CONSTITUTIONAL CONSTRAINTS ON ASYLUM TERMINATION BY THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY

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INTRODUCTION

In June 2009, a federal jury delivered verdicts against brothers Jagprit and Jagdip Singh Sekhon.[1] Attorneys and owners of Sekhon & Sekhon, a now-defunct immigration law firm, the brothers were found to have filed hundreds of fraudulent asylum applications with the former Immigration and Naturalization Service (INS) and its successor, United States Citizenship and Immigration Services (USCIS), a constituent agency of the United States Department of Homeland Security (DHS).[2] Before the criminal proceedings, Sekhon & Sekhon boasted a ninety-five percent approval rate for asylum clients, netting over $1 million in asylum representation fees.[3]

At trial, the government lodged a damning case against the brothers and their employees. Evidence showed that Sekhon attorneys and paralegals had concocted "harrowing, but fictitious, stories of arbitrary arrest, detention, torture, and rape" and coached clients to memorize those narratives for interviews and hearings before federal immigration agencies and administrative courts.[4] Documents in support of clients' asylum claims were shown to have been fraudulent, often manufactured by the firm's employees.[5]

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1 The jury found that the Sekhons, along with several of their employees, were guilty. *See* Verdict, United States v. Caza, No. 2:06-cr-00058-JAM (E.D. Cal. June 25, 2009), ECF No. 326; *see also* Press Release, U.S. Dep't of Justice, E. Dist. of Cal., Three Attorneys and Two Interpreters Convicted in Long-Running Asylum Fraud Scheme (June 25, 2009) [hereinafter Press Release, Three Attorneys], *available at* http://www.ilw.com/immigrationdaily/news/2009,0629-brown.pdf.

2 Press Release, Three Attorneys, *supra* note 1; *see also* Establishment of Bureau of Citizenship and Immigration Services (BCIS), 6 U.S.C. § 271 (2012). Effective August 23, 2004, the Department of Homeland Security renamed the BCIS to USCIS. Name Change from the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services, 69 Fed. Reg. 60938–01 (Oct. 13, 2004). Federal regulations continue to use the acronyms of BCIS and USCIS in reference to this constituent agency of the Department of Homeland Security. *See* Nijjar v. Holder, 689 F.3d 1077, 1079 n.5 (9th Cir. 2012).

3 Stephen Magagnini, *Law Firm's Scam Reopens Hundreds of Asylum Cases*, MCCLATCHY NEWSPAPERS, Nov. 22, 2009, *available at* http://www.timesfreepress.com/news/2009/nov/22/law-firms-scam-reopens-hundreds-asylum-cases; Martha Neil, *Misconduct by 3 Sekhon Firm Lawyers Puts Up to 700 Clients in Peril*, A.B.A. J. (Nov. 16, 2009, 6:10 PM), http://www.abajournal.com/news/article/misconduct_by_sekhon_firm_lawyers_puts_up_to_700_clients_in_peril.

4 U.S. Dep't of Justice, E. Dist. of Cal., *supra* note 1, at 2.

5 *Id.* ("Documents presented to the jury included a large number of items recovered from the home of [a Romanian paralegal], including Romanian notary tax stamps found under his mattress, and jpg images of seals for Romanian doctors, notaries, and churches found on floppy disks in his bedroom. Some of those seals were matched to seals on documents filed in connection with asylum claims for Sekhon & Sekhon clients.").

District Judge Fred Damrell sentenced Jagprit Singh Sekhon to 108 months in prison and his brother, Jagdip, to sixty months.[6] After sentencing the Sekhons and their employees, DHS served on some of the firm's former clients Notices of Intent to Terminate Asylum Status (NOITs), alleging that the clients had engaged in fraud such that they were ineligible for asylum when INS or USCIS had conferred it on them.[7] Certain former clients admitted to their complicity in the fraud, and several testified against the Sekhons during the criminal trial.[8] Others, however, asserted that their original asylum claims had been truthful.[9]

In recent years, fraudulent asylum schemes that parallel the Sekhon case have emerged throughout the United States.[10] The prevalence of so-called "asylum mills"[11] has cast doubt upon the integrity and legitimacy of the nation's asylum program.[12] While DHS and the U.S. Department of Justice have aggressively sought out and prosecuted lawyers and others who have profiteered from such schemes,[13] thorny questions have arisen with respect to their former clients, on whom the federal government has already conferred asylum. While some clients may have

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6 Press Release, U.S. Immigration & Customs Enforcement, 3 Sacramento Attorneys Receive Lengthy Sentences in Asylum Fraud Scheme Investigated by ICE HSI (Sept. 24, 2010), *available at* http://www.ice.gov/news/releases/1009/100924sacramento.htm.

7 A Notice of Intent to Terminate Asylum Status is a formal notice from DHS, notifying an alien of DHS's intent to rescind the asylum status of an alien to whom DHS had previously granted asylum; current federal regulations require DHS to issue a Notice of Intent to Terminate Asylum Status at least thirty days before a termination interview, during which an alien may present evidence that he is still eligible for asylum. *See infra* Part I.F; *see also* 8 C.F.R. § 1208.24(c) (2014); *see also, e.g.*, Dhariwal v. Mayorkas, No. CV 11–2593 PSG, 2011 WL 6779314, at *1 (N.D. Cal. Dec. 27, 2011) ("[O]n July 2, 2010 USCIS issued Dhariwal[, a former Sekhon client,] a Notice of Intent to Terminate Asylum Status ('NOIT'). The NOIT listed eighteen similarities between Dhariwal's asylum application and 'the narrative from another application prepared by Sekhon & Sekhon that the applicant admitted was not true.'" (footnote omitted)).

8 U.S. Dep't of Justice, E. Dist. of Cal., *supra* note 1, at 2 ("At trial, . . . seven former . . . clients . . . [testified] that they had not suffered persecution in their home countries, and that [Jagprit Singh Sekhon] had drafted the fictitious stories [for them].").

9 *See, e.g.*, *Dhariwal*, 2011 WL 6779314, at *2 (describing plaintiff's challenges to DHS's allegations of fraud listed in its Notice of Intent to Terminate plaintiff's asylum).

10 *See* Joseph Goldstein & Kirk Semple, *Law Firms Are Accused of Aiding Chinese Immigrants' False Asylum Claims*, N.Y. TIMES, Dec. 19, 2012, at A28; Press Release, U.S. Att'y's Office, E. Dist. of Pa., Leader of Asylum Fraud Conspiracy Sentenced (June 10, 2010), *available at* http://www.fbi.gov/philadelphia/press-releases/2010/ph061010.htm.

11 The term "asylum mill" refers to a law firm or professional services office that unlawfully fabricates asylum narratives on behalf of noncitizen clients. *See, e.g.*, Joe Anuta, *Feds Crack Down on Flushing Asylum Mill*, TIMES LEDGER (Dec. 27, 2012), http://www.timesledger.com/stories/2012/52/asylumlawers_ne_2012_12_27_q.html.

12 *See, e.g.*, Sam Dolnick, *Immigrants May Be Fed False Stories to Bolster Asylum Pleas*, N.Y. TIMES, July 12, 2011, at A1.

13 Press Release, U.S. Att'y's Office, S. Dist. of N.Y., Twenty-Six Individuals, Including Six Lawyers, Charged in Manhattan Federal Court with Participating in Immigration Fraud Schemes Involving Hundreds of Fraudulent Asylum Applications (Dec. 18, 2012), *available at* http://www.justice.gov/usao/nys/pressreleases/December12/AsylumFraudChargesPR.php.

benefited from their attorneys' fraud, many others, in applying for asylum, may have legitimately claimed fear of persecution in their countries of origin.[14] If clients with legitimate asylum claims erroneously lose their status as a consequence of their attorneys' unrelated fraud, they may face removal[15] to countries where they are at risk of harm.[16]

Although deportation and removal proceedings are civil in nature, the U.S. Supreme Court has acknowledged their penal dimension.[17] Asylum termination effectively revokes an alien's[18] right to remain in the United States,[19] and may ultimately result in that alien's removal to a country from which he has previously stated a fear of persecution.[20] Aliens in asylum termination proceedings therefore have a heightened need for procedural safeguards.[21] Such safeguards, however, have been

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14 *See infra* Part I.A.

15 The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (1996), consolidated deportation proceedings and exclusion proceedings into a single type of proceeding, known as "removal proceedings." This Note refers to "deportation" and "removal" interchangeably. *See* 8 U.S.C. §§ 1229–1229a (2012).

16 For a detailed explanation of how termination proceedings may eventually lead to removal from the United States, see *infra* Part II.

17 The Court has "long recognized that deportation is a particularly severe 'penalty,' [even if], in a strict sense, [it is not] a criminal sanction." Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (citation omitted). The Court has also noted that U.S. law has long "enmeshed criminal convictions and the penalty of deportation." *Id.* at 365–66.

18 8 U.S.C. § 1101(a)(3) (2012) ("The term 'alien' means any person not a citizen or national of the United States.").

19 *See infra* note 61 and accompanying text.

20 8 U.S.C. § 1101(a)(42)(A) ("The term 'refugee' means . . . any person who is outside any country of such person's nationality . . . 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 . . . ."); *see also infra* Part I.

21 Though federal decisions have noted that the similarities between immigration and criminal proceedings necessitate adequate procedural safeguards in the immigration context, this attitude reflects a fairly recent jurisprudential shift by the Supreme Court. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 577 n.107 (1990) (citing Carlson v. Landon, 342 U.S. 524, 537 (1952) ("Deportation is not a criminal proceeding and has never been held to be punishment.")). Procedural protections afforded to aliens in removal and deportation proceedings have, historically, been minimal as compared to criminal proceedings. *Id.* This is largely attributable to the "plenary power doctrine," which the Supreme Court initially adopted as the federal government faced legal challenges for its policy of excluding Chinese immigrants from entering the United States; this doctrine afforded Congress unfettered power to regulate immigration in the United States without judicial interference. *See* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889). For a description of the plenary power's fruition, theoretical underpinnings, and development from the late nineteenth century onward, see Motomura, *supra*, at 551–52, and see also Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 365 (2007). Pursuant to the plenary power doctrine, the judiciary often refused to address constitutional challenges to U.S. immigration law, and instead adopted what Professor Motomura has termed "subconstitutional" rationales to invalidate immigration rules, policies, and administrative actions. *See* Motomura, *supra*, at 548.

noticeably absent. Informal and unrecorded,[22] a decision to terminate by DHS is virtually unreviewable[23] until an alien is subject to imminent removal from the United States.[24] Moreover, DHS records reveal that, of the 1784 Notices of Intent to Terminate issued between March 1, 2003 and March 19, 2014, just forty (roughly two percent of all NOITs issued) resulted in decisions not to terminate asylum.[25] The data are not conclusive, but they do suggest that DHS has treated asylum termination proceedings as a mere procedural formality, rather than a meaningful opportunity for those facing termination to be heard. Since asylum termination may lead to potentially grave consequences,[26] these procedural informalities, coupled with a lack of meaningful review,[27] raise serious constitutional concerns.

