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Administrative Notice, Due Process, and the Adjudication of Asylum Claims in the United States

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Abstract

This Note addresses the conflict within the U.S. Courts of Appeals regarding an alien's right to challenge the BIA's administrative notice of a political change in an asylum seeker's home country. Part I of this Note discusses U.S. asylum law standards and the procedures that an applicant must follow in seeking asylum and in appealing an adverse asylum decision. Part I also discusses the origin of administrative notice, its application in immigration proceedings, and an alien's right to procedural due process. Part II examines circuit court decisions addressing whether an applicant is denied due process when the BIA takes administrative notice of a change in the political situation in an alien's home country without allowing the applicant an opportunity to respond before a decision is rendered. Part III argues that current immigration procedures are inadequate and that the current BIA practice violates the Due Process Clause of the Fifth Amendment of the U.S. Constitution. This Note concludes that an alien should be warned before the BIA takes administrative notice and permitted to challenge administratively noticed facts before the BIA renders a decision.

NOTES

ADMINISTRATIVE NOTICE, DUE PROCESS, AND THE ADJUDICATION OF ASYLUM CLAIMS IN THE UNITED STATES

INTRODUCTION

Aliens[1] are eligible for asylum in the United States if they have been persecuted in the past or they have a well-founded fear of persecution in their countries of origin because of their race, religion, nationality, political opinion, or membership in a particular social group.[2] Aliens seeking asylum in the United States commonly claim that they fear persecution by repressive governments in their countries of origin if they return.[3] A change of government in these countries, therefore, can affect an alien's eligibility for asylum.[4] If a repressive regime is replaced, aliens originally from that country may no longer possess

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1. 8 U.S.C. § 1101(a)(3) (1988). Under U.S. law, the term "alien" means any person who is not a citizen or a national of the United States. *Id.* A national of the United States is a person who owes permanent allegiance to the United States. 8 U.S.C. § 1101(a)(21) (1988).

2. *See* 8 U.S.C. § 1101(a)(42)(A). An alien physically present in the United States or at a land border or port of entry may be granted asylum in the discretion of the Attorney General if the Attorney General determines that the alien is a refugee within the meaning of the statute. 8 U.S.C. § 1158(a) (1988). A refugee is:

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

8 U.S.C. § 1101(a)(42)(A).

3. *See, e.g.*, Castillo-Villagra v. INS, 972 F.2d 1017, 1020 (9th Cir. 1992) (Nicaraguan citizens claiming persecution by Sandinista government); Baka v. INS, 963 F.2d 1376 (10th Cir. 1992) (Hungarian nationals claiming persecution by Communist government of Hungary); *see also* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 65 (1979) (persecution normally related to action by authorities of country or by segments of population tolerated by authorities).

4. *See, e.g.*, Kapcia v. INS, 944 F.2d 702, 707 (10th Cir. 1991) (asylum request denied after change in Polish government); Wojcik v. INS, 951 F.2d 172, 173 (8th Cir. 1991) (same). Asylum may be terminated after it has been granted because of a change in the circumstances in an alien's home country. 8 U.S.C. § 1158(b).

a well-founded fear of persecution.[5] U.S. immigration adjudicators, who review aliens' requests for asylum, have noted changes in the governments of the aliens' home countries in denying these requests.[6]

A change in the government of an alien's home country may occur after an alien has supplied evidence to support his request for asylum in the United States but before immigration officials have made a decision on the request.[7] In this instance, the record of evidence upon which immigration officials will base their decision will not include any evidence from the alien on the significance of a recent change of government and its impact on his asylum request.[8] In many cases, aliens seeking asylum contend that the change in government does not eliminate the threat of persecution that they will face if returned to their home country.[9] The aliens argue that their persecutors have retained positions of authority despite the change in leadership[10] and, therefore, the change in government has not eliminated their well-founded fear of persecution.[11]

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5. *See, e.g.*, Kaczmarczyk v. INS, 933 F.2d 588, 594 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993) (former member of Solidarity labor union found to no longer possess well-founded fear of persecution after Solidarity election to coalition government in Poland).

6. *See, e.g.*, *Castillo-Villagra*, 972 F.2d at 1022-23 (immigration appeals agency relied on recent election results in concluding that aliens lacked well-founded fear of persecution).

7. *See, e.g.*, Gebremichael v. INS, 10 F.3d 28, 32 (1st Cir. 1993) (immigration appeals agency denied asylum request two years after oral argument and one year after political changes in Ethiopia); *Castillo-Villagra*, 972 F.2d at 1021 (immigration appeals agency denied asylum request one year after appeal and six months after political changes in Nicaragua).

8. *See, e.g.*, *Gebremichael*, 10 F.3d at 32 (noting that political changes in Ethiopia occurred after briefs received and oral argument held); *Castillo-Villagra*, 972 F.2d at 1021 (noting that none of the parties "had occasion to develop a record about the possibility that the Sandinistas might someday lose control").

9. *See* Stephanie Griffith, *New INS Policy Alarms Area's Nicaraguans*, WASH. POST, July 31, 1990, at B5 (anti-Sandinista asylum applicants express fear over INS policy of deporting Nicaraguans after Sandinistas defeated in elections); Appellants' Opening Brief at 12, Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992) (No. 90-70618) (petitioners fear that Sandinistas still have power to persecute them for political beliefs).

10. *See* Griffith, *supra* note 9, at B5 (quoting one Nicaraguan citizen seeking asylum in United States as saying that despite election of new President in Nicaragua in 1990, "[t]he Sandinistas can still throw her out of the government in five minutes").

11. *Id.* Although the alleged persecutors in cases where the government has changed are no longer part of the government, the statutory definition of a refugee does not require that the persecution come from the refugee's own government. *See* 8 U.S.C. § 1101(a)(42)(A). The definition only specifies that the refugee be unwilling or

The Board of Immigration Appeals (the "BIA"), the administrative appeals unit that decides appeals from the decisions of lower immigration authorities,[12] has found that some aliens from countries where the government has changed do not have a well-founded fear of persecution. Despite the right of an alien who has entered the United States to be heard on the evidence concerning an asylum request,[13] the BIA has denied asylum to these aliens even though they have not had an opportunity to address the change in government before the BIA rendered a decision.[14] In addition, the BIA used nearly identical decisions to deny asylum to a large numbers of these aliens,[15] despite an alien's right to an individualized determination of his asylum re-

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unable to avail himself of the protection of his government because of a well-founded fear of persecution. *Id.* U.S. courts have held that asylum may be granted when persecution is at the hands of forces over which the government is unwilling or unable to control. *See* Bolanos-Hernandez v. INS, 749 F.2d 1316 (9th Cir. 1984), *amended*, 767 F.2d 1277 (9th Cir. 1985) (noting that Salvadoran guerrillas are source of persecution); McMullen v. INS, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981) (noting that Provisional wing of Irish Republican Army is source of persecution).

12. 8 C.F.R. 3.1(b) (1993). The BIA is an administrative appeals agency of the U.S. Department of Justice that reviews, among other things, asylum decisions made by Immigration Judges ("IJs"). *Id.* The IJs, sometimes referred to as "Special Inquiry Officers," are responsible for deciding questions involving bond, exclusion, and deportation. RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAW 18 (2d ed. 1992). Both IJs and the BIA are a part of the U.S. Department of Justice's Executive Office for Immigration Review ("EOIR"), *id.* at 217, an entity separate from the INS and created by the Attorney General in 1983. *Id.* at 7.

13. U.S. CONST. amend. V, cl. 4. The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." *Id.* Aliens physically within the United States are "persons" within the meaning of the U.S. Constitution, and are therefore entitled to the procedural due process mandated by the Fifth Amendment. *See* Landon v. Plasencia, 459 U.S. 21 (1982). An alien's procedural due process rights have been held to include an opportunity to be heard before removal from the United States. The Japanese Immigrant Case, 189 U.S. 86, 101 (1903). Aliens not physically within the United States, often referred to as excludable aliens, are not entitled to procedural due process beyond that provided by immigration regulations. *See Landon*, 459 U.S. at 21.

This Note is limited to an analysis of the due process implications of BIA use of administrative notice in deportation cases, rather than exclusion cases. *But see* Dhine v. District Director, 818 F. Supp. 671, 677 (S.D.N.Y.) (BIA erred in exclusion case by taking administrative notice of disputable fact that there had been no persecution of Jews in Ethiopia after fall of Mengistu regime), *rev'd in part on other grounds*, 3 F.3d 613 (2d Cir. 1993).

14. *See, e.g.*, de la Llana-Castellon v. INS, 16 F.3d 1093, 1095 (10th Cir. 1994) ("The BIA did not give the Petitioners . . . an opportunity to present rebuttal evidence before the appeal was dismissed.").

15. Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992). "The identical language was used [by the BIA] in a large number of other cases, apparently as INS form language

quest.[16] The BIA has used the doctrine of administrative notice to recognize these changes in the government of an alien's home country.[17]

The doctrine of administrative notice, also known as official notice, allows an administrative agency like the BIA to establish the existence of facts without resorting to formal methods of proof.[18] For example, the BIA took administrative notice of the ouster of the repressive Sandinista Party in Nicaragua[19] and the election of a non-Communist government in Poland soon after these events occurred.[20] As a result, many of the aliens seeking asylum before the BIA on the basis of their fear of persecution by the Sandinistas in Nicaragua or the Communists in Poland were rejected by the BIA.[21]

The U.S. Courts of Appeals hear appeals from BIA decisions.[22] The circuit courts are divided on whether an applicant for asylum is denied due process, in contravention of the Fifth Amendment of the U.S. Constitution, when the BIA takes administrative notice of a change in government in the applicant's home country without allowing the applicant an opportunity to respond.[23] Specifically, these courts disagree on whether a mo-

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for Nicaraguan cases after Violeta Chamorro won the Nicaraguan presidential election." *Id.*

16. Morgan v. United States, 298 U.S. 468, 481 (1936).

17. *See, e.g.*, Sarria-Sibaja v. INS, 990 F.2d 442, 443 (9th Cir. 1993) (reviewing use of administrative notice by BIA to deny asylum after change in government in alien's home country); Acewicz v. INS, 984 F.2d 1056 (9th Cir. 1993) (same); *Castillo-Villagra*, 972 F.2d at 1022-23 (same).

18. 2 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 10.6, at 150 (3rd ed. 1994); 4 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 25.01, at 2 (1993). "A court or an agency can make a finding of fact without evidentiary support by taking judicial or official notice, respectively, of that fact." 2 *id.*; *see* MCCORMICK ON EVIDENCE § 359, at 1028-33 (Edward W. Cleary ed., 3rd ed. 1984). With administrative notice, an administrative law judge "bypasses the normal process of proof and relies upon facts and opinions not supported by evidence 'on the record.'" *Id.* at 1028.

19. *See, e.g., Sarria-Sibaja*, 990 F.2d at 443; Gomez-Vigil v. INS, 990 F.2d 1111 (9th Cir. 1993); *Castillo-Villagra*, 972 F.2d at 1017; Rhoa-Zamora v. INS, 971 F.2d 26 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993); Gutierrez-Rogue v. INS, 954 F.2d 769 (D.C. Cir. 1992); Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991).

20. *See, e.g.*, Wojcik v. INS, 951 F.2d 172 (8th Cir. 1991); Janusiak v. INS, 947 F.2d 46 (3d Cir. 1991); Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 583 (1991); Kubon v. INS, 913 F.2d 286 (7th Cir. 1990).

21. *See, e.g., Castillo-Villagra*, 972 F.2d at 1022-23 (describing BIA use of administrative notice of results of Nicaraguan election); *Kaczmarczyk*, 933 F.2d at 591 (describing BIA use of administrative notice of Polish election).

22. 8 U.S.C. § 1101a (1988).

23. *Compare* Getachew v. INS, No. 92-70836, 1994 WL 234557 (9th Cir. June 2,

tion to reopen BIA proceedings is a constitutionally acceptable means of rebutting administratively noticed facts.[24] The U.S. Supreme Court has twice denied certiorari on this question.[25]

This Note addresses the conflict within the U.S. Courts of Appeals regarding an alien's right to challenge the BIA's administrative notice of a political change in an asylum seeker's home country. Part I of this Note discusses U.S. asylum law standards and the procedures that an applicant must follow in seeking asylum and in appealing an adverse asylum decision. Part I also discusses the origin of administrative notice, its application in immigration proceedings, and an alien's right to procedural due process. Part II examines circuit court decisions addressing whether an applicant is denied due process when the BIA takes administrative notice of a change in the political situation in an alien's home country without allowing the applicant an opportunity to respond before a decision is rendered. Part III argues that current immigration procedures are inadequate and that the current BIA practice violates the Due Process Clause of the Fifth Amendment of the U.S. Constitution. This Note concludes that an alien should be warned before the BIA takes administrative notice and permitted to challenge administratively noticed

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1994) *and* de la Llana-Castellon v. INS, 16 F.3d 1093 (10th Cir. 1994) *and* Kahssai v. INS, 16 F.3d 323 (9th Cir. 1994) (per curiam) *and* Sarria-Sibaja v. INS, 990 F.2d 442 (9th Cir. 1993) (per curiam) *and* Gomez-Vigil v. INS, 990 F.2d 1111 (9th Cir. 1993) (per curiam) *and* Acewicz v. INS, 984 F.2d 1056 (9th Cir. 1993) *and* Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992) (all holding that BIA administrative notice of change in government of applicant's native country without warning to and adequate rebuttal from asylum applicant violates due process) *with* Rhoa-Zamora v. INS, 971 F.2d 26 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993) *and* Gutierrez-Rogue v. INS, 954 F.2d 769 (D.C. Cir. 1992) *and* Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991) *and* Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 583 (1991) (all holding that BIA administrative notice of change of government in applicant's native country does not violate due process where applicant may challenge noticed facts in motion to reopen). *See* Gebremichael v. INS, 10 F.3d 28 (1st Cir. 1993) (agreeing with Seventh Circuit in dicta). Other cases have ruled on the use of administrative notice by the BIA without discussing due process. *See* Baka v. INS, 963 F.2d 1376 (10th Cir. 1992); Wojcik v. INS, 951 F.2d 172 (8th Cir. 1991); Kapcia v. INS, 944 F.2d 702 (10th Cir. 1991); Janusiak v. INS, 947 F.2d 46 (3d Cir. 1991); Kubon v. INS, 913 F.2d 286 (7th Cir. 1990); McLeod v. INS, 802 F.2d 89 (3rd Cir. 1986).

24. *See Llana-Castellon*, 16 F.3d at 1100; *Gomez-Vigil*, 990 F.2d at 1114; *Castillo-Villagra*, 972 F.2d at 1029; *Rhoa-Zamora*, 971 F.2d at 34; *Gutierrez-Rogue*, 954 F.2d at 773; *Rivera-Cruz*, 948 F.2d at 968; *Kaczmarczyk*, 933 F.2d at 596-97.

25. Rhoa-Zamora v. INS, 971 F.2d 26 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993); *Kaczmarczyk*, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 583 (1991).

facts before the BIA renders a decision.[26]

I. *HISTORY OF ASYLUM, ADMINISTRATIVE NOTICE, AND DUE PROCESS*

The statutory requirements of U.S. asylum law have been shaped largely by compliance with international treaties on the treatment of refugees.[27] The administrative procedures governing asylum decisions include provisions that allow an alien to appeal an adverse decision to the BIA.[28] Like other government agencies, the BIA has used the doctrine of administrative notice to resolve cases before it, particularly appeals from aliens seeking asylum.[29] Administrative notice allows an agency to establish the existence of facts without resorting to formal methods of proof.[30] Administrative notice of facts without allowing a party to the proceeding an opportunity to respond may violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution.[31]

A. *Asylum Law in the United States*

U.S. immigration law allows aliens with a well-founded fear of persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group to enter or remain in the United States rather than return to their

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26. *See Castillo-Villagra*, 972 F.2d at 1029. This Note addresses the due process implications of administrative notice during an appeal to the BIA, not administrative notice by the judges who initially decide asylum applications. If an asylum request has been denied on the basis of administratively noticed facts before an appeal to the BIA, the alien has an opportunity to challenge these facts on appeal to the BIA. 8 C.F.R. § 208.8 (1993). Because these aliens have an opportunity to rebut these facts, there is no deprivation of due process. *See* Acewicz v. INS, 984 F.2d 1056, 1061 (9th Cir. 1993) (no due process violation where Polish aliens were asked before appeal to BIA to address Solidarity's participation in coalition government).

