July 15, 2020

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Submitted via www.regulations.gov


Dear Assistant Director Reid:

On behalf of the American Bar Association (ABA), I submit the following comments in response to the Notice of Proposed Rulemaking regarding Procedures for Asylum and Withholding of Removal, Credible Fear and Reasonable Fear Review (hereinafter, the “Proposed Rules”). The ABA urges the Department of Homeland Security (DHS) and the Department of Justice (DOJ) (together, the “Agencies”) to rescind the Proposed Rules for the reasons described in detail below.

The ABA has grave concerns about the Proposed Rules. Issued against the backdrop of a steady drumbeat of executive branch efforts in the past few years to erode protections for persons who seek asylum,1 the Proposed Rules, if adopted, would, as a practical matter, essentially eliminate the availability of asylum in

* The ABA appreciates the assistance of the law firm Fried, Frank, Harris, Shriver & Jacobson LLP for its pro bono support in helping to prepare these comments.

1 These have included, for example, the “family separation” policy (separating children from their families); the “Migration Protection Protocols” (forcing individuals to wait in Mexico for their U.S. hearings); the “third country” policy (denying asylum to anyone who did not seek asylum in a country they passed through en route to the U.S. (which policy recently was declared invalid by the Ninth Circuit Court of Appeals); establishment of “tent courts” (providing for virtual hearings in remote desert areas, without access to legal counsel); “metering” (restricting entry at border ports of entry); “binary choice” policy (forcing parents to choose between separation from their children or their children’s indefinite detention); asylum cooperative agreements or “safe” third-country agreements (removing asylum seekers to a Northern Triangle country to seek asylum there); decisions by the Attorney General on self-certification reversing longstanding precedent (suggesting in dicta that victims of domestic violence or gang violence could rarely obtain asylum, for example); suspension of the entry of immigrants who would not be covered by health insurance; and “turn-back” policies (turning back migrants—which, since the pandemic, has included unaccompanied children—at the border, without any screening or adjudication at all).
The proposed changes not only would fundamentally alter existing law with respect to both substantive eligibility and procedure, but would reverse decades of judicial precedent (dating to at least the passage of the Refugee Act of 1980)--all without any action from Congress.

The ABA is the largest voluntary association of lawyers in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. Working with and through its Commission on Immigration, the ABA advocates for improvements to immigration law and policy; provides continuing education to the legal community, judges, and the public on immigration law issues; and develops and assists in the operation of pro bono legal representation programs for immigrants and asylum seekers, with a special emphasis on the needs of the most vulnerable. Our views are informed in part by our experience in operating two direct representation immigration projects at the border (ProBAR in Harlingen, Texas and the Immigration Justice Project in San Diego, California) that serve detained (and some non-detained) adult and unaccompanied minor immigrants and asylum seekers, as well as the Children’s Immigration Law Academy (CILA) a technical support project in Houston that serves children’s immigration legal services programs throughout Texas.

The ABA’s policy work in the immigration field is concentrated primarily on ensuring fair treatment and due process rights for asylum seekers and other immigrants, from the time of their arrival at our border through the final adjudication of their cases. We have issued policy recommendations advocating for access to legal information and legal counsel for indigent immigrants in removal proceedings; the elimination of

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family separation; compliance with standards relating to the civil detention of non-citizens in immigration proceedings; alternatives to detention and limiting detention to the least restrictive alternative; the appointment of counsel for unaccompanied children and other indigent individuals in removal proceedings; compliance with standards relating to the custody, care and adjudication of unaccompanied children; improvements to the immigration adjudication process; and the preservation and amplification of fair asylum laws and procedures.

The evolution of the country’s asylum laws reflects the inherent struggle to balance the need to enforce territorial borders with the imperatives, especially for a leading world power, of supporting the world’s most vulnerable people by providing a safe haven for refugees. While the existing asylum process fails to fully deliver the fairness and due process one would expect in the U.S. legal system, the Proposed Rules, through redefinition of central legal concepts and elimination of the minimal due process protections in the current system, go so far as to essentially abrogates the possibility of asylum for almost all who would apply for it.

As a preliminary matter, the ABA is troubled and believes it is prejudiced by the truncated 30-day notice period provided by the Agencies for the submission of comments on the Proposed Rules. No explanation has been given as to why the customary 60-day notice period could not be provided. The abbreviated period seems particularly inappropriate given the transformational nature of the proposed changes, the complexity and length of the Proposed Rules, and their serious consequences in restricting (or even eliminating) the ability of many individuals seeking protection from persecution to obtain asylum.

Although the ABA has complied with the published 30-day deadline, we note that we have been forced to select only a few issues to address due to these time constraints. We would have commented on additional issues of concern and provided more specific, illustrative examples from our project staff and volunteers if the standard 60-day period had been provided. The fact that we have not commented on certain provisions of the Proposed Rules should not be interpreted as support for, or certainly, lack of objection to them.

The ABA urges that the Proposed Rules be rescinded for the following reasons:

- The Proposed Rules are not consistent with, and would essentially eviscerate, the substantive asylum law and procedures as established and intended by Congress. The Proposed Rules go beyond “clarifying” or “interpreting” the relevant statute. Rather, they exclude from eligibility entire categories of people for whom Congress intended to provide asylum protection. In addition, they establish a new process for determining asylum eligibility that includes features that were specifically considered and rejected by Congress.

- Further, the Proposed Rules would eliminate basic due process protections from the asylum application process and would virtually eliminate the already limited opportunity for meaningful access to legal counsel and legal information. In addition to determining eligibility to seek asylum based on only an initial limited screening before a U.S. Citizenship and Immigration

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3 Exec. Order 12866, 58 C.F.R. § 190 (1993); Exec. Order 13563, 75 C.F.R. § 3821 (2011) (saying “to the extent feasible,” a period of “at least 60 days” should be provided for comments on proposed rules. The Agencies have not indicated any reason that the 60-day time period would not be feasible here.).
Services (USCIS) asylum officer rather than a full hearing before an impartial adjudicator, the Proposed Rules would change the applicable standards of proof, shift burdens, and deny access to legal counsel and information. By abbreviating the system so that access to asylum determinations can be foreclosed at the initial stage of the process, the Proposed Rules also would reduce almost to zero the already limited access asylum seekers have to legal counsel and legal information—while at the same time making such access more important than ever before given the abbreviated process and other changes. As a result, this process is fundamentally unfair and lacks basic safeguards necessary to ensure due process.

I. The Proposed Rules, if Adopted, Would Contravene the Substantive Laws Relating to Asylum Eligibility as Intended and Established by Congress.

In 1967, the U.S. became a signatory to the United Nations Protocol Relating to the Status of Refugees (1967 Protocol), as a result of which the U.S. became obligated to comply with the 1951 Geneva Convention on the Status of Refugees (Refugee Convention). Later, Congress codified these obligations in the Refugee Act of 1980 (Refugee Act), and made them part of the Immigration and Nationality Act (INA). As the U.S. Supreme Court recognized: “The [Refugee Act] establish[ed] a broad class of refugees who are eligible for…asylum” in the U.S. As is described in specific detail below, the Proposed Rules, if adopted, would exclude from asylum protection entire categories of people whom Congress never acted or intended to exclude. Indeed, the changes contemplated are so extreme that, as a practical matter, they would nearly eliminate any right to asylum in the U.S. altogether. This result would be contrary to the language and purpose of our laws that provide asylum protection to people who face persecution or torture in their home countries on account of grounds specified by Congress to be consistent with our obligations under international law. The Proposed Rules also are of great concern to the ABA given our longstanding support for laws, policies, and practices that ensure optimum access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge.

The foundational principle of administrative law is that an agency has no power to negate a law enacted by the legislature. The purpose of legislative delegation to administrative agencies is the creation of rules that are consistent with the statute enacted and legislative intent. Thus, regulations will not be upheld by a court if they conflict with the statute they purport to administer, are contrary to legislative intent, or essentially

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6 INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987) (emphasis added). The Supreme Court noted that the Refugee Act “mirrors the provisions of the [1967 Protocol], which provided the motivation for the enactment of the [Refugee Act].” Id.
eviscerate the law. Further, an agency may not depart from its own prior policy without providing a reasoned explanation of the need for the change.

The Proposed Rules, if adopted, would violate each of these principles. They are inconsistent with, and would effectively negate, the INA and the 1967 Protocol. They are inconsistent with the legislative intent underlying enactment of the Refugee Act. They depart from the Agencies’ own prior policies, Board of Immigration Appeals’ (BIA) precedents, and federal Circuit Court of Appeals precedents, without adequate explanation for the changes. In the name of addressing ambiguity and providing clarity, they would not clarify but would change Congress’ delineation of who is eligible for asylum protection in this country.

The Refugee Convention and 1967 Protocol define which people qualify as “refugees” and provide that refugees are eligible for asylum protection. A refugee is defined as: “Any person who is unable or unwilling to avail himself or herself of the protection of [his or her home] 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.” The Refugee Act adopts the same definition and provides that refugees are eligible for asylum protection in the U.S. Decades of BIA, U.S. Circuit Court and U.S. Supreme Court jurisprudence have interpreted the meaning of “unable to avail”; “well-founded fear”; “persecution”; “on account of” (also referred to as “nexus”); “particular social group”; and “political opinion.” The emphasis has been on the need for case-by-case analysis based on the particular facts and circumstances. It is axiomatic that these determinations depend on a multitude of factors specific to each case—such as, among many others, the country involved; the region or specific area of the country; the conditions in that place at the relevant time; the individual involved; the specific events that occurred; the context in which the events occurred; and the frequency and severity of the events.

Upending the case-by-case approach of determining eligibility for asylum protection based on the definition of refugee adopted by Congress and as long interpreted by the courts, the Proposed Rules would impose near-blanket exclusions from asylum eligibility through the Agencies’ redefinition of who should be

7 Under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984), the U.S. Supreme Court established that agencies have implicit authority to interpret statutes and that courts should defer to those interpretations so long as (a) the statute was silent or ambiguous with respect to the specific issue and (b) the agency’s interpretation is reasonable (i.e., is not inconsistent with the statute). National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967 (2005), clarified that, under “Chevron deference,” agency interpretations of a statute will not trump judicial precedents if the judicial decision followed from what the court found to be “unambiguous” terms of the statute (in which case, the Supreme Court explained, Congress would have left no “gaps for agencies to fill in their discretion”). Thus, while an agency can adopt rules to “fill the gaps” with respect to ambiguous provisions, its interpretation cannot contravene the statute or the Congressional intent. Also, see, e.g., Secretary of Labor v. Twentymile Coal Co., 411 F. 3d 256, 260-62 (D.C. Cir. 2005) (“To read the regulation’s use of the term...[in this way] would lead to absurd results....This Court will not adopt an interpretation that would render the particular law meaningless.”).


