Comments in Response to "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review", 85 Fed Reg. 36264-36306 (Jun. 15, 2020)

Dear Sir or Madam: the attached comments are in response to the publication at 85 Fed Reg. 36264-36306 (Jun. 15, 2020) of "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review", by the Department of Homeland Security and the Department of Justice.

I am filing these comments on behalf of myself, Andrew Arthur, and on behalf of the Center for Immigration Studies, a Washington, DC-based independent, non-partisan, non-profit, research organization, where I am the Resident Fellow in Law and Policy.

The Center for Immigration Studies

Since its founding in 1985 by Otis Graham Jr., the Center for Immigration Studies has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. Staff at the Center has testified before Congress over 130 times, and our research has been cited by the Supreme Court, among others.

My Background

I began my legal career through the Attorney General's Honors Program as a clerk to Administrative Law Judge Joseph E. McGuire in the Office of the Chief Administrative Hearing Officer at the United States Department of Justice, Executive Office for Immigration Review. After a two-year clerkship with Judge McGuire, I received a second Honors Program appointment as a Trial Attorney in the San Francisco District Counsel's Office, and later the Baltimore District Counsel's Office, of the former Immigration and Naturalization Service (INS).

In 1999, I was promoted to the INS's General Counsel's Office in Washington DC, first as an Associate General Counsel, and later as an Assistant General Counsel and Acting Chief of the INS National Security Law Division. In the General Counsel's Office, I supervised attorneys handling cases involving espionage, terrorism, and persecutors. He also advised the Attorney General, Deputy Attorney General, and INS Commissioner on issues relating to national security.

In July 2001, I left the INS to become a Counsel on the House Judiciary Committee, where I performed oversight of immigration issues and drafted legislation. After five years at House Judiciary, I was appointed to the immigration bench, serving for eight years as an Immigration Judge at the York Immigration Court in York, Pennsylvania.

At the beginning of the 114th Congress, I left the bench and came back to Capitol Hill, where I served as Staff Director of the National Security Subcommittee at House Oversight and Government Reform before taking retirement from federal service in September 2016. I have been with the Center for Immigration Studies since April 2017.

I am a non-practicing attorney, but a member in good standing of the bar of the Maryland Court of Appeals.

Introduction to Comments on Part II, Sections C and D in the JNPR

On June 15, the Department of Justice (DOJ) and the Department of Homeland Security (DHS) issued a Joint Notice of Proposed Rulemaking (JNPR)[1] to make various changes to the immigration regulations. That JNPR contains a significant number of proposed amendments to the regulations governing asylum under section 208 of the Immigration and Nationality Act (INA)[2], statutory withholding of removal under section 241(b)(3) of the INA[3], and immigration applications pursuant to the Convention Against Torture (CAT)[4]. Most of those amendments codify existing case law, although certain of them modify existing standards and procedures.

Background on Asylum

There are many different immigration benefits that an alien who is seeking to enter and remain in the United States may pursue. Family-based visas are available to those with qualifying relatives, and employment-based visas may be pursued by those with needed skills. If an alien has neither an employer nor a family member to file a petition, the alien could pursue a diversity visa through the visa lottery.

For many seeking to enter the United States without a visa, however, an asylum application is the vehicle they choose.

An applicant for asylum has the burden to demonstrate that he or she is eligible for that protection.[5] To satisfy that burden, the applicant must prove that he or she is a refugee.[6]

A "refugee" is a person outside of his or her country of nationality or habitual residence who is "unable or unwilling" to return to 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."[7] As

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[1] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236).
[2] Section 208 of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.
[3] Section 241(b)(3) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim
[4] *See Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections*, U.S. DEP'T OF JUSTICE (Jan. 15, 2009) ("CAT protections relate to the obligations of the United States under Article 3 of the United Nations Convention Against Torture. This is an international treaty provision designed to protect aliens from being returned to countries where they would more likely than not face torture. Torture is defined, in part, as severe pain or suffering (physical or mental) that is intentionally inflicted by or at the instigation of or with the consent or acquiescence of a public official, or other person acting in an official capacity. Under this treaty provision, the United States agrees not to "expel, return, or extradite" aliens to another country where they would be tortured."), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf.
[5] 8 C.F.R. § 1208.13(a), available at: https://www.law.cornell.edu/cfr/text/8/208.13.
[6] *See* section 208(b) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.
[7] Section 101(a)(42) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1101&num=0&edition=prelim.

the JNPR[8] notes: "The requirement that the fear be on account of one of the five grounds is commonly called the 'nexus requirement.'"

The "well-founded fear" bar is not a high one. The regulation governing asylum eligibility explains:

> *An applicant has a well-founded fear of persecution if:*
>
> *(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;*
>
> *(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and*
>
> *(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.*[9]

The first and third factors above are subjective, that is, individual to the applicant. The second is objective, meaning that the adjudicator must conclude that such persecution would occur, not just that the applicant thinks it would.

In *INS v. Cardoza-Fonseca*[10], the Supreme Court fleshed out the parameters of this standard: "One can certainly have a well founded [*sic*] fear of an event happening when there is less than a 50% chance of the occurrence taking place." In fact, the Court suggested that a 10-percent likelihood of persecution may be sufficient.

There are generally two different processes by which an alien may apply for asylum: the affirmative asylum process and the defensive asylum process.[11] To obtain asylum through the affirmative asylum process, an alien must be physically present in the United States, and may apply for asylum status regardless of how the alien arrived in the United States or the alien's current immigration status.[12] Those applications are filed with U.S. Citizenship and Immigration Services (USCIS), followed by a non-adversarial interview (that is, without confrontation or cross-examination by a government attorney) by an asylum officer (AO); if that application is denied, the alien can renew the application in removal proceedings before an immigration judge (IJ)[13], an adjudicator within DOJ's Executive Office for Immigration Review (EOIR).

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[8] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36281 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[8] Section 208 of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf

[9] 8 C.F.R. § 208.13(b)(2)(i) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.13.

[10] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1980), available at: https://supreme.justia.com/cases/federal/us/480/421/.

[11] *See Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES. (last updated Oct. 19, 2015), *available at*: https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states

[12] *Id.*

[13] *Id.*

A defensive application for asylum is filed when an alien is seeking asylum as a defense against removal from the United States.[14] For asylum processing to be defensive, the alien must be in removal proceedings in immigration court.[15] Before an alien can file such an application, the IJ must have found that the alien is removable, because the alien entered without inspection or on some other ground.[16] Those proceedings are adversarial, with the United States represented by an attorney from U.S. Immigration and Customs Enforcement (ICE).[17]

Background on Statutory Withholding of Removal

Statutory withholding of removal[18] is similar to asylum, but the standards for that protection are higher, and the benefits available to an alien granted withholding of removal are fewer.

Specifically, under the statutory withholding provision in section 241(b)(3)(A) of the INA[19], an alien may not be removed "to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." This has been interpreted to require the alien to "establish that it is more likely than not" such persecution would occur upon removal to the country in question to be granted statutory withholding of removal[20], a significantly higher burden than showing a "well-founded fear."

An alien can only be granted statutory withholding after the alien has been ordered removed.[21] An alien granted statutory withholding can be removed to a "third country" — just not any country to which that protection has been extended (and not rescinded).[22] For example, to grant statutory withholding when I was an immigration judge, I had to first order the applicant removed, and then withhold removal to the country or countries in question.

Aside from withholding the removal of the alien to such countries, aliens granted statutory withholding are eligible for employment authorization[23], but not much else. They are not placed on a path to lawful permanent residence, and therefore cannot, unless otherwise eligible, be naturalized.

Aliens generally apply for statutory withholding instead of asylum for one of three reasons: (1) they have failed to establish that they are eligible for asylum in the exercise of discretion (asylum is discretionary

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Section 241(b)(3) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.
[19] *Id*.
[20] *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections*, U.S. DEP'T OF JUSTICE (Jan. 15, 2009), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf.
[21] Andrew Arthur, *SCOTUS: Courts Can Review Factual Challenges to CAT Denials for Criminal Aliens, Moving the goal posts to find jurisdiction*, CENTER FOR IMMIGRATION STUDIES (Jun. 3, 2020), available at: https://cis.org/Arthur/SCOTUS-Courts-Can-Review-Factual-Challenges-CAT-Denials-Criminal-Aliens.
[22] *Id*.
[23] *See* 8 C.F.R. 274A.12(a)(10) (2020), available at: https://www.law.cornell.edu/cfr/text/8/274a.12.

relief[24], whereas a grant of statutory withholding is mandatory, for any alien who establishes eligibility); (2) they are barred from applying for asylum because they failed to file for that protection within one year of entry[25] (the "one-year bar"); or (3) they are subject to one of the criminal bars to asylum that is not otherwise applicable to statutory withholding[26].

Background on CAT

The United States is a signatory to CAT[27], which it ratified on October 21, 1994. That ratification was not "self-executing", and required congressional legislation to make it effective.

The legislation implementing CAT is section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)[28]. Pursuant to that section, it is the policy of the United States "not to expel, extradite, or otherwise effect the involuntary removal of any person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture."[29] FARRA did not dictate how that policy was to be implemented, instead leaving it up to the "appropriate" executive branch agencies to enact regulations to enforce CAT protections.[30]

Aside from the somewhat vague directions in FARRA, CAT protection is largely regulatory, and the regulations implementing CAT are found in 8 C.F.R. §§ 208.16(c), (d), and (f)[31]; 208.17[32]; 208.18[33]; 1208.16(c), (d), and (f)[34]; 1208.17[35]; and 1208.18[36].

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[24] *Matter of A-B-*, 27 I&N Dec. 316, 345 n. 12 (A.G. 2018), available at: https://www.justice.gov/eoir/page/file/1070866/download. I will discuss this much further, below.
[25] *See* section 208(a)(2)(B) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.
[26] *Compare* section 208(b)(2) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf *with* section 241(b)(3)(B) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.
[27] *See* Michael John Garcia, *The U.N. Convention Against Torture, Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, CONGRESSIONAL RESEARCH SERVICE (Jan. 21, 2009) at 3 (" The United States signed CAT on April 18, 1988, and ratified the Convention on October 21, 1994, subject to certain declarations, reservations, and understandings, including a declaration that CAT Articles 1 through 16 were not self-executing, and therefore required domestic implementing legislation.") available at: https://fas.org/sgp/crs/intel/RL32276.pdf.
[28] *See* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. 105-277, Div. G, Tit. XII, chap. 3, subchap. B, section 2242 (1998), available at: https://www.govinfo.gov/content/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf.
[29] *Id*. at section 2242(a).
[30] *Id*. at section 2242(b).
[31] 8 C.F.R. § 208.16(c), (d), and (f) (DHS, withholding of removal under CAT) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.16.
[32] 8 C.F.R. § 208.17 (2020) (DHS, deferral of removal under CAT), available at: https://www.law.cornell.edu/cfr/text/8/208.17.
[33] 8 C.F.R. § 208.18 (2020) (DHS), available at: https://www.law.cornell.edu/cfr/text/8/208.18.
[34] 8 C.F.R. § 1208.16(c), (d), and (f) (2020) (EOIR, CAT withholding), available at: https://www.law.cornell.edu/cfr/text/8/1208.16.
[35] 8 C.F.R. § 1208.17 (2020) (EOIR, CAT deferral), available at: https://www.law.cornell.edu/cfr/text/8/1208.17.
[36] 8 C.F.R. § 1208.18 (2020) (EOIR, CAT standards), available at: https://www.law.cornell.edu/cfr/text/8/1208.18.

Like statutory withholding, CAT protection is only available to an alien who has been removed from the United States.[37] There are two forms of CAT protection that are available to aliens: withholding of removal[38] and deferral of removal[39]. The latter is a more restrictive protection that is available to applicants for protection who are not eligible for CAT withholding because they fall within one or more of a series of categories barring statutory withholding in section 241(b)(3)(B) of the INA[40] (including the fact that the alien is a persecutor, has been convicted of a particularly serious crime, or poses a danger to the national security of the United States).

The bars to statutory withholding are incorporated into the bars for CAT withholding via regulation.[41] This reflects the fact that, in FARRA[42], Congress directed:

> *To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations described in subsection (b) shall exclude from the protection of such regulations aliens described in section 241(b)(3)(B) of the [INA].*

The drafters of those regulations in the former INS, concluding that they could not bar "aliens described in" the referenced section from protection under CAT, opted instead to create a "less extensive" form of protection, deferral.[43]

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[37] *See* Andrew Arthur*, SCOTUS: Courts Can Review Factual Challenges to CAT Denials for Criminal Aliens Moving the goal posts to find jurisdiction*, CENTER FOR IMMIGRATION STUDIES (Jun. 3, 2020), available at: https://cis.org/Arthur/SCOTUS-Courts-Can-Review-Factual-Challenges-CAT-Denials-Criminal-Aliens.

[38] *See* 8 C.F.R. § 208.16(c), (d), and (f) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.16; 8 C.F.R. § 1208.16(c), (d), and (f) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.16.

[39] *See* 8 C.F.R. § 208.17 (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.17; 8 C.F.R. § 1208.17 (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.17.

[40] *See* section 241(b)(3)(B) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.

[41] *See* 8 C.F.R. § 208.16(d)(2) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.16; 8 C.F.R. § 1208.16(d)(2) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.16.

[42] Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. 105-277, Div. G, Tit. XII, chap. 3, subchap. B, section 2242(c) (1998), available at: https://www.govinfo.gov/content/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf.

[43] *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8481 ("Although aliens who are barred from withholding of removal under § 241(b)(3)(B) of the Act are not eligible for withholding under 208.16(c), the Article 3 implementing statute directs that any exclusion of these aliens from the protection of these regulations must be consistent with United States obligations under the Convention, subject to United States reservations, understandings, declarations, and provisos conditioning ratification. Section 2242(c) of the Foreign Affairs Reform and Restructuring Act of 1998. Article 3 prohibits returning any person to a country where he or she would be tortured, and contains no exceptions to this mandate. Nor do any of the United States reservations, understandings, declarations, or provisos contained in the Senate's resolution of ratification provide that the United States may exclude any person from Article 3's prohibition on return because of criminal or other activity or for any other reason. Indeed, the ratification history of the Convention Against Torture clearly indicates that the Executive Branch presented Article 3 to the Senate with the understanding that it 'does not permit any discretion or provide for any exceptions.'"), available at: https://www.govinfo.gov/content/pkg/FR-1999-02-19/pdf/99-4140.pdf#page=13.

Issues with the Statutory and Regulatory Factors for Protection

As noted, to be granted asylum or withholding of removal, an alien must show a nexus between a statutorily protected ground (race, religion, nationality, membership in a particular social group, and political opinion) and the harm inflicted on the applicant or that the applicant fears.

Harm may be inflicted for many reasons, and sometimes, for no reason at all. The Attorney General[44] has explained the process by which an adjudicator analyzes an asylum claim:

> *The prototypical refugee flees her home country because the government has persecuted her—either directly through its own actions or indirectly by being unwilling or unable to prevent the misconduct of non-government actors—based upon a statutorily protected ground. Where the persecutor is not part of the government, the immigration judge must consider both the reason for the harm inflicted on the asylum applicant and the government's role in sponsoring or enabling such actions. An alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet the asylum statute does not provide redress for all misfortune. It applies when persecution arises on account of membership in a protected group and the victim may not find protection except by taking refuge in another country.*

As the foregoing demonstrates, it is not always easy for an adjudicator to determine whether alleged harm was inflicted or is feared on account of one of the statutorily protected grounds. It is particularly difficult as it relates to two of those grounds, "membership in a particular social group" and "political opinion", the precise definition of which can be vague and somewhat protean.[45] Yet another difficulty arises where harm may be inflicted for several different reasons, so-called "mixed motive" cases, as the Conference Report for the REAL ID Act[46] made clear:

> *The INA requires all aliens seeking asylum to establish that they suffered or fear persecution "on account of'' one of five factors: race, religion, nationality, membership in a particular social group, or political opinion. As the Supreme Court has held: "since the statute makes motive critical, [an asylum applicant] must provide some evidence of it, direct or circumstantial." . . . .*
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> *In explaining the Supreme Court's decision [in* Cardoza-Fonseca*], the Ninth Circuit stated: ``[I]n those cases in which a persecuted activity could stem from many causes, some protected by the statute and others unprotected, the victim must tie the persecution to a*

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[44] *Matter of A-B-*, 27 I&N Dec. 316, 318 (A.G. 2018), available at: https://www.justice.gov/eoir/page/file/1070866/download.

[45] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36277-79 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236) (discussing the history of the interpretation of the phrase "membership in a particular social group"); *id* at 36279-80 (history of the interpretation of the phrase "political opinion"), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[46] H.R. REP. 109-72, at 162 (2005) (Conf. Rep.), available at: https://www.congress.gov/109/crpt/hrpt72/CRPT-109hrpt72.pdf.

> *protected cause. To do this, the victim needs to show the persecutor had a protected basis (such as the victim's political opinion) in mind in undertaking the persecution.'' . . . The BIA has explained the alien's burden as follows: an asylum applicant ``bear[s] the burden of establishing facts on which a reasonable person would fear that the danger arises on account of'' one of the five protected factors. . . .*
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> *The main issue in assessing motivation in an asylum context occurs in so-called ``mixed motive'' cases, where there is more than one possible motive for harm, one protected, others not.*

To address this dilemma, the REAL ID Act[47] added a new section 208(b)(1)(B)(i) to the INA[48], which states:

> *The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of [section 101(a)(42)(A) of the INA]. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be **at least one central reason** for persecuting the applicant. [Emphasis added.]*

Even that definition, however, failed to resolve issues with the vague nature of certain of the statutory factors themselves. This is a significant issue because the adjudicator of an application for asylum or withholding of removal (in the former case an AO or IJ, in the latter an IJ) must generally make those determinations fairly quickly.

And yet, those determinations can have significant ramifications, as the Government Accountability Office (GAO) has noted: "Asylum decisions can have serious consequences. Granting asylum to an applicant with a genuine claim protects the asylee from being returned to a country where he or she has been or could in the future be persecuted." [49]

There are similar issues with CAT. As the foregoing reveals CAT is almost exclusively regulatory (hence the designation "statutory withholding of removal" to distinguish it from CAT withholding of removal). As explained below, however, the CAT regulations as issued were not as clear as they needed to be, which prompted reviewing courts to struggle with the CAT definition, and to expand that protection beyond Congress's intent in ratifying and implementing the convention.

JNPR Amendments to the Standards for Consideration During Review of an Application for Asylum, Statutory Withholding of Removal, and CAT

As explained above, adjudicators rely on "bright-line rules" to follow in making determinations in cases involving applications for asylum, statutory withholding, and CAT. For decades, however, such rules

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[47] REAL ID Act of 2005, Div. B, sec. 101(a)(3) of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. Law 109-13 (2005), available at: https://www.congress.gov/bill/109th-congress/house-bill/1268/text?overview=closed.

[48] Section 208(b)(1)(B)(i) to the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

[49] *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV'T ACCOUNTABILITY OFFICE, GAO-16-50, at 1 (Dec. 2015), *available at:* http://www.gao.gov/assets/680/673941.pdf

have been lacking, or rules were in effect only to be overturned or modified by circuit courts. The JNPR provides many such bright-line rules, which if adopted would guide adjudicators' in their decision-making processes in applications for those protections, consistent with and/or derived from precedent and practice.

Membership in a particular social group

The phrase "membership in a particular social group" is not further defined in the INA.[50] As then-Judge Samuel Alito[51] stated in 1993: "Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a 'particular social group.'" Further, he explained, "neither the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase 'particular social group.'"[52]

The Board of Immigration Appeals (BIA) had undertaken efforts to flesh out the parameters of what constituted a "particular social group" in this context in its 1985 precedential decision, *Matter of Acosta*[53]. It noted that the inclusion of this ground was an "afterthought" in the aforementioned international instruments[54], but concluded that the phrase meant "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic", consistent with the other protected grounds.

In a somewhat famous and oft-repeated passage, it continued:

> *The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However,*

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[50] *See* section 101(a)(42)(A) of the INA (2020) ("The term 'refugee' means (A) any 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 . . . membership in a particular social group . . . . "), available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1101&num=0&edition=prelim; section 208(b)(1)(B)(i) of the INA (2020) ("To establish that the applicant is a refugee within the meaning of [section 101(a)(42)(A) of the INA, the applicant must establish that . . . membership in a particular social group . . . was or will be at least one central reason for persecuting the applicant."), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf; section 241(b)(3)(A) of the INA (2020) ("Notwithstanding paragraphs [241(b)(1) and (2) of the INA], the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's . . . membership in a particular social group. . . "), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.