Those facing asylum termination have challenged DHS procedures in court.[28] In 2010 and 2011, the Third and Fifth Circuits respectively sanctioned asylum termination by DHS, while holding that the Executive Office for Immigration Review (EOIR)—the Justice Department agency containing the immigration courts and the Board of Immigration Appeals (BIA)—could not review those decisions.[29] A circuit split emerged in 2012, when the Ninth Circuit delivered its

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In the past three decades, legal scholars have observed the waning importance of the plenary power doctrine in immigration-related decisions, or, at the very least, have noted that the doctrine is subject to constitutional constraints. *See id.* at 549, 608–10; *cf.* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 385–86 (2002) ("The problems present in [Zadvydas v. Davis, 553 U.S. 678 (2001)] are not the product of confusion; rather they are the evidence that justice has displaced [the plenary power] doctrine."). Indeed, Supreme Court and circuit court decisions have explicitly recognized that certain immigration statutes, regulations, and policies violate procedural due process protections enmeshed in the Fifth Amendment of the U.S. Constitution. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (holding that immigration statute permitting indefinite civil detention of an alien would raise "a serious constitutional problem" due to conflict with the Due Process Clause of the Fifth Amendment); *see also* U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, DUE PROCESS IN IMMIGRATION PROCEEDINGS (2015), *available at* http://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/E.pdf.

22 *See infra* note 251 and accompanying text.

23 *See infra* notes 109–10, 141–44 and accompanying text. *But see* Singh v. USCIS, No. 10 C 8288, 2011 WL 1485368, at *3 (N.D. Ill. Apr. 19, 2011) (holding that plaintiff, whose asylum DHS terminated, sufficiently pleaded claims as to unlawfulness of termination to survive government's motion to dismiss).

24 *See infra* notes 83–85, 141–44 and accompanying text.

25 Response to Freedom of Information Act (FOIA) Request, at 7 (May 28, 2014) (on file with author).

26 *See infra* note 250.

27 *See infra* Parts I.E and III.B.

28 *See, e.g.*, *Singh*, 2011 WL 1485368, at *2 (challenging asylum termination by DHS on grounds that it violated Administrative Procedure Act, procedural due process, and plaintiff's First Amendment rights); *see also* Chamlikyan v. Bardini, No. C 10–00268 CRB, 2010 WL 5141841, at *3 (N.D. Cal. Dec. 13, 2010) (challenging DHS asylum termination on ground that it violated Administrative Procedure Act and procedural due process).

29 Qureshi v. Holder, 663 F.3d 778, 780 (5th Cir. 2011); Bhargava v. Att'y Gen. of U.S., 611 F.3d 168, 171 (3d Cir. 2010).

decision in *Nijjar v. Holder*,[30] which held that DHS lacked statutory authority to terminate asylum and that any regulation granting it such authority was invalid as a matter of law.[31] The *Nijjar* court halted the DHS campaign to terminate the asylum of former Sekhon clients and to remove them from the United States. Oddly, though perhaps fittingly, the attorney of record on the *Nijjar* petitioners' briefs was none other than Jagprit Singh Sekhon.[32]

Even after *Nijjar*, confusion has persisted in other circuits. Approximately two weeks after the Ninth Circuit issued its decision, the BIA, an appellate administrative tribunal, decided *Matter of A-S-J-*,[33] which, to date, all immigration judges outside of the Ninth Circuit must follow.[34] There, the BIA held that DHS may lawfully terminate asylum, and that an immigration judge may not review those decisions to terminate.[35]

Interpretive canons of immigration law may have driven the Ninth Circuit to avoid constitutional issues in *Nijjar*,[36] but this Note argues that the court should have gone further than it did. Part I of this Note discusses the historical roots, along with the current statutory and regulatory framework for granting and terminating asylum in the United States. Part II discusses the decisional split regarding DHS asylum termination that has emerged among federal circuit courts and the BIA. Part III assesses DHS asylum termination through a constitutional lens, concluding that asylum, once granted, confers upon an alien a private interest, such that its deprivation—i.e., termination—must comport with the Due Process Clause of the Fifth Amendment of the U.S. Constitution.[37] Concluding that DHS asylum termination procedures violate the Fifth Amendment, Part III proposes procedural reforms to remedy this constitutional defect, arguing that an immigration judge should render asylum termination decisions after an adversarial hearing between the alien and the government. Ultimately, this Note attempts to reconcile the seemingly opposing demands of eradicating asylum fraud while preserving procedural safeguards for

30 689 F.3d 1077 (9th Cir. 2012).

31 *Id.* at 1085.

32 *See id.* at 1078. The Ninth Circuit's decision makes no reference as to whether petitioners had been implicated in the fraudulent asylum scheme that led to the Sekhon brothers' convictions. Based on the facts and procedural history recited by the court, this author surmises that they were not. *See id.* at 1078–80.

33 25 I. & N. Dec. 893 (BIA 2012).

34 *Id.* at 894 n.2.

35 *Id.* at 898.

36 *See* Slocum, *supra* note 21, at 365–68 (discussing the plenary power doctrine and its relation to canons of statutory construction, including constitutional avoidance, lenity, and construction that avoids conflict with international law).

37 U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

those suspected of such fraud, so as to prevent their erroneous removal to countries where they may suffer harm.

I. FRAMEWORK FOR GRANTING AND TERMINATING ASYLUM

A. *A Brief History of the U.S. Asylum System*

As a signatory to the 1967 United Nations Protocol Relating to the Status of Refugees,[38] the United States adopted a formal asylum program to fulfill its treaty obligations.[39] The Protocol adopted thirty-two articles of the 1951 United Nations Convention Relating to the Status of Refugees,[40] an internationally-adopted framework for refugee protection that remains in place at the time of this writing.[41] In 1980, Congress enacted the Refugee Act, which formalized the process for granting asylum to noncitizens physically present within the United States.[42]

Consistent with the 1951 Convention and the 1967 Protocol,[43] federal law defines a "refugee" as:

> any person who is outside any country of such person's nationality . . . who is unable or unwilling to return to . . . [or] avail himself . . . of the protection of[] that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[44]

The Protocol requires that the expulsion of a refugee occur only pursuant to a decision reached "in accordance with due process of

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38 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, *available at* http://www.unhcr.org/3b66c2aa10.html. For additional background on federal asylum law, see also E. Lea Johnston, *An Administrative "Death Sentence" for Asylum Seekers: Deprivation of Due Process Under 8 U.S.C. § 1158(d)(6)'s Frivolousness Standard*, 82 WASH. L. REV. 831, 835–47 (2007).

39 Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (incorporating by reference the terms of the Convention).

40 *See* Guy S. Goodwin-Gill, *Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees*, U.N. AUDIOVISUAL LIBR. INT'L L. (2008), http://legal.un.org/avl/pdf/ha/prsr/prsr_e.pdf (noting that 144 States out of a total United Nations membership of 192 have adopted the 1951 Convention).

41 1967 Protocol Relating to the Status of Refugees art. 1 ("The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention [Relating to the Status of Refugees of 1951]." (footnote omitted)).

42 Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102 (1980) (codified throughout sections of 8 U.S.C. §§ 1101–1537).

43 *See* Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 137.

44 8 U.S.C. § 1101(42)(A) (2012).

law."[45] Before expulsion, Protocol signatories must allow refugees to submit evidence on their own behalf, to be represented in expulsion proceedings, to appeal any decision to expel, and to present their cases to competent authorities.[46]

From the early 1980s until 2003, the adjudication of asylum applications was wholly contained within the Department of Justice.[47] During that period, the INS and EOIR, two Department of Justice agencies, were solely responsible for processing asylum applications.[48] That changed on March 1, 2003, with the enactment of the Homeland Security Act, which created DHS and concomitantly dissolved the INS.[49]

With the Homeland Security Act, assorted agencies within the Department of Homeland Security assumed former INS functions.[50] USCIS, an agency within the Department of Homeland Security, is now responsible for the adjudication of asylum applications by asylum officers.[51] EOIR, which remains a Department of Justice agency, still adjudicates asylum applications during removal proceedings before immigration judges.[52] Thus, an alien who seeks asylum in the United States may apply through two discrete administrative channels: "affirmatively," before DHS, or "defensively," in removal proceedings before EOIR.[53]

B. *Affirmative Asylum*

To apply affirmatively for asylum, an alien first must file with USCIS Form I-589, the Application for Asylum and for Withholding of Removal, along with evidence in support of the claim.[54] Thereafter, the applicant must appear at an interview before an asylum officer, an employee of USCIS, the agency contained within DHS.[55] After that

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45 Convention and Protocol Relating to the Status of Refugees art. 32.

46 *Id.*

47 Among other functions, the former INS was responsible for administering laws related to the deportation and naturalization of aliens, and also investigated alleged immigration violations. *See Records of the Immigration and Naturalization Service [INS]*, NAT'L ARCHIVES, http://www.archives.gov/research/guide-fed-records/groups/085.html#85.1 (last visited Apr. 19, 2015).

48 *See* Nijjar v. Holder, 689 F.3d 1077, 1078 nn.1–2 (9th Cir. 2012).

49 For a concise description of the structural and administrative reforms that the Homeland Security Act effected on the U.S. immigration system, see *id.* at 1078–79.

50 Homeland Security Act of 2002, Pub. L. No. 107–296, §§ 441, 451, 116 Stat. 2135, 2195 (codified at 6 U.S.C. §§ 251, 271); *see also Nijjar*, 689 F.3d at 1079 n.4.

51 8 C.F.R. § 1208.9 (2014); *see also Nijjar*, 689 F.3d at 1079.

52 *Id.* § 1208.2(b); *see also Nijjar*, 689 F.3d at 1079.

53 *See Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERVICES (Mar. 10, 2011), http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states.

54 8 C.F.R. § 1208.3(a).

55 *Id.* § 1208.9(b).

interview, the officer determines the applicant's eligibility for asylum.[56]

The burden falls upon the applicant to establish by a preponderance of evidence that he is a "refugee," as defined by 8 U.S.C. § 1101(42)(A),[57] such that he has a well-founded fear of persecution in his country of origin, on the basis of his race, religion, nationality, membership in a particular social group, or political opinion.[58] If, after the interview, the asylum officer determines that the applicant is a "refugee" and is not precluded from obtaining asylum on other grounds,[59] the officer may grant the application in his discretion.[60]

Once granted, asylum confers upon the alien permission to remain and work in the United States for an indefinite period.[61]

C. *Defensive Asylum in Removal Proceedings*

An asylum officer may decline to approve the asylum application on various grounds.[62] If an alien applying for asylum is in valid status at the time of adjudication (e.g., the alien possesses a still-valid student visa), the officer may deny asylum.[63] If the applicant is inadmissible or deportable, and the asylum officer does not grant asylum, the officer refers the application to an immigration judge, serving on the alien a charging document that identifies the grounds of the alien's inadmissibility or deportability and instructs the alien to appear at a removal hearing.[64]

Referral to an immigration judge effects a crucial jurisdictional switch from DHS, the cabinet-level department containing USCIS,[65] to the EOIR, the Justice Department agency containing the immigration courts, and the BIA, an appellate review tribunal. Upon DHS's filing of the charging document, jurisdiction vests exclusively in the immigration

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56 *Id.*

57 *See supra* note 20.

58 *See* 8 U.S.C. § 1158(b)(1)(B)(i) (2012); 8 C.F.R. § 1208.13(a).

59 An alien may be ineligible for asylum if, inter alia, the government determines that he has persecuted others on the basis of race, religion, nationality, membership in a particular social group, or political opinion; having been convicted of a crime such that he presents a danger to the United States; there is reason to believe that the alien has engaged in a serious nonpolitical crime outside the United States; there are reasonable grounds to regard the alien as a danger to the security of the United States; or, the alien was firmly resettled in another country—other than the one from which he seeks asylum—prior to arriving in the United States. *See* 8 U.S.C. § 1158(2).

