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Heads You Stay; Tails You Go: Arbitrariness in Asylum Proceedings and How a Slight Procedural Speedbump May Help

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Heads You Stay; Tails You Go: Arbitrariness in Asylum Proceedings and How a *Slight* Procedural Speedbump May Help

Jay Newman[*]

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INTRODUCTION

Those who come to the United States seeking asylum often do so with minimal personal belongings, basic English language skills, and little knowledge of the United States's legal system. One such immigrant was Miguel Angel Arevalo Quintero.[1] Quintero, like many young men in El Salvador, faced the dilemma of either joining a gang or living in constant fear of one.[2] In 2012, Quintero joined MS-13, an international street gang with a large presence in El Salvador, in an attempt at self-preservation.[3] However, Quintero, unable to cope with the atrocities associated with MS-13, traveled to the United States and sought asylum only a few months after joining.[4]

In support of his claim for asylum, Mr. Quintero stated on his Form I-589 that he sought asylum as a member of a particular social group, that he was a former member of a gang, and that he feared MS-13 would persecute him if he was forced to return to El Salvador.[5] In support of these claims, Quintero testified, while appearing pro se in immigration court, that MS-13 sent him threatening Facebook messages and that his cousin had been killed for deserting the gang.[6] Additionally, Quintero presented extensive *country conditions evidence* detailing the prevalence of gang violence in El Salvador.[7] However, the immigration judge denied all of Quintero's applications for relief.[8] Notably, the immigration judge's discussion of particular social groups consisted solely of a single footnote

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1. Quintero v. Garland, 998 F.3d 612, 619 (4th Cir. 2021).
2. *Id.*
3. *Id.*; Jennifer J. Adams & Jesenia M. Pizaro, *MS-13: A Gang Profile*, 16 J. GANG RSCH. 1, 6 (2009) ("Violence plays a major role in MS-13 culture. ").
4. *Quintero*, 998 F.3d at 619.
5. *See id.* at 641 ("[T]he immigration judge denied Petitioner's application for relief . . . ."); DEPT. OF HOMELAND SEC. & U.S. DEPT. OF JUST., OMB NO. 1615-0067, FORM I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL (2022).
6. *Quintero*, 998 F.3d at 619 ("[G]ang members in El Salvador sent him a menacing Facebook message asking where he was and warning him, 'we take some time, but we don't forget.'").
7. *Id.* at 620; UNIV. OF CAL. AT HASTINGS COLL. OF L. CTR. FOR GENDER AND REFUGEE STUD., FINDING COUNTRY CONDITIONS EVIDENCE FOR ASYLUM AND FEAR-OF-RETURN IMMIGRATION CASES PRO SE MANUAL 6 (2020) ("'Country conditions evidence' refers to written documents that help explain the danger and lack of protection in [an applicant's] country.").
8. *Quintero*, 998 F.3d at 620.

asserting that Quintero was still in MS-13 despite the primary basis for Quintero's claim being that he is a member of a persecuted social group as an MS-13 deserter.[9]

Quintero subsequently appealed his case to the Board of Immigration Appeals (BIA), which affirmed the immigration judge's holding.[10] He then appealed to the United States Court of Appeals for the Fourth Circuit.[11] The Fourth Circuit found that the immigration judge and the BIA failed to meaningfully consider the *country conditions evidence* Quintero offered and that the court mischaracterized his testimony with its assertion that he was still a member of MS-13.[12] Accordingly, the Fourth Circuit vacated the lower authorities' denial of relief and remanded the case.[13] In support of its holding, the Fourth Circuit stated that it is especially important for immigration judges to develop the record in pro se cases because a developed record is critical to facilitate a meaningful appeal.[14] In its conclusion, the Fourth Circuit noted, "In our country, few populations are as vulnerable as non-citizens facing removal proceedings who are unable to secure the assistance of adequate counsel. Yet the consequences they may face are severe: family separation, prolonged detention, and deportation to a country where persecution or even death awaits."[15] Further, the court determined that it would be an unreasonable policy to place the burden solely on asylum seekers to meaningfully develop the record given that they are often "poor, young, uneducated, or (like Petitioner) all three."[16] Thus, the court recognized that an important aspect of the immigration judge's role is to develop a record that would facilitate a meaningful appeal.[17]

As the Fourth Circuit noted in *Quintero v. Garland*, asylum seekers are often unaware of what evidence would convincingly support their case or meaningfully develop the record because of a lack of English language skills and legal knowledge.[18] Other federal circuit courts, however, seem to have ignored these practical observations in similar cases concerning procedures intended to develop the record in asylum and withholding of

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 647–48.
13. *Id.* at 643–47.
14. *Id.* at 627.
15. *Id.* at 647.
16. *Id.*
17. *See id.*
18. *See id.* at 632.

removal cases.[19] Section 208(b)(1)(B)(ii) of the Immigration and Nationality Act (INA), or Title 8, § 1158(b)(1)(B)(ii) of the United States Code, governs how a non-citizen is to sustain the burden of proof within asylum and withholding of removal proceedings.[20] The last sentence of the provision provides, "Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[21] Courts that fail to recognize the practical concerns outlined in *Quintero* have interpreted this provision to not require that the immigration judge provide notice to the petitioner about any evidentiary deficiencies prior to a final judgment.[22] This interpretation leaves the task of determining which facts best support one's cause to the applicant, who likely has little to no legal experience. Therefore, not requiring immigration judges to provide notice also requires the applicant to create a record that supports a full and fair hearing with the immigration judge, an appeal to the BIA, and any subsequent appeals. As the Fourth Circuit's reasoning suggests, this practice is unlikely to consistently result in a record that supports a meaningful appeal.[23]

Additionally, the current procedures for asylum and withholding of removal proceedings[24] allow for wide variances from judge-to-judge in the frequency with which asylum and withholding of removal are granted.[25] The New York immigration courts provide an example of such variances.[26] In the New York immigration courts, one immigration judge

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19. *See, e.g.*, Rapheal v. Mukasey, 533 F.3d 521 (7th Cir. 2008); Gaye v. Lynch, 788 F.3d 519 (6th Cir. 2015); Avelar-Oliva v. Barr, 945 F.3d 757 (5th Cir. 2020); Wei Sun v. Sessions, 883 F.3d 23 (2d Cir. 2018); Uzodinma v. Barr, 951 F.3d 960 (8th Cir. 2020).

20. *See* INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

21. *Id.*

22. *See Rapheal*, 533 F.3d 521; *Gaye*, 788 F.3d 519; *Avelar-Oliva*, 945 F.3d 757; *Wei Sun*, 883 F.3d 23; *Uzodinma*, 951 F.3d 960.

23. *See generally Quintero*, 998 F.3d 612.

24. *See* INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii); INA §§ 240(b)(4), 240(b)(5), 8 U.S.C. § 1229a(b)(4), 1229a(b)(5).

25. *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015–2020*, TRAC IMMIGR., https://trac.syr.edu/immigration/reports/judge2020/denialrates.html [https://perma.cc/68PB-GCAT] (last visited June 5, 2022).

26. *See id.* The Executive Office for Immigration Review, which is under the Department of Justice, administers the immigration court system. Immigration courts conduct civil administrative proceedings. U.S. DEPT. OF JUST., FACT SHEET: OBSERVING IMMIGRATION COURT HEARINGS (2018), https://www.justice.gov/eoir/page/file/1079306/download [https://perma.cc/FF3L-RZEB].

grants asylum in only 5% of cases while another grants asylum in 97% of cases.[27] Such variances exist in immigration courts across the country.[28] Discrepancies this large indicate that there is an unacceptable amount of arbitrariness in these proceedings and raise serious doubts as to whether the immigration court system consistently gives meaningful hearings to non-citizens.

Congress must rectify this issue by providing asylum-seekers an opportunity to meet with the immigration judge overseeing their cases in between the calendar and merits hearings.[29] To implement this, Congress should amend the procedure for removal proceedings in asylum cases to add a conference between the applicant and the immigration judge. In this conference, the immigration judge would identify those facts within the non-citizen's testimony that need additional evidentiary support. If the non-citizen presents the identified evidence, a presumption that the non-citizen has satisfied the burden of proof would be established.

Part I of this Comment sets forth the development of the law and procedures governing asylum and withholding of removal by first looking to the impetus for providing asylum to refugees. It also examines the pathways to asylum within the United States and the due-process rights those procedures afford to non-citizens. Part I then gives an overview of current jurisprudence concerning the procedural rights INA § 208(b)(1)(B)(ii) grants.

Part II of this Comment analyzes the insufficiencies of current jurisprudential interpretations of INA § 208(b)(1)(B)(ii). This analysis highlights the need for Congress to amend the statutory procedures for asylum and withholding of removal. Part III of this Comment proposes a solution to the problems Part II enumerates. Specifically, Part III suggests that Congress should amend INA § 240(b) to provide for a conference between the calendar hearing and the merits hearing of asylum and withholding of removal proceedings. During this conference, the immigration judge would identify shortcomings in the evidence the non-citizen gathered or facts in need of additional support. Further, if the non-

27. *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015–2020*, *supra* note 25.

28. U.S. DEPT. OF JUST., *supra* note 26.

29. The master calendar hearing is the first hearing of the adjudicatory process and serves to advise non-citizens of their rights within the process and the timeline associated with the process. The merits hearing, which is sometimes also referred to as the individual calendar hearing, is a more formal hearing on contested matters. *See* INA §§ 240(b)(4), 240(b)(5), 8 U.S.C. §§ 1229a(b)(4), 1229a(b)(5); 8 C.F.R. §§ 1240.10, 1240.15 (2022).

citizen can provide the requested information, the proposed statute will create a presumption that the non-citizen met the burden of proof.