[51] *Fatin v. INS*, 12 F. 3d 1233, 1238 (3d Cir. 1993), available at: https://scholar.google.com/scholar_case?case=11990936080202514559&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[52] *Id*. at 1239.

[53] *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) *overruled in part by INS v. Cardoza Fonseca*, 480 U.S. 421 (1987) *as recognized by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2986.pdf.

[54] *Id*. at 232.

> *whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.*[55]

The "case-by-case basis" for interpreting "particular social group" continued for decades.[56] One major issue with the test set forth in *Matter of Acosta*, however, was that applicants for asylum and statutory withholding who legitimately had suffered harm or feared harm as a result of common criminality (such as extortion, kidnapping, robbery, and gang recruitment) would often assert that they belonged to social groups based upon their own particular characteristics, which they then claimed made them targets for such crimes, such as "affluent Guatemalans"[57].

Asylum was not, however, intended to provide protection to every foreign national who has suffered harm, even harm that, as Americans, we would consider abhorrent.[58] Many of those cases are extremely sympathetic, however, and courts would often contort the definition to grant protection to an individual who had legitimately suffered, or who had a palpable fear.

To resolve this issue, as the JNPR[59] notes, the BIA started to provide guidelines for IJs to follow in assessing whether proposed groups fit the definition in the late 2000s. In its January 2007 decision in *Matter of A-M-E & J-G-U-*, the BIA held that in determining whether a particular social group qualifies for protection, the adjudicator should consider "whether the group's shared characteristic gives the members the requisite social visibility to make them readily identifiable in society and whether the group can be defined with sufficient particularity to delimit its membership."[60]

Ultimately, in 2014, the BIA issued *Matter of M-E-V-G-*[61], a precedent decision that set boundaries for what was and was not a "particular social group".

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[55] *Id*. at 233.
[56] *Matter of A-B-*, 27 I&N Dec. 316, 318-20 (A.G. 2018) (history of BIA interpretation of the phrase "particular social group"), available at: https://www.justice.gov/eoir/page/file/1070866/download.
[57] *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-75 (BIA 2007), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3550.pdf.
[58] *Fatin*, 12 F.3d at 1240 ("Thus, we interpret Acosta as recognizing that the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional. If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country — and it seems most unlikely that Congress intended such a result."), available at: https://scholar.google.com/scholar_case?case=11990936080202514559&q=fatin+v.+ins&hl=en&as_sdt=10006&as_vis=1.
[59] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36278 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236) ("Nor is the term defined in the United Nations Convention Relating to the Status of Refugees ('Refugee Convention'), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, or the related Refugee Protocol."), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[60] *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3550.pdf.
[61] *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3795.pdf.

First, it renamed the "social visibility" requirement "social distinction", to make clear that it did not mean "ocular . . . visibility" (which had caused come confusion).[62] Next, it held that an alien seeking asylum or statutory withholding claiming "membership in a particular social group" must show that the group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[63]

That formulation brings "membership in a particular social group" in line with the four other protected grounds (and in particular race, religion, and nationality). This is especially true of the "immutability" factor, that is, a characteristic that the applicant either cannot change (like race and national origin) or should not be required to change (like religion or political opinion).

These somewhat straightforward standards were nonetheless subject to litigation and inconsistent application, a point underscored by the Attorney General in *Matter of A-B-*[64]. The JNPR correctly concluded that made "it difficult" for IJs and AOs "to uniformly apply the framework."[65]

To address these issues, the JNPR proposes to codify these standards, as well as "outline several nonexhaustive bases that would generally be insufficient to establish a particular social group"[66]-- most of which are either derived from case law or that expand on the "particular social group" definition in case law.

Specifically, pursuant to the proposals in the JNPR, "without more" an AO or IJ would not grant protection to an applicant based on criminal associations or activities (past or present); "presence in a country with generalized violence or a high crime rate"; "attempted recruitment"; criminal targeting for financial gain (such as robbery or extortion); purely personal disputes and criminal acts of which the government was unaware or in which the government was uninvolved; and status as a national returning from the United States.[67] DHS and DOJ specifically cite in the JNPR to the precedent upon which those statuses were identified and excluded from the definition.[68]

And, significantly, there is precedent for such codification of case law. For example, in paragraph 101(a)(3) of the REAL ID Act[69], Congress added new clauses 208(b)(1)(B)(i), (ii), and (iii) to the INA[70], which relate to the burdens of proof aliens must bear in obtaining asylum, as well as standards to guide credibility assessments by adjudicators. As the Conference Report for that law makes clear, the rules

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[62] *Id*. at 236.
[63] *Id*. at 237.
[64] *See Matter of A-B-*, 27 I&N Dec. 316. 331-32 (A.G. 2018).
[65] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36278 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[66] *Id*. at 36278-79.
[67] *Id*. at 36279.
[68] *Id*.
[69] REAL ID Act of 2005, Div. B, sec. 101(a)(3) of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. Law 109-13 (2005), available at: https://www.congress.gov/bill/109th-congress/house-bill/1268/text?overview=closed.
[70] Subparagraph 208(b)(1)(B)(i), (ii), and (iii) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

and standards therein were based on pertinent case law, and codified such case law, while resolving certain disparities in the application of the law among the circuit courts.[71]

To the degree that the departments rely upon DOJ precedent in specifying those statuses, that is well within the authority of the Attorney General under the INA. Specifically, as section 103(a)(1) of the INA states, "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." Thus, in the INA, Congress explicitly provided the Attorney General (and, by extension, DOJ) with the authority and responsibility for interpreting the provisions therein.

Note that the Supreme Court has held, "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[72] In those instances where DOJ has relied upon BIA or Attorney General precedent in formulating this policy in the JNPR, it has essentially done both: by ad hoc litigation subsequently incorporated into general rule, which is subject to notice and comment.

Two of the identified statuses are new: "past or present terrorist activity or association" and "past or present persecutory activity or association". To the degree that terrorists and persecutors are already limited in their ability to seek asylum[73] and statutory withholding[74], this is unexceptional.

One caveat: aliens who have engaged in terrorist activity are not explicitly barred from receiving statutory withholding, however, where "there are reasonable grounds to believe that the alien is a danger to the security of the United States"[75], they are. Any alien who has been active in or associated with a terrorist organization, even one whose terrorism is not directed at the United States or its institutions, however, poses a danger to our foreign policy, and therefore our national security.

Plus, as the JNPR[76] explains:

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[71] H.R. REP. 109-72, at 162 (2005) (Conf. Rep.) ("Paragraph 101(a)(3) codifies case law standards for granting asylum, both to resolve conflicts between fora and to codify precedential rules."); *see also id*. ("First, that paragraph would create a new clause 208(b)(1)(B)(i) in the INA. This clause codifies existing regulations and case law standards stating that the burden of proof is on the asylum applicant to establish eligibility as a refugee. This clause also will clarify the standard that an asylum applicant must meet to establish the motivation for persecution claimed."); *id*. at 165 ("Clauses 208(b)(1)(B)(ii) and (iii), added by paragraph 101(a)(3) of Division B, will bring clarity and consistency to evidentiary determinations by codifying standards for determining the credibility of applicant testimony, and determining when corroborating evidence may be required."), available at: https://www.congress.gov/109/crpt/hrpt72/CRPT-109hrpt72.pdf.

[72] *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) ("*Chenery II*"), available at: https://supreme.justia.com/cases/federal/us/332/194/.

[73] *See* sections 208(b)(2)(A)(i) and (v) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

[74] *See* sections 241(b)(3)(B)(i) and (iv) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.

[75] *Id*. at section 241(b)(3)(iv) of the INA.

[76] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36279 n. 29 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

> *Just as past criminal associations cannot establish a particular social group, neither past association with terrorists or past association with persecutors warrants recognition as a particular social group. To do so would reward membership in organizations that cause harm to society and create a perverse incentive to engage in reprehensible or illicit behavior as a means of avoiding removal.*

The veracity of that statement is self-evident.

Even an alien asserting fear based on one of the enumerated statuses, however, can still receive protection (to the extent that they are not barred from applying for[77] or being granted asylum[78] or statutory withholding[79]). They simply need to show "more", that is, for example, that they were targeted by criminals or for recruitment based on a recognized protected status.[80] Those are examples of the "mixed-motive" cases referenced above.[81]

In addition to the substantive amendments to the regulations above, the JNPR also proposes procedural changes to the application process for asylum and statutory withholding claims before IJs.[82] Specifically:

> *While in proceedings before an immigration judge, the alien must first define the proposed particular social group as part of the asylum application or otherwise in the record. If the alien fails to do so while before an immigration judge, the alien will waive any claim based on a particular social group formulation that was not advanced.*[83]

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[77] *See* section 208(a)(2) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

[78] *See* sections 208(b)(2)(A) through (C) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf. Note that Congress explicitly distinguished between aliens who are barred from even applying for asylum, in section 208(a)(2) of the INA, and those who can apply for that protection, but are barred from receiving it. This is a distinction with a difference, as in the former instances there is no requirement that the aliens described be allowed to apply for asylum, at all.

[79] *See* section 241(b)(3)(B) of the INA, available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.

[80] *Id*. at 36279 ("At the same time, the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society-specific nature of this determination.").

[81] *See* section 208(b)(1)(B)(i) of the INA (2020) ("To establish that the applicant is a refugee within the meaning of [section 101(a)(42)(A) of the INA], the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion **was or will be at least one central reason for persecuting the applicant**.") (emphasis added), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

[82] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36279 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[83] *Id*.

As the JNPR notes, that requirement is premised upon the BIA's decision in *Matter of W-Y-C- & H-O-B-*[84], which itself also references prior precedent. Inasmuch as it does so, the assessment of the legality of and support for the codification of precedent, above, applies as well.

The JNPR does not impose an onerous burden. As I have recently explained[85]:

> *[T]he idea behind asylum, statutory withholding, and CAT is that a foreign national has come to this country seeking protection for specific reasons (and in particular, fearing harm from a specific source). Therefore, even an unrepresented alien respondent should be expected to explain what those reasons are, whom and what the alien fears, and why.*

It is absolutely critical that both ICE and the IJ know exactly what the alien's claim is at the time of the hearing, albeit for different reasons. As the BIA[86] has held:

> *Removal proceedings, which are adversarial in nature, are designed to provide the parties with an opportunity to develop the record by presenting evidence and testimony before an Immigration Judge, who makes the necessary factual findings and legal conclusions based on the claims presented.*

Requiring an asylum applicant to define the claimed social group with specificity allows the ICE attorney to play his or her role in that adversarial proceeding, and in particular to probe whether any harm claimed or feared was or would be on account of the grounds asserted by the applicant, or whether there may be some other motivation (assuming the alien's claim is credible)[87].

That requirement would also permit the IJ to play his or her role[88] of developing and protecting the record in the proceedings. More importantly, however, it would enable the IJ to more quickly assess the merits (or lack thereof) of the alien's asylum claim. Not only is this a key regulatory responsibility[89], but

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[84] *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 190-91 (BIA 2018) ("It is an applicant's burden to establish her claim for relief or protection on the record before the Immigration Judge. . . . Therefore an applicant for asylum or withholding of removal must 'clearly indicate' on the record before the Immigration Judge 'what enumerated ground(s) she is relying upon in making her claim. ' . . . Where an applicant raises membership in a particular social group as the enumerated ground that is the basis of her claim, she has the burden to clearly indicate "the exact delineation of any particular social group(s) to which she claims to belong."), available at: https://www.justice.gov/eoir/page/file/1027451/download.

[85] Andrew Arthur, *DHS/DOJ: Allow IJs to Skip Hearings Involving Legally Insufficient Protection Claims, Based on law and legal practice — including other EOIR regulations*, CENTER FOR IMMIGRATION STUDIES (Jul. 8, 2020), available at: https://cis.org/Arthur/DHSDOJ-Allow-IJs-Skip-Hearings-Involving-Legally-Insufficient-Protection-Claims.

[86] *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 190-91 (BIA 2018), available at: https://www.justice.gov/eoir/page/file/1027451/download.

[87] *See* section 208(b)(1)(B)(iii) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf (standards for assessing credibility).

[88] *See* 8 C.F.R. § 1003.10(b)(2020) ("Immigration judges shall administer oaths, receive evidence, and interrogate, examine, and cross-examine aliens and any witnesses.").

[89] *See id*. ("In all cases, immigration judges shall seek to resolve the questions before them **in a timely** and impartial manner consistent with the Act and regulations.") (emphasis added.)

given the fact that there were (as of April 15) 1,122,697 pending cases[90] before the nation's 509 IJs[91], and the fact that, as of October 11, 2019 more than 476,000 of those cases involved asylum[92], completing asylum cases as quickly as possible—consistent with due process—is critical to controlling the immigration court backlog.[93]

Moreover, this procedure will not disadvantage the asylum applicant, nor allow the alien to be caught off guard. The JNPR also contains a proposal to allow for pretermission of legally insufficient applications.[94] I have explained[95]:

> *Pertinently, it specifically proposes to add a new subsection (e) to [8 C.F.R. § 1208.13], allowing IJs to pretermit a protection claim where the alien has failed to establish legal eligibility for the protection sought — that is, has failed to "establish[] a prima facie claim for relief or protection under applicable law."*

That proposal would allow an IJ to pretermit an application for asylum, statutory withholding, or CAT upon a motion by ICE or on the IJ's own initiative (*sua sponte*).[96] In either scenario, the regulation makes clear that the applicant must be given at least 10 days to respond to either DHS's motion to pretermit or the IJ's own order to the respondent to show why the application should not be so pretermitted.[97]

Adoption of the two proposed regulatory changes would place the asylum applicant on notice that there are deficiencies in the application, such that additional evidence is needed to shore up the applicant's

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[90] *Pending Cases*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (data generated Apr. 15, 2020), available at: https://www.justice.gov/eoir/page/file/1242166/download.

[91] *Immigration Judge (IJ) Hiring*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (data generated Jun. 2020), available at: https://www.justice.gov/eoir/page/file/1242156/download.

[92] Andrew Arthur, *Statistics Reveal the Scope of the Asylum Backlog, A lot of asylum claims, but few asylum grants*, CENTER FOR IMMIGRATION STUDIES (Nov. 25, 2019), available at: https://cis.org/Arthur/Statistics-Reveal-Scope-Asylum-Backlog.

[93] *See* "Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges", GAO-17-438, Government Accountability Office (Jun. 2017), available at: http://www.gao.gov/products/GAO-17-438.

[94] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36277 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[95] Andrew Arthur, *DHS/DOJ: Allow IJs to Skip Hearings Involving Legally Insufficient Protection Claims, Based on law and legal practice — including other EOIR regulations*, CENTER FOR IMMIGRATION STUDIES (Jul. 8, 2020), available at: https://cis.org/Arthur/DHSDOJ-Allow-IJs-Skip-Hearings-Involving-Legally-Insufficient-Protection-Claims.

[96] *See id.*; *see also* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36277 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[97] *See* Andrew Arthur, *DHS/DOJ: Allow IJs to Skip Hearings Involving Legally Insufficient Protection Claims, Based on law and legal practice — including other EOIR regulations*, CENTER FOR IMMIGRATION STUDIES (Jul. 8, 2020), available at: https://cis.org/Arthur/DHSDOJ-Allow-IJs-Skip-Hearings-Involving-Legally-Insufficient-Protection-Claims; *see also* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36277 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

claim, or that further elucidation is required with respect to the legal sufficiency of the claimed social group.

Consistent with this logic, the JNPR[98] would also make clear that the asylum applicant would waive any claim within a motion to reopen or reconsider a negative asylum determination "related to the alien's membership in a particular social group that could have been brought at the prior hearing." This will encourage asylum applicants (and their counsel, if any) to assert any potential basis for asylum relief within the asylum application *ab initio*, thereby ensuring the timely completion of the merits hearing (as required by law) and reducing strains on the IJs' dockets.

Further, as the JNPR[99] explains, the proposed requirement is consistent with the regulation[100] governing motions to reopen before the immigration court, which bars reopening to apply for relief in cases where the alien received notice of the opportunity to apply for that relief from the IJ at the time of the hearing, "unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing." This requirement will also "avoid gamesmanship and piecemeal analyses of claims in separate proceedings when all claims could have been brought at once", as the JNPR[101] notes.[102]

In summary, these proposals will give aliens applying for protection ample notice and motivation to file complete and adequately reasoned asylum applications in advance of the merits hearing, which will protect the rights of the alien, assist the IJ in completing the case in a timely manner, and aid the ICE attorney in representing the interests of the government. For these reasons, DHS and DOJ should adopt these proposals in the final rule, and amend the regulations accordingly.

Political opinion

As explained above, aliens may seek asylum and statutory withholding based upon either past persecution or a fear of future persecution on the basis of political opinion.

This was (usually) traditionally (and logically), a fairly straightforward analysis—the alien had (or was believed to have) a specific political opinion in opposition to the government and was subject to or

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[98] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36279 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[99] *Id*.

[100] 8 C.F.R. § 1003.23(b)(3) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1003.23.

[101] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36279 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[102] *See also INS v. Doherty*, 502 US 314, 323 (1992) (motion to reopen; "[I]n a deportation proceeding. . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States."), available at: https://scholar.google.com/scholar_case?case=8707621299668215514&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

threatened with harm because of that opinion, or to force the alien to change that opinion, consistent with the framework set forth in *Matter of Acosta*[103].

That was until reviewing courts began to attempt to shoehorn other claims into the definition of "political opinion", as the JNPR[104] describes, to include harm inflicted or feared by non-governmental actors and for actions (and inactions) that, while again extremely sympathetic, are not what a reasonable person would think of as "political opinions".

It is clear from a review of the *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*[105] issued by the United Nations High Commissioner for Refugees (UNHCR) that, for purposes of protection, harm inflicted on account of "political opinion" must come from "the Government" or more generally "the authorities." It is also apparent from the *Handbook* that "opinion" means just that, as assessed from the point of view of the authorities. For example, it states[106]:

> *Where a person is subject to prosecution or punishment for a political offence, a distinction may have to be drawn according to whether the prosecution is for political* ***opinion*** *or for politically-motivated* ***acts****. If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee. [Emphasis in original.]*

Despite this clear guidance, however, DHS and DOJ do not propose to limit "persecution on account of political opinion" strictly to actions taken by the government or local authorities.

Instead, the departments have proposed[107] to specify what does—and does not—constitute "political opinion" for purposes of asylum and statutory withholding, utilizing standards that include harm by both governmental and non-governmental actors.

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[103] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985) *overruled in part by INS v. Cardoza Fonseca*, 480 U.S. 421 (1987) *as recognized by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2986.pdf.

[104] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36279 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[105] *See Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (reissued Feb. 2019), at 24-25 ("Holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. . . . As indicated above, persecution 'for reasons of political opinion' implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities."), available at: https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

[106] *Id*. at

[107] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36279, 36291, and 36300 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

Specifically, DHS and DOJ put forward[108] amendments to 8 C.F.R. §§ 208.1(d) and 1208.1(d), specifying that:

> *[A] political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof.*

Consistent with the restrictions on claims based on membership in a particular social group premised on common criminality, the JNPR[109] proposes to limit the parameters of persecution on account of this factor for purposes of asylum and statutory withholding where the "political opinion" is:

> *[D]efined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.*

Even this definition is overly broad, however. Criminal organizations and gangs—with only limited exceptions—have no "political" agenda whatsoever. They exist simply to satisfy their criminal ends.[110]

And, opposition to those groups, even when manifested in such "expressive behavior"[111] as "attending rallies, organizing collective actions such as strikes or demonstrations, speaking at public meetings, printing or distributing political materials, [or] putting up political signs," is simply good citizenship in support of the rule of law.

Or, enlightened self-interest (in the best sense of the words) on the part of individuals who believe that the rule of law is essential to their ability to simply live their lives—work, run businesses, engage in commerce, send their children to school, or more mundanely visit friends and loved ones, worship, dine out, attend theaters and sporting events, or go to public places—unimpeded and unmolested.

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[108] *Id*. at 36280, 36291, and 36300.