60 8 C.F.R. § 1208.14(b).

61 *Id.* § 1208.14(e) ("If the applicant is granted asylum, the grant will be effective for an indefinite period, subject to termination . . . ."); *see also* 8 U.S.C. § 1158(c)(1).

62 *See supra* note 59.

63 8 C.F.R. § 1208.14(c)(2).

64 *Id.* § 1208.14(c)(1).

65 *See supra* note 51 and accompanying text.

court, and removal proceedings commence.[66]

Whereas the asylum interview before USCIS is nonadversarial,[67] removal proceedings before an immigration judge—an administrative trial[68]—are decidedly so. In an adversarial proceeding between the alien and a prosecuting attorney from U.S. Immigration and Customs Enforcement, another DHS agency,[69] the immigration judge sits as a neutral arbiter to determine the alien's eligibility for relief.

The immigration judge reviews the alien's asylum application de novo.[70] Even if an asylum officer declines to approve the alien's application for asylum in the first instance, the immigration court may grant the application for asylum in its discretion, provided the alien establishes his statutory eligibility for relief.

D. *Review by Board of Immigration Appeals*

If the immigration judge denies the asylum application, the alien may appeal that decision to the BIA,[71] the highest adjudicative body within the EOIR, which is responsible for the review of administrative immigration adjudications in a manner consistent with federal statutes and regulations.[72] In that capacity, the BIA issues precedent decisions that instruct DHS and the immigration courts as to the proper administration of federal immigration law.[73]

In general, the BIA reviews questions of law, discretion, judgment, and all other issues arising on appeal of an immigration judge's decision under a de novo standard.[74] As an appellate tribunal, the BIA will not engage in factfinding for the purpose of deciding an appeal.[75] The Board will review factfinding by the immigration judge, if ever, to determine only whether those findings of fact are "clearly erroneous."[76]

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66 8 C.F.R. §§ 1003.14(a), 1208.2(b).

67 *Id.* § 1208.9(b) ("The asylum officer shall conduct the interview in a nonadversarial manner . . . .").

68 *See id.* § 1240.10(a)(4) (noting that an alien respondent in a removal proceeding "will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government").

69 *Id.* § 1240.2(a) ("Service counsel shall present on behalf of the government evidence material to the issues of deportability or inadmissibility and any other issues that may require disposition by the immigration judge.").

70 *Id.*

71 *Id.* §§ 1003.38, 1240.15.

72 *Id.* 1003.1(d)(1).

73 *Id.*

74 *Id.* § 1003.1(d)(3)(ii).

75 *Id.* § 1003.1(d)(3)(iv).

76 *Id.* § 1003.1(d)(3)(i).

The BIA may, inter alia, dismiss an alien's appeal or remand the case back to an immigration judge for further proceedings.[77] If the BIA dismisses the appeal of an immigration judge's order of removal, that order becomes administratively final.[78] Subject to certain exceptions, the government must remove the alien from the United States no more than ninety days after the order becomes administratively final.[79]

E. *Judicial Review and Stay of Removal*

Although the BIA's dismissal of an appeal renders an order of removal administratively final, the alien may seek judicial review by filing a petition for review to a federal circuit court.[80]

Although federal statutes bar judicial review of most forms of discretionary immigration relief, they do not preclude review of an immigration judge's denial of an alien's application for asylum.[81] Courts of appeal review removal proceedings under a highly deferential standard of review, and "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[82]

To avoid removal during the pendency of review by a circuit court, the alien must seek a stay of his removal.[83] The filing of a petition for review does not automatically stay the order of removal.[84] Because the alien is not entitled to the stay as a matter of right, he may be removed

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77 *See generally id.* § 1003.1.

78 *Id.* § 1241.1(a).

79 8 U.S.C. § 1231(a)(1)(A) (2012). Whereas the statute requires that the "Attorney General" remove the alien with a final order of removal, in practice, U.S. Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security, carries out the removal. *See Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/offices/enforcement-removal-operations (last visited Apr. 19, 2015) (Enforcement and Removal Operations, a department within ICE, "identifies and apprehends removable aliens, detains these individuals when necessary and removes illegal aliens from the United States"). In finding that DHS lacked statutory authority to terminate asylum, the Ninth Circuit, in *Nijjar v. Holder*, paid particular attention to the language of statutory provisions giving power to the "Attorney General," as compared to provisions that only gave power to the "Secretary of Homeland Security." *See* 689 F.3d 1077, 1082 (9th Cir. 2012). For a brief discussion of the potential problems with the Ninth Circuit's reasoning in this regard, see *infra* note 193.

80 8 U.S.C. § 1252(a)(1).

81 *Id.* § 1252(a)(2)(B)(ii).

82 *Id.* § 1252(b)(4)(B).

83 *See generally id.* § 1231(a)(1)(B)(ii). For a discussion on how to apply for a discretionary stay of removal during the pendency of judicial review, TRINA REALMUTO ET AL., PRACTICE ADVISORY, SEEKING A JUDICIAL STAY OF REMOVAL IN THE COURT OF APPEALS: STANDARD, IMPLICATIONS OF ICE'S RETURN POLICY AND THE OSG'S MISREPRESENTATION TO THE SUPREME COURT, AND SAMPLE STAY MOTION (2012), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Seeking_a_Judicial_Stay_of_Removal_May2012.pdf.

84 *See* 8 U.S.C. § 1252(b)(3).

during the pendency of judicial review, even if he ultimately prevails in his petition.[85]

F. *Termination of Asylum*

As set forth above, asylum, once granted, allows an alien to remain in the United States for an indefinite period. Under certain circumstances, however, the government may terminate that status. The Attorney General may terminate asylum if he determines that the alien no longer meets the statutory conditions for asylum eligibility on account of a "fundamental change in circumstances."[86] Congress has given the Attorney General the authority to promulgate regulations that enumerate grounds for terminating asylum;[87] regulations provide that fraud in an already-approved asylum application may be grounds for termination.[88]

Federal regulations provide a framework for asylum termination in immigration court.[89] In that context, an immigration judge sits as a neutral arbiter in an adversarial proceeding, where DHS bears the burden of establishing by a preponderance of evidence that asylum termination is appropriate.[90]

Although unsupported by express language in the asylum statute,[91] the regulations also provide that an asylum officer may terminate asylum, but only if an asylum officer had granted asylum status to the alien in the first instance.[92] In this context, the asylum officer conducts a termination interview to determine whether there was fraud in the original asylum application, such that alien was ineligible for asylum at the time that the government granted it.[93]

In *Nijjar*, the Ninth Circuit observed that although the regulations grant asylum officers—DHS employees—the authority to terminate

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85 *See* Nken v. Holder, 556 U.S. 418, 435 (2009) ("Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal.").

86 8 U.S.C. § 1158(c)(2)(A); *see also* 8 C.F.R. § 1208.24(a) (2014) (enumerating specific grounds for asylum termination by DHS).

87 8 U.S.C. § 1158(b)(2)(C) ("The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).")

88 *See* 8 C.F.R. §§ 208.24, 1208.24. The latter regulation is a duplication of the former, and was promulgated by the Department of Justice in 2003, one day before the INS ceased to exist. *See* Nijjar v. Holder, 689 F.3d 1077, 1080 (9th Cir. 2012).

89 8 C.F.R. § 1208.24(f).

90 *Id.*

91 *See* 8 U.S.C. § 1158(c)(2).

92 8 C.F.R. § 1208.24(c).

93 *Id.*

asylum, the asylum statute confers that power exclusively on the Attorney General.[94] Despite the contradicting authority, an internal manual promulgated by USCIS—updated after the *Nijjar* decision—describes the procedures that asylum officers must follow in the course of a termination proceeding.[95] According to the manual, receipt of adverse information from the United States or abroad usually triggers termination proceedings.[96] Before scheduling a termination interview, asylum officials must determine that the adverse information amounts to a prima facie case for termination.[97] In that event, USCIS issues a NOIT at least thirty days before conducting a termination interview.[98]

The termination interview is similar to an affirmative asylum interview, although questions by an officer center on grounds for terminating rather than granting asylum.[99] At the interview, the alien may present evidence to show that he remains eligible for asylum.[100] If, after the interview, the officer concludes that the alien is no longer eligible for asylum, USCIS provides the alien with written notice that asylum has been terminated, and any employment authorization that had been granted on the basis of asylum status is automatically terminated.[101] Regulations provide that, if the asylum officer terminates asylum, DHS must initiate removal proceedings against the alien.[102]

Neither statute nor regulation specifies the evidentiary burden that an asylum officer must satisfy before terminating asylum. The USCIS training manual does indicate that merely to initiate termination proceedings, "the Asylum Office must have information that, on its face, indicates that asylum termination may be appropriate, but need not have the higher level of evidence required to terminate asylee status."[103] The manual also instructs that a preponderance of evidence must support an asylum officer's decision to terminate.[104]

Importantly, regulations and DHS training materials provide that upon receipt of adverse information, DHS may elect to vest jurisdiction

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94 In *Nijjar v. Holder*, the court held the term "Attorney General" to refer to an immigration judge sitting within the Executive Office for Immigration Review, a Department of Justice agency. *See* 689 F.3d 1077, 1085 (9th Cir. 2012).

95 *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM DIV., AFFIRMATIVE ASYLUM PROCEDURES MANUAL (AAPM) (2013) [hereinafter AFFIRMATIVE ASYLUM PROCEDURES MANUAL], *available at* http://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf.

96 *Id.* at 83–85.

97 *Id.* at 84.

98 *Id.* at 85.

99 *Id.* at 86; *see also* 8 C.F.R. § 1208.24(c) (2014).

100 *Id.*

101 AFFIRMATIVE ASYLUM PROCEDURES MANUAL, *supra* note 95, at 86.

102 8 C.F.R. § 1208.24(e) ("When an alien's asylum status . . . is terminated under this section, the Service shall initiate removal proceedings . . . .").

103 AFFIRMATIVE ASYLUM PROCEDURES MANUAL, *supra* note 95, at 83.

104 *Id.* at 86.

in an immigration judge for the purposes of terminating asylum—even if an asylum officer granted that status in the first instance.[105] In such a scenario, the proceeding would unfold as an adversarial hearing before an immigration judge, described above, wherein the government would need to demonstrate by a preponderance of evidence that the immigration judge should terminate asylum.[106]

II. THE EMERGING CIRCUIT SPLIT

Between 2010 and 2012, three federal appellate courts and the BIA considered cases related to asylum termination by DHS. Although the Ninth Circuit was the only court to hold that DHS lacks the authority to terminate asylum, the respective holdings of the Third and Fifth Circuits still revealed the procedural problems underlying the asylum termination process.

A. *Third Circuit*

Bhargava v. Attorney General[107] was the first federal appellate decision addressing asylum termination by DHS.[108] There, the Third Circuit held that pursuant to federal regulations, DHS had the authority to terminate asylum, and that an immigration judge lacked jurisdiction to review that termination after DHS placed the alien into removal proceedings.[109] The court did not expressly address whether the BIA had the authority to review such terminations.[110]

In September 2002, an asylum officer (presumably of the former INS) granted asylum to the petitioner, Kumar Bhargava, a native and citizen of India.[111] Thereafter, in February 2004, DHS served on Bhargava a Notice of Intent to Terminate his asylum.[112] Bhargava

105 8 C.F.R. § 1208.24(f).