27. *See* 1951 Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152; Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 268 (establishing international standards for treatment of refugees).

28. 8 C.F.R. § 3.2 (1993).

29. *See, e.g.*, Kapcia v. INS, 944 F.2d 702, 707 (10th Cir. 1991) (BIA notice change in Polish government); Wojcik v. INS, 951 F.2d 172, 173 (8th Cir. 1991) (same).

30. 4 STEIN ET AL., *supra* note 18, § 34.01.

31. *See* Ohio Bell Telephone Co. v. Public Utils. Comm'n, 301 U.S. 292, 300 (1937) (holding state agency denied due process by computing property value on basis of facts officially noticed but not disclosed in record).

home countries.[32] Both aliens detained at U.S. borders and those already present in the United States are eligible for asylum.[33] These aliens may apply for asylum directly to the Immigration and Naturalization Service,[34] or they may assert an asylum claim during deportation or exclusion proceedings.[35] A decision rendered during deportation or exclusion proceedings may be appealed to the BIA.[36] After a decision by the BIA, aliens may file a motion to reopen the case if new evidence arises.[37] Finally, the BIA's decision in a deportation case may be appealed to the U.S. Court of Appeals.[38] Final decisions rendered in an exclusion proceeding may be reviewed in a habeas corpus proceeding in U.S. District Court.[39]

1. An Overview of U.S. Asylum Law

The 1951 Convention Relating to the Status of Refugees (the "Convention") includes a definition of "refugee" that was adopted by the United States in the Immigration and Nationality Act (the "INA").[40] Although the United States was not a signatory to the Convention, it acceded to the 1967 Protocol Relating

32. *See* 8 U.S.C. § 1101(a)(42)(A) (1988). The Refugee Act of 1980 amended the Immigration and Nationality Act (the "INA") and established a new statutory procedure for granting asylum to refugees. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C. (1988)).

33. BOSWELL, *supra* note 12, at 151.

34. 8 C.F.R. § 208.2(a) (1993).

35. 8 C.F.R. § 208.2(b) (1993). Exclusion occurs when aliens seeking entry to the United States from outside U.S. borders are rejected. *See* 8 U.S.C. § 1226 (1988) (exclusion procedure); 8 U.S.C. § 1182 (1988) (defining excludable aliens); *see also* BOSWELL, *supra* note 12, at 67. Deportation refers to proceedings initiated against aliens who have already entered the United States. 8 U.S.C. § 1252 (1988) (deportation procedure); 8 U.S.C. § 1251 (1988) (defining deportable aliens); BOSWELLL *supra* note 12, at 69. The difference between exclusion and deportation hinges on whether an alien has "entered" the United States. *See* 8 U.S.C. § 1101(13) (1988) ("entry" defined); *see also* BOSWELL, *supra* note 12, at 69. Aliens charged with deportation, unlike those charged with exclusion, are entitled to the protection of the U.S. Constitution, including the right to due process under the Fifth Amendment. Landon v. Plasencia, 459 U.S. 21, 26 (1982).

36. 8 C.F.R. § 3.1(b) (1993).

37. 8 C.F.R. § 3.2 (1993).

38. 8 U.S.C. § 1105a (1988).

39. *Id.*

40. *See* 1951 Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152. A "refugee" was defined as any person outside his or her country of nationality and unwilling or unable to return to it "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." *Id.* This definition of

to the Status of Refugees, which incorporated the Convention definition of a "refugee" by reference.[41] The INA gives the U.S. Attorney General discretion to allow aliens to remain in the United States if they have suffered persecution in the past or they have a well-founded fear of persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group.[42] Asylum is thus a discretionary remedy.[43] An alien who satisfies the statutory definition of a refugee may be denied asylum in the exercise of discretion.[44] For example, aliens have been denied asylum in the exercise of discretion because they entered the United States with fraudulent documents.[45]

As the statutory definition of a refugee indicates, aliens must establish either that they have suffered persecution in the

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"refugee" is identical in all but phrasing to the one adopted in the Immigration and Nationality Act. *See* 8 U.S.C. § 1101(a)(42)(A) (1988) (defining refugee).

41. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 268, 268 n.1. The Protocol Relating to the Status of Refugees incorporates the definition of refugee from the 1951 Convention Relating to the Status of Refugees. *See* 1951 Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 151. This definition of refugee is identical in all but phrasing to the one adopted in the INA. *See* 8 U.S.C. § 1101(a)(42)(A) (1988).

42. 8 U.S.C. §§ 1101(a)(42)(A), 1158 (1988). The U.S. Attorney General is also responsible for the administration and enforcement of the INA. *See* 8 U.S.C. § 1103. For practical reasons, the Attorney General delegates the administration of the INA to the Immigration and Naturalization Service ("INS"). *See* 8 U.S.C. § 1101(a)(18) (1988). The INS is a federal agency within the U.S. Department of Justice. 8 U.S.C. § 1101(a)(34) (1988).

43. 8 U.S.C. § 1158(a) (1988). An alien "may be granted asylum" in the discretion of the Attorney General if the Attorney General determines that the alien satisfies the statutory definition of a refugee. *Id.*; *see* INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.5 (1987). Asylum is one of two methods through which otherwise deportable aliens who claim that they will be persecuted if deported can seek relief. *Cardoza-Fonseca*, 480 U.S. at 423. Section 243(h) of the INA requires the Attorney General to withhold deportation of aliens who demonstrate that their "life or freedom would be threatened" on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1253(h) (1988). In *INS v. Stevic*, the U.S. Supreme Court held that in order to qualify for withholding of deportation, aliens must demonstrate that "it is more likely than not that [they] would be subject to persecution" in the country to which they would be returned. 467 U.S. 407, 429-30 (1984).

44. *See* 8 U.S.C. § 1101(a)(42)(A) (aliens may be granted asylum "in discretion" of the U.S. Attorney General).

45. *See* Walai v. INS, 552 F. Supp. 998, 999 (S.D.N.Y. 1982) (Afghan national with fraudulent passport denied asylum despite well-founded fear of persecution); Matter of Shirdel, Interim Decision No. 2958 (BIA Feb. 21, 1984) (same); Matter of Salim, 18 I. & N. Dec. 311 (1982) (same).

past[46] or that they have a well-founded fear of persecution in their countries of origin.[47] The U.S. Supreme Court established a standard for determining whether an alien has a well-founded fear of persecution in *INS v. Cardoza-Fonseca*.[48] In *Cardoza-Fonseca*, a Nicaraguan entered the United States as a visitor and remained longer than permitted.[49] The INS commenced deportation proceedings, and the Nicaraguan requested asylum in the United States.[50] An Immigration Judge ("IJ") and the BIA ruled that the Nicaraguan was not eligible for asylum because she had not established a "clear probability of persecution" if she was returned to Nicaragua.[51] The U.S. Supreme Court, however, held that the "well-founded fear" standard that governs asylum proceedings is different and more generous than the "clear probability" standard used by the IJ and the BIA.[52] In *Cardoza-Fonseca*, the U.S. Supreme Court noted that the reference to "fear" in the statutory definition of a refugee makes the determination of an alien's eligibility turn to some extent on the subjective mental state of the alien.[53] In addition, the Court observed that an alien could have a well-founded fear of persecution even

46. *See* 8 U.S.C. § 1101(a)(42)(A) (aliens eligible for asylum "because of persecution or a well-founded fear of persecution"); Desir v. Ilchert, 840 F.2d 723, 729 (9th Cir. 1988) ("[P]ast persecution, without more, satisfies the [definition of a refugee] even independent of establishing a well-founded fear of persecution."); 8 C.F.R. § 208.13(b) (1993) ("The applicant may qualify as a refugee either because he has suffered actual past persecution or because he has a well-founded fear of future persecution."). Once an applicant has shown past persecution, the burden of proof shifts to the government to show that the alien lacks a well-founded fear of future persecution. In re Chen, Interim Dec. 3104, at 6-7 (BIA Apr. 25, 1989); 8 C.F.R. § 208.13(b) (proof of past persecution creates presumption of well-founded fear of persecution).

47. 8 U.S.C. § 1101(a)(42(A).

48. 480 U.S. 421 (1987). The U.S. Supreme Court held that the "well-founded fear" standard of proof for asylum is not equivalent to the "more likely than not" standard applicable to withholding of deportation. *Id.*; *see supra* note 42 (describing withholding of deportation). The Court noted that Congress used different, broader language to define the term "refugee" in section 208(a) of the INA than it used to describe the aliens entitled to withholding of deportation under section 243(h) of the INA. *Id.* at 432. This difference in language, the Court found, reflected U.S. compliance with the provisions of the 1967 Protocol, which does not require aliens to show that it is more likely than not that they will be persecuted. *Id.* at 436-41. Lastly, the Court found that the legislative history of the INA demonstrates the congressional intent that different standards apply to asylum and withholding of deportation. *Id.* at 441-43.

49. *Id.* at 424.

50. *Id.*

51. *Id.* at 425.

52. *Id.* at 449-50.

53. INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987); *see* Matter of Acosta, Interim

when there is less than a fifty percent chance of the persecution occurring.[54]

Since *Cardoza-Fonseca*, U.S. courts and the BIA agree that an applicant for asylum has established that his fear is "well-founded" if he shows that a reasonable person in his circumstances would fear persecution.[55] As the Supreme Court indicated, a reasonable person may well fear persecution even where its likelihood is significantly less than clearly probable.[56] However, there must be a reasonable possibility of actually suffering such persecution.[57] The applicant must show that his fear of persecution is both subjectively genuine and objectively reasonable.[58] The objective component requires a showing by credible, direct, and specific evidence in the record of facts that would support a reasonable fear that the applicant faces persecution.[59]

2. U.S. Asylum Application Procedures

An alien may initiate a request for asylum in the United States in two ways.[60] An alien may apply for asylum directly to the Immigration and Naturalization Service (the "INS").[61] Alternatively, an alien may seek asylum during exclusion or deportation proceedings[62] before an IJ.[63] Aliens may not appeal an INS

Dec. No. 2986, at 14 (BIA Mar. 1, 1985) (noting subjective element of well-founded fear standard).

54. *Cardoza-Fonseca*, 480 U.S. at 431. As an example, the Court noted hypothetically that in a country where every tenth adult male was either killed or sent to a remote labor camp, an alien who managed to escape from this country would have a well-founded fear of persecution. *Id.* (*quoting* 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)).

55. Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

56. *Id.*

57. *Id.*

58. Blanco-Comarribas v. INS, 830 F.2d 1039 (9th Cir. 1987); Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986).

59. Diaz-Escobar v. INS, 782 F.2d 1488 (9th Cir. 1986). In view of this standard of proof, there must be a showing that: (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in other by means of some sort of punishment; (2) the persecutor is aware or could become aware that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien. Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

60. 8 C.F.R. § 208.2 (1993).

61. 8 C.F.R. § 208.2(a).

62. *See supra* note 35 (explaining deportation and exclusion).

63. 8 C.F.R. § 208.2(b).

decision denying asylum,[64] but they are entitled to renew their requests during exclusion and deportation proceedings.[65] Aliens who are within the United States are subject to deportation.[66] These aliens, unlike aliens at U.S. borders, are entitled to a full hearing on their asylum requests.[67]

a. Requests for Asylum Filed Directly with the INS

Persons not charged with exclusion or deportation may apply for asylum status at an INS office with jurisdiction over the alien's place of residence in the United States or the port of entry where the alien has landed.[68] These applications are referred to Asylum Officers ("AOs")[69] who decide whether to grant applications for asylum.[70] As part of their review of an asylum application, AOs schedule an interview with the asylum applicant and gather information about human rights conditions in the applicant's country of origin. The AOs forward the applications to the U.S. State Department's Bureau of Human Rights and Humanitarian Affairs (the "BHRHA") for information on human rights conditions in the applicants' home countries.[71] The BHRHA may assess the accuracy of aliens' statements about conditions in their home countries and it may evaluate whether the aliens will be persecuted upon their return to their home country.[72] In addition, the BHRHA advisory opinion may include in-

64. *Id.*

65. *Id.*

66. *See supra* note 35 (explaining deportation and exclusion).

67. *Id.*

68. 8 C.F.R. § 208.4(a).

69. 8 C.F.R. § 208.2. These asylum officers are specially trained in international relations and international law. 8 C.F.R. § 208.1(b) (1993). There are approximately 150 asylum officers in the United States. Tim Weiner, *U.S. Plans to Delay Work Permits for Immigrants Who Seek Asylum*, N.Y. TIMES, Feb. 17, 1994, at A1. The Office of Refugees, Asylum and Parole and the Asylum Policy and Review Unit of the U.S. Department of Justice, in coordination with the U.S. Department of State, must compile and disseminate to asylum officers information concerning persecution in other countries and must maintain a documentation center with information on human rights conditions. 8 C.F.R. § 208.1(c).

70. 8 C.F.R. § 208.4(a). Asylum officers decide whether to grant requests for asylum and withholding of deportation. *Id.* Withholding of deportation is available to an alien whose life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* INS v. Stevic, 467 U.S. 407 (1984).

71. 8 C.F.R. § 208.11(a).

72. *Id.* At one time, BHRHA commented on all asylum applications; but in recent years it has commented only on selected applications. *Id.*

formation about similarly situated aliens from that country.[73] The AO uses this information from the BHRHA to determine whether the alien has a well-founded fear of persecution in his home country and to evaluate the alien's credibility.[74]

The AO also arranges an interview with the applicant.[75] The interview is intended as a non-adversarial proceeding and if the applicant so requests, it will be conducted in private.[76] The purpose of the interview is to elicit all information relevant to the applicant's eligibility for asylum.[77] The AO is authorized to present and receive evidence and question the applicant and any witnesses.[78] The applicant can have counsel present at the interview and he may introduce evidence.[79] Aliens have the burden of proving that they are refugees as defined by statute.[80]

Thereafter, the AO issues a written decision.[81] An AO may grant or deny an application in the exercise of discretion to an applicant who qualifies as a refugee, unless a grant is prohibited by a mandatory ground for denial.[82] Mandatory grounds for denial include conviction of a serious crime in the United States,[83] firm resettlement in a third country after the flight from persecution,[84] national security concerns,[85] and participation by the alien in the persecution of others.[86] If the AO decides to deny asylum, the decision must state why the request was denied and must include an assessment of the alien's credibility.[87] An alien denied asylum by an AO may be subject to immediate deportation or exclusion.[88] A request for asylum may be renewed, how-

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73. *Id.*

74. 2 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 34.02 (rev. ed. 1993); *see supra* notes 46-59 and accompanying text (discussing well-founded fear of persecution).

75. 8 C.F.R. § 208.9 (1993). Unlike an immigration hearing before an Immigration Judge, the interview with an AO is considered non-adversarial. *Id.*

76. 2 GORDON & MAILMAN, *supra* note 74, § 34.02[6][a].

77. *Id.*

78. *Id.*

79. *Id.*

80. 8 C.F.R. § 208.13(a) (1993).

81. 8 C.F.R. § 208.17.

82. 2 GORDON & MAILMAN, *supra* note 74, § 34.02[10][b].

83. 8 C.F.R. § 208.14(c)(1).

84. 8 C.F.R. § 208.14(c)(2).

85. 8 C.F.R. § 208.14(c)(3).

86. 8 C.F.R. § 208.13(c).

87. 8 C.F.R. § 208.17.