[109] *Id*.

[110] *See, e.g., Press Release, Treasury Sanctions Latin American Criminal Organization, Designation Targets Latin American Gang Mara Salvatrucha (MS-13)*, U.S. DEP'T OF THE TREASURY (Oct. 11, 2012) ("The U.S. Department of the Treasury today designated the Latin American gang Mara Salvatrucha, known as MS-13, pursuant to Executive Order (E.O.) 13581, which targets **significant transnational criminal organizations** (TCOs) and their supporters. MS-13 is being targeted for its involvement in serious transnational criminal activities, including drug trafficking, kidnapping, human smuggling, sex trafficking, murder, assassinations, racketeering, blackmail, extortion, and immigration offenses. . . . MS-13's **criminal nature** can be seen in one of its mottos, 'Mata, roba, viola, controla' ('Kill, steal, rape, control'). Domestically, the group is involved in multiple crimes including murder, racketeering, drug trafficking, sex trafficking and human trafficking including prostitution. The group frequently carries out violent attacks on opposing gang members, often injuring innocent bystanders. MS-13 members have been responsible for numerous killings within the United States.") (emphasis added.), available at: https://www.treasury.gov/press-center/press-releases/Pages/tg1733.aspx.

[111] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36280 n. 30 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

Moreover, any harm inflicted on account of such "expressive behavior" is not (generally) "persecution on account of political opinion", but rather an attempt by a criminal organization to continue its criminal activities unimpeded—which, after all, is a key objective of such organizations . Respectfully, the definition as proposed has no support that I can identify in the UNHCR *Handbook*[112], at all.

The same is only slightly less true with respect to the references to terrorist and guerilla organizations—some of which are really little more than thinly veiled criminal syndicates[113]. Again, although those organizations may have a political agenda that they seek to promote, action against civilians who are opposed to those groups is better viewed (again) through the lens of attempts to remove impediments to their goals instead of "persecution on account of political opinion", per se.

These points underscore why the departments should, instead, hew more closely to the definition of "political opinion" in the UNHCR *Handbook*, and focus solely (or at least more exactly) on opinions in opposition to governmental organizations. In the extreme case, where the government is a kleptocracy, intent on preserving its political power chiefly to attain criminal aims, opposition thereto is what a reasonable person would think of as "political opinion". Few in the United States would view (at the extreme) even full-throated opposition to criminal organizations as such, and they likely reflect the views of the vast majority of persons in the world.

The departments should consider, in the final rule, standards for "political opinion" that are based more closely on UNHCR guidance.

Persecution

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[112] *Compare* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36279, 36291, and 36300 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review *with Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (reissued Feb. 2019), at 24-25, available at: https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

[113] *See, e.g., Revolutionary Armed Forces of Colombia (FARC)*, STANFORD CENTER FOR INT'L SECURITY AND COOPERATION (updated Jul. 2019), "Overview" ("The Revolutionary Armed Forces of Colombia (FARC), a Marxist-Leninist guerrilla group, was founded by Manuel Marulanda and Jacobo Arenas in 1964. The group was formed to represent the rural population's interests following the Colombian civil war from 1948 to 1958.The FARC originally aimed to overthrow the government, **and it financed its operations through the drug trade, kidnapping, extortion, and illegal gold mining**. Following a peace deal with the Colombian government in 2016, the FARC has officially disarmed and demobilized. . . . Although the FARC has officially become a political party, some ex-guerrilla members have refused to demobilize **and have continued** militant and **drug trafficking activities** under the FARC's original name.") (emphasis added.), available at: https://cisac.fsi.stanford.edu/mappingmilitants/profiles/revolutionary-armed-forces-colombia-farc#text_block_17686; *Profiles: Colombia's armed groups*, BBC News (Aug. 29, 2013) ("**The Farc** is the oldest and largest group among Colombia's left-wing rebels and **is one of the world's richest guerrilla armies**. The group was founded in 1964, when it declared its intention to overthrow the government and install a Marxist regime. But tactics changed in the 1990s, as right-wing paramilitary forces attacked the rebels, and **the Farc became increasingly involved in the drug trade to raise money for its campaign**.") (emphasis added.), available at: https://www.bbc.com/news/world-latin-america-11400950.

The JNPR[114] also proposes to codify case law defining the term "persecution" for purposes of asylum and statutory withholding.

Again, the term was not defined by Congress, nor in the international agreements upon which the asylum and statutory withholding provisions are based.[115] The current definition has its genesis in the aforementioned *Matter of Acosta*[116], where the BIA summarized pre-Refugee Act[117] case law interpreting the term "persecution":

> *First, harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome. Second, harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.*[118]

It concluded[119] that this construction should be applied to that term as used in section 101(a)(42)(A) of the INA[120].

That left open the question of how significant that "harm or suffering" had to be to constitute persecution. Then-Judge Alito likely explained the issue best in *Fatin*[121]:

> *[W]e interpret Acosta as recognizing that the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional. If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country — and it seems most unlikely that Congress intended such a result.*

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[114] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36280 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[115] *See Balazoski v. INS*, 932 F.2d 638, 641-42 (7th Cir. 1991) ("Congress did not define persecution in the INA, nor did the United Nations in the international conventions and protocols that provided the backdrop for congressional asylum legislation and which have thus informed the judiciary's interpretation of § 208."), available at: https://scholar.google.com/scholar_case?case=3437110621576327026&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[116] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985) *overruled in part by INS v. Cardoza Fonseca*, 480 U.S. 421 (1987) *as recognized by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2986.pdf.

[117] *See* Refugee Act of 1980, Pub. L. No. 96-212 (1980), *available at*: https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf.

[118] *Id*.

[119] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985) *overruled in part by INS v. Cardoza Fonseca*, 480 U.S. 421 (1987) *as recognized by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2986.pdf.

[120] *See* section 101(a)(42)(A) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.

[121] *Fatin v. INS*, 12 F. 3d 1233, 1240 (3d Cir. 1993), available at: https://scholar.google.com/scholar_case?case=11990936080202514559&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

Isolated instances of harassment and intimidation[122], the denial of rights and privileges[123], discrimination[124], certain levels of economic deprivation[125], and even brief periods of detention[126] have all been found *not* to constitute persecution.

As a review of the Ninth Circuit's primer on *Relief from Removal* reveals, defining persecution in any given case is more art than science.[127] In order to "better clarify what does and does not constitute persecution" the JNPR proposes to add new paragraphs 8 C.F.R. §§ 208.1(d) and 1208.1(d), defining the term.[128] The proposed definition is based on case law (which again is cited in the JNPR), and as noted, there is strong precedent for codifying such case law.

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[122] *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998) ("We agree with our sister circuits that 'persecution' within the meaning of 8 U.S.C. § 1101(a)(42)(A) requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty."), available at: https://casetext.com/case/mikhailevitch-v-immigration-naturalization.

[123] *Faddoul v. INS*, 37 F.3d 185, 189 (5th Cir. 1994) ("The decision to bestow or deny citizenship is deeply-rooted in national sovereignty and must be left to the individual nation's discretion."), available at: https://scholar.google.com/scholar_case?case=11387315561381309943&hl=en&as_sdt=6&as_vis=1&oi=scholarr; *De Souza v. INS*, 999 F.2d 1156, 1159 (7th Cir. 1993) ("The refusal of the Kenyan government to grant De Souza citizenship did not deprive her of any right; she had no right to Kenyan citizenship. It is well within the discretion of the Kenyan government to decide who its citizens will be. Her contention that being forced to attend a private high school amounts to persecution borders on frivolity. The Kenyan government could provide public education to all people, no people, or some people without 'persecuting' them. De Souza's claim really amounts to this: Kenya did not provide her with *enough* public education. She was allowed to attend public grade school, but not public high school. Providing public elementary education to noncitizens, as the Kenyan government did for De Souza, is not persecution. To the contrary, one might even call it generosity.), available at: https://scholar.google.com/scholar_case?case=11914382814009025625&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[124] *Bereza v. INS*, 115 F.3d 468, 476 (7th Cir. 1997) ("Nor does the evidence compel the conclusion that Bereza's past ordeals, even when examined as interrelated events, amounted to persecution severe enough to render him eligible for asylum despite the lack of a well-founded fear of future persecution. Bereza was discriminated against both in school and at work. As a result, Bereza could not pursue his chosen career and, toward the end of his time in Ukraine, he suffered adverse consequences to his health because of a politically motivated demotion."), available at: https://caselaw.findlaw.com/us-7th-circuit/1039139.html.

[125] *Ubau-Marenco v. INS*, 67 F.3d 750, 755 (9th Cir. 1995) ("Petitioners also claim that they are 'economic' refugees. This court has found persecution where there is 'a probability of deliberate imposition of substantial economic disadvantage upon an alien for reasons of race, religion, or political opinion. . . ' . . . Although it appears that the Sandinistas have taken steps which have economically harmed the petitioners, petitioners have failed to show that these actions rise to the level of economic persecution for political opinion."), available at: https://scholar.google.com/scholar_case?case=5173804522857594955&hl=en&as_sdt=6&as_vis=1&oi=scholarr; *overruled on other grounds by Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc), available at: https://scholar.google.com/scholar_case?case=18169483121833753748&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[126] *Milosevic v. INS*, 18 F.3d 371 n.2 (7th Cir. 1994) ("In any event, 'brief detentions and mild harassment' by a previous government 'do not add up to "persecution"' within the meaning of" section 101(a)(42) of the INA), available at: https://scholar.google.com/scholar_case?case=15816139213119875297&hl=en&as_sdt=6&as_vis=1&oi=scholarr#[3].

[127] *See Relief from Removal, Asylum, Withholding of Removal, and the Convention Against Torture*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (undated), at II.B, available at: http://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/B.%20Relief%20from%20Removal.htm#_Toc32324685.

[128] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36280-81, 36291-92, and 36300 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003,

It is particularly appropriate to codify that case law in this instance, because it provides adjudicators with one clear source in defining this vague term, which is often the starting point for any asylum or statutory withholding determination. The departments should include these amendments, as stated, in the final rule.

Nexus between harm and a protected ground

An essential element of any claim for asylum or statutory withholding is a link, or "nexus", between the applicant and the alleged threat or persecution.[129]

As the JNPR[130] notes, Congress refined this requirement in the REAL ID Act, which added section 208(b)(1)(B)(i) to the INA[131]. Specifically, that section states:

> *To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion* ***was or will be at least one central reason for persecuting the applicant****. [Emphasis added.]*

According to the conference report[132] for that bill:

> *In requiring an asylum applicant to establish that at least one central reason for persecution was or will be one of the five factors for asylum relief, this subsection calls for an evaluation of whether the protected characteristic is central to the persecutor's motivation to act.*

The issue, the JNPR[133] explains, is that "the contours of the nexus requirement have further been shaped through case law rather than rulemaking, making it difficult" for AOs, IJs, and the BIA "to uniformly apply it."

1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[129] *See Singh v. INS*, 134 F.3d 962, 970 (9th Cir. 1998) ("Petitioner's assertion that some of her daughter's schoolmates were raped does not establish unique persecution of Petitioner. [A]ttacks on Petitioner's daughter's schoolmates do not support a finding of persecution against Petitioner without a connection to her, especially where evidence about the reasons for the attacks is lacking."), available at: https://scholar.google.com/scholar_case?case=2984965374742030680&hl=en&as_sdt=6&as_vis=1&oi=scholarr. *Haijiani-Niroumand v. INS*, 26 F.3d 832, 838 (8th Cir. 1994), ("[A]lthough petitioner presented some evidence that his uncle was killed several years ago in Teheran, he failed to provide a nexus between his uncle's death and his current fear of persecution.") available at: https://casetext.com/case/hajiani-niroumand-v-ins.

[130] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36281 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[131] Section 208(b)(1)(B)(i) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

[132] H.R. REP. 109-72, at 162-63 (2005) (Conf. Rep.), available at: https://www.congress.gov/109/crpt/hrpt72/CRPT-109hrpt72.pdf.

[133] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36281 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at:

To address this issue, consistent with their proposed amendments to the asylum regulations interpreting the terms "membership in a particular social group" and "political opinion", the departments[134] propose to set forth "eight nonexhaustive situations, each of which is rooted in case law" that would not provide the nexus required to satisfy the requirements for an asylum claim.

Those circumstances[135] are:

> *(i) Interpersonal animus or retribution;*
>
> *(ii) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;*
>
> *(iii) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;*
>
> *(iv) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;*
>
> *(v) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;*
>
> *(vi) Criminal activity;*
>
> *(vii) Perceived, past or present, gang affiliation; or,*
>
> *(viii) Gender.*

Six of the foregoing circumstances are unexceptional. Strictly personal retribution has long been held not to constitute persecution.[136] General disapproval of criminal[137] and terrorist[138] organizations,

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https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review

[134] *Id*.

[135] *Id*. at 36291 and 36300.

[136] *Matter of Pierre*, 15 I&N Dec. 461, 463 (BIA 1975) (fear of retribution from husband, a deputy in the Haitian government, was a "strictly personal" matter), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/17/2433.pdf.

[137] *See Saldarriaga v. Gonzales*, 402 F.3d 461, 468 (2005) ("Petitioner claims to fear reprisal by Colombian drug criminals for his association with the Drug Enforcement Agency ('DEA') and his employment by one of its informants. However, petitioner has not demonstrated how his connection to the drug trade or his collaboration with the DEA stemmed from a political position he espouses."), available at: https://www.leagle.com/decision/2005863402f3d4611816. This is also consistent with the JNPR's similar restriction with respect to the definition of the phrase "political opinion")

[138] *Adhiyappa v. INS*, 58 F.3d 261 (6th Cir. 1995) ("Petitioner did not present evidence that the terrorists were targeting anti-separatists who were not serving as government informants; the evidence would support a conclusion, therefore, that it was his status as an informant, not his political opinion, that spurred their hatred. The terrorists focused their efforts on individuals they viewed as 'traitors,' those who were serving as government informants and thereby causing separatists to be killed by government forces."), available at: https://www.leagle.com/decision/199531958f3d2611272.

resistance to recruitment or coercion from such organizations[139], extortion based on perceptions of wealth[140], common criminal activity[141]; and perceived past or present gang affiliation[142] similarly have been recognized not to satisfy the asylum standard.

The second and eighth circumstances, on the other hand, are likely to be the source of considerable comment, as both touch on the issue of whether individual acts of domestic violence can constitute persecution, and if so under what circumstances.

This was an unresolved issue, at least at the administrative level, from January 2001, when then-Attorney General Janet Reno vacated the BIA's decision in *Matter of R-A-*[143] until the BIA issued its

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[139] *INS v. Elias-Zacarias*, 502 U.S. 478, 481-81 (1992) ("Even a person who supports a guerrilla movement might resist recruitment for a variety of reasons-fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few. The record in the present case not only failed to show a political motive on Elias-Zacarias' part; it showed the opposite. He testified that he refused to join the guerrillas because he was afraid that the government would retaliate against him and his family if he did so. Nor is there any indication (assuming, arguendo, it would suffice) that the guerrillas erroneously believed that Elias-Zacarias' refusal was politically based.. . . Thus, the mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution on account of political opinion, as [section 101(a)(42) of the INA] requires."), available at: https://supreme.justia.com/cases/federal/us/502/478/; *Matter of E-A-G-*, 24 I&N Dec. 591, 596 (BIA 2008) ("Moreover, the respondent's refusal to join MS, without more, does not constitute a "political opinion." Nor would any harm befalling the respondent as a result of such refusal normally be found to be motivated by a political opinion."), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3618.pdf.

[140] *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-76 (BIA 2007), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3550.pdf ("affluent Guatemalans"; "The respondents have produced no evidence to show that the anonymous caller or callers had any motive other than attempted criminal extortion.").

[141] *Gormely v. Ashcroft*, 364 F. 3d 1172, 1177 (9th Cir. 2004) ("Random, isolated criminal acts perpetrated by anonymous thieves do not establish persecution."), available at: https://scholar.google.com/scholar_case?case=12572040729325511303&hl=en&as_sdt=20000006&as_vis=1.

[142] *See Castellano-Chacon v. INS*, 341 F. 3d 533, 549 (6th Cir. 2003) ("Castellano is not arguing that he will be persecuted on the basis of his membership in MS 13. Instead, the evidence he has presented establishes, at best, that 'tattooed youth' are targeted and prosecuted. As a result, we can only rule in Castellano's favor if we hold that 'tattooed youth' constitute a social group, which we decline to do."), available at: https://scholar.google.com/scholar_case?case=15708189635416591254&hl=en&as_sdt=6&as_vis=1&oi=scholarr; *Bastanipour v. INS*, 980 F. 2d 1129, 1132 (7th Cir. 1992) ("Whatever its precise scope, the term 'particular social groups' surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do. A contrary conclusion would collapse the fundamental distinction between persecution on the one hand and the prosecution of nonpolitical crimes on the other."), available at: https://scholar.google.com/scholar_case?case=16386456409444666236&hl=en&as_sdt=20000006&as_vis=1; *Matter of E-A-G-*, 24 I&N Dec. 591, 596 (BIA 2008) ("Of course, the respondent in this case is not, and has never been, a member of any criminal gang. . . . Nevertheless, because we agree that membership in a criminal gang cannot constitute a particular social group, the respondent cannot establish particular social group status based on the incorrect perception by others that he is such a gang member."), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3618.pdf.

[143] *Matter of R-A-*, 22 I&N Dec. 906 (A.G.2001; BIA 1999), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I&N Dec. 629 (A.G. 2008), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3403.pdf.

August 2014 decision in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014)[144], which was then called into question again when then-Attorney General Jeff Sessions issued his June 2018 decision in *Matter of A-B-*[145], overruling *Matter of A-R-C-G-*.

In *Matter of A-R-C-G-*[146], a case designated as a precedential decision, the BIA held that:

> *Depending on the facts and evidence in an individual case, "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal . . . .*

Attorney General Sessions, however, in vacating and remanding *Matter of A-B-* (in which the BIA below had relied on *Matter of A-R-C-G-*) determined that this was an inappropriate case to designate as precedent.[147] He specifically concluded that the BIA in *Matter of A-R-C-G-* had failed to "perform[] the rigorous analysis required by the Board's precedents", given the fact that DHS had conceded in that case "that the respondent suffered harm rising to the level of past persecution, that she was a member of a qualifying particular social group, and that her membership in that group was a central reason for her persecution."[148]

He found that asylum cases premised on domestic violence abroad should be subject to the same rules (which he reiterated therein) governing whether an applicant has established persecution on account of "membership in a particular social group" as all other claims asserting "particular social group" as a protected ground.[149] Further, he specifically held: "The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim."[150]

This has long been a difficult issue for AOs and IJs to address, because domestic violence cases do not, as a general rule, fit precisely within the statutory requirements for protection and respectfully, the lack of guidance from Congress and the BIA failed to help matters. As then-Attorney General Michael Mukasey stated in lifting the stay on the BIA in his order in *Matter of R-A-*[151]:

> *Insofar as a question involves interpretation of ambiguous statutory language, the Board is free to exercise its own discretion and issue a precedent decision establishing a*

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[144] *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/26/3811.pdf.
[145] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), available at: https://www.justice.gov/eoir/page/file/1070866/download.
[146] *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/26/3811.pdf.
[147] *See* Matter *of A-B-*, 27 I&N Dec. 316, 319-20 (A.G. 2018), available at: https://www.justice.gov/eoir/page/file/1070866/download.
[148] *Id*.
[149] *Id*.
[150] *Id*. at 320.
[151] *Matter of R-A-*, 24 I&N Dec. 629, 631 (A.G. 2008), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3624.pdf.

uniform standard nationwide. Providing a consistent, authoritative, nationwide interpretation of ambiguous provisions of the immigration laws is one of the key duties of the Board.

Attorney General Sessions[152] was correct in concluding that, in light of the government's concessions in *Matter of A-R-C-G-*, that case was an unhelpful and improper vehicle to provide such guidance.