106 *Id.*

107 611 F.3d 168 (3d Cir. 2010).

108 *See id.* at 170 ("Somewhat surprisingly, there are no reported district court or court of appeals decisions on point.").

109 *Id.* at 170–71.

110 *But see* Qureshi v. Holder, 663 F.3d 778, 780 (5th Cir. 2011) (interpreting *Bhargava* to hold that the BIA lacked jurisdiction to review asylum termination by DHS).

111 *Bhargava*, 611 F.3d at 169.

112 *Id.* (The Notice of Intent to Terminate informed petitioner "that DHS 'obtained evidence that indicates fraud in [his] application for asylum such that [he was] not eligible for asylum at the time it was granted,' specifically that '[t]he preparers of [his] application for asylum indicated as a part of a plea agreement that the claims made in the asylum application [he] submitted were fraudulent, and that the documents [he] submitted in support of [his] testimony as having been tortured [in India] were counterfeit'").

attended a termination interview.[113] After that interview, DHS terminated Bhargava's asylum status and served on him a Notice to Appear before an immigration judge, thereby commencing removal proceedings against him.[114]

In immigration court, Bhargava moved for the immigration judge to terminate his removal proceedings[115] and certify his case to the BIA.[116] The immigration judge denied both of Bhargava's motions on the ground that he lacked jurisdiction to review (and thus override) asylum termination by DHS.[117] The immigration judge noted that:

> [I]f Congress, in the [Immigration and Nationality] Act [codified as amended at 8 U.S.C. §§ 1101–1537], or the Attorney General, in the regulations, intended for [immigration judges] to have review *de novo* [sic] over the termination of an asylum grant, that language would be specifically included in the Act or the regulations, as it is in other sections.[118]

After denying the motions, the immigration judge thereafter held a hearing on the merits of Bhargava's new, re-filed applications for asylum, withholding of removal, and protection under the Convention Against Torture.[119] The immigration judge found Bhargava not credible and held that he had not met his burden of proof to establish eligibility for relief.[120] The BIA adopted and affirmed the immigration judge's holding as to Bhargava's applications for relief, along with the immigration judge's determination that he lacked jurisdiction to review the asylum termination by DHS.[121] The BIA accordingly dismissed Bhargava's appeal.[122]

In his petition for review to the Third Circuit, Bhargava did not challenge the immigration judge's holding on the merits of his claims for relief;[123] he instead challenged the immigration judge's

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113 *Id.*

114 *Id.*

115 *See id.* Not to be confused with asylum termination, parties to a removal proceeding may move to "dismiss" or "terminate" removal proceedings on various grounds, including, inter alia, that an alien is not removable from the United States as a matter of law. *See* 8 C.F.R. § 1239.2 (2014).

116 *Bhargava*, 611 F.3d at 169. Although the Third Circuit did not expressly indicate why petitioner moved to certify his case to the Board of Immigration Appeals, the petitioner may have attempted to seek review of the asylum officer's decision to terminate Bhargava's asylum status. *See* 8 C.F.R. § 1003.1(d)(3)(iii) ("The Board may review all questions arising in appeals from decisions issued by Service officers de novo.").

117 *Bhargava*, 611 F.3d at 169–70.

118 *Id.* at 170 (internal quotation marks omitted).

119 *Id.*

120 *Id.* The decision does not explicitly indicate whether the immigration judge ordered Bhargava removed from the United States.

121 *Id.*

122 *Id.*

123 In other words, the petition for review did not challenge the immigration judge's adverse

determination that he lacked jurisdiction to review the DHS decision to terminate asylum status.[124] Thus, the narrow issue in *Bhargava* was simply whether an immigration judge could review DHS's decision to terminate asylum.[125]

The Third Circuit echoed the immigration judge and observed that the regulations were "silent with respect to an immigration judge's jurisdiction to review a termination of asylum by DHS."[126] The court interpreted this silence to mean that an immigration judge lacked such authority.[127] On those grounds, the Third Circuit denied Bhargava's petition for review.[128]

B. *Fifth Circuit*

In *Qureshi v. Holder*,[129] the Fifth Circuit addressed jurisdictional questions that were similar to those in *Bhargava*. Unlike the petitioner in *Bhargava*, whose asylum was terminated on account of alleged fraud, DHS terminated the asylum status of Ghazanfar Qureshi and his wife and children[130] because Qureshi allegedly persecuted others in his native Pakistan, rendering him statutorily ineligible for asylum at the time that the government granted it to him.[131]

Without providing a clear basis for doing so, the Fifth Circuit adopted the Third Circuit's holding in *Bhargava*, concluding that the immigration judge—and also the BIA—lacked jurisdiction to review asylum termination by DHS.[132] In light of the procedural posture of the case, the Fifth Circuit went further than the Third Circuit in one important regard, holding that asylum termination was not an administratively final action and, thus, pursuant to the Administrative Procedure Act (APA), not subject to judicial review.[133]

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credibility finding against Bhargava, which rendered him ineligible for his claims for immigration relief. *See supra* note 120 and accompanying text.

124 *Bhargava*, 611 F.3d at 170.

125 *Id.*

126 *Id.*

127 *Id.* at 171.

128 *Id.*

129 663 F.3d 778 (5th Cir. 2011).

130 *Id.* Mr. Qureshi's wife and children were derivatives of his original asylum application. *Id.* at 779; *see* 8 U.S.C. § 1158(b)(3)(A) (2012).

131 *Qureshi*, 663 F.3d at 779. As derivatives of his asylum application, his wife and children would have been rendered ineligible for asylum, as well. *See* 8 U.S.C. § 1158(b)(2)(A)(i) (In general, an alien is ineligible for asylum if "the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.").

132 *Qureshi*, 663 F.3d at 780.

133 *Id.* at 781; *see also* 5 U.S.C. § 704 (2012) ("[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review [only] on the

After their asylum status had been terminated and while their removal proceedings remained pending before an immigration judge, the Qureshis brought an action in federal district court, alleging that DHS's termination of their asylum status had been unlawful[134] and therefore violated the APA.[135] Noting that the Qureshis could reapply for asylum during their then-pending removal proceedings, the district court dismissed the Qureshis' claim on the ground that asylum termination "is not the consummation of the agency's decisionmaking process,"[136] and therefore not "a final agency action" subject to judicial review under the APA.[137] The district court accordingly dismissed the Qureshis' complaint for want of subject matter jurisdiction.[138]

The Fifth Circuit affirmed the district court's dismissal of the complaint.[139] Because it agreed that the district court lacked subject matter jurisdiction, the Fifth Circuit declined to address whether the underlying asylum termination by DHS had been lawful.[140] While affirming the dismissal, the Fifth Circuit also made clear that neither the immigration judge nor the BIA could review a DHS decision to terminate asylum.[141]

Nevertheless, the Fifth Circuit noted that the Qureshis could reapply for asylum in removal proceedings.[142] If the immigration judge denied their new asylum applications and the BIA affirmed that denial, thereby rendering the order of removal administratively final,[143] the

review of the final agency action."); FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 238 (1980) (holding that the Federal Trade Commission's complaint issuance was not a "final agency action," and thus not subject to judicial review).

134 *Qureshi*, 663 F.3d at 779–80 ("[T]he Qureshis sued . . . , claiming that termination of their asylum status, without a showing by specific evidence that Mr. Qureshi was a persecutor, violated the Constitution, multiple statutes, and federal regulations.").

135 *See* 5 U.S.C. § 706(2) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .").

136 Qureshi v. Holder, No. 10–1861, 2010 WL 5141877, at *4 (E.D. La. Dec. 10, 2010).

137 *Id.* at *4–5 (citing Tagoe v. Ashcroft, 108 F. App'x 597, 599 n.4 (10th Cir. 2004)). In direct contravention of the Third Circuit's holding in *Bhargava*, however, the district court intimated that the immigration judge *could* review DHS's decision to terminate asylum. *Id.* at *5 ("[T]he immigration judge must determine 'whether an alien is removable from the United States,' . . . . If the termination of asylum was invalid, then the immigration judge has no grounds to order that the alien be removed unless the judge terminates the alien's asylum status on his or her own authority." (citations omitted)); *cf.* Bhargava v. Att'y Gen. of U.S., 611 F.3d 168, 171 (3d Cir. 2010) (affirming administrative findings that immigration judge lacked jurisdiction to review asylum termination by DHS).

138 *Qureshi*, 2010 WL 5141877, at *7.

139 *Qureshi*, 663 F.3d at 779.

140 *Id.* at 782 n.11.

141 *Id.* at 781.

142 *Id.* at 780.

143 *See supra* note 78 and accompanying text.

Qureshis could appeal to a circuit court to review, among other issues, "direct legal challenges to [DHS's] original termination decision."[144] At least tacitly, the Fifth Circuit held that judicial review of DHS asylum termination was indeed available to the Qureshis, but not until the BIA had entered an administratively final order of removal against them.[145] Based on the Fifth Circuit's reasoning, asylum termination by DHS would evade any type of review—whether administrative or judicial—until the alien whose asylum had been terminated was subject to imminent removal from the United States.[146]

C. *Ninth Circuit*

Nijjar v. Holder[147] was the third and, to date, final published[148] circuit court decision to address the lawfulness of asylum termination by DHS. The Ninth Circuit holding significantly deviated from the holdings of the Third and Fifth Circuits.

Just as in *Bhargava*, *Nijjar* arose from a petition for review of a decision by the BIA.[149] The petitioner, Gurjeet Singh Nijjar, had been granted asylum by the former INS in 1996, and, in 1997, brought his wife and son to the United States as derivative asylees.[150] In November 2003, Nijjar received a Notice of Intent to Terminate Asylum status on the grounds that he had engaged in fraud; the Notice instructed Nijjar to appear at a termination interview.[151] After repeated postponements by Nijjar, DHS issued a "Termination Notice," notifying that his asylum status had been terminated, even though an asylum officer had never conducted a termination interview.[152] Accompanying the "Termination Notice" was a Notice to Appear before an immigration judge; because Nijjar's asylum had been terminated, DHS had placed him into removal proceedings.[153]

Before the immigration judge, Nijjar moved to terminate removal proceedings, arguing that DHS did not have the authority to terminate

144 *Qureshi*, 663 F.3d at 780.

145 With the entry of an administratively final order of removal, the Qureshis would be subject to removal from the United States, unless they were able to obtain a stay of their removal from a circuit court. *See supra* notes 79–80 and accompanying text.

146 *See supra* notes 83–84 and accompanying text.

147 689 F.3d 1077 (9th Cir. 2012).

148 The U.S. Court of Appeals for the Eleventh Circuit issued an unpublished decision on the issue on August 21, 2014. *See infra* note 193.

149 *Nijjar*, 689 F.3d at 1080.

150 *Id.* at 1078.