I. THE HISTORY AND PROCEDURE OF ASYLUM AND WITHHOLDING OF REMOVAL

The concerted international effort to provide greater aid for refugees began in the wake of World War II with the 1948 Universal Declaration of Human Rights, an international agreement that imposed a duty on countries to consider receiving refugees fleeing persecution.[30] The 1951 United Nations Convention Relating to the Status of Refugees (1951 Convention) reinforced this, and in 1967, the United Nations Protocol Relating to Refugees affirmed the duty to take refugees.[31] The statutory basis for asylum traces its roots back to the 1951 Convention, and that convention remains the primary framework for the treatment of refugees in the United States.[32]

The 1951 Convention defined both the classes of people constituting refugees and the protections that should be afforded to them.[33] Specifically, the 1951 Convention considered refugees to be those unwilling or unable to return to their country of origin because of a well-founded fear of persecution on account of their race, religion, nationality, membership of a particular social group, or political opinion.[34] Notably,

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30. *See generally* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

31. Kendall Coffey, *The Due Process Right To Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 312 (2001).

32. *See generally* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP, PROCESS AND POLICY 734 (9th ed. 2020).

33. *See generally* Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

34. *Id.* art. 1:

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> > (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
> >
> > Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

the drafting history of the 1951 Convention suggests that the convention was not intended to require countries to grant lawful status to any person meeting the definition of a refugee.[35] Instead, the 1951 Convention reserved most of the rights generally associated with asylum, like the rights to work authorization and social security, solely for those lawfully in a country.[36] Additionally, the 1951 Convention granted refugees unlawfully residing in participating countries the rights to non-refoulment and access to courts.[37] Many developed countries granted initially unlawful immigrants lawful status as a result of the right to non-refoulment.[38] This lawful status and the additional rights flowing from it are known as *asylum* in many countries.[39] The United States formally accepted this duty to accept refugees fleeing persecution by signing the 1967 United Nations Protocol Relating to the Status of Refugees a year after the United Nations drafted it.[40] Then, the Refugee Act of 1980 codified the right to seek asylum.[41]

A. History of Asylum in the United States

Although not codified until 1980, Congress has long recognized the need to provide exemptions in immigration law to prevent immigrants who

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> (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

35. ALEINIKOFF ET AL., *supra* note 32, at 810–11.
36. Convention Relating to the Status of Refugees, *supra* note 33, arts. 17, 23, 24.
37. *Id.* art. 16. Non-refoulment is the right to not be forced to return to the country where a refugee was persecuted. *See id.* art. 33.
38. ALEINIKOFF ET AL., *supra* note 32, at 733.
39. *Id.* at 812.
40. Coffey, *supra* note 31, at 314.
41. *See generally* Refugee Act of 1980, 94 Stat. 102 (1980).

have unjustly become political enemies of their home country's government from being returned to their home country.[42] This policy prevails even when an immigrant is otherwise inadmissible or deportable.[43] Congress illustrated this policy in 1875 when it provided that immigrants who have been convicted of a crime were not excludable if they had been convicted of political offenses in their home country.[44] However, Congress did not systematically attempt to provide asylum until the end of World War II.[45] Recognizing their inadequate efforts to assist Jewish refugees during the Holocaust, the United States and the international community took action to provide for refugees.[46] For the next 30 years, Congress enacted legislation that spurred deliberate action to welcome refugees to the United States.[47]

Some of these focused initiatives dealt with displaced persons World War II left stranded,[48] refugees from the Hungarian revolution in 1956,[49] and Cubans who fled after Fidel Castro took power.[50] In 1950, Congress also enacted the International Security Act, which prevented non-citizens from being deported to any country that the Attorney General determined would subject them to physical persecution.[51] A few years later, Congress amended the International Security Act to make explicit that withholding deportation falls within the Attorney General's discretion.[52] The power to withhold deportation later became known as *withholding of deportation* and is now known as *withholding of removal*.[53] As originally enacted in

42. *See* Page Act of 1875 (Immigration Act), ch. 141 § 5, 18 Stat. 477 (1875).

43. *See id.*

44. *Id.*

45. ALEINIKOFF ET AL., *supra* note 32, at 733.

46. *See generally* Convention Relating to the Status of Refugees, *supra* note 33; Refugee Act of 1980, 94 Stat. 102 (1980). The Holocaust (1933–1945) was the systematic, state-sponsored persecution and murder of six million European Jews by the Nazi German regime and its allies and collaborators. *Introduction to the Holocaust*, HOLOCAUST ENCYCLOPEDIA (Nov. 5, 2021), https://encyclopedia.ushmm.org/content/en/article/introduction-to-the-holocaust [https://perma.cc/W67E-Z994].

47. *See generally* ALEINIKOFF ET AL., *supra* note 32, at 734.

48. Displaced Persons, Refugees and Orphans Act, ch. 647, 62 Stat. 1009 (1948).

49. Peter Pastor, *The American Reception and Settlement of Hungarian Refugees in 1956–1957*, 9 HUNGARIAN CULTURAL STUD, E-J. AM. HUNGARIAN EDUCATORS ASS'N 197, 200 (2016).

50. INA § 243(h), 8 U.S.C. § 1253(h).

51. Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987 (1950).

52. INA § 243(h), 8 U.S.C. § 1253(h).

53. INA § 241(b)(3), 8 U.S.C § 1231(b)(3); 8 C.F.R. § 208.16 (2022).

INA § 243(h), withholding of removal afforded no official immigration status, although it did provide some basic protections.[54] Subsequently, the Refugee Act of 1980 improved the position of refugees who came to the United States on their own.[55]

In particular, Congress enacted § 208 of the INA, which established *asylum* status for immigrants who are refugees as defined in the 1951 United Nations Convention.[56] In addition to creating asylum, the Refugee Act also amended § 243(h) to make its provisions mandatory.[57] Accordingly, these actions brought the United States in line with its obligations under the 1967 United Nations Protocol.[58] As an important part of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) amendments, Congress moved § 243(h) to § 241(b)(3) of the INA.[59] Thus, today, INA §§ 208 and 241(b)(3) establish two distinct forms of relief for immigrants who come to the United States fleeing persecution.[60] Immigration and Nationality Act § 208, which governs asylum, requires that immigrants have a well-founded fear of persecution, while § 241(b)(3), which governs withholding of removal, requires that the immigrants show that their life or freedom would be threatened if they were returned to their home country.[61]

A few key differences exist between those who are allowed to stay in the country via asylum under § 208 and those allowed to stay via withholding of removal under § 241(b)(3). On the one hand, recipients of asylum are allowed to, among other things, work, bring their families to the United States,[62] and receive a pathway to citizenship.[63] On the other hand, those withheld from removal may receive work authorization[64] but may not be allowed to bring their families, and, in principle, they could be removed at any time if a third country is willing to receive them.[65]

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54. INA § 243(h), 8 U.S.C. § 1253(h) (barring the Attorney General from deporting immigrants to countries where, in the Attorney General's opinion, the immigrants would be subject to physical persecution).

55. *See* generally INA § 208, 8 U.S.C. § 1158 (establishing asylum status for individuals who met the statutory definition of refugee).

56. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).

57. INA § 243(h), 8 U.S.C. §1253(h) (1952) (amended 1960).

58. Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1967).

59. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

60. INA §§ 208, 241(b)(3), 8 U.S.C. §§ 1158, 1231(b)(3).

61. INA §§ 208, 241(b)(3), 8 U.S.C. §§ 1158, 1231(b)(3).

62. INA § 208(b)(3), 8 U.S.C. § 1158(b)(3).

63. INA § 209(b), 8 U.S.C. § 1159(b).

64. 8 C.F.R. § 274a.12(a)(10) (2022).

65. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

Additionally, unless they can qualify for citizenship on other grounds, parties withheld from removal are left indefinitely without official status.[66]

B. Procedures for Seeking Asylum and Withholding of Removal

Immigration and Nationality Act § 208(b)(1)(A) sets forth the statutory basis for granting asylum.[67] This provision grants the Attorney General and the Secretary of Homeland Security the power to grant asylum to any non-citizen who follows the requisite procedures.[68] If the applicant follows these procedures, the Attorney General or the Secretary of Homeland Security must then deem the applicant a refugee as defined in the INA.[69] The INA defines a refugee as:

> [A]ny person who is outside any country of such person's nationality . . . 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 . . . .[70]

Thus, the INA gives broad authority to the Attorney General and the Secretary of Homeland Security to grant asylum.