Regardless of one's personal or professional position on the proposal in the JNPR[153] on these issues, it is appropriate for DOJ, as a preliminary matter, to take *a* position. Should Congress believe that asylum applicants who have suffered domestic abuse abroad should be eligible for asylum in the United States, it can specifically provide for that protection—as it did[154] for foreign nationals who were "forced to abort a pregnancy or to undergo involuntary sterilization, or who ha[ve] been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program. . . ."[155]

Further, I would note that, even under the proposals in the JNPR, aliens whose claims are premised in part on one of the eight circumstances above could still be granted asylum and/or statutory withholding. The departments explain that "the regulation does not foreclose that, at least in rare circumstances, such facts could be the basis for finding nexus, given the fact-specific nature of this determination."[156] That is certainly true.

For example, an alien who was targeted for coercion by a terrorist or criminal group on account of a protected characteristic could still be granted protection, as could a partner in a domestic relationship. It is even possible to conceive that an alien could establish, for instance, persecution on account of religion resulting from what would otherwise be considered common criminality.

To the extent that these provisions will provide needed guidance to AOs and IJs in making decisions in a timely manner, they should be adopted. The departments should, however, give significant consideration to any well-reasoned arguments in adding these amendments to the regulations in the final rule.

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[152] *Matter of A-B-*, 27 I&N Dec. 316, 319-20 (A.G. 2018), available at: https://www.justice.gov/eoir/page/file/1070866/download.

[153] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36281-82 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[154] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), at Title VI, subtitle A, section 601 (amending section 101(a)(42)(A), Pub. L. 104-208 (1996), available at: https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf.

[155] *See* section 101(a)(42)(B) of the INA, available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1101&num=0&edition=prelim (added by section 601 of IIRIRA, *see* n. 136).

[156] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36281-82 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

Stereotypes

The JNPR would also add new subsections (g) to 8 C.F.R. §§ 208.1 and 1208.1, which would bar consideration of any evidence that promotes "cultural stereotypes about an individual or a country."[157] DHS and DOJ explain that they "propose to make clear that pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim."

It is beyond cavil that consideration by *any* adjudicator of *any* such stereotypes is in error, and would call into question the fitness of that adjudicator. This is especially true in the context of asylum or statutory withholding.

The Supreme Court[158] has held that an applicant for those forms of protection must offer "direct or circumstantial proof" of any alleged persecutor's motives. It is impossible, however, to think of any facts promoting cultural stereotypes that would constitute competent evidence for such proof.

The JNPR[159] cites with respect to these amendments the following passage from the Attorney General's opinion in *Matter of A-B-*, overruling *Matter of A-R-C-G-* (which, as noted above, he did therein):

> *I note that conclusory assertions of countrywide negative cultural stereotypes, such as A-R-C-G-'s broad charge that Guatemala has a "culture of machismo and family violence" based on an unsourced partial quotation from a news article eight years earlier, neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations.*[160]

Plainly, if the assertions in that article were true, there would have been other, competent evidence to support the prevalence of domestic violence in that country, such as U.S. State Department Country Reports on Human Rights Practices[161], crime reports from the national or relevant municipal government in Guatemala, or studies from non-governmental organizations.

These proposed amendments are, for the reasons stated above, not only unexceptional but well overdue, and the departments should adopt them in the final rule.

Internal Relocation

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[157] *See id*. at 36292 and 36300.
[158] *INS v. Elias-Zacarias*, 502 US 478, 483 (1992), available at: https://scholar.google.com/scholar_case?case=9940441370772503895&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
[159] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36282 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[160] *Matter of A-B-*, 27 I&N Dec. 316, 336 n.9 (A.G. 2018), available at: https://www.justice.gov/eoir/page/file/1070866/download.
[161] *See 2019 Country Reports on Human Rights Practices*, U.S. DEP'T OF STATE (Mar. 11, 2020), available at: https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/.

The ability of an alien to avoid a threat of harm or future harm is a salient issue in the consideration of asylum and statutory withholding claims, even where an alien has shown past persecution or a well-founded fear of future persecution.[162] Specifically, if an alien seeking those protections could, within reason, relocate within the country from which protection is sought and thereby avoid persecution, the applicant may not be granted protection.[163]

The reason for this is that some asylum and withholding claims are limited to a specific location—that is, the alien fears harm from authorities or actors in a specific location or area, but the alien could reasonably and safely relocate elsewhere in the alien's country of nationality or last habitual residence[164]. Recognizing this, the current regulations governing applications for asylum and statutory withholding, as well as CAT[165], accordingly provide a mechanism for assessing whether the applicant could relocate internally in his or her own country to avoid harm.

For example, pursuant to regulation[166], where an asylum applicant has not established past persecution, and the alleged persecutor is not affiliated with the government, the alien bears the burden of proving that he or she could not reasonably relocate to avoid future persecution. Where the alien has established past persecution, or that feared persecution is government-sponsored, DHS bears the burden of proving that the alien could safely internally relocate[167]. A similar burden-shifting scheme is present in the regulations[168] governing applications for statutory withholding.

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[162] *See* 8 C.F.R. §§ 208.13(b)(1)(i)(B), (2)(ii), (3) (2020) (AO asylum determinations), available at: https://www.law.cornell.edu/cfr/text/8/208.13, ; 1208.13(b)(1)(i)(B), (2)(ii), and (3) (IJ asylum determinations), available at https://www.law.cornell.edu/cfr/text/8/1208.13; and 1208.16(b)(1)(i)(B), (b)(2), (b)(3) (IJ statutory withholding determinations) https://www.law.cornell.edu/cfr/text/8/1208.16.

[163] *See id*.

[164] *See, e.g.*, *Etugh v. INS*, 921 F.2d 36, 39 (3d Cir. 1991) ("Etugh failed to allege he would be persecuted beyond the local vicinity of his hometown, Akirika. Since deportation would not require Etugh to return to the purportedly dangerous region of Nigeria where he formerly lived, and because Etugh's affidavits indicate he is safe from the threatening Abala faction at least in Nigeria's capital, the Board correctly decided Etugh had not made a prima facie case for asylum under section 208" of the INA), available at: https://casetext.com/case/etugh-v-us-ins.

[165] 8 C.F.R § 1208.16(c)(3)(ii) (2020) ("In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to: . . . (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured."), available at: https://www.law.cornell.edu/cfr/text/8/1208.16.

[166] 8 C.F.R. §§ 208.13(b)(2) and (3)(i) (2020) (AO asylum determinations), available at: https://www.law.cornell.edu/cfr/text/8/208.13; 1208.13(b)(2) and (3)(i) (IJ asylum determinations), available at https://www.law.cornell.edu/cfr/text/8/1208.13.

[167] 8 C.F.R. §§ 208.13(b)(1)(b) and (3)(i) (2020) (AO asylum determinations), available at: https://www.law.cornell.edu/cfr/text/8/208.13; 1208.13(b)(1) and (3)(i) (IJ asylum determinations), available at https://www.law.cornell.edu/cfr/text/8/1208.13.

[168] 8 C.F.R. § 1208.16(b)(1)(i)(B), (b)(2), and (b)(3) (2020) (IJ statutory withholding determinations) https://www.law.cornell.edu/cfr/text/8/1208.16.

I will note, as an aside, that the same burden-shifting scheme applies to affirmative asylum applications before AOs, but that the regulation[169] itself is nonsensical, because it does not conform to the current procedures for adjudicating affirmative asylum applications.

Specifically, AO assessments are non-adversarial[170], and therefore DHS is not a party to offer evidence, let alone "evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." Even that analysis leaves aside that there is no "Service" (the term used in the regulation, and referring to the former INS, which was abolished on March 1, 2003[171]) to do anything. I have elsewhere explained why such regulations are still in place, more than 17 years after the CFR was expanded to reflect the division of burdens between EOIR in DOJ on the one hand, and USCIS, CBP, and ICE on the other[172]. The JNPR[173] offers amendments to clean up this regulation, as well as others.[174]

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[169] 8 C.F.R. §§ 208.13(b)(2) and (3)(i) (2020) (AO asylum determinations), available at: https://www.law.cornell.edu/cfr/text/8/208.13; 1208.13(b)(2) and (3)(i) (IJ asylum determinations), available at https://www.law.cornell.edu/cfr/text/8/1208.13.

[170] *See Obtaining Asylum in the United States, Key Differences Between "Affirmative" and "Defensive" Asylum Process*, DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (updated Oct. 19, 2015), available at: https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-united-states.

[171] *Did You Know?: The INS No Longer Exists*, DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Apr. 13, 2011), available at: https://www.uscis.gov/archive/blog/2011/04/did-you-know-ins-no-longer-exists.

[172] Andrew Arthur, *DHS and DOJ Move to Discard Irrelevant Regulations: Simple regulatory hygiene that's overdue, and a model for future deletions*, CENTER FOR IMMIGRATION STUDIES (Jul. 1, 2020) ("Prior to 2003, the Immigration and Naturalization Service (INS) – a unified agency with jurisdiction over immigration enforcement and administrative adjudications – and the Executive Office for Immigration Review (EOIR) – the component with jurisdiction over the immigration courts and the Board of Immigration Appeals (BIA) – were both within DOJ. The two components shared the same regulations, which are contained in title 8 of the CFR, titled 'Aliens and Nationality.' Those regulations implement the statutory provisions in the Immigration and Nationality Act (INA), which are codified at 8 U.S.C. § 1001, et seq. (also captioned, not coincidentally, 'Aliens and Nationality'). Note that INS and EOIR did not share regulations because they were in the same department, but because they were each performing roles authorized by the INA. And, as U.S. Citizenship and Immigration Services (USCIS) notes: 'The CFR is arranged by subject title and generally parallels the structure of the United States Code.' Thus, for example, the regulations implementing the immigration-inspection provisions (section 235 of the INA, which includes expedited removal) are located in 8 C.F.R. §§ 235.1 to 235.13. Subsequently, however, Congress abolished the INS on March 1, 2003, after DHS was established by Congress in the Homeland Security Act of 2002 (HSA). EOIR remained within DOJ, while INS's immigration administrative adjudication and enforcement responsibilities were eventually assigned to three different agencies within DHS: USCIS, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP). The immigration regulations (again in title 8 of the CFR) were accordingly reorganized and split into two. Chapter I of title 8 regulates DHS's roles and operations, while chapter V therein now governs the duties and responsibilities of DOJ and EOIR. The Final Rule implementing these changes noted: 'This rule duplicates certain parts and sections of the regulations that relate to proceedings before both the INS and EOIR in both chapter I and chapter V, respectively, i.e., shared provisions.' . . . Consequently, some regulatory provisions were carried over to chapter V of title 8 in the CFR that have little or nothing to do with EOIR, the immigration courts, or the BIA."), available at: https://cis.org/Arthur/DHS-and-DOJ-Move-Discard-Irrelevant-Regulations.

[173] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36293 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[174] *See* Andrew Arthur, *DHS and DOJ Move to Discard Irrelevant Regulations: Simple regulatory hygiene that's overdue, and a model for future deletions*, CENTER FOR IMMIGRATION STUDIES (Jul. 1, 2020) ("The JNPR focuses on a handful of those regulations relating to the admission of aliens (including expedited removal, one of the main

I will further note that, with respect to applications for CAT[175] (where government involvement is an element[176] of the claim), the possibility of relocation is part of the IJ's consideration of whether it is more likely than not that the alien would be tortured in the country of removal as well[177], but, as the Ninth Circuit[178] has recognized, the burden shifting in the asylum and statutory withholding regulations does not apply to torture claims. If that burden-shifting is not required to adjudicate a CAT claim, there is no reason it should be required to adjudicate a claim for asylum or statutory withholding, either.

In the JNPR[179], DHS and DOJ find that "the current regulations regarding internal relocation inadequately assess the relevant considerations in determining whether internal relocation is possible, and if possible, whether it is reasonable to expect the asylum applicant to relocate." Specifically, they note that the equivocation in the catch-all factors in 8 C.F.R. §§ 208.13(b)(3) and 1208.13(b)(3) undermines the utility of the factors listed in those provisions.[180] Specifically those provisions each state:

> *For purposes of determinations under paragraphs (b)(1)(i), (b)(1)(ii), and (b)(2) of this section, adjudicators* ***should consider, but are not limited to considering****, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.* ***Those factors may, or may not, be relevant****, depending on all the circumstances of the case,* ***and are not necessarily determinative of whether it would be reasonable for the applicant to relocate****.* (Emphasis added.)

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focuses of the JNPR): 8 C.F.R. §§ 1235.1, 1235.2, 1235.3, 1235.4, 1235.5, and 1235.6."), available at: https://cis.org/Arthur/DHS-and-DOJ-Move-Discard-Irrelevant-Regulations.

[175] *See* 8 C.F.R § 1208.16(c)(3)(ii) (2020) (CAT generally), available at: https://www.law.cornell.edu/cfr/text/8/1208.16 and 8 C.F.R. § 1208.17 (deferral under CAT), available at: https://www.law.cornell.edu/cfr/text/8/1208.17.

[176] *See* 8 C.F.R. § 1208.18(a)(1) (2020) ("Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, **when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity**.") (emphasis added), available at: https://www.law.cornell.edu/cfr/text/8/1208.18.

[177] *See* 8 C.F.R § 1208.16(c)(3)(ii) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.16.

[178] *See Maldonado v. Lynch*, 786 F. 3d 1155, 1163-64 (9th Cir. 2015) ("The regulations governing asylum, however, differ markedly from those governing deferral of removal under CAT; they explicitly shift the burden to the government after the petitioner has established a well-founded fear of persecution . . . . The regulations governing CAT deferral, unlike the asylum regulation, do not call for any burden shifting."), available at: https://scholar.google.com/scholar_case?case=6321256781042997561&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[179] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36282 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[180] 8 CFR §§ 208.13(b)(3) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.13, and 1208.13(b)(3)(2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.13.

Then-former President Theodore Roosevelt warned against the use of such "weasel words"[181] in a 1916 speech, and his admonition resounds today. In this context such caveats render the regulatory directions in those provisions particularly unhelpful. Are the factors determinative, or not? Are they even relevant? What weight should be assigned to any, each, or all? It is axiomatic that each asylum and statutory withholding case rises and falls on its own facts and merits, but such rules should, as a preliminary matter, set a clear standard for AOs and IJs—each of whom, as noted, has limited time and resources—to make such assessments.

And, as the JNPR[182] (correctly) notes:

> *[S]ome factors—e.g., administrative, economic, or judicial infrastructure—do not have a clear relevance in assessing the reasonableness of internal relocation in many cases, while others insufficiently appreciate as a general matter that asylum applicants have often already relocated hundreds or thousands of miles to the United States regardless of such factors.*

For these reasons, the departments propose to streamline the manner in which the most relevant of those factors are stated in the regulation, to better guide adjudicators in assessing claims in which internal relocation is, or should be, an issue.[183] As DHS and DOJ explain[184]:

> *Consequently, the Departments have determined that the regulatory burdens of proof regarding internal relocation should be assigned more in line with these baseline assessments of whether types of persecution generally occur nationwide, while recognizing that exceptions, such as persecution by local governments or nationwide organizations, might overcome these presumptions. Thus, the Departments propose to amend the regulations to presume that for applications in which the persecutor is not a government or government-sponsored actor, internal relocation would be reasonable unless the applicant demonstrates by a preponderance of the evidence that it would not be. This presumption would apply regardless of whether an applicant has established past persecution.*

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[181] *Garner's Usage Tip of the Day: Weasel Words*, LAW PROSE (Apr. 2, 2019) ("Theodore Roosevelt said, in a speech in St. Louis on May 31, 1916: 'One of our defects as a nation is a tendency to use what have been called weasel words. When a weasel sucks eggs it sucks the meat out of the egg and leaves it an empty shell. If you use a weasel word after another there is nothing left of the other.'"), available at: http://www.lawprose.org/garners-usage-tip-of-the-day-weasel-words/#:~:text=Theodore%20Roosevelt%20said%2C%20in%20a,nothing%20left%20of%20the%20other.%E2%80%9D.

[182] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36282 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[183] *See id*.

[184] *See id*.

Respectfully, the proposed amendments *do* improve on the current regulations, but not as much as they could. The amendments[185] adopt a "totality of the circumstances" approach with respect to the issue of internal relocation that is consistent with the rules for persecution generally[186] and the credibility of applicants[187] specifically.

They also offer examples of what constitutes private—as opposed to government—actors for purposes of internal relocation, including "gang members and rogue officials" (the latter discussed below), as well as "family members" and "neighbors" who are not government officials themselves.[188]

And, they require the adjudicator to consider the fact that the alien relocated to the United States to seek protection, suggesting that the ability of aliens to *relocate* from their residences in their countries of nationality or last habitual residence is established, and therefore the only issue is whether the alien could return and relocate *internally* elsewhere within that country safely.

This addresses an inconsistency that is present in many asylum and statutory withholding claims—an assertion that the applicant does not have the means to move to escape alleged persecution. If, for example, an alien could leave San Pedro Sula, Honduras and come to the United States, that alien logically has the means to move from San Pedro Sula to Tegucigalpa, the capital of that country. The only question is whether such relocation is reasonable and would allow the alien to avoid persecution.

Nonetheless, the proposed amendments retain the burden-shifting scheme within the current regulations—in which the applicant bears the burden of establishing that the applicant can safely relocate in the case of a "private actor", and "DHS" bears that burden in a case involving "the government and government-sponsored actors[s]". Even (and most erroneously, as explained above) in the context of affirmative asylum applications before AOs.[189]

In the latter case[190], the amendments to 8 C.F.R. § 208.13(b)(3) are as inapt (and nonsensical) as the current regulation. There is no "DHS"[191] to prove "by a preponderance of the evidence" or any other standard that where the alleged "persecutor is a government or is government-sponsored" that internal

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[185] *See id*. at 36292 (amending 8 C.F.R. § 208.13(b)(3), 36301 (amending 8 C.F.R. § 1208.13(b)(3), and 36303 (amending 8 C.F.R. § 1208.16(b)(3)).

[186] *See Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) ("We look at the totality of the circumstances in deciding whether a finding of persecution is compelled."), available at: https://casetext.com/case/guo-v-ashcroft.

[187] Section 208(b)(1)(B)(iii) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

[188] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36292 (amending 8 C.F.R. § 208.13(b)(3), 36301 (amending 8 C.F.R. § 1208.13(b)(3), and 36303 (amending 8 C.F.R. § 1208.16(b)(3)) (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[189] *See id*.

[190] *See id*. at 36292 (amending 8 C.F.R. § 208.13(b)(3)(ii) (2020)) ("In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.").

[191] *See id*.

relocation is reasonable in an affirmative asylum proceeding or credible-fear assessment. The *only* DHS presence is the AO, who is the adjudicator. Does that mean that the AO is *both* the adjudicator *and* a party? If so, the regulation needs to be clearer.

But, the fact is there should be no dichotomy between claims involving private versus government actors, and no such burden-shifting with respect to the issue of internal relocation, in credible fear claims, affirmative asylum applications, defensive asylum applications, or statutory withholding cases.

The *first* rule of asylum is that *the applicant bears the burden of proof*.[192] Congress never indicated or suggested—let alone stated—that this burden would *ever* shift, regardless of the issue.[193]

While Congress did not explicitly adopt the exact same burden in the provisions governing statutory withholding of removal[194], it is clear[195] that a statutory withholding applicant still bears the burden of proof, and nothing in the INA suggests that there would be such a burden-shifting on any of the factors relevant to that claim.

Nor would removal of the current presumption as it relates to internal relocation in cases involving governmental persecutors (along with its consequent burden-shifting requirement to DHS) from the regulations impose an onerous burden on an applicant for asylum or statutory withholding of removal. This fact is best considered in the context of a hypothetical asylum claim filed by a U.S. citizen or national abroad, and in the context of a former resident of San Francisco, California.[196]

Imagine that applicant is claiming, in Canada, that he or she has been harmed or has a fear of harm at the hands of the San Francisco Police Department (SFPD) on account of political opinion, and that Canada follows the same standards that are applicable in the United States in adjudicating asylum and *non-refoulement* (which includes the international standard for statutory withholding)[197] claims.

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[192] Section 208(b)(1)(B)(i) of the INA (2020) ("The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

[193] *See id*.

[194] *See* section 241(b)(3) of the INA (2020), and in particular subparagraph (C) therein, available at https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.

[195] *See id*.; *see also Pedro-Mateo v. INS*, 224 F.3d 1147, 1150 (9th Cir. 2000) ("A failure to satisfy the lower standard of proof required to establish eligibility for asylum therefore necessarily results in a failure to demonstrate eligibility for withholding of deportation."), available at: https://casetext.com/case/pedro-mateo-v-ins#p1150.