151 *Id.* at 1079. Nijjar received a letter on INS letterhead, instructing him to appear at a termination interview at an INS office. *See id.* By the time that Nijjar received the letter, the Homeland Security Act had been enacted, and the INS no longer existed. *See id.*

152 *Id.*

153 *Id.*

asylum.[154] The immigration judge nevertheless concluded that she lacked jurisdiction to review an asylum termination by DHS, and therefore ordered Nijjar, his wife, and his son removed from the United States.[155] On appeal, the BIA agreed that the immigration judge lacked jurisdiction to review DHS's termination of asylum and therefore affirmed the order of removal.[156] Nijjar thereafter petitioned the Ninth Circuit for review,[157] and the court ultimately granted the petition.[158]

The Ninth Circuit ostensibly rooted its holding in a strict textualist[159] reading of 8 U.S.C. § 1158, the statute governing procedures to grant and terminate asylum. The court reasoned that, in the absence of express statutory language granting DHS the authority to do so, DHS could not lawfully terminate Nijjar's asylum.[160] Accordingly, the Ninth Circuit held that the regulation granting DHS authority to terminate asylum[161] was ultra vires,[162] because the statute granted the power to terminate exclusively to the Attorney General.[163]

The court grounded its reasoning in a historical analysis of the asylum statute since its 1980 enactment.[164] In particular, it analyzed certain provisions of the REAL ID Act of 2005 (REAL ID),[165] which, inter alia, modified the statute to prevent terrorists from gaining entry into—and obtaining immigration relief in—the United States.[166]

In *Nijjar*, the Ninth Circuit posited a correct reading of the asylum statute, as amended by REAL ID.[167] Before REAL ID, only the Attorney General had the statutory authority to grant or terminate asylum.[168] As the court noted, REAL ID modified the asylum statute such that the Attorney General and the Secretary of Homeland Security would both have legal authority to grant asylum to aliens.[169] But REAL ID made no parallel modification to the statutory subsection governing asylum *termination*.[170] The Ninth Circuit read the resulting asymmetrical

154 *Id.* at 1080.

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 For a general discussion of the central tenets of textualism, see generally John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997).

160 *Nijjar*, 689 F.3d at 1082, 1084–85.

161 8 C.F.R. §§ 208.24(a), 1208.24(a) (2014).

162 *Nijjar*, 689 F.3d at 1085–86.

163 *Id.*; *see id.* at 1085 (interpreting the term "Attorney General" to include immigration judges and the BIA).

164 *See* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105 (1980).

165 Pub. L. No. 109-13, 119 Stat. 231 (2005).

166 *Id.* §§ 101(a)(1)–(2), 119 Stat. at 302–03.

167 8 U.S.C. § 1158 (2012).

168 *Id.* §§ 1158(b)(1), (c)(2).

169 Nijjar v. Holder, 689 F.3d 1077, 1083–84 (9th Cir. 2012); *see also* REAL ID § 101, 119 Stat. at 302–06.

170 *Nijjar*, 689 F.3d at 1083–84.

language to vest authority to terminate asylum exclusively with the Attorney General.[171]

In *Nijjar*, the government unsuccessfully argued that if, pursuant to REAL ID, Congress had given the Secretary of Homeland Security the power to *grant* asylum, it therefore followed that Congress had intended to authorize the Secretary of Homeland Security to take away asylum status.[172] The government further asserted that REAL ID's failure to name the Secretary of Homeland Security in the termination provision simply amounted to Congressional "oversight,"[173] and urged the Ninth Circuit to read DHS's termination authority into the statute.[174] The Ninth Circuit rejected the government's arguments.[175]

While the decision purported to rest on statutory interpretation, the Ninth Circuit appears to have interpreted the statute against a background of constitutional norms.[176] While interpreting the statute as it did, the Ninth Circuit noted that:

> [A] sensible congressional purpose [behind the statutory scheme] is obvious. . . . Terminations of asylum are grave enough so that Congress might sensibly intend just what it did, assigning the authority to the Attorney General, where a neutral arbiter, the immigration judge, rather than an asylum officer, would make the decision, and where the decision would be subject to appeal to the Board of Immigration Appeals, rather than being unappealable. That would be consistent with the procedure for when an asylum officer denies an application for asylum status, and must refer the denied application for asylum to an immigration judge for de novo consideration, subject to appeal. Reading the statute to mean what it says makes termination procedure parallel to denial procedure. Reading the statute as the government urges not only conflicts with

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171 *Id.* at 1083–85 (holding that Congress conferred asylum termination authority solely upon an immigration judge, whose decision to terminate would be subject to review by the Board of Immigration Appeals). In *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984), the Supreme Court held that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." In *Nijjar*, the Ninth Circuit declined to defer to the Department of Justice regulation regarding DHS asylum termination, because, in its view, Congress had made clear by statute that DHS did not have the authority to terminate asylum and had thus "spoken to the precise question at issue." *See Nijjar*, 689 F.3d at 1083 (quoting *Chevron*, 467 U.S. at 842) (internal quotation marks omitted).

172 *Nijjar*, 689 F.3d at 1085; *see also* Transcript of Oral Argument, *Nijjar*, 689 F.3d 1077 (No. 07-74054).

173 *Nijjar*, 689 F.3d at 1084.

174 *Id.*

175 *Id.*

176 As Professor Motomura notes, notwithstanding the century-old plenary power doctrine, which directs federal courts away from directly addressing constitutional questions in immigration cases, courts have tacitly relied on "phantom constitutional norms" while interpreting immigration statutes, without explicitly acknowledging their adherence to such constitutional principles. *See* Motomura, *supra* note 21, at 549.

> its plain meaning but also creates an unfair anomaly. We can think of no reason why Congress would give an alien more procedural protection when his asylum application is denied in the first instance, than when his asylum status is granted but subsequently taken away.[177]

While statutory interpretation ostensibly guided the Ninth Circuit's reasoning, the decision revealed the court's underlying concern that the unreviewable termination of asylum by DHS offended basic notions of procedural due process protected by the Fifth Amendment.[178]

D. *Board of Immigration Appeals*

Although the decisional law of federal circuit courts is binding on immigration judges who sit in those respective circuits,[179] the circuit split that emerged in 2012 left open questions with respect to the lawfulness of DHS asylum termination in immigration cases originating outside of the Third, Fifth, and Ninth Circuits. Two weeks after the Ninth Circuit's decision in *Nijjar*, the BIA published an intermediate decision in *Matter of A-S-J-*,[180] holding that an immigration judge lacks the authority to review asylum termination by DHS,[181] and that the BIA could not declare invalid the regulation granting DHS the authority to terminate asylum.[182]

The removal proceedings giving rise to the BIA's decision were initiated within the jurisdiction of the Second Circuit,[183] which, to date, has not addressed whether DHS has the authority to terminate asylum. After terminating the alien's asylum status on the basis of alleged fraud, DHS initiated removal proceedings.[184]

Before an immigration judge, the alien moved to terminate removal proceedings, arguing that DHS had failed to show fraud by a preponderance of evidence when it terminated his asylum status.[185] The immigration judge construed 8 C.F.R. § 208.24(f),[186] the regulation

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177 *Nijjar*, 689 F.3d at 1085 (footnotes omitted).

178 For a discussion of the tenets of procedural due process protected by the Due Process Clause of the Fifth Amendment, see *infra* Section III.A.

179 *See Board of Immigration Appeals*, U.S. DEP'T JUSTICE (Nov. 2011), http://www.justice.gov/eoir/biainfo.htm ("BIA decisions are binding on all DHS officers and immigration judges unless modified or overruled by the Attorney General or a federal court.").

180 25 I. & N. Dec. 893 (BIA 2012).

181 *Id.* at 900.

182 *Id.* at 894 n.2.

183 *Id.* ("This case arises within the jurisdiction of the Second Circuit. We will only apply *Nijjar* within the jurisdiction of the Ninth Circuit at this time.").

184 *Id.* at 894.

185 *Id.* at 895.

186 Duplicated at 8 C.F.R. § 1208.24(f) (2014). *See* Nijjar v. Holder, 689 F.3d 1077, 1080 (9th Cir. 2012).

granting an immigration judge the authority to terminate an alien's asylum, to confer onto him the authority to reverse DHS's decision to terminate asylum.[187] Concluding that DHS had failed to establish the alien's fraud, the immigration judge ordered the alien's asylum status reinstated and terminated removal proceedings.[188]

The BIA reversed the immigration judge and reinstated the removal proceedings, concluding that the immigration judge lacked the authority to review asylum terminations conducted by DHS.[189] The BIA made clear that it would follow *Nijjar* for cases arising only within the Ninth Circuit, thereby rendering its administrative decision binding on all immigration judges sitting outside of the Ninth Circuit's jurisdiction.[190] As of the date of this publication, no federal court of appeals has overruled the BIA's decision.

III. CONSTITUTIONAL ANALYSIS

The Ninth Circuit resolved the issue of DHS asylum termination on statutory—and thus "subconstitutional"[191]—grounds. Determining that Congress had not given DHS the power to terminate asylum, the court did not address whether the agency's termination procedures could withstand constitutional challenge.[192] *Nijjar* therefore left unanswered whether the DHS termination procedures would have been valid had Congress expressly granted the agency the power to terminate.[193] This Note argues that DHS asylum termination

187 *A-S-J-*, 25 I. & N. Dec. at 895.

188 *Id.*

189 *Id.* at 900.

190 *Id.* at 894 n.2. On July 1, 2014, the BIA clarified *A-S-J-*, holding that (1) DHS is not required to establish that an alien knew of the fraud in his asylum application in order to terminate a grant of asylum, but (2) DHS must separately prove that under the true facts, the alien was not eligible for asylum at the time it was granted. *In re* P-S-H-, 26 I. & N. Dec. 329, 337–38 (BIA 2014). Accordingly, an alien with fraud in his asylum application may still face asylum termination, even if the alien's attorney committed the fraud and the alien had no knowledge of that fraud. *Id.* at 336.

191 *See* Motomura, *supra* note 21, at 549.

192 The petitioner's brief did not raise constitutional claims. *See* Principal Brief in Support of Petition for Review, Nijjar v. Holder, 689 F.3d 1077 (9th Cir. 2012) (Nos. 07-74054, 08-70933), 2008 WL 4972357.

193 Another plausible critique of the Ninth Circuit's decision in *Nijjar* is that the government was *correct* in arguing that the absence of statutory language conferring power onto DHS to terminate asylum amounts to congressional oversight. *See supra* note 173 and accompanying text. Consider, for instance, that although a federal statute assigns the Attorney General the duty of removing aliens from the United States, DHS has assumed this administrative duty. *See supra* note 79 and accompanying text. In an unpublished decision on August 21, 2014, the U.S. Court of Appeals for the Eleventh Circuit held that, notwithstanding *Nijjar*—and the asymmetrical statutory language between the respective subsections addressing the conferral and termination of asylum—the creation of DHS in 2003 gave the Secretary of Homeland Security the authority to terminate asylum. *See* Lena v. U.S. Att'y Gen., 578 F. App'x 828, 831–32 (11th Cir. 2014). A more

procedures, as currently configured, violate procedural due process requirements protected by the Fifth Amendment. Accordingly, these procedures would remain invalid, even if Congress had expressly granted DHS the authority to terminate asylum.

A. *Procedural Due Process*

The current regulatory scheme granting DHS power to terminate asylum violates procedural due process guaranteed by the Fifth Amendment of the U.S. Constitution. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[194] Asylum termination by DHS at once deprives an asylee of both his "liberty" and "property," and may also threaten his "life." But DHS termination procedures lack adequate safeguards to prevent the potentially erroneous deprivation of these constitutionally-protected interests.

The U.S. Supreme Court has repeatedly held that aliens present in the United States—even those present unlawfully—are entitled to procedural due process protections enshrined in the Fifth Amendment.[195] However, in bringing a claim predicated on a procedural due process violation, an individual cannot merely claim that a government action has deprived him of "life, liberty, or property"; alleging a deprivation, without more, cannot give rise to a claim of a constitutional violation.[196] Rather, the claimant must articulate that the state's deprivation of that protected interest occurred without the due process of law.[197]

To sustain a claim against the federal government predicated on a procedural due process violation, a plaintiff must show: (1) that he has a life, liberty, or property interest protected by the Due Process Clause; (2)

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thorough assessment of appropriate delegation of agency power after the Homeland Security Act of 2003 is beyond the scope of this Note.

