

IMMIGRATION LAW: NOWHERE TO TURN— ILLEGAL ALIENS CANNOT USE THE FREEDOM OF INFORMATION ACT AS A DISCOVERY TOOL TO FIGHT UNFAIR REMOVAL HEARINGS

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I. INTRODUCTION

Because there are no discovery rights in immigration proceedings, aliens have to resort to 5 U.S.C. § 552(b), the Freedom of Information Act (FOIA),¹ to request a copy of their files from the

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¹ Freedom of Information Privacy Act, 5 U.S.C. § 552 (2007). The Act was enacted in 1966 and generally provides that any person has the right, enforceable in court, to request access to federal agency records or information. Records or information may be withheld pursuant to one of the nine exemptions set forth in the Act. These nine legal categories

United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS).² In spite of the FOIA, the USCIS frequently withholds the referral notes from disclosure, which contain the answers and responses that the asylum applicant provided under oath during the asylum interview.

The Government claims that USCIS is entitled to withhold the interview notes under one of the nine exemptions set forth in 5 U.S.C. § 552(b).³ Pursuant to the Act, the most frequent exemptions used to withhold information pursuant to an alien's FOIA request are (b)(2), (b)(5), (b)(7)(c), and (b)(7)(e).⁴ The Government takes the firm position that, unlike the alien who is not entitled to a copy of the interview notes, the Government has a right to

exempted from disclosure are as follows: (1) national security, (2) internal agency rules, (3) other statutes, (4) business information, (5) internal government memos, (6) private matters, (7) law enforcement investigations, (8) regulation of financial institutions, and (9) oil wells. 5 U.S.C. § 552(b); Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 76 (2006).

² On November 25, 2002, President George W. Bush signed into law the Homeland Security Act (HSA) of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). The HSA created a new Department of Homeland Security (DHS), abolished the Immigration and Naturalization Service (INS), which was an agency with the U.S. Department of Justice, and transferred the INS's functions to the USCIS of the DHS. Homeland Security Act of 2002 §§ 101, 451.

³ *E.g.*, Alan B. Morrison, *Balancing Access to Government-Controlled Information*, 14 J. L. & POL'Y 115, 116 (2006) (FOIA has been amended several times since it was enacted in 1966 and "applies only to federal agencies, which excludes Congress, the judiciary, and the President and his closest advisers."). All agencies of the Executive Branch of the U.S. Government are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from public disclosure by one of the nine exemptions or three special law enforcement record exclusions of the FOIA. *See, e.g.*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136-37 (1975); Morrison, *supra*, at 117; David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 635 (2005). Under 5 U.S.C. § 552(b), these nine exemptions provide the only bases for an Agency to withhold or deny records in part or in full. After exhausting administrative appeals, a person requesting a record has the right to judicial review of the agency's decision to withhold records. 5 U.S.C. § 552 (a)(4)(B); Pozen, *supra* at 636.

⁴ Exemption 2 protects records related solely to the internal personnel rules and practices of an agency. Exemption 7 applies to all records or information compiled for law enforcement purposes whose release could reasonably be expected to cause the specified harm. The basis for withholding under (b)(7)(C) is unwarranted invasion of personal privacy, and the basis for withholding under (b)(7)(E) is to protect the revelation of investigatory techniques, procedures, or guidelines. 5 U.S.C. § 552(b) (2007). While Exemption 6 is beyond the scope of this Article, it is another provision used by governmental agencies to withhold records based on unwarranted invasion of privacy. *See* Jeffrey D. Zimmerman, *United States Department of State v. Ray: The Distorted Application of the Freedom of Information Act's Privacy Exemption to Repatriated Haitian Migrants*, 9 AM. U. J. INT'L L. & POL'Y 385 (1993).

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use the interview notes to impeach aliens who provide inconsistent answers to questions posed by the Government during the removal proceedings.⁵

This Article challenges the authority of the Attorney General and the DHS Secretary to withhold information from an alien after a FOIA request⁶ under Exemption (b)(5),⁷ to use that same withheld information to impeach the alien's testimony during an individual hearing on the merits, and to use that as grounds for the Immigration Court to deny an applicant's request for asylum. This Article takes the position that the USCIS needs to change its unfair practice to avoid the harsh and pervasive injustice that aliens face in removal proceedings. Aliens in removal proceedings have due process rights, including the right to receive notice and to have a meaningful opportunity to be heard in a full and fair hearing.⁸ To address such injustice and unfairness, this Article critically examines the extent to which the Attorney General or the DHS Secretary exceeds his or her authority in withholding the interview notes, and urges Congress to enact fair and sensible legislation requiring the Government to disclose to aliens any information given under oath so that aliens can fully prepare for their removal hearings on the merits.

II. THE GOVERNMENT'S WITHHOLDING OF ASYLUM INTERVIEW NOTES IS UNFAIR TO ALIENS

Between 1994 and 2005, immigration judges (IJ) around the nation decided about 297,240 asylum cases, of which 64% were de-

⁵ See Memorandum from USCIS Director Dr. Emilio T. Gonzalez to Prakash Khatri, *infra* note 34.

⁶ See 5 U.S.C. § 552 (2007).