9 INA § 101(a)((42)(A) (2005).

10 INA § 101(a)((42)(A) (2005). A “refugee” is any person who meets the definition of refugee and is outside his or her home country. An “asylee” is a person who meets the definition of “refugee” but is seeking admission at a port of entry to, or is already present in, the U.S.
considered to be a refugee. The Agencies’ definitions in the Proposed Rules do not interpret the statutorily-provided criteria, but rather arbitrarily exclude vast categories of people who are either covered by the plain language of the statute, or whose exclusion from coverage is inconsistent with legislative intent. Certainly, Congress did not act to exclude them as evidenced by the forty years of evolving jurisprudence under the Refugee Act.  

It also is concerning that the Agencies fail to provide an adequate explanation for any of the proposed changes. The Agencies claim that the purpose of the proposed changes is to provide “clarity” and more “uniform application” of the law; to “streamline” the process and “reduce the amount of time adjudicators must spend evaluating [asylum] claims”; and to reduce widespread “fraud” and “meritless claims” by asylum applicants. However, as just discussed, the changes do not “clarify” the law but rewrite it. In addition, “streamlining” is a concept that involves improvements to the efficiency of a system, not simply excluding from the system many to whom the law provides its protection (whether because the group is large or simply disfavored). Also, far from increasing efficiency, the new changes use undefined terms which will lead to unnecessary litigation before the BIA and the Circuit Courts of Appeal to determine their actual meaning. In many cases, the Agencies simply substitute a new term for an existing term or standard, with commentary that purports to shed light on the meaning but includes no definition in the rules themselves. For example, it is hardly clear on its face precisely what a change from a standard of “significant possibility” to one of “reasonable possibility” actually means. The only support the Agencies cite for the proposition that fraud and meritless claims exist is that a large percentage of asylum claims are denied. Clearly, the denial of applications does not necessarily establish that the applicants acted fraudulently or had baseless claims. Indeed, the increase in the percentage of applications denied appears

11 The evisceration of the basic provision of asylum protection as intended by Congress is evidenced, further, by the Proposed Rules’ revision of the procedures for determining eligibility (which the Agencies concede are intended to “weed out” most claimants at the very earliest stage of the process) (see Sections II and III below).


13 See East Bay Sanctuary Covenant v. Barr, Nos. 19-16487, 19-16773, 2020 U.S. App. LEXIS 21017, at *55-56 (9th Cir. July 6, 2020) (“On the side of the government, the public has an interest in relieving burdens on the asylum system and the efficient conduct of foreign affairs. But, as the district court noted, shortcutting the law, or weakening the boundary between Congress and the Executive, are not the solutions to these problems.”). See also, Cece v. Holder, 733 F.3d 662, 675 (7th Cir. 2013) (“[U]ndoubtedly any of the six million Jews ultimately killed in concentration camps in Nazi-controlled Europe could have made valid claims for asylum, if only they had had that opportunity. Many of our asylum laws originated out of a need to address just such refugees from World War II. It would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims.”).

14 The Agencies themselves acknowledge that the proposed rule would supersede interpretations by the federal courts of appeals and “warrant re-evaluation” by reviewing courts. Proposed Rules, 85 Fed. Reg. at 36266, n. 1 and 36282, n. 32.


16 We note that fraud has been a theme often articulated by the Agencies in recent years without any substantiation of the alleged problem. For example, USCIS’s spending on anti-fraud efforts in connection with applications for immigrant benefits more than doubled from 2016 to 2020 (with the amount spent on the vetting of applications for benefits tripling). However, USCIS offered no evidence indicating there were undetected levels of fraud in benefit adjudications. See Sarah Pierce and Doris Meissner, USCIS Budget Implosion Owes to Far More Than the
to be primarily a result the approach of the Agencies *themselves* in establishing increasingly restrictive policies to severely limit the universe of those eligible for asylum.\(^{17}\)

The following are some of the ways in which the Proposed Rules would contravene statutory language or intent, without any indication that the INA allows for such exclusions from asylum protection, that such exclusions would be consistent with what Congress intended, or providing a reasoned explanation for changes to prior agency interpretations of important statutory terms. The Proposed Rules also are concerning because they would present many new barriers to asylum eligibility when the United States should be ensuring optimum access to legal protection for asylum seekers.

1. **The Proposed Rules create a near-blanket exclusion from asylum eligibility for people who are persecuted based on gender, domestic violence, or gang violence—which would preclude protection for the vast majority of recent applicants.**

As noted, the Refugee Act provides that, among other grounds for asylum eligibility, asylum protection will be afforded to people who face persecution on account of their “membership in a particular social group.” The term “particular social group” (PSG) is not defined in the statute or by regulation, but has been interpreted by the BIA and the federal courts. The BIA established the definition in 1985, in *Matter of Acosta*, as: “A group of persons all of whom share a common, immutable characteristic,” which characteristic “either is beyond the power of an individual to change or that it is so fundamental to his identity or conscience that it ought not be required to be changed.”\(^{18}\) The characteristic upon which a PSG is based may be one a person is born with, or may be based on social status, shared habits, or shared experiences.\(^{19}\) In recent years, the BIA and the Attorney General have made it more difficult for asylum seekers to demonstrate membership in a PSG, by adding to the immutability requirement the concepts that the group also must be “socially distinct”—*i.e.*, is “understood to exist as a recognized component of the

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\(^{17}\) For example, in addition to a generally more restrictive approach by the Agencies, they have increased the use of detention, which severely restricts asylum seekers’ access to legal counsel and legal information (see Section IV below); and they have increasingly employed as judges individuals with government and prosecutorial backgrounds. The data suggests that it is stricter asylum policies and political factors in the U.S. that underlie the increase in the percentage of asylum applications denied in recent years. The percentage of applications denied reached a record high in 2018 (see TRAC Report, *Asylum Decisions and Denials Jump in 2018* (Nov. 28, 2018), https://trac.syr.edu/immigration/reports/539/ (with data compiled from 2001 through 2018 by TRAC, a nonpartisan, nonprofit data research center affiliated with Syracuse University). The 2018 rate of denials represented a jump of 40% over the rate from the year before, and of 89% over the rate the year before that. Moreover, the variability of the rate of denials depending on the specific Immigration Judge deciding the case suggests that, even at the Immigration Court level, asylum decisions generally are based more on political outlook than the legal validity of the claims. For example, as reflected in the TRAC report data, in the San Francisco Immigration Court, the denial rate in 2018 among the various judges on that court varied from a high of 97% to a low of 10%. (The TRAC report notes that rising denial rates have not been the result of asylum seekers “failing to show up” for their hearings, as asylum applicants were in court for the grant or denial decision in 98.6% of cases on a nationwide basis.)

\(^{18}\) 19 I&N Dec. 211 (BIA 1985).

\(^{19}\) See, *e.g.*, *In re C.*, 23 I&N Dec. 951, 956, 959-60 (BIA 2006).
society in question”; and must have “particularity”--i.e., is “defined by characteristics that provide a clear benchmark for determining who falls within the group.”

The Proposed Rules would create a near-blanket exclusion from the definition of PSG for all groups of people whose persecution is based on gender, domestic violence or gang violence. Nothing in the statutory definition or the legislative history indicates that these groups are excludable from asylum protection, however. For example in the case of persecution based on gender, the United Nations High Commissioner for Refugees (UNHCR), which oversees the Refugee Convention on which the Refugee Act is based, has explicitly confirmed that people fleeing gender-based persecution, including on account of membership in a gender-based PSG, do qualify for asylum under the Convention’s definition of “refugee” (which is the same definition Congress specified in the Refugee Act). The ABA has long supported including gender-based violence as a ground for asylum and has urged the adoption of legislation or administrative action ensuring that gender-based persecution will be recognized as a PSG. Further, the proposed exclusions are contrary to decades of jurisprudence finding that members of these groups can be eligible for asylum protection. For example, the Agencies, notably, cite only one case in support of their proposed general bar on gender-based claims--and the case cited, Niang v. Gonzales, actually stands for the opposite proposition. In Niang, the Tenth Circuit Court of Appeals, while it found that the individual in that case was not entitled to asylum based on the alleged gender-based PSG, stated that gender “certainly do[es]” constitute a PSG and that “the BIA’s decisions provide[] no reason why more than gender…would be required to identify a

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20 Matter of W-G-R-, 26 I&N Dec. 208, 217 (BIA 2014); Matter of M-E-V-G-, 26 I&N Dec. 227, 239 (BIA 2014). We note that, in addition to the blanket exclusion of specified groups from the definition of PSG, as we discuss herein, the Proposed Rules also would narrow the definition of PSG by codifying the requirements of “social distinct[ion]” and “particularity” (Proposed Rules, 85 Fed. Reg. at 36278)--even though these concepts are inherently vague and certain Circuit Courts have rejected them as “unreasonable interpretations” of the term “PSG” (see, e.g., Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009) (holding that the Acosta “immutability” test is the appropriate standard for a PSG); Ceece v. Holder, 733 F.3d 662 (7th Cir. 2013) (finding that “young Albanian women living alone” is a cognizable PSG); Valdiviezo-Galdamez v. Attorney General of the U.S., 663 F.3d 582, 608 (9th Cir. 2011) (rejecting the social visibility test); and Henriquez-Rivas v. Holder, 707 F.3d 1081, 1088, 1090-91 (9th Cir. 2013) (where the court wrote: “It is difficult to articulate precisely what the BIA mean[s] by “social visibility”…[a]nd [t]he BIA’s elaboration in case-by-case adjudication…is somewhat inconsistent….”)].

21 It is to be noted that the exclusion of gender as a basis for a PSG is not provided for in the section of the Proposed Rules that addresses PSGs. Rather, the section that addresses the “nexus” requirement provides a general bar on asylum and withholding claims based on gender--thus indicating that gender cannot be the basis for a PSG (nor the basis for political opinion, as discussed in Section I.2 below). This placement appears to reflect a more general misunderstanding of the difference between the “nexus” requirement and the “grounds” for asylum specified in the statute.


There are numerous BIA and Circuit Court decisions that make the same point, but, in the Proposed Rules, the Agencies do not provide a reasoned explanation for the exclusions in light of this contrary authority.

Moreover, the proposed near-blanket exclusion approach violates decades of jurisprudence that has emphasized that determining whether persecution was on account of the person’s membership in a PSG requires a fact-intensive analysis of a variety of factors specific to the individual case. The Agencies cite 422 F.3d 1187 (10th Cir. 2005); Proposed Rules, 85 Fed. Reg. at 36291. (The Agencies quote from Niang as follows: “There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation’s residents to obtain asylum on the ground that women are persecuted there….,” 85 Fed. Reg. at 36291. However, the court states in Niang that this concern is misplaced. The issue, the Court stated is not “whether either gender constitutes a social group (which both certainly do),” but whether the members of the group are likely to be persecuted on that basis (emphasis added)).