194 U.S. CONST. amend. V.

195 *See* Yamataya v. Fisher, 189 U.S. 86, 101 (1903) ("[I]t is not competent for the [government] . . . arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."); *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976) (holding that the Fifth Amendment "protects every . . . person[] from deprivation of life, liberty, or property without due process of law. . . . [including those] whose presence in this country is unlawful, involuntary, or transitory" (citations omitted)); Wong Yang Sung v. McGrath, 339 U.S. 33, 49–50 (1950) (holding that Fifth Amendment entitles aliens present in the United States—even those present unlawfully—to procedural due process during deportation proceedings).

196 Zinermon v. Burch, 494 U.S. 113, 125 (1990).

197 *Id.*

that the State has deprived him of that life, liberty, or property interest; and (3) that the State did not provide him with adequate process before the deprivation occurred.[198] In *Mathews v. Eldridge*,[199] the Supreme Court established a set of three factors necessary to determine what minimum procedural protections must be afforded when a deprivation of life, liberty, or property is to occur:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[200]

Depending on the "weight" that a reviewing court assigns to each of the three factors, a court may determine that government procedures are either sufficient or insufficient with respect to the private interest or entitlement that the government intends ultimately to deprive.

Distinct private interests arise from the conferral of asylum. In light of these private interests, along with the risks that erroneous deprivation of asylum during DHS termination proceedings, additional procedural safeguards are necessary to comport with the Fifth Amendment.

B. Mathews *Factors*

1. Private Interests Affected by the Official Action

A grant of asylum gives rise to private interests such that the alien, now situated as an asylee, is entitled to procedural due process protection should the government thereafter attempt to terminate that status. The Supreme Court has held that statutorily-created "entitlements" may give rise to a so-called "property interest" in the holder of that entitlement; procedural due process "safeguard[s] . . . the security of interests that a person" may claim with respect to the entitlement.[201] The Court has been less clear with respect to what process is due with respect to discretionary benefits.

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198 *See id.* at 126; *see also* Hahn v. Star Bank, 190 F.3d 708, 716 (6th Cir. 1999).

199 424 U.S. 319 (1976).

200 *Id.* at 335.

201 Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576 (1972). Although in *Roth* the Court addressed an alleged violation of the Due Process Clause of the Fourteenth Amendment—an allegedly unlawful deprivation by a *state* government—the analytic lens through which the Court assessed the alleged violation is identical to that used when assessing alleged violations of the Due

The plain language of the statute governing procedures for granting asylum provides that "[t]he Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien . . . if [either] determines that such alien is a refugee."[202] This language makes clear that the approval of an asylum application is a discretionary immigration benefit, not an entitlement.[203]

Based on the language of the asylum statute and Supreme Court jurisprudence, lower federal courts have consistently held that an alien cannot claim a private interest in asylum, a discretionary benefit, if the government has not yet granted asylum to that alien.[204] The Supreme Court has reasoned that to claim a property interest in a benefit, one must "have more than a unilateral expectation of it," and "must, instead, have a legitimate claim of entitlement to it."[205] Before asylum is granted, an alien may claim only a unilateral expectation in that benefit. In dismissing procedural due process claims by aliens *seeking* asylum in the first instance, the federal courts have roughly adopted the following syllogism: (1) a person may claim a property interest in statutorily-created benefits to which he is entitled only; (2) statutorily-created discretionary benefits are per se not entitlements because the state may grant or deny the benefit in its discretion, even if the applicant has established his eligibility for the benefit; thus, (3) because one is per se not entitled to a discretionary benefit, he cannot claim a property interest in that benefit.[206]

The Supreme Court and certain lower federal courts have,

Process Clause of the Fifth Amendment, in the context of alleged deprivations of life, liberty, or property by the federal government. *See Eldridge*, 424 U.S. at 332 ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."); *see also id.* (discussing procedural due process jurisprudence that applies equally to the states and the federal government).

202 8 U.S.C. § 1158(b)(1)(A) (2012) (emphasis added).

203 *Cf.* Ching v. Mayorkas, 725 F.3d 1149, 1155 (9th Cir. 2013) (Immigrant visa for immediate relative is a nondiscretionary entitlement pursuant to 8 U.S.C. § 1154(b), which "provides that '[a]fter an investigation of the facts in each case, . . . the [Secretary of Homeland Security ('Secretary')] *shall*, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative[,] . . . *approve the petition*.'" (alterations in original) (footnote omitted)) .

204 *See generally* Yuen Jin v. Mukasey, 538 F.3d 143, 157 (2d Cir. 2008) ("[A]n alien who has already filed one asylum application, been adjudicated removable and ordered deported, . . . does not have a liberty or property interest in a discretionary grant of asylum."); Obleshchenko v. Ashcroft, 392 F.3d 970, 971 (8th Cir. 2004) (aliens, who have not been granted asylum in the first instance, cannot claim a protected liberty or property interest in asylum, a statutorily created form of relief that is conferred subject to the discretion of the government); Oguejiofor v. Att'y Gen. of the U.S., 277 F.3d 1305, 1039 (11th Cir. 2002) ("[A]n alien has no constitutionally-protected right to discretionary relief or to be eligible for discretionary relief.").

205 *Roth*, 408 U.S. at 577.

206 *See supra* note 204; *see also* Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) ("[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.").

however, intimated that a plaintiff may claim an entitlement in a discretionary benefit, once granted. In *Goldberg v. Kelly*,[207] the Supreme Court suggested that when a government benefit program creates in the recipient a reasonable expectation that he will continue to receive those benefits, a liberty or property interest might arise.[208] Adopting parallel reasoning, at least one federal court of appeals has found that persons may claim a property interest in an already-conferred discretionary benefit.[209]

Once the government grants asylum, the alien may then claim an entitlement to that status, along with the rights that flow therefrom. Asylum, once granted, gives rise to at least four distinct private interests that may be implicated during termination proceedings. These private interests include: (1) the right to remain in the United States, (2) the right to remain united with one's immediate family, (3) the right to work and earn a livelihood, and (4) the right to avoid forcible return to a country in which one may suffer persecution, harm, or death.[210] This Note addresses those private interests in turn.

Asylum termination affects an alien's right to remain in the United States and thus implicates a "liberty" interest protected by the Fifth Amendment. In *Board of Regents of State Colleges v. Roth*,[211] the Supreme Court noted that the liberty interest protected by the Due Process Clause of the Fifth and Fourteenth Amendments:

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a

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207 397 U.S. 254, 264 (1970) ("Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.").

208 *See id.*; *see also* Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L. REV. 871, 880 (2000) ("[One reading of *Goldberg*] focuses on whether a reasonable expectation to continued receipt of the benefit existed. If the government has taken affirmative steps in providing a benefit, thus giving a person a reasonable expectation of continued receipt of the benefit, then a property or liberty interest exists." (footnote omitted)).

209 *See* EJS Props., LLC v. City of Toledo, 698 F.3d 845, 856 (6th Cir. 2012) (finding that that "[p]roperty owners may have a property interest . . . in a discretionary benefit, such as a re-zoning ordinance, after it is conferred") (citing Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 263 F.3d 627, 642 (6th Cir. 2001) (holding property interest had arisen in discretionary ordinance after it had been approved, based on expectation in receipt of discretionary benefit that government's discretionary grant had created), *rev'd on other grounds*, 538 U.S. 188 (2003)). The *EJS* court held that petitioners could not claim a property interest in the re-zoning ordinance, a discretionary benefit in which they claimed a property interest, because the City Council had never approved the re-zoning ordinance in the first instance. *See EJS Props., LLC*, 698 F.3d at 856.

210 At least one federal district court has acknowledged that two of these three private interests—property interests and liberty interests—are implicated in the context of asylum termination proceedings. *See* Singh v. USCIS, No. 10 C 8288, 2011 WL 1485368, at *7 (N.D. Ill. Apr. 19, 2011). *Singh* arose within the jurisdiction of the Seventh Circuit, where a federal court of appeals has yet to address asylum termination by DHS.

211 408 U.S. 564 (1972).

> home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[212]

Because an asylee's right to remain and establish a life in the United States is essential to his pursuit of happiness—especially if he has previously suffered persecution in his country of origin—the government's grant of asylum, and the right to remain in the United States that flows therefrom, give rise to a "liberty" interest in an asylee.[213] And while asylum termination does not, in itself, effect immediate removal from the United States,[214] the current legal framework may all but guarantee an alien's removal once DHS terminates his asylum.[215]

Outside of the Ninth Circuit, an immigration judge may not invalidate a DHS decision to terminate asylum.[216] Thus, even if during the removal proceedings that follow termination,[217] an alien re-applies for asylum[218] and establishes that his original asylum claim was legitimate, that alien may nevertheless be subject to removal. Because an alien re-applying for asylum is identically situated to one applying for asylum in the first instance,[219] the adjudicator must deny the application if conditions in the country of origin have changed such that the alien no longer has a well-founded fear of persecution there.[220]

Among plaintiffs who have litigated DHS decisions to terminate, many—if not most—resided in the United States for a decade or longer before receiving a Notice of Intent to Terminate.[221] Within that span of

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212 *Id.* at 572 (alteration in original) (internal quotation marks omitted).

213 *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950), *overruled on other grounds by* Ardestani v. INS, 502 U.S. 129 (1991).

214 Termination by asylum triggers removal proceedings, but does not guarantee removal. *See, e.g.*, 8 C.F.R. § 1208.24(e) (2014) ("When an alien's asylum status . . . is terminated under this section, the Service shall initiate removal proceedings . . . .").

215 *See infra* notes 221–35, 263 and accompanying text.

216 *See In re* A-S-J-, 25 I. & N. Dec. 893, 900 (BIA 2012).

217 *See* 8 C.F.R. § 1208.24(e).

218 *See* Qureshi v. Holder, 663 F.3d 778, 780 (5th Cir. 2011) ("[A]n ex-asylee may . . . re-apply for asylum during his removal proceeding.").

219 Re-applying for asylum constitutes an altogether new application. *See id.* at 780 n.3 (citing *In re* B-, 20 I. & N. Dec. 427 (BIA 1991)).

220 *See* 8 C.F.R. § 1208.13(b)(1)(i)(A) (requiring that an adjudicator deny an asylum application for an alien who has suffered past persecution in his country of origin, but where country conditions have changed such that the alien no longer has a well-founded fear of future persecution there).

221 *See, e.g.*, Dhariwal v. Mayorkas, No. CV 11–2593 PSG, 2011 WL 6779314, at *1 (N.D. Cal. Dec. 27, 2011) (noting that government granted asylum to plaintiff on February 13, 2001 and thereafter issued to him a Notice of Intent to Terminate on July 2, 2010); Chamlikyan v. Bardini, No. C 10–00268 CRB, 2010 WL 5141841, at *1–2 (N.D. Cal. Dec. 13, 2010) (government granted asylum to plaintiff on July 10, 1995 and issued a Notice of Intent to Terminate on October 25, 2007); *see also* Singh v. USCIS, No. 10 C 8288, 2011 WL 1485368, at *1 (N.D. Ill. Apr. 19, 2011)

time, conditions in their countries of origin may have changed such that a risk of persecution no longer exists.[222] Under those circumstances, regulations require an immigration judge to deny the alien's renewed application and order removal.[223]

Consider a perverse but plausible scenario that could arise within the current DHS regulatory scheme. *A* and his wife, *W*, hail from the country *X*. *A* and *W* observe religion *Y* and engage in pro-*Y* activism in country *X*. In 2003, the government of *X* begins to arrest and summarily execute certain devotees of religion *Y*.[224] Fearing for their lives, *A* and *W* leave *X* and travel to New York City, entering with tourist visas that they previously used to visit relatives in the United States.