⁷ Exemption 5 allows an agency to withhold from disclosure "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (2007). Exemption 5 incorporates the privileges recognized in civil discovery including the deliberative process privilege, the attorney work-product privilege, and attorney-client privilege. See *Dep't. of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 2 (2001) (stating that those privileges recognized in civil discovery "include the privilege for attorney work-product and what is sometimes called the 'deliberative process' privilege"). When an objection is raised as to why the interview notes are being withheld, the Government tends to explain that the USCIS can withhold the interview notes from disclosure based on attorney work-product privilege. See *generally* *Phillips v. Immigration & Customs Enforcement*, 385 F. Supp. 2d 296 (S.D.N.Y. 2005); *Nadler v. U.S. Dept. of Justice*, 955 F.2d 1479, 1491 (11th Cir. 1992) ("It is settled that Exemption 5 encompasses the work-product rule.").

⁸ *Nazarova v. INS*, 171 F.3d 478, 482 (7th Cir. 1999).

nied.⁹ Between 2001 and 2005, over 50% of immigrants appeared *pro se* in removal proceedings within the nation's 54 Immigration Courts.¹⁰ According to the Catholic Legal Immigration Network, in 2003, nearly 40% of immigrants who hired attorneys prevailed on the merits of their cases as compared to only 14% of the *pro se* immigrants.¹¹ Whether or not an asylum seeker is represented by counsel, prevailing on an asylum case is a distant goal because most often the Government denies the alien a meaningful opportunity to review preliminary asylum interview notes in order to fully prepare for his or her case on the merits.

This unfair practice has deleterious effects on asylum seekers because they have nowhere to turn to seek information and documents in their file to prepare for their hearing on the merits. Unlike civil litigants in state and federal courts, there are no civil discovery procedures to allow them to find out the contents of their files. The Government routinely takes statements under oath from aliens applying for admission at a port of entry or from aliens being interviewed under oath during an asylum interview. The practice of denying aliens an opportunity to review asylum referral notes to prepare for their hearing on the merits is fundamentally unfair to aliens because such a practice prevents asylum seekers from being classified as refugees to be eligible for grants of asylum under the Immigration and Naturalization Act (INA).¹²

III. CLASSIFICATION OF AN ALIEN AS A REFUGEE

To prevail in an asylum case, an applicant must establish to the satisfaction of the Immigration Court that he or she is a refugee. Under the INA, an alien may be classified as a refugee if he or she can establish past persecution or a well-founded fear of future per-

⁹ TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, JUDGES SHOW DISPARITIES IN DENYING ASYLUM (2006), <http://trac.syr.edu/immigration/reports/160/> (last visited Mar. 12, 2007). In reviewing data based on asylum decisions by 208 judges who made at least 100 decisions from fiscal year 1994 to 1999 and from fiscal year 2000 to 2005, TRAC examined 297,240 recorded cases and found that (1) "[t]he typical judge by judge denial rate—half denied more and half denied less—was 65%"; (2) "[the] [d]enial rates for the 208 judges ranged from a low of 10% to a high of 98%." *Id.*

¹⁰ Karin Brulliard, *Battling Deportation Often a Solitary Journey*, WASH. POST, Jan. 8, 2007, at A1.

¹¹ *See id.*

¹² The Immigration and Nationality Act § 208(a), 8 U.S.C. § 1158(a)(1); 8 U.S.C. § 1101(a)(42)(A) (2007) (defining "refugee").

secution if forcibly removed to his or her home country.¹³ To be eligible for asylum, the persecution must be based on one of the following protected grounds: race, nationality, religion, membership in a particular social group, or political opinion.¹⁴ Most asylum applicants are individuals who recently arrived from politically troubled countries. Most often, those recent newcomers do not speak or read English, nor do they know about the legal standards required to receive a grant of asylum. Yet, in attempting to attain their objective, non-represented asylum seekers have to navigate through a labyrinth of complex immigration laws. Therefore, an asylum seeker's ultimate goal of being classified as a refugee is a distant one, especially for those applicants who are not represented by counsel.

Typically, an alien in removal proceedings is entitled to due process.¹⁵ Yet, every year thousands of aliens are ordered removed from the U.S. after immigration judges have conducted hearings that are fundamentally unfair. One group of aliens who are disproportionately affected by and constantly subjected to these unfair hearings are those aliens who initially apply for asylum before the USCIS District Director. As part of DHS, a USCIS adjudicating officer interviews the affirmative asylum applicant under oath and decides whether to grant the asylum or to refer the case to the Immigration Court for removal proceedings.¹⁶

¹³ *Mejia-Pais v. INS*, 111 F.3d 720, 723 (9th Cir. 1997) (stating that to be eligible for asylum, an alien must establish "either past persecution or a well-founded fear of present persecution on account of [a protected ground]" under 8 U.S.C. § 1101(a)(42)(A)).

¹⁴ Under the INA, the Attorney General only has discretion to grant asylum to a deportable alien if the alien qualifies as a "refugee." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). The term "refugee" is statutorily defined as "any 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 . . ." 8 U.S.C. § 1101(a)(42)(A) (2008).

¹⁵ *See e.g.*, *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (holding that the Due Process Clause applies to persons within the United States including legal and illegal aliens); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 (1953).