See, e.g., In re Acosta, 19 I&N Dec. at 233 (BIA 1985) (which lists “sex” as the first example of an immutable characteristic that could be the basis for a PSG); and Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) (in which then-Judge Samuel Alito opined that a woman who claimed she was entitled to asylum based on persecution “solely because she is a woman” had identified “a group that constitutes a ‘particular social group.’”).

See, e.g., Pirir-Boc v. Holder, 750 F.3d 1077, 1084 (9th Cir. 2014) (“To determine whether a group is a particular social group for the purposes of an asylum claim, the agency must make a case-by-case determination as to whether the group is recognized by the particular society in question. To be consistent with its own precedent, the BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity, especially where, as here, it is presented with evidence showing that the proposed group may in fact be recognized by the relevant society.”).

While, in the Agencies’ discussion of the Proposed Rules, some minimal lip service is paid to the concept of the need for a case-specific analysis of PSG, the Agencies make clear that persecution relating to gender, domestic violence, or gang violence “generally will be insufficient to demonstrate persecution based on this protected ground”; that the Agencies, “in general, will not favorably adjudicate asylum or statutory withholding of removal claims based on persecution [relating to these grounds]”; and that it will only be in “rare circumstances such facts [i.e., gender- or gang-based violence]) could be the basis for finding nexus.” Proposed Rules, 85 Fed. Reg. at 36281-2. Moreover, the passing reference to these being the rules “in general” does not mean that they contemplate a case-by-case analysis (see, e.g., Grace v. Whitaker, 344 F. Supp. 3d 96, 125-26 (D.D.C. 2018), holding that an Attorney General opinion saying that gang-based claims “generally” will not qualify for asylum impermissibly “create[s] a general rule”).

In Matter of A-B, 27 I&N Dec. 316 (BIA 2018), the Attorney General overruled the precedential decision of Matter of A-R-C-G, 26 I&N Dec. 388 (BIA 2014), which had officially recognized domestic violence (i.e., violence occurring within the home) as a basis for asylum. In A-B, however, the Attorney General found that any violence by a “private,” non-governmental actor is suspect as a basis for asylum because the victims are not necessarily “exposed to more violence or human rights violations than other segments of society.” The Attorney General extended the analysis to state in dicta that victims of gang violence generally would not be eligible for asylum under the same reasoning. However, A-B did not provide a blanket rule that the PSG asserted in A-R-C-G, or that other PSGs based on domestic or gang violence, definitively could not constitute a valid PSG under any set of circumstances. Rather, the underlying legal framework was left intact—such that, if the facts of a particular case established that the requirements for a PSG were met based on domestic or gang violence, there would be a basis for asylum eligibility. Although much of the dicta in A-B that negates domestic or gang violence as a likely basis for a PSG was included in policy guidance issued by ICE and USCIS, a memorandum issued by ICE acknowledges that, in A-B, “although the [Attorney General] overruled A-R-C-G, he did not conclude that particular social groups based on status as a victim of private violence could never be cognizable, or that applicants could never qualify for asylum or statutory withholding of removal based on domestic violence or gang violence.” Memorandum from U.S. Immigration and Customs Enforcement, Litigating Domestic Violence-Based Persecution Claims Following Matter
“ambiguity” in the term “PSG” and assert that the Proposed Rules will provide greater “clarity” as to its meaning by establishing “parameters” for what kind of groups will constitute a PSG. However, the Proposed Rules do not provide parameters for determining which groups constitute a PSG at all; rather, they simply define PSG to exclude specified groups from its ambit--anyone who suffers persecution on account of gender, domestic violence, or gang violence--without indicating how this “interpretation” is a reasonable one, especially given the need for an individualized case-by-case consideration based on the particular factual circumstances, DHS’ prior position that gender can be a PSG,27 and the contrary federal court case law.

The Agencies note that the BIA has often issued “decisions delineating which groups did and did not qualify” as PSGs. However, as the Agencies also note, “[f]ederal courts have raised questions about whether the Board or the Attorney General can recognize or reject particular social groups in this manner”28 and the Agencies do not address this issue at all in the Proposed Rules. The BIA cases cited by the Agencies all were issued prior to the addition of the “particularity” and “social distinction” requirements for PSGs. Although “immutability” arguably involves a question that can be determined as a matter of law in at least some cases (i.e., deciding whether a characteristic a person has cannot be changed or is so intrinsic that it should not have to be changed), “particularity” and “social distinction” are fact-based concepts the determination of which will always vary depending on the specific context of a given case (i.e., deciding whether a particular person has characteristics that are associated with a particular group within a particular society at a particular time). Accordingly, while it was previously questionable whether the BIA could validly specify groups as not qualifying for PSGs as a matter of law, it is clearly much more questionable now.

2. The Proposed Rules provide such a narrow definition of “political opinion” as to nearly eliminate it as a basis for asylum protection.

As noted, the Refugee Act provides that persecution on account of “political opinion” is a basis for asylum eligibility. “Political opinion” is not defined in the statute or by regulation. Through decades of
administrative and judicial interpretation, the term has been accorded a generally broad interpretation. The Proposed Rules, however, seek to define “political opinion” more narrowly, requiring an opinion supporting “a discrete cause related to political control of a state or a unit thereof.” Further, the Proposed Rules specify types of opinions that would not qualify as political opinion under this new, narrow definition.

The Agencies cite “ambiguity” in the term “political opinion” and state that the Proposed Rules will provide greater clarity as to its meaning by establishing parameters for what will and will not constitute political opinion. The Proposed Rules do not provide parameters, however, but simply, through definition of the term, exclude entire categories of political opinions as having insufficient grounds for asylum protection. The Agencies’ efforts to explain why this new interpretation is a reasonable one or consistent with legislative intent are not persuasive, especially given decades of case law development that are in tension with the proposed definition.

For example, the Agencies cite Matter of S-P as support for limiting the definition of political opinion to opinions “involv[ing] a cause against a state or political entity rather than against a culture.” However, Matter of S-P stands for a very different proposition. The BIA required in that case that the asylum applicant demonstrate that his political opinions were “antithetical” to those of the government--not that his opinions related to the government itself. The Agencies also cite the 2019 United Nations High Commissioner for Refugees (UNHCR) Handbook as support for the new definition, but the Handbook states only that, to qualify as a basis for asylum protection, a “political opinion” must simply be “different from those of the Government.” It does not suggest, much less require, that the opinion relate to control of the government itself.

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29 See generally Gregory Porter, Persecution Based on Political Opinion, 25 Cornell Intl. L.J. 231, 250-51 (1992); see also Garcia-Ramos v. Immigration & Naturalization Serv., 775 F.2d 1370, 1374 (9th Cir. 1985) (holding that evidence of membership and activities in persecuted political groups demonstrated political activity); Hu v. Holder, 652 F.3d 1011, 1018 (9th Cir. 2011) (holding that participation in a labor union can be political activity).


31 Id.


The Agencies’ proposed new definition would overturn decades of case law development, which has provided generally for a broad definition of political opinion in the asylum context and would exclude many types of opinions that are commonly considered to be squarely “political” although they do not “relate to political control of the state.” Similarly, persecution of a person for speaking out to expose corruption, speaking out in defense of civil liberties or human rights, or joining a union would be excluded, although these have long been considered bases for asylum protection in the U.S. as political opinions or political acts. The proposed definition requiring that political opinion be against “the state or a legal entity thereof” also ignores the reality that, in many countries, those in control of a town or region (or even the country) may well not be “the state” but, rather, an entity the government cannot or will not control--making the state irrelevant for purposes of the type of political opinion at which asylum protection is addressed.

3. The Proposed Rules create a new definition of “persecution” itself that is so narrow as to eliminate most acts that have long been considered to be persecution.

Compounding the problem created by the redefinition of “PSG” and “political opinion” (discussed above) is that the Proposed Rules create a new definition for “persecution” that is so narrow as to essentially render the concept meaningless. “Persecution” currently is not defined in the statute or by regulation. In the

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35 An agency cannot, through regulation, change the common meaning of a term used by Congress unless the statute or legislative history indicate that something other than the common meaning was intended. See, e.g., *Dimension Financial* 474 U.S. 368-373 where the U.S. Supreme Court held that the Federal Reserve Board could not “redefine” the term “commercial loan” to include transactions that “[d]id not fall within the commonly accepted definition of ‘commercial loans’ [because] n[ot]hing in the statutory language or the legislative history indicate[d] that the term ‘commercial loan’ meant anything different from its accepted ordinary commercial usage.”

36 In one of many such cases, the BIA erred in denying a Ukrainian businessperson asylum on the basis of political opinion after he exposed to high-level government officials corruption in the local police department and he was persecuted for it. *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007). Also, the Second Circuit reaffirmed that opposition to corruption at a state-owned factory where the asylum claimant had worked could qualify as political opinion for asylum purposes even though he had not proved that similar corruption existed anywhere else, or in any other context, in the country. *Ruqiang Yu v. Holder*, 693 F.3d 294 (2d Cir. 2012).

37 *Osorio v. INS*, 1994 U.S. App. LEXIS 40943 42-43 (2d Cir. 1994). Further, even pacifism and neutrality have sometimes been recognized as reflecting an opinion that pits an applicant in conflict with a ruling government. See James C. Hathaway & Michelle Foster, *The Law of Refugee Status* 409, 413-15 (Cambridge Univ. Press 2d ed. 2014) (1991); see, e.g., *Bolanos-Hernandez v. INS*, 767 F2d 1277, 1286 (9th Cir. 1985); cf. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (where the Supreme Court held that a person, who was neutral with respect to support for a guerilla group, did not have grounds for asylum based on political opinion--but because he had not provided sufficient evidence to demonstrate that the guerillas would persecute him on his return to Guatemala because of his political beliefs).

Proposed Rules, the Agencies state that the “current definition of persecution, for asylum and withholding of removal purposes, [is] a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way viewed as offensive.” 39 The new proposed definition would require “an intent to target a belief or characteristic” and “the infliction of a severe level of harm” by “actions so severe that they constitute an exigent threat.” In fact, the proposed definition includes types of harm very close to those contemplated as within the meaning of “torture” in the implementing regulations for the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 40 and therefore would elevate the concept of persecution to require a showing similar to that required to demonstrate torture. Indeed, torture under the existing regulations encompasses conduct not requiring physical harm at all, but includes certain forms of psychological abuse. 41

The definition of persecution imposed under the Proposed Rules would exclude many levels and types of harm and suffering that UNHCR and courts have recognized, and have been widely understood as constituting, persecution. “Persecution” has been understood as a term that is not limited to just an imminent threat of death or serious bodily harm. 42 For example, the UNHCR Handbook and case law provide that acts which, when considered in the aggregate, deprive a person of the ability to work or earn a livelihood, can constitute persecution. 43 The ABA is concerned with the Agencies’ efforts to further limit access to humanitarian protection by elevating the legal standard for what constitutes “persecution,” especially when they purport to do so without explaining how or why the new definition of “persecution” is a reasonable construction of the statute, considering contrary views by UNHCR and multiple federal courts.