A and *W* are unfamiliar with the United States legal system. With the advice of a relative in New York, *A* hires a law firm to help prepare his asylum application. *A* prevails in his application, and in 2004, the government grants asylum to him and *W*, whom *A* listed as a derivative on the application.[225] One year after obtaining asylum, *A* and *W* apply to adjust their status to that of lawful permanent residents.[226] For several years, their applications to adjust status remain pending without a decision.[227] In the meantime, the couple finds work and give birth to

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(government granted plaintiff asylum on March 5, 1996 and issued Notice of Intent to Terminate on November 4, 2009).

222 *See, e.g.*, *Singh*, 2011 WL 1485368, at *4 (noting that "[i]n the removal proceeding, plaintiff will have to establish that he is presently at risk of persecution, a difficult task given that the persecution he alleges he experienced occurred in the early 1990s and that fifteen years have passed since he was originally granted asylum" (citation omitted)).

223 *See* 8 C.F.R. § 1208.13(b)(1)(i)(A) ("[A]n immigration judge, in the exercise of his or her discretion, *shall* deny the asylum application of an alien found to be a refugee on the basis of past persecution if . . . by a [finding of] a preponderance of the evidence: . . . [t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." (emphasis added)). The regulation's language may suggest that the immigration judge has discretion in deciding whether to deny the application. *Id.* But the regulation's operative language instructs that the immigration judge "shall" deny the application in the event of a fundamental change in country conditions, and, as such, the decision is nondiscretionary. *See id.*; *see also In re* M-Z-M-R-, 26 I. & N. Dec. 28, 30–31 (BIA 2012) ("In the case of an applicant who meets the 'refugee' definition based on past persecution, the regulations now *direct* Immigration Judges to deny asylum as a matter of discretion if the DHS rebuts a presumption that the applicant has a well-founded fear of future persecution on the basis of the original claim by establishing by a preponderance of the evidence either that there has been 'a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in [his] country of nationality . . . .'" (emphasis added) (footnotes and citation omitted)).

224 On these facts, *A* and *W* could arguably bring an asylum claim predicated on a well-founded fear of persecution on the basis of their religion, political opinion, and social group. *See* 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

225 *See id.* § 1158(b)(3)(A).

226 An asylee may adjust status to a lawful permanent resident one year after obtaining asylum. *See id.* § 1159.

227 *See* Dhariwal v. Mayorkas, No. CV 11–2593 PSG, 2011 WL 6779314, at *1 (N.D. Cal. Dec.

two U.S. citizen children. They make a life in the United States. All the while, sectarian violence ends in *X*, and conditions for members of religion *Y* vastly improve.

In 2013, however, *A* receives from DHS a Notice of Intent to Terminate asylum status. The Notice alleges that, because the firm that assisted with *A*'s asylum application was found to have fabricated asylum applications, and because of similarities between *A*'s application and applications that the government has already determined to have been fraudulent, *A* may not have been eligible for asylum at the time that the government granted it to him.[228] The letter instructs *A* to appear at a termination interview. At the interview, *A* presents evidence to prove the veracity of his original asylum claim, but DHS nevertheless terminates his asylum, determining that a preponderance of evidence—namely, the similarities between his application and fraudulent ones—establishes that *A* was ineligible for asylum in the first instance.[229] DHS places *A* and *W* into removal proceedings and revokes their employment authorization.[230]

In removal proceedings before an immigration judge, *A* asserts that his original asylum application was authentic, and the immigration judge accepts *A*'s claim. But because the immigration judge lacks the authority to review asylum termination by DHS, she cannot reverse its decision to terminate.[231] To avoid removal to country *X*, *A* re-files an application for asylum,[232] again listing *W* as a derivative. Noting that conditions have changed in *X*, such that neither *A* nor *W* has a well-founded fear of persecution there, the immigration judge denies the application and orders the couple removed to *X*. The BIA affirms, and the order of removal becomes administratively final.[233] The couple petitions for review by a circuit court and seek a stay of removal; the court denies the stay, and the couple faces imminent removal.[234] Because their U.S. citizen children are minors, they cannot petition for their parents to remain in the United States.[235]

While the above hypothetical makes clear that asylum termination may impinge upon an individual's interest in remaining in the United

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27, 2011) (noting that plaintiff applied for adjustment of status in April 2002 but received a notice of intent to terminate in July 2010); *Singh*, 2011 WL 1485368, at *4 n.2 (noting that plaintiff applied for adjustment of status in 1999, more than ten years before DHS served on him a Notice of Intent to Terminate Asylum).

228 The contents of this hypothetical Notice of Intent to Terminate are largely based upon that which the plaintiff received in *Dhariwal*. *See supra* note 7.

229 *See supra* notes 99–101 and accompanying text.

230 *See* 8 C.F.R. § 1208.24(e) (2014).

231 *In re* A-S-J-, 25 I. & N. Dec. 893, 900 (BIA 2012).

232 *See supra* note 142 and accompanying text.

233 *See supra* note 78 and accompanying text.

234 *See supra* notes 83–85 and accompanying text.

235 *See generally* 8 U.S.C. § 1154 (2012).

States, it reveals a second distinct interest that asylum termination by DHS may affect—the right to remain united with one's family. Among those aliens whose asylum DHS has attempted to terminate, many have U.S. citizen children who were born in the United States.[236] The Supreme Court and federal circuit courts have held that liberty interests—which the Fifth Amendment protects—include the right to raise a family.[237] The deprivation of asylum, and the removal that it may inevitably effect, may permanently separate an alien parent from his U.S. citizen child, thereby depriving an alien of that liberty.

Even if an asylee has no U.S. citizen children, asylum also confers upon him the right to work in the United States for the duration of his status as an asylee.[238] Once DHS terminates asylum status and places an alien into removal proceedings,[239] it also revokes that alien's employment authorization.[240] If, during the pendency of ensuing removal proceedings, the alien re-files for asylum, the alien may not re-apply for work authorization until at least 150 days after removal proceedings have commenced[241] and cannot receive work authorization until at least 180 days have elapsed.[242] During that period, the alien may not lawfully work in the United States and is thus deprived of the opportunity to earn a livelihood. Moreover, if an alien causes any delay in his scheduled hearings, that alien may waive his right to employment authorization for the duration of the removal proceedings.[243]

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236 In *Singh v. USCIS*, the plaintiff argued that termination of asylum violated his First Amendment right to associate with his four-year old, U.S. citizen son. *See* No. 10 C 8288, 2011 WL 1485368, at *5 (N.D. Ill. Apr. 19, 2011). The district court rejected this argument. *See id.* This Note proposes that the plaintiff's constitutional right to remain with his U.S. citizen son may instead have been protected on Fifth Amendment grounds.

237 *See* Landon v. Plasencia, 459 U.S. 21, 34–35 (1982) (holding that a right to live with and not be separate from one's immediate family is "a right that ranks high among the interests of the individual" and cannot be taken away without procedural due process); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that liberty interests include a "right . . . to marry, establish a home and bring up children").

238 8 U.S.C. § 1158(c)(1)(B).

239 8 C.F.R. § 1208.24(e) (2014) ("When an alien's asylum status . . . is terminated under this section, the Service shall initiate removal proceedings . . . .").

240 *Id.* § 1208.24(c) ("If the asylum officer determines that the alien is no longer eligible for asylum . . . the alien shall be given written notice that asylum status . . . any employment authorization issued pursuant thereto, are terminated.").

241 *Id.* § 1208.7(a)(1).

242 *See id.*; *see also* 8 U.S.C. § 1158(d)(2).

243 *See* AM. IMMIGRATION COUNCIL ET AL., FREQUENTLY ASKED QUESTIONS ABOUT THE ASYLUM CLOCK CLASS ACTION SETTLEMENT, *available at* http://legalactioncenter.org/sites/default/files/KLOK%20FAQ.pdf (discussing the potential "waiver" of work permit eligibility in the course of removal proceedings); *see also* JESÚS SAUCEDO ET AL., UP AGAINST THE ASYLUM CLOCK: FIXING THE BROKEN EMPLOYMENT AUTHORIZATION ASYLUM CLOCK 2, *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Asylum_Clock_Paper.pdf (noting that "the government's current administration of the [180-day 'clock'] causes asylum applicants to encounter excessive delays in receiving work authorization and in some instances, results in them never receiving one at all").

In *Goldberg*, the Supreme Court determined that welfare recipients held a property interest in the welfare payments that they received;[244] such payments, the Court reasoned, provided the means for individuals to satisfy basic needs, including paying for food and medical care.[245] An employment authorization document carries with it a right to earn a livelihood in the United States, and thus to pay for essential needs.[246] Accordingly, under *Goldberg*, a property interest flows from the right to work that asylum confers upon an alien.

Finally, asylum termination by DHS implicates an alien's Fifth Amendment interest in his own "life."[247] If DHS were to terminate an alien's asylum status and that alien re-applied for asylum in removal proceedings, an immigration judge would review the renewed application as though it had been filed for the first time; nevertheless, a DHS decision to terminate—especially for alleged fraud—would likely have an adverse impact on this new asylum application, a request for discretionary relief.[248] If, after asylum termination, an alien claims an ongoing fear of persecution in his country of origin, an immigration judge might decline to grant relief on discretionary grounds, on account of the prior alleged fraud that resulted in termination.[249] An alien who is removed to a country from which he claims a well-founded fear may suffer potentially catastrophic consequences, including persecution, physical and psychological harm, torture, or death.[250]

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244 Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

245 *Id.* (noting that welfare payments provide means to obtain essential food, clothing, housing, and medical care).

246 *See* 8 C.F.R. § 274a.12(a) (Asylees "are authorized to be employed in the United States without restrictions as to location or type of employment as a condition of their admission or subsequent change to one of the indicated classes."); *id.* § 274a.12(a)(5) ("An expiration date on the employment authorization document issued by USCIS reflects only that the document must be renewed, and not that the [asylee's right to work] has expired.").

247 *See* U.S. CONST. amend. V.

248 *See* Nijjar v. Holder, 689 F.3d 1077, 1081–82 (9th Cir. 2012) ("Not addressed in *Qureshi* is that [a] hypothetical second asylum application would ordinarily be time-barred, quite aside from whatever negative implication the fraud determination would have on the applicant's credibility in his second attempt to obtain asylum." (footnote omitted)). *But see In re* A-S-J-, 25 I. & N. Dec. 893, 896 (BIA 2012) ("The regulations do not require that the Immigration Judge accept the determination of fraud made by the [USCIS]; rather, the Immigration Judge determines the respondent's eligibility for asylum de novo.").

249 In *Bhargava*, the immigration judge found that the petitioner was not credible and therefore denied relief. *See* Bhargava v. Att'y Gen. of U.S., 611 F.3d 168, 170 (3d Cir. 2010).

