Your Background

List your last address where you lived before coming to the United States. If this is not the country ddress in the country where you fear persecution. *(List Address, City/Town, Department, Provinc*
NOTE: *Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Number and Street *(Provide if available)*	City/Town	Department, Province, or State	Co
A	N/A	N/A	N/A
A	N/A	N/A	N/A

Provide the following information about your residences during the past 5 years. List your present address fi
NOTE: *Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Number and Street	City/Town	Department, Province, or State	Country
A	N/A	N/A	N/A
A	N/A	N/A	N/A
A	N/A	N/A	N/A
A	N/A	N/A	N/A
A	N/A	N/A	N/A

Provide the following information about your education, beginning with the most recent school that y
NOTE: *Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Name of School	Type of School	Location *(Address)*
A	N/A	N/A
A	N/A	N/A
A	N/A	N/A
A	N/A	N/A

Provide the following information about your employment during the past 5 years. List your present employment
NOTE: *Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Name and Address of Employer	Your Occupation
A	N/A
A	N/A
A	N/A

Provide the following information about your parents and siblings (brothers and sisters). Check the box if the person
NOTE: *Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Full Name	City/Town and Country of Birth	Curren
ther N/A	N/A	☐ Deceased N/A
ther N/A	N/A	☐ Deceased N/A
ling N/A	N/A	☐ Deceased N/A
ling N/A	N/A	☐ Deceased N/A
ling N/A	N/A	☐ Deceased N/A
ling N/A	N/A	☐ Deceased N/A

n I-589 Edition 01/20/25

Information About Your Application

Use Form I-589 Supplement B, or attach additional sheets of paper as needed to complete your responses to the A.)

n answering the following questions about your asylum or other protection claim (withholding of removal under 241(holding of removal under the Convention Against Torture), you must provide a detailed and specific account of the b er protection. To the best of your ability, provide specific dates, places, and descriptions about each event or action nents evidencing the general conditions in the country from which you are seeking asylum or other protection and th re relying to support your claim. If this documentation is unavailable or you are not providing this documentation wi n your responses to the following questions.

to Instructions, Part 1: Filing Instructions, Section II, "Basis of Eligibility," Parts A - D, Section V, Completing the 'Additional Evidence That You Should Submit," for more information on completing this section of the form.

hy are you applying for asylum or withholding of removal under section 241(b)(3) of the INA, or for withholding o vention Against Torture? Check the appropriate box(es) below and then provide detailed answers to questions A a

eeking asylum or withholding of removal based on:

- Race
- Religion
- Nationality
- ☐ Political opinion
- ☐ Membership in a particular social group
- ☐ Torture Convention

u, your family, or close friends or colleagues ever experienced harm or mistreatment or threats in the past by a

No ☐ Yes

s," explain in detail:
hat happened;
hen the harm or mistreatment or threats occurred;
ho caused the harm or mistreatment or threats; and
hy you believe the harm or mistreatment or threats occurred.

N/A

arm or mistreatment if you return to your home country?

☐ Yes

plain in detail:
arm or mistreatment you fear;
ou believe would harm or mistreat you; and
ou believe you would or could be harmed or mistreated.

N/A

Pretermission

C-A-R-R-, 29 I&N Dec. 13

- IJ not required to consider an I-589 if it is incomplete, particularly where opportunity to cure has been offered.
- IJ may not pretermit an I-589 solely because the respondent did not submit a declaration.

H-A-A-V-, 29 I&N Dec. 157

- If factual allegations underlying an I-589, viewed in the light most favorable to the respondent, do not establish prima facie eligibility for relief or protection, an IJ may pretermit the applications.

But See

NIPNLG/CGRS, Practice Advisory, “Fighting for a Day in Court: Understanding and Responding to Pretermission of Asylum Applications” (updated Aug. 27, 2025)

Credibility and Corroboration

G-C-I-, 29 I&N Dec. 176

- A respondent's nonresponsive and evasive testimony, including when related to the issue of corroboration, supports an adverse credibility determination.
- A lack of corroboration may be an independent basis to find that a respondent has not met his burden of proof to establish a claim for asylum or withholding of removal.