4. The Proposed Rules would constrain an adjudicator’s discretion when determining whether to grant asylum relief and upend decades of case law.

39 The Agencies cite for this definition the decision in Matter of Acosta, 19 I&N Dec. at 222.

40 8 C.F.R. § 208.18(a).

41 See id. (establishing that the threat of imminent death and the threat of death or torture of another person could qualify as torture); Deborah A. Anker, Understanding “Suffering,” Yet Misconstruing Intentionality: U.S. Compliance and Non-Compliance with the Convention against Torture, REF|LAW (Aug. 6, 2017) (threats of extrajudicial killing or assassination are normally considered torture by U.S. Courts); see also http://www.reflaw.org/understanding-suffering-yet-misconstruing-intentionality-u-s-compliance-and-non-compliance-with-the-convention-against-torture/#. Indeed, the U.N. Special Rapporteur on Torture describes solitary confinement; denial of sleep, food or hygiene; and threats to kill or torture relatives as forms of torture. U.N. Comm’n Hum. Rts., 42d Sess., Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Rep. of the Special Rapporteur, ¶ 119, U.N. Doc. E/CN.4/1986/15 (Feb. 19, 1986).

42 The Ninth Circuit articulated the prevailing view of the meaning of persecution in Desir v. Ilchert, where it stated that persecution or well-founded fear of persecution “encompass[es] more than just restrictions or threats to life and liberty. [It] involves the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive…. [It] is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate.” 840 F.2d 723, 726-27 (9th Cir. 1988).

43 UNHCR Handbook at ¶¶ 53-55. See also, e.g., Stserba v. Holder, 646 F.3d 964, 972 (6th Cir. 2011); Shi Chen v. Holder, 604 F.3d 324, 334 (7th Cir. 2010); and Zhen Hua Li v. Attorney Gen. of the U.S., 400 F.3d 157, 168-69 (3d Cir. 2005).
Under the asylum statute, BIA case law, and decades of federal court jurisprudence, the Agencies are authorized to use their discretion in determining whether, based on a consideration of the totality of the circumstances, an individual who is eligible for asylum should be granted relief. The Proposed Rules seek to upend this standard by listing specific factors that adjudicators must consider when determining whether to grant asylum relief as a matter of discretion, and the weight that must be placed on such factors. This proposed change is of great concern to the ABA, which has long supported providing adjudicators with discretion when deciding the availability of immigration relief. The ABA also is disturbed by the Agencies’ failure to provide a reasoned explanation—indeed, they provide no explanation—for attempting to supersede existing case law. Specifically, the Proposed Rules would impose a set of nine factors, the presence of any one of which would allow for the favorable exercise of discretion only in “extraordinary circumstances,” and three additional factors that must be considered, any one of which must be considered as “significantly adverse for purposes of the discretionary determination.”

As the Agencies acknowledge, this approach directly contravenes the standard, which has been in effect since 1987 under the BIA’s seminal Matter of Pula decision, that, in determining whether to grant asylum, the “danger of persecution should generally outweigh all but the most egregious factors.” The concept of discretion is intended to be flexible when it matters most to the applicant—existing regulations provide that discretionary denials should be reconsidered by the Immigration Judge when they would preclude the applicant’s reunification with a spouse or child following to join. The proposed changes also are in tension with the existence of the statutory bars to applying for or being eligible for asylum. Negative discretionary factors should be left for the adjudicator to weigh and consider as appropriate on a case-by-case basis. Instead, the Proposed Rules seek to elevate certain considerations into the equivalent of statutory bars to asylum. In addition, federal jurisprudence across multiple circuits reflects that denials of asylum based on factors such as those included in the Proposed Rules should be (and have been) “exceedingly rare” and “generally based on egregious conduct by the applicant.” While the agencies acknowledge the inconsistency with Matter of Pula, they fail to provide a reasoned explanation for their decision to overturn decades of case law and dictate the discretionary factors that adjudicators must use and the weight the factors must be given when considering whether to grant asylum.

44 INA § 208(b)(1)(A); Matter of Pula, 19 I&N Dec. 467, 473 (BIA 1987).


46 Establishing Asylum Eligibility, 8 C.F.R. §§ 208.13(d), 1208.13(d) (proposed June 11, 2020). The Proposed Rules make clear that the factors will function as bars except in “extreme” cases involving “national security or unusual and extreme harm” to the applicant. Proposed Rules, 85 Fed. Reg. at 36283.


49 8 C.F.R. § 1208.16(e); see also, e.g., Huang v. INS, 436 F. 3d 89 (2d. Cir. 2006).


51 See, e.g., Chi Alfred Zuh v. Mukasey, 547 F.3d 504, 507 (4th Cir. 2008); Aioub v. Mukasey, 540 F.3d 609, 612 (7th Cir. 2008); Wu Zheng Huang v. Immigration & Naturalization Serv., 436 F.3d 89, 92 (2d Cir. 2006); Kouljinski v. Keisler, 505 F.3d 534, 543 (6th Cir. 2007).
The mandated discretionary factors also are concerning because if implemented in individual cases, they would make it exceedingly difficult to win asylum as a matter of discretion. The proposed discretionary factors require that adjudicators assign adverse consequences to not only minor conduct, but also actions that individuals fleeing their home countries seeking humanitarian protection often must take in order to stay alive and reach safety. In particular, the ABA has concerns regarding the following negative discretionary factors in the Proposed Rules:

(i) **Unlawful Entry.** The ABA opposes the imposition of limitations that restrict asylum relief based on the place or manner of arrival at the U.S. border. Section 208(a)(1) of the INA clearly states that any non-citizen who is physically present in the United States, or arrives in the United States (whether or not at a designated port of arrival) may apply for asylum, irrespective of such person’s status. This clear statutory language recognizes the reality for many asylum seekers fleeing persecution: they frequently cannot obtain documentation that enables them to enter the protection country lawfully, precisely because they fear persecution from the very actor that would need to issue them travel documents, the government of the country from which they have fled. Requiring adjudicators to give unlawful entry significant weight in a discretionary asylum determination also is unduly punitive given that DHS currently employs a “metering” policy at the southern border, whereby Customs and Border Protection (CBP) limits the number of individuals who can seek to be inspected and apply for asylum at a port of entry during a given time period. This practice has turned away many asylum seekers from the southern border and forced thousands of individuals to wait months in Mexico for their opportunity to present claims for protection. DHS’ own Office of Inspector General found that “metering” likely has led more non-citizens who would otherwise seek to enter the southern border legally to cross unlawfully between ports of entry. Finally, while this aspect of the Proposed Rule does contain an exception, it is incredibly limited and thus does not account for the real-life circumstances that impact the manner of an individual’s arrival to the United States.

(ii) **Failure to Seek Asylum in Other Countries While in Transit, Transit Through More than One Country, and Spending More than 14 days in a Third Country that Provides Humanitarian Protection.** The ABA opposes the imposition of limitations that restrict asylum relief based on submission of applications for protection in countries in transit. The Agencies provide no reasoned explanation for the inclusion of this factor, but rather speculate that failure to seek asylum or refugee protection in at least one country through which a person transited may reflect an increased likelihood that the alien is misusing the asylum system. The Agencies also ignore that, in many cases, in the countries through which asylum seekers may transit on the way to the U.S. seeking asylum is either impracticable or impossible. Moreover, for

52 See ABA Resolution 117, Report to the House of Delegates (Feb. 17, 2020).


54 See ABA Resolution 117, supra.

55 For example, Guatemala’s asylum system is only three years old; implementing regulations went into effect in early 2019. In 2019, Guatemala had only three asylum officers for the entire country. In its first two years, Guatemala decided a mere 20 to 30 asylum applications; between March 2018 and May 2019, zero of the hundreds of submitted applications were decided. Although Mexico’s protection system is more advanced than Guatemala’s, it remains incapable of providing the level of protection that would translate into a truly accessible asylum system. Mexico’s asylum agency has failed to grow to meet increased numbers of asylum applications—there were only 30 officers as of July 2019 covering a caseload that increased 200% in 2019; at the same time, Mexico reduced the
people transiting by airplane, direct flights (without a brief stopover in a country outside the U.S.) are not always available to individuals fleeing persecution (or, in some countries, are not available at all). For individuals traveling by ground transportation or on foot (as the vast majority of asylum seekers do), it can take more than fourteen days to traverse another country given transportation limitations and the dangers presented along common migration routes; CBP’s use of “metering” itself makes it virtually impossible for a person entering Mexico to leave within fourteen days. The lack of a reasoned justification for the negative weight the Agencies would require adjudicators to place on these factors is evidenced by two recent court decisions that enjoined the Administration’s effort to restrict eligibility for asylum based on transit through a third country without applying for asylum there.

(iii) Criminal Convictions. The Proposed Rules would require adjudicators to consider a criminal conviction that remains valid for immigration purposes as a significant adverse discretionary factor—despite a reversal, vacatur, expungement, or modification of conviction or sentence (unless the alteration is related to a procedural or substantive defect in the underlying criminal proceeding). The ABA has long voiced concern about the already expansive immigration consequences of criminal convictions and the need for consideration of whether collateral sanctions (such as ineligibility to apply for relief from removal and other immigration consequences) should be subject to waiver or another form of relief if they are inappropriate or unfair in a particular case. In addition, Congress has already determined that non-citizens convicted of an aggravated felony are considered to have been convicted of a particularly serious crime, and thus are not eligible for asylum. The ABA also has expressed concern about the expansion of what is considered an “aggravated felony” to include a large number of offenses, some of them minor. The Proposed Rules would further expand the consequences of criminal convictions while constraining adjudicators’ discretion to weigh the effect that such convictions should have on the granting of relief in a particular case. The Proposed Rules also would require adjudicators to consider criminal convictions that pre-date the Rule’s eventual effective date. The ABA opposes retroactivity provisions in immigration laws that reduce benefits available to non-citizens while depriving them of their ability to take such provisions into account when making their decisions or shaping their conduct. In addition, the ABA previously has raised


59 ABA Resolution 114A, Report to the House of Delegates (Feb. 8, 2010)
concerns about the extension of the interpretation of the term “aggravated felony” to reach state dispositions (such as convictions that are set-aside or expunged) that are not considered convictions under state law. The Proposed Rules would further exacerbate the current situation by rendering ineffective any state or federal sentencing court’s orders for the purpose of ameliorating the collateral consequences of criminal convictions for a favorable exercise of discretion in an asylum case.