[196] The hypotheticals set forth herein are strictly for academic purposes. I cast no aspersions on any of the individuals described herein, nor do I mean to. All are bound to provide the freedoms to all residents of the United States as safeguarded by the Constitution, and I have no reason to believe or assume that any would "persecute" on the basis of political opinion or any other immutable characteristic—any individual, citizen or alien—as the term "persecution" is defined in the INA.

[197] *The principle of non-refoulement under international human rights law*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (undated), available at:

A relevant issue in this context would be whether the applicant could relocate within the United States (say, to Los Angeles) and thereby avoid harm by the SFPD.

Imagine as well that there is no burden shifting. The applicant would have to show that even if he or she moved to Beverly Hills or Westwood that the new local authorities would harm the applicant on the same grounds, or would return the applicant to San Francisco where the applicant would face such harm. In either case, it would not be a significant burden for the applicant to prove either fact, if either were true.

The issue of relocation would still exist but not be as salient if instead of the SFPD, the persecutor of our hypothetical San Franciscan was California Governor Gavin Newsom, or state Attorney General Xavier Becerra. Moving to Los Angeles would still mean remaining in California, and it should not be hard for the applicant to show that he or she could not relocate in that state safely to avoid harm from Newsom or Becerra.

It would, however, remain an extremely relevant issue if instead of moving to Los Angeles, it would be reasonable for the alien to move to Miami, Florida, where the mayor (Francis Suarez) and the governor, (Ron De Santis) are each Republicans (Newsom and Becerra are Democrats).

Again, the alleged persecutor would be a government official, but the ability of the applicant to seek protection in Miami would be significant because the alleged persecutors and the new municipal and state authorities do not share the same political affiliation. It would still not, however, be onerous for the applicant to prove to the Canadian authorities that, notwithstanding the reasonableness of relocation, the threat of harm would still exist, if that were true—although there would be more issues for the applicant to confront.

Or, assume instead for purposes of the hypothetical that the alleged persecutor was President Donald Trump or Attorney General William Barr. Even if the applicant were to bear the burden of showing that he or she could not move out of San Francisco and thereby safely relocate within the United States, the burden would not be that great. The persecutor is the federal government, whose reach would extend throughout all of the 50 states.

Finally, though, assume that the applicant in the last scenario is instead a lawful permanent resident (LPR) alien in the United States, residing in Frederick County, Maryland, whose sheriff participates in the 287(g) program[198], meaning that he and his office cooperate with DHS in immigration enforcement[199],

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https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf.

[198] *287(g) ICE-Homeland Security Partnership*, Frederick County Sheriff's Office, Maryland (undated), available at: https://www.frederickcosheriff.com/287g-program.

[199] *See* Jessica M. Vaughan and James R. Edwards, Jr., *The 287(g) Program, Protecting Home Towns and Homeland*, CENTER FOR IMMIGRATION STUDIES (Oct. 9, 2009), available at: https://cis.org/Report/287g-Program.

and the issue is whether the LPR could relocate safely to San Francisco. San Francisco is a sanctuary city[200], and California has a strict sanctuary policy[201] as well.

The applicant could still seek asylum and *non-refoulement* in Canada, but the applicant's inability to relocate (assuming it would be reasonable to do so) to avoid harm by the federal government would be slightly more complicated. That said, however, it would not be impossible for the applicant to show that he or she could not safely relocate to San Francisco from Frederick County, if that were true.

Given these arguments, DHS and DOJ should remove the presumptions involving government actors and the inability of an applicant for asylum and statutory withholding to internally relocate, and the burden-shifting requirements consequent thereto, in the amendments[202] proposed for 8 C.F.R. §§ 208.13(b)(3)(ii), 1208.13(b)(3)(ii), and 1208.16(b)(3)(ii) in the final rule, and amend those regulations accordingly. The final amendment should state that an applicant for asylum and withholding of removal bears the burden of establishing all of the elements of his or her claim, and that this burden never shifts to DHS—consistent with the clear requirements in the INA.

Factors for Consideration in Discretionary Determinations

Asylum is a discretionary form of relief, meaning that even if an applicant establishes statutory eligibility for asylum, the alien still bears the burden of establishing that he or she merits that protection in the exercise of discretion.[203]

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[200] We Are a Sanctuary City, OFFICE OF THE MAYOR (San Francisco) (undated) ("Since 1989, San Francisco has proudly been a Sanctuary City. We will stand shoulder-to-shoulder with our immigrant communities and fight for the progress we've achieved in this City. We are a sanctuary city, now, tomorrow and forever."), available at: https://sfmayor.org/sanctuary-city.

[201] *See* Andrew Arthur, Understanding SCOTUS's Denial of Review of California Sanctuary Laws: Consistency at and percolation up to the High Court, whether we like it or not, Center for Immigration Studies (Jun. 17, 2020) (California's "SB 54 . . . limits cooperation between California state and local law enforcement officers and the Department of Homeland Security (DHS) in immigration-enforcement matters."), available at: https://cis.org/Arthur/Understanding-SCOTUSs-Denial-Review-California-Sanctuary-Laws.

[202] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36292 (amending 8 C.F.R. § 208.13(b)(3)(ii), 36301 (amending 8 C.F.R. § 1208.13(b)(3)(ii), and 36303 (amending 8 C.F.R. § 1208.16(b)(3)(ii)) (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, and 1236), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[203] Section 101(b)(1)(A) of the INA (2020) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of [section 101(a)(42)(A) of the INA].") (emphasis added); *INS v. Stevic*, 467 US 407, 423 n.18 (1984) ("Under § 208(a) [of the INA], in order to be eligible for asylum, an alien must meet the definition of 'refugee' contained in § 101(a)(42)(A) [of the INA], a standard that also would qualify an alien seeking to immigrate under § 207 [of the INA]. Meeting the definition of 'refugee,' however, does not entitle the alien to asylum — the decision to grant a particular application rests in the discretion of the Attorney General under § 208(a) [of the INA]".), available at: https://scholar.google.com/scholar_case?case=12060890825493121856&hl=en&as_sdt=6&as_vis=1&oi=scholarr#[19].

In *Matter of Pula*[204], the BIA held that "the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted." It continued:

> *Among those factors which should be considered are whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States. In addition, the length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residency there are also relevant. . . . Further, whether the alien has relatives legally in the United. States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere is another factor to consider. In this regard, the extent of the alien's ties to any other countries where he does not fear persecution should also be examined. Moreover, if the alien engaged in fraud to circumvent orderly refugee procedures, the seriousness of the fraud should be considered.*[205]

In *Matter of A-B-*[206], the Attorney General reiterated the *Matter of Pula* factors, "remind[ing] all asylum adjudicators that a favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA."

As I noted[207] after *Matter of A-B-* was issued: "Despite the more than three decades that have passed since the BIA issued that decision, asylum is only very rarely denied under the factors set forth in *Matter of Pula*." Part of that, as I explained[208], had to do with the language of that 1987 decision, as well as circuit-court disapproval of administrative attempts to deny asylum in the exercise of discretion.

The paucity of discretionary denials also has to do with the lack of guidance from DOJ and DHS on the issue. In the more than 30 years between *Matter of Pula* and *Matter of A-B-*, DOJ, in particular, provided few if any guidelines for adjudicators to follow in assessing whether to exercise discretion in asylum cases.

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[204] *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3033.pdf.
[205] *Id*. at 473-74.
[206] *Matter of A-B-*, 27 I&N Dec. 316, 345 n. 12 (A.G. 2018), available at: https://www.justice.gov/eoir/page/file/1070866/download; *see also* Andrew Arthur, *The Safe-Third Country Sleeper Footnote in Matter of A-B-*, Center for Immigration Studies (Jun. 15, 2018) ("Specifically, in footnote 12 of that decision, the attorney general reiterated the fact that asylum is a discretionary form of relief. . . This is directly relevant to recent events along the Southwest border, and in particular to the wave of aliens who have recently been apprehended at entry or after crossing the border illegally and claimed credible fear, a development I discussed in my May 4, 2018, Backgrounder on 'Catch and Release Escape Hatches'. Simply put, it at least provides incentives for third-country nationals abroad (and in particular Central Americans transiting Mexico) to apply for asylum before coming to the United States."), available at: https://cis.org/Arthur/SafeThird-Country-Sleeper-Footnote-Matter-AB.
[207] *Id*.
[208] *Id*.

There are two reasons why this complicated such determinations. First, as noted, under section 103(a)(1) of the INA[209], "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." Second, each of the IJs and the BIA members are, *de facto* and *de jure*, exercising the Attorney General's authority in section 103(a)(1) of the INA, and in particular (and especially) his discretion. With respect to IJs, section 101(b)(4) of the INA[210] states:

> *The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a [removal] hearing under section [240 of the INA]. An immigration judge* ***shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe****, but shall not be employed by the Immigration and Naturalization Service. [Emphasis added.]*

To review the decisions of the more than 500 IJs[211] at the nation's 67 immigration courts and two adjudications centers[212], past Attorneys General have delegated some of their review authority to the BIA by regulation, which is found at 8 C.F.R. § 1003.1(a)[213]:

> *There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR). The Board members shall be attorneys appointed by the Attorney General* ***to act as the Attorney General's delegates*** *in the cases that come before them. [Emphasis added.]*

If the Attorney General is going to have delegates to exercise his discretion in asylum cases (which, as noted above are a significant portion of the immigration court caseload), they should have guidance to direct the exercise of that discretion—guidance that has by and large not been forthcoming in the last three decades.

In the JNPR, DOJ and DHS propose amendments to 8 C.F.R. §§ 208.13[214] and 1208.13[215] that would add a new subsection (d) to each. Those amendments would provide a non-exhaustive list of adverse discretionary factors, three of which are deemed "[s]ignificantly adverse discretionary factors" and nine others of which would ordinarily result in a denial of asylum in the exercise of discretion.

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[209] Section 103(a)(1) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1103&num=0&edition=prelim.
[210] Section 101(b)(4) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1101&num=0&edition=prelim.
[211] *Immigration Judge (IJ) Hiring*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (data generated June 2020), available at: https://www.justice.gov/eoir/page/file/1242156/download.
[212] *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (May 27, 2020), available at: https://www.justice.gov/eoir/office-of-the-chief-immigration-judge.
[213] 8 C.F.R. § 1003.1(a) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1003.1.
[214] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36293 (amending 8 C.F.R. § 208.13), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[215] *Id.* at 36301-02 (amending 8 C.F.R. § 1208.13).

The three significant factors all have to do with the alien's transit to and arrival in the United States, including the "alien's unlawful entry or unlawful attempted entry" into this country "unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country"; the alien's failure to apply for protection in a safe third country through which the alien passed on his or her way to the United States that offered such protection (unless the alien applied for and was denied such protection); and the "alien's use of fraudulent documents to enter the United States" if the alien transited through a third country.[216]

These factors all plainly respond to the hundreds of thousands of aliens who entered illegally across the Southwest border or who sought entry with fraudulent documents in the past three years across that border, and in particular those aliens who were nationals of countries other than Mexico (OTMs).

According to CBP[217], in FY 2019, 977,509 aliens were apprehended along the Southwest border or were deemed inadmissible by the agency at the ports along that border. Of that number, 851,508 were apprehended by the Border Patrol, with the rest (126,001) were deemed inadmissible by CBP officers (an unknown number because they had attempted entry through fraud).[218] With respect to the Border Patrol apprehensions, 473,682 were adults travelling with children (family units or "FMU"), 76,020 were unaccompanied alien children (UACs), and 301,806 were single adults.[219]

Those hundreds of thousands of family units and UACs contributed to a humanitarian and national-security disaster at the border[220], as the capabilities of CBP and ICE to process them were strained to the point of breaking. The majority of each were OTMs[221], primarily from the Northern Triangle of Central

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[216] *Id*, at 36293, 36301-02.

[217] *Southwest Border Migration FY 2019*, U.S. CUSTOMS AND BORDER PROTECTION (last modified Nov. 14, 2019), available at: https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019.

[218] *See id*.

[219] *See id*.

[220] *See Border Crisis: CBP's Response*, U.S. CUSTOMS AND BORDER PROTECTION (undated) ("In some sectors, the U.S. Border Patrol diverted up to 60% of its agents from the border security mission to care for families and children, significantly reducing agents' presence on the border. 'On a daily basis, agents are feeding and caring for migrants, consoling children, and rescuing over 4,000 aliens that smugglers have placed into peril,' Brian Hastings, chief of law enforcement operations for the Border Patrol told the House Judiciary Committee July 25. 'They continue to perform the humanitarian mission, knowing they are sacrificing the border security mission they were hired to do, day after day, with no end in sight.' The crisis depleted ICE's detention capacity and greatly overwhelmed its resources. That caused the Border Patrol to hold migrants in overcrowded conditions rather than moving them to ICE's facilities designed for longer-term custody. Without this outlet, the Border Patrol was compelled to hold detainees much longer than it should. In fact, holding 4,000 people in custody at one time is a crisis. At its height, the agency had nearly 20,000 in custody. 'Our Border Patrol facilities … were not designed to hold families or children,' Acting Commissioner Morgan said in another news conference earlier in October. 'They were designed as police stations. And because of that, because of the new demographic of families and children, those resources became strained, and our limited resources had to be diverted from their law enforcement duties, securing the border, to address the humanitarian crisis. Make no mistake: Our country was less safe because of it.'"), available at: https://www.cbp.gov/frontline/border-crisis-cbp-s-response; Andrew Arthur, *Humanitarian and National Security Disaster at the Border: A Congress-and court-caused Katrina*, CENTER FOR IMMIGRATION STUDIES (Mar. 8, 2019), available at: https://cis.org/Arthur/Humanitarian-and-National-Security-Disaster-Border.

[221] *See U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, U.S. CUSTOMS AND BORDER PROTECTION (last modified Nov. 14, 2019), available at: https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019.

America countries of El Salvador (56,897 aliens in family units, 12,021 UACs), Guatemala (185,233 aliens in family units, 30,329 UACs), and Honduras (188,416 aliens in family units, 20,398 UACs). "Only" 166,458 of the aliens apprehended by Border Patrol were from Mexico, the vast majority (149,967) of whom were single adults, with 6,004 travelling in family units and 10,487 who were UACs.[222]

This represents a significant demographic shift over the past decade. Before 2011, over 90 percent of arriving aliens were single adult males, [223] and before 2009, 90 percent of arriving aliens were Mexican nationals.[224] In FY 2019, by contrast, 607,406 of the aliens apprehended or deemed inadmissible at the Southwest border were family units or UACs (62 percent)[225], and just 237,078 of the aliens apprehended or deemed inadmissible at that border were Mexican nationals: 24 percent of the total.[226]

That increase has been driven by a number of factors. In testimony[227] before the House Judiciary Committee in March 2019, I identified three: deficiencies in the credible fear system[228], the current iteration of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)[229], and the *Flores* settlement agreement.[230]

With respect to the last of these, I explained:

> *The agreement, which was originally signed in 1997, has now been read to create a presumption in favor of the release of all alien minors, even those alien minors who arrive with their parents.* [231] *As DHS has stated: "Under the* Flores *Agreement, DHS can only detain UACs for 20 days before releasing them to the Department of Health and Human Services (HHS) which places the minors in foster or shelter situations until they*

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[222] *See id*.
[223] *Press Release: To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard*, Dep't of Homeland Security (Apr. 4, 2018), available at: https://www.dhs.gov/news/2018/04/04/secure-border-and-make-america-safe-again-we-need-deploy-national-guard.
[224] *Id*.
[225] *Southwest Border Migration FY 2019*, U.S. CUSTOMS AND BORDER PROTECTION (last modified Nov. 14, 2019), available at: https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019.
[226] *See id*.; *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, U.S. CUSTOMS AND BORDER PROTECTION (last modified Nov. 14, 2019), available at: https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019; *Southwest Border Inadmissibles by Field Office Fiscal Year 2019*, U.S. CUSTOMS AND BORDER PROTECTION (last modified Nov. 14, 2019), available at: https://www.cbp.gov/newsroom/stats/sw-border-migration/ofo-sw-border-inadmissibles-fy2019.
[227] *Protecting Dreamers and TPS Recipients: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Andrew Arthur, Resident Fellow in Law and Policy, Center for Immigration Studies), available at: https://cis.org/Testimony/Protecting-Dreamers-and-TPS-Recipients.
[228] *See* Andrew Arthur, *Fraud in the "Credible Fear" Process, Threats to the Integrity of the Asylum System*, CENTER FOR IMMIGRATION STUDIES, Apr. 2017, *available at*: https://cis.org/sites/cis.org/files/arthur-credible-fear-4-17_0.pdf.
[229] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 (2008), *available at*: https://www.congress.gov/bill/110th-congress/house-bill/7311?q=%7B%22search%22%3A%5B%22William+Wilberforce+Trafficking+Victims+Protection+Reauthorization+Act+of+2008%22%5D%7D&r=1.
[230] *Flores v. Reno*, Stipulated Settlement Agreement, *available at*: https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf.
[231] *See Flores v. Lynch*, 828 F. 3d 898 (9th Cir. 2016), *available at*: https://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf.

locate a sponsor."[232] *The agreement encourages UACs to enter the United States illegally, and encourages the parents of UACs to hire smugglers to bring them to the United States. Further, it encourages people to bring their own children (or children whom they claim to be their own) when they make the perilous journey to the United States, thinking that it will make it more likely that they (the parents or purported parents) will be released if they travel with children.*

Echoing these statements, a month later, on April 16, 2019, the Homeland Security Advisory Council's bipartisan CBP Families and Children Care Panel issued a "Final Emergency Interim Report".[233] Among other shocking details in that report, the panel[234] determined:

> *Over 53,000 FMU were apprehended last month alone by the Border Patrol, and at the current trajectory, that number of FMU apprehensions is likely to exceed 500,000 in Fiscal Year (FY) 2019.*
>
> *After being held for several days at inadequate and overcrowded holding areas at USBP stations, most of the adults -- provided they have a child with them and have stated that they fear returning to their country of origin -- are issued Notices to Appear (NTA) at a later time before an immigration judge somewhere in the U.S. and then dropped at a local bus station or delivered to already overwhelmed non-profit shelters.* ***The NTA, combined with long delays in the adjudication of asylum claims, means that these migrants are guaranteed several years of living (and in most cases working) in the U.S. Even if the asylum hearing and appeals ultimately go against the migrant, he or she still has the practical option of simply remaining in the U.S. illegally, where the odds of being caught and removed remain very low. A consequence of this broken system****, driven by grossly inadequate detention space for family units and a shortage of transportation resources,* ***is a massive increase in illegal crossings of our borders, almost entirely driven by the increase in FMU migration from Central America****.*
>
> ***By far, the major "pull factor" is the current practice of releasing with a NTA most illegal migrants who bring a child with them. The crisis is further exacerbated by a 2017 federal court order in*** **Flores v. DHS** ***expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to unaccompanied children (UAC). After being given NTAs, we estimate that 15% or less of FMU will likely be granted asylum. The current time to process an asylum claim for anyone who is not detained is over two years, not counting appeals.*** *[Emphasis added.]*

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[232] *Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes*, U.S. DEP'T OF HOMELAND SECURITY, Feb. 15, 2018, *available at*: https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and.

[233] *Final Emergency Interim Report, CBP Families and Children Care Panel*, HOMELAND SECURITY ADVISORY COUNCIL (Apr. 16, 2019), available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

[234] *Id*. at 1-2.

The foregoing passage also suggests, as I noted above, that there have been serious abuses of the credible-fear and asylum systems, as aliens have exploited those systems (and the delays therein, exacerbated by the entry of hundreds of thousands of aliens) in an attempt to live and work in the United States indefinitely.

That conclusion is backed up by facts. Prior to 2013, only one percent of aliens claimed credible fear.[235] By FY 2018, 18 percent of all aliens apprehended or deemed inadmissible along the Southwest border claimed credible fear.[236] The most logical conclusion is that smugglers have adopted our nation's lax credible-fear and asylum systems as a "sales pitch" to foreign nationals seeking a better life in this country.[237]

As I recently explained[238]:

> *What had been a shield in the expedited removal provision for aliens legitimately seeking asylum [credible fear] gradually became a sword with which other aliens could cut through the expedited removal provision to gain (indefinite) entry into the United States. In FY 2009, a year in which the Border Patrol apprehended 556,041 illegal entrants, USCIS completed 5,523 credible fear cases. In FY 2019, by contrast, Border Patrol apprehended 859,501 illegal entrants, and AOs received 105,439 credible fear claims, completing 102,204 (75,252 of whom received a positive credible fear finding).*

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[235] *Press Release: To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard*, Dep't of Homeland Security (Apr. 4, 2018), available at: https://www.dhs.gov/news/2018/04/04/secure-border-and-make-america-safe-again-we-need-deploy-national-guard.