Particular Social Groups

K-E-S-G-, 29 I&N Dec. 145

- Sex + Nationality ≠ PSG

R-E-R-M- & J-D-R-M-, 29 I&N Dec. 202

- *L-E-A- I* bad, *L-E-A- II* good

S-S-F-M-, 29 I&N Dec. 207

- *A-R-C-G-* bad, *A-B- I* and *A-B- II* good

L-A-L-T-, 29 I&N Dec. 269

- Perceived or imputed membership works only if underlying PSG is independently cognizable
- "Perceived Salvadoran gang member" not cognizable
- "Salvadoran tattooed men" not immutable

But See

NIJC, Practice Advisory, "Gender-Based Asylum Under Trump 2.0: A Resource for Pro Bono Attorneys" (Aug. 2025)

Jeffrey S. Chase, Blog Post, "Gender Is a Particular Social Group" (Sept. 11, 2025)

Nexus

O-A-R-G-, 29 I&N Dec. 30

- Where a PSG is defined by "former" status, IJs must ensure the persecutor's conduct was based on a desire to overcome or animus toward the group, not retribution for conduct the respondent engaged in while a member.

C-I-R-H- & H-S-V-R-, 29 I&N Dec. 114

- While explicit statements from the persecutors are not required, there must be some showing of a connection between persecutors' actions and the protected ground such that the alleged harm is not solely stemming from statistical likelihoods or unfortunate coincidence.

But See

O.C.V. v. Bondi, No. 23-9609, 2025 WL 2447603 (10th Cir. 2025) (vacating *Matter of M-R-M-S-*, 28 I&N Dec. 757 (BIA 2023), because it created an impermissible categorical rule that prematurely ends the nexus inquiry after identifying a persecutor's ultimate goal unrelated to the protected ground)

Convention Against Torture (broad rules)

M-S-I-, 29 I&N Dec. 61

- Acquiescence standard for CAT differs from unable-or-unwilling standard for asylum and WH; the potential for private actor violence plus speculation that police cannot or will not help is insufficient to prove acquiescence.

N-N-B-, 29 I&N Dec. 79

- IJ applied the wrong legal standard for CAT protection, determining respondent "could be" tortured instead of that he would "more likely than not" be tortured.

But See

Rodriguez-Molinero v. Lynch, 808 F.3d 1134, 1135-36 (7th Cir. 2015) (holding that the "more likely than not" standard "cannot be and is not taken literally" and that "[a]ll that can be said responsibly on the basis of actually obtainable information is that there is, or is not, a substantial risk that a given alien will be tortured if removed")

Convention Against Torture (specific cases)

A-A-R-, 29 I&N Dec. 38 – record does not support finding that prison conditions under state of exception policy in El Salvador are intended to torture

A-A-R-V-, 29 I&N Dec. 118 – bisexual criminal deportee did not establish likelihood of torture in Salvadoran prison

E-Z-, 29 I&N Dec. 123 – likelihood of torture based on Russian's travel to U.S. and Ukraine support was clear error

Convention Against Torture (specific cases)

S-S-, 29 I&N Dec. 136 – clear error where no finding that detention in Haiti would be long-term and record did not support finding that conditions were intended to torture

O-Y-A-E-, 29 I&N Dec. 190 – threats in Venezuela long ago and no harm after threats

J-A-, 29 I&N Dec. 253 – insufficient proof of torture though arrest likely and isolated incidents of torture in Uzbekistan; and of specific intent despite pursuit of prosecution for terrorism where no showing of illegitimate prosecution

But See

Jeffrey S. Chase, Blog Post, “When Are Future Predictions Clearly Erroneous? Matter of A-A-R-” (May 18, 2025)

Cancellation of Removal

Hardship Standard

Buri Mora, 29 I&N Dec. 186

- The respondent has not established the requisite exceptional and extremely unusual hardship to the qualifying relatives based on economic detriment and family separation, particularly where the qualifying relatives will remain in the United States and treatment for their mental health conditions and developmental delays will not be affected by the respondent's removal.

Discretion

Bain, 29 I&N Dec. 72 – recency and repeated nature of criminal history and lack of a showing of rehabilitation

Gonzalez Jimenez, 29 I&N Dec. 129

- Use of false or stolen SSN and providing false information on tax returns are negative considerations that weigh against a favorable exercise of discretion.
- When respondent excuses conduct by claiming reliance on professional advice, respondent should file evidence of specific advice and explain why reliance was reasonable.

Discretion

Garcia-Flores, 29 I&N Dec. 230 - IJ erred by making adverse credibility finding regarding two child victims and in effect finding respondent factually innocent

McDonald, 29 I&N Dec. 249 – reversing on discretion where conviction plus charging document and victim's statement indicate sexual conduct with child, and seriousness and recency of uncontested criminal acts are extremely serious negative factor

Appeals

Appeal Filing Period

Iskandarani, 29 I&N Dec. 26

- When an Immigration Judge issues an oral decision, the 30-day appeal filing period is calculated from the date the decision is rendered and is unaffected by the subsequent mailing of a memorandum summarizing the oral decision.