88. 2 GORDON & MAILMAN, *supra* note 74, § 34.02[11][a].

ever, at a subsequent exclusion or deportation proceeding before an IJ.[89]

b. Requests for Asylum Made During Exclusion and Deportation Hearings

A request for asylum may be asserted during exclusion or deportation proceedings before an IJ.[90] Exclusion occurs when aliens seeking entry to the United States are rejected at the border or a port of entry because they do not have a required visa or because they have not complied with the U.S. immigration laws.[91] Deportation refers to the expulsion of aliens, who are already physically within the borders of the United States, for non-compliance with U.S. immigration laws.[92] Grounds for exclusion[93] are quite broad[94] and include: prior criminal convictions;[95] health-related reasons;[96] security-related concerns;[97] in-

89. 8 C.F.R. 208.18(b). On March 30, 1994, the INS proposed new rules for the handling of asylum claims that, if enacted, would substantially change the role of the Asylum Officer (the "AO") during asylum process. *See* 59 Fed. Reg. 14,779 (1994) (to be codified at 8 C.F.R. pts. 103, 208, 236, 242 and 274a) (proposed Mar. 30, 1994). Under the proposed rules, AOs would no longer prepare detailed denials of asylum claims. *Id.* Instead, they would automatically issue mandatory referrals of applications not granted asylum to IJs. *Id.* Interviews would be discretionary and AOs would be authorized to refer claims immediately to an IJ. *Id.*

90. 8 C.F.R. § 208.2(b).

91. BOSWELL, *supra* note 12, at 67.

92. *Id.* The primary difference between deportation and exclusion is the level of procedural due process in the two proceedings. Landon v. Plasencia, 459 U.S. 21, 25-26 (1982).

93. *See* 8 U.S.C. § 1182 (1988).

94. BOSWELL, *supra* note 12, at 25.

95. 8 U.S.C. § 1182(a)(2) (1988 & Supp. IV 1992). The criminal exclusion category includes persons who have been convicted of a crime involving moral turpitude, 8 U.S.C. § 1182(a)(2)(A)(i)(I), those convicted of more than one crime, regardless of whether it involved moral turpitude, 8 U.S.C. § 1182(a)(2)(B), and persons who have been involved in the trafficking of narcotics, 8 U.S.C. § 1182(a)(2)(C).

96. 8 U.S.C. § 1182(a)(1). Health-related grounds include any alien found to have a communicable disease of public health significance, 8 U.S.C. § 1182(a)(1)(A)(i), or a physical or mental disorder that may pose a threat to the property, safety or welfare of the alien or others, 8 U.S.C. § 1182(a)(1)(A)(ii) (1988), or who is found to be a drug abuser or addict, 8 U.S.C. § 1182(a)(1)(A)(iii).

97. 8 U.S.C. § 1182(a)(3). Security-related grounds for exclusion include a reasonable belief that an alien will engage in espionage or sabotage, 8 U.S.C. § 1182(a)(3)(A), or terrorist activities, 8 U.S.C. § 1182(a)(3)(B). In addition, an alien is excludable if the U.S. Secretary of State believes that an alien's entry or proposed activities would have "potentially serious adverse foreign policy consequences" for the United States. 8 U.S.C. § 1182(a)(3)(C). In general, any immigrant who is or has been a member of the Communist Party is excludable, 8 U.S.C. § 1182(a)(3)(D), but gener-

ability to financially support oneself;[98] lack of proper labor certification and work qualifications;[99] prior illegal entry;[100] lack of proper documentation;[101] or ineligibility for citizenship.[102] Grounds for the deportation of aliens already within the U.S. include: excludability at entry;[103] inability to financially support oneself;[104] criminal offenses;[105] failure to register or falsification of documents;[106] and security-related grounds.[107] Once deportation or exclusion proceedings have begun, only an IJ can entertain a request for asylum.[108] Even those requests filed previously

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ous waivers are available. *See id.* Any alien who participated in Nazi persecution or genocide is excludable. 8 U.S.C. § 1182(a)(3)(E).

98. *See* 8 U.S.C. § 1182(a)(4) (aliens may be excluded if likely to become public charge).

99. 8 U.S.C. § 1182(a)(5). In general, any alien who seeks to enter the United States in order to perform skilled or unskilled labor is excludable, unless the U.S. Secretary of Labor has previously approved the application. 8 U.S.C. § 1182(a)(5)(A). Aliens seeking to practice medicine in the United States, but who have not graduated from an accredited medical school, will be excluded unless they pass an examination and are competent in English. 8 U.S.C. § 1182(a)(5)(B).

100. 8 U.S.C. § 1182(a)(6). In general, aliens deported within the previous one year are excludable. 8 U.S.C. § 1182(a)(6)(A). In addition, stowaways, 8 U.S.C. § 1182(a)(6)(D), smugglers, 8 U.S.C. § 1182(a)(6)(E), and aliens who seek entry by fraud or wilful misrepresentation are excludable. 8 U.S.C. § 1182(a)(6)(C).

101. 8 U.S.C. § 1182(a)(7).

102. 8 U.S.C. § 1182(a)(8). In addition to these eight categories of excludable aliens, practicing polygamists, 8 U.S.C. § 1182(a)(9)(A), and aliens withholding custody of a child in violation of a U.S. court order, are excludable. 8 U.S.C. § 1182(a)(9)(c).

103. 8 U.S.C. § 1251(a)(l) (1988 & Supp. IV 1992). If an alien has been admitted to the United States but should have been excluded at entry, this is a separate basis for deportation. *Id.*; BOSWELL, *supra* note 12, at 69.

104. 8 U.S.C. § 1251(a)(5). Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry, is deportable. *Id.*

105. 8 U.S.C. § 1251(a)(2). Any alien convicted of a crime of moral turpitude within five years after the date of entry and confined for longer than one year, 8 U.S.C. § 1251(a)(2)(A)(i), convicted of more than one crime involving moral turpitude regardless of whether the alien was confined, 8 U.S.C. § 1251(a)(2)(A)(ii), or convicted of an aggravated felony at any time after entry, is deportable. 8 U.S.C. § 1251(a)(2)(A)(iii). Any alien convicted of a controlled substance violation, 8 U.S.C. § 1251(a)(2)(B), and certain firearms offenses is deportable. 8 U.S.C. § 1251(a)(2)(C).

106. 8 U.S.C. § 1251(a)(3).

107. 8 U.S.C. § 1251(a)(4). Aliens engaged in espionage or sabotage, 8 U.S.C. § 1251(a)(4)(A), terrorist activities, 8 U.S.C. § 1251(a)(4)(B), or who have participated in Nazi persecution or genocide are deportable, 8 U.S.C. § 1251(a)(4)(D). In addition, an alien whose presence or activities the U.S. Secretary of State believes would have "potentially serious adverse foreign policy consequences" for the United States is deportable. 8 U.S.C. § 1251(a)(4)(C).

108. 8 C.F.R. § 208.2(b) (1993). In 1983, the IJs and the BIA were reorganized

with an asylum officer must be refiled with an IJ if an alien has been placed in exclusion or deportation proceedings.[109]

The IJ will gather information about human rights conditions in the applicant's country of origin and will schedule a hearing to consider the request for asylum and any grounds for exclusion or deportation.[110] Like the AO, the IJ will refer an asylum application to the BHRHA for information about human rights conditions in the alien's country of origin.[111] In contrast to the interview with an AO, however, the hearing before the IJ in either exclusion or deportation proceedings is a due process hearing.[112] The applicant is entitled present witnesses and documentary evidence, cross-examine opposing witnesses, and dispute derogatory evidence.[113] The government is represented by an INS attorney in proceedings before an IJ.[114] An alien is nor-

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under the Executive Office of Immigration Review, a division of the U.S. Department of Justice separate from the INS. 6 GITTEL GORDON & CHARLES GORDON, IMMIGRATION LAW AND PROCEDURE § 150.03[1] (rev. ed. 1993).

A request for asylum initiated during deportation or exclusion proceedings is also treated automatically as a request for withholding of deportation. 8 C.F.R. § 208.3(b) (1993). Withholding of deportation is a mandatory form of relief from deportation available to aliens who can demonstrate probability of persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1253(h). Withholding of deportation differs from asylum in three important ways. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 6-33 (1992). First, asylum is a discretionary remedy, and withholding is mandatory. *Id.* Second, withholding is available only to those aliens whose life or freedom will likely be threatened on return to their native country. *Id.* Although an alien whose life or freedom has been threatened is eligible for asylum, not every alien who is eligible for asylum is necessarily eligible for withholding of deportation. *Id.* Lastly, withholding of deportation applies only to the country in which the alien's life or freedom is threatened, not to any other country that will accept him. *Id.* If withholding of deportation is granted, the deportation order against the alien can still be executed if another country will admit the alien. *Id.* In order to qualify for withholding, an alien must demonstrate a "clear probability" that they will be persecuted in the country as to which withholding is sought. INS v. Stevic, 467 U.S. 407 (1984).

109. 8 C.F.R. § 208.2(b).

110. 2 GORDON & MAILMAN, *supra* note 74, § 34.02[11][a].

111. 8 C.F.R. § 236.3(b) (1993) (referral of asylum applications to BHRHA from exclusion proceedings); 8 C.F.R. § 242.17(c)(3) (1993) (referral of asylum applications to BHRHA from deportation proceedings). The BHRHA has curtailed its responses to requests for such information in recent years. 2 GORDON & MAILMAN, *supra* note 74, § 34.02[11][a]; *see supra* note 72 (noting decline in BHRHA response to AO requests for human rights information).

112. 2 GORDON & MAILMAN, *supra* note 74, § 34.02[11][a].

113. *Id.*

114. 8 C.F.R. § 3.16 (1993).

mally represented by an attorney, although the government is not required to provide an attorney.[115]

The IJ may grant or deny the asylum application.[116] The IJ makes a determination *de novo* on the asylum application, regardless of whether a previous application was filed or decided by an AO.[117] In determining whether an alien has a well-founded fear of persecution, the IJ has the authority to assess the credibility of witnesses.[118] A finding that testimony of a witness was not credible, however, must be supported by substantial evidence.[119] The decision of an IJ on an asylum application is appealable to the Board of Immigration Appeals.[120]

3. Appeals and Motions Before the Board of Immigration Appeals

Since 1922, the BIA has existed under various names and has held various responsibilities.[121] When immigration laws were enforced by the Secretary of Labor, the panel was known as the Board of Review.[122] In 1940, when the responsibility for immigration enforcement was transferred to the Attorney General, the Board of Review was renamed the Board of Immigration Appeals.[123] Today, the BIA is a division of the U.S. Department of Justice's Executive Office for Immigration Review.[124] The Executive Office for Immigration Review includes a separate entity for IJs.[125] The BIA is a quasi-judicial panel of five administrative judges that does not operate like a court in a traditional judicial sense.[126] The BIA's decisions are binding on the INS[127] and

115. *Id.*

116. 2 GORDON & MAILMAN, *supra* note 74, § 34.02[11][e].

117. 8 C.F.R. § 208.2(b) (1993).

118. 2 GORDON & MAILMAN, *supra* note 74, § 34.02[11][c].

119. *Id.*

120. 8 C.F.R. § 3.1(b) (1993).

121. 6 GORDON & GORDON, *supra* note 108, § 150.03[1].

122. *Id.*

123. *Id.*; *see also* 5 Fed. Reg. 3,503 (1940) (codified as amended at 8 C.F.R. §§ 3.1-3.8 (1993)).

124. 8 C.F.R. § 3.1(a)(1). The Executive Office for Immigration Review ("EOIR") was established in 1983, at which time the BIA and the IJs were placed in the newly created office. 6 GORDON & GORDON, *supra* note 108, § 150.03[1]. Formerly, the BIA was attached to the office of the Attorney General, subject to the general supervision of the Deputy Attorney General. *Id.*

125. 8 C.F.R. § 3.1(a)(1).

126. 6 GORDON & GORDON, *supra* note 108, § 150.03[2].

127. 6 *id.* § 150.02[1].

published BIA decisions serve as precedent.[128]

a. Appeals to the BIA

The BIA has appellate jurisdiction over a number of IJ decisions, including those made in the course of exclusion and deportation proceedings.[129] Generally, only the party aggrieved by the IJ's decision may appeal.[130] In exclusion and deportation proceedings, the person ordered excluded or deported is obviously an aggrieved party and is eligible to appeal.[131] The INS, which is a party to all proceedings before District Directors and IJs, has standing to appeal to the BIA from a decision that it opposed below.[132] Local INS attorneys brief the INS' position on each appeal to the BIA and serve as opposing counsel when an alien appeals to the BIA.[133]

In order to appeal to the BIA, an alien must file a notice of appeal with the INS office or the office of the IJ with jurisdiction over the case.[134] The notice of appeal must be filed within the time required by immigration regulations.[135] In deportation cases, the notice of appeal must be filed within ten calendar days after the mailing of a written decision or the stating of an oral decision.[136] In exclusion cases, where the IJ's decision is oral, excluded aliens must state immediately after the decision is

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128. 8 C.F.R. § 3.2(h) (1993).

129. 8 C.F.R. § 3.1(b). The appellate jurisdiction of the BIA includes: decisions of IJs in exclusion, deportation, waiver of inadmissibility, recision of adjustment of status, and temporary protected status cases; decisions of INS District Directors involving administrative fines, family visa petitions, and waiver of inadmissibility cases; and determinations relating to bond, parole, or detention of an alien in deportation proceedings. *Id.* In addition, any decision that is appealable to the BIA may be certified to the BIA for final decision by the Commissioner of the INS, an IJ, a District Director, or the BIA itself. Matter of Santos, 19 I. & N. Dec. 105 (BIA 1984).

The BIA has original jurisdiction for the prescription of rules governing proceedings before it, 8 C.F.R. § 3.1(d)(3), the recognition of organizations and accreditation of individuals to practice before the INS, IJs, and the BIA, 8 C.F.R. §§ 3.1(d)(3), 1502.2 (1993), and the discipline of attorneys and representatives practicing before the INS, IJs, and the BIA. 8 C.F.R. § 292.3 (1993).

130. 6 GORDON & GORDON, *supra* note 108, § 150.06[1].

131. *Id.*

132. *Id.*; Byus-Narvaez v. INS, 601 F.2d 879, 882 (5th Cir. 1979).

133. 6 GORDON & GORDON, *supra* note 108, § 150.06[4][f].

134. 8 C.F.R. § 3.3(a) (1993).

135. *Id.*

136. 8 C.F.R. § 3.38(b) (1993). If the decision was mailed to the alien, a notice of appeal must be filed within 13 days. *Id.*

made whether they wish to appeal.[137] If excluded aliens want to appeal to the BIA, they must file the proper forms immediately.[138] When a written decision is issued by the IJ in an exclusion case, the alien has thirteen days in which to file an appeal.[139]

The parties may submit briefs in support of their case.[140] Briefs must be submitted with the notice of appeal or within such additional time as is allowed.[141] If oral argument before the BIA is desired, a request should be made in the notice of appeal.[142] The BIA can reject an appeal for a number of reasons, including the absence of any grounds for the appeal, the lack of a legal or factual basis for appeal, or because the appeal is filed for the purposes of delay.[143]

The BIA reviews the decision of the IJ solely on the basis of the administrative record.[144] The BIA does not receive the oral testimony of witnesses[145] and will ordinarily neither receive nor consider new evidence, unless it is presented in a motion to reopen.[146] The scope of BIA review is broad and the BIA may make its own fact findings on the evidence.[147] The BIA, however, normally accepts the IJ's findings of fact if they are adequately supported.[148] The BIA does not rule on constitutional attacks on the INA itself.[149] The BIA often decides, however, questions of procedural due process and statutory construction.[150] In addition, the BIA may overrule discretionary determinations below if

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137. 6 GORDON & GORDON, *supra* note 108, § 150.06[3]; BOSWELL, *supra* note 12, at 28.