[236] *Claims of Fear, CBP Southwest Border and Claims of Credible Fear Total Apprehensions/Inadmissibles (FY2017 - FY2018)*, U.S. CUSTOMS AND BORDER PROTECTION (last modified Oct. 23, 2019), available at: https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear.

[237] *See Border Crisis: CBP's Response*, U.S. CUSTOMS AND BORDER PROTECTION (undated) ("Central American migrants believed U.S. officials would admit them to the United States, if they crossed the border with a child. A recent court ruling limits families and children during immigration proceedings, and most were released into the United States within days. Meanwhile, the illegal aliens were allowed to stay while their asylum claims make it through the courts, a process so backlogged it lasts for years. It's a fact not lost on the criminal organizations profiting off the exploitation of migrants. 'This perception about our immigration system incentivizes migrants to put their lives in the hands of smugglers and make the dangerous trek north to our southwest border, ' Acting Commissioner Morgan wrote in remarks submitted to the Senate Committee on Homeland Security and Governmental Affairs on July 30. 'We see the cost of these pull and push factors every day in profits derived by transnational criminal organizations, in the lives lost along the journey, and in the flight of generations of youth from the countries of the Northern Triangle.' . . . 'Smugglers are exploiting these loopholes to encourage more migration. They openly advertise a safe and legal journey to the United States, misleading families by telling them there is a policy that anyone who arrives with a child will not be deported.'"), available at: https://www.cbp.gov/frontline/border-crisis-cbp-s-response; Andrew Arthur, *DHS/DOJ: Raise Credible Fear Standard for Statutory Withholding and CAT: A familiar burden of proof, and an overdue change*, CENTER FOR IMMIGRATION STUDIES (Jun. 25, 2020), available at: https://cis.org/Arthur/DHSDOJ-Raise-Credible-Fear-Standard-Statutory-Withholding-and-CAT.

[238] *Id*.

There is, however, no reason for those OTMs to wait to come to the United States if they legitimately fear persecution or torture. They could apply for asylum in Mexico, which, as my former colleague, Kausha Luna[239], noted, grants protection, and on much broader grounds than the United States:

> *Mexico signed the 1951 Refugee Convention and its 1967 Protocol in 2000. In addition, Mexico is party to the 1984 Cartagena Declaration on Refugees. The 1984 declaration goes beyond the definition of "refugee" that appears in the 1951 Geneva Convention. Per the 1951 Geneva Convention a refugee is an individual who,*
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> > *[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.*
>
> *The Cartagena Declaration expands the definition of refugee to include:*
>
> > *persons who have fled their countries because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*

In fact, all of the seven countries in Central America are also parties to both the Refugee Convention and the Refugee Protocol.[240]

Given these facts, it is appropriate for the departments to consider the unlawful entry or attempted unlawful entry of an OTM (who is not also claiming a fear in Mexico) into the United States, as well as an OTM's failure to apply for protection in a safe third country before applying for asylum in the United States as "significant adverse discretionary factors" in determining whether to grant asylum in the exercise of discretion.[241]

And, as the JNPR[242] notes, seeking entry through fraud is a violation of the INA[243] (and in certain instances, also a crime punishable by up to 10 years in jail and a fine[244]), and DHS and DOJ "are

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[239] Kausha Luna, Mexico's Refugee Law, CENTER FOR IMMIGRATION STUDIES (Jun. 24, 2018), available at: https://cis.org/Luna/Mexicos-Refugee-Law.
[240] Andrew Arthur, *Administration Issues Third-Country Asylum Eligibility Rule: Bars claims of aliens who failed to apply for asylum en route to the United States*, CENTER FOR IMMIGRATION STUDIES (Jul. 19, 2019), available at: https://cis.org/Arthur/Administration-Issues-ThirdCountry-Asylum-Eligibility-Rule.
[241] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36293 (amending 8 C.F.R. § 208.13 (2020), 36301-02 (amending 8 C.F.R. § 1208.13 (2020)), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[242] *Id*. at 36283.
[243] *See* section 212(a)(6)(C)(i) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.
[244] *See* 8 U.S.C. § 1546(a) (2020), available at: https://www.law.cornell.edu/uscode/text/18/1546.

concerned that the use of fraudulent documents makes the proper enforcement of the immigration laws difficult and requires an immense amount of resources."[245]

The latter point is a good one. Subverting the admissions process through fraud is a serious issue—Ramzi Yousef, who was "was convicted of the 1993 bombing of New York's World Trade Center building"[246], his accomplice Ahmed Ajaj[247] (who was sentenced to 114 years for his role in that attack), and attempted "millennium bomber" Ahmed Ressam[248] each attempted to use false passports from visa waiver countries to enter the United States.[249] Plus, such attempted fraud forces CBP officers at the ports of entry to utilize significant resources in response.

That said, even under the amendments proposed in the JNPR, fraud at entry will only be a "significant adverse discretionary factor" if the applicant for asylum did not come directly from the applicant's home country.[250] This will protect legitimate asylum seekers who did not have any choice except to utilize fraud to escape from persecution and come to this country.

There are other exceptions to these rules[251], as noted above. An alien's failure to apply for asylum in a third country that provides such protection will not be considered a "significant adverse discretionary factor" if that "alien received a final judgment denying the alien in such country", or if the alien is a "victim of a severe form of trafficking in persons", as that term is defined by regulation[252].

Again, these exceptions will protect vulnerable aliens, and provide them with asylum protections, assuming that they are statutorily eligible for that relief (and have shown that they otherwise merit asylum in the exercise of discretion).

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[245] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36283, available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[246] *Most Wanted 436. Ramzi Yousef*, FEDERAL BUREAU OF INVESTIGATION (undated), available at: https://www.fbi.gov/wanted/topten/topten-history/hires_images/FBI-436-RamziAhmedYousef.jpg/view.

[247] Kirk Mitchell, *1993 World Trade Center bomber's religious freedom case against U.S. prison system goes to trial in Denver Ahmad Ajaj was convicted in the Feb. 26, 1993 bombing in which six people were killed*, Denver Post (Aug. 27, 2018), available at https://www.denverpost.com/2018/08/27/world-trade-center-bomber-ahmad-ajaj-trial/.

[248] *History, Millennium Plot/Ahmed Ressam*, FEDERAL BUREAU OF INVESTIGATION (undated), available at: https://www.fbi.gov/history/famous-cases/millennium-plot-ahmed-ressam.

[249] Steven A. Camarota, *The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States, 1993-2001*, Center for Immigration Studies (May 1, 2002), available at: https://cis.org/Report/How-Militant-Islamic-Terrorists-Entered-and-Remained-United-States.

[250] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36283, available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[251] *See id*. at 36293, 36302.

[252] 8 C.F.R. § 214.11 (2020), available at: https://www.law.cornell.edu/cfr/text/8/214.11.

Turning to the nine other adverse discretionary factors in the JNPR[253] (not otherwise designated as "significant"), two are similar to the aforementioned "significant" discretionary factors, and apply where an alien (other than a "victim of a severe form of trafficking") (1) spent more than 14 days in a third country that provides protection against persecution or CAT immediately prior or en route to the United States without applying for, and being denied, such protection, and (2) transited through such a country on his or her way to the United States without applying for, and being denied, such protection.

These two factors, which again are similar to the three significant factors above, address and respond to the same issues as those other factors. Simply put, if an alien is truly seeking protection from persecution or torture, the alien should ask for that protection in the first safe country he or she comes to—not wait until arriving in the United States to seek asylum.

Not only does the failure of that foreign national to seek protection elsewhere on the way to the United States undermine the alien's claim as a factual matter, but it also has the deleterious effects on U.S. national security and the ability of CBP to protect our borders described above. Aliens should not be rewarded for "forum shopping" their asylum claims.

The third factor[254] has to do with aliens who have been convicted of crimes, convictions (or sentences) that were subsequently amended or altered on grounds other than the fact that the alien was not guilty.

Under section 208(b)(2)(A)(ii) of the INA[255], an alien is barred from receiving asylum if "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States . . . . " Aggravated felonies, as defined in section 101(a)(43) of the INA[256], are considered, by statute[257], to be "particularly serious crimes", as are other crimes designated by the Attorney General[258].

"Conviction" is defined under the INA[259] as:

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[253] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36284, available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[254] *See id*.
[255] Section 208(b)(2)(A)(ii) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.
[256] Section 101(a)(43) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1101&num=0&edition=prelim.
[257] Section 208(b)(2)(B)(i) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.
[258] Section 208(b)(2)(B)(ii) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.
[259] Section 101(a)(48)(A) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1101&num=0&edition=prelim.

> *[A} formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-*
>
> *(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and*
>
> *(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.*

For purposes of this definition, "a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."[260]

That said, even convictions that would not otherwise bar an alien from an asylum grant under the INA can still be an adverse factor for purposes of granting asylum in the exercise of discretion.

As I have previously explained[261]:

> *Although immigration law is uniquely the province of the federal government, charges in removal proceedings are often premised on state court criminal convictions. For example, section 237(a)(2)(A)(iii) of the [INA] renders removable any alien who has been convicted of an aggravated felony after admission. Included in the aggravated felony definition at section 101(a)(43)(F) of the INA is "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." This applies to not only federal criminal convictions, but also crimes under state law as well.*
>
> *State courts will often attempt to vacate a conviction that would render an alien removable, or modify or "clarify" a criminal sentence for such a conviction, after that conviction is entered, and (in certain instances) after the sentence itself has been served. This is sometimes done for issues relating to the legality of the conviction, and sometimes for other reasons, including to allow criminal aliens to avoid the immigration consequences of those convictions. IJs and the BIA in those instances are left to determine what effect, if any, the underlying state convictions and sentences have for immigration purposes.*

The BIA responded to this issue in *Matter of Pickering*.[262] It held there that:

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[260] Section 101(a)(48)(B) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1101&num=0&edition=prelim.
[261] Andrew Arthur, *AG Issues Guidelines on State Criminal-Sentence Modifications, Returning to logic and uniformity by returning to the INA*, Center for Immigration Studies (Oct. 30, 2019), available at: https://cis.org/Arthur/AG-Issues-Guidelines-State-CriminalSentence-Modifications.
[262] *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263, 267-70 (6th Cir. 2006), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3493.pdf.

> *If a court vacates an alien's conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.*

The JNPR[263] notes: "Circuit courts of appeals have consistently accepted this principle, deeming *Pickering* reasonable and consistent with congressional intent." *Matter of Pickering* did not, however, address cases in which sentences for convictions were subsequently altered, and the BIA's case law on this issue had been somewhat unclear and confusing.[264]

Attorney General Barr clarified this issue in *Matter of Thomas and Matter of Thompson*[265]. He held that state-court orders that "modify, clarify, or otherwise alter a criminal alien's sentence" will not affect immigration matters unless they are "based on a procedural or substantive defect in the underlying criminal proceeding", as opposed to "based on reasons unrelated to the merits of the underlying criminal proceeding, such as rehabilitation or the avoidance of immigration consequences."[266]

Looking at the legislative history of section 101(a)(48) of the INA (which was added by section 322 of IIRIRA[267]), the Attorney General concluded that in enacting this provision, Congress "made clear that immigration consequences should flow from the original determination of guilt," and "ensured uniformity in the immigration laws by avoiding the need for immigration judges to examine the post-conviction procedures of each state."[268]

The amendments to 8 C.F.R. §§ 208.13[269] and 1208.13 would build upon these decisions, and make clear that a conviction for a "particularly serious crime" would remain an adverse discretionary factor even if that conviction was reversed, vacated, expunged or modified, or if the sentence therefor was vacated or modified for any other reason, aside from the applicant being found not guilty.

This would eliminate the gamesmanship that follows otherwise valid state court convictions, in which pliable judges and/or state prosecutors are convinced to go back and change otherwise valid

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[263] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36284, available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review

[264] *See Matter of Thomas and Matter of Thompson*, 27 I&N Dec. 674, 675 (A.G. 2019) (reviewing precedent decisions), available at: https://www.justice.gov/eoir/page/file/1213201/download.

[265] *Id*. at 674.

[266] *Id*.

[267] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), at Div. C, Tit. III, subtit. B, section 322 (adding section 101(a)(48) to the INA, Pub. L. 104-208 (1996), available at: https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf.

[268] *See Matter of Thomas and Matter of Thompson*, 27 I&N Dec. 674, 682-84 (A.G. 2019), available at: https://www.justice.gov/eoir/page/file/1213201/download.

[269] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36284, 36294 (amending 8 C.F.R. §§ 208.13), and 36302 (amending 8 C.F.R. § 1208.13), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review

convictions, in order to provide the alien with protection from the immigration laws of the United States.

The JNPR would also add, as an adverse discretionary factor, the fact that the applicant "[a]ccrued more than one year of unlawful presence in the United States prior to filing the asylum application."[270]

Under section 208(a)(2)(B) of the INA[271], an alien is barred from filing for asylum if that application is not filed within one year of the alien's most recent entry into the United States, absent changed circumstances[272]. Pursuant to the proposed amendment, however, more than one year of *cumulative* unlawful presence in the United States would constitute an adverse discretionary factor for purposes of denying a validly filed application for that protection.[273]

This factor would therefore apply if an alien enters illegally on several different occasions, and remains illegally in the United States for a total of more than one year before filing an application for asylum. It would also apply to an alien who enters the United States legally on more than one occasion and overstays for a total of more than one year.

This factor is consistent with Congress's expressed intent with respect to aliens who remain in the United States unlawfully in section 212(a)(9)(B)(i)(II)[274] and (in particular) section 212(a)(9)(C)(i)[275] of the INA.

Section 212(a)(9)(B)(i)(II)[276] of the INA renders aliens who have remained in the United States illegally for a year or more inadmissible for 10 years from the date that they depart or are removed from the United States. Section 212(a)(9)(C)(i) of the INA[277], on the other hand, permanently bars aliens who

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[270] *See id*.
[271] Section 208(a)(2)(B) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.
[272] *See* section 208(a)(2)(D) of the INA (2020) ("An application for asylum of an alien may be considered, notwithstanding subparagraph[208(a)(2)(B) of the INA], if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph [208(a)(2)(B) of the INA."), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.
[273] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36284, available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review
[274] Section 212(a)(9)(B)(i)(II) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.
[275] Section 212(a)(9)(C) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.
[276] Section 212(a)(9)(B)(i)(II) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.
[277] Section 212(a)(9)(C) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.

repeatedly enter the United States illegally and are thereafter present illegally in the United States for a cumulative period of a year or more from admission (subject to exceptions and waivers).

These provisions show that Congress intended all aliens to comply with the immigration laws of the United States, and especially wanted the most serious penalty (permanent inadmissibility) to apply to those aliens who, on more than one occasion, enter or remain in the United States illegally.

This is also reflected in the criminal penalties for unlawful entry in section 275(a) of the INA[278]. Aliens who enter illegally are subject to a misdemeanor sentence of less than six months imprisonment, and a fine.[279] A second offense, however, exposes the alien to a felony sentence of up to two years and a fine.[280] Notably, there is no reference to any period of unlawful presence to trigger these penalties—the simple offenses are enough.[281]

Given Congress's expressed intention that aliens should comply with the immigration laws of the United States, and in particular the significant penalties that it has imposed for those who violate the immigration laws on more than one occasion, cumulative unlawful presence of more than a year should be an adverse factor in *granting* asylum in the exercise of discretion, even for those aliens who are not otherwise barred from *filing* an asylum application under section 208(a)(2)(B) of the INA[282], as proposed by DHS and DOJ.[283]

Next, the JNPR[284] would include, in the list of adverse discretionary factors, the fact that an asylum applicant has, at the time of filing the asylum application, failed to comply with federal, state, or local tax laws by complying with any obligations thereunder.

Justice Holmes remarked that: "Taxes are what we pay for civilized society . . . ."[285] This is true not only for citizens and nationals of the United States, and LPRs, but for all those who rely upon public services, and in particular the protection of the laws-- including aliens without status.

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[278] Section 275(a) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1325&num=0&edition=prelim#:~:text=Any%20alien%20who%20(1)%20enters,or%20misleading%20representation%20or%20the.

[279] *See id*.

[280] *Id*.

[281] *See id*.

[282] Section 208(a)(2)(B) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

[283] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36284, 36294 (amending 8 C.F.R. §§ 208.13), and 36302 (amending 8 C.F.R. § 1208.13), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review

[284] *See id*.

[285] *Compañia General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 US 87, 100 (1927), available at: https://scholar.google.com/scholar_case?case=14587306158937130 10&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

Often, however, as an IJ I would encounter respondents who had either failed to file taxes, or who filed questionable returns. On more than one occasion, respondents were unable to identify "dependents" who were listed on their tax returns, for whom they had received tax benefits.

The JNPR[286] would, appropriately, require asylum applicants to have properly filed all of their taxes prior to seeking the protection of the United States. This adverse discretionary factor will, however, likely be difficult to apply in practice, absent an admission by the alien or counsel that the alien had failed to comply with out tax laws.

The tax laws rival the immigration laws in their complexity, and therefore, assessing whether an applicant was required to file taxes and, if they were, did so, will likely be an arduous task. Guidance on this issue from DOJ and the Department of the Treasury will likely been needed if AOs and IJs are to apply this adverse factor appropriately.

In addition, the departments propose[287] to add the denial of two prior asylum applications "for any reason" as an adverse discretionary factor, as well as the withdrawal of a prior asylum application with prejudice, the abandonment of a prior asylum application, and a failure to appear for an asylum interview with an AO (the latter with exceptions for "[e]xceptional circumstances" or a lack of adequate notice).

As noted in footnote 102 above, the Supreme Court[288] has held, in the context of a motion to reopen: "In a deportation proceeding. . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." It is not uncommon for aliens to seek to delay removal or extend unlawful presence in the United States by filing non-meritorious applications for asylum, and not unheard of for them to reschedule or "miss" AO asylum interviews for the same reasons.

And, EOIR statistics[289] reveal that almost 30 percent of all IJ asylum decisions in FY 2019 (27,127 out of 91,370) fell within the category of "other", which includes "a decision of abandonment, not adjudicated, other, or withdrawn." In fact, in FY 2019 alone, IJs issued 10,574 *in absentia* orders in asylum cases.[290] Even that number of *in absentia* orders does not include aliens who claimed fear, but failed to apply for

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[286] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36284-85, 36294 (amending 8 C.F.R. §§ 208.13), and 36302 (amending 8 C.F.R. § 1208.13), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[287] *Id*.

[288] *Doherty*, 502 U.S. at 323, available at: https://scholar.google.com/scholar_case?case=8707621299668215514&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[289] *Asylum Decision Rates*, DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (data generated Apr. 15, 2020) ("Other" rate was 29.69 percent), available at: https://www.justice.gov/eoir/page/file/1248491/download.

[290] *Asylum Applicant In Absentia Removal Orders*, DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (data generated Apr. 15, 2020), available at: https://www.justice.gov/eoir/page/file/1107716/download.

asylum.[291] The JNPR[292] explains that: "Asylum applications take a significant portion of processing time and already constitute half of the docket in immigration court."

These amendments will limit such strains on AOs' and IJs' limited resources, and will prevent aliens from abusing the asylum system. Like "the boy who cried wolf", the alien may at some point be in a situation where he or she actually shows statutory eligibility for relief, but the alien should not file for asylum until that point, and certainly should not simply game the system before then to remain in the United States indefinitely.

I will also note that two of these adverse factors for discretion[293] (abandonment of a prior asylum application, and failure to attend an asylum interview" without prior authorization or in the absence of exceptional circumstances") implement section 208(d)(5)(A)(v) of the INA[294], which state that the procedure for filing asylum applications:

> *[S]hall provide that . . . in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a [removal] hearing under [section 240 of the INA], the application may be dismissed* ***or the applicant may be otherwise sanctioned for such failure****. [Emphasis added.]*

Denial in the exercise of discretion is the most appropriate sanction in those cases, even if applied to a subsequent application for asylum.