¹⁶ *Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication*, 60 *STAN. L. REV.* 295, 306-307 (2007). An affirmative asylum seeker is an alien who voluntarily identifies herself to DHS by submitting an application for asylum to one of the USCIS regional asylum offices. *Id.* at 305. The immigration status of an affirmative asylum applicant may vary from an alien who maintains a valid non-immigrant visa to an individual who overstayed her visa or entered the country without inspection. *Id.*

Sometimes, a referral case may take about two years before the immigration judge sets the case for an individual hearing on the merits. The problem in such a situation is that an alien usually forgets most of the answers provided to questions asked by the USCIS asylum officer during the initial interview. Because a single inconsistency that goes to the heart of the asylum's claim is sufficient for an immigration judge to deny an asylum application,¹⁷ the Government's practice has been to withhold the asylum interview notes and use that same information to impeach aliens who provide materially inconsistent testimonies, which the Government uses as a basis to urge the Immigration Court to deny the asylum application.

IV. THE USE OF THE FREEDOM OF INFORMATION ACT TO DENY DUE PROCESS TO ASYLUM SEEKERS

It is well-settled that Congress has plenary power in immigration matters involving the admissions and removal of aliens.¹⁸ Congress has delegated the power to implement the INA statutes to the Attorney General, who promulgates regulations regarding the admittance and removal of aliens. The Attorney General, or the DHS Secretary, exceeds his or her power in withholding interview notes pursuant to Exemption (b)(5) of FOIA, however, because there is no showing that Congress intended to deny due process to aliens in removal proceedings.¹⁹

It is crucial to understand that a single inconsistency between an alien's testimony and application is enough for an immigration judge to deny an application for asylum, so long as the inconsistency goes to the heart of the asylum's claim.²⁰ However, an alien has the heavy burden of showing that he or she has suffered past

¹⁷ See *Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001) ("Although only one inconsistency can be sufficient, here at least two of the inconsistencies cited by the Board are not minor 'as they relate to the basis for his alleged fear of persecution' and go to 'the heart of [his] asylum claim.'"). See also, *de Leon-Barrios v. INS*, 116 F.3d 391, 393-94 (9th Cir. 1997) (noting that discrepancies upon which a negative credibility finding rests "involved heart of the asylum claim").

¹⁸ See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (stating that the Supreme Court has long held that "an alien seeking initial admission . . . has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative"); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

¹⁹ *But see* Memorandum from USCIS Director Dr. Emilio T. Gonzalez to Prakash Khatri, *infra* note 34.

²⁰ *Chebchoub*, 257 F.3d at 1043.

persecution or has a well-founded fear of future persecution, which must be based on one of the protected grounds.²¹

Where an alien fails to meet his or her burden of establishing past persecution or a well-founded fear of future persecution, an immigration judge will generally deny the application and enter a non-final order of removal. If the alien does not file a Notice of Appeal on Form EOIR 26 within thirty days with the Board of Immigration Appeals (BIA), then the immigration judge order becomes final.²² If the alien files an appeal with the BIA, the alien may remain in the country until the BIA makes a decision on the appeal.

Generally, the BIA dismisses most appeals, agreeing with the immigration judge's decisions. In those cases, an alien can petition a court of appeals to review the final order of the BIA, which generally affirms the immigration judge's decision to deny an application for asylum,²³ to withhold of removal,²⁴ and to refuse Article

²¹ See 8 U.S.C. §§ 1158(b)(1); 8 U.S.C. § 1101(a)(42)(A)(2007), which sets out the eligibility requirements for asylum. Even if an alien meets his or her burden for asylum, the Attorney General still has discretion to grant asylum on a case-by-case basis. 8 U.S.C. § 1252(b)(4)(D)(2007). A party who relies on past persecution on account of political opinion is eligible for asylum if the party can show that he had a political opinion or that one was imputed to him by his persecutor and that the persecution was on account of the imputed political opinion. See *Bunuan Agbuya v. INS*, 219 F.3d 962, 968 (9th Cir. 2000). Although uncorroborated but credible testimony may be sufficient to sustain an applicant's burden of proving eligibility for asylum, "[t]he weaker an applicant's testimony . . . the greater the need for corroborative evidence." *Yang v. U.S. Att'y Gen.*, 418 F.3d 1198, 1201 (11th Cir. 2005). However, "an adverse credibility determination does not alleviate the immigration judge's duty to consider other evidence produced by an asylum applicant," and the immigration judge must provide "specific, cogent reasons" for her credibility finding. *Forgue v. U.S. Att'y Gen.*, 401 F.3d 1282, 1287 (11th Cir. 2005); see also *Procedures for Asylum and Withholding of Removal*, 8 C.F.R. §§ 208.13(a), 208.16(b) (2007).

²² See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FACT SHEET: IMMIGRATION COURT PROCESS IN THE UNITED STATES: REMOVAL PROCEEDINGS, BOND REDETERMINATIONS, ASYLUM, CONVENTION AGAINST TORTURE (2005) available at <http://www.usdoj.gov/eoir/press/05/ImmigrationCourtProcess2005.htm> (stating that "[w]ithin 30 days of receiving a denial decision from an immigration judge, the applicant may appeal to the BIA. If the BIA affirms the immigration judge's denial decision, the applicant may file an appeal with the federal court system.")

