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Aleksandar Cuic

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# THE TRUMP ADMINISTRATION AND IMMIGRATION JUDGES: DECREASED JUDICIAL INDEPENDENCE OR INCREASED EFFICIENCY?

*Aleksandar Cuic\**

*Through the Attorney General, the Trump administration has changed asylum and immigration policies in several ways. In 2018, former-Attorney General Sessions used his referral power to overturn an immigration court's determination that victims of domestic violence are eligible for asylum as members of a "particular social group." In the same year, the Attorney General issued a decision that prohibits immigration judges from administratively closing cases. Lastly, then-acting Attorney General Whitaker certified a case that raised a question as to whether membership in a family is a "particular social group" under asylum law. This article explores a question raised by these recent developments: is Trump administration's approach to immigration judges an attempt to decrease those judges' independence or merely to increase the immigration system's efficiency?*

Imagine this factual scenario:

A mother from rural Guatemala, married at the age of seventeen, is repeatedly abused by her spouse. He breaks her nose, throws paint thinner on her, burning her breasts, and repeatedly rapes her. She seeks protection from local law enforcement who do not arrest the spouse nor, simply put, do much of anything. However, and as a result of police

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\* Aleksandar Cuic is an adjunct professor of law at Case Western Reserve University School of Law, and partner at Robert Brown LLC, a prominent immigration law firm. He oversees the firm's litigation practice, focusing largely on removal/deportation defense matters and general litigation. He is also well-versed in the firm's family-based immigration practice, which includes preparation of immigrant visas, consular processing and naturalization and citizenship matters. His background in legal ethics is a trademark of both his practice style and is a value that is prized by the firm. Prior to his arrival at Robert Brown LLC, Aleksandar was a solo practitioner, working in the field of general litigation and legal ethics. He received his Juris Doctorate from the Cleveland Marshall School of Law and is admitted to practice law in the State of Ohio. He also received a Master's in Business Administration from the Cleveland State University College of Business. Aleksandar is a graduate of Bowling Green State University, where he majored in International Business and Russian Language/Culture.

involvement, the abuse increases. Seeking protection, she goes to stay with her father. But each time she does, her husband finds her, and threatens to kill her unless she returns home. Returning home, the abuse continues and increases. She escapes to a nearby city of roughly 3,000,000 inhabitants and he finds her again. She, like many victims of domestic abuse, returns home to the same cycle of abuse. With nowhere to turn, she, along with her three minor children, makes the roughly 1,800 mile trek from Guatemala to the United States to seek asylum.

In the United States, “The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General ... if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee,”<sup>1</sup> as defined under the Immigration and Nationality Act.<sup>2</sup>

Thus, not only must the applicant meet the discretionary authority of the Secretary of Homeland Security or the Attorney General, but also the applicant must be a “refugee,” defined as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>3</sup>

For years, Asylum and Refugee law in the United States struggled with gender-based asylum claims,<sup>4</sup> and even more so when such claims involved private actions such as domestic abuse. Simply put, where does this Guatemalan victim fit into the definition?

As all will agree, legal precedent meandering its way through the judicial system takes time irrespective of area of law—Immigration Law included. In 1985, in the Matter of Acosta, the Board of Immigration Appeals (BIA), the appellate body of US Immigration

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1. 8 U.S.C § 1158 (b)(1)(A).

2. *Id.* at § 1158 (b)(1)(B)(i).

3. 8 U.S.C. § 1101 (a)(42)(A).

4. *See Gender-Based Asylum Claims: Before and After Matter of A-R-C-G-*, NAT’L IMMIGR. JUST. CTR., <https://www.immigrantjustice.org/resources/gender-based-asylum-claims-and-after-matter-r-c-g> [https://perma.cc/84LD-3MNL] (outlining the history of case law regarding gender-based asylum claims).