138. 6 GORDON & GORDON, *supra* note 108, § 150.06[3].

139. 8 C.F.R. § 236.7 (1993).

140. 8 C.F.R. § 3.3(c).

141. *Id.* On request, the BIA usually grants extensions of 10 days. 6 GORDON & GORDON, *supra* note 108, § 150.06[4][d].

142. 8 C.F.R. § 3.1(e). Previously, oral argument was generally allowed on request. 6 GORDON & GORDON, *supra* note 108, § 150.07. It is now available only in the discretion of the BIA. 8 C.F.R. § 3.1(e).

143. 8 C.F.R. §§ 3.1(d), 103.3 (1993).

144. Matter of Chavarri-Alva, 14 I. & N. Dec. 298 (BIA 1973).

145. Matter of Reyes, 16 I. & N. Dec. 475 (BIA 1978).

146. 6 GORDON & GORDON, *supra* note 108, § 150.07[3][a].

147. Noverola-Bolaino v. INS, 395 F.2d 131 (9th Cir. 1968); Canjura-Flores v. INS, 784 F.2d 885 (9th Cir. 1985).

148. 6 GORDON & GORDON, *supra* note 108, § 150.07[3][a].

149. 6 *id.* § 150.07[3][c]; *see* Matter of Awadh, 15 I. & N. Dec. 775 (BIA 1976).

150. 6 GORDON & GORDON, *supra* note 108, § 150.07[3][c].

it disagrees with those determinations.[151] In most instances where an alien's request for asylum or other relief has been denied by an IJ, the execution of the IJ's order of deportation or exclusion will be stayed automatically pending appeal to the BIA.[152] An appeal of an IJ's decision denying a motion to reopen or to reconsider, however, will not stay the execution of the order, unless the IJ or the BIA specifically grants a stay.[153]

The BIA commonly takes up to a year or more to render a decision.[154] BIA rulings on an appeal of an IJ decision are always in writing in the form of an opinion.[155] Individual members of the BIA may file separate concurring or dissenting opinions.[156] The BIA may grant the relief requested or remand the case to the INS or the IJ for further action.[157] Due to the large number of cases currently before it, the BIA frequently uses dismissal orders with the same language as that used in earlier cases.[158]

b. Motions Before the BIA and Stays Pending Their Determination

There are two motions that a party to a BIA proceeding may use to highlight new developments in the facts or the law of a particular case.[159] When new evidence becomes available, a motion to reopen may be used to bring these new facts to the attention of the BIA.[160] Where only legal developments have emerged, a motion to reconsider is appropriate.[161] The BIA has the discretion to reopen or reconsider any case it has decided.[162]

If the BIA grants a motion to reopen, it ordinarily remands

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151. 6 *id.* § 150.07[3][a].

152. 8 C.F.R. § 3.6(a) (1993).

153. 8 C.F.R. § 3.6(b).

154. FRAGOMEN & BELL, *supra* note 108, at 8-5.

155. 6 GORDON & GORDON, *supra* note 108, § 150.07[5].

156. *Id.*

157. 8 C.F.R. § 3.2(d).

158. 6 GORDON & GORDON, *supra* note 108, § 150.07[5]; *see, e.g.*, Castillo-Villagra v. INS, 972 F.2d 1017, 1023 (9th Cir. 1992). In the case of Nicaraguan appeals pending before the BIA, the *Castillo-Villagra* Court observed that "identical language was used in a large number of other cases, apparently as INS form language for Nicaraguan cases after Violeta Chamorro won the Nicaraguan presidential election." *Id.*

159. 6 GORDON & GORDON, *supra* note 108, § 150.08[1][a].

160. *Id.*

161. *Id.*

162. 8 C.F.R. § 3.2.

the case to the IJ for further proceedings.[163] Because a motion to reconsider raises only a question of law, there is usually no need to remand the case to the IJ.[164] If the BIA is persuaded by a motion to reconsider that its prior decision was incorrect, it enters a new decision.[165] If the BIA is not persuaded, it denies the motion to reconsider.[166] An alien may petition the U.S. Court of Appeals to review the BIA's denial of the motion to reopen or reconsider.[167] This appeal entitles the alien to an automatic stay of deportation or exclusion pending review by a U.S. Court of Appeals.[168]

4. The Motion to Reopen BIA Proceedings

The BIA will reopen a case to allow the asylum applicant to offer new evidence that is relevant to the movant's application.[169] The motion will only be granted, however, if the new evidence is "material," was not previously available to the applicant, and could not have been discovered or presented at the earlier hearing.[170] Where a motion to reopen is filed for the purpose of seeking some form of discretionary relief such as asylum, the new evidence supporting the motion must establish that the alien meets all of the statutory eligibility requirements[171] and that the favorable exercise of discretion is warranted.[172]

Unlike an appeal to the BIA,[173] filing a motion to reopen or

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163. 6 GORDON & GORDON, *supra* note 108, § 150.08[1][a].

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. 8 U.S.C. § 1105a (1988).

169. 8 C.F.R. § 3.2. "Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." *Id.* "Motion to reopen shall state the new facts to be proved at the reopened hearing." 8 C.F.R. § 3.8 (1993).

170. 8 C.F.R. § 3.2.

171. *See supra* notes 45-48 and accompanying text (describing statutory standards for asylum).

172. 6 GORDON & GORDON, *supra* note 108, § 150.08[1][d]; *see, e.g.*, Matter of Sipus, 14 I. & N. Dec. 229 (BIA 1979) (appeal dismissed for failure to establish extreme hardship element of suspension of deportation); Matter of Reyes, 18 I. & N. Dec. 249 (BIA 1982) (appeal dismissed where suspension of deportation would likely be denied in exercise of discretion).

173. See *supra notes* 149-50 and accompanying text (describing stay of deportation for appeals to BIA, but not motion to reopen).

reconsider with the BIA does not automatically stay execution of a deportation or exclusion order.[174] For this reason, it is possible that an alien will be deported before the motion is decided.[175] In a deportation case, if execution of the deportation order is not imminent, an alien may apply for a stay of deportation with the motion to reopen.[176] If there is a possibility that the INS may attempt to deport the alien while the motion before the BIA remains undecided, a stay of deportation should be sought locally from the District Director[177] and where appropriate, the IJ.[178] If these measures are unsuccessful, a telephonic stay may be sought directly from the BIA.[179] If the BIA denies a stay, judicial review of the denial is available in U.S. District Court.[180]

The burden of proof on an alien filing a motion to reopen is substantial.[181] In *INS v. Abudu*,[182] the U.S. Supreme Court upheld the BIA's denial of a motion to reopen where the applicant had not applied for asylum at her deportation hearing and did not do so until three years later.[183] The Court noted that there were four bases for denying a motion to reopen.[184] First, the applicant must establish a *prima facie* case for the underlying relief sought.[185] Second, the applicant must show that the evidence that was not introduced earlier was at the time unavailable.[186] Third, the applicant must explain any failure to apply ini-

174. 8 C.F.R. § 3.8(a) (1993).

175. *See* Castillo-Villagra v. INS, 972 F.2d 1017, 1024 (9th Cir. 1992). "[A]s a practical matter, the remedy of a motion to reopen may be unavailable, because the petitioner may be deported and the motion may become moot prior to decision." *Id.*; *see also* Kaczmarczyk v. INS, 933 F.2d 588, 597 n.9 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993). "There thus exists the possibility that unsuccessful asylum applicants may be ordered to leave the country before the Board has ruled on their motions to reopen." *Id.*; *see also* Castaneda-Suarez v. INS, 993 F.2d 142, 145 n.5 (7th Cir. 1993) (INS declined to assure appellate court that petitioner would not be deported before consideration of his good faith motion to reopen).

176. 6 GORDON & GORDON, *supra* note 108, § 150.08[4][b].

177. 8 C.F.R. § 243.4 (1993).

178. 8 C.F.R. §§ 3.6(b), 242.22 (1993).

179. 6 GORDON & GORDON, *supra* note 108, § 150.08[4][b].

180. *Id.*

181. United States v. Doherty, __ U.S. __, 112 S. Ct. 719 (1992).

182. 485 U.S. 94 (1988).

183. *Id.*

184. *Abudu*, 485 U.S. at 96.

185. *Id.*

186. *Id.*

tially for the relief requested where the reason for reopening is a benefit not previously requested.[187] Fourth, where the benefit sought is discretionary, as is the case with asylum, applicants must demonstrate that they are deserving of a favorable exercise of discretion.[188] The Court noted that the party moving to reopen BIA proceedings bears a heavy burden, because of the strong public interest in bringing litigation to a close and preventing unnecessary delay of alien deportation.[189] The U.S. Supreme Court has strictly construed the requirements of a motion to reopen, describing it as "disfavored."[190]

5. Aliens Placed in Deportation Are Entitled to Procedural Due Process

The Fifth Amendment to the U.S. Constitution states that no "person" shall be deprived of life, liberty, or property without due process of law.[191] The U.S. Supreme Court has long held, however, that aliens who have not entered[192] the United States are not "persons" entitled to the protection of the U.S. Constitution.[193] These aliens are subject to exclusion from the United States, according to the Supreme Court, and Congress can establish whatever procedures it deems fit in determining excludabil-

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187. *Id.*

188. *Id.* The appellate court, in *Abudu*, in deciding whether a *prima facie* case had been presented, would have required the BIA to accept the facts as presented in the new application as true and then decide whether the case should be reopened. Abudu v. INS, 802 F.2d 1096, 1102 (9th Cir. 1986), *rev'd*, 485 U.S. 94 (1988). The Supreme Court rejected the appellate court's analogy to a motion for summary judgment and instead compared the motion to reopen to a motion for a new trial in criminal law. INS v. Abudu, 485 U.S. at 110. "The appropriate analogy is a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which the courts have uniformly held that the moving party bears a heavy burden." *Id.*

189. INS v. Jong Ha Wang, 450 U.S. 139, 144 n.5 (1981).

190. INS v. Doherty, 112 S. Ct. 719, 724 (1992). "Motions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing, and motions for a new trial on the basis of newly discovered evidence. This is especially true in a deportation proceeding." *Id.* (*quotinq* INS v. Abudu, 485 U.S. 94, 107-08 (1988)).

191. U.S. CONST. amend. V, cl. 4.

192. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). An alien "enters" the United States and becomes entitled to constitutional protection when the alien crosses U.S. borders and remains in the United States outside the custody of immigration authorities. *Id.*

193. FRAGOMEN & BELL, *supra* note 108, at 8-5; Symposium, *Due Process and the Treatment of Aliens*, 44 U. PITT. L. REV. 165-328 (1983); Comment, *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286-1465 (1983).

ity.[194] Aliens who have entered the United States, on the other hand, are "persons" within the meaning of many constitutional protections, including due process.[195] As such, Congress cannot establish procedures for determining deportability that are inconsistent with the U.S. Constitution.[196] Therefore, aliens already within the United States are entitled to a deportation hearing that conforms to the minimum requirements of due process.[197]

The Due Process Clause of the Fifth Amendment entitles aliens within the United States to the same procedural safeguards due U.S. citizens in civil, criminal, and administrative proceedings.[198] Although the U.S. Courts of Appeals are divided on the BIA's use of administrative notice to deny asylum applications, the circuit courts that have reviewed this question have unanimously concluded that an alien in a deportation proceeding has a due process right to contest facts that have been administratively noticed.[199] According to these courts, deportation proceedings must conform to the requirements of the Due Process Clause of the Fifth Amendment, and therefore include a meaningful opportunity to be heard.[200]

Under the Due Process Clause of the Fifth Amendment, a person has the right to be present before the tribunal that pronounces judgment upon a question of life, liberty, or property.[201] The fundamental requirement of due process includes the opportunity to be heard at a meaningful time and in a mean-

194. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). Once Congress establishes the procedure for exclusion, they must be maintained and the failure to follow mandated procedures is a violation of due process. Gegiow v. Uhl, 239 U.S. 3 (1915).

195. The Japanese Immigrant Case, 189 U.S. 86, 101 (1903).

196. Woodby v. INS, 385 U.S. 276 (1966).

197. *Id.*

198. Ng Fung Ho v. White, 259 U.S. 276 (1922); Wong Yang Sung v. McGrath, 339 U.S. 33, *modified*, 339 U.S. 908 (1950); Chew v. Colding, 344 U.S. 590 (1953); Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970), *reh'g denied*, 400 U.S. 856 (1971).

199. Gomez-Vigil v. INS, 990 F.2d 1111, 1114 (9th Cir. 1993); Castillo-Villagra v. INS, 972 F.2d 1017, 1029 (9th Cir. 1992); Rhoa-Zamora v. INS, 971 F.2d 26, 33 (7th Cir.), *cert. denied*, 112 S. Ct. 583 (1991); Kaczmarczyk v. INS, 933 F.2d 588, 596 (7th Cir.), *cert. denied*, 113 S. Ct. 1943 (1993); Rivera-Cruz v. INS, 948 F.2d 962, 968 (5th Cir. 1991); Gutierrez-Rogue v. INS, 954 F.2d 769, 773 (D.C. Cir. 1992).

200. *Gomez-Vigil*, 990 F.2d at 1114; *Castillo-Villagra*, 972 F.2d at 1029; *Rhoa-Zamora*, 971 F.2d at 33; *Kaczmarczyk*, 933 F.2d at 596; *Rivera-Cruz*, 948 F.2d at 968; *Gutierrez-Rogue*, 954 F.2d at 773.

201. U.S. CONST. amend. V, cl. 4.

ingful manner.[202] In addition, an alien is entitled to a deportation decision based on the record created during and before the hearing.[203] Finally, due process entitles aliens to an individualized determination of their interests[204] and also requires that the adjudicator consider the evidence and arguments that an alien presents.[205]

6. Judicial Review of BIA Decisions

Aliens may petition a court to review orders rendered in either deportation or exclusion proceedings. The procedure for obtaining this review differs for each, however.[206] An alien who has been denied asylum in a deportation proceeding and is subject to a final deportation order may obtain judicial review of the order by filing a petition for review with the U.S. Court of Appeals in the judicial circuit where the IJ proceedings were conducted or where the alien resides.[207] Aliens denied asylum and found to be excludable may not appeal an adverse decision directly to a higher court. Rather, aliens found to be excludable can file a petition in a U.S. District Court for a writ of habeas corpus in order to have the denial of asylum reviewed.[208] A writ of habeas corpus is a mechanism for bringing prisoners or detainees before a court in order to test the legality of their detention or imprisonment.[209] An appeal to the U.S. Court of Appeals, in a deportation case, results automatically in a stay of the deportation order, and the alien will not be removed from the United States during the pendency of the appeal. A petition for

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202. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

203. *Id.*

204. *See Rhoa-Zamora*, 971 F.2d at 34.

205. *See* Morgan v. United States, 298 U.S. 468, 481 (1936).

206. 8 U.S.C. § 1105a(a) (1988). This Note is limited to an analysis of the use of administrative notice in deportation cases. *See supra* note 13 (limiting Note to deportation cases). *But see* Dhine v. District Director, 818 F. Supp. 671, 677 (S.D.N.Y.) (BIA erred in exclusion case by taking administrative notice of disputable fact that there had been no persecution of Jews in Ethiopia after fall of Mengistu regime), *rev'd in part on other grounds*, 3 F.3d 613 (2d Cir. 1993).

207. 8 U.S.C. § 1105a(a). If the U.S. Court of Appeals denies the appeal, a deportable alien can also seek a writ of habeas corpus. 8 U.S.C. § 1105a(a)(10).

208. 8 U.S.C. § 1105a(b).

209. *See* Fay v. Noia, 372 U.S. 391 (1963). The purpose of the writ of habeas corpus is not to determine the guilt or innocence of a prisoner or an alien's eligibility for relief from deportation, but only whether the prisoner is deprived of his due process. *Id.* The writ of habeas corpus is authorized by the U.S. Constitution. U.S. CONST. art. I, § 9; *see also* 28 U.S.C. § 2241 *et. seq.* (authorizing habeas corpus relief).

a writ of habeas corpus in an exclusion case will not automatically stay the execution of an exclusion order.