Applications for asylum and withholding of removal follow one of three different paths depending on whether the asylum applicant is in removal proceedings when the application is filed and if so, in what kind of removal proceeding.[71] These paths are: (1) the affirmative path; (2) the defensive path; and (3) the expedited removal procedure.[72] The two most prominent paths are affirmative and defensive applications.[73] When seeking asylum affirmatively, non-citizens present their case before an asylum officer prior to the initiation of removal proceedings.[74] When seeking asylum defensively, non-citizens submit an application to the immigration judge after the initiation of removal proceedings.[75] Regardless of whether a non-citizen seeks asylum affirmatively or

66. *See id.*
67. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).
68. *Id.*
69. *Id.*
70. INA § 201(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).
71. *See* INA §§ 208, 235, 8 U.S.C. §§ 1158, 1225.
72. *See* INA §§ 208, 235, 8 U.S.C. §§ 1158, 1225.
73. *See* INA § 208, 8 U.S.C. § 1158.
74. *Id.*
75. *Id.*

defensively, the substantive criteria for establishing eligibility are the same.[76] Additionally, applicants generally must seek asylum within one year of arrival; however, the INA does not provide a time limit in which applicants may seek withholding of removal.[77] The third path is through the expedited removal procedure, which typically applies to certain non-citizens arriving to or recently entering the United States.[78] The expedited removal procedure only allows asylum for a narrow class of citizens who must first clear a credible-fear screening before their case moves forward as a defensive application.[79]

As a preliminary matter, Congress requires non-citizens applying for both asylum and withholding of removal to file a Form I-589.[80] This form asks applicants questions such as why they are seeking protection and what risks they may face if they return to their home country.[81] This form also asks for information that is relevant to asylum seekers' claims, such as whether they have any organizational affiliations, the current whereabouts and conditions of family members, and the circumstances of their departure.[82] Applicants may also provide additional materials such as news accounts about the conditions of their home country, affidavits, medical records, and human rights reports.[83] Further, INA § 208 requires that, at the time of filing an application, non-citizens be made aware of their privilege to be represented by counsel and provided a list of attorneys who represent asylum seekers pro bono.[84] Section 208 further states that asylum may not be granted until the applicant's identity is checked across law enforcement and national security databases.[85]

The first of the three paths for seeking asylum, an affirmative application, applies to applicants who are not currently in removal proceedings.[86] Applicants in the affirmative process may file an

76. Patrick J. Glen, *In re* L-A-C-*: A Pragmatic Approach to the Burden of Proof and Corroborating Evidence in Asylum Proceedings*, 35 GEO. IMMIGR. L.J. 1, 6 (2020).

77. INA § 208(a)(2)(b), 8 U.S.C. § 1158(a)(2)(b).

78. INA § 235(b)(1), 8 U.S.C. § 1225(b)

79. *See id.*

80. 8 C.F.R §§ 208.3, 1208.3 (2022).

81. DEPT. OF HOMELAND SEC. & U.S. DEPT. OF JUST., *supra* note 5.

82. *Id.*

83. *Id.*

84. *See* INA § 208(d)(4), 8 U.S.C. § 1158(d)(4).

85. INA § 208(d)(5)(A)(i), 8 U.S.C. § 1158(d)(5)(A)(i).

86. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states [https://perma.cc/BC7C-YNUD] (last visited Aug. 15, 2022).

affirmative application by mailing a Form I-589 to the United States Citizenship and Immigration Service (USCIS).[87] The USCIS then schedules an interview with applicants who submitted compliant applications.[88] Subsequently, asylum officers perform a non-adversarial interview with the applicant.[89]

Asylum officers grant or deny applications on the basis of the application, information gathered from the interview and the State Department, and "other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions."[90] Asylum officers grant asylum in meritorious cases anywhere from 15% to 50% of the time.[91] Generally, when an asylum officer finds that a case does not meet the standards for asylum, the case is referred to immigration court.[92] There, an immigration judge will consider the case in a removal proceeding.[93]

The second pathway, the defensive application, applies to applicants seeking asylum once a removal proceeding is already underway.[94] Here, the applicant can only apply for asylum and withholding of removal by providing a defensive application to an immigration judge.[95] This subjects the applicant to the burden of proof found in INA § 208.[96] Asylum and withholding of removal applicants typically state their desire to seek these forms of relief to the immigration judge at the master calendar hearing, which is the first hearing in removal proceedings.[97] During the master calendar hearing, the court schedules a second hearing to adjudicate contested matters and applications for relief, which is called the merits hearing.[98] The judge then grants applicants a certain period of time in which applicants must fill out Form I-589 and file it with the judge.[99] The matter then proceeds to the more formal merits hearing, which involves a

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87. *See* DEPT. OF HOMELAND SEC. & U.S. DEPT. OF JUST., *supra* note 5.

88. 8 C.F.R. § 208.9 (2022).

89. *Id.* As prescribed by statute, asylum officers are full-time professionals who receive training in areas such as international human rights law and non-adversarial interview techniques. *Id.* § 208.1.

90. *Id.* § 208.12(a).

91. *See* ALEINIKOFF ET AL., *supra* note 32, at 737.

92. *See* 8 C.F.R. § 208.14(c)(1) (2022).

93. *Id.*

94. *Obtaining Asylum in the United States*, *supra* note 86.

95. 8 C.F.R. § 208.2(b) (2022).

96. INA § 208(b), 8 U.S.C. § 1158(b).

97. *See* ALEINIKOFF ET AL., *supra* note 32, at 738.

98. *See* INA §§ 240(b)(4), 240(b)(5), 8 U.S.C. §§ 1229a(b)(4), 1229a(b)(5); 8 C.F.R. §§ 1240.10, 1240.15 (2022).

99. *See* ALEINIKOFF ET AL., *supra* note 32, at 738.

Department of Homeland Security (DHS) trial attorney and examination and cross-examination of witnesses.[100] The examinations include cross-examination by the applicant or the applicant's counsel of any witnesses provided by the Department of Homeland Security.[101]

The third pathway by which a non-citizen may seek asylum is an application during expedited removal proceedings.[102] In expedited removal proceedings, INA § 235(b)(1), in tandem with INA §§ 212(a)(6)(C) or (7), subjects non-citizens to removal by an immigration officer as opposed to an immigration judge.[103] However, this is only the case for individuals in one of the following categories: (1) entrants arriving at ports of entry; (2) entrants brought to the United States after interdiction at sea; or (3) entrants apprehended within 100 miles of the U.S. and within 14 days of entrance who have not been admitted or paroled.[104] Under §§ 235(b)(1)(A)(i)–(ii), immigration officers may order non-citizens removed for having false or inadequate identification or for other fraud or misrepresentation.[105] A non-citizen who falls into this class but who expresses a fear of return or an intention to seek asylum is then referred to an asylum officer who interviews the non-citizen.[106] The purpose of this interview is to determine if the non-citizen has a credible fear of persecution, defined in INA § 235(b)(1)(B)(v) as a "significant possibility . . . that the alien could establish eligibility for asylum . . . ."[107] If asylum officers determine that the non-citizen has such a possibility of establishing his or her claim, then the case moves forward on the merits as a defensive asylum claim.[108] Alternatively, if asylum officers determine that the non-citizen did not meet the significant-possibility standard, the

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100. U.S. DEPT. OF JUST., IMMIGRATION COURT PRACTICE MANUAL § 4.16(d) (2020).

101. *Id.*

102. INA § 235(b)(1), 8 U.S.C. § 1225(b)(1).

103. *Id.*; INA §§ 212(a)(6)(C), 212(a)(7), 8 U.S.C. §§ 1182(a)(6)(C), 1182(a)(7).

104. HILELL R. SMITH, CONG. RSRCH. SERV., IF 11357, EXPEDITED REMOVAL OF ALIENS: AN INTRODUCTION (2022); 69 Fed. Reg. 48878 (August 11, 2004); INA §§ 212(a)(6)(C), 212(a)(7), 8 U.S.C §§ 1182(a)(6)(C), 1182(a)(7); 22 C.F.R. § 40.1(p) (2022) ("Port of entry means a port or place designated by the DHS at which an alien may apply to DHS for admission into the United States.").

105. INA §§ 235(b)(1)(A)(i–ii), 8 U.S.C. §§ 1225(b)(1)(A)(i–ii); INA §§ 212(a)(6)(C), 212(a)(7), 8 U.S.C §§ 1182(a)(6)(C), 1182(a)(7).

106. INA §§ 235(b)(1)(A)(i–ii), 8 U.S.C. §§ 1225(b)(1)(A)(i–ii); INA §§ 212(a)(6)(C), 212(a)(7), 8 U.S.C §§ 1182(a)(6)(C), 1182(a)(7).

107. INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v).

108. INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii).

non-citizen is ordered to be removed.[109] However, the non-citizen can request that an immigration judge review a negative determination no later than one week after the determination is made.[110] Judicial review of the immigration judge's decision on credible fear is available in limited circumstances.[111]

Lastly, if a non-citizen is ineligible for asylum for reasons such as not requesting asylum within a year of entry or a disqualifying criminal history, the non-citizen may request withholding of removal under INA § 241(b)(3) as an alternative form of relief.[112] This is because the Attorney General's grant of such is not discretionary if the non-citizen can meet the burden of proof.[113] A non-citizen qualifies for withholding of removal if the Attorney General finds that the non-citizen's life or freedom would be threatened if returned to the non-citizen's home country.[114]

Similarly, asylum applicants may establish eligibility for asylum by showing either that they have suffered persecution or that they have a well-founded fear of future persecution.[115] Although persecution is not defined in the INA,[116] courts have defined it as an *extreme concept*, which includes the threat of death, torture, or injury to one's person or liberty on account of a protected ground, such as race, religion, or nationality.[117]

C. Due Process

Having established the statutory basis and the procedures by which non-citizens seek relief from persecution, the next questions are what rights these statutes confer upon the non-citizen and how non-citizens raise perceived issues with the handling of their cases. The answers to these questions center on the due-process rights of non-citizens seeking relief from persecution. Generally, non-citizens within the United States have

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109. INA § 235(b)(1)(B)(iii), 8 U.S.C. § 1225(b)(1)(B)(iii).
110. INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III).
111. INA §§ 242(a)(2)(A), 242(e), 8 U.S.C. §§ 1252(a)(2)(A), 242(e).
112. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A).
113. *Id.*
114. *Id.*
115. Glen, *supra* note 76, at 6 (citing 8 C.F.R. § 208.13 (2020)).
116. *Id.* (citing Marquez v. INS, 105 F.3d 374, 379 (7th Cir. 1997)) ("Congress has left defining the word 'persecution' to the courts.").
117. *See, e.g.*, *id.* at 6–7 (citing Kipkemboi v. Holder, 587 F.3d 885, 888 (8th Cir. 2009)).