Courts, found that “sex” amongst other “common, immutable characteristics” can meet the “particular social group” definition for purposes of asylum.<sup>5</sup> Eleven years later, in *Matter of Kasinga*, the BIA expanded *Matter of Acosta*, finding that “young women of the Tchamba-Kunsuntu Tribe who have not had [Female Genital Mutilation], as practiced by that tribe, and who opposed the practice” also met the particular social group definition for purposes of Asylum.<sup>6</sup> The rationale in *Kasinga* not only supported *Acosta*, but also implicitly (perhaps) addressed private actions in terms of asylum; Female Genital Mutilation as a form of persecution not done by a government actor, but private persons—here, a tribe.

In the years that followed, Legacy Immigration Naturalization Service (INS),<sup>7</sup> Immigration Judges, the Board of Immigration Appeals, and Circuit Courts, all of whom in one way or another, render asylum-related decisions, issued decisions for, and against, domestic violence-based asylum claims.<sup>8</sup> Getting approved was essentially premised on the adjudicator’s subjective definition of asylum.<sup>9</sup> Eventually, on August 26, 2014, nearly 29-years after *Acosta*, the Board of Immigration Appeals issued a three member panel<sup>10</sup> decision in *Matter of A-R-C-G- et al.*<sup>11</sup> In the decision, the BIA held:

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5. 19 I&N Dec. 211, 233 (BIA 1985).
  6. 21 I&N Dec. 357, 357 (BIA 1996).
  7. Stephen R. Viña, CONG RESEARCH SERV., RS21410, INS REORGANIZATION UNDER THE HOMELAND SECURITY ACT OF 2002: EFFECTIVE DATES AND DUAL ROLES (2003). Now reorganized as sub-agencies within the Department of Homeland Security as the United States Citizenship and Immigration Service (USCIS), US Immigration and Customs Enforcement (ICE) and US Customs and Border Protection (CBP). *Id.*
  8. *See Matter of R-A-*, 22 I&N Dec. 906, 928 (BIA 1999) (reversing an Immigration Judge’s grant of asylum based on domestic violence in finding that “Congress did not intent the “social group” category to be an all-encompassing residual category for persons facing genuine social ills”); *see also* Asylum and Withholding Definitions, 65 Fed. Reg. 76588-98 (proposed Dec. 7, 2000) (proposing changes to the definition of persecution and particular social group to allow for domestic violence victims to qualify for asylum claims).
  9. *See generally* Stuart Anderson, *The Sessions Asylum Decision: What Are Its Implications?*, FORBES (June 13, 2018, 12:26 AM), <https://www.forbes.com/sites/stuartanderson/2018/06/13/the-sessions-asylum-decision-what-are-its-implications/#1cb621b6776b> [<https://perma.cc/WU6B-KX4D>](exploring Jeff Session’s view affecting the previous legal definition and policy regarding domestic violence based asylum claims).
  10. For Immigration practitioners, a rarity as most appellate decisions are adjudicated by a single board member. *See* 8 CFR §1003.1(e)(3) and

“that the lead respondent, a victim of domestic violence in her native country, is a member of a particular social group composed of “married women in Guatemala who are unable to leave their relationship.”<sup>12</sup>

Admittedly, the BIA’s holding in A-R-C-G- did not cure all ills. Questions remained: does this holding apply only to “married women” or “Guatemalan women?” Is it inapplicable to men? Even with those questions and others, immigration practitioners at least had something to hang their hats on. With this holding, however, our imagined factual scenario became reality and the Guatemalan victim above was granted asylum.

Now, let’s imagine again:

Matter of A-R-C-G-, following precedent developments beginning with *Acosta* from 1985, is used before our nation’s Immigration Courts and USCIS Asylum Offices. Victims and their children, who make dangerous—often deadly—journeys to our borders to seek refuge, finally obtain protection for the first time in their lives. While not perfect nor guaranteed, at least there is a chance. Then, less than four years later, with the stroke of a pen, Matter of A-R-C-G- is overruled by a single person.