(iiv) More Than One Year of Unlawful Presence. The Proposed Rules also would require adjudicators to consider cumulative unlawful presence of more than one year as a significant adverse factor. It is not appropriate for unlawful presence of more than one year to be part of the discretionary considerations, however, given that the statute itself already provides for a one-year filing deadline and specifies the exceptions to it.60 To the extent this provision is intended to target something other than the one year filing deadline, the justification for that is unclear. Brief such periods, possibly visa overstays, should not be aggregated in such a way as to equate to an asylum bar. In addition, the Agencies’ justification for the sweeping changes in the Proposed Rule that applicants still could be eligible for withholding of removal and protection under CAT61 is not a sufficient response, given that it is more difficult to obtain those forms of relief and the relief provided is far more limited in scope and duration.62

II. The Proposed Rules, if Adopted, Would Contravene Congressional Intent as to Asylum Procedures.

The Proposed Rules, if adopted, would create a new, abbreviated process for determining asylum eligibility. This process contravenes, and effectively would rescind, the expedited removal process that Congress enacted in Section 235 of the INA. Indeed, most of the elements of the process contemplated by the Proposed Rules were specifically considered and rejected by Congress during its negotiations about expedited removal.

Under the Proposed Rules, a potentially final determination of asylum eligibility would be made in many cases at the earliest stage of the process, with little or no access to legal counsel or information, without the guarantee of a full hearing, and without meaningful administrative or judicial review. The Agencies cite the need for a “streamlined” process to reduce administrative burdens. However, the proposed new process ignores that the existing law establishes, and Congress intended to provide, a process that attempts to avoid refoulement (i.e., the forcible return of refugees or asylum seekers to a country where they are liable to be

62 CAT and withholding protections demand a “clear probability” of persecution or torture. Therefore, a person with a “well-founded fear” of persecution could have a valid asylum claim but not meet the higher standard for withholding of removal and could be removed to their home country and face persecution, torture, or even death. For people who meet the higher standard and can obtain these alternative forms of relief, the relief is significantly limited as compared to asylum. As one important example, there is no ability to obtain documents that permit travel internationally and a return to the U.S. or to be reunited with one’s spouse or children left abroad—where the result that most withholding and CAT recipients face permanent separation from their immediate families. There is also no ability to apply for adjustment of status and eventually citizenship, which would allow the individual to participate fully as a member of society in the country of protection.
subjected to persecution)—through an initial screening for potential asylum eligibility, to be followed (only for those who pass the screening) by a full asylum hearing. The change in process contemplated by the Proposed Rules would increase the burdens placed on asylum seekers at an early stage in the process, thereby increasing the chance that they will be returned to a country where they are in danger of being persecuted or tortured.

The legislative history for the expedited removal provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) is instructive in illustrating several ways in which the process set forth in the Proposed Rules is directly contrary to Congressional intent. The final version of current Section 235 of the INA was the result of a lengthy negotiation process that ultimately produced two competing bills during the 104th Congress.63 Both bills, H.R. 2202 (House Bill) and S. 1664 (Senate Bill), were aimed at enhancing border and interior enforcement, removing incentives for illegal immigration, and facilitating prompt removal of persons without authorization to be in the U.S., but the process for doing so varied considerably between them. In the conference session to reconcile these differences, there was significant compromise on both sides. The text of the agreed upon compromise version of the House Bill was set forth in a Conference Report dated September 24, 1996 (Conference Agreement), and the Conference Agreement was signed into law.64

A comparison of the language of the original House and Senate Bills with each other and with the Conference Agreement that resulted from the negotiations and became law sheds light on Congressional intent on several key points. Statements placed into the Congressional Record for the Conference Agreement immediately after its passage explain the compromises that took place and provide clear expressions of Congressional intent with respect to the process of screening for asylum eligibility. A review of the legislative history provides numerous examples of ways in which the Proposed Rules are not consistent with what Congress decided or intended—and, indeed, in several respects, would seek to implement now what Congress specifically rejected. Some of the key examples are as follows:

1. **The Proposed Rules heighten by “interpretation” the standard for establishing a “credible fear of persecution” as part of the preliminary screening process.**

   a. **Asylum**

   The existing expedited removal procedure prescribed by Section 235 of the INA provides for an initial screening of persons who indicate a fear of return to their country of nationality to determine whether their claims will be further considered in a full hearing before an Immigration Judge; if not, they are removed on an expedited basis. The standard for progressing past the screening stage is that the claimant demonstrates a “credible fear of persecution” if returned to the home country. “Credible fear” is defined by the statute as “a significant possibility, taking into account the credibility of the statements made by the alien in support of [his] claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum”—which is considered to be a fairly low standard to meet.65 The Proposed Rules would change the


definition of “credible fear” by interpretation to a higher standard--it would define “significant possibility” as a “substantial and realistic possibility of succeeding,” and would specifically incorporate into the credible fear determination an evaluation of the possibility of internal relocation (including placing the burden on that issue on the applicant), and consideration of the existence of any bars to asylum.

The legislative history clearly indicates that Congress intended the standard for proceeding through the initial screening stage to be a low one. In fact, the Proposed Rules contemplate a standard very close to that which Congress considered and rejected.66 The original House Bill defined the standard for a credible fear of persecution as “more probable than not” that the statements made by the alien in support of the alien’s claim are true” combined with a “significant likelihood” that the person could establish eligibility for asylum.67 The original version of the Senate Bill defined a credible fear of persecution as only “a substantial likelihood that the statements made by the alien in support of the … claim are true; and that there is a significant possibility … that the alien could establish eligibility as a refugee.”68 The Senate ultimately decided in its bill on an even more lenient screening standard with respect to credible fear of persecution, as follows: “in light of statements and evidence produced by the alien in support of [the] claim, and of such other facts as are known to the officer about country conditions, a claim by the alien that the alien is eligible for asylum…would not be manifestly unfounded.”69 Finally, the standard that emerged in the Conference Agreement, and was enacted into law, established the credible fear standard as a “significant possibility, … taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum….”70

Statements inserted into the record after passage of the Conference Agreement, when considered together, confirm that the final Conference Agreement language reflect a standard somewhere between the original Senate Bill and the language in its Amendment. Representative Henry Hyde, then-Chairman of the House Judiciary Committee, explained in the Congressional Record that the credible fear standard was redrafted to “fully address concerns that the ‘more probable than not’ language in the [House Bill] was too restrictive.”71 This statement is consistent with other commentary referring to the credible fear standard adopted in the Conference Agreement as an intentionally low standard. Senator Orrin Hatch, then-Chairman of the Senate Judiciary Committee, explained: “The Senate [B]ill had provided for a determination of whether the asylum claim was “manifestly unfounded,” while the version of the House [B]ill as passed applied a “significant possibility” standard coupled with an inquiry into whether there was a substantial likelihood that the alien’s statements were true. The [C]onference [Agreement] struck a compromise by rejecting the higher standard of credibility included in the House [B]ill. The standard adopted in the

67 Id.
68 S. 1664, 104th Cong. § 193 (1996) (as reported from the Senate Judiciary Committee on Mar. 4, 1996).
Conference [Agreement] is intended to be a low screening standard for admission into the usual full asylum process.”

The Agencies concede in the Proposed Rules that the new credible fear standard they would adopt represents a change from that in use since expedited removal began in 1997. They attempt to defend their change to the higher standard by noting that it does not reach the level of the “more probable than not” credibility standard contained in the original House Bill. That, even if true, is insufficient because by defining “significant possibility” for the first time in the Proposed Rules, the Agencies are in effect creating a standard that is higher than the standard Congress intended, as reflected in the Conference Agreement. The Agencies simply cannot move the goal posts by adopting, through regulation, a standard higher than that which Congress intended.

b. Withholding of Removal and Relief under the CAT

Nothing in the legislative history of Section 235 suggests that Congress intended that the standard to be applied in screening for eligibility for protection would be different depending on the type of relief the applicant was seeking. Quite to the contrary: the differences between the “well-founded fear standard” applicable to asylum and the “more likely than not” standard applicable to statutory withholding of removal had been settled by the Supreme Court for nearly a decade by the time Congress considered and created the expedited removal process. It could have built in different screening standards for the different forms of relief at that time but chose not to do so. Nevertheless, the Proposed Rules assert that it is “reasonable for the alien’s associated screening burden to be higher” for withholding of removal and CAT relief, and seek to import the higher substantive relief standards into the screening process by raising the current “significant possibility” credible fear screening standard to a “reasonable possibility” that the applicant could satisfy the statutory burdens for a grant of relief when considering eligibility for withholding and CAT relief during a credible fear interview. More importantly, however, the stated intent by the Agencies to increase the screening threshold when Congress chose not to do so in 1996 cannot be disguised as mere interpretation. It is at odds with clear Congressional intent that the expedited removal screening process would incorporate a low threshold requirement for asylum, withholding, and CAT relief, and Congress’ understanding that the higher standards for demonstrating eligibility for relief would be applied only in the adjudication on the merits before an Immigration Judge.

2. The Proposed Rules would restrict access to review by an Immigration Judge of a negative screening determination.

Under the existing expedited removal procedure, an asylum seeker is entitled to automatic review of an interviewing officer’s negative fear determination by a supervisory asylum officer and then, if requested, by an Immigration Judge. The Conference Agreement incorporated specific provisions requiring a written

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74 Id.
record of the credible fear proceeding and determination and directing that the Immigration Judge review had to take place from 1-7 days after the credible fear determination. In addition, the Immigration Judge’s review was required to include an opportunity for the applicant to be heard and questioned by the judge. These details concerning the administrative review process and its features that were added during the Conference process demonstrate the specific Congressional intent regarding the significance of that review. For these reasons, the policy should continue to permit Immigration Judge review of a negative fear determination as a default, and not revert to automatic removal.

The Proposed Rules would diminish protections required by Congress in two ways. First, they would incorporate determinations regarding internal relocation and bars to asylum into the credible fear screening process. Internal relocation currently is not addressed during the credible fear screening process. While asylum officers currently identify potential bars to asylum eligibility during the credible fear process, that does not impact the outcome of fear determinations--as long as a credible fear of persecution is established, the applicant receives a positive fear determination and is referred to Immigration Court for full Section 240 proceedings, where the Immigration Judge will consider the ultimate applicability of any potential bars. Under the Proposed Rules, an asylum officer would evaluate the applicability of a potential bar and determine whether it applies. If so, it would result in a negative fear determination (unless the applicant could meet the proposed new screening standard for withholding and/or protection under CAT). The asylum seeker could still obtain review of that negative determination from an Immigration Judge, but he would remain detained for the additional period of time required to obtain that review. It is unlikely that an asylum seeker could obtain evidence to prove that he could not safely relocate elsewhere in his home country or to refute the existence of a bar to asylum within the brief period of 7 days or less before the Immigration Judge review.

The second change relates to the availability of review by an Immigration Judge in specific cases. Congress, as the result of concerns originating in the Senate, provided for independent administrative review of negative fear determinations. The Leahy-Dewine amendments specifically authorized this process, as previously explained. Ever since the implementation of Section 235, the process has included automatic review for an applicant who received a negative determination but did not respond, regardless of the reason, when asked whether he wanted that review by an Immigration Judge. That protection would be altered in the Proposed Rules, again eliminating for many asylum applicants what Congress provided. For the most vulnerable asylum seekers who are shocked by receipt of a negative determination, are suffering from trauma, and do not have access to counsel to explain the process to them, this proposed change would result in a waiver of the right to Immigration Judge review, and issuance of an expedited removal order, without full consideration of their claim for protection.