²³ See 8 U.S.C. §§ 1158(b)(1); 8 U.S.C. § 1101(a)(42)(A) (2007). "The Attorney General or the Secretary of Homeland Security has discretion to grant asylum if the alien meets the INA's definition of a 'refugee.'" *Huang v. U.S. Att'y. Gen.*, 429 F.3d 1002, 1008 (11th Cir. 2005) (citing INA § 208(b)(1), 8 U.S.C. § 1158(b)(1); REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (May 11, 2005) (amending INA § 208(b)(1) and adding "the Secretary of Homeland Security")); *Mejia v. U.S. Att'y. Gen.*, 498 F.3d 1253, 1256 (11th Cir. 2007).

²⁴ 8 U.S.C. § 1231(b)(3)(A) (2007); 8 C.F.R. § 208.16(b) (2007); *Alim v. Gonzales*, 446 F.3d 1239, 1255 (11th Cir. 2006) ("An alien is entitled to withholding of removal [to a country] . . . if he can show that . . . it is "more likely than not she will be persecuted or

III relief under the United Nations Convention Against Torture (CAT).²⁵

In denying petitions for review of the Agency's final orders, appellate courts have ruled that a few isolated incidents or mere harassment does not constitute persecution.²⁶ Therefore, unless an alien can show that the BIA or the immigration judge's decision denying relief is not supported by competent, substantial evidence,²⁷ a petition for review will generally be denied as federal appellate courts give deference²⁸ to the immigration judge or the

tortured upon being returned to her country."). Many courts have noted that the standard for withholding of removal is more rigid than the one for asylum because it requires the alien to "demonstrate a 'clear probability of persecution'" if there is a risk of being returned to the country of deportation." *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-32 (1987); *Janusiak v. INS*, 947 F.2d 46, 47 (3d Cir. 1991). "Clear probability" means that it is "more likely than not that an alien would be subject to persecution . . ." *INS v. Stevic*, 467 U.S. 407, 429-30 (1984). Yet, once an alien meets the standard under withholding of removal provision, the Attorney General is mandated to withhold removal in situations where the Attorney General determines that such alien's life or freedom would be threatened on account of one of the protected grounds. 8 U.S.C. § 1231(b)(3)(A) (2007); *see Huang v. INS*, 436 F.3d 89, 95 (2d Cir. 2006) (citing *Osorio v. INS*, 18 F.3d 1017, 1032 (2d Cir. 1994)); *Ali v. Ashcroft*, 394 F.3d 780, 791 (9th Cir. 2005) ("While the grant of asylum is discretionary, withholding of removal is mandatory if the petitioner establishes that upon removal from the United States her 'life or freedom would be threatened' on account of one of the five protected grounds.").

²⁵ *See* United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Implementation of the Convention Against Torture, 8 C.F.R. § 208.18 (2007). To be eligible for protection under the CAT, the applicant must establish "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture, 8 C.F.R. § 1208.16(c)(2) (2007); *see Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001) (defining and discussing "torture"). An applicant is entitled to relief under CAT if that party can establish that it could be subject to cruel or degrading punishment if forcibly returned to the country of removal. *See Zubeda v. Ashcroft*, 333 F.3d 463, 471 (3d Cir. 2003). Precisely, "it shall be the policy of the United States not to expel, or otherwise affect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture . . ." *Id.* (citing Foreign Affairs Reform and Restructuring Act of 1988, Section 2242, Pub.L. No. 105-277, 112 Stat. 2681-761 (Oct. 21, 1988) (codified as 8 U.S.C. § 1231)).

²⁶ *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1230-31 (11th Cir. 2005) (stating that "'persecution' is an 'extreme concept,' requiring 'more than a few isolated incidents of verbal harassment or intimidation,' and that 'mere harassment does not amount to persecution.'") (citing *Gonzalez v. Reno*, 212 F.3d 1338, 1355 (11th Cir. 2000)).

²⁷ *See Al Najjar v. Ashcroft*, 257 F.3d 1262 (11th Cir. 2001).

²⁸ *See* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FACT SHEET: ASYLUM VARIATIONS IN IMMIGRATION COURT (2007), available at www.usdoj.gov/eoir/press/07/AsylumVariationsNov07.pdf (stating that the DHS does not appeal decisions of an immigration judge or BIA to federal court, as those decisions are binding on DHS and that "[h]istorically, the vast majority of decisions of immigration judges and the BIA

BIA that is a designee of the Attorney General, who is charged to interpret and administer immigration statutes.²⁹

Once an alien shows past persecution, the asylum applicant is entitled to an automatic presumption of a well-founded fear of future persecution, which “requires apprehension that is both subjectively present and objectively reasonable.”³⁰ “Subjectively present” means that an applicant must show that his or her subjective fear of persecution is genuine, and “objectively reasonable” means that “a reasonable person in the applicant’s circumstances would fear persecution if forcibly returned to his or her native country.”³¹ Once an asylum seeker shows a well-founded fear of persecution, the burden shifts to the Government to show “that since the time the persecution occurred, conditions . . . have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if . . . [she] were to return.”³²

As previously noted, because an asylum application can be denied for a single inconsistency that goes to the heart of the asylum claim,³³ the Government during individual hearings usually uses

that are appealed to federal court are upheld”). A court of appeals’ standard of review of the immigration judge’s credibility findings is highly deferential. *See Zhang v. INS*, 386 F.3d 66, 73–74 (2d Cir. 2004). The immigration judge’s “administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B) (2007); *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *Yu v. Ashcroft*, 364 F.3d 700, 703 (6th Cir. 2004) (citing 8 U.S.C. § 1252(b)(4)(D)).