On March 7, 2018, Attorney General Jeff Sessions, under the authority vested in him,<sup>13</sup> directed the Board of Immigration Appeals to refer, for his unfettered review, a case arising from the Charlotte Immigration Court.<sup>14</sup> Like the Respondent in A-R-C-G-, the case involved a victim of domestic violence, this time from El Salvador.<sup>15</sup> In 2015, an Immigration Judge denied her request for asylum and the Respondent appealed.<sup>16</sup> The Board of Immigration Appeals, citing to Matter of A-R-C-G-, sustained the appeal, granted her request for asylum, and remanded the case back to the Immigration Judge to comply with required background checks as required under 8 CFR §1003.1(d)(6).<sup>17</sup> However, upon remand, and

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(e)(6).-(detailing the circumstances that may be assigned for review by a three-member panel).

11. 26 I&N Dec. 388 (BIA 2014).
12. *Id.* at 388-9.
13. See 8 C.F.R. §1003.1(h)(1)(i) (“The Board shall refer to the Attorney General for review of its decision all cases that...[t]he Attorney General directs the Board to refer to him.”).
14. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).
15. *Id.* at 321.
16. *Id.*
17. *Id.* at 321-2. Said regulation provides “the Board shall not issue a decision affirming or granting to an alien an immigration status, relief or

after security checks were cleared by the Department of Homeland Security, the Immigration Judge did not render a decision.<sup>18</sup> Instead, the Immigration Judge certified the case back to the BIA for, what he perceived, was intervening case law following the Fourth Circuit's decision in *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017).<sup>19</sup> Once jurisdiction returned to the BIA, Attorney General Sessions began his review.<sup>20</sup>

Then, on June 11, 2018, Attorney General Sessions issued his decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).<sup>21</sup> In *Matter of A-B-*, the Attorney General not only streamlined what "membership in a particular social group" should now be,<sup>22</sup> but also specifically targeted the holding in *Matter of A-R-C-G-*.<sup>23</sup> Explicitly, he stated that A-R-C-G- "was wrongly decided,"<sup>24</sup> "should not have been issued,"<sup>25</sup> and that the decision was issued "contrary to the appropriate way that the Board has in the past, and must in the future, approach such asylum claims."<sup>26</sup> As a result, in the opening section of his decision, the Attorney General stated "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."<sup>27</sup>

So, where does this leave us now? On an immigration practitioner level, seeking asylum for victims of private actors, especially for victims of domestic violence, has clearly been impacted. We must now refocus and reevaluate our clients' claims in terms of particular social groups as newly defined. We must also evaluate whether those

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protections from removal ... if...identity, law enforcement, or security investigations or examinations have not been completed during the proceedings." 8 CFR §1003.1(d)(6)(i)(A).

18. *See id.* (mentioning the order by the immigration judge administratively sending the matter back to the Board, instead of ruling).
19. *Id.* For a full background on this matter, particularly the Amicus Brief of sixteen former Immigration Judges and Board of Immigration Appeal Members, *see Backgrounder and Briefing on Matter of A-B-*, UC HASTINGS CTR. FOR GENDER AND REFUGEE STUD., <https://cgrrs.uchastings.edu/matter-b/background-and-briefing-matter-b> [<https://perma.cc/75SU-RRX3>].
20. *Matter of A-B-*, 27 I&N Dec. at 322-3 (A.G. 2018).
21. *Id.* at 316.
22. *Id.* at 320.
23. *Id.* at 317, 319.
24. *Id.* at 333.
25. *Id.*
26. *Id.* at 334.
27. *Id.* at 317.

individuals who were granted protection under A-R-C-G- are still safe to seek permanent residency as the underlying basis of their eligibility is now invalid.<sup>28</sup>