ECAS

Arciniegas-Patino, 28 I&N Dec. 883

- Where parties properly served with electronic notice of briefing schedule, representative's failure to diligently monitor inbox, including spam folder, does not excuse party's failure to meet deadline.

F-B-G-M- & J-E-M-G-, 29 I&N Dec. 52

- Electronic notification of briefing schedule sent by email is sufficient notice in ECAS case even if representative does not open the email or access the document.
- Rebuttable presumption of delivery applies to electronic notification of briefing schedule but is weaker than the presumption that applies to certified mail.

Motions to Remand/Reopen

De Jesus Platon, 29 I&N Dec. 7

- Evidence of post-conviction relief submitted in support of motion to remand does not demonstrate that conviction was vacated for a procedural or substantive defect in the underlying criminal proceedings and not for reasons of rehabilitation or immigration hardship.

D-E-B-, 29 I&N Dec. 83

- Supplemental filing to a motion to reopen that raises claims that are fundamentally different from those raised in the original motion is treated as a separate motion.

CA5

Noncitizen Victories

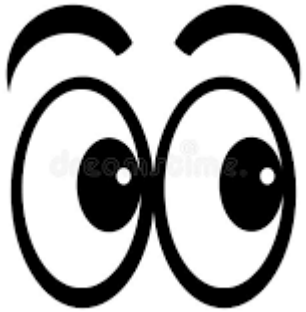
Santos-Zacaria v. Garland, 126 F. 4th 363

- IJ said no persecution because rape was not enough; BIA reversed on past persecution but concluded that presumption was overcome for reasons including time since harm, opportunity to change gender in Guatemala, and relocation alternative.
- Because some of the facts the BIA relied on were neither undisputed nor found by the IJ, the court remanded withholding claim because of impermissible factfinding.
- Also remanded for failure to address pattern-and-practice claim, regardless of BIA's conclusion on past persecution.
- BIA sufficiently explained CAT denial because decision evinced a reliance on IJ's reasoning.

Aguilar-Quintanilla v. McHenry, 126 F. 4th 1065

- Petitioner's removal did not moot withholding-only claim because return could be facilitated under ICE Policy Directive 11061.1.
- Despite adverse credibility finding, remanded because agency failed to consider affidavits regarding police searching for petitioner.
- "Although the IJ said she considered all evidence, a generic conclusion by the agency that it has reviewed all evidence fails to demonstrate that it has 'heard and thought.' It is merely a conclusion."
- "[K]ey evidence must be considered in [the IJ's] likelihood-of-torture assessment, not somewhere else."

W.M.M. v. Trump, No. 25-10534, 2025 WL 2508869



- Removal under the Alien Enemies Act is enjoined because "we find no invasion or predatory incursion."
- The notice the Government will give to detainees who are subject to removal under the AEA satisfies due process.
- *See Trump v. J. G. G.*, 145 S.Ct. 1003 (2025) (vacating order blocking removal under the AEA, requiring that challenges be brought in habeas, and requiring notice of removal under the AEA to allow for habeas claim)

Simantov v. Bondi, No. 24-60487, 2025 WL 2587112

- Affirming determination that petitioner did not meet cancellation standard under hardship or VAWA grounds.
- Court has jurisdiction to review holding that petitioner failed to meet cancellation standard on VAWA grounds.

Other Cases

Sustaita-Cordova v. Garland, 120 F.4th 511 (affirming negative hardship determination under "deferential" review and applying *Matter of Fernandes* retroactively)

Texas v. DHS, 123 F.4th 186 (enjoining DHS from cutting concertina wire fence along Texas-Mexico border)

Luna v. Garland, 123 F.4th 775 (determination that pet'r did not rebut weaker presumption of delivery of notice of hearing not an abuse of discretion) (cert petition filed)

Cuenca-Arroyo v. Garland, 123 F.4th 781 (affirming no-hardship determination; no jurisdiction to review discretionary denial of voluntary departure even though BIA characterized tax misrepresentations as "tax fraud")

Texas v. United States, 126 F.4th 392 (enjoining approval of new DACA applications in Texas only)