²⁹ 8 U.S.C. § 1103(a) (2007). The Supreme Court has stated, “The Attorney General, while retaining ultimate authority, has vested the BIA with power to exercise the ‘discretion and authority conferred upon the Attorney General by law’ in the course of ‘considering and determining cases before it.’” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (citing 8 CFR § 3.1(d)(1) (1998)).

³⁰ *Mitev v. INS*, 67 F.3d 1325, 1331 (7th Cir. 1995); *see also Ambati v. Reno*, 233 F.3d 1054, 1059–60 (7th Cir. 2000); *Cardoza-Fonseca*, 480 U.S. 421, 430–31 (1987).

³¹ *See Mitev*, 67 F.3d at 1331; *Chang v. INS*, 119 F.3d 1055, 1065–66 (3d Cir. 1997).

³² *Surita v. INS*, 95 F.3d 814, 821 (9th Cir. 1996) (citing 8 C.F.R. § 208.13(b)(1)(i)); *Matter of Chen*, 20 I. & N. Dec. 16, v.18 (BIA 1989).

³³ *Chebchoub*, 257 F.3d at 1043. Moreover, “an IJ’s denial of asylum relief, however, can be supported solely by an adverse credibility determination, especially if the alien fails to produce corroborating evidence.” *Chen v. U.S. Att’y Gen.*, 463 F.3d 1228, 1231 (11th Cir. 2006). A grant of asylum requires that the alien provide sufficiently detailed, corroborated and reliable testimony. *Id.* “Indications of reliable testimony include consistency on direct examination, consistency with the written application, and the absence of embellishments.” *Ruiz v. U.S. Att’y Gen.*, 440 F.3d 1247, 1255 (11th Cir. 2006); *see also, In re B-*, 21 I & N Dec. 66, 70 (BIA 1995); *Dailide v. U.S. Att’y Gen.*, 387 F.3d 1335, 1343 (11th Cir. 2004). “[A]n adverse credibility finding must go to the heart of the claim, and not be based on minor discrepancies, inconsistencies, and omissions.” *Lui v. U.S. Att’y Gen.*, 156 Fed Appx. 270, 273 (11th Cir. 2005) (citing *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002); *Akinmade v. INS*, 196 F.3d 951, 954 (9th Cir. 1999)). The standard of credibility determi-

the asylum referral notes to pinpoint testimonial answers that appear to be inconsistent, or those that are in fact inconsistent, with the asylum application or the interview notes and on that basis urges the immigration judge to deny the applications.³⁴

Moreover, it must be noted that the Government would sometimes ask the immigration judge to make a frivolous finding based on inconsistencies between the asylum application and the alien's testimony. It is crucial to understand that a frivolity finding operates against the alien as a life bar from receiving any immigration benefits. Frivolity findings must be made pursuant to 8 C.F.R. § 208.20, which

delineates a specific framework the IJ must follow before making [a frivolity] finding. The IJ must first find material aspects of the alien's asylum application were demonstrably false and such fabrications were knowingly and deliberately made. The alien must then be given ample opportunity during his hearing to address and account for any deliberate, material fabrications upon which the IJ may base a finding of frivolousness.³⁵

As was held in *Scheerer v. U.S. Att'y Gen.*, however, more than an adverse credibility finding is needed to support a finding of frivolousness.³⁶

Urging the immigration judge to deny the asylum application or to make a frivolity finding based on inconsistencies between testimony, the asylum application, and other evidence is not the prob-

nations has changed under the REAL ID Act of 2005, which requires immigration judges to make credibility findings "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim." Pub. L. 109-13, div. B, § 101(a)(3), 119 Stat. 231, 303 (codified at 8 U.S.C. § 1158(b)(1)(B)(iii)).

³⁴ In an Interoffice Memorandum, USCIS Dr. Emilio T. Gonzalez stated that:

... ICE trial attorneys and Immigration Judges use the Asylum Officers' assessment to identify persecutors and individuals who may pose a threat to U.S. security. Because the hearing is *de novo*, the Immigration Judge is not bound by the Asylum Officer's findings, but the information elicited in the affirmative process is nonetheless extremely valuable in establishing an applicant's identity and impeaching the applicant's testimony.

Interoffice Memorandum from USCIS Director Dr. Emilio T. Gonzalez to Prakash Khatri: *Response to the Recommendation to Limit USCIS Adjudication of Asylum Applications to Those Submitted by Individuals in Valid Non-Immigrant Status*, (June 20, 2006) available at http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_24_Asymlum_Status_USCIS_Response-06-20-06.pdf.

³⁵ *Scheerer v. U.S. Att'y Gen.*, 445 F.3d 1311, 1317 (11th Cir. 2006) (citations omitted).

³⁶ *Id.* at 1318; *see also*, *Muhanna v. Gonzales*, 399 F.3d 582, 589 (3d Cir. 2005) (concluding the frivolity determination was not based on a thorough examination of the asylum application but instead on the assessment of the petitioners credibility when testifying).

lem. What must be addressed is the practice of denying aliens in removal proceedings access to public records that the aliens need to prepare for their case on the merits. These proceedings are unfair to aliens.