On a national scale, Matter of A-B- had furthered what many perceive to be the continued undermining of Immigration Judges' authority and independence.<sup>29</sup> Unlike judges in the Judicial Branch, who are given authority and independence under Article III of the Constitution, Immigration Judges are "administrative law judges" under the Administrative Procedures Act of 1946.<sup>30</sup> They work within the Department of Justice, now led by the Attorney General.<sup>31</sup> In fact, prior to issuing Matter of A-B-, Attorney General Sessions issued yet another decision in Matter of Castro-Tum, which stripped the Immigration Judges' authority to administratively close proceedings for various reasons.<sup>32</sup> Attorney General Sessions stated "I conclude

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28. *Id.* For those granted asylum, they are eligible for permanent residency (commonly referred to a green card status) one year after the grant of asylum. 8 USC §1159(1).
29. Maria Sacchetti, *Immigration Judges' Union Calls for Immigration Court Independent from Justice Department*, WASH. POST (Sept. 21, 2018), [https://www.washingtonpost.com/local/immigration/immigration-judges-union-calls-for-immigration-courts-independent-from-justice-department/2018/09/21/268e06f0-bd1b-11e8-8792-78719177250f\\_story.html?utm\\_term=.6009fc4c8414](https://www.washingtonpost.com/local/immigration/immigration-judges-union-calls-for-immigration-courts-independent-from-justice-department/2018/09/21/268e06f0-bd1b-11e8-8792-78719177250f_story.html?utm_term=.6009fc4c8414) [<https://perma.cc/8965-2BVZ>].
30. Administrative Procedure Act of 1946, Pub.L. 79-404, 60 Stat. 237; Alexander Manuel, *Judges and the Administrative State*, ABA J. (May 9, 2018, 8:30 AM), [http://www.abajournal.com/news/article/judges\\_and\\_the\\_administrative\\_state](http://www.abajournal.com/news/article/judges_and_the_administrative_state) [<https://perma.cc/F6RZ-DGA9>].
31. Emma Platoff, *Immigration Judges are Expected to be Impartial. But They Report to Jeff Sessions*, TEXAS TRIBUNE (Aug. 15, 2018, 12:00 AM), <https://www.texastribune.org/2018/08/15/immigration-judges-report-prosecutors-jeff-sessions-justice-department/> [<https://perma.cc/LJJ3-SLB2>].
32. 27 I&N Dec. 271 (A.G. 2018). This tool allowed Judges to remove active cases from their dockets or temporarily pause proceedings often times to allow the Respondent to seek collateral relief or for purposes of judicial economy.—*See* Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012) (stating an immigration judge may close a proceeding even if either party opposes); *see also* Matter of W-Y-U-, 27 I&N Dec. 17 (BIA 2017) (regarding when an immigration judge may close a proceeding).—It is noted, that for some cases that have already been administratively closed, the Department of Homeland Security is planning, under the Trump Administration's direction, to re-calendar, or move the Court to place cases back on its' active docket, 8,000 cases this upcoming fiscal year alone. *8,000 New Ways the Trump Administration is Undermining Immigration Court Independence*, THE HILL (Aug. 9, 2018), <http://thehill.com/opinion/immigration/402542-8000-new-ways-the-trump-administration-is-undermining-immigration->

that immigration judges and the Board lack the general authority to administratively close cases.”<sup>33</sup>

Matter of Castro-Tum involves the case of a Guatemalan individual whose proceedings were before the Honorable Steven Morely of the Philadelphia Immigration Court.<sup>34</sup> After missing several Court proceedings, the Immigration Judge administratively closed Castro-Tum’s proceedings as he had concerns over whether hearing notices were properly being served.<sup>35</sup> It seems the area where Castro-Tum resided was known to have issues with mail.<sup>36</sup> Under the Judge’s rationale, if Castro-Tum was not getting notices of his hearings, a due process issue existed.<sup>37</sup> On appeal, the BIA disagreed and remanded the case to the same Judge with instructions to schedule another hearing and, should Respondent fail to appear again, to order him removed in absentia.<sup>38</sup> Another hearing was scheduled 12 days later and this time, instead of administratively closing proceedings, the Immigration Judge issued a continuance believing 12 days was not enough notice to afford due process.<sup>39</sup>