Finally, the JNPR[295] proposes to add a ninth adverse discretionary factor, for aliens who fail to file a motion to reopen to apply for asylum based upon changed country conditions within a year of such changes.

Pursuant to section 240(c)(7) of the INA[296], an alien may only file one motion to reopen (with exceptions) within 90 days of the entry of a final order. That 90-day limit, however, does not apply to a motion to reopen to apply for asylum or statutory withholding "based on changed country conditions

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[291] *See id*. n. 1.
[292] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36284, 36294 (amending 8 C.F.R. §§ 208.13), and 36302 (amending 8 C.F.R. § 1208.13), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[293] *Id*. at 36284.
[294] Section 208(d)(5)(A)(v) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.
[295] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36285, 36294 (amending 8 C.F.R. §§ 208.13), and 36302 (amending 8 C.F.R. § 1208.13), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[296] *See* section 240(c)(7) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.

arising in" the alien's country of nationality or the country of removal "if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding."[297]

Congress failed, however, to put any time limit on reopening to apply for asylum based on changed country conditions. In the JNPR[298], the departments argue that rendering a failure to file a motion to reopen within one year of changed country conditions an adverse discretionary factor "would appropriately incentivize aliens to exercise due diligence with regard to their cases, as is otherwise required for motions to reopen, and aid in the efficient processing of asylum applications before EOIR." They are absolutely correct.

In fact, consistent with the general time limitation on the filing of motions to reopen in section 240(c)(7)(C)(i) of the INA[299], DHS and DOJ should make a failure to file a motion to reopen within 90 days of changed country conditions an adverse discretionary factor.

Keep in mind that motions to reopen can only be filed by aliens under final orders of removal. Thus, if a changed circumstance is so significant that it would place the alien in danger of harm or torture, the alien has every incentive to move for reopening as soon as the alien is aware of that change, so as to avoid being removed to a country where the alien would be persecuted. And, if the change is so significant that it would endanger the alien, the alien should know about that change soon after it occurs.

The alien's delay in filing such a motion should properly be viewed as an attempt to extend his or her unlawful status in the United States, in contravention of Congress's clear intent in section 241(a)(1)(A) of the INA[300] that an alien *ordered* removed *be removed* within 90 days of the final removal order. Congress's waiver of the deadlines for aliens to file motions to reopen to apply for asylum or statutory withholding is not a blank check for those aliens to remain indefinitely, but a lifeline for aliens facing removal who would be facing harm as a result of a change in the circumstances in the alien's home country or country of removal. Aliens should be expected to reach for that lifeline as soon as possible, and in any event within 90 days of the change. If they fail to do so, it should be considered an extremely adverse factor.

Even where the AO or the IJ concludes that one of these nine adverse discretionary factors is present, under the JNPR, the alien's asylum application is not automatically denied in the exercise of discretion. Rather, "in extraordinary circumstances", including those that involve "national security or foreign policy considerations" or where the alien demonstrates "by clear and convincing evidence" that denying

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[297] Section 240(c)(7)(C)(ii) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.
[298] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36285, available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[299] *See* section 240(c)(7)(C)(i) of the INA (2020) ("Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal."), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim
[300] Section 241(a)(1)(A) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.

asylum "would result in exceptional and extremely unusual hardship to the alien", those adjudicators may nonetheless grant asylum to an alien who meets the statutory requirements for that protection, in the exercise of discretion.[301]

Even if one of these exceptions applies, however, where one or more of those nine adverse factors is serious enough, the exception may not be compelling enough to overcome the conclusion that the alien should be denied asylum in the exercise of discretion.[302] Again, asylum is a unique form of protection, because a grant of asylum places the alien on a path to LPR status[303], and ultimately citizenship.[304] That protection should be judiciously granted, therefore, only to the truly needy and deserving.

Moreover, even if an alien who has established statutory eligibility for asylum is denied that protection in the exercise of discretion, the alien may still be eligible for statutory withholding under section 241(b)(3) of the INA[305], assuming that the alien can meet the higher burdens required for that protection. Statutory withholding is not discretionary, but rather must be granted to any alien ordered removed who satisfies the requirements for that protection.[306] Thus, statutory withholding remains a backstop to prevent the removal of an alien who would be persecuted upon return, but who does not merit asylum in the exercise of discretion under the standards proposed in the JNPR.[307]

For the reasons set forth herein, the departments should include the proposed amendments to 8 C.F.R. §§ 208.13 and 1208.13 in the JNPR[308], which provide standards for AOs and IJs to follow in assessing whether to grant an application for asylum in the exercise of discretion, with the minor changes suggested above, in the final rule.

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[301] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36285, 36294 (amending 8 C.F.R. §§ 208.13), and 36302 (amending 8 C.F.R. § 1208.13), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[302] *See id*.

[303] *See* section 209(b) of the INA (2020) (asylum applicant can apply for LPR status within one year of an asylum grant, with exceptions), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1159&num=0&edition=prelim.

[304] *See* section 316(a) of the INA (2020) (LPR may be naturalized after five years of LPR status), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1427&num=0&edition=prelim.

[305] *See* section 241(b)(3) of the INA (2020), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.

[306] *See id*. ("Notwithstanding paragraphs [241(b)(1) and (2) of the INA], **the Attorney General may not remove** an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.") (emphasis added).

[307] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36284 ("Especially given that an applicant may still seek non-discretionary statutory withholding of removal and protection under the CAT regulations, the Departments believe that the inclusion of the proposed adverse discretionary factors in the rule will ensure that immigration judges and asylum officers properly consider, in all cases, whether every applicant merits a grant of asylum as a matter of discretion, even if the applicant has otherwise demonstrated asylum eligibility."), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[308] *Id*. at 36294 (amending 8 C.F.R. §§ 208.13), and 36302 (amending 8 C.F.R. § 1208.13). .

Firm resettlement

Section 208(b)(2)(A)(vi) of the INA[309] bars aliens who were "firmly resettled in another country prior to arriving in the United States" from receiving asylum. This provision was added to the INA by section 604 of IIRIRA[310], which was captioned "Asylum Reform", but as the JNPR [311]notes, Congress had earlier "added it as a prohibition to entry as a refugee from abroad in 1980" and "DOJ first defined 'firm resettlement' in the context of asylum applications in 1990."

The departments continue:

> *At the time, DOJ did not provide an explanation for the chosen definition, although it was similar to the existing definition of firm resettlement for refugees. . . . Aside from technical edits, and minor updates to ensure gender neutrality and change references from "nation" to "country," the definition of firm resettlement has remained the same for nearly 30 years.*

That definition is set forth in regulation at 8 C.F.R. §§ 208.15[312] and 1208.15[313]. Pursuant to those regulations, "[a]n alien is considered to be firmly resettled if" prior to arriving in the United States, the alien "entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement".[314]

There are two regulatory exceptions to this rule: (1) the alien went to that country fleeing persecution, remained there only long enough to book forward passage, and "did not establish significant ties in that country" and (2) the alien was not actually resettled because "the conditions of" the alien's "residence in that country were . . . substantially and consciously restricted by the authority of the country of refuge."[315]

The second exception contains a list of considerations for making this determination, including the types of housing and employment that were available to the alien in that country, the conditions under which the other residents therein live, and the alien's ability to hold property, travel, receive an education, access public relief, and naturalize, compared to the other residents in that country.[316]

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[309] Section 208(b)(2)(A)(vi) of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.
[310] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), at Div. C, Tit. VI, subtit. A, section 604, Pub. L. 104-208 (1996), available at: https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf.
[311] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36284, available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[312] 8 C.F.R. § 208.15 (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.15.
[313] 8 C.F.R. § 1208.15 (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.15.
[314] *Id*.; 8 C.F.R. § 208.15 (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.15.
[315] *Id*.
[316] *Id*.

Respectfully, the current definition is so narrow, I would be surprised that the bar gets applied at all. The departments[317] propose to amend that narrow definition, as they explain, given "the increased availability of resettlement opportunities and the interest of those genuinely in fear of persecution in attaining safety as soon as possible . . . ."

More plainly, there are 43 more countries that offer refugee protection than there were in 1990[318], and it is appropriate, in accordance with the statutory firm resettlement asylum bar, to prevent foreign nationals (and in particular, OTMs) from moving from country to country that could and would grant them protection in order to, again, "forum shop" for asylum the United States.

In light of this, the departments propose to amend 8 C.F.R. §§ 208.15 and 1208.15 to "specify three circumstances under which an alien would be considered firmly resettled" under the bar. Those three circumstances are: (1) the alien could have resided or did reside in a permanent status or a non-permanent but renewable protective status in a third country the alien transited on the way to the United States, "regardless of whether the alien applied for or was offered such status"; (2) the alien safely and voluntarily resided in a third country for a year or more before entering the United States; or (3) the alien is a citizen of a safe third country and was in that country before coming to the United States or was a citizen of a safe third country present in that country before coming to the United States and subsequently renounced the citizenship of that country.

The latter two circumstances are beyond reasonable. There are many benefits to living in the United States with asylum status, but it is appropriate to limit that status to foreign nationals who truly have nowhere else to go. Given the unique citizenship laws of the various countries in the world, there are any number of individuals who hold citizenship in more than one of those countries, and if a foreign national with more than one citizenship has a fear in a country of nationality or last habitual residence, he or she should live in another country in which that foreign national has citizenship, in lieu of seeking asylum in the United States.

In other words, simply because a foreign national *could* seek asylum in the United States, there is no reason we should grant that status where that foreign national has other options, even if, from an economic or quality-of-life standpoint, those other options are not as attractive.

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[317] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36285-86, available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[318] *See* States *Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (undated) (there are 145 States Parties to the 1951 Convention, 146 States Parties to the 1967 Protocol, 142 States Parties to both, and 148 States Parties to either, including Mexico (both, June 2000), El Salvador (both 1983), Guatemala (both 1983), Honduras (both 1992), Costa Rica (both 1978), Nicaragua (both 1980), Belize (both 1990), Panama (both 1978), the Bahamas (1993), Colombia (Convention 1961, Protocol 1980), Brazil (Convention 1960, Protocol 1972), Venezuela (Protocol 1986), Peru (Convention 1964, Protocol 1983), Paraguay (both 1970), Uruguay (both 1970), Chile (1972), and Argentina (Convention 1961, Protocol 1967); available at: https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html.

A similar analysis applies to the first circumstance. I could not find a single country—other than Cuba—in the Western Hemisphere that does not grant protective status of one sort or another. Europe, Africa, and Asia are almost as well represented on UNHCR's list of countries that provide protection, which is referenced in footnote 318.[319] Again, looking at economic, educational, or health-care opportunities, most are not as attractive as the United States. But, the purpose of asylum is not to provide the alien with the best opportunities for themselves or their children—it is to protect them from persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[320]

And, if a foreign national is truly fleeing his or her homeland in fear, that foreign national should not (and logically would not) pass up other opportunities to be protected from that fear, simply to enter the United States illegally, apply for asylum here, and live and work in this country indefinitely.

Pursuant to the proposed regulatory changes in the JNPR[321], the asylum applicant bears the burden of proving that the firm-resettlement bar does not apply, and the issue of firm resettlement may be raised either by DHS (the AO in affirmative asylum or credible-fear proceedings, or the ICE attorney in the case of a defensive asylum application), or by the IJ.

Finally, under the amendments proposed in the JNPR[322], the firm resettlement of a parent or parents shall be imputed to an alien son or daughter "if the resettlement occurred before" that son or daughter turned 18, "and the alien resided with" his or her parents when *they* were firmly resettled. An exception to this rule provides that the bar will not apply if the alien son or daughter proves that he or she "could not have derived any" status—permanent or "potentially indefinitely renewable temporary legal immigration status" (including protective status) from the parent.

The proposed amendments to the regulatory provisions in the JNPR are reasonable and appropriate, and reflect Congress's intentions in implementing the firm-resettlement bar in IIRIRA. The departments should include those amendments in the final rule.

Rogue Officials

The JNPR[323] proposes amendments to the regulations[324] implementing CAT protection to clarify what constitutes "torture" for purposes of CAT.

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[319] *See id*.
[320] *See* section 208 of the INA (2020), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.
[321] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36286, 36294 (amending 8 C.F.R. § 208.15), and 36303 (amending 8 C.F.R. § 1208.15), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[322] *Id*.
[323] *Id*. at 36286-88.
[324] 8 C.F.R. §§ 208.18 (2020) (applicable to DHS), available at: https://www.law.cornell.edu/cfr/text/8/208.18, and 1208.18 (2020) (applicable to IJs and the BIA), available at: https://www.law.cornell.edu/cfr/text/8/1208.18.

As ultimately adopted by the INS, "torture"[325] for purposes of the CAT is explicitly defined by regulation. Specifically, it is:

> *[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind . . . .*

That said, not all "harm or suffering" as referenced will satisfy the CAT standard. Rather, only such abuse "inflicted by or at the instigation of or with the consent or acquiescence of a *public official* or *other person acting in an official capacity*" will qualify the applicant for CAT.[326]

As the JNPR[327] notes, however:

> *The regulations do not provide further guidance for determining what sorts of officials constitute "public officials," including whether an official such as a police officer is a public official for the purposes of the CAT regulations if he or she acts in violation of official policy or his or her official status—in other words, a "rogue" police official.*

This has proven to be a problem, as the departments note, because in cases involving "rogue" officials, some "federal courts have generally implied from the lack of further explanation regarding the definition of 'public official' that no exception excluding 'rogue' officials from the definition exists."[328]

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[325] 8 C.F.R. §§ 208.18(a)(1), available at: https://www.law.cornell.edu/cfr/text/8/208.18; 1208.18(a)(1), available at: https://www.law.cornell.edu/cfr/text/8/1208.18.

[326] *See id*. (emphasis added).

[327] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36286, available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[328] *Id*., *see also Barajas-Romero v. Lynch*, 846 F. 3d 351, 362-63 (9th Cir. 2017) ("The statute and regulations do not establish a 'rogue official' exception to CAT relief. The regulations say that torture, for purposes of relief, has to be 'at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' The four policemen were 'public officials,' even though they were local police and state or federal authorities might not similarly acquiesce. Since the officers were apparently off-duty when they tortured Barajas-Romero, they were evidently not acting 'in an official capacity,' but the regulation does not require that the public official be carrying out his official duties, so long as he is the actor or knowingly acquiesces in the acts. The regulation uses the word 'or' between the phrases 'inflicted by ... a public official' and 'acting in an official capacity.' The word 'or' can only mean that either one suffices, so the torture need not be both by a public official and also that the official is acting in his official capacity. An 'and' construction would require that the conjunction be 'and.' The record leaves no room for doubt that the four policemen were public officials who themselves inflicted the torture."), available at: https://scholar.google.com/scholar_case?case=20566780368580684 3&hl=en&as_sdt=6&as_vis=1&oi=scholarr, *but see Suarez-Valenzuela v. Holder*, 714 F. 3d 241, 248 (4th Cir. 2013) ("The BIA noted that Suarez-Valenzuela had not established that the government acquiesced to Luis's behavior [Luis was a police officer] in the past or would do so in the future. Although the BIA acknowledged that the other officers who assisted Luis 'may have acquiesced to the harm the applicant received by not intervening,' the BIA considered these officers to be 'rogue' because other government officials denounced Luis's behavior by prosecuting, convicting, and incarcerating him. In fact,

The problem is obvious. CAT protection is supposed to apply, exclusively, to applicants who have been targeted by the government for harm or suffering, not where such harm or suffering would be inflicted by a private actor. Some "public officials", however, act out of personal animus, not only without government approval, but in contravention of the laws and policies of the government for which they work.

Consider this in the context of the United States, which has an untold number of government employees, each of which could be considered to be a "public official". In fact, the United States has approximately two million government employees (not counting U.S. Postal Service workers) at the federal level alone,[329] and that figure is in addition to millions of state, local, and municipal employees. Ideally, each of them would comport themselves at all times in accordance with the law, but regrettably, that is not true[330] and, given human nature, not even reasonable.

To address this issue, DHS and DOJ propose[331] to amend the regulations[332] defining torture to make clear that (1) "pain and suffering" does not constitute torture for purposes of CAT "unless it is done while the official is acting in his or her official capacity (i.e. under 'color of law')", and (2) that such pain or suffering "inflicted by, or at the instigation of or with the consent or acquiescence of" a rogue official (that is, an official not acting under color of law) "does not constitute a 'pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'", even when the harm inflicted rises to the level of acts constituting "torture" as defined in the regulations.[333]

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the BIA noted that Luis tortured Suarez-Valenzuela to prevent him from testifying, indicating that he acted out of fear that the government would punish him and not with any form of government approval. Finally, the BIA explained that Suarez-Valenzuela had not established that Luis's future actions, if any, would be on behalf of the government, noting that Suarez-Valenzuela had not demonstrated that Luis remained a government employee following his imprisonment. Because Suarez-Valenzuela's testimony supports the BIA's conclusions, we find that substantial evidence supports its determination that the Peruvian government was not complicit in Suarez-Valenzuela's past torture and was unlikely to acquiesce to his future torture."), available at: https://scholar.google.com/scholar_case?case=12002438483984905 15&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[329] *See* Mike Maciag, *Federal Employees By State*, GOVERNING (Apr. 20, 2017), available at: https://www.governing.com/gov-data/federal-employees-workforce-numbers-by-state.html.

[330] *See, e.g., Press Release: Former Baltimore City Police Gun Trace Task Force Detective Sentenced To 12 Years In Federal Prison For Racketeering Conspiracy*, U.S. Dep't of Justice, U.S. Atty's Office for the District of Maryland (May 28, 2019) ("Rayam participated in 15 robberies from June 2014 through October 2016. Rayam admitted that he was armed with his [Baltimore Police Department] service firearm during the robberies, that individual victims of the robberies were physically restrained to facilitate the commission of the offense, and that he authored false and fraudulent incident reports and other official documents in some cases in order to conceal his criminal conduct and otherwise obstruct justice."), available at: https://www.justice.gov/usao-md/pr/former-baltimore-city-police-gun-trace-task-force-detective-sentenced-12-years-federal.

[331] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36286, 36294, and 36303 available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[332] 8 C.F.R. §§ 208.18(a)(1) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.18; 1208.18(a)(1) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.18.

[333] *See* 8 C.F.R. §§ 208.18(a)(2) (2020) ("Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture."),

The departments explain that the "color of law" analysis in the proposed amendments are not only not contrary to CAT or to the regulations implementing it, but are in fact consistent with the United States' ratification of CAT and with a federal criminal statute partially implementing that convention.[334]

In addition, the JNPR[335] proposes amending 8 C.F.R. § 208.18(a)(7) and 1208.18(a)(7)[336], the provisions in the regulations implementing CAT that define what constitutes "acquiescence of a public official". Those regulations currently state: "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."

While this seems like a fairly straightforward definition, federal courts have found that it could use some refining with respect to what constitutes "awareness" in the context of "acquiescence" to torture.[337] The Third Circuit[338] (in a case that I often cited as an IJ), has held that "acquiescence" for purposes of CAT does not require the applicant to show "that the government in question was actually aware of the conduct that constitutes torture." Instead, the court held, "an alien seeking relief under the CAT can establish that the government in question acquiesces to torture by showing that the government is *willfully blind* to a group's activities." (emphasis added.)

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available at: https://www.law.cornell.edu/cfr/text/8/208.18; 1208.18(a)(2) (2020) (same), available at: https://www.law.cornell.edu/cfr/text/8/1208.18

[334] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36286 ("U.S. ratification history of the CAT specifically approves of a 'color of law' analysis. See, e.g., S. Exec. Rep. No. 101-30, at 14 (1990) ('Thus, the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted `under color of law."; and citing 18 U.S.C. 2340(1) (2020) ("`[T]orture' means an act committed by a person acting under the color of law . . . ."). available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[335] *Id*.

[336] 8 C.F.R. §§ 208.18(a)(7) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.18; 1208.18(a)(1) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.18.