3. **The Proposed Rules eliminate the availability of a full asylum hearing.**

The existing procedures provide for a full removal hearing (a “Section 240 hearing”) before an Immigration Judge for individuals who pass the credible fear screening. The legislative history of IIRIRA reflects that Congress intended that asylum seekers be accorded a full Section 240 hearing on the merits of their claims if they are determined to have a credible fear of persecution.

As the Agencies themselves note, the Conference Agreement contained language providing that “if the officer finds that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum under normal non-expedited removal proceedings (emphasis
Normal non-expedited removal proceedings consist of a hearing under Section 240 of the INA. Moreover, then-Chairman Hyde, in his statement in the Congressional Record on the Conference Agreement, alluded to “more elaborate procedures” being available to asylum seekers after asylum officers screened their cases to determine whether they had credible fear of persecution and stated that the credible fear screening should admit an applicant to “the usual full asylum process.” Further, even the House Judiciary Committee, whose original version of the House Bill included the higher “more likely than not/reasonable probability standard” for screening interviews, believed that a full Section 240 asylum adjudication was the correct result once the “credible fear” standard had been met. Similarly, various statements elsewhere in the earlier House bills and in the Senate amendment used similar language referring to either “a full asylum hearing,” “full asylum proceedings,” or “[S]ection 240 proceedings” for asylum seekers who passed credible fear interviews. The INS implemented the expedited removal statute by affording full Section 240 hearing proceedings to everyone who passed a credible fear screening.

The Proposed Rules would deviate from the practice that dates to the implementation of expedited removal in 1997. It would restrict asylum seekers who pass a fear screening to what would now be called “Asylum-and-Withholding Proceedings.” However, Congress clearly knew how to preclude certain applicants from access to full Section 240 proceedings, as evidenced by the fact that it specifically restricted alien crewmembers, stowaways, and certain others to asylum-only proceedings under Section 235(b)(2)(B) of the INA. It is therefore telling that Congress did not impose this limitation on asylum seekers who demonstrated a credible fear of persecution. The Agencies’ proposal to relegate persons who have passed a credible fear screening into a more limited asylum-only type of hearing, even though they were not listed with the other categories of applicants identified in Section 235(b)(2) for such treatment, would by so doing

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79 The Committee wrote: “A ‘credible fear’ is established if the alien is more likely than not telling the truth, and if there is a reasonable probability that the alien will meet the definition of a refugee and otherwise qualify for asylum. This standard, therefore, is lower than the ‘well-founded fear’ standard needed to ultimately be granted asylum in the U.S.—the arriving alien need only show a probability that he will meet the well-founded fear standard. The credible fear standard is designed to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process. If the alien meets this threshold, the alien is permitted to remain in the U.S. to receive a full adjudication of the asylum claim—the same as any other alien in the U.S.” See H.R. Rep. No. 104-469, pt. 1 at 158 (1996), issued with the House Bill as it was reported from the House Judiciary Committee in March 1996. The version of the bill as reported included the higher threshold for “credible fear” that was ultimately rejected in favor of the lower standard. Compare H.R. 2202, 104th Cong. (1996) (as reported by H.R. Comm. on the Judiciary, March 4, 1996) with H.R. 2202, 104th Cong. (1996) (as passed by Senate, May 2, 1996). Regardless, however, the language of the report shows that even the Committee members in favor of a higher standard accepted without question the fact that meeting the threshold should result in a full hearing. See H.R. Rep. No. 104-469, pt.1 at 158 (1996).
deprive them of full Section 240 proceedings and be clearly inconsistent with express Congressional intent.\textsuperscript{82}

III. \textbf{The Proposed Rules, if Adopted, Would Eliminate Due Process Protections in the Asylum Process Provided and Intended by Congress.}

Protection of due process rights is a core concern of the ABA. In civil matters, the Supreme Court has held that challenges to the adequacy of due process require evaluating the procedure provided by the government by balancing the government’s interest at stake in a given proceeding with the risk of erroneous deprivation of the private interest resulting from that same procedure.\textsuperscript{83} According to the Supreme Court, the basic hallmarks of a fundamentally fair proceeding are notice of the government’s proposed action and the grounds for it, the right to be represented by counsel, the opportunity to be heard (including the right to present evidence), and a fair hearing conducted before an impartial tribunal.\textsuperscript{84} Although Congress may entrust to agencies within the executive branch the administration of statutory schemes relating to immigration, these agencies may not implement regulations that are “contrary to clear Congressional intent.”\textsuperscript{85} Where Congress has prescribed a procedure, there is an implication that Congress intends that the procedure will be administered fairly, absent explicit Congressional action indicating otherwise.\textsuperscript{86}

The Proposed Rules would eliminate traditional forms of fair procedure— including pre-empting adequate notice and an opportunity to be heard—without explicit action by Congress. Further, these proposed changes certainly do not promote compliance with our nonrefoulement obligations that Congress enshrined in law. Moreover, the private interest at stake—the asylum seeker’s right to avoid return to a country where he or she risks persecution, torture or death that is at the very heart of the asylum process—clearly outweighs any potential administrative efficiencies.\textsuperscript{87}

\footnotesize{\textsuperscript{82} Another concern that bears on the availability of the full hearing that Congress intended is the provision of the Proposed Rules that would allow an Immigration Judge to pretermit an asylum claim simply on review of the application form itself. That concept is so new and extreme that it is not addressed in the legislative history of Section 235. Our concerns on that issue are addressed in Section III below, due to the obvious due process implications of that proposed change.}

\footnotesize{\textsuperscript{83} Mathews v. Eldridge, 424 U.S. 319, 335 (1976).}


\footnotesize{\textsuperscript{85} See generally Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 n.9 and 862-64 (1984) (examining legislative history); see also Osorio v. INS, 18 F.3d 1017 (setting aside BIA interpretation of the federal statutes).}

\footnotesize{\textsuperscript{86} Greene v. McElroy, 360 U.S. 474, 508 (1959) (assuming fair process was intended by statute in order to avoid constitutional question). See also Califano v. Yamasaki, 442 U.S. 682, 693 (1979) (assuming fair process was intended in order to avoid a constitutional question). In evaluating due process protections, the Supreme Court has expressed concern “that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition.” Greene v. McElroy, 360 U.S. at 508.}

\footnotesize{\textsuperscript{87} The Proposed Rules cite Matter of R–A–, 24 I&N Dec. 629, 631 (A.G. 2008) (quoting Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)) as authority for what the Agencies characterize as clarification or interpretation of the relevant statutes, and argue that their Proposed Rules would be entitled to}
Among the due process protections that would be abrogated or eliminated by the Proposed Rules are the following:

1. **Proposed changes to the CFI process would deny applicants meaningful notice and opportunity to be heard.**

The Credible Fear Interview (CFI), intended to take place within the first few days of an individual’s arrival in the U.S., was envisioned by Congress as requiring a low threshold showing of potential eligibility for asylum. During those few days, the intent was for the applicant to be able to rest, recover from the journey, and review basic information about the credible fear interview process. The person was not expected to prepare to present a full claim for asylum on the merits, produce documentary evidence, or negate definitively the existence of any potential bars to asylum.

The Proposed Rules would expand dramatically the scope of the CFI interview, the burdens placed upon the applicant, and the consequences of the resulting CFI determination. By doing so without any additional information about these burdens being provided to the applicant, the creation of additional opportunities to access legal information or representation (see Section IV below) or to collect corroborative evidence, they establish a proceeding that falls short of the minimum standards of due process. This is particularly true where Immigration Judge review of a negative determination would still take place within seven days as it does under the current process.

a. **Bars to asylum considered at the Credible Fear Interview.**

The Proposed Rules would require Asylum Officers to screen for the feasibility of internal relocation and other bars to asylum at the credible fear stage. These changes, in light of the legislative history discussed
in Section II above, are contrary to Congressional intent that clearly provided for the credible fear interview to have a limited scope. Allowing the complex issues of bars to asylum and the feasibility of internal relocation to be considered at this stage would make it impossible for most applicants to receive positive credible fear determinations. Indeed, proving that relocation is not possible anywhere in one’s home country (essentially proving a negative) is such a difficult task that, in current Section 240 hearings, the burden of proof on this issue shifts to DHS once the asylum applicant has made a showing of past persecution.91

Importing the bars to asylum and the feasibility of internal relocation into the credible fear analysis will result in countless asylum applicants with meritorious claims being turned away without a hearing before an impartial judge. Many Asylum Officers conducting CFI interviews are not attorneys,92 and they are adjudicating eligibility of an applicant already charged as being inadmissible by a sister component of their own agency. This makes DHS effectively prosecutor and judge on these new complex issues. Moreover, although CFI interviews are theoretically nonadversarial, it is reported that officers recently have been directed to conduct them in a more hostile and aggressive manner.93 Review by an Immigration Judge is an imperfect safeguard but it is the only opportunity many applicants (in particular those suffering from trauma, disability, or other mental illness) have to receive a hearing before an impartial and competent adjudicator.94 The Proposed Rules would obliterate what remains of that safeguard. The proposed elimination of automatic Immigration Judge review for applicants who do not affirmatively state their desire for review heightens this risk even more.95

b. Heightened standard of proof at the Credible Fear Interview.

The Proposed Rules also raise many of the legal standards and shift the burden proof to applicants in a way that creates an insurmountable hurdle to achieve asylum eligibility.96 Under current law, in order to obtain addressed by asylum applicants at the credible fear stage will deprive many of the due process right to be heard on this issue. Many will be unaware that the onus is now on them to prove that internal relocation was not a reasonable option in their home country and will be unable to carry their burden in the timeframe allowed.

91 Id. at 36282 (proposing repeal of regulations shifting the burden of proof to the government).

92 See also Stephen Paskey, Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum, 56 Santa Clara L. Rev. 457, 468 (2016).

93 Rachel Frazin, US asylum officers ordered to take tougher stance on persecution claims, The Hill (May 7, 2019), https://thehill.com/latino/442567-us-asylum-screeners-to-take-tougher-stance-on-migrants-persecution-claims-report (detailing how asylum officers have been ordered to be more aggressive in their questioning).

94 Flaws in the Immigration Judge review process as well as in merits hearings have received widespread attention. Amit Jain & Joanne Lee, Interviewing Refugee Children: Theory, Policy, and Practice with Traumatized Asylum Seekers, 29 Yale J. L. & Feminism 421, 442 (2018) (describing reversal of immigration judge’s finding of no credible fear for woman with cognitive disability thanks to RFR); AILA Policy Brief, Restoring Integrity and Independence to America’s Immigration Courts, at 5-7, Jan. 24, 2020 (describing the deep structural flaws in the immigration system and the politicization of the immigration bench). Nevertheless, review within EOIR provides for, at a minimum, a structurally independent review. Immigration Judges are all attorneys employed by the Department of Justice rather than by the Department of Homeland Security as both Customs and Border Protection and USCIS Asylum Officers are.