Ikome v. Bondi, 128 F.4th 684 (denial of continuance an unreviewable discretionary determination) (cert petition filed)

Ayala Chapa v. Bondi, 132 F.4th 796 (BIA did not act *ultra vires* by ordering removal after temporary Board member's temporary term expired where member was properly reappointed at the time of the removal order)

Sandoval Argueta v. Bondi, 137 F.4th 265 (attempt to solicit sex from minor over the internet in Texas is "crime of child abuse" despite mistake as to the identity of the victim)

Linares-Rivas v. Bondi, 139 F.4th 454 (noncitizen did not raise reviewable legal question re: discretionary denial of cancellation, nor did he exhaust ineffective assistance claim)

Montiel Rubio v. Bondi, 147 F.4th 568 (substantial evidence supported denial of asylum and CAT in Venezuelan political opinion case based on no past persecution and no objectively reasonable fear of future harm)

Garcia Morin v. Bondi, No. 24-60590, 2025 WL 2630516 (numerical bar to motions to reopen is not subject to equitable tolling)

United States v. Texas, No. 24-50149, 2025 WL 2493531 (ordering rehearing en banc in SB4 case)


SCOTUS

Agency Cases

Monsalvo Velásquez v. Bondi, 145 S.Ct. 1232

- Noncitizen moved BIA to reopen proceedings on day 62 of 60-day voluntary-departure period, a Monday; BIA rejected it as untimely.
- Court has jurisdiction to review legal meaning of "60 days," a term in the final removal order, even though removability itself wasn't challenged.
- A voluntary-departure deadline that falls on a weekend or legal holiday extends to the next business.
  - That is in harmony with the longstanding administrative construction against which Congress adopted the VD statute, and consistent with other deadlines in the same section of the INA.

Riley v. Bondi, 145 S.Ct. 1290

- Riley ordered removed under "final administrative review order" in expedited procedure for noncitizens convicted of aggravated felony; BIA denied CAT over 16 months later; CA4 dismissed PFR, filed three days later, as untimely.
- BIA order denying deferral in "withholding only" proceeding is not a "final order of removal."
- 30-day deadline to challenge final order of removal is a claims-processing rule, not a jurisdictional requirement.
- *See Romero-Lozano v. Bondi*, No. 23-60638, 2025 WL 2318265 (5th Cir.) (denying motion to recall mandate remanding case and to reinstate petition that was timely when filed but untimely under *Riley*)

The Shadow Docket

Noem v. Abrego Garcia, 145 S.Ct. 1017 (affirms instruction to "facilitate" plaintiff's release from custody in El Salvador but directs court to clarify instruction to "effectuate" release)

Noem v. National TPS Alliance, 145 S.Ct. 2728 (permitting termination of a portion of the Temporary Protected Status designations for Venezuelan nationals)

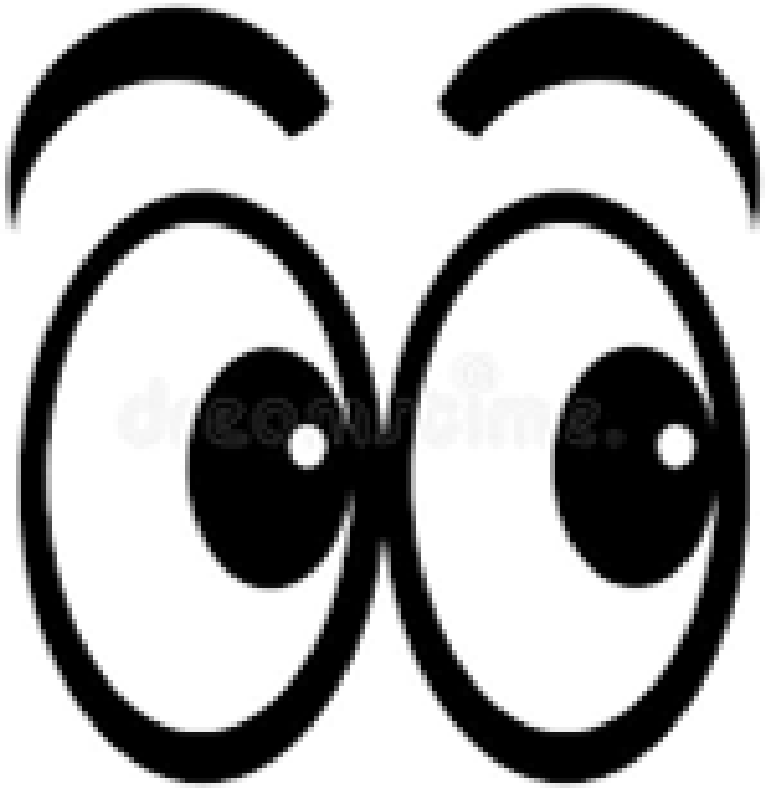
Noem v. Doe, 145 S.Ct. 1524 (permitting termination of parole for Cuban, Haitian, Nicaraguan, and Venezuelan noncitizens pending appeal)