Justice requires that an applicant for asylum or withholding of deportation be afforded a meaningful opportunity to establish his or her claim. Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.³⁷

The constitutional defects in the proceedings are most apparent (1) when an alien makes a FOIA request for a copy of the file and the USCIS fails to use due diligence to process the request, yet the Government almost always has a copy of the same file and uses it in its case in chief, or (2) when the USCIS does provide a copy of the file but withholds the interview notes that contain binding answers that the alien gave under oath during the initial asylum interview.³⁸

When asked for a copy of asylum referral notes through a FOIA request, regardless of their motive, the USCIS is required under 5 U.S.C. § 552(a)(3) to provide the alien requester with such records unless the USCIS “affirmatively establishes that the requested records fall into one of FOIA’s exemptions.”³⁹ But providing the requested records has not been the norm. The Government’s practice of withholding referral notes from disclosure while using the same records to impeach aliens and urge the immigration judge to deny their applications for relief is repugnant.

³⁷ See *Zubeda*, 333 F.3d at 480 (quoting *Senathirajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998), which quoted *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

³⁸ One scholar explained reasons why government officials routinely deny requests for documents,

In some of the worst cases, officials are actually hiding something, either a violation of law or a practice that the public would not find acceptable on moral grounds or because it shows waste or inefficiency. But that is only part of the story; most withholding is based on the agency official’s different assessment of the benefits and risks of disclosure as opposed to the assessment of those seeking the information and perhaps those who wrote the law.

See Morrison, *supra* note 3, at 118.

³⁹ *Capital Collateral Counsel v. Dept. of Justice*, 331 F.3d 799, 802 (11th Cir. 2003); *NLRB*, 421 U.S. at 137 (noting that under 5 U.S.C. § 552(a)(3) “. . . all ‘identifiable records’ must be made available to a member of the public on demand”); see also Martha A. Churchill, *The Freedom of Information Act— Carry a Big Stick*, 79 MICH. B.J. 836(4) (2000).

Exemption b(5) is used as a cover because USCIS knows that the public would find the practice unacceptable, especially since these aliens are not allowed to review pertinent and sometimes indispensable documents in preparation of their cases on the merits.⁴⁰

If state or federal judges were to allow prosecutors or civil litigants to withhold information from depositions of witnesses but allow one side to use the depositions even for impeachment purposes without giving the other side the benefit of reviewing the depositions beforehand, then the parties from whom the materials were being withheld would find such practice repugnant and prejudicial to their case. Yet, this is exactly what immigration judges have allowed the Government to do when aliens are being impeached by the Government—the Government uses materials to prepare for their hearings on the merits, while the aliens are not permitted access to the same materials.⁴¹

V. THE NEED TO CALL AN END TO THE GOVERNMENT'S UNFAIR PRACTICE

A balance must be struck between the Government's need to remove aliens who violate our immigration laws and aliens' need to be protected from being sent back to countries where they will be persecuted and tortured because of their race, nationality, religion, membership association, or political opinion. While the Government has the power to remove illegal aliens, that power should not be used in a manner that is inconsistent with due process. Therefore, the Government should cease its practice of withholding from disclosure interview notes and other documents requested by asylum seekers who need those documents to prepare for their hearings on the merits.

⁴⁰ See Morrison, *supra* note 3.

⁴¹ Steven Forester, *Haitian Asylum Advocacy: Questions to Ask Applicants and Notes on Interviewing and Representation*, 10 N.Y.L. SCH. J. HUM. RTS. 351, 434 (1993) (noting that “[i]t is unclear whether INS officers took sworn statements in Guantánamo, but they did take interview notes, which the Asylum Officer occasionally has used to impeach [a] client’s testimony at the asylum interview”). With regard to airport interview notes, many circuits have cautioned the BIA not to use such interviews against an asylum seeker unless it meets certain indicia of reliability. See, e.g., *Balogun v. Ashcroft*, 374 F.3d 492, 504 (7th Cir. 2004) (“[A]irport interviews only are useful and probative if they are reliable.”); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) (“The airport interview is an inherently limited forum for the alien to express the fear that will provide the basis for his or her asylum claim, and the BIA must be cognizant of the interview’s limitations when using its substance against an asylum applicant.”)

It has not been reported whether immigrant advocates or aliens have challenged the Government's practice of withholding from disclosure interview notes in an alien's file.⁴² Such withholding without justification is a blatant disregard of aliens' procedural due process rights. Thus, this unfair practice must be challenged in court to reach the question of whether Congress intended to deny due process to aliens in removal proceedings.

There are two obvious avenues to challenge these violations. The first avenue is through Federal district courts following an alien's receipt of an incomplete file in response to a FOIA request.⁴³ The second avenue is through circuit courts of appeals, via a petition for review initiated by an alien raising contested issues before the immigration judge and the BIA. The jurisdiction of U.S. courts of appeals to review final orders by the BIA is governed by section 242 of the INA.⁴⁴ The Attorney General is charged with administering immigration statutes enacted by Congress.⁴⁵ In construing a statute, a federal court will afford substan-

⁴² Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Proceedings*, 40 CAL. W.L. REV. 265, 268 (2004) (arguing that "a constitutional right of access to deportation hearings is necessary to safeguard the First Amendment's structural role of ensuring the informed public debate," and that access to such hearings meets the Supreme Court's requirements under *Richmond Newspapers, Inc. v. Virginia*.) Hafetz notes that following the September 11th terrorist attacks, hundreds of people were arrested and detained on immigration charges and that Michael Creppy, Chief Immigration Judge issued a memo directing judges to close "special interest" immigration court proceedings to the public and the press. *Id.* at 266; *see also* Pozen, *supra* note 3, at 662 (citing Memorandum from Michael J. Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (Sept. 21, 2001)); Shunta L. Vincent, *An Alternative to the Blanket Closure of "Special Interest" Deportation Hearings: Balancing the Press's Right to Access and the Government's National Security Interests*, 55 ALA. L. REV. 409, 420-421 (2004) (noting that of the nearly 1200 immigrants who were detained following the September 11th attacks, about 130 with significant information on possible terrorist activity were arrested and criminally charged, and more than half of the 1200 detainees were removed from the United States on minor immigration charges).