95 See discussion of this issue in Section III.3.b below.

96 We note that individuals applying for asylum are already at a disadvantage in their ability to demonstrate the validity of their case to the government. For example, there are often language barriers, the inability for an
a hearing on the merits of their claim, individuals must first demonstrate in an interview with an Asylum Officer that they have a “credible fear” of persecution in their home country. While, as discussed above, a credible fear interview was intended as a low threshold screening only, the Proposed Rules would transform it into an evidentiary and possibly adversarial proceeding in which applicants would have an impossible burden to prove their cases. As one example, the definition of “significant possibility” within the screening process would be heightened to “demonstrating a substantial and realistic possibility of succeeding in immigration court.” This would apply to persons potentially eligible for asylum as well as others described below. (See the more detailed discussion in Section II.1.a above.)

Another example is that the standard of proof in fear determinations for those only eligible for statutory withholding of removal and CAT applicants in the expedited removal process would be raised from the same “significant possibility” standard that exists today for all asylum, withholding and CAT applicants to a “reasonable possibility.” This reasonable possibility standard is equivalent to the well-founded fear standard used to determine ultimate eligibility for asylum on the merits, which is intended to be higher than the current “significant possibility” standard. The reasonable possibility standard is currently used for screening applicants in expedited removal who are subject to the Reasonable Fear (as opposed to Credible Fear) process due to aggravated felony convictions or the existence of a prior removal order. Under the new heightened screening standards, applicants eligible for statutory Withholding of Removal would have to demonstrate a “reasonable possibility” that they “would be persecuted on account of [one of the five statutory grounds].” Those eligible only for relief under the CAT would have to demonstrate a “reasonable possibility” that they “would be tortured” if returned.

These changes to the screening standards for withholding of removal and CAT claims would collapse merits adjudications into the screening process, by forcing applicants to litigate the validity of their claims during the screening phase which is intended to be a non-adversarial brief preliminary interview. It is highly unlikely that an applicant could satisfy this higher legal standard without presenting witnesses, sworn statements, research on country conditions, expert opinions, and other opportunities to present proper evidence and develop a record absent more fulsome hearings. This standard may have been appropriate for those who have already had their day in court and returned to the U.S. following removal, or who are barred from full proceedings by an aggravated felony conviction; however, including other withholding and CAT applicants in the same category as those individuals is not consistent with the process created by Congress.

2. Proposed changes relating to “frivolous” applications would unfairly deprive applicants of relief.

individual to procure counsel, the inability or refusal to accept documents and physical evidence such as photographs and newspaper articles when proceedings are conducted remotely, traumatic conditions and events that may impact an individual’s ability to present their case and an unfamiliarity with asylum law and procedures that create an incredibly high bar to prevail on an asylum claim even absent the administration’s proposed changes.


98 Id. at 36268-71.

99 This is particularly true where there is no guarantee of access to legal information, much less counsel, prior to the screening interview. (See Section IV below.)
Under the Proposed Rules, if an applicant is found to have filed a “frivolous” asylum application, the applicant will be barred from obtaining asylum and any immigration benefit or relief in the future. Currently, frivolousness determinations may only be made by an Immigration Judge after finding that the applicant knew the application was frivolous and that a material element of the application was deliberately fabricated.

The Proposed Rules would allow Immigration Judges (or in the affirmative asylum context, Asylum Officers) to make findings that an applicant knowingly filed a frivolous application. The applicant would not be guaranteed the opportunity to address any discrepancies or implausible aspects of their claims in cases where the adjudicator determines that sufficient opportunity was already afforded. Other changes proposed include an expansion of the types of issues which would allow an Immigration Judge to find an application to be knowingly frivolous. This would include an asylum claim deemed “patently without substance or merit…if applicable law clearly prohibits the grant or asylum.” These changes would enable judges to deem an application frivolous even if there was no knowing intent on the part of the applicant. Because asylum law is complex, expecting an asylum applicant (who is most likely not fluent in English, and may have little formal education, much less legal training) to avoid inadvertently making a claim that is foreclosed by applicable law is unreasonable. Moreover, applicable law is constantly in flux, and it is challenging even for attorneys who regularly practice immigration law to stay current.

3. Proposed changes to the asylum procedure would eliminate the fundamental right to a fair hearing.

a. The power to pretermit cases based on a review of the Form I-589 alone.

An essential feature of a fair process is the right to have one’s claims heard in an appropriate administrative or judicial setting where the facts and evidence can be presented. The Proposed Rules would eliminate the opportunity for a fair hearing (which includes an opportunity to submit evidence and testimony in support of an application), by authorizing an Immigration Judge to pretermit (deny) an asylum application based on the written application alone if the individual has not “established a prima facie claim for relief or protection under the applicable laws and regulations.” Judges could pretermit without a court hearing, or

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101 Id. at 36273.
102 Id. at 36275. The limited advisals on the Form I-589 itself, in English, could be deemed an adequate warning by the agency, standing in stark contrast to the oral advisals on the record currently required before an asylum application can be filed in Immigration Court.
103 Id. at 36276.
104 This provision could also have a chilling effect on attorneys, who have an ethical duty to advocate zealously on behalf of their clients (ABA Model Rule 1.3, Diligence, Comment [1]) which could include making a good faith argument for an extension or change in the law. See ABA Model Rule 3.1, Meritorious Claims and Contentions, Comment [2].
the taking of any testimony whatsoever. Establishing eligibility for asylum requires all applicants, including children, to come forward with facts, to demonstrate that those facts place them within the scope of the statute’s protection, to demonstrate that no bars to asylum exist in the case, and finally to convince the judge (or in the affirmative asylum context, the asylum officer) that they merit a grant of asylum in the exercise of discretion. This necessarily demands the opportunity for an applicant to explain answers, add additional detail, and respond to questions. Allowing Immigration Judges to dismiss an application without any hearing or testimony, based on a written application form alone, would fall far short of the process established by Congress for persons who passed a CFI/RFI screening interview.106

Certain barriers inherent in the asylum application process would operate in many cases to prevent a fair determination of the sufficiency of a claim based on the application form alone. First, most asylum applicants do not speak English, but the Form I-589 is complicated application and must be completed in English (which includes technical terms and legal concepts difficult even for English speakers, including attorneys, to understand). An applicant might answer questions on the form with very basic responses due specifically to this language barrier. Second, applicants are now even more frequently than before detained when preparing their Form I-589. Interpreters must be provided for them in Immigration Court to record their testimony for the record; however, interpreters are not provided to applicants, detained or otherwise, to explain the instructions or questions on the application form or to help them complete the application itself by translating their answers into English. This requires many applicants to do the best they can with any English they possess, or to rely on other detainees or even facility staff to assist them. Third, many applicants have recently suffered emotional and physical trauma in their home countries and on their journeys, which interferes with their ability to readily reveal (and relive) devastating, and often very personal, events that are the basis for their asylum claim.107 This problem is intensified by a lack of trust of officials associated with the government, such as soldiers, police or uniformed guards, that many applicants have based on experience in their home countries. In a hearing, Immigration Judges can assure applicants that the details of their experiences are critical for their claim and that the information will be kept confidential.

All of these factors are exacerbated by the fact that most applicants are not represented by counsel and many have had little or no access to legal information, particularly if they are in detention.108 Time pressures also may prevent preparation of a fully detailed application. A legally sufficient application (i.e., one that has all blanks filled in, with photos and signature) is quite different from one that makes out a prima facie claim on its face. Detained individuals may be facing very short turnaround times of just a week or two for completing the application before filing it in court. Even non-detained applicants may be struggling to meet the one year filing deadline, particularly if they have not been able to obtain representation.

106 See the discussion in Section II.3.


108 See the discussion in Section IV below.
For all of these reasons, an in-person hearing and questioning by an Immigration Judge is a crucial aspect of allowing asylum applicants to fully present the facts of their particular case, and thereby receive a fair adjudication. Pretermittting applications without a hearing risks inherently unfair outcomes.

b. Elimination of Immigration Judge review of negative CFI determinations unless affirmatively requested.

A key component of a fair process is that a claim be heard by a neutral and impartial adjudicator. The Proposed Rules would remove the requirement for USCIS asylum officers to interpret silence following delivery of a negative credible fear determination as a request for review of that decision by an Immigration Judge, thereby removing access to the neutral adjudicator from the process at that early stage. During Congressional negotiations over the procedures to be enacted with respect to expedited removal, Senators Leahy and DeWine specifically added language to the House Bill providing for review of credibility determinations by an Immigration Judge in order to alleviate concerns about errors in CFI adjudications. That amendment was meant to provide a safety net for asylum seekers and to promote accuracy, and that concept survived in the Conference Bill ultimately adopted. Accordingly, since January 5, 2001, the regulations have provided “that an alien's failure or refusal to indicate whether he or she desires a review shall be deemed to be a request for such review.”

The need to preserve review of negative determinations has not diminished since expedited removal has come into being. In 2016, immigration judges vacated approximately 28% of all negative credible fear determinations. For family detention centers, the number of vacated negative determinations increases to 47%. And these statistics pertain only to the cases in which the asylum applicant actually knew how to, and chose to, pursue Immigration Judge review. (They would undoubtedly be higher if every negative CFI decision were reviewed.) Language barriers, errors on the part of officials, and trauma have been identified as reasons for otherwise eligible applicants receiving negative credible fear determinations. Trauma, anxiety, and depression are commonplace among asylum seekers in family detention centers awaiting credible fear interviews, with one estimate placing rates of Post-Traumatic Stress Disorder at

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109 See Marincas v. Lewis, 92 F.3d 195, 204-04 (3d. Cir. 1996); see also Cham v. AG of the United States, 445 F.3d 683, 690-91 (3d Cir. 2006) (“[A]lthough Cham has no constitutional right to asylum, he was entitled, as a matter of due process, to a full and fair hearing on his application.”).


112 Id.


114 Shattuck, 93 Wash. L. Rev. at 508.

115 Shattuck, 93 Wash. L. Rev. at 509.

116 Shattuck, 93 Wash. L. Rev. at 463.
People with PTSD are often reluctant to speak about their experiences, they often have memory problems, experience disassociation, and have difficulty putting their experiences into words. While internal guidelines instruct Asylum Officers to be trauma sensitive and not to conduct interviews in an adversarial manner, Asylum Officers have been reported at times to disregard these guidelines, use adversarial questioning techniques and display insensitivity to trauma, even when interviewing children.