DHS v. D. V. D., 145 S.Ct. 2153 (permitting removal of non-citizens to a country not specifically identified in their removal order without hearing any potential CAT claims)

Trump v. Casa, Inc., 145 S.Ct. 2540 (because universal injunctions likely exceed court authority, staying injunction re: executive order ending birthright citizenship, but only to the extent that the injunctions are broader than necessary to provide complete relief to each plaintiff with standing)

Noem v. Vasquez Perdomo, No. 25A169, 2025 WL 2585637 (lifting restrictions on immigration stops in L.A.)

Certiorari Granted



Urias-Orellana v. Bondi, No. 24-777

- Noncitizen threatened several times and physically assaulted by armed cartel members who vowed to leave him like his two half-brothers who had been shot multiple times if he didn't comply with payment demands.
- BIA affirmed rulings that the past harm did not amount to persecution and that the noncitizen didn't disprove the reasonable possibility of safe relocation.
- First circuit affirmed on substantial-evidence review.
- Issue: Whether a federal court of appeals must defer to the BIA's judgment that a given set of undisputed facts does not demonstrate mistreatment severe enough to constitute "persecution."

2. Crimmigration updates & best practices

A quick divisibility refresher

- Categorical approach to analyze the impact of a state criminal offense in immigration with limited exceptions
  - Avoids relitigating a criminal case and creates some uniformity
- For categorical analysis, we need to understand if the statute is divisible
  - unless the whole statute (or none of it) triggers immigration consequences
- *Mathis* told us that an offense is divisible if it contains separate offenses, as opposed to various means of committing a single offense
  - Different offenses have different elements
    - Something is an element if it must be proven, in every case, to a unanimous jury beyond a reasonable doubt (except recidivism)
    - Something is a means if it does not require the above
- *Mathis* offers guidance on how to figure this out in practice
  - First look at the face of the statute, if that fails then
    - Then highest court for the state evaluating criminal statutes is best
      - If all else fails, you can look at indictment for intel on statute itself

Interesting case from the CCA on indictments

Crawford v. State, 710 S.W.3d 774, 783 (Tex.Crim.App., 2025)

- The CCA held that a defendant was guilty of assault on a peace officer, a second-degree felony, even though the indictment alleged an assault on a public servant, a third-degree felony
- Indictment specified the alleged victim was a sheriff's deputy, which is a peace officer
- It sheds light on the CCA's complicated case law on indictments and why analyzing the divisibility of Texas statutes is not straightforward

Indictments/Information

Remember the indictment has two jobs

1. to allege all the things requires to be proven from the offense (elements) AND
2. to give notice the defendant of the prohibited conduct

But this means if you are looking at an indictment OR case law discussing what was required to be proven in a particular case, the discussion:

- Could be referring to actual elements OR
- It could be referring to notice issues in that particular case

Means and the Indictment: Prosecutor Power

- The state can choose how they want to allege the means in the indictment
- A state is free to list various means unless there is a Notice objection
  - In *Kitchens* (CCA 1991), the CCA says the state can put two means separated by an "and" in the indictment, and the jury can split and return a general verdict so long as they each believe one of the means were met
    - This is the conjunctive pleading, disjunctive proof rule in Texas
- But if the state alleges a single specific non-elemental way that the defendant committed the offense it won't get a conviction if the jury does not agree on the that specific means alleged.