In both deportation and exclusion cases, an alien may only seek review of a "final" order of deportation and exclusion.[210] This finality requirement is satisfied if an alien appealing a deportation or exclusion order has exhausted all available administrative remedies, including an appeal to the BIA.[211] In addition, aliens may not obtain review of a final order of deportation or exclusion if they have left the United States.[212]

Reviewing courts use two different standards of review to evaluate the factual findings and the exercise of discretion in an asylum appeal.[213] The factual findings of the IJ or the BIA on an alien's eligibility for asylum must be upheld by a reviewing court if supported by substantial evidence.[214] If an alien meets the statutory definition of a refugee, but the application is denied in the discretion of the INS,[215] this decision is reviewable for abuse of discretion.

B. *An Overview of the Doctrine of Administrative Notice*

Administrative notice allows a fact finder to establish the existence of facts without a formal introduction of proof to support those facts.[216] Administrative agencies may take administrative notice of facts that are either common knowledge or that are within the agency's area of expertise.[217] An agency takes notice of both adjudicative facts, which are specific to the parties and their circumstances, and facts not concerning the parties, which are called legislative facts.[218] Due process mandates that parties to an agency proceeding be informed that the agency has taken official notice and be given an opportunity to present evidence

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210. 8 U.S.C. § 1105a(a)-(b). A "final order" is not defined in the INA, but a final order of deportation has been interpreted as including all determinations and orders incidental to a deportation hearing by an IJ and reviewable by the BIA. BOSWELL, *supra* note 12, at 218.

211. 8 U.S.C. § 1105a(c).

212. *Id.*

213. Saleh v. U.S. Dept. of Justice, 962 F.2d 234, 238 (2d Cir. 1992).

214. 8 U.S.C. § 1105a(a)(4).

215. *See supra* notes 44-46 and accompanying text (explaining discretionary nature of asylum).

216. 4 STEIN ET AL., *supra* note 18, § 25.01 at 2; 2 DAVIS & PIERCE, *supra* note 18, § 10.6, at 150.

217. 4 STEIN ET AL., *supra* note 18, § 25.01, at 3-4.

218. 4 *id.* § 25.02.

in rebuttal.[219] Administrative notice in immigration proceedings is not governed by any statute or regulation.[220] Nonetheless, the BIA has used this mechanism to recognize changes in an asylum applicant's home country.[221]

1. The Scope of Administrative Notice

An agency can make a finding of fact without evidentiary support by taking administrative notice of that fact.[222] Like its counterpart, judicial notice, administrative notice derives from the practical observation that facts which are commonly known need not be proved.[223] By eliminating the necessity of proving commonly acknowledged facts, judicial and administrative notice make trials and administrative proceedings more efficient and meaningful.[224]

The doctrine of administrative notice, however, is broader than judicial notice.[225] Administrative notice allows an agency to take notice of facts that are not commonly known, but are within the agency's area of expertise.[226] This broad application of administrative notice reflects the special expertise of administrative officials who decide these cases.[227] Because administrative agencies are designed to provide decision-making by persons who are knowledgeable in the field, administrative notice may be taken

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219. 4 *id.* § 25.03.

220. Gebremichael v.INS, 10 F.3d 28, 38 (1st Cir. 1993).

221. *See, e.g.,* Castillo-Villagra v. INS, 972 F.2d 1017, 1022-23 (9th Cir. 1992); Kaczmarczyk v. INS, 933 F.2d 588, 591 (7th Cir.), *cert. denied,* __ U.S. __, 113 S. Ct. 1943 (1993) (describing BIA use of administrative notice); In re Chen, Interim Dec. 3104, at 7 (BIA Apr. 25, 1989) (observing that administrative notice may be used to rebut presumption created when alien proves past persecution).

222. 4 STEIN ET AL., *supra* note 18, § 25.01 at 2; 2 DAVIS & PIERCE, *supra* note 18, § 10.6, at 150.

223. 4 STEIN ET AL., *supra* note 18, § 25.01, at 2; MCCORMICK ON EVIDENCE, *supra* note 14, § 359, at 1028; 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 10.6 (1994). "The theory [of judicial notice] is that, where a fact is well-known by all reasonably intelligent people in the community, or its existence is so easily determinable with certainty from unimpeachable sources, it would not be good sense to require formal proof." Harper v. Killion, 345 S.W.2d 309, 311 (Tex. Civ. App. 1961).

224. Walter Gellhorn, *Official Notice in Administrative Adjudication,* 20 TEX. L. REV. 131, 136 (1941). A case before an administrative agency, unlike one in court, "is rarely an isolated phenomenon, but is rather merely one unit in a mass of related cases . . . [that] often involve fact questions [that] have frequently been explored by the same tribunal." *Id.*

225. 4 STEIN ET AL., *supra* note 18, § 25.01, at 3-4.

226. 4 *id.* § 25.01, at 3-4.

227. 4 *id.* § 25.01, at 4-5.

of facts which are within an agency's area of expertise.[228]

2. Adjudicative and Legislative Facts

Courts and administrative agencies distinguish between two different types of facts that may be judicially or administratively noticed.[229] These categories are called adjudicative and legislative facts.[230] Adjudicative facts are those facts that relate to the particular parties in an action and to their particular controversy.[231] Legislative facts are more general and do not concern the immediate parties to an action.[232]

The procedural safeguards that surround administrative notice of legislative and adjudicative facts differ.[233] Due to the importance of adjudicative facts to the parties to an administrative

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228. 4 *id.*; 2 DAVIS & PIERCE, *supra* note 18, § 10.6, at 158.

229. 4 STEIN ET AL., *supra* note 18, § 25.02.

230. *Id.* This terminology was first developed by Professor Kenneth C. Davis. Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942). This distinction between the types of facts that can be noticed was adopted by the drafters of the Federal Rules of Evidence. *See* FED. R. EVID. 201 advisory committee's note, Subdivision (a). Drawing the distinction between legislative and adjudicative facts, however, can be a difficult task. 2 DAVIS & PIERCE, *supra* note 18, § 10.5, at 144. Even the commentators disagree on where to draw the line. *See* MCCORMICK ON EVIDENCE, *supra* note 18, § 328, at 920 (noting that question over whether date of contract execution on June 3, 1906, was a Sunday is adjudicative fact); 2 DAVIS & PIERCE, *supra* note 18, § 10.6, at 155 (stating that same question is not adjudicative fact).

231. 4 STEIN ET AL., *supra* note 18, § 25.02, at 16. Adjudicative facts have been succinctly defined as "simply the facts of the particular case." FED. R. EVID. 201 advisory committee's note. "[T]hey helped explain who did what, when, where, how, and with what motive and intent." MCCORMICK ON EVIDENCE, *supra* note 18, § 328, at 920. Examples of an adjudicative fact include whether, in an automobile negligence case, a well-known street was in fact within a local business district where a certain speed limit was applicable. Varcoe v. Lee, 181 P. 223 (1919). At a time when Sunday contracts were illegal, the question of whether the relevant sales contract, dated June 3, 1906, had been executed on a Sunday is another example of an adjudicative fact. Beardsley v. Irving, 81 Conn. 489 (1909).

232. 4 STEIN ET AL., *supra* note 18, § 25.02, at 16. Legislative facts have also been defined as facts that "have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge . . . or in the enactment of a legislative body." FED. R. EVID. 201 advisory committee's note, Subdivision (a). They are facts which the judge considers as part of his law-making function. *Id.* Examples of legislative facts include any non-evidentiary fact that a judge considers in determining whether a statute is constitutional, how a statute should be interpreted, or how the common law should treat a particular issue. *See, e.g.*, Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir 1970) (judicial notice of facts concerning nature of urban apartment rentals used to extend implied warranty of habitability to apartment rentals).

233. 2 DAVIS & PIERCE, *supra* note 18, § 10.6, at 150.

proceeding, it is generally easier for an administrative agency to take notice of legislative facts than adjudicative facts.[234] In addition, adjudicative facts vary in their certainty.[235] Depending on the degree to which adjudicative facts are disputable, some may not be administratively noticed at all, while others may only be noticed with prior warning to the parties or with an opportunity for rebuttal.[236]

Both adjudicative and legislative facts may be administratively noticed.[237] For example, official notice that the Sandinista Party has been defeated in Nicaraguan elections is a legislative fact,[238] which enables an agency to take official notice of this development.[239] However, administrative notice that the Sandinistas no longer pose a threat to an asylum applicant is a fact concerning one of the parties to an asylum hearing, and therefore is properly called an adjudicative fact.[240]

4. Administrative Notice and Due Process

Due process may require that a party be permitted to respond to administratively noticed facts in some manner.[241] This requirement may be satisfied in a variety of ways, depending on

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234. *Id.*

235. *See* Castillo-Villagra v. INS, 972 F.2d 1017, 1028 (9th Cir. 1992).

236. *Id.* Several factors have been used to evaluate whether an administrative agency has abused its discretion to take administrative notice. *See* Kenneth C. Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 932 (1980). These factors include whether the facts at issue are: (1) narrow and specific or broad and general; (2) central or peripheral; (3) readily accepted or controversial; (4) purely factual or mixed with judgment, policy or political preference; (5) readily provable or provable only with difficulty or not at all; or, (6) facts about the parties or facts unrelated to them. *Id.*

237. 4 STEIN ET AL., *supra* note 18, § 25.02, at 17.

238. *See, e.g.*, Gebremichael v. INS, 10 F.3d 28, 37 (1st Cir. 1993) (noting that change of government is legislative fact); *Castillo-Villagra*, 972 F.2d at 1027 (same).

239. *Gebremichael*, 10 F.3d at 31; *Castillo-Villagra*, 972 F.2d at 1027.

240. *Castillo-Villagra*, 972 F.2d at 1027.

241. 4 STEIN ET AL., *supra* note 18, § 25.03, at 24. A party to an administrative proceeding may be entitled by statute to respond to administratively noticed facts. 4 *id.* § 25.03, at 25. The Administrative Procedure Act (the "APA") governs administrative proceedings before some federal agencies. Administrative Procedure Act, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-706 (1988)). The APA does not distinguish between adjudicative and legislative facts. *Id.* § 7(d), 5 U.S.C. § 556 (1988). Instead, the APA provides that when an agency decision rests on official notice of a "material" fact, a party is entitled to an opportunity to show the contrary. *Id.* The APA, however, does not govern deportation and exclusion proceedings. *See* Marcello v. Bonds, 349 U.S. 302, 309 (1955) (exclusivity provision of INA excludes application of APA to immigration matters).

the circumstances.[242] For example, due process will be satisfied if a party is allowed to submit contrary evidence and cross-examine the source of administratively noticed facts.[243] Depending on the interests at stake, the likelihood of administrative error, and the cost to the government,[244] it may be sufficient to allow the party to supplement the record or to move for a rehearing.[245] Due process may also require that parties to an agency proceeding be informed that official notice is being taken by the agency and be given an opportunity to present evidence in rebuttal.[246] In determining whether a party to an administrative proceeding has had a fair opportunity to respond, a reviewing court will consider whether the administratively noticed facts are adjudicative or legislative, the doubt or certainty of the facts involved, and whether the fact is central or peripheral to the controversy.[247]

5. Administrative Notice by the BIA

U.S. immigration statutes and regulations make no reference to administrative notice, but the BIA has used this doctrine to recognize certain facts in rendering decisions on immigration and asylum appeals.[248] In asylum cases, administrative notice has been used by the BIA to recognize developments in an alien's home country, particularly changes in the country's govern-

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242. 4 STEIN ET AL., *supra* note 18, § 25.03, at 27.

243. 4 *id.* § 25.03, at 27-28.

244. Mathews v. Eldridge, 425 U.S. 319 (1976).

245. 2 DAVIS & PIERCE, *supra* note 18, § 10.6, at 162.

246. 4 STEIN ET AL., *supra* note 18, § 25.03, at 24. If there is other evidence in the record to support the agency's decision, however, and none of the parties was prejudiced by the lack of rebuttal, then the agency's decision will be affirmed. 4 *id.* § 25.03, at 25-27; *see, e.g.*, Castillo v. INS, 951 F.2d 1117 (9th Cir. 1991) (noting that BIA will be affirmed if there is substantial evidence to support its findings).

247. *See supra* note 227 (listing criteria used to determine whether administrative agency has abused discretion by taking administrative notice).

248. *See, e.g.*, Matter of Giannoutsos, Interim Dec. 2742 (BIA 1979) (BIA may take administrative notice of numerical limits on number of available visas); Matter of Chen, Interim Dec. 3104 (BIA 1989) (BIA administrative notice of changes in Chinese society since Cultural Revolution); Matter of Walsh & Pollard, Interim Dec. 3111 (BIA 1988) (IJ administrative notice of INS handbook held proper). Regulations already provide procedural protection for the taking of administrative notice by asylum officers. 8 C.F.R. § 208.12(a) (1993) ("Prior to the issuance of an adverse decision made in reliance upon [state department materials], that material must be identified and the applicant must be provided with an opportunity to inspect, explain, and rebut the material . . ."). This regulation does not apply to IJ or the BIA. *Id.*

ment.[249] Furthermore, the BIA has administratively noticed whether a particular group remains in power after an election and whether the election has vitiated any prior well-founded fear of persecution.[250] Although immigration statutes and regulations do not expressly entitle asylum petitioners to rebut noticed facts, all courts agree that an alien is entitled to respond to these facts under the Due Process Clause of the Fifth Amendment.[251] However, these same courts disagree on whether a motion to reopen BIA proceedings is a constitutionally sufficient method of rebutting administrative notice of a change in the government of an alien's home country.[252]

II. *CIRCUIT COURT DECISIONS INTERPRETING ADMINISTRATIVE NOTICE BY THE BIA*

U.S. circuit courts are divided on the question of whether the BIA violates the Due Process Clause of the Fifth Amendment

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249. *See, e.g.*, Castillo-Villagra v. INS, 972 F.2d 1017, 1022-23 (9th Cir. 1992); Kaczmarczyk v. INS, 933 F.2d 588, 591 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993).

250. *See, e.g.*, *Castillo-Villagra*, 972 F.2d at 1022-23.

251. Getachew v. INS, No. 92-70836, 1994 U.S. App. WL 234557, at *3 (9th Cir. June 2, 1994) ("due process requires the Board to refrain from taking administrative notice of facts not in the record unless the procedures it follows are fair under the circumstances"); de la Llana-Castellon v. INS, 16 F.3d 1093, 1096 (10th Cir. 1994) (due process requires meaningful opportunity to be heard, fact-finding based on disclosed record, individualized determination of rights, and consideration of evidence and argument presented); Kahssai v. INS, 16 F.3d 323, 325 (9th Cir. 1994) (due process requires that asylum applicant be allowed to rebut noticed facts); Gomez-Vigil v. INS, 990 F.2d 1111, 1119 (9th Cir. 1993) (BIA may not use its authority to take official notice so as to deny meaningful hearing) (Aldisert, J., concurring); Rhoa-Zamora v. INS, 971 F.2d 26, 33 (due process requires careful, individualized review of evidence presented and opportunity to rebut noticed facts), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993); *Castillo-Villagra*, 972 F.2d at 1030 (due process requires that asylum seeker be permitted to rebut noticed facts); Gutierrez-Rogue v. INS, 954 F.2d 769, 773 (D.C. Cir. 1992) (BIA may not take notice so as to deny alien's due process right to meaningful hearing); Rivera-Cruz v. INS, 948 F.2d 962, 968 (5th Cir. 1991) (interested parties must have effective chance to respond to crucial facts); Kaczmarczyk v. INS, 933 F.2d 588, 596 (7th Cir.) (aliens have due process right to rebut officially noticed facts).