⁴³ *See Morrison*, *supra* note 3, at 117 (noting that requesters are given the right to sue federal agencies in United States district courts, which are empowered to make *de novo* reviews to determine whether an agency has properly used an exemption in refusing to disclose records under the Act).

⁴⁴ 8 U.S.C. § 1252 (2007), *amended* by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B., 119 Stat. 231.

⁴⁵ Under 8 U.S.C. § 1103(a) (2007), the Attorney General, with some exceptions, "shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . ." The DHS Secretary is also charged to administer the INA under 8 U.S.C. § 1103(a)(1) (2007). While the functions of the former INS are transferred to the USCIS, a new bureau within DHS under 6 U.S.C. § 271(b)(5), the Department of Justice still retains the functions of the Executive Office for

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tial deference to those agencies charged with administering the statute.⁴⁶ An agency's interpretation of a statute must be approved unless the construction is unreasonable and contrary to congressional intent. While a court will not substitute its own judgment for that of an agency such as the BIA, the courts must reject any interpretation that "is arbitrary, capricious, or manifestly contrary to the statute."⁴⁷

At issue is not an immigration statute, but 5 USC § 552(b), the FOIA statute,⁴⁸ which requires each agency of the federal government to set its own regulations in responding to FOIA requests. Aliens in removal proceedings have due process rights⁴⁹ under the Fifth Amendment to the United States Constitution.⁵⁰ An alien whose rights are to be affected must receive notice and have a meaningful opportunity to be heard.⁵¹ This meaningful opportunity to be heard is understood to encompass a full and fair hearing.⁵² Even if the Attorney General or the DHS Secretary is authorized to set regulations to carry out his duties in administering immigration statutes, FOIA regulations should not be set to prevent aliens from presenting an effective case in a full and fair hearing.⁵³

Immigration Review (EOIR), which includes the immigration courts and the BIA. *See* 8 U.S.C. § 1103(g)(1) (2007).

⁴⁶ *United States v. Rutherford*, 442 U.S. 544, 553 (1979).

⁴⁷ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *see also* *Bamidele v. INS*, 99 F.3d 557, 561 (3d Cir. 1996).

⁴⁸ *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 793-95 (1984).

⁴⁹ Due process claims in deportation proceedings are reviewed *de novo*. *Sanchez-Cruz v. INS*, 255 F.3d 775, 779 (9th Cir. 2001). A due process violation exists if an alien shows that he or she was deprived of liberty without due process of law. *See Mathews*, 426 U.S. at 77. To prevail on a due process challenge to a removal proceeding, there must be a showing that the alleged misconduct resulted in "substantial prejudice" to the alien. *Mullen-Cofee v. INS*, 976 F.2d 1375, 1380 (11th Cir. 1992); *Ibrahim v. INS*, 821 F.2d 1547, 1550 (11th Cir. 1987).

⁵⁰ *See Plyler v. Doe*, 457 U.S. 202, 210 (1982).

⁵¹ *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

⁵² *Dobrota v. INS*, 311 F.3d 1206, 1210 (9th Cir. 2002) (citing *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997)).

⁵³ The Supreme Court has stated that that the FOIA is not meant to provide documents to particular individuals who have special entitlement to them, but rather "to inform the *public* about agency action." *NLRB*, 421 U.S. at 143 (emphasis added). Aliens referred to in this Article are not complaining that USCIS has withheld the information in violation of the alien's right, but rather are concerned about the Agency's actions, namely the practice of withholding information in an alien's file and later using the same information to urge the Immigration Court to deny an applicant's request for asylum. *See Gonzalez Memorandum, supra* note 34. In that Memorandum, Dr. Gonzalez stated, "It is important to understand that, while the *de novo* process enables the Immigration Judge to

A federal agency must disclose agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in section 552(b).⁵⁴ Congress created these exemptions because it “realized that legitimate governmental and private interests could be harmed by release of certain types of information.”⁵⁵ Nonetheless, “[t]he mandate of the FOIA calls for broad disclosure of Government records.”⁵⁶ Once an agency is required to disclose records to one member of the public, the FOIA requires it to release the same records to any other citizen who requests them.⁵⁷