250 *See, e.g.*, Matt Reynolds, *Gay Asylum Seeker Illegally Deported to Torture and Death, Mother Says*, ALTERNET (Dec. 12, 2013), http://www.alternet.org/immigration/gay-asylum-seeker-illegally-deported-torture-and-death-mother-says; *see also* Julia Preston, *Losing Asylum, Then His Life*, N.Y. TIMES, June 30, 2010, at A16.

2. Risk of Erroneous Deprivation

Risk of adjudicator error is acute in the context of asylum termination proceedings conducted by DHS. Interviews by DHS to determine whether to *grant* asylum are informal and unrecorded;[251] termination interviews are similarly informal, but procedural informality in the termination context may permit for certain adjudicator bias to go unchecked—especially risky, given the private interests implicated and the fact that DHS asylum termination proceedings are not subject to immediate administrative or judicial review.[252]

DHS conducts termination proceedings in an inquisitorial rather than an adversarial manner; inquisitorial proceedings are questionably effective for the purpose of factfinding.[253] DHS officers often decide whether to terminate asylum based on evidence that DHS has, itself, obtained.[254] Pursuant to this procedure, a single agency—if not a single agent[255]—at once investigates and adjudicates the asylum termination inquiry.[256]

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251 *See* Barahona-Gomez v. Reno, 236 F.3d 1115, 1120 (9th Cir. 1999) (contrasting the "informal conferences conducted by asylum officers" with the "formal rules of procedure govern[ing] the conduct of immigration court proceedings" that mandate "[t]estimony of witnesses [to be] taken under oath [and] transcribed," among other requirements). This author has identified neither a statute nor a regulation requiring that asylum interviews go unrecorded, and any conclusion as to this point is based on his own experiences working in the field of immigration law. Still, Asylum Officer Basic Training Materials contain instructions to asylum officers regarding the importance of taking "clearly written and comprehensive notes" during asylum interviews. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., RAIO, ASYLUM DIVISION, ASYLUM OFFICER BASIC TRAINING COURSE, INTERVIEWING PART II: NOTE-TAKING (Aug. 10, 2009), *available at* http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Interview-Part-2-Notetaking-31aug10.pdf. These materials support the conclusion that interviews by asylum officers—unlike removal proceedings before immigration judges—are neither recorded nor transcribed.

252 *See supra* notes 82–84; *see also Nijjar*, 689 F.3d at 1085.

253 In the context of formal administrative adjudication, the APA generally proscribes inquisitorial proceedings, wherein an agency employee performs both investigative and adjudicative functions. *See* 5 U.S.C. § 554(d) (2012) ("An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision . . . [or] recommended decision . . . except as witness or counsel in public proceedings."). Asylum termination by DHS is an informal adjudication, and therefore is not subject to the inquisitorial prohibition under section 554(d). Furthermore, during the existence of the former INS, federal courts allowed immigration officials to assume dual investigator-adjudicator functions. *See V. The Procedural Rights of Deportable Aliens*, 96 HARV. L. REV. 1370, 1370 n.3 (1983). For a discussion of certain advantages to an inquisitorial immigration system, especially in the context of removal proceedings, see Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647 (2012).

254 *See generally* AFFIRMATIVE ASYLUM PROCEDURES MANUAL, *supra* note 95, at 84 (describing termination proceedings predicated on adverse information obtained by DHS).

255 *Id.* at 83–84 (describing the evidentiary standards that the Asylum Office must meet before issuing a Notice of Intent to Terminate, but providing no guidance with respect to the procedures

Official DHS training materials advise that, if, in the course of an asylum termination interview predicated on fraud, an alien offers a new, "true" story, an asylum officer may not affirm the original asylum grant based on this new narrative. DHS's rationale is telling:

> [A]fter having committed fraud in the affirmative [asylum] system, the appropriate forum for the individual to present a new asylum claim is in defensive proceedings where adversarial methods . . . can further test the veracity of the new story.[257]

At least implicitly, these training manuals suggest that adversarial proceedings, as opposed to inquisitorial proceedings, are preferable for the purpose of factfinding.

An inquisitorial system likely encourages adjudicator bias. Evidence of asylum officers' conduct during termination proceedings illustrates this procedural pitfall. At one termination interview that predates the Sekhon cases,[258] an asylum officer referred to notes by an asylum officer from the alien's original interview but did not allow the alien facing termination to examine the notes or cross-examine the person who had produced them.[259] At another termination interview, an asylum officer allegedly questioned an asylee about prior statements made during the course of his original asylum interview without providing the asylee or his attorney with a copy of the alleged statement so that they could review it.[260] These actions suggest that in termination proceedings, asylum officers serve not as impartial factfinders, but rather as adversaries against aliens whom they treat with suspicion. What is more, DHS may elect to terminate asylum without conducting a termination interview.[261] Indeed, DHS did exactly that during the termination proceedings that led to the *Nijjar* decision.[262]

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to which the Asylum Office and its officers must adhere with respect to the investigative and adjudicative functions of termination proceedings).

256 *See supra* note 253.

257 *See* AFFIRMATIVE ASYLUM PROCEDURES MANUAL, *supra* note 95, at 86.

258 *See* Sidhu v. Bardini, No. C 08–05350 CW, 2009 WL 1626381 (N.D. Cal. June 10, 2009).

259 *See id.* at *2 (during termination interview, plaintiff's attorney was not permitted to participate meaningfully in asylum officer's examination of aliens facing asylum termination because "(1) during the interview the asylum officer referred to notes from [alien's] original asylum interview but [attorney and clients] were not allowed to review these documents, (2) [attorney] was not allowed to cross-examine the makers of these documents and (3) [alien] was not permitted to present a witness to testify on her behalf").

260 *See* Singh v. USCIS, No. 10 C 8288, 2011 WL 1485368, at *1 (N.D. Ill. Apr. 19, 2011).

261 USCIS training materials indicate that if an alien fails to appear at his asylum termination interview, the asylum office may nevertheless terminate asylum. *See* AFFIRMATIVE ASYLUM PROCEDURES MANUAL, *supra* note 95, at 86 ("If the individual fails to appear for the interview and the failure to appear is not excused . . . the Asylum Office [prepares a] recommendation memo [recommending either termination or continuation of asylum status that] includes a brief statement of the circumstances surrounding the failure to appear, whether any excuse was submitted and, if so, why the excuse was insufficient.").

262 Nijjar v. Holder, 689 F.3d 1077, 1079 (9th Cir. 2012).

Outside of the Ninth Circuit, the risk of erroneous deprivation is particularly grave, because, as the *Qureshi* court noted, the judiciary may entertain a claim that DHS erred only once the BIA enters an administratively final order of removal.[263] By the time a circuit court reviews potential errors arising out of a DHS decision to terminate, an alien may have already been removed to a country where he is at risk of persecution or harm.[264]

3. Recommendation and Assessment of Additional Procedural Safeguards

To remedy the constitutional defects of asylum termination proceedings by DHS, the current inquisitorial proceedings require specific reforms. Asylum termination should occur exclusively in the context of an adversarial proceeding before an immigration judge who sits as a neutral arbiter.[265] In this procedural scenario, an alien would, as a matter of right, have the opportunity to appeal an immigration judge's decision to terminate asylum to the BIA. During the pendency of the appeal, that judge's order would remain administratively nonfinal,[266] such that the alien could maintain employment authorization, along with any other rights asylum conferred on him. Moreover, these hearings would be recorded and transcribed,[267] allowing the BIA or a circuit court to review the precise grounds underlying an immigration judge's decision to terminate. These reforms would ensure that review of a termination decision is available before the alien loses his

263 *See supra* notes 145–46 and accompanying text.

264 *See supra* Part I.E.

265 Asylum termination proceedings before DHS may also give rise to an equal protection problem. Unlike the Fourteenth Amendment, which safeguards individual rights against the states—among them, equal protection under the law—the Fifth Amendment of the U.S. Constitution contains no Equal Protection Clause. *See* U.S. CONST. amend. V (containing no Equal Protection Clause); *cf.* U.S. CONST. amend. XIV (containing Equal Protection Clause). Nevertheless, the Supreme Court has held that any failure by the federal government to provide equal protection under the law may violate due process enshrined in the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 498 (1954). Asylum termination regulations may violate Equal Protection by creating two distinct asylum termination "classes": aliens whose asylum is terminated by DHS, and aliens whose asylum is terminated by an immigration judge. Whereas 8 C.F.R. § 1208.24(c), which governs DHS termination, creates a class of aliens who cannot appeal a DHS decision to terminate to a higher administrative body, 8 C.F.R. § 1208.24(f), which governs asylum termination by an immigration judge, affords an alien an adversarial proceeding before an immigration judge, and arguably allows that alien to appeal the immigration judge's decision to the BIA. A more thorough examination of the equal protection issues at play is, however, beyond the scope of this Note.

266 *See supra* notes 78–79 and accompanying text.

267 *See* 8 C.F.R. § 1003.28 (2014).

employment authorization[268] and, more importantly, before an alien is subject to a final order of removal.[269]

The administrative burdens involved in creating additional procedural safeguards are minimal. Current regulations already provide for asylum termination procedures before an immigration judge,[270] wherein DHS bears the burden of demonstrating that termination is warranted.[271] Those same regulations already require DHS to place an alien into removal proceedings after an asylum officer has terminated asylum.[272] Thus, the proposed procedural reform simply requires DHS to divert prosecutorial resources into a consolidated proceeding, whereby an immigration judge would first determine whether to terminate asylum, and then continue with removal proceedings, when appropriate. With these steps, the federal government could resolve a significant constitutional problem while continuing to address the problem of asylum fraud.

CONCLUSION

Although the Ninth Circuit has held that DHS lacks statutory authority to terminate asylum, the agency retains the authority to do so in every other judicial circuit in the United States.[273] In light of the ongoing prosecution of lawyers and practitioners who have profited from the operation of asylum mills,[274] and the likelihood of asylum termination proceedings that will consequently result, whether DHS has the authority to terminate asylum remains a vital question.

The procedural framework for asylum termination not only offends procedural due process, but also undermines human rights safeguards enmeshed in the nation's asylum system. What is more, this current framework allows DHS to engage in these practices while evading review by higher administrative bodies and the federal judiciary. Finally, since these procedures violate procedural due process, they may also constitute a breach of the United States' treaty obligations undertaken upon becoming a party to the 1967 Protocol.[275]

Acknowledging that asylum fraud remains an ongoing problem, this Note does not call for an end to asylum termination altogether. Instead, it proposes a simple reform by limiting termination authority to

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268 *See supra* note 240.
269 *See supra* Part I.E.
270 8 C.F.R. § 1208.24(f).
271 *Id.*
272 *Id.* § 1208.24(e).
273 *See In re* A-S-J-, 25 I. & N. Dec. 893, 894 n.2 (BIA 2012).
274 *See supra* notes 10–13.
275 *See supra* note 46 and accompanying text.

the Attorney General—requiring that an immigration judge sit as a neutral arbiter in termination proceedings, where crucial human interests hang in the balance.[276] While strengthening procedural safeguards, these reforms would guarantee an alien's right to BIA review of an immigration judge's decision to terminate asylum, before that alien is subject to a final order of removal. The administrative burden to implement these changes would be minimal.[277] Most importantly, these crucial reforms could protect asylees who have been wrongfully implicated in fraud because of their attorneys' wrongdoing.

276 *See generally supra* Part III.B.1.
277 *See supra* Part III.B.3.