252. *See Llana-Castellon*, 16 F.3d at 1100 ("the reopening procedure does not substitute for advance notice and an opportunity to rebut administratively noticed facts before the ruling is issued"); Gebremichael v. INS, 10 F.3d 28, 38 (1st Cir. 1993) (agreeing with those circuits that have held that motion to reopen satisfies due process) (dicta); *Gomez-Vigil*, 990 F.2d at 1119 (holding that motion to reopen not adequate to satisfy due process) (Aldisert, J., concurring); *Castillo-Villagra*, 972 F.2d at 1030 (same); Gutierrez-Rogue v. INS, 954 F.2d 769, 773 (D.C. Cir. 1992) (motion to reopen procedure provides adequate opportunity to challenge officially noticed facts); *Rivera-Cruz*, 948 F.2d at 968 (same); Kaczmarczyk v. INS, 933 F.2d 595-97 (same).

of the U.S. Constitution when it takes administrative notice of a change in a country's government and denies an alien's request for asylum without providing an opportunity to respond.[253] The U.S. Courts of Appeals for the Fifth Circuit, the Seventh Circuit, and the D.C. Circuit have held that the BIA does not violate an alien's rights to procedural due process when it takes administrative notice of a change in the government of the alien's native country.[254] In contrast, the Ninth and Tenth Circuits have held that by first taking administrative notice, and then failing to afford aliens an opportunity to respond to these facts, the BIA violates the Due Process Clause of the Fifth Amendment.[255] The U.S. Supreme Court has twice denied certiorari on this question.[256]

A. *Circuit Court Decisions Holding that Administrative Notice by the BIA Without an Opportunity to Respond Does Not Violate the Due Process Clause*

A majority of U.S. Courts of Appeals have held that the BIA does not violate an alien's due process rights by denying asylum

253. *Compare* Getachew v. INS, No. 92-70836, 1994 U.S. App. WL 234557 (9th Cir. June 2, 1994) *and* de la Llana-Castellon v. INS, 16 F.3d 1093 (10th Cir. 1994) *and* Kahssai v. INS, 16 F.3d 323 (9th Cir. 1994) (per curiam) *and* Sarria-Sibaja v. INS, 990 F.2d 442 (9th Cir. 1993) (per curiam) *and* Gomez-Vigil v. INS, 990 F.2d 1111 (9th Cir. 1993) (per curiam) *and* Acewicz v. INS, 984 F.2d 1056 (9th Cir. 1993) *and* Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992) (all holding that BIA administrative notice of change in government of applicant's native country without warning to and adequate rebuttal from asylum applicant violates due process) *with* Rhoa-Zamora v. INS, 971 F.2d 26 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993) *and* Gutierrez-Rogue v. INS, 954 F.2d 769 (D.C. Cir. 1992) *and* Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991) *and* Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 583 (1991) (all holding that BIA administrative notice of change of government in applicant's native country does not violate due process where applicant may challenge noticed facts in motion to reopen).

254. Rhoa-Zamora v. INS, 971 F.2d 26 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993); Gutierrez-Rogue v. INS, 954 F.2d 769 (D.C. Cir. 1992); Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991); Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 583 (1991). The First Circuit agreed in dicta with the approach of these appellate courts. Gebremichael v. INS, 10 F.3d 28, 38 (1st Cir. 1993).

255. De la Llana-Castellon v. INS, 16 F.3d 1093 (10th Cir. 1994); Sarria-Sibaja v. INS, 990 F.2d 442 (9th Cir. 1993); Gomez-Vigil v. INS, 990 F.2d 1111 (9th Cir. 1993); Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992). The Sixth Circuit agreed with the approach of these circuit courts in an unpublished opinion. Ulloa v. INS, No. 91-3028, slip op. at 2 (6th Cir. Sept. 17, 1991).

256. Rhoa-Zamora v. INS, 971 F.2d 26 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993); Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 583 (1991).

after taking administrative notice of a change in the governing party in the applicant's home country.[257] The Fifth Circuit,[258] the Seventh Circuit,[259] and the D.C. Circuit[260] have held that the availability of a motion to reopen proceedings before the BIA ensures that the alien has a fair hearing on a request for asylum.[261] These courts all agree that an alien is constitutionally entitled to rebut facts administratively noticed by the BIA.[262] However, this opportunity does not have to be provided before the BIA renders a decision on the alien's appeal.[263] Rather, these appellate courts assume that a rebuttal can be accomplished during a motion to reopen proceedings before the BIA.[264]

The United States Court of Appeals for the Seventh Circuit was the first circuit court to rule on whether the BIA's denial of asylum, after administrative notice of a government change, violated the Due Process Clause.[265] In *Kaczmarczyk v. INS*, the Sev-

257. Rhoa-Zamora v. INS, 971 F.2d 26 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993); Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 583 (1991); Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991); Gutierrez-Rogue v. INS, 954 F.2d 769 (D.C. Cir. 1992) (all holding BIA administrative notice of change of government in applicant's native country does not violate due process where applicant may challenge noticed facts in motion to reopen).

258. Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991).

259. Rhoa-Zamora v. INS, 971 F.2d 26 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993); Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 583 (1991).

260. Gutierrez-Rogue v. INS, 954 F.2d 769 (D.C. Cir. 1992).

261. *Rhoa-Zamora*, 971 F.2d at 34; *Kaczmarczyk*, 933 F.2d at 597; *Rivera-Cruz*, 948 F.2d at 968; *Gutierrez-Rogue*, 954 F.2d at 773.

262. *Rhoa-Zamora*, 971 F.2d at 33-34; *Kaczmarczyk*, 933 F.2d at 596; *Rivera-Cruz*, 948 F.2d at 968; *Gutierrez-Rogue*, 954 F.2d at 773.

263. *Rhoa-Zamora*, 971 F.2d at 34; *Kaczmarczyk*, 933 F.2d at 597; *Rivera-Cruz*, 948 F.2d at 968; *Gutierrez-Rogue*, 954 F.2d at 773. The Fifth Circuit found that an alien's objection to administrative notice of a change in government was premature. *Rivera-Cruz*, 948 F.2d at 967. The court held that an alien's objection to the BIA's use of administrative notice should be raised first in a motion to reopen before the court even considered the issue. *Id.*

264. *Rhoa-Zamora*, 971 F.2d at 34; *Kaczmarczyk*, 933 F.2d at 597; *Rivera-Cruz*, 948 F.2d at 968; *Gutierrez-Rogue*, 954 F.2d at 773; *see supra* notes 174-90 and accompanying text (describing motion to reopen procedure).

265. Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993). Other U.S. circuit courts had previously ruled on the appropriateness of BIA administrative notice. *See, e.g.*, Kapcia v. INS, 944 F.2d 702 (10th Cir. 1991); Wojcik v. INS, 951 F.2d 172 (8th Cir. 1991). The Seventh Circuit, however, was the first U.S. circuit court to rule on a due process challenge to this method of recognizing a change in the government of an alien's home country. Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993).

enth Circuit upheld the BIA's use of administrative notice of a change in Poland's government to deny asylum to former members of the Polish trade union, Solidarity.[266] The court consolidated the appeals of three former Solidarity members who complained that their arrests or detentions, by Polish police, were on account of their membership in Solidarity and their participation in anti-government rallies or labor strikes.[267] The three men claimed that they feared persecution on account of their political beliefs.[268]

Initially, an IJ denied all three men asylum and refused to withhold their deportation. The men then appealed to the BIA.[269] In all three cases, the BIA took administrative notice of the fact that in September, 1989, Solidarity joined the Communist Party in a coalition government in Poland and that Solidarity's members were no longer being persecuted by Polish authorities for their affiliation with the trade union.[270] The BIA, as a result of the developments in Poland, concluded that none of the three petitioners had a "well-founded fear" of persecution if they were returned to Poland.[271]

On appeal to the Court of Appeals, the petitioners argued that the BIA denied them their due process right to a fair hearing.[272] The petitioners noted that the Communist Party still controlled the Polish military and police.[273] The petitioners claimed that when the BIA decided their appeals on the basis of information that was not in the record, they were denied a fair hear-

266. *Kaczmarczyk*, 933 F.2d at 591.

267. *Id.* at 591-92.

268. *Id.* at 591.

269. *Id.*

270. *Id.*

271. Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993).

272. *Id.* at 595. The court rejected arguments that administrative notice by the BIA was too broad and amounted to an "across-the-board denial of all Polish asylum claims." *Id.* at 593. Administrative agencies can take administrative notice of commonly acknowledged facts, and the court found that the BIA's conclusion that Solidarity members faced an insignificant risk of persecution in Poland was a commonly acknowledged fact. *Id.* at 594.

The court also rejected a second argument from the petitioners that § 7(e) of the APA, 5 U.S.C. § 556(e), requires the BIA to allow them an opportunity to rebut noticed facts. *Id.* The court held that the APA is not applicable to deportation proceedings under the INA, and because asylum claims initiated as part of the deportation process are part and parcel of that process, the APA rebuttal requirement is not applicable. *Id.*

273. *Id.* at 594.

ing.[274]

The Seventh Circuit agreed that the Due Process Clause of the Fifth Amendment required that the petitioners be allowed an opportunity to rebut officially noticed facts.[275] The court held that this finding is particularly appropriate when the administratively noticed facts are crucial to the outcome of the administrative proceeding.[276] The court stated that if it had held that the petitioners were not entitled to rebut officially noticed facts, it would have sanctioned the use of an "unregulated back door" through which non-record evidence might be used to deny asylum requests with no response from the alien.[277]

The court held, however, that the BIA did not violate the petitioner's right to a fair hearing by rendering a decision on the basis of administratively noticed facts.[278] According to the Seventh Circuit, the availability of a motion to re-open the BIA proceeding after the BIA renders a decision, but before deportation, is constitutionally sufficient to satisfy the Due Process Clause of the Fifth Amendment.[279] This mechanism, the court reasoned, provides an asylum applicant with sufficient opportunity to present the BIA with evidence that the facts it officially noticed are incorrect or that they are true but irrelevant to the alien's case.[280] Although the regulations governing a motion to reopen do not refer to official notice, the court held that a motion to reopen satisfies the requirements of the Due Process Clause of the Fifth Amendment.[281]

The Seventh Circuit acknowledged that the motion to reopen does not stay the execution of an order of deportation.[282] The court, however, assumed that the BIA would exercise its discretion to stay the execution of a deportation order while the

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274. *Id.* at 593

275. *Id.* at 596.

276. Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993).

277. *Id.* As the Seventh Circuit explained, "*not* to allow petitioners an opportunity to rebut noticed facts would sanction the creation of an unregulated back door through which unrebuttable, non-record evidence could be introduced against asylum petitioners outside of the statutorily-mandated hearing context." *Id.*

278. *Id.* at 596-97.

279. *Id.* at 597.

280. *Id.*

281. Kaczmarczyk v. INS, 933 F.2d 588, 596-97 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993).

282. *Id.*

motion is pending before the BIA.[283] In addition, the court reasoned that a denial of a motion to reopen may be appealed to the Court of Appeals, and judicial review will ensure that BIA decisions taking official notice will not deprive aliens of their right to a fair asylum proceeding.[284] The reasoning of *Kaczmarczyk* was applied in other Seventh Circuit cases, including appeals brought by Nicaraguans denied asylum after the election of a new President in February 1990.[285] In addition, the Fifth and District of Columbia Circuits rejected similar challenges to the BIA's use of official notice.[286] These circuits have relied on *Kaczmarczyk* to uphold BIA official notice of a change in the Nicaraguan government to deny asylum requests before the aliens were permitted to respond.[287]

B. *Circuit Court Decisions Holding That Administrative Notice by the BIA, Without An Opportunity to Respond, Violates the Fifth Amendment*

The U.S. Courts of Appeals for the Ninth Circuit and the Tenth Circuit have held that asylum applicants are denied due process when the BIA takes administrative notice of a change in government, in the applicant's home country, without allowing them an opportunity to respond before the BIA issues a decision.[288] Specifically, the Ninth and the Tenth Circuits have found that the BIA should have forewarned aliens of their administrative notice of a change in government, allowing them an opportunity to respond before a decision was rendered.[289] The Tenth Circuit also concluded that the appeal to the BIA consisted entirely of form language and deprived the petitioners of an individualized determination of their asylum claim, which vio-

283. *Id.* at 597 n.9. "There . . . exists the possibility that unsuccessful asylum applicants may be ordered to leave the country before the Board has ruled on their motions to reopen." *Id.*

284. *Id.*

285. Rhoa-Zamora v. INS, 971 F.2d 26 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993).

286. Rivera-Cruz v. INS, 948 F.2d 962, 968 (5th Cir. 1991); Gutierrez-Rogue v. INS, 954 F.2d 769, 773 (D.C. Cir. 1992).

287. *Rivera-Cruz*, 948 F.2d at 968; *Gutierrez-Rogue*, 954 F.2d at 773.

288. Castillo-Villagra v. INS, 972 F.2d 1017, 1031 (9th Cir. 1992); de la Llana-Castellon v. INS, 16 F.3d 1093, 1100 (10th Cir. 1994).

289. *Castillo-Villagra*, 972 F.2d at 1031; *Llana-Castellon*, 16 F.3d at 1100.

lated their Fifth Amendment rights.[290]

1. The *Castillo-Villagra v. INS* Decision

In the first ruling of its kind, the Ninth Circuit, in *Castillo-Villagra v. INS*,[291] held that the BIA's use of administrative notice to deny asylum to three Nicaraguan citizens violated the Due Process Clause of the Fifth Amendment.[292] In *Castillo-Villagra*, the appellate court held that the BIA failed to provide due process when it dismissed an appeal for asylum solely on the ground that a new President was elected in Nicaragua without allowing the applicants an opportunity to respond.[293] Teresa de Jesus Castillo-Villagra and her two adult daughters sought asylum on the basis of their membership in a political group that opposed the Sandinista regime in Nicaragua[294] and their participation in various anti-government demonstrations.[295] A U.S. State Department report on conditions in Nicaragua supported claims of Sandinista persecution of political opponents.[296]

An IJ denied the three women's applications for asylum.[297] The IJ found that one of the women was not a credible witness

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290. *Llana-Castellon*, 16 F.3d at 1098.

291. 972 F.2d 1017 (9th Cir. 1992).

292. *Castillo-Villagra*, 972 F.2d at 1029.

293. *Id.*

294. *Id.* at 1021. The women claimed to be members of the Movimiento Democratico Nicaraguense (the "MDN"). *Id.* at 1022.

295. *Id.* at 1021-22. In a hearing before an IJ, Castillo-Villagra's oldest daughter, Maria Auxiliadora Aleman-Castillo, testified that their home in Jinotega was stoned about ten times by mobs of 20 to 50 people because of the family's political opinions and activities. *Id.* All three women claimed they were denied food coupons and were arrested because of their support for MDN. In the Matter of Teresa de Jesus Castillo-Villagra, No. A26 944 955-957 (Immigration Judge, Feb. 1, 1988) (on file with the *Fordham International Law Journal*).

296. JT. COMM. ON FOREIGN AFFAIRS, COUNTRY REPORTS ON HUMAN RIGHTS FOR 1984, S. REP. NO. 99-6, 99th Cong., 1st Sess. 609 (1985). According to the U.S. State Department report on conditions in Nicaragua at the time, the Sandinistas used party organizations as part of its intelligence and security network. *Id.* at 614. Specifically,

> [The Sandinistas] rely on organizations controlled by the Sandinista National Liberation Front, such as the ubiquitous 'block committees,' to help implement their policies at the local level and exert control, instill loyalty and to identify and implement sanctions against suspected opponents. Using both its own powers and intimidation by Sandinista organizations, the Government systematically harassed opposition political parties.

Id.