But it gets more complicated– Cognate Pleading

- Lesser Included Offenses (LIOs) are governed by Crim. Pro. 37.09 (1)
  - There are a few ways to see if an offense is a LIO but we will focus on one only today
- CCA in *Hall* explains the Cognate Pleading Rule, which evaluates a LIO based on what is alleged in the indictment
- An offense is an LIO of another offense if the indictment:
  - **alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced**." *Ex parte Watson*, 306 S.W. 3d 259, 273 (Tex. Crim. App. 2009) (opinion on reh'g). (or a few other options)

Cognate Pleading and Divisibility Research

- The cognate pleading approach is very different from the categorical approach's strict elemental test because it
  - Compares the offense as charged in an indictment, including means or other facts alleged
- Also be aware the CCA phrasing in LIO cases can add confusion
  - CCA may refer to "non-statutory elements" or "essential elements" or even "the statutory elements of the offense and those elements as modified by the indictment"
- So because of cognate pleading and notice issues, you may read cases that discuss facts that need to be proven beyond a reasonable doubt but are not elements of the offense

Notice vs. Elements

- Remember indictment needs to provide meaningful notice to the defendant
  - This may include both means and elements
- **Notice must be proven in a specific case**
- **Elements must be proven in all cases**
- Example: I am baking sweet potato casserole for thanksgiving.
- Sweet potatoes are an element – always
- Marshmallows are required if you are eating with my grandma (notice)

Other proof of means vs. elements

- **Constitutionally mandated indicators**

  1. If a fact increases the punishment for the offense, it is an element (unless it is the fact of a prior conviction)
     - This is what *Mathis* meant about the statute on its face showing what the elements are

  2. A single count can only contain one offense (Rule Against Duplicity)
  - If there are various factors alleged in a single count (if not corrected in jury instructions) then they must be means as or it would be duplicitous
    - This is what *Mathis* peek at indictment is all about

Beware of the anti-duplicity trap

- As we know the state is bound to the theory of the case alleged in the indictment if they chose to specify
  - This means you can have a single means that must be proved beyond a reasonable doubt in a particular case
- But remember don't confuse what must be proven in one case vs. what must be proven in every case
- In other words, don't try to reverse the rule on duplicity
  - While it can be informative to only see a single fact alleged, it would be dangerous to assume that makes it an element
    - Take the example of my friend

Divisibility and the Demand for Certainty

- *Mathis* and *Taylor (SCOTUS)*
  - Indicated that if the documents do not "speak plainly" then the "demand for certainty" will not be met and it will not be considered a divisible statute
- *Alejos-Perez v. Garland (Alejos Perez I),* 991 F.3d 642, 649 (5th Cir. 2021)
  - Found that after examining the statute, CCA case law on a similar statute and other documents "the government has failed to show that Penalty Group 2-A is divisible"
- CCA often finds that Texas criminal statutes contain only a single offense. Some examples:
  - Robbery
    - *Floyd v. State*, 714 S.W.3d 9, 15 (Tex. Crim. App. 2024), reh'g denied (Jan. 22, 2025)
    - CCA came to a different conclusion that the Circuit courts and found Robbery NOT divisible
  - Felony Murder
    - *Fraser v. State*, 583 S.W.3d 564, 566 (Tex.Crim.App., 2019)
    - The predicate felony is NOT an element of felony murder
    - CCA upheld a felony murder conviction where jury was split on what felony was

Matter of Khan (BIA 2024)

- If elements of a sentencing enhancement are proven beyond a reasonable doubt, those additional elements are combined with the elements of the underlying criminal statute and all the elements are then considered together as one compound crime.
- Remember *Apprendi v. New Jersey* (2000)
  - EVERY fact that increases punishment, except recidivism, defines a separate offense that the state must plead and prove beyond a reasonable doubt
- Because the enhancement must be proven in every case where the increased punishment is sought, *Matter of Khan* isn't such a big change

The BIA's case law bonanza, *Loper Bright* and the Circuit Courts

- Onslaught of cases from the BIA, often standing in stark contrast to years of prior practice or case law
- After *Loper Bright* the Circuit Courts do not defer to the BIA anymore under *Chevron*
  - *Skidmore* deference, as it remains, states only persuasive as it is logical or reasoned
- Many of these new BIA rules are in conflict between prior law from the Circuit Courts or SCOTUS
  - In conflict, SCOTUS or Circuits govern
- Retroactivity rules of the Circuits come into play with these rulings

3. Litigating detention issues

The BIA 2025 Bond cases

- AG designated a series of cases for publication about immigration bond
- First group of cases were mainly fact specific scenarios around flight risk and dangerousness – not many rules to pull out
- Then two significant cases
  - *Matter of Q Li*
    - Holding anyone who was apprehended by Border Patrol, paroled at entry and not later admitted, is ineligible for bond
  - *Matter of Yajure Hurtado*
    - Holding anyone without status who entered without inspection, and not later admitted, is ineligible for bond