[337] *See, e.g., Scarlett v. Barr*, 957 F. 3d 316, 334 (2d Cir. 2020) ("Scarlett's CAT claim depends on his demonstrating government acquiescence in likely torture. This court has stated that acquiescence is demonstrated by evidence that 'government officials know of or remain willfully blind to an act [of torture] and thereafter breach their legal responsibility to prevent it.'. . . Acquiescence is distinct from the specific intent required of the torturer himself.") 336 (surveying circuits' decisions; "In none of these cases, however, did the courts consider, much less decide, how the 'unable' prong of the unwilling-or-unable standard, as applicable to withholding claims, might translate to identifying government acquiescence in torture under the CAT. We think that question is best left to the agency on remand, which can consider it with the benefit of the Attorney General's guidance in *Matter of A-B-*.") (2d Cir. 2020), available at: https://scholar.google.com/scholar_case?case=14026453952963361468&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[338] *Silva-Rengifo v. Atty. Gen. of U.S.*, 473 F. 3d 58, 70 (3d Cir. 2007), available at: https://scholar.google.com/scholar_case?case=13485368184647213352&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

Consistent with that assessment (and others), DHS and DOJ propose[339] to amend 8 C.F.R. § 208.18(a)(7) and 1208.18(a)(7) to clarify that "awareness" can mean "either actual knowledge" in advance of the activity constituting torture that it is going to occur, or "willful blindness" of that fact.

The departments[340] further propose to define "willful blindness" in the CAT context (again, in accordance with well-trodden legal principles) to mean:

> *[T]he public official or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire.*

To eliminate any possible confusion (and to conform the definition to meet "the Senate's understanding in the CAT ratification documents" in response to concerns from law enforcement about the domestic application of CAT under U.S. criminal law), the JNPR[341] would further amend the regulations to explain: "No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture."

The JNPR explains this proposed amendment as follows:

> *First, the official or other person in question must have been charged with preventing the activity as part of his or her duties. So, for instance, an official who is not charged with preventing crime or who is outside his or her jurisdiction would not have a legal responsibility to prevent activity constituting torture, even if that person was aware of the activity. . . . Second, such a person does not breach a legal duty to intervene if the person is unable to intervene, or if the person intervenes, but is nevertheless unable to prevent the activity.*

To summarize, the JNPR[342] would amend 8 C.F.R. §§ 208.18(a)(1) and 1208.18(a)(1) to read:

> *Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating*

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[339] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36286, 36294 (amending 8 C.F.R. § 208.18(a)(7)), and 36303 (amending 8 C.F.R. § 1208.18(a)(7)), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[340] *Id*.

[341] *Id*., and specifically at 36287-88, and 36294-95 (amending 8 C.F.R. § 208.18(a)(7)).

[342] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36286-87, 36294 (amending 8 C.F.R. § 208.18(a)(1)), and 36303 (amending 8 C.F.R. § 1208.18(a)(1)), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review

or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official ***acting in an official capacity*** *or other person acting in an official capacity.* ***Pain or suffering inflicted by a public official who is not acting under color of law ("rogue official") shall not constitute pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the rogue official****. [added language highlighted]*.

The departments[343] would amend 8 C.F.R. §§ 208.18(a)(7) and 1208.18(a)(7) to read:

Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. ***Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.*** *[added language highlighted].*

These are reasonable amendments, grounded in the CAT itself and interpretations of current regulations, as well as other sources of domestic law. The departments should adopt these amendments into the final rule, for the reasons explained above.

Information Disclosure

Very strict regulations[344] bar the government's disclosure of information related to asylum, credible fear, and reasonable fear determinations in all but a limited number of situations.

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[343] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36286-88, 36294-95 (amending 8 C.F.R. § 208.18(a)(7)), and 36303 (amending 8 C.F.R. § 1208.18(a)(7)), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[344] 8 C.F.R. §§ 208.6 (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6 (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.

Specifically, "information contained in or pertaining to any asylum application" (which includes an application for statutory withholding and CAT[345]), and "records pertaining to any credible fear determination" or "reasonable fear determination" may "not be disclosed without the written consent of the applicant, except as permitted" by regulation "or at the discretion of the Attorney General."[346]

Often, as the materials cited above suggest, "Attorney General" can mean any number of officials within DOJ. In this context, however, it has been my experience (including as the Acting Section Chief for the National Security Law Division at the then-INS) that the authority to disclose information in asylum applications or credible-fear or reasonable-fear records is not delegated to an official much below the Attorney General himself, if even then.

This bar on goes even further, restricting the disclosure of even the fact that an alien applied for asylum, or received a credible fear or reasonable-fear review.[347]

It should be noted that the bars on disclosure are strictly regulatory—there is no statutory authority for these restrictions on disclosure. There are policy arguments that can be made for non-disclosure of protection-related facts and materials, however. For example, the very filing of an application for asylum, statutory withholding, or CAT may be viewed as a hostile or disloyal act by the alien's home country, and disclosure of those materials may bolster an otherwise weak claim.

There are limitations on these restrictions, but they are narrow.[348] Of course, the information in the asylum application can be disclosed in connection with the adjudication of that application[349], and the records pertaining to credible- or reasonable-fear determinations can be considered in the course of those determinations.[350]

In addition, these regulations do not bar disclosure to any U.S. government official or contractor in connection with the defense of any legal action in which the asylum application or credible- or reasonable-fear determination is a part[351], or any legal action arising from the adjudication or failure to adjudicate the asylum application.[352]

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[345] *See* 8 C.F.R. §§ 208.3(b) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.3, 1208.3(b), available at: https://www.law.cornell.edu/cfr/text/8/1208.3.
[346] 8 C.F.R. §§ 208.6(a) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6(a) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.
[347] 8 C.F.R. §§ 208.6(b) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6(b) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.
[348] 8 C.F.R. §§ 208.6(c) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6(c) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.
[349] 8 C.F.R. §§ 208.6(c)(1)(i) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6(c)(1)(i) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.
[350] 8 C.F.R. §§ 208.6(c)(1)(ii) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6(c)(1)(ii) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.
[351] 8 C.F.R. §§ 208.6(c)(1)(iv) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6(c)(1)(iv) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.
[352] 8 C.F.R. §§ 208.6(c)(1)(iii) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6(c)(1)(iii) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.

This information may also be disclosed to federal, state, or local courts in a legal action arising from proceedings in which those applications or determinations are a part[353], or arising from the adjudication or non-adjudication of those applications or determinations.[354]

Finally, such information may be disclosed to a U.S. government official or contractor who needs that information "in connection with" a federal "criminal or civil matter."[355] While this would appear to be a broad exception, in my experience, it is in practice quite narrow, as government employees are loathe to even appear to violate these particular regulations. For example, I recently explained[356]:

> *The current regulations. . . have led to some absurd results. For example, I once had to tell a federal judge in a separate civil matter that he could not have access to an alien's full file (known as an "A-File"), and that I could not tell him why (which would itself have violated the regulation). Imprisonment for contempt could have been one of the sanctions (my boss told me to take my toothbrush with me), but the regulation is that strict.*

And, I would add, that vague. I also noted therein[357] that these restrictions can "inhibit[] investigations into asylum fraud, where the same (or an extremely similar) application is filed by different aliens in different cases (I am aware of such an investigation where both aliens ended up having to be granted asylum)."

As the JNPR[358] explains, however, while these "regulations prohibit disclosing protected information to unauthorized 'third parties'", they "are silent, save by exception, as to who constitutes an unauthorized third party."

The departments[359] also raise concerns (similar to the ones I expressed above) that the current confidentiality restrictions could prevent their investigations of fraud in the asylum process (a subject

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[353] 8 C.F.R. §§ 208.6(c)(2)(ii) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6(c)(2)(ii) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.
[354] 8 C.F.R. §§ 208.6(c)(2)(i) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6(c)(2)(i) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.
[355] 8 C.F.R. §§ 208.6(c)(1)(v) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6(c)(1)(v) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.
[356] Andrew Arthur, *Proposed Rules Would Speed Asylum, Withholding, and CAT Claims, Regulation: the slower, more complex alternative to certification*, CENTER FOR IMMIGRATION STUDIES (Jun. 11, 2020), available at: https://cis.org/Arthur/Proposed-Rules-Would-Speed-Asylum-Withholding-and-CAT-Claims.
[357] *Id*.
[358] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36288, available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.
[359] *Id*.

about which I have written[360] at some length). They explain[361] that "there is a clear need to ensure that the confidentiality provisions are not being used to shield fraud and abuse that can only be uncovered by comparing applications and information across proceedings." In addition, DHS and DOJ assert, "there is need to ensure that other types of criminal activity are not shielded from investigation and prosecution due to the confidentiality provisions."

Another issue related to these confidentiality regulations arises in the custody context, in that those regulations "can constrain the government from responding to aliens' attempts to gain release via habeas."[362]

To explain, an alien who is detained pending removal proceedings can request a bond redetermination from an IJ[363], and can appeal that decision to the BIA[364]. At any point, however, the respondent can seek release from immigration custody by filing a habeas petition with a federal district court judge.[365]

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[360] *See* Andrew Arthur, *Fraud in the "Credible Fear" Process, Threats to the Integrity of the Asylum System*, CENTER FOR IMMIGRATION STUDIES (Apr. 19, 2017) ("Fraud in the asylum process is not a 'victimless crime'. As [GAO] has noted: '[Granting asylum to an individual with a fraudulent claim jeopardizes the integrity of the asylum system by enabling the individual to remain in the United States, apply for certain federal benefits, and pursue a path to citizenship.' In addition, fraudulent asylum applications delay the consideration of other, more meritorious applications, and impede the granting of benefits to aliens who are in legitimate need of protection. Even more seriously, as discussed below, terrorists have also exploited the asylum system through fraud to remain in the United States and do harm to the American people. Due to its surreptitious nature, it is impossible to measure the extent of fraud in the asylum process. As Denise N. Slavin, then-vice president of the National Association of Immigration Judges, told the New York Times in 2011, however: 'Fraud in immigration asylum is a huge issue and a major problem.' In perhaps the most substantive attempt to examine asylum fraud, USCIS's Fraud Detection and National Security Directorate (FDNS) partially completed an asylum-based Benefits Fraud and Compliance Assessment (BFCA). That BFCA was described in depth by Louis D. Crocetti, Jr., former associate director of FDNS, during testimony before the House Committee on the Judiciary's Subcommittee on Immigration and Border Security in February 2014. The asylum-based BFCA Program was designed '[t]o determine the scope and types of fraud, and the application and utility of existing fraud detection methods' and '[t]o identify weaknesses and vulnerabilities, and propose/undertake corrective action.' It consisted of a "random sampling of [239 out of 8,555] pending and completed (approved/referred) [affirmative asylum applications filed] with USCIS between May 1 and October 31, 2005.'26 Of those 239 cases, 29 (or 12 percent) were determined to be fraudulent; 12 of those 29 cases had already been granted. While 72 (or 30 percent) of the cases did not contain any 'fraud indicators' (that is, inconsistencies, derogatory, or negative information), 138 (or 58 percent) 'exhibited possible indicators of fraud,' not counting 27 additional cases (for a total of 69 percent) that had been referred because of fraud indicators for overseas verification requests, which had not been completed."), available at: https://cis.org/Report/Fraud-Credible-Fear-Process.

[361] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36288, available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[362] Andrew Arthur, *Proposed Rules Would Speed Asylum, Withholding, and CAT Claims, Regulation: the slower, more complex alternative to certification*, CENTER FOR IMMIGRATION STUDIES (Jun. 11, 2020), available at: https://cis.org/Arthur/Proposed-Rules-Would-Speed-Asylum-Withholding-and-CAT-Claims.

[363] 8 C.F.R. § 1003.19 (2020), available at: https://www.law.cornell.edu/cfr/text/8/1003.19.

[364] 8 C.F.R. § 1003.3 (2020), available at: https://www.law.cornell.edu/cfr/text/8/1003.3.

[365] *See* 28 U.S.C. § 2241 (2020), available at: https://www.law.cornell.edu/uscode/text/28/2241; *see also Demore v. Kim*, 538 U.S. 510, 517 (2003) (pre-removal order; "Section [236(e) of the INA] contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent's constitutional challenge to the

One of the reasons that the alien may have been denied bond by the IJ or the BIA is that the alien has failed to show that he or she is likely eligible for relief[366], and in particular, asylum or CAT. The confidentiality regulations[367], however, do not allow the government to raise this point in opposing the alien's petition for relief on habeas, because again, the very fact that the alien has made such a claim is protected from disclosure, and there is no exception within the current confidentiality regulations that would allow for such disclosure.

To address these issues (as well as others), the JNPR[368] proposes to amend the confidentiality provisions to make clear that the government is permitted to disclose information in or pertaining to an application for asylum, statutory withholding, or CAT: in connection with "any state or federal criminal investigation, proceeding, or prosecution"; "to deter, prevent, or ameliorate the effects of child abuse"; in "defense of any legal action relating to the alien's immigration or custody status"; in connection with "an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws"; and "[p]ursuant to any state or federal mandatory reporting requirement."

It would also specifically allow the disclosure of such information to "employees and officers" of the Departments of State and Labor, as well as HHS. Each of those agencies plays a critical role in our immigration system, and it is appropriate for them to have access to such information.

The Department of State issues visas to foreign nationals abroad[369] but also more pertinently "prepares responses to information requests on country conditions relevant to specific asylum claims and coordinates responses to overseas document verification requests."[370] The Department of Labor "has responsibility for enforcing labor standards protections" for aliens present in the United States.[371] And, HHS is responsible for sheltering UACs who are apprehended by DHS.[372]

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legislation authorizing his detention without bail."), available at: https://scholar.google.com/scholar_case?case=6530717710454372385&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[366] *See Matter of X-K-*, 23 I&N Dec. 731, 736 (BIA 2005) (bond; "Some aliens may demonstrate to the Immigration Judge a strong likelihood that they will be granted relief from removal and thus have great incentive to appear for further hearings."), *overruled on other grounds*, *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3510.pdf.

[367] *See* 8 C.F.R. §§ 208.6(a) (2020), available at: https://www.law.cornell.edu/cfr/text/8/208.6, and 1208.6(a) (2020), available at: https://www.law.cornell.edu/cfr/text/8/1208.6.

[368] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. at 36288, 36292 (amending 8 C.F.R. § 208.6), 36301 (amending 8 C.F.R. § 1208.6), available at: https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review.

[369] *See U.S. Visas*, DEP'T OF STATE (undated), available at: https://travel.state.gov/content/travel/en/us-visas.html

[370] *Fact Sheet, Asylum in the U.S.*, DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR (May 3, 2004), available at: https://2001-2009.state.gov/g/drl/rls/32076.htm.

[371] *See* Andrew Arthur, *How Many Resources Does the Government Have to Enforce the Temporary Worker Visa Program? Answer: Not enough.*, CENTER FOR IMMIGRATION STUDIES (Apr. 22, 2020), available at: https://cis.org/Arthur/How-Many-Resources-Does-Government-Have-Enforce-Temporary-Worker-Visa-Program.

[372] *See* Andrew Arthur, *Unaccompanied Alien Children and the Crisis at the Border*, CENTER FOR IMMIGRATION STUDIES (Apr. 1, 2019), available at: https://cis.org/Report/Unaccompanied-Alien-Children-and-Crisis-Border.

The amendments proposed in the JNPR to the current confidentiality regulations are appropriate. They properly take into consideration the legitimate need to protect the confidentiality of aliens who have applied for asylum, statutory withholding, and CAT, while at the same time ensuring that those applicants have not engaged in fraud (which undermines our generous protection laws), and that they do not use the confidentiality provisions to gain inappropriate release from custody, or to hide criminal activity.

These amendments also help to guarantee that federal government employees and officials have the information that they need to do their jobs, and that DHS and DOJ are able to comply with all appropriate reporting requirements.

The departments should incorporate these changes to the regulations in the final rule.

Additional Comments

In addition to the comments set forth above, I ask to be allowed to incorporate the following analyses of other provisions in the aforementioned Joint Notice of Proposed Rulemaking (JNPR) as comments thereto, as if set forth herein:

Andrew Arthur, *Proposed Rules Would Speed Asylum, Withholding, and CAT Claims, Regulation: the slower, more complex alternative to certification*, CENTER FOR IMMIGRATION STUDIES (Jun. 11, 2020) (in response to the JNPR, generally), available at: https://cis.org/Arthur/Proposed-Rules-Would-Speed-Asylum-Withholding-and-CAT-Claims.

Andrew Arthur, *DHS/DOJ: Send Credible-Fear Claimants to Asylum- and Withholding-Only Proceedings, Why wasn't this done when the president asked the first time?*, CENTER FOR IMMIGRATION STUDIES (Jun. 15, 2020) (comments in response to Part II, Section A, Subsection 1 in the JNPR, "ASYLUM-AND-WITHHOLDING-ONLY PROCEEDINGS FOR ALIENS WITH CREDIBLE FEAR"), available at: https://cis.org/Arthur/DHSDOJ-Send-CredibleFear-Claimants-Asylum-and-WithholdingOnly-Proceedings.

Andrew Arthur, *Proposed Regulation: IJs Should Consider Precedent in Review of Negative Credible-Fear Determinations, Common-sense codification of current practice*, CENTER FOR IMMIGRATION STUDIES (Jun. 18, 2020) (comments in response to Part II, Section A, Subsection 2 in the JNPR, "CONSIDERATION OF PRECEDENT WHEN MAKING CREDIBLE FEAR DETERMINATIONS IN THE 'CREDIBLE FEAR' PROCESS"), available at: https://cis.org/Arthur/Proposed-Regulation-IJs-Should-Consider-Precedent-Review-Negative-CredibleFear.

Andrew Arthur, *DHS and DOJ Move to Discard Irrelevant Regulations, Simple regulatory hygiene that's overdue, and a model for future deletions*, CENTER FOR IMMIGRATION STUDIES (Jul. 1, 2020) (comments in response to Part II, Section A, Subsection 3 in the JNPR, "REMOVE AND RESERVE DHS-SPECIFIC PROCEDURES FROM DOJ REGULATIONS"), available at: https://cis.org/Arthur/DHS-and-DOJ-Move-Discard-Irrelevant-Regulations.

Andrew Arthur, *DHS/DOJ: Raise Credible Fear Standard for Statutory Withholding and CAT, A familiar burden of proof, and an overdue change*, CENTER FOR IMMIGRATION STUDIES (Jun. 25, 2020) (comments in response to Part II, Section A, Subsection 4 in the JNPR, "REASONABLE POSSIBILITY AS THE STANDARD OF PROOF FOR STATUTORY WITHHOLDING OF REMOVAL AND TORTURE-RELATED FEAR

DETERMINATIONS FOR ALIENS IN EXPEDITED REMOVAL PROCEEDINGS AND STOWAWAYS"), available at: https://cis.org/Arthur/DHSDOJ-Raise-Credible-Fear-Standard-Statutory-Withholding-and-CAT.

Andrew Arthur, *DHS/DOJ: Empower Asylum Officers to Apply the Immigration Laws in Credible Fear, Cleaning up the mess that is the credible fear process; more could be done*, CENTER FOR IMMIGRATION STUDIES (Jul. 2, 2020) (comments in response to Part II, Section A, Subsection 5 in the JNPR, "PROPOSED AMENDMENTS TO THE CREDIBLE FEAR SCREENING PROCESS"), available at: https://cis.org/Arthur/DHSDOJ-Empower-Asylum-Officers-Apply-Immigration-Laws-Credible-Fear.

Andrew Arthur, *DHS/DOJ Propose Redefining What Constitutes a 'Frivolous' Asylum Application, Revising the pinched Clinton-era definition would expedite valid protection claims and deter abuse*, CENTER FOR IMMIGRATION STUDIES (Jul. 7, 2020) (comments in response to Part II, Section B, Subsection 1 in the JNPR, "FRIVOLOUS APPLICATIONS"), available at: https://cis.org/Arthur/DHSDOJ-Propose-Redefining-What-Constitutes-Frivolous-Asylum-Application.

Andrew Arthur, *DHS/DOJ: Allow IJs to Skip Hearings Involving Legally Insufficient Protection Claims, Based on law and legal practice — including other EOIR regulations*, CENTER FOR IMMIGRATION STUDIES (Jul. 8, 2020) (comments in response to Part II, Section B, Subsection 2 in the JNPR, "PRETERMISSION OF LEGALLY INSUFFICIENT APPLICATIONS"), available at: https://cis.org/Arthur/DHSDOJ-Allow-IJs-Skip-Hearings-Involving-Legally-Insufficient-Protection-Claims.