the benefit of full due-process rights in non-immigration contexts[118] but far more limited due-process rights within the context of immigration.[119]

The basis of due process within the context of an immigration proceeding begins in 1889 with *Ping v. United States*, colloquially known as the "Chinese Exclusion Case."[120] This case arose in response to the Scott Act, which prohibited the return of Chinese laborers to the United States even if they had been issued a certificate that, under a previous congressional act, allowed them to return.[121] Chae Chan Ping, a Chinese laborer with such a certificate, left the United States while the certificate still allowed entry but returned after the Chinese Exclusion Act invalidated it.[122] Thus, after returning from a trip to China to visit his family, the federal government denied Chae Chan Ping entry pursuant to the Scott Act.[123] In response, Chae Chan Ping brought an action against the federal government claiming that the act violated his due-process rights under the Fifth and Fourteenth Amendments.[124]

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118. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The Supreme Court explicitly recognized non-citizens' rights to traditional due process in *Yick Wo v. Hopkins*. The 1886 case involved the city of San Francisco shutting down Chinese-immigrant-owned laundry mats. *Id.* at 366. The main issue in *Yick Wo* was whether a city ordinance that allowed the city of San Francisco to shut down all 200 Chinese-owned laundries and only one Caucasian-owned laundry mat was unconstitutional. *Id.* The Court answered as a preliminary issue, however, whether the Chinese immigrants were entitled to due process under the Fourteenth Amendment's due process clause despite the Chinese immigrants not being citizens of the United States. *Id.* at 367. On this point, the Court stated that the Fourteenth Amendment is not confined to citizens and that its provisions are "universal in their application, to all persons within the territorial jurisdiction . . . ." *Id.* at 369. Thus, the Court held that the Fourteenth Amendment makes no distinction between a citizen and non-citizen. *Id.*

119. *See generally* Ping v. U.S., 130 U.S. 581 (1889).

120. *Id.* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1633 (1992) ("The first Supreme Court case to consider directly the federal government's power to exclude aliens was the Chinese Exclusion Case, decided in 1889"); Lauri Kai, *Embracing the Chinese Exclusion Case: An International Law Approach to Racial Exclusions*, 59 WM. & MARY L. REV. 2617 (2018).

121. *Ping*, 130 U.S. at 589 (citing § 4 of the Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884, 22 St. p. 59, c. 126; 23 St. p. 115, c. 220).

122. *Id.* at 582.

123. *Id.* at 589. The statute referred to in this case was § 4 of the Restriction Act of May 6, 1882, as amended by the act of July 5, 1884. *Id.*

124. *Id.* at 582. The primary distinction between the Fifth and Fourteenth Amendments is that the Fifth Amendment applies the federal government while the Fourteenth Amendment applies to the states. U.S. CONST. amends. V, XIV.

The United States Supreme Court rejected Chae Chan Ping's claim and instead acknowledged the government's plenary power to control immigration.[125] Specifically, the Court stated that "[T]he government of the United States . . . can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation."[126] The Court reasoned that it is a basic function of a government to control who is allowed to enter its territory.[127] The Court specifically stated, "The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States . . . cannot be granted away or restrained on behalf of any one."[128] Thus, the Court held that the United States government possessed the plenary power to exclude any non-citizens from entering the country.[129] Therefore, non-citizens attempting to enter the United States do not have any due-process rights.[130]

A few years later in 1893, the Court in *Fong Yue Ting v. United States* faced a habeas corpus issue raised by non-citizens already within United States territory.[131] Specifically, *Fong Yue Ting* involved three Chinese laborers who were arrested and held by the federal government for not having certificates of residence.[132] The Court specifically addressed whether non-citizens within the United States have more due-process rights than those seeking to enter the country.[133] Here, the Court held that non-citizens are only entitled to the safeguards of the Constitution and the protection of the laws of the United States while the government permits them to remain in the United States.[134] The Court noted that Congress, under its power to exclude or expel non-citizens, may remove any non-citizen from the country through executive officers without judicial trial or examination.[135] Finally, the Court held that an order of deportation is not a punishment; therefore, the provisions of the Constitution securing

125. *Ping*, 130 U.S. at 581.
126. *Id.* at 603.
127. *Id.* at 603–04.
128. *Id.* at 609.
129. *See id.*
130. *See id.*
131. Fong Yue Ting v. U.S., 149 U.S. 698, 698 (1893).
132. *Id.* at 703.
133. *Id.* at 711.
134. *Id.* at 724.
135. *Id.* at 728 ("[C]ongress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed out of the country be executive officers, without judicial trial or examination . . . .").

the right to a trial by jury and prohibiting unreasonable searches and seizures were not applicable.[136] Thus, between *Ping* and *Fong Yue Ting*, the Supreme Court established that Congress holds plenary power over immigration in both the admission and deportation contexts.

1. The Supreme Court Extends Procedural Due Process to Unauthorized Immigrants in Immigration Proceedings

In 1903, a decade after *Fong Yue Ting* and 14 years after *Ping*, the Supreme Court in *Yamataya v. Fisher*, often referred to as the "Japanese Immigrant Case,"[137] explicitly extended due-process rights to immigrants alleged to be in the United States either lawfully or unlawfully.[138] *Yamataya* involved a Japanese immigrant who challenged an administrative decision that found her to be a pauper and, thus, excludable under the applicable immigration statutes.[139] Specifically, the immigrant claimed that she was deprived of procedural due process, as she was not given a meaningful opportunity to be heard.[140] In response to these claims, the Court held that while it is true that Congress vested the executive branch with the power to exclude immigrants at the border, a different set of rules must apply to afford due process to immigrants within the jurisdiction of the United States.[141]

Specifically, the Court held that it is unlawful for an executive officer to deport an immigrant who has entered the country, even illegally, without giving that immigrant an opportunity to be heard on questions concerning his or her right to remain in the country.[142] Additionally, the Court stated that allowing executive officers to do so would constitute an arbitrary exercise of power that would be incompatible with the principles of due process of law.[143] Notably, the Court did not address whether an unauthorized immigrant can invoke the Fifth Amendment; instead, the Court based the immigrant's right to due process in the immigration

136. *Id.* at 730.

137. Motomura, *supra* note 120, at 1637; Landon v. Plasencia, 459 U.S. 21, 33 (1982).

138. Yamataya v. Fisher, 189 U.S. 86, 101 (1903).

139. *Yamataya*, 189 U.S. at 94. The term *excludable* is not used in the modern immigration framework. The Illegal Immigration Reform and Immigration Responsibility Act changed the language to *admissible*. Pub. L. 104-208, 100 Stat. 3009–575 (1996) (codified at 8 U.S.C. § 1101(a)).

140. *Yamataya*, 189 U.S. at 94.

141. *Id.* at 100.

142. *Id.*

143. *Id.*

statutes.[144] Further, the Court noted that due process does not necessarily require an opportunity to be heard "upon a regular, set occasion, and according to the forms of judicial procedure . . . ."[145] However, the Court stated that it does include an opportunity to be heard that will secure the *prompt* and *vigorous* action that Congress intended while still being appropriate for the nature of the case.[146] Thus, the Court established that immigrants within the jurisdiction of the United States are entitled to at least the procedural due-process rights within the immigration statutes, even for immigrants arriving in the United States illegally.[147] Although the Court decided *Yamataya* well over a century ago, its principles remain in effect today.[148] This is evident in the Court's affirmation of these principles in cases such as *Landon v. Plasencia*, where the Court held that a returning non-citizen who was stopped at the border but was later being held in the United States was entitled to procedural due process.[149]

2. Procedural Due Process vs. Substantive Due Process

The *Yamataya* Court's avoidance of whether the immigrant was entitled to substantive due process under the Due Process Clause of the Constitution is significant. The difference between procedural and substantive due process is that those entitled to only procedural due process may only challenge the divestiture of their liberty or property by challenging the process by which they were divested.[150] Specifically, a plaintiff seeking to challenge procedural due process would allege that the divestiture was not conducted in a manner consistent with the process prescribed by Congress in the governing statute.[151] This means that a person entitled solely to procedural due process cannot raise claims based on substantive constitutional rights such as equal protection or freedom of speech.[152] As a simple illustration, imagine a child has been expelled from school, and the child's parents think the expulsion is unjust. If the child is entitled only to procedural due process, the parents could challenge the expulsion only on the basis that the school did not follow the proper

144. *Id.*
145. *Id.* at 101.
146. *Id.*
147. *Id.* at 100–01.
148. Landon v. Plasencia, 459 U.S. 21, 22 (1982).
149. *Id.*
150. Motomura, *supra* note 120, at 1656.
151. *Id.*
152. *Id.*

protocol when determining if expulsion was appropriate.[153] If the parents wanted to challenge the expulsion because they thought the school expelled the child due to the child's race or religion, the claim would be barred. Claims, such as the latter, concern substantive rights guaranteed in the Constitution and are outside of the scope of procedural due process.[154]

Although procedural due process entails something less than the typical full complement of rights under the Constitution, the Supreme Court has noted that procedural due process nonetheless imposes constraints on government decisionmakers.[155] One of these constraints is the opportunity to be heard in a meaningful manner.[156] Further, the Supreme Court in *Reno v. Flores* reasoned that "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[157] Together, these principles require the federal government to provide a meaningful hearing to those seeking asylum and withholding of removal.[158] However, the immigration court system has systemically deprived asylum and withholding of removal applicants of a meaningful hearing and, thus, their procedural due-process rights.[159] Specifically, the procedure for sustaining the burden of proof in asylum and withholding of removal proceedings has allowed for arbitrariness and has effectively deprived many non-citizens of their § 240(b)(2) hearing under the INA.[160]