297. In the Matter of Teresa de Jesus Castillo-Villagra, No. A26 944 955-957 (Immigration Judge, Feb. 1, 1988) (on file with the *Fordham International Law Journal*). *Id.*

and that the women were not persecuted on account of their membership in a political party nor their disagreement with Sandinista policies.[298] The women appealed the IJ's decision to the BIA.[299] On appeal, the BIA did not review the IJ's credibility determinations nor the IJ's decision that these three applicants lacked a well-founded fear of persecution.[300] Instead, the BIA took administrative notice that an anti-Sandinista coalition took power in Nicaragua on April 25, 1990, and denied the family's appeal.[301] The BIA held that, regardless of whether they originally had a well-founded fear of persecution, these anti-Sandinista asylum applicants were no longer threatened with persecution because the Sandinistas were ousted from power in Nicaragua.[302] The BIA decided this case solely on the basis of administrative notice of the change in the Nicaraguan government.[303] The women thereafter sought review by the U.S. Court of Appeals for the Ninth Circuit.[304]

On appeal, Castillo-Villagra and her daughters did not challenge the BIA's use of administrative notice to recognize the change in Nicaragua's government.[305] Rather, they claimed that the BIA deprived them of due process by taking administrative notice of the change without prior warning and without allowing

298. *Id.* at 6. The IJ noted that one of the women said she was arrested at a demonstration, but her application said she was arrested at someone's home. *Id.* The IJ ruled that the rock throwing of the "so-called mobs" did not amount to persecution. *Id.* at 9. Because of a lack of documentary corroboration, the IJ also doubted that the women were active in MDN affairs. *Id.* at 8.

299. In re Castillo-Villagra, No. A26 944 955 (BIA Sept. 21, 1990) (on file with the *Fordham International Law Journal*).

300. *Id.*

301. *Id.* at 2; *see also* Mark A. Uhlig, *Chamorro Takes Nicaragua Helm*, N.Y. TIMES, Apr. 26, 1990, at A1. The BIA resolved a "large number" of other cases in the same manner. *Castillo-Villagra*, 972 F.2d at 1023.

302. In re Castillo-Villagra, No. A26 944 955, at 2 (BIA Sept. 21, 1990) (on file with the *Fordham International Law Journal*). According to the BIA: "Given that the Sandinista party no longer governs Nicaragua, under the present circumstances we do not find that the record now before us supports a finding that the respondents have a well-founded fear of persecution by the Sandinista government were they to return to Nicaragua." *Id.*

303. *Id.*; *see Castillo-Villagra*, 972 F.2d at 1023 ("The Board gave no reasons for its decision except for the facts of which it took administrative notice.").

304. *Castillo-Villagra*, 972 F.2d at 1017.

305. *Id.* at 1025. None of the courts upholding the BIA's use of administrative notice have found it improper for the BIA to notice a change in the government of an alien's home country. *See, e.g.*, de la Llana-Castellon v. INS, 16 F.3d 1093, 1096 (10th Cir. 1993); *Castillo-Villagra*, 972 F.2d at 1027.

them an opportunity to respond.[306] They claimed that despite the change in government in Nicaragua, the Sandinistas still controlled the police and the army, retaining the power to persecute their political adversaries.[307] The Ninth Circuit reversed the BIA, vacated the INS deportation order, and remanded the case to the BIA for further proceedings.[308]

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306. *Castillo-Villagra*, 972 F.2d at 1025.

307. *Id.* Other aliens challenging the BIA's administrative notice of a change of government in their home countries have argued similarly. *See Gomez-Vigil*, 990 F.2d at 1113; *supra* text accompanying note 273 (noting that Communist Party continued to control Polish military and police when BIA took administrative notice of change in Poland's government in *Kaczmarczyk*); *see also supra* notes 9-11 and accompanying text (noting that aliens retain fear of persecution despite change in the government of their native countries). In *Castillo-Villagra*, the court found that the petitioners' fears of continued persecution were plausible. *Castillo-Villagra*, 972 F.2d at 1030. Specifically,

> [t]he record they developed before the election allowed for the conclusion that Nicaragua had been dominated by the Sandinista party, and that Sandinista power flowed from the party, not just the government. It may be that the party's permeation of society enables it to persecute opponents, even with the presidency and some departments of government in other hands.

Id.

308. *Castillo-Villagra*, 972 F.2d at 1031. In addition to reviewing BIA use of administrative notice, the Court of Appeals rejected INS arguments that the petitioners lacked jurisdiction since they had not exhausted their administrative remedies. *Id.* at 1023-25. The INS claimed the petitioners could have moved to reopen on the ground that administrative notice should not have been taken and that they cannot raise this issue for the first time in a petition for judicial review. *Id.* at 1023. The court noted that aliens cannot obtain judicial review until they have exhausted all administrative remedies available "as of right." *Id.* (citing 8 U.S.C. § 1105a(c)). The court observed, however, that immigration regulations provide that the BIA "may" reopen. *Id.* This remedy is discretionary, the court held, and not available "as of right." *Id.* Therefore, exhaustion of the motion to reopen is not a jurisdictional prerequisite for review by the Court of Appeals. *Id.*; *see* INS v. Doherty, __ U.S. __, 112 S. Ct. 719, 724 (1992) (noting that "the granting of a motion to reopen is thus discretionary" and "disfavored").

The Court of Appeals also rejected arguments that exhaustion of the motion to reopen should be required as matter of prudence in order to develop a proper record. *Castillo-Villagra*, 972 F.2d at 1024. "The BIA decision makes development of a further record irrelevant, because it is undisputed that the petitioners claim to be anti-Sandinista Nicaraguans, and that was the only fact that mattered." *Id.*

The court also determined that the BIA's use of administrative notice must be analyzed under the INA, not the APA. *Castillo-Villagra*, 972 F.2d at 1025. Although the APA would bar administrative notice in the circumstances of this case, the APA provides that statutes adopted after the enactment of the APA shall not be deemed to modify it "except to the extent that it does so expressly." *Id.*; *see* 5 U.S.C. § 559 (1988). The INA includes a fairly detailed procedural framework, the court observed, as well as a provision that makes it the "sole and exclusive procedure" on the deportation of aliens. *Castillo-Villagra*, 972 F.2d at 1025; *see* 8 U.S.C. § 1252(b). "We conclude that the INA displaces the APA on this question, so we do not analyze the administrative notice issue under the APA." *Castillo-Villagra*, 972 F.2d at 1025; *see* Ardestani v. INS, __ U.S. __, 117 S. Ct. 515 (1991); Marcello v. Bonds, 349 U.S. 302 (1955).

In a unanimous decision, the court held that the aliens were not given a fair opportunity to be heard and were denied procedural due process by the BIA.[309] The petitioners, the Ninth Circuit said, might have been able to show the BIA that conditions in Nicaragua were too complex, unsettled, and particularized for the BIA to conclude that they could not have a well-founded fear of persecution.[310] In *Castillo-Villagra*, the Ninth Circuit proposed a broad "rule of convenience" for the application of administrative notice,[311] allowing administrative judges to take notice of adjudicative facts whenever they know of information that will be useful in rendering a decision.[312] The court found that an "essential concomitant" of this rule was an opportunity for the applicant to respond to the noticed facts.[313] Therefore, the court ruled, the only practical way to handle questions such as whether to take administrative notice or allow rebuttal of the facts so noticed is to give an agency such as the BIA discretion to make these determinations.[314]

Furthermore, the court found that agency decisions on these matters are subject to review for abuse of discretion.[315] An agency's discretion must be exercised in such a way as to be fair under the circumstances.[316] For example, the court ruled that the BIA does not have to provide an asylum applicant an opportunity to rebut administrative notice that a new government has been formed in his country of origin because this is a legislative fact that is indisputable and general.[317] The INS, however, should have warned the parties that it intended to take administrative notice of the fact that any well-founded fear of persecution the applicants might have had before the change of govern-

309. *Castillo-Villagra*, 972 F.2d at 1029.

310. *Id.*

311. *Castillo-Villagra*, 972 F.2d at 1027-28; *see* Banks v. Schweiker, 654 F.2d 637 (9th Cir. 1981) (administrative law judge could properly take notice of how social security office personnel ordinarily dealt with inquiries such as those claimant made in denying his entitlement to benefits).

312. *Castillo-Villagra*, 972 F.2d at 1027-28.

313. *Id.* at 1028.

314. *Id.*

315. *Id.*

316. *Id.* The court referred to several factors that may be used when determining whether an agency abused its discretion. *Castillo-Villagra*, 972 F.2d at 1028-29 n.5 (quoting Kenneth C. Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 932 (1980)); *see supra* note 236 (listing factors).

317. *Castillo-Villagra*, 972 F.2d at 1029.

ment was eliminated by the change in government.[318] By alerting the parties to this intention, the petitioners would have had the opportunity to challenge the facts administratively noticed.[319]

In *Castillo-Villagra*, the Ninth Circuit recognized that the reliance that other circuit courts placed on an alien's right to rebut administratively noticed facts in a motion to reopen was insufficient.[320] The court observed that the filing of a motion to reopen does not automatically stay an order of deportation.[321] Therefore, the INS could make a motion to reopen moot by deporting the alien before the BIA rules on the motion.[322] The court refused to assume, as other circuits had,[323] that the BIA would voluntarily stay deportation until the BIA decided the alien's motion to reopen.[324] The BIA has broad discretion to deny motions to reopen, the Ninth Circuit reasoned, and an alien would therefore not be protected from deportation during the pendency of a motion to reopen.[325]

2. Other Ninth Circuit Decisions

In subsequent asylum cases, the Ninth Circuit elaborated on the inadequacy of the motion to reopen.[326] In a concurring opinion in *Gomez-Vigil v. INS*, Circuit Court Judge Betty B. Fletcher wrote that the plain language of the regulations governing motions to reopen made this an inappropriate means of responding to officially noticed facts.[327] These regulations require the introduction of new evidence, previously unavailable, before a motion to reopen would be granted.[328] Judge Fletcher

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318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 1030; *see supra* notes 159-60 and accompanying text (noting that motion to reopen will not stay deportation or exclusion order).

322. *Castillo-Villagra*, 972 F.2d at 1030; *see supra* notes 159-60 and accompanying text (noting that motion to reopen will not stay deportation or exclusion order).

323. *See, e.g., Kaczmarczyk*, 933 F.2d at 597, n.9 (assuming that BIA would stay deportation pending decision on motion to reopen).

324. *Castillo-Villagra*, 972 F.2d at 1030.

325. *Id.*

326. *See* Gomez-Vigil v. INS, 990 F.2d 1111 (9th Cir. 1993).

327. *Id.* at 1123-25; *see supra* notes 175-96 and accompanying text (describing motion to reopen BIA proceedings).

328. *Id.* at 1124; *see supra* note 176 and accompanying text (describing requirement of new evidence for motion to reopen).

found that aliens seeking asylum from countries where the government has changed are not offering new evidence.[329] Rather, these aliens seek to reiterate their original claims of a well-founded fear of persecution.[330] Specifically, these aliens claim that the persecutors, who threatened them before the change in government, remain in power and continue to threaten them with persecution.[331] According to Judge Fletcher, these aliens seek to rebut administratively noticed facts with factual statements that argue continuity with the past, not change requiring new facts.[332] By definition, Judge Fletcher wrote, this evidence is not new within the meaning of federal regulations governing motions to reopen.[333]

The immigration regulations also require that the new evidence, submitted as part of a motion to reopen, be unavailable or unpresentable at the time the BIA hears an appeal.[334] However, Judge Fletcher found that the new facts that aliens will often seek to introduce via the motion to reopen are not unavailable, undiscoverable, or unpresentable at the time of the BIA review.[335] In *Gomez-Vigil*, the facts were not only available, but were initially presented to the BIA for its review.[336] Therefore, Judge Fletcher wrote that the aliens, seeking to rebut administrative notice of a change in government, were unable to satisfy the requirement of presenting facts that were unavailable, undiscovered, or unpresentable.[337]

Finally, Judge Fletcher observed that the motion to reopen was inadequate because this procedure did not allow for the direct review of administratively noticed facts.[338] Aliens seeking to respond to administrative notice of political developments in their home countries need to introduce additional facts that require live testimony or oral argument.[339] In contrast, motions to

329. *Gomez-Vigil*, 990 F.2d at 1124.
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *See supra* notes 169-90 and accompanying text (describing requirements of motion to reopen).
335. *Gomez-Vigil*, 990 F.2d at 1125.
336. *Id.*
337. *Id.*
338. *Id.* at 1124.
339. *Id.*

reopen are usually decided without a hearing and serve only a limited screening function.[340] Due to the abbreviated nature of the motion to reopen procedure, Judge Fletcher found this method of responding to administrative notice inadequate.[341]

2. The Tenth Circuit Adopts *Castillo-Villagra*

The reasoning of the Ninth Circuit in *Castillo-Villagra* was adopted by the U.S. Court of Appeals for the Tenth Circuit.[342] In *De la Llana-Castellon v. INS*, the BIA affirmed an IJ's denial of asylum solely on the basis of administrative notice of the election in Nicaragua.[343] The Tenth Circuit reversed, holding that the BIA was required to give the family of Nicaraguans seeking asylum prior warning of administrative notice of elections in Nicaragua and an opportunity to be heard on these facts.[344] In addition, the *Llana-Castellon* court found that the BIA's use of the same form language, in several asylum decisions, deprived aliens of the individualized review of the facts required by due process.[345]

The Tenth Circuit found that the BIA's use of form paragraphs, identical to those used in other cases, deprived the Nicaraguans of their Fifth Amendment rights.[346] The court highlighted a paragraph in the BIA's decision that nearly replicated the language used in other cases.[347] The BIA's decision, according to the Tenth Circuit, contained no indication that it had conducted an individual examination of the evidence presented by the asylum applicants.[348] Specifically, the *Llana-*

340. *Id.*; Hernandez-Ortiz v. INS, 777 F.2d 509, 514 (9th Cir. 1985); Reyes v. INS, 673 F.2d 1087, 1089, 1091 (9th Cir. 1982).

341. *Gomez-Vigil*, 990 F.2d at 1124; Moran-Enriquez v. INS, 884 F.2d 420, 423 n.2 (9th Cir. 1989). Judge Fletcher also noted that a motion to reopen places a higher burden on an alien by requiring a prima facie showing of eligibility for asylum. *Gomez-Vigil*, 990 F.2d at 1124; *see* James C. Frasher & Xuan T. Tran, Note, *Administrative Notice in Political Asylum Appeals: Does the Motion to Reopen Preserve the Alien's Due Process Rights?*, 69 NOTRE DAME L. REV. 311, 326-27 (1993).

342. De la Llana-Castellon v. INS, 16 F.3d 1093 (10th Cir. 1994).

343. *Id.* at 1095.

344. *Id.* at 1099.

345. *Id.* at 1098.

346. *Id.*

347. *Id.* The Tenth Circuit observed, "that the paragraph containing the BIA's administratively noticed facts is nearly a verbatim copy of those employed in other cases." *Id.*

348. *Id.*; *see supra* notes 204-05 and accompanying text (explaining that aliens are

Castellon court found that the BIA's decision could apply to almost any Nicaraguan alien seeking asylum.[349] The court observed that some elements of the BIA's decision had no application to the petitioners.[350] The appearance of irrelevant facts in the BIA's decision prompted the Tenth Circuit to conclude that the BIA used administrative notice to dismiss the appeal without conducting an individualized review.[351] The Tenth Circuit held that when the BIA's decision consists entirely of boilerplate language, this decision is a denial of due process.[352]

III. *THE APPROACH OF THE NINTH AND TENTH CIRCUITS PROTECTS THE PROCEDURAL DUE PROCESS RIGHTS OF DEPORTABLE ALIENS SEEKING ASYLUM IN THE UNITED STATES*

The U.S. Courts of Appeals that have examined the BIA's use of administrative notice agree that an asylum seeker is constitutionally entitled to present evidence to rebut the proposition on which notice was taken.[353] These courts have found that the Fifth Amendment requires an alien to be allowed an opportunity to be heard on officially noticed facts relied on to deny an asylum request.[354] Most courts assume that this rebuttal can be ac-

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entitled to individualized determination of their case); *see also* Castillo-Villagra v. INS, 972 F.2d 1017, 1023 (9th Cir. 1992).