Learning of the Continuance order, the Executive Office for Immigration Review (EOIR), under the Department of Justice, removed Judge Morely from Castro-Tum’s matter, and assigned a judge from Virginia to hear this case.<sup>40</sup> The substitute judge then ordered Castro-Tum to be removed from the United States.<sup>41</sup> On the day of the hearing with the new judge from Virginia, Judge Morely

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court?utm\_source=Recent%20Postings%20Alert&utm\_medium=Email  
&utm\_campaign=RP%20Daily [https://perma.cc/TW5L-9UAV].

33. Matter of Castro-Tum, 27 I&N Dec. 271, 294 (A.G. 2018).
34. *Id.* at 278.
35. *Id.* at 280.
36. Dann Cuellar, *Philadelphia’s New Postmaster Hears Irate Residents’ Complaints*, ABC 6: ACTION NEWS (Mar. 1, 2018), <https://6abc.com/community-events/philadelphias-new-postmaster-hears-irate-residents-complaints/3127191/> [https://perma.cc/ZP92-7AHE].
37. *See generally* Matter of Castro-Tum, 27 I&N Dec. at 280 (A.G. 2018) (stating that the judge expressed concern that the respondents were not getting adequate notice of their hearings.).
38. *Id.* at 280-1.
39. *See id.* (outlining the judge’s various continuances in the case).
40. Tal Kopan, *Immigrant ordered deported after Justice Department replaces Judge*, CNN (Aug. 7, 2018), <https://www.cnn.com/2018/08/07/politics/immigration-judge-replaced-deportation-case-justice-department/index.html> [https://perma.cc/BTZ6-RHGK].
41. *Id.*

“was working and heard all his other cases as scheduled.”<sup>42</sup> Why, then, was Judge Morley removed? Whether Judge Morely’s repeated continuances and equitable assistance for Castro-Tum was proper—and that is debatable from all sides—the action of removing a Judge because of what he perceived was a violation of due process further raises the question of Immigration Judges’ independence on the bench.

Interestingly, the issue of Castro-Tum has resulted in Immigration Judges pushing back. A grievance was filed in early August 2018 by the National Association of Immigration Judges on behalf of Judge Morley’s removal from Castro-Tum’s matter as well as eighty-six (86) other cases of his that were sought to be certified to the Attorney General and/or reassigned to other judges.<sup>43</sup> With this grievance, for the first time that I can recall in my practice as an immigration attorney, judges are now vocal.

Speaking on behalf of the Union, Afsaneh Ashley Tabaddor, an Immigration Judge sitting in the Los Angeles Immigration Court, stated, “[t]he decisional independence of immigration judges is under siege” and “[i]f allowed to stand, the agency can simply forum-shop its cases for the outcome it wishes to achieve.”<sup>44</sup> Judge Tabaddor’s position was recently backed by the Union’s Vice President, Judge Amiena Khan of the New York Immigration Court, saying the removal of Judge Morely “is another transparent way, surprisingly transparent in this instance, for the agency to come in and re-create the ideology of this whole process more towards a law enforcement ideology.”<sup>45</sup>

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42. *Id.*

43. Tal Kopan, *Immigration judge removed from cases after perceived criticism of Sessions*, CNN (Aug. 8, 2018), <https://www.cnn.com/2018/08/08/politics/immigration-judges-justice-department-grievance/index.html> [https://perma.cc/72HR-T683]; Kartikay Mehrotra, *Immigration Judges Cry Foul on Sessions Role in Deportation*, BLOOMBERG (Aug. 8, 2018, 2:51 PM EDT), <https://www.bloomberg.com/news/articles/2018-08-08/immigration-judges-cry-foul-on-sessions-role-in-deportation-case> [https://perma.cc/DE2D-AAY4].