D. Pre-REAL ID Act Burden of Proof in Asylum and Withholding of Removal

Just as there are different methods for non-citizens to seek asylum, there are also different standards of proof. Pursuant to INA § 208(b)(1)(B), an applicant has the burden of proving that he or she meets § 101(a)(42)(A)'s definition of a refugee.[161] An applicant is considered a refugee if he or she establishes that race, religion, nationality, membership in a particular social group, or political opinion "will be at least one central reason for persecuting the applicant."[162] Immigration and Nationality Act

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153. *Id.*
154. *Id.*
155. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).
156. *Id.* (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
157. Reno v. Flores, 507 U.S. 292, 306 (1993).
158. *Mathews*, 424 U.S. at 333; *Reno*, 507 U.S. at 306.
159. *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015–2020, supra* note 25.
160. *Id.*
161. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).
162. *Id.*

§ 101(a)(42)(A) defines a *refugee* as one who cannot return to his or her country of origin because of persecution or a "well-founded fear of persecution . . . ."[163] With regard to the burden of proof for establishing a claim of asylum, 8 C.F.R. § 1208.13 governs.[164] This provision provides that an applicant has a *well-founded fear* when: (1) the applicant has a fear of persecution in the applicant's home country on account of race, nationality, religion, membership in a particular social group, or political opinion; (2) there is a reasonable possibility of persecution if the applicant were to return to his or her home country; and (3) the applicant is unwilling to return to the applicant's home country because of such fear.[165] Notably, the only objective criterion in this definition—and, thus, the only term in need of defining—is *reasonable possibility*. The Supreme Court in *INS v. Cardoza-Fonseca* held that a reasonable possibility may be a less than 50% chance of persecution.[166] Specifically, the Court noted, with no apparent limiting language, that a possibility of future persecution as low as 10% is a reasonable possibility.[167]

Although asylum and withholding of removal are related claims of relief, the applicant's burden of proof for withholding of removal claims is significantly higher.[168] As with asylum, the applicant generally carries the burden of proof in withholding of removal.[169] However, to meet the burden of proof, the applicant for withholding of removal must establish that he or she *would be* threatened in the proposed country of removal due to the applicant's race, religion, nationality, membership in a particular social group, or political opinion.[170] The Supreme Court in *INS v. Stevic* held that the *would be* standard requires an applicant for withholding of removal to show that he or she would more likely than not be threatened in the proposed country of removal on the basis of the protected grounds.[171] However, in cases where the applicant has established past persecution on the basis of the protected grounds, there is a rebuttable presumption that the applicant would be subjected to future persecution on account of those same characteristics.[172] The USCIS, however, may

163. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).
164. 8 C.F.R. § 1208.13 (2022).
165. *Id.* § 1208.13(b)(2).
166. INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).
167. *See id.* at 440.
168. 8 C.F.R. § 1208.16 (2022).
169. *Id.* § 1208.16(b).
170. *Id.*
171. INS v. Stevic, 467 U.S. 407, 429–30 (1984).
172. 8 C.F.R. § 1208.16(b)(1)(i) (2022).

overcome the presumption.[173] The USCIS may do this by proving by a preponderance of the evidence that the conditions in the applicant's home country no longer pose a threat or that the applicant could relocate to a safe place within the applicant's home country.[174]

The procedure for sustaining the burden of proof once the applicant is in immigration court is the same for both asylum and withholding of removal proceedings.[175] Congress enacted INA § 208(b)(1)(B)(ii), the provision governing these procedures, relatively recently in 1996 as part of the REAL ID Act.[176] To understand Congress's goals when enacting this provision and the subsequent federal circuit split concerning its meaning, a contextual overview is necessary.

Prior to the enactment of the REAL ID Act—in which Congress enacted several amendments to the asylum statue governing matters including corroboration, burden of proof, and credibility determinations—the INA did not expressly allocate the burden of proving eligibility for asylum.[177] However, in the accompanying regulations, the Department of Homeland Security provided that the burden of proof falls on the asylum seeker to prove that he or she is a refugee as defined by the INA.[178] The regulations also provided that the testimony of the applicant may be enough on its own to meet the burden of proof.[179]

Courts have long recognized that asylum cases pose an inherent problem when it comes to proof because the circumstances giving rise to these claims often happen in distant countries rendering an investigation impractical.[180] Recognizing this issue, the Board of Immigration Appeals (BIA) has held that in some instances the applicant's testimony may be the only evidence available, and that testimony may suffice to meet the applicant's burden when "the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for . . . fear."[181] The BIA has also noted that a lack of corroborating

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173. *See id.*
174. *See id.* § 1208.16(b)(1)(ii).
175. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii); INA § 241(b)(3)(C), 8 U.S.C § 1231(b)(3)(C).
176. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified as amended at 8 U.S.C. § 1158(b)(1)(B)(ii)).
177. Glen, *supra* note 76, at 8.
178. 8 C.F.R. § 208.13 (2022).
179. *Id.*
180. *See* Mejia-Paiz v. INS, 111 F.3d 720, 722 (9th Cir. 1997); Zhang v. INS, 386 F.3d 66, 71 (2d Cir. 2004).
181. *In re* Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. 1987).

evidence is not necessarily fatal to an applicant's claim.[182] The BIA made it clear, however, that every effort should be made to obtain such evidence because insufficient corroborative evidence could be fatal when the testimony alone does not persuade the immigration judge.[183]

In the case of *In re S-M-J-*, the BIA elaborated on its position regarding corroborative evidence, holding that corroborative evidence should be provided when such evidence is reasonably expected.[184] Further, the BIA noted that evidence such as the general conditions of the country from which the asylum applicant is seeking refuge should normally be available.[185] Additionally, the BIA clarified that even when the applicant's testimony is consistent with the general country conditions, corroborative evidence, when reasonably available, still may be required in the form of items such as birth certificates or media accounts of large demonstrations.[186] Thus, the BIA made clear that, although not required, corroborative evidence is generally necessary to carry the burden of proof.[187]

Federal circuit courts, however, did not unanimously adopt the BIA's framework for corroborative evidence before the REAL ID Act.[188] The Second and Third Circuit Courts of Appeals provided the most thorough support for the BIA's framework, reasoning that the BIA's framework was consistent with the text of the INA because it acknowledged the use of the permissive term *may* in the statute and directed that credible testimony may not always be sufficient to carry the burden of proof.[189] Further, the Second and Third Circuits noted that the BIA's framework was consistent with international standards for the treatment of refugees[190] and was also, at a minimum, not inconsistent with precedent in their respective jurisprudence.[191]

The Ninth and Seventh Circuits, however, were not convinced that corroborating evidence could be required when an applicant was deemed

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182. *Id.*
183. *Id.*
184. *In re* S-M-J-, 21 I. & N. Dec. 722, 724–25 (B.I.A. 1997).
185. *Id.* at 724.
186. *Id.*
187. *See id.* at 724–25.
188. Glen, *supra* note 76, at 11.
189. Diallo v. INS, 232 F.3d 279, 285–86 (2d Cir. 2000); Abdulai v. Ashcroft, 239 F.3d 542, 554 (3d Cir. 2001).
190. THE UN REFUGEE AGENCY, *Handbook on Procs. and Criteria for Determining Refugee Status and Guidelines on Int'l Prot.*, U.N. Doc. HCR/1P/4/ENG/REV.4 (2019).
191. *Diallo*, 232 F.3d at 285–86; *Abdulai*, 239 F.3d at 554.

credible.[192] Specifically, in *Uwase v. Ashcroft*, the Seventh Circuit held that when an asylum applicant presents convincing testimony, the applicant is not required to submit corroborating evidence even if the evidence is easily attainable.[193] In *Sidhu v. INS* and *Kataria v. INS*, the Ninth Circuit took a slightly different approach.[194] In these cases, the court drew a line between using a failure to corroborate to make a general credibility determination, which it deemed acceptable, and using a failure to corroborate to deny an otherwise credible applicant relief, which it deemed unacceptable.[195]

II. REAL ID ACT

In 2005, Congress sought to remedy the above disagreement, among other things, with the passage of the REAL ID Act (the Act).[196] The Conference Report for the Act observed that the INA did not provide explicit evidentiary standards for the granting of asylum or the necessity of corroborating evidence.[197] Further, the report observed that a circuit split emerged over the standards for determining whether corroborating evidence is necessary.[198] In its effort to remedy this discrepancy, Congress enacted the following provision:

> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.[199]

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192. Sidhu v. INS, 220 F.3d 1085, 1090 (9th Cir. 2000); Gontcharova v. Ashcroft, 384 F.3d 873, 877 (7th Cir. 2004).
193. Uwase v. Ashcroft, 349 F.3d 1039, 1041 (7th Cir. 2003).
194. *Sidhu*, 220 F.3d at 1090; Kataria v. INS, 232 F.3d 1107, 1114 (9th Cir. 2000).
195. *Sidhu*, 220 F.3d at 1090; *Kataria*, 232 F.3d at 1114.
196. Glen, *supra* note 76, at 16.
197. *Id.*
198. *Id.*
199. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

With this provision, Congress adopted the BIA's framework from *In re S-M-J-* and codified the rule that corroborative evidence may be required to carry the burden of proof even when the applicant has testified credibly.[200]

This new provision, however, simply created a new disagreement amongst the federal circuit courts.[201] Specifically, courts disagreed as to the procedures required when an immigration judge determines that the applicant must present corroborating evidence to meet his or her burden of proof.[202] Some courts, such as the Ninth and Third Circuits, determined that the statute is forward-looking, meaning that the immigration judge must notify the applicant of deficiencies and allow the applicant to obtain missing evidence or explain why such evidence is unobtainable.[203] Other courts, such as the Second, Fifth, Sixth, Seventh, and Eighth Circuits, favor a backward-looking approach, meaning that immigration judges may deny relief altogether upon determining that corroborating evidence was needed, reasonably available, and not provided.[204]

A. The Forward-Looking Approach

The Ninth Circuit in *Ren v. Holder* concluded that a plain reading of the relevant language of INA § 208(b)(1)(B)(ii) indicates that the provision is forward-looking.[205] In particular, the court looked to the words *where*, *determines*, *should provide*, *must be provided*, *does not have*, and *cannot reasonably obtain*.[206] The Ninth Circuit found this language to be fundamentally forward-looking and that the prescribed actions for the immigration judge are initiated at the moment he or she decides that any or more corroboration is needed.[207] As an example, the court reasoned that if Congress intended the provision to allow an

200. *See generally In re* S-M-J-, 21 I. & N. Dec. 722 (B.I.A. 1997).