It appears that many immigration judges have agreed with the Government that aliens in removal proceedings do not have discovery rights and that the Government can withhold information, including the interview notes, until the Government decides to use it to impeach the testifying alien, who will be given an opportunity to review the interview notes in court. This approach is fundamentally unfair to aliens who did not have an opportunity to fully prepare for their hearings; yet the aliens are bound by those answers

make independent determinations of fact and law on new evidence, nothing precludes the regular practice of relying on an Asylum Officer’s work to focus a court proceeding or challenge an applicant’s credibility.” *Id.* (noting that the use of asylum officer’s notes to challenge an applicant’s credibility has been supported and upheld by the Second Circuit in *Diallo v. Gonzalez*, 445 F.3d 624, 631-33 (2d Cir. 2006)). In *Diallo*, the alien petitioned the Second District to review the BIA’s decision to affirm the immigration judge’s denial of relief, arguing that the immigration judge erred by basing the adverse reliability finding on the asylum interview without analyzing its reliability. *Id.* at 631. The court denied the petition, finding that an asylum interview was different from an airport interview. *Id.* The court explained that while asylum interviews are conducted by asylum officers “after the alien has arrived in the United States, has taken the time to submit a formal asylum application, and has had the opportunity to gather his or her thoughts, to prepare for the interview, and to obtain counsel,” airport interviews take place immediately after the alien has arrived in the United States often after weeks of travel. *Id.* at 631-32. Therefore, the court noted that it “appears that the imperative to ‘closely examine’ the reliability of asylum interviews is not as pressing as it is in the airport interview context.” *Id.* at 632. Finding that the interview summary provided sufficiently reliable information, the court ruled that the immigration judge was justified to rely on it. *Id.* at 633. While the *Diallo* court upheld the use of asylum interviews, the decision does not justify the practice of withholding interview notes from disclosure. The *Diallo* case was not a challenge to the USCIS’s unfair practice of withholding such notes. Rather, the case was about the reliability of the asylum interview as a base for an adverse credibility finding. Therefore, it remains an issue of great public importance whether the circuit courts of appeals will split regarding the validity of withholding asylum interview records under exemption 5 of the FOIA.

⁵⁴ *Weber Aircraft Corp.*, 465 U.S. at 793 –94.

⁵⁵ *F.B.I. v. Abramson*, 456 U.S. 615, 621 (1982); *C.I.A. v. Sims*, 471 U.S. 159, 167 (1985).

⁵⁶ *Sims*, 471 U.S. at 166.

⁵⁷ *E.g.*, *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (“As a general rule, if the information is subject to disclosure, it belongs to all.”).

which were given under oath. Because the courts of appeals have exclusive jurisdiction to review the BIA's final orders of removal,⁵⁸ a petition for review is one of the main vehicles to challenge the Attorney General's authority to withhold specific information in an alien's file, if the issues or objections are preserved for appeal by the alien who must exhaust his or her administrative remedy.⁵⁹

It is possible that the various circuits might split on whether the Attorney General, or the DHS Secretary, has the authority to withhold information in an alien's file to be used later to urge the immigration judge to deny an application for asylum. That potential split could prompt the Supreme Court to accept the issue for review. By the time it takes for the issue to eventually reach the Supreme Court, however, thousands of asylum seekers will have already been removed following constitutionally defective hearings.

VI. CONCLUSION

The US Government's practice of (1) withholding information such as asylum interview notes from an alien's FOIA request under Exemption 5 USC § 552(b)(5); (2) using that same withheld information to impeach the alien; and (3) urging the immigration court to deny an applicant's request for asylum with little consideration for the due process guaranteed by the U.S. Constitution has far reaching implications for aliens seeking refuge in this country. Because it is likely to take years to litigate the issue in the different circuit courts of appeals before the issue can reach the United States Supreme Court, the best resolution is to persuade Congress to enact legislation addressing the problem.

It is a violation of the very premise of due process to allow the Government to withhold material information given under oath by aliens and permit the Government to use the same withheld information to urge aliens' removal without providing them with the benefit of examining the materials before their hearings on the merits. Considering the current case law and the apparent misin-

⁵⁸ 8 U.S.C. § 1252 (2007).

⁵⁹ 8 U.S.C. § 1252(d)(1) (2007) ("A court may review a final order of removal only if – (1) the alien has exhausted all administrative remedies available to the alien as of right . . ."); *see also* *Amaya-Artunduaga v. U.S. Att'y Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006); *Sundar v. INS*, 328 F.3d 1320, 1323 (11th Cir. 2003) ("The rules are clear: before proceeding to federal court, an alien must exhaust his or her administrative remedies.") (citing *Kurfees v. INS*, 275 F.3d 332, 336 (4th Cir. 2001)).

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terpretation and misuse of key legislation by the Attorney General, the DHS Secretary, and their designees, it is imperative that Congress enact legislation addressing an alien's rights in removal proceedings. We cannot permit the blatant disregard of the Constitution by allowing the Government to use unfair practices, even in the removal of illegal aliens. We cannot continue to believe that we stand for the application of international norms and fair treatment of refugees while our immigration laws are being implemented in a manner that shocks the conscience.

To allow the Attorney General or the DHS Secretary to use FOIA regulations to deny aliens due process undermines confidence in the system. Because the problem has become pervasive and the implications of widespread removal of asylum seekers in fundamentally unfair hearings are too severe to ignore, Congress should step in and enact fair and sensible immigration reform to ensure that aliens in removal proceedings are afforded due process. If using an exemption under 5 USC § 552(b) to deny aliens a meaningful opportunity to be heard in full and fair hearing was not what Congress intended when it authorized the Attorney General or the DHS Secretary to promulgate regulations in administering immigration statutes, then Congress needs to make that clear.