44. Claudia Lauer, *Immigration Judges Accuse DOJ of Undermining Independence*, U.S. NEWS (Aug. 8, 2018), <https://www.usnews.com/news/us/articles/2018-08-08/immigration-judges-accuse-doj-of-undermining-independence> [https://perma.cc/P49D-BUAR].

45. Antonio Olivo, *Immigration Judges, Worried Trump is Seeking to Cut Them Out, Fight Back*, WASH. POST (Aug. 9, 2018), [https://www.washingtonpost.com/local/social-issues/immigration-judges-worried-trump-is-seeking-to-cut-them-out-fight-back/2018/08/09/3d7e915a-9bd7-11e8-8d5e-c6c594024954\\_story.html?utm\\_term=.1ae5e6b5fde7](https://www.washingtonpost.com/local/social-issues/immigration-judges-worried-trump-is-seeking-to-cut-them-out-fight-back/2018/08/09/3d7e915a-9bd7-11e8-8d5e-c6c594024954_story.html?utm_term=.1ae5e6b5fde7) [https://perma.cc/5DUF-UEYS].

Now, let's imagine one more time:

The Immigration system is indeed broken and the Trump Administration, through his Attorney Generals is trying to fix it and is actually getting it right.

Let that sink in and ask yourself: is it even possible? The Immigration Court system is currently at a backlog of over 730,000 cases nationwide with an average completion of 717 days.<sup>46</sup> The 717 days does not include adjudication times with the United States Citizenship and Immigration Service, the Board of Immigration Appeals, or Federal Circuit Courts. Adding in those additional layers, immigration cases can take, and often do take, several years to resolve.<sup>47</sup> Are cases like *Castro-Tum*, where the Respondent missed numerous hearings without finality, only adding to this backlog? Are cases like *A-R-C-G-* expanding our nation's immigration laws beyond what Congress clearly intended? That's not for me or the reader to decide. What we are left with, however, is this: if this current Administration is doing the right thing, given our current social and political climate, the message conveyed is not bringing the varying sides of the Immigration debate closer together.

On November 7, 2018, Attorney General Sessions resigned<sup>48</sup> yet the office continues its focus on immigration law. On December 3, 2018, less than a month after Sessions' resignation, acting Attorney General Matthew Whitaker certified another precedential case.<sup>49</sup> This time, the question is whether or not membership in a family unit is a particular social group under asylum law.<sup>50</sup> Under *Matter of L-E-A-*, the Board of Immigration Appeals held that it was.<sup>51</sup> Based on recent trends, one would assume *L-E-A-* will not survive the Attorney General's review.

With the immigration debate, I've always said on a scale of 1 to 10, people are either a 1 or a 10. Debates often pit those that hold family unity in high regard wanting a strict immigration policy that results in the separation of families versus those that wish to abolish

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46. See Immigration Court Backlog Tool, TRAC IMMIGRATION (last visited Nov. 10, 2018), [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) [<https://perma.cc/UEZ5-PRTX>].

47. *Id.*

48. Devin Barrett et al., *Jeff Sessions forced out as attorney general* (Nov. 7, 2018) [https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b\\_story.html](https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html) [<https://perma.cc/7CKB-5UEN>].

49. *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017)

50. *Id.* at 42-3.

51. *Id.*

Immigration and Customs Enforcement and open our borders while simultaneously locking their doors at night in their homes. Now, these are extreme examples but they do exist. I, too, share in this debate on personal and professional levels.

This all said, let's not forget that we are a nation of compassion. Let's also not forget, "we are a nation of laws and not men."<sup>52</sup> But the recent opinions by former Attorney General Sessions<sup>53</sup> outlined herein, whose authorization is vested under the law, blur this line. And the result?

The debate rages on.

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52. Attributed to our second President John Adams.

53. Note that he incorporated the use of "I" throughout his analysis.