Background: Mandatory Detention Statutes

- 8 USC 1225 (INA 235) applies to all applicants for admission
  - (b)(1) Expedited Removal
  - (b)(2) seeking admission
- 8 USC 1226(c) (INA 236(c))
  - Inadmissible or deportable for various criminal offenses
- 8 USC 1231 (INA 241)
  - Final order of removal

Closer Look: Matter of Yajure Hurtado

- BIA says 235 (1225) applies to all applicants for admission
  - Then states that those who entered without inspection are applicants for admission
  - Then holds anyone, no matter how long they have been in the U.S., is subject to 1225 instead of 1226 if they entered without inspection
  - 1225 does not permit any bond
- Can't appeal bond denial to Circuit Court
- Immigration counsel can attempt distinguish but judge may not rule on it
- There is a class action pending on this issue
  - *Maldonado Baustia et al v. Noem*
- If bond denied, the only place to raise a bond denial is in habeas

Specific Arguments re *Yajure Hurtado*

- BIA reading is contrary to the statutory framework
  - 236 (1226) has always included folks who are inadmissible explicitly
  - Congress recently expanded mandatory detention (Laken Riley) again explicitly referencing those who entered without inspection

- BIA reading is contrary to decades of agency practice applying 236 (1226)

- BIA reading is contrary to SCOTUS case law which evaluated EWI folks under 236
  - *Jennings v. Rodriguez*, 583 U.S. 281, 305-06 (2018); *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 579 (2022)
  - If conflict, then SCOTUS should govern
    - *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 428 (2024)

Specific Arguments re *Yajure Hurtado*

- BIA reading should not be applied retroactively
  - *Monteon-Camargo v. Barr*, 918 F.3d 423, 431 (5th Cir. 2019), as revised (Apr. 26, 2019)

- BIA acts arbitrarily and capriciously by disregarding the rule of orderliness
  - Federal (and state courts) apply the rule orderliness: one panel cannot overrule another panel's decision absent an intervening change in law
  - EOIR Policy Memoranda 25-34 acknowledges that there is no established rule for immigration judges to resolve conflicting BIA decisions
  - IJs have to "try their best"
  - *Matter of Yajure Hurtado* and *Matter of Q. Li* conflict with *Matter of Cabrera-Fernandez* (EWI may be released under 236(a)) and *Matter of Roque-Izada* (EWI released was under 236(a))

Habeas for other detention issues

- 236(c) (1226(c))Prolonged Detention
  - Even if mandatory detention is lawful, at some point detention can become constitutionally unreasonable.
    - *Ramirez v. Watkins*, No. CIV.A. B:10-126, 2010 WL 6269226, at *6 (S.D. Tex. Nov. 3, 2010).
  - Courts disagree on the specific factors, but they generally agree that they should consider
    - the length of detention
    - the likelihood of continued detention
    - if the immigrant is culpable for that length of detention.

Challenging Alien Enemies Act

Claims challenging “Alien Enemies Act” fall “within the ‘core’ of the writ of habeas corpus and thus must be brought in habeas.” *Trump v. J. G. G.*, 604 U.S. 670, 672 (2025).

AEA: foreign citizens of a country at war with the US or of a country that invaded or engaged in a predatory incursion (threatened or attempted) against US territory may be detained and removed based on a proclamation by the President

Challenging Alien Enemies Act

No judicial review except as to the interpretation and constitutionality of the Act and whether the person meets the definition of an alien enemy

In challenges to President Trump's Proclamation invoking AEA against Venezuelans believed to be Tren de Aragua, courts have held that in habeas proceedings, the Government bears the burden by clear and convincing evidence to demonstrate that foreign citizens meet the AE designation

Habeas based on Zadvydas

1) The most well-established immigration habeas case, it is premised on the prolonged/indefinite detention of an individual after a final order of removal.
2) 1231(a)(1): says that an immigrant must be removed within 90 days, with a possibility of a 90 -day extension
3) Also say AG “shall detain” the immigrant during the removal period.
4) SCOTUS ruled that, after six months of post-removal order detention, if the immigrant can provide good reason to believe that he or she is unlikely to be removed in the reasonably foreseeable future, and the government cannot provide evidence showing otherwise, the immigrant must be released.
    1) There is a presumption that the first six months are permitted, and the immigrant must put on a prima facie case after those six months.