201. *See generally* Ren v. Holder, 648 F.3d 1079 (9th Cir. 2011); Saravia v. Att'y Gen. U.S., 905 F.3d 729 (3d Cir. 2018); Wei Sun v. Sessions, 883 F.3d 23 (2d Cir. 2018); Avelar-Oliva v. Barr, 954 F.3d 757 (5th Cir. 2020); Gaye v. Lynch, 788 F.3d 519 (6th Cir. 2015); Rapheal v. Mukasey, 533 F.3d 521 (7th Cir. 2008); Uzodinma v. Barr, 951 F.3d 960 (8th Cir. 2020).

202. *See generally Ren*, 648 F.3d 1079; *Saravia*, 905 F.3d 729; *Wei Sun*, 883 F.3d 23; *Avelar-Oliva*, 954 F.3d 757; *Gaye*, 788 F.3d 519; *Rapheal*, 533 F.3d 521; *Uzodinma*, 951 F.3d 960.

203. *Ren*, 648 F.3d at 1079; *Saravia*, 905 F.3d at 737.

204. *Wei Sun*, 883 F.3d 23; *Avelar-Oliva*, 954 F.3d 757; *Gaye*, 788 F.3d 519; *Rapheal*, 533 F.3d 521; *Uzodinma*, 951 F.3d 960.

205. *Ren*, 648 F.3d at 1091; *see* INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

206. *Ren*, 648 F.3d at 1091.

207. *Id.*

immigration judge to deny relief after determining that corroborative evidence is needed without giving the applicant an opportunity to remedy the deficiency, then the statute would have used the phrase: "should have provided."[208] The Ninth Circuit next stated that the canons of constitutional avoidance required that the provision be forward-looking, holding that the REAL ID Act did not change the Ninth Circuit's case law, which requires a full and fair hearing in deportation proceedings.[209] The court reasoned that demanding corroborative evidence to be produced immediately on the day of the hearing or provided before notice is given would raise serious due process concerns.[210] Thus, one should avoid such an interpretation.[211]

Although reaching the same conclusion, the Third Circuit in *Saravia v. Attorney General of the United States* relied upon different reasoning.[212] Instead of breaking the statute down grammatically as the Ninth Circuit did in *Ren*, the Third Circuit reasoned that the backward-looking approach would render subsequent review meaningless.[213] The court decided that the record for review would not be adequately developed if applicants were not given an opportunity to obtain the corroborative evidence that is found to be missing at the merits hearing or an opportunity to meaningfully attempt to obtain this evidence.[214] The court also noted that it would be temporally illogical to require an applicant to explain why certain evidence could not be produced, noting the difference between asking why certain evidence was not produced and asking why certain evidence *could not be* produced.[215] The reasoning behind the distinction is that an applicant cannot explain why evidence cannot reasonably be produced if the applicant never tried to produce it.[216] Finally, the Third Circuit stated that to hold otherwise would allow for "gotcha" decisions in immigration court.[217]

208. *Id.*
209. *Id.* at 1092.
210. *Id.*
211. *Id.* at 1093.
212. Saravia v. Att'y Gen. U.S., 905 F.3d 729, 737 (3d Cir. 2018).
213. *Id.*
214. *Id.*
215. *Id.* at 738.
216. *Id.*
217. *Id.* ("That opportunity to supply evidence or explain why it is not available can only occur before the Immigration Judge rules on the applicant's petition. To decide otherwise is illogical temporally and would allow for 'gotcha' conclusions in Immigration Judge opinions.").

B. The Backward-Looking Approach

Notably, after the above decision from the Ninth Circuit in *Saravia* but before the Fifth Circuit's decision in *Avelar-Oliva v. Barr*, the BIA adopted the backward-looking approach.[218] In *Matter of L-A-C-*, the BIA rendered a precedential decision[219] in which it held that an immigration judge who finds the evidence presented in the merits hearing in need of corroboration is not required to provide an opportunity for the applicant to remedy the deficiency.[220] The BIA reasoned that it is unreasonable to require a judge to decide whether to grant a continuance at the merits hearing, as required by the Ninth Circuit.[221] Further, the BIA stated that it is often not clear until after the immigration judge has had time to review the evidence the applicant provided whether any or more corroboration is required to meet the burden of proof.[222] Thus, as opposed to the Ninth Circuit, the Fifth Circuit had to address a precedential BIA decision in its analysis of the procedure required by INA § 208(b)(1)(B)(ii).[223]

The Fifth Circuit in *Avelar-Oliva v. Barr* began its analysis by citing to *Matter of L-A-C-* and noting that it must give an agency's interpretation of the statutes it administers *Chevron* deference.[224] In *Chevron v. Natural Resources Defense Council*, the United States Supreme Court held that if a statute is silent or ambiguous regarding an issue delegated to the agency, courts must ask if the agency's interpretation is based on a permissible construction of the statute.[225] Notably, the Ninth Circuit held that the

218. *In re* L-A-C-, 26 I & N Dec. 516, 516 (B.I.A. 2015); *see generally Saravia*, 905 F.3d 729; Avelar-Oliva v. Barr, 954 F.3d 757 (5th Cir. 2020).

219. *AAO Decisions*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Jan. 27, 2021), https://www.uscis.gov/administrative-appeals/aao-decisions [https://perma.cc/S283-46J3] (follow "Precedent Decisions" tab) ("Precedent decisions are legally binding on the [Department of Homeland Security] components responsible for enforcing immigration laws in all proceedings involving the same issues. In addition, absent any controlling judicial precedent to the contrary, federal courts give greater deference to [Administrative Appeals Office] precedent decisions, as well as to non-precedent and adopted decisions that follow the same legal reasoning of a precedent decision.").

220. *In re L-A-C-*, 26 I & N Dec. at 516.

221. *Id.* at 523.

222. *Id.* at 516.

223. *Avelar-Oliva*, 954 F.3d at 770; Chevron, U.S.A., Inc. v. Nat. Res. Def. Couns., Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

224. *Avelar-Oliva*, 954 F.3d at 770.

225. *Chevron*, 467 U.S. at 843.

statute was unambiguous.[226] Conversely, The Fifth Circuit held that while the Ninth Circuit's interpretation is plausible, it is not the only reasonable interpretation and that the BIA's interpretation is reasonable and, thus, is afforded deference under *Chevron*.[227]

As the Fifth Circuit noted in *Avelar-Oliva*, the majority of the circuits that have decided the issue have adopted the backward-looking approach.[228] In its 2008 decision of *Raphael v. Mukasey*, the Seventh Circuit held that providing non-citizens with notice of deficiencies in their corroborating evidence would be both unnecessary under INA § 208(b)(1)(B)(ii) and imprudent because it would provide an additional burden on the already overburdened DHS.[229] In 2015, the Sixth Circuit in *Gaye v. Lynch* held that the language of § 208(b)(1)(B)(ii) does not unambiguously require notice of evidentiary deficiencies, thereby aligning itself with the Seventh Circuit.[230] In 2018, the Second Circuit in *Wei Sun v. Sessions* held that § 208(b)(1)(B)(ii) was ambiguous and upheld the BIA interpretation in *Matter of L-A-C-* under *Chevron*.[231] Finally, the Eighth Circuit in its 2020 decision *Uzodinma v. Barr* held that the notice provided to non-citizens that corroborative evidence may be required to sustain the burden of proof on the asylum application form and in the related statutes is sufficient to satisfy any due process concerns.[232] Thus, courts on both sides of the forward- versus backward-looking issue have pointed out practical and logical issues with both approaches.

III. PITFALLS IN THE PRESENT PROCEDURE

The holdings of the federal circuit courts, INA § 208(b)(1)(B)(ii), and the relevant INA procedural statutes, such as INA § 240(b), have not provided the immigration court system with a procedure that results in consistent and predictable outcomes in asylum proceedings.[233] Further,

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226. Ren v. Holder, 648 F.3d 1079, 1092 (9th Cir. 2011). The *Ren* court's holding that the language of INA § 208(b)(1)(B)(ii) is unambiguous suggests that the Ninth Circuit would not adopt the backward-looking approach in a future case despite the precedential BIA decision adopting the backward-looking approach.

227. *Avelar-Oliva*, 954 F.3d at 771.

228. *Id.* at 770.

229. Rapheal v. Mukasey, 533 F.3d 521, 530 (7th Cir. 2008).

230. Gaye v. Lynch, 788 F.3d 519, 530 (6th Cir. 2015).

231. Wei Sun v. Sessions, 883 F.3d 23, 28 (2d Cir. 2018).

232. Uzodinma v. Barr, 951 F.3d 960, 966 (8th Cir. 2020).

233. *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015–2020*, *supra* note 25.

both the forward- and backward-looking approaches present significant issues.