349. *Llana-Castellon*, 16 F.3d at 1098.

350. *Id.*

351. *Id.*; *see* Rhoa-Zamora v. INS, 971 F.2d 26, 34 (7th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 1943 (1993). The Court of Appeals noted that the BIA's disposition of cases with decisions "employing identical, 'boilerplate' paragraphs regarding the effect of the Nicaraguan election casts a cloud over the [BIA's] decisions and hinders meaningful judicial review." *Rhoa-Zamora*, 971 F.2d at 34.

352. *Llana-Castellon*, 16 F.3d at 1098. The Seventh Circuit has also noted that administrative notice is not a substitute for an analysis of the facts of each applicant's individual circumstances. Kaczmarczyk v. INS, 933 F.2d 588, 594-95 (7th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 583 (1991). The Seventh Circuit observed that aliens appealing a BIA decision are "right to demand that the BIA engage in a careful, individualized review of the evidence presented in their applications and hearings." *Kaczmarczyk*, 933 F.2d at 594-95.

353. *See supra* note 251 (listing cases finding that due process requires BIA to allow aliens to respond to noticed facts). The Seventh Circuit noted that "*not* to allow petitioners an opportunity to rebut noticed facts would sanction the creation of an unregulated back door through which unrebuttable, non-record evidence could be introduced against asylum petitioners outside of the statutorily-mandated hearing context." *Kaczmarczyk*, 933 F.2d at 596.

354. *See supra* note 251 (listing cases finding that due process requires BIA to allow aliens to respond to noticed facts).

complished in the context of a motion to reopen the proceedings.[355] However, a motion to reopen the proceedings is not an adequate means of allowing an alien to respond to official notice of a change in the home country's government.[356] In addition, this deprivation of due process is enhanced by the BIA's use of nearly identical form language for all similarly situated aliens, depriving them of an individualized determination of their eligibility for asylum.[357] By warning aliens of their intention to officially notice a change of government in the home country, the BIA would provide an alien with the opportunity to respond in accordance with the Due Process Clause of the Fifth Amendment.[358]

A. *The Motion to Reopen Proceedings Is Not an Adequate Means of Allowing an Alien to Respond to Administrative Notice*

A motion to reopen the proceedings is not an effective method of allowing an alien to respond to official notice of a change in the government of the home country.[359] The plain language of the immigration regulations, governing the motion to reopen, makes this an inappropriate means of responding to facts that have been previously administratively noticed by the BIA.[360] In addition, the filing of a motion to reopen will not stay an order of deportation, and an alien may be deported before the BIA rules on the motion.[361] Finally, a motion to reopen takes the place of a direct review and raises the burden of proof

355. *See supra* note 252 (listing cases discussing whether motion to reopen provides constitutionally adequate opportunity to rebut noticed facts).

356. *See supra* notes 320-41 and accompanying text (describing inadequacy of motion to reopen).

357. *See supra* notes 346-52 and accompanying text (describing BIA use of form language and due process deprivation).

358. *See supra* notes 318-19 and accompanying text (noting that Ninth Circuit approach allows pre-decision warning of administrative notice by BIA).

359. *See supra* notes 320-41 and accompanying text (describing inadequacy of motion to reopen).

360. *See supra* notes 326-37 and accompanying text (stating that plain language of regulation makes it inappropriate means of rebutting noticed facts). Even courts upholding the BIA's use of administrative notice agree that the motion to reopen is not designed as an opportunity to respond to officially noticed facts. *See* Gebremichael v. INS, 10 F.3d 28, 39 n.29 (1st Cir. 1993) (noting that motion to reopen was not designed to permit response to administratively noticed facts).

361. *See supra* notes 320-25 and accompanying text (explaining that filing motion to reopen will not stay deportation order).

on an alien seeking asylum.[362]

1. The Plain Language of Immigration Regulations Makes A Motion to Reopen Inappropriate

The plain language of the federal regulations governing motions to reopen before the BIA makes reliance on this mechanism inappropriate.[363] In order to reopen asylum proceedings, an alien's motion must supply new evidence that is material to the asylum request.[364] In addition, this new evidence must have been unavailable and undiscovered or unpresentable at the time the BIA reviewed the alien's claims.[365] The U.S. Supreme Court has strictly interpreted the threshold requirements for reopening.[366] Only new evidence, according to the Court, that was previously unavailable and undiscovered or unpresentable on direct review before the BIA justifies a reopening.[367]

Aliens seeking asylum from countries where the government has changed are not offering new evidence.[368] Rather, these aliens argue that the forces that threatened them before the change in government remain in power and still threaten them with persecution.[369] These aliens seek to rebut administratively noticed facts with factual statements that are consistent with evidence previously entered.[370] The aliens want to seek review of the same evidence that the BIA initially ignored when it took administrative notice and denied their appeals.[371] By definition, this evidence is not new within the meaning of federal regulations governing a motion to reopen.[372] The U.S. Supreme Court has strictly interpreted the language of the regulation gov-

362. *See supra* notes 338-41 and accompanying text (describing inadequacy of motion to reopen).

363. *See supra* notes 326-37 and accompanying text (stating that motion to reopen procedure is not appropriate method of allowing an alien to respond to noticed facts).

364. *See supra* note 169 and accompanying text (explaining requirement of new evidence for motion to reopen BIA proceedings).

365. *Id.*

366. *See supra* notes 181-90 and accompanying text (describing burden of proof for motion to reopen BIA proceedings).

367. *Id.*

368. *See supra* notes 326-33 and accompanying text (explaining that aliens seeking to rebut administrative notice of change in government are not offering new evidence).

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

erning motions to reopen BIA proceedings.[373] This literal reading of the regulation prevents an interpretation that might make the motion to reopen an appropriate mechanism for allowing aliens to respond to administratively noticed facts.[374]

2. Aliens May Be Deported Before the BIA Rules on a Motion to Reopen in Violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution

A final order of deportation is not stayed by the filing of a motion to reopen.[375] While motions to reopen are pending before the BIA, aliens may be deported to their home country.[376] For this reason, the INS could make a motion to reopen the BIA proceedings moot by deporting the applicant before the motion is heard.[377] Aliens with plausible asylum claims may therefore be deported from the United States solely on the basis of an administrative notice of a change in the government of their home country.[378]

While some circuit courts have assumed that the BIA would use its authority to stay a deportation order during the pendency of the alien's motion,[379] this assumption is debatable.[380] The BIA has wide discretion to deny motions to reopen and has no obligation to stay deportation while these motions are pending.[381] In fact, the INS has acknowledged that aliens in this situation may be deported from the United States before they have the opportunity to challenge administratively noticed facts.[382] Without a stay of deportation, aliens would be deported before

373. *See supra* notes 181-90 and accompanying text (describing strict U.S. Supreme Court interpretation of motion to reopen regulations).

374. *Id.*

375. *See supra* notes 188-90 and accompanying text (noting that motion to reopen does not stay execution of deportation order).

376. *Id.*

377. *Id.*

378. *Id.*

379. *See supra* notes 282-83 and accompanying text (describing Seventh Circuit's assumption that BIA would stay deportation while motion to reopen is pending).

380. *See supra* notes 323-25 and accompanying text (describing Ninth Circuit refusal to assume that BIA would stay deportation while motion to reopen is pending).

381. *Id.*

382. *See* Castaneda-Suarez v. INS, 993 F.2d 142, (7th Cir. 1993) (noting that INS declined to assure appellate court that petitioners would not be deported before consideration of motion to reopen).

the BIA rules on their motion to reopen in violation of the Due Process Clause of the Fifth Amendment.[383]

3. A Reopening Proceeding Cannot Replace Direct Review

A motion to reopen BIA proceedings is not an adequate substitute for the direct review of an IJ's decision.[384] This proceeding will only address the propriety of the administrative notice taken by the BIA.[385] When an alien is warned beforehand that administrative notice will be taken, the applicant is able to discuss the change of government during the direct review of the IJ's rulings.[386] Direct review before the BIA, by contrast, allows an alien to argue the issues presented by a change in government, as well as other facts in the record, in a single hearing.[387] For this reason, direct review of the entire record is a more efficient means of allowing an alien to respond to administratively noticed facts.[388]

In addition, aliens facing possible deportation have specific factual issues that are best developed through live testimony and oral argument rather than by briefing alone.[389] Oral argument before the BIA will allow an alien to respond to specific questions about the change in government and to describe fully the alien's well-founded fear of persecution.[390] Motions to reopen, however, are usually decided without oral argument and serve only a limited screening function.[391] When a case requires oral argument to fully establish all the facts, the abbreviated procedure of the motion to reopen is inadequate.[392]

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383. *See supra* notes 188-90 and accompanying text (noting that motion to reopen does not stay execution of deportation order).

384. *See supra* notes 338-41 and accompanying text (describing inadequacy of motion to reopen).

385. *See supra* notes 169-72 and accompanying text (describing requirements of motion to reopen).

386. *See supra* notes 129-58 and accompanying text (describing appeals to the BIA).

387. *Id.*

388. *See supra* notes 338-41 and accompanying text (describing inadequacy of motion to reopen).

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

4. A Motion to Reopen Raises the Burden of Proof an Alien Must Meet

Aliens seeking to respond to administratively noticed facts in a motion to reopen face a higher burden of proof than aliens directly appealing an IJ's decision to the BIA.[393] Aliens filing a motion to reopen are required to meet the heavy burden of establishing a *prima facie* case for asylum eligibility.[394] This burden is increased by the BIA's use of administrative notice to recognize the change in government in the alien's home country.[395] In effect, the BIA has assumed that the alien does not have a well-founded fear of persecution by taking administrative notice of a change in government in an applicant's home country.[396] Any evidence supporting eligibility for asylum, therefore, will be prejudiced by the prior finding of ineligibility.[397]

In effect, aliens in this situation must not only establish a *prima facie* case, but they must also overcome the presumption that they do not have a well-founded fear of persecution.[398] Where the alien has not had an opportunity to address the facts the BIA relied on initially, the burden for eligibility for asylum is difficult to overcome.[399] If these aliens were permitted to address the change of government in their countries on direct appeal to the BIA, they would not be burdened with this prior presumption.[400]

B. *Administrative Notice Through the Use of INS Form Language Denies Aliens Individualized Determinations of Their Asylum Claims as Required by the Fifth Amendment of the U.S. Constitution*

An alien is entitled to a deportation decision based on the record created before and during the hearing.[401] Due process

393. *See supra* notes 181-90 and accompanying text (describing alien's burden of proof for motion to reopen).

394. *Id.*

395. *See supra* note 249 (explaining that administrative notice is similar to presumption).

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *See supra* notes 198-205 and accompanying text (describing procedural due process rights of aliens).

entitles aliens to an individualized determination of their asylum claims[402] and also requires that the decision-maker consider the evidence and arguments that aliens present.[403] The BIA has taken administrative notice of a change in one country and denied asylum applications from aliens from that country by the use of nearly identical decisions for each applicant.[404] In many instances, the language of the BIA's decisions could apply to nearly any alien seeking asylum from that country[405] and some elements of these decisions had no relevance to the parties involved in the case.[406] Under these circumstances, the uniformity of these opinions indicates the rote application of administrative notice to dismiss these appeals.[407] This use of boilerplate language indicates the rote application of administratively noticed facts without an individual determination of the merits of an alien's claim of asylum in violation of the Fifth Amendment.[408]

C. *The BIA Should Warn Aliens Before Denying Asylum Solely on the Basis of Administrative Notice of a Change in the Government of the Aliens' Home Country*

The BIA should warn aliens of its intention to dispose of their appeals solely on the basis of changes in the government of their home countries.[409] The U.S. Court of Appeals for the Ninth Circuit in *Castillo-Villagra* has adopted a flexible rule that allows the BIA to use its discretion to decide whether to take administrative notice, whether to allow the parties to respond, and whether the parties must be notified in advance that notice will be taken.[410] Under this approach, the BIA is not required to

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402. *Id.*

403. *Id.*

404. *See supra* notes 346-52 and accompanying text (describing BIA use of form opinions for large number of aliens seeking asylum).

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *See supra* notes 318-19 and accompanying text (describing Ninth Circuit approach of warning aliens before administrative notice is taken).

410. *See supra* notes 310-14 and accompanying text (describing Ninth Circuit approach of warning aliens before administrative notice is taken). Despite the suggestion by one federal appeals court judge that *Castillo-Villagra* requires advance notice in all instances of administrative notice, *see Gomez-Vigil*, 990 F.2d at 1114, 1120-21 (Aldisert, J., concurring), the holding in *Castillo-Villagra* makes clear that the BIA may use its own discretion to decide whether to notify the parties in advance that administrative notice

warn an alien every time it takes administrative notice of a change in the alien's home country.[411] In those instances where the change in an applicant's home country is only one of several factors relied upon by the BIA, a pre-decision warning that administrative notice will be used may be unnecessary.[412] In addition, where an alien has addressed a change in government in proceedings before an IJ, there is no need for a warning that the BIA intends to take administrative notice of the same change in government.[413] Under the Ninth Circuit approach, the BIA is required to warn an alien when it intends to rely solely on administrative notice of a recent change in the government of the alien's native country before ruling on the request for asylum.[414] By warning aliens of its intention to administratively notice a change of government in their home countries, the BIA would provide aliens with a predecision opportunity to respond to administratively noticed facts and would avoid the shortcomings of the motion to reopen.[415] Therefore, the BIA would avoid the possibility that aliens will be deported before having an opportunity to respond to administratively noticed facts.[416]

CONCLUSION

The BIA violates the Due Process Clause of the Fifth Amendment by denying asylum requests solely on the basis of administratively noticed facts to which the alien has not had an opportunity to respond. Aliens must be given an adequate opportunity to challenge or supplement evidence concerning the

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will be taken and even whether rebuttal need be permitted at all. *Castillo-Villagra*, 972 F.2d at 1028; *Gomez-Vigil*, 990 F.2d at 1123 (Fletcher, J., concurring). As the *Castillo-Villagra* court observed, "[t]here is no need to allow rebuttal of the fact that water does not run uphill." *Castillo-Villagra*, 972 F.2d at 1023.

411. *Id.*

412. *See* Castillo v. INS, 951 F.2d 1117 (9th Cir. 1991) (BIA decision will be upheld if supported by substantial evidence); *see supra* note 246 (noting that if there is other evidence in record that substantially supports BIA's decision, improper use of administrative notice will not cause reversal); *cf.* Sarria-Sibaja v. INS, 990 F.2d 442, 444 (9th Cir. 1993) (reversing BIA ruling when BIA did not state alternative basis for decision).

413. *See* Acewicz v. INS, 984 F.2d 1056, 1061 (9th Cir. 1993) (objection to administrative notice dismissed where petitioners had ample opportunity to address change in Polish government before IJ); *see also* Matter of H-M et al., Interim Decision 3204 (BIA Aug. 11, 1993).

414. *See supra* notes 310-14 and accompanying text (describing Ninth Circuit approach to administrative notice by BIA).

415. *Id.*

416. *Id.*

political situation in their home countries because these changes may not automatically eliminate an alien's well-founded fear of persecution. A motion to reopen, made after the BIA has rendered a decision, is not an adequate means of allowing an alien to respond to administrative notice, as some U.S. Courts of Appeals have held. The plain language of immigration regulations makes a motion to reopen inappropriate because an alien may be deported before the BIA rules on the motion. A motion to reopen proceeding is an inadequate substitute for direct review of the facts underlying a deportation order and raises the burden of proof an alien must meet. In addition, the BIA's rote application of administratively noticed facts has deprived aliens of their due process rights. The BIA should adopt the Ninth and Tenth Circuit approach, which warns aliens before a decision is rendered on their asylum claims solely on the basis of administrative notice of changes in the governments of their home countries.

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