TPS Habeas

- Habeas for a detained non-citizen who has valid TPS
- The TPS statute indicates that individuals with TPS “shall” not be detained
- Claims based on the INA and Due Process Clause

Nuts and Bolts: Petition and Verification

1) Must make an application in writing that is signed and verified by the person seeking relief or by someone acting on his behalf. 28 U.S.C. § 2242
    a) Verification and the next of friend designation.
2) Can be supplemented or amended just like any other civil action. 28 U.S.C. § 2242.
3) Keep it short and set forth the facts with an eye to having the government admit or deny the facts.

Nuts and Bolts: Allegations

1) Must allege facts concerning the applicant's detention;
2) Name the person having custody over the applicant;
3) Claim or authority for the detention. 28 U.S.C. § 2242.
4) State whether a court has upheld the validity of the order and if so, state the name of the court, the date and the nature of the proceeding.

Nuts and Bolts: Custody and Custodian

1) Writ issued by court must be directed to person having custody of the person detained. 28 U.S.C. § 2243.
2) In "core" habeas petitions challenging physical confinement, the proper respondent in a habeas is the warden of the facility where the person is held. *Rumsfeld v. Padilla*, 542 U.S. 426, 425 (2004).
3) To avoid any problems, for purposes of identifying the proper custodian, name the warden of the facility in which the detainee is held and/or the ICE/INS official having "power over" the immigrant.

Nuts and Bolts: Jurisdiction and Venue

1) Section 2241 grants district courts jurisdiction to hear habeas by immigrants. 28 U.S.C. § 2241; *INS v. St. Cyr*, 121 S.Ct. 2271 (2001).
2) Venue proper in district where court issuing writ has custody over custodian. 28 U.S.C. § 2243

Nuts and Bolts: Exhaustion

1) 2241 does not contain an administrative exhaustion requirement
2) "prudential" or judicially crafted exhaustion may be required. ~~1.~~ *See Leonardo v. Crawford*, 646 F.3d 1157, 1160-61 (9th Cir. 2011) (finding that a detainee challenging an IJ's adverse bond determination typically should first appeal to the BIA)
3) Key question: does there exist some administrative process that exists to review the issue? If so, courts will usually want you to start there.

Litigating-Service

1) Service for habeas is confusing, as it could be governed by different processes. For example, Federal Rule of Civil Procedure 4(i) governs service when serving a government agency. 28 USC 2243 suggests that the court will effect service by issuing an Order to Show Cause
2) It is also possible your court “serves” the petition. This is the practice in the Western District of Texas.
3) Our suggestion: do the Rule 4(i) service, and you know you are covered.

Litigating-Emergency Relief

1) One of the strategies often employed by the federal government is to slow walk the habeas petition.
2) Order to Show Cause
3) Federal court has procedural tools, such as TROs and Preliminary injunctions to deal with this.
    a) Likelihood of success, b) irreparable harm, c) balance of hardships, and d) public interest.

Litigating-Discovery

1) A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.
2) Rule 6 of the Rules Governing Habeas indicates that good cause exists where specific allegations show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that [they are] entitled to relief.
3) Conversely, good cause cannot arise from mere speculation and cannot be ordered on the basis of pure hypothesis.
4) Judge has wide latitude to decide scope of discovery.

Litigating: EAJA fees

- The Equal Access to Justice Act ("EAJA") allows for the recovery of attorney fees if a party prevails in a *civil* suit against the government unless the government can show that its position was "substantially justified or that special circumstances make an award unjust."
- Now, counsel cannot recover EAJA fees in the Fourth, Fifth and Tenth Circuits. *O'Brien v. Moore*, 395 F.3d 499, 505 (4th Cir. 2005);*Barco v. Witte*, 65 F.4th 782, 785 (5th Cir. 2023); *Ewing v. Rodgers*, 826 F.2d 967, 971 (10th Cir.1987).
- The Second and Ninth Circuits permit EAJA recovery in 2241 cases. *Vacchio v. Ashcroft*, 404 F.3d 663 (2d Cir. 2005); *In re Petition of Hill*, 775 F.2d 1037 (9th Cir. 1985).

Problems on the ground with detention/habeas & Questions?

- Timing
  - Ability to get habeas relief before the removal case is completed
- Relief: Release/Bond or Requiring the IJ to set a bond
  - This just adds another delaying factor to complicate timing with the removal case
- DHS invokes automatic stay if bond is granted, adding another layer of complexity
- Pro Hac Vice issues
- Anticipating Government Response if Habeas docket goes crazy
- Feel free to raise your hand if you have any questions about the practical issues with filing for Habeas

Practicing in a shifting landscape

Q&A