First, in both approaches, the frequency with which immigration judges within a single state grant relief to asylum applicants can vary as much as 92%.[234] For example, between 2015 and 2020, one immigration judge in the New York immigration courts granted asylum at a rate of 3% while another granted asylum at a rate of 95%.[235] Such a variance is not limited to New York.[236] In Oakdale, Louisiana, the variance in grant rate ranged from a .5% to 21% over the same five-year span.[237] While modest in magnitude compared to New York, the variance in Oakdale still suggests that one asylum seeker in Oakdale may be over forty times more likely to be granted asylum as another based on the immigration judge presiding over his or her case. Further, these variances are not limited to jurisdictions that have adopted the backward-looking approach.[238] In the San Francisco immigration court, a jurisdiction subject to the Ninth Circuit's *Ren* holding, there is a variance of approximately 89%.[239] Two facts underscore the significance of these variances. First, immigration judges are assigned cases randomly.[240] Second, each of the New York and Louisiana judges referenced above have decided over one hundred cases.[241]

The second issue is that about 20% of asylum applicants are represented pro se, and these applicants are about half as likely to succeed in their asylum cases as applicants who are represented by counsel.[242] While not explicitly shown in statistics, the disparity between pro se applicants and those with counsel is likely attributable to pro se applicants' unfamiliarity with the United States court system and inexperience with the English language. These two factors make it even less likely that an

234. *Asylum Denial Rates Continue to Climb*, TRAC IMMIGR. (Oct. 28, 2020), https://trac.syr.edu/immigration/reports/630/ [https://perma.cc/W7YH-B5W5].

235. *Id.*

236. *Id.*

237. *Id.*

238. *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015–2020*, *supra* note 25.

239. *Id.*

240. Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at its Breaking Point?*, MIGRATION POL'Y INST. (Oct. 3, 2019), https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point [https://perma.cc/MWV2-ZLRC].

241. *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015–2020*, *supra* note 25.

242. *Record Number of Asylum Cases in FY 2019*, TRAC IMMIGR. (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/ [https://perma.cc/MS8C-34WD].

applicant will be able to identify and produce the evidence needed to corroborate their case with nothing more to aid them than Form I-589 and INA § 208(b)(1)(B)(ii). Notably, this number does not include those immigrants who did not apply for asylum because they could not navigate the process on their own.[243] The large variances in grant rates within individual immigration courts illuminate the widespread issue with fairness within the United States's immigration court system that gives rise to serious due process concerns.

In addition to the inconsistency issue, the backward-looking approach also raises a serious concern about the adequacy of notice prior to the merits hearing. The Eighth Circuit in *Uzodinma* stated that the asylum application, Form I-589, and the related statutes provide sufficient notice to applicants about what evidence is needed and the consequences of not producing it.[244] However, this position does not withstand scrutiny. Regarding the evidence applicants should provide, Form I-589 instructions provide that "[s]upporting evidence may include but is not limited to newspaper articles, affidavits of witnesses or experts, medical and/or psychological records, doctors' statements, periodicals, journals, books, photographs, official documents, or personal statements or live testimony from witnesses or experts."[245] Next, the Seventh Circuit in *Rapheal* reasoned that the relevant statutes provide immigrants with sufficient notice and cited to 8 U.S.C. § 1158(b)(1)(B)(ii).[246] This provision states "[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[247] This provision is also what the Eighth Circuit in *Uzodinma* referred to with the term *relevant statutes*.[248] These sources do not provide immigrants with case-specific recommendations for what evidence may be needed to support their particular claim and, thus, do not always provide particularly helpful guidance to applicants.

In fact, *Ren* itself provides a clear example of a case where Form I-589 and the relevant statutes were not particularly helpful in identifying the corroborative evidence needed to support the particular claim at issue.[249] In that case, the immigration judge indicated that a bail receipt

243. *Id.*
244. Uzodinma v. Barr, 951 F.3d 960, 966 (8th Cir. 2020).
245. DEPT. OF HOMELAND SEC. & U.S. DEPT. OF JUST., *supra* note 5.
246. 8 U.S.C. § 1158(b)(1)(B)(ii) is the codified version of INA § 208(b)(1)(B)(ii).
247. Rapheal v. Mukasey, 533 F.3d 521, 527 (7th Cir. 2008).
248. *Uzodinma*, 951 F.3d at 966.
249. Ren v. Holder, 648 F.3d 1079, 1093 (9th Cir. 2011).

from the Chinese government, a baptismal certificate, and live testimony from the applicant's pastor in the United States was needed to corroborate the applicant's claim.[250] It would likely be disingenuous to say that live testimony from a pastor is a foreseeable request from the notice given in Form I-589 and § INA 208(b)(1)(B)(ii).[251] The applicant in *Ren* obtained counsel and still did not produce the corroborative evidence needed, which further underscores the assertion that these requests are not foreseeable to the typical pro se applicant.[252] Moreover, when the immigration judge informed the applicant in *Ren* that testimony from the pastor was required, the applicant's counsel asked whether an affidavit would suffice.[253] This shows that even the counsel was unsure about what form in which the evidence must be even after being told what the substance of the evidence should be.[254]

The immigration judge in *Ren*, after determining that more evidence was needed, provided the applicant with a continuance to obtain the evidence requested.[255] Under the backward-looking approach, however, the immigration judge could simply have denied the applicant's asylum or withholding of removal claim because he or she thought live testimony from a pastor was necessary but not provided.[256] Such a decision would be, in the words of the Third Circuit, a "gotcha" decision,[257] and it would be difficult to argue that such a decision was the result of the meaningful and fair hearing as required by the Fifth Amendment[258] and INA §

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250. *Id.*

251. *See* DEPT. OF HOMELAND SEC. & U.S. DEPT. OF JUST., *supra* note 5; INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

252. *Ren*, 648 F.3d at 1093.

253. *Id.*

254. *Id.*

255. *Id.*

256. *See* Wei Sun v. Sessions, 883 F.3d 23 (2d Cir. 2018); Avelar-Oliva v. Barr, 954 F.3d 757 (5th Cir. 2020); Gaye v. Lynch, 788 F.3d 519 (6th Cir. 2015); Rapheal v. Mukasey, 533 F.3d 521 (7th Cir. 2008); Uzodinma v. Barr, 951 F.3d 960 (8th Cir. 2020).

257. Saravia v. Att'y Gen. U.S., 905 F.3d 729, 737–38 (3d Cir. 2018).

258. Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Yamataya v. Fisher, 189 U.S. 86, 101 (1903):

> Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and

240(b).[259] Thus, the backward-looking approach fails to provide applicants with a meaningful amount of notice as to what evidence will be needed to carry the burden of proof prior to a final adjudication. A system that grants judges the ability to deny relief prior to meaningful notice being given to the applicant does not adequately limit the judge's discretion and, thus, enables immigration judges to rule based on personal beliefs and predispositions. Thus, this lack of notice, in addition to the large variances in grant rates under both approaches, calls into question the adequacy of the due process afforded to applicants in the immigration court system.

IV. A PROCEDURAL REMEDY

To remedy the above issues with efficiency and efficacy, Congress should pass an amendment to the INA requiring a pre-merits hearing conference between the asylum applicant and the immigration judge. In the conference, the immigration judge would provide non-binding advice regarding which aspects of the applicant's testimony need corroboration. While not binding, the production of the needed corroborating evidence identified by the immigration judge would provide a presumption that the applicant has met the burden of proof. Therefore, this solution requires the immigration judge to provide reasons why the immigrant has not met the burden of proof despite the production of the evidence identified in the conference.[260] By providing an informal hearing as opposed to a continuance, this solution balances the interest of the asylum seekers in receiving a fair hearing and the government's interest in efficiency.

The United States Supreme Court in *Mathews v. Eldridge* provided a framework for determining the appropriate balance between the due process rights for certain parties and the government's interest in efficient proceedings.[261] Although Congress is not bound by this case, the reasoning

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> deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

259. INA § 240(b), 8 U.S.C. § 1229(b).

260. FED. R. EVID. 301, Advisory Committee's Note to 1972 Proposed Rule ("Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it.").

261. *Mathews*, 424 U.S. at 334 (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)) ("'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.").

set forth in *Mathews* nonetheless provides a structured way to craft a solution to the aforementioned issues.[262] Specifically, the Court stated that "due process is flexible and calls for such procedural protections as the situation demands."[263] The Court provided three factors to consider when determining the extent of due process required in a certain situation.[264] These factors include: (1) "the private interest that will be affected by the official action"; (2) "the risk of erroneous deprivation of such interests through the procedures used, and the probable value . . . of additional . . . procedural safeguards"; and (3) "the Government's interest, including the . . . fiscal and administrative burdens that the additional . . . procedural requirement would entail."[265]

First, the private interests involved in asylum and withholding of removal cases are significant, as these decisions can carry life or death consequences.[266] *Quintero* precisely illustrates the important nature of private interests involved.[267] In this case, the applicant faced deportation back to El Salvador where an international street gang waited to punish him for leaving the gang.[268] The courts that have adopted the backward-looking approach have not meaningfully grappled with the high personal interests of asylum applicants.[269] In advocating for the backward-looking approach, the Seventh Circuit in *Rapheal* summarily held that the additional burden of a second hearing was not justified by the interests present in asylum cases especially where the law provides notice.[270] Similarly, the Eighth Circuit in *Uzodinma* summarily considered the interests at stake when it held that the notice provided in the relevant statues and the asylum application form provided sufficient notice to satisfy any due process concerns.[271]

Second, regarding the risk of erroneous deportations under the current approaches, the wide variances in grant rates indicate that the risk of

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262. *Id.*
263. *Id.*
264. *Id.* at 335.
265. *Id.*
266. *See* Quintero v. Garland, 998 F.3d 612 (4th Cir. 2021).
267. *See id.*
268. *Id.* at 619.
269. *See generally* Wei Sun v. Sessions, 883 F.3d 23 (2d Cir. 2018); Avelar-Oliva v. Barr, 954 F.3d 757 (5th Cir. 2020); Gaye v. Lynch, 788 F.3d 519 (6th Cir. 2015); Rapheal v. Mukasey, 533 F.3d 521 (7th Cir. 2008); Uzodinma v. Barr, 951 F.3d 960 (8th Cir. 2020).
270. *See Rapheal*, 533 F.3d at 530.
271. *Uzodinma*, 951 F.3d at 966.

erroneous deportations is also significant.[272] Thus, it is clear that the first and second *Mathews* factors weigh in favor of a more robust procedure for asylum and withholding of removal claims. Therefore, the remaining question under *Mathews* pertains to the third factor—specifically whether there is a solution that meaningfully reduces the risk of erroneous deportation and does not inappropriately burden the immigration court system with additional procedural costs. To meaningfully reduce the risk of erroneous deportation while balancing procedural costs, the solution will need to address the inconsistency, notice, and backlog issues under the backward- and forward-looking approaches.

A. Consistency and Notice

The large variance in grant rates in the San Francisco immigration court suggests that a simple adoption of the forward-looking approach would not remedy the consistency issue.[273] This inefficacy, even under the forward-looking approach, is likely attributable to the fact that the credibility of applicants can be tainted if they present little-to-no evidence corroborating their claim at the merits hearing, especially in the eyes of an immigration judge that favors denial. In fact, it is completely natural to distrust any account that lacks support. Thus, given the fact that the type and amount of evidence needed to support a claim is completely discretionary, the credibility of the witness can have a large impact on how onerous the immigration judge makes the evidentiary requirements.[274] Thus, providing notice to applicants about what evidence will likely be required to support their case prior to the merits hearing would aid the applicant in appearing credible, thereby addressing both the notice issue and the consistency issue.

The proposed meeting would provide the notice needed to increase the credibility of applicants by giving the immigration judge an opportunity to review the applicant's testimony and any corroborative evidence the applicant provides. The judge would then direct the applicant to portions of his or her testimony that need corroboration. Such an opportunity would provide several advantages beyond creating a presumption that makes an erroneous denial less likely. First, it would reduce the likelihood that an immigration judge will find an applicant's testimony not credible. Specifically, it would accomplish this by identifying evidence that applicants could use to support their testimony and giving applicants the

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272. *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015–2020*, *supra* note 25.

273. *Id.*

274. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

opportunity to gather such evidence prior to the merits hearing, thereby helping applicants to present a convincing case at the merits hearing. Second, the presumption would, at least to a certain extent, give the immigration judge an additional incentive to rule in a manner that is consistent with the evidence and the law. This is because the presumption would act as an assurance granted to applicants by the immigration judge that if they produce the identified evidence then they have a strong chance of success. This presumption would create a disincentive for judges to repeatedly deny applications after giving such assurances, as doing so would make the judge seem, at best, unreliable. Lastly, as the BIA indicated in *Matter of L-A-C-*, immigration judges often need time to examine an applicant's testimony to determine which aspects need corroboration.[275] This solution keeps that reality in mind by creating a presumption that the burden of proof has been met, thus leaving room for further consideration.

B. Backlog

Considering the government's interest in procedural efficiency, requiring all courts to adopt the holdings of the forward-looking approach would likely not be a workable solution under *Mathews*.[276] This is because granting a continuance imposes a significant procedural burden, as it not only prolongs proceedings by several months but also requires an additional merits hearing.[277] However, simply adopting the backward-looking approach in the name of efficiency is likely not a workable solution under *Mathews* either. The Seventh Circuit noted in *Rapheal* that providing applicants with notice of the specific corroborative evidence needed to support their case increases the burden on the already-burdened system.[278] Any increase in the burden on the system, however, does not necessarily outweigh upholding the due-process rights given to applicants. As the *Mathews* court explained, the interests of the parties must be weighed.[279] Thus, a solution, such as adopting the backward-looking approach, that reduces the backlog but does not consider the cost of sacrificing due process afforded to applicants is not workable.[280]

The proposed solution of a pre-merits hearing conference would be more workable than the present approaches, as it would not require the

275. *In re* L-A-C-, 26 I & N Dec. 516, 516 (B.I.A. 2015).
276. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
277. Ren v. Holder, 648 F.3d 1079, 1093 (9th Cir. 2011).
278. Rapheal v. Mukasey, 533 F.3d 521, 521 (7th Cir. 2008).
279. *Mathews*, 424 U.S. at 348.
280. *Id.* at 335.

unplanned continuance, which results when a deficiency is identified in the Ninth and Third Circuits.[281] Such unplanned continuances can delay proceedings several months and further contributes to the backlog of cases.[282] Further, the combination of the increased credibility and the presumption would lead to less appeals, which would help to offset the long-term cost of adding the additional conference. The reduced frequency of appeals and the low cost of the conference relative to a continuance would likely result in the new conference costs being offset by the improved efficacy. Thus, the proposed hearing offers a solution that both acknowledges the present due process concerns while minimizing the burden on the government.

C. The Proposed Text of the INA Amendment

Congress should implement the proposed change in legislation by amending INA § 240(b)(2).[283] Presently, INA § 240(b)(2) provides the form of removal proceedings and states that removal proceedings may take place in person, by video conference, or over the telephone.[284] To implement the above conference, Congress should add a Part C to § 240(b)(2) that states:

> (C) Asylum and Withholding of Removal
>
> In addition to the requirements provided for in paragraphs (A) and (B), in proceedings concerning asylum and withholding of removal, there shall be a conference between the non-citizen seeking relief under §§ 208, 235(b), or 241(b)(3) of this Act and the immigration judge in which the immigration judge shall identify any evidence that in his or her judgment must be supported with evidence beyond the testimony of the applicant in order to sustain the burden of proof. Any applicant that produces the identified evidence shall be presumed to have met the burden of proof.

The first sentence of the above provision would establish the proposed meeting between the calendar and merits hearings for proceedings brought under INA §§ 208, 235(b), and 241(b)(3). Again, this meeting would serve

281. *Ren*, 648 F.3d at 1093; Saravia v. Att'y Gen. U.S., 905 F.3d 729, 737 (3d Cir. 2018).
282. *Ren*, 648 F.3d at 1093.
283. *See* INA § 240(b)(2), 8 U.S.C. § 1229(b)(2).
284. *Id.*

to remedy the notice issues raised under the present backward-looking approach while also imposing a lesser burden on the immigration court system than the forward-looking approach. The second sentence of the above provision establishes the presumption that the burden of proof has been met if the applicant produces the evidence identified by the immigration judge in the meeting established in the first sentence. This presumption would serve to reduce the wide variances in grant rates by giving the immigration judge a greater incentive to carefully consider the evidence by the time it reaches the merit hearing.

Lastly, although this provision in practice allows the judge to aid the applicant, it does not fundamentally change the role of the judge to an advocate. Rather, it provides the judge an opportunity to better execute his or her duty to develop the record for appeal. The duty to develop the record, as the *Quintero* court noted, is an important role for immigration judges.[285] INA § 240(b)(1) provides the duties of immigration judges in removal proceedings.[286] Among these duties are the duties to receive evidence and examine non-citizens.[287] Further, the Ninth Circuit in *Jacinto v. INS* and *Hussain v. Rosen* provided boundaries for the role of an immigration judge within removal proceedings.[288] First, the court in *Jacinto* explained that immigration judges must make it clear to applicants that they have an opportunity to present testimony in support of their case.[289] Second, the court in *Hussain* held that while the immigration judge must give the applicant an opportunity to be heard, the immigration judge cannot guide the applicant's testimony towards meeting the requirements for establishing refugee status.[290] The proposed solution fits within the framework the Ninth Circuit provides because it does not call for the immigration judge to guide the applicant towards the requisite status.

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285. Quintero v. Garland, 998 F.3d 612, 619 (4th Cir. 2021).

286. INA § 240(b)(1), 8 U.S.C. § 1229(b)(1):

> The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

287. *Id.*

288. *See* Jacinto v. INS, 208 F.3d 725 (9th Cir. 2000); Hussain v. Rosen, 985 F.3d 634 (9th Cir. 2021).

289. *Jacinto*, 208 F.3d at 728.

290. *Hussain*, 985 F.3d at 644.

Rather, it merely calls on the immigration judge to inform applicants about what evidence they need to establish the testimony as credible.

CONCLUSION

Section 208(b)(1)(B)(ii) of the INA and its forward-and-backward-looking interpretations as adopted by the United States Circuit Courts have failed to efficiently and effectively provide non-citizens seeking relief from persecution with a full, fair, and meaningful hearing. This is evident in the aforementioned variances, which indicate that a non-citizen's hope for relief does not necessarily depend upon the merits of his or her case but instead on which immigration judge is assigned to the case.[291] This apparent shortfall in the immigration court system is a strong indication that a change in legislation is necessary to provide a procedure that benefits a vulnerable class of people. To resolve this shortfall, Congress should amend the INA to provide immigrants who produce the evidence an immigration judge requests at a pre-merits hearing conference with a presumption that they have met their burden of proof. Additional rights for asylum-seekers and withholding of removal applicants will help prevent people, like Mr. Quintero, from arbitrarily being denied safety due to their inability to effectively advocate for themselves.

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291. *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015–2020*, *supra* note 25.