These practices can and have resulted in applicants with cognitive disabilities or other mental health conditions receiving negative determinations, only to have them vacated later. Indeed, it is applicants with these particular vulnerabilities who may be so stunned or demoralized by receiving a negative determination that they are unable to speak up when asked if they choose to seek review. Moreover, the mere fact of detention alone is so intolerable for many applicants that they may quite literally not know what to say in the immediate aftermath of receiving a negative determination (when the question about seeking further review is posed). The current presumption in favor of review by an Immigration Judge, employed by the DOJ rather than by a component of the enforcement agency DHS, best protects the opportunity for all applicants to have access to a neutral adjudicator. It does not impose significant administrative burdens but is a meaningful protection for those unable to affirmatively request such review on their own for any reason.

c. The Requirement of an impartial adjudicator.

The Proposed Rules assume the existence of the current structure of the Agencies indefinitely into the future. We recognize that these Comments are not the place to advocate for complete reform of the immigration adjudication infrastructure. I would be remiss, however, not to note that the ABA has had serious concerns for many years relating to the lack of independence that results from the location of the Executive Office for Immigration Review (EOIR) within the DOJ and the corresponding control of Immigration Judges and BIA members by the sitting Attorney General. In 2010, the ABA published a Report and adopted policy urging that the Immigration Courts and BIA be relocated outside DOJ and housed in either a new Article I Court or an independent administrative agency. In early 2019, following a further decline in Immigration Court independence, more direct control of Immigration Court dockets and substantive procedures by management of EOIR, along with a sharp spike in self-certification of decisions by a series of Attorneys General, we revised our recommendation by identifying an independent Article I

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117 AILA Letter on Family Detention at 2-4.


119 Jain & Lee, Interviewing Refugee Children at 446-49.

120 Id. at 442.

121 To the extent statements made or not made at the CFI interview for similar reasons become part of the record for review of a negative determination by an Immigration Judge or at a de novo hearing on the merits of the protection claim, they also decrease the applicant’s opportunity for a fair hearing.


123 ABA Resolution 114F, Report to the House of Delegates (Feb. 8, 2010).
Court as the preferred structure. We reiterate those concerns here to note that, to the extent hiring and advancement decisions within EOIR continue to reflect a lack of diversity of background and a strong preference for individuals with immigration enforcement, prosecution or other government backgrounds on the bench, the ability of applicants to experience a fair and impartial adjudication process will remain in question.

4. The Proposed Rules fail to protect asylum applicants against retroactivity.

The Proposed Rules are silent on the Agencies’ intention with regard to applicability of any provisions included in a Final Rule to applications pending on its effective date. A fundamental principle of fairness is that agencies cannot prejudice individuals by changing the rules in the middle of the game, and applying new laws without advance notice. The ABA has adopted policy opposing retroactive application of other provisions of immigration law. In the immigration context, courts likewise have held that noncitizens cannot lose rights or benefits without advance notice of a change in the law.

The law disfavors retroactive regulations and “administrative rules will not be construed to have retroactive effect unless their language requires this result.” Further, unless Congress explicitly grants an agency authority to engage in retroactive rule making, the agency does not have the power to do so. Retroactive application of the Proposed Rules would have unfair and prejudicial impacts on countless asylum seekers with applications pending at various stages of the administrative process the Proposed Rules seek to radically change. Pro se applicants who diligently prepared and submitted a technically complete application before the one year filing deadline, in the hopes of developing supporting evidence, locating witnesses or finding an attorney before their hearing date, could have their applications pretermitted without a hearing. Even represented applicants could have their applications pretermitted or found frivolous, because the grounds for asylum existing on their application date no longer exist. These concerns about retroactivity pertain to cases that have already had an initial adjudication which may be on appeal to the BIA or pending in the Circuit Courts. Should any of those cases be remanded in the future to Immigration

125 Landsgraf v. USI Film Products, 511 U.S. 244 (1994).
126 ABA Resolution 114A, Report to the House of Delegates (Feb. 8, 2010) (urging Congress to end the retroactive application of the aggravated felony provisions of the INA).
129 Id. at 208-09.
Courts, we urge the Agencies to ensure that they will be adjudicated in light of the law that applied at the time the application was filed originally.


The ABA believes that access to legal counsel and legal information is a fundamental tenet of due process and opposes legislative and regulatory proposals relating to immigration that would limit the rights of persons subject to removal proceedings to retain counsel and to enjoy full representation. The need for counsel is especially acute in connection with asylum claims—in light of the complexity of the asylum laws; the multiple different tracks and complicated procedures associated with applying for asylum and in determining applicable precedent; and the asylum seekers’ lack of familiarity with our legal system, the language barrier, and recent traumatization from persecution and the arduous journey to the U.S. Moreover, the consequences of an individual’s not succeeding with his or her asylum claim may be deportation, bars to future admissibility of five to twenty years, and the possibility of persecution, torture or even death in the home country. Nevertheless, under the current regulations and process for asylum seekers, there is only limited access to legal counsel and legal information throughout the process. The Proposed Rules would frontload the process at the expedited removal stage, making it even more difficult to obtain counsel and legal information before the CFI interview yet, at the same time, would make obtaining them more critical than ever before.

The INA permits counsel in removal proceedings to the extent the asylum seeker can obtain counsel on his or her own (i.e., the asylum seeker can engage paid or pro bono counsel, but is not provided representation at government expense). The ABA supports appointed counsel for all indigent individuals in removal proceedings who are unrepresented, with a priority on those in detention. However, under the current

130 See ABA Resolution 120A, Report to the House of Delegates (Feb. 7-9, 1983). The ABA has long supported laws and policies that ensure optimal access to legal protection for asylum seekers and has opposed unduly restrictive limitations that prevent asylum seekers from initiating claims. See ABA Resolution 107F, Report to the House of Delegates (Feb. 13, 2006); ABA Resolution 10C, Report to the House of Delegates (Feb. 6, 2017); ABA Resolution 177, Report to the House of Delegates (Feb. 17, 2020). “The ABA has adopted several “right to counsel” policies in the immigration field. These policies seek to expand access to retained and pro bono legal representation to certain vulnerable populations.” See ABA Resolution 107A, Report to the House of Delegates (Feb. 13, 2020).

131 Kathleen Staudt, Border Politics in a Global Era 163, ch 4 (Rowman & Littlefield 2018). For example, individuals may seek asylum through a variety of different processes: (a) recent arrivals to the U.S. are placed in expedited removal proceedings where they must undergo a credible fear or reasonable fear screening, and then only if successful pursue asylum as a defense to removal before an immigration judge; (b) those apprehended in the interior of the U.S. but not in expedited removal proceedings may also seek asylum or other relief before an immigration judge but without the credible fear process; and (c) persons who are inside the U.S. but not in removal proceedings may apply for asylum affirmatively through an interview by a USCIS Asylum Officer, followed by a referral to Immigration Court for removal proceedings before an immigration judge where they can apply de novo if their affirmative application is not granted. These different processes have different timetables, due to both statutory processing requirements and varying case backlogs. The “affirmative” asylum process is intended to be non-adversarial, while Immigration Court proceedings involve a trained, attorney prosecutor charged with seeking the deportation of the applicant. Further, asylum determinations have been recognized at times to be subject to the shifting influences of America’s foreign policy and/or domestic politics.

132 INA § 240(b)(4)(A) (1952).

133 ABA Resolution 10C, Resolution, Adopted by the House of Delegates (Feb. 6, 2017).
rules, the right for counsel to be present at and participate in the credible fear interview by an asylum officer, or at a review by an Immigration Judge of the CFI determination, is already limited. This is problematic because a negative determination in the interview may result in expedited deportation and the record established in the CFI will be the basis for review of the determination by an Immigration Judge and can be used against the applicant in the ultimate asylum hearing. An expedited removal order also results in a bar to admissibility for five years or twenty years, in the case of a second removal. The presence of counsel can be permitted at a CFI or review of a CFI (subject to limitations on participation in the proceedings that may be imposed) in the discretion of the asylum officer or the judge.

As a practical matter, it is difficult to impossible for asylum seekers to obtain counsel at the CFI stage, due primarily to their recent arrival in the United States, lack of funds to pay a lawyer, difficulty while in detention to contact lawyers or to contact family to help pay for them, and government policies making pro bono representation difficult to obtain (such as the location of detention facilities in very remote areas). Asylum seekers who are successful in establishing their credible fear at the CFI stage still face continued detention unless they can establish eligibility for bond or parole--again, the vast majority are unable to obtain counsel at this stage. Finally, at the stage of preparing an asylum application and the hearing thereon, some asylum seekers are able to obtain counsel. At the same time, the data confirms that, at every stage of this complex process, there is very little chance of success without legal representation, and this reality is even more profound for those in detention. As a result, many people who are deported have valid asylum claims but cannot establish as much because they do not know which facts are legally relevant or how to best present obtain and present evidence of these facts.

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134 See 8 CFR § 208.30(d)(4).

135 Office of Chief Immigration Judge, Immigration Court Practice Manual § 7.4(d)(iv)(C) (July 2, 2020), https://www.justice.gov/eoir/page/file/1258536/download (saying that the asylum seeker is not represented during the immigration judge review, but that a representative may be present during the review, at the discretion of the Immigration Judge).


138 Eagly & Shafer, supra, A National Study of Access to Counsel in Immigration Court, 164 U. of Pa. L. Rev 1 (drawing on data from over 1.2 million deportation cases decided between 2007 and 2012 and finding that 37% of all immigrants, and 14% of detained immigrants, secured representation; also finding that immigrants with attorneys were five-and-a-half times more likely to obtain relief from removal). In all cases from 2007 to 2012, immigrants won relief without an attorney in only 5% of the cases--in 95% of successful cases, the immigrant was represented by counsel. See 2019 Update Report § 5-3. The issue is of particularly grave impor for child applicants. Data from 2019 indicates that among children with representation, 73% received immigration relief while only 27% of unrepresented children received immigration relief. TRAC, Syracuse University, “Juveniles--Immigration Court Deportation Proceedings,” https://trac.syr.edu/phptools/immigration/juvenile/ (last accessed July 8, 2020).

139 Through our experience working with asylum seekers at the CFI stage, we know that asylum seekers are often very reluctant for a long time to reveal sensitive, embarrassing, personal information about what has happened to them (particularly to government officials). Also, asylum seekers tend to focus exclusively on the one thing that has happened to them that they personally view as the most compelling (because it was the most awful thing for them), but that event or action may not be the part of what has happened to them that establishes a nexus to one of the permitted grounds for asylum. Moreover, the data shows that asylum seekers who are represented by counsel bring...
As discussed in Section II above, the Proposed Rules significantly expand the bases on which an asylum officer can make a final determination on a case at the early CFI stage. In addition, the Proposed Rules would shift to the applicant the burden of proof with respect to complex factual and legal issues such as whether there are mandatory bars to asylum\textsuperscript{140} and whether the person has the ability to relocate safely within the home country.\textsuperscript{141} Thus, assistance of counsel would be critical at that stage, but still would be very difficult to obtain given the practical difficulties associated with obtaining counsel at this early stage (as noted above).

It is important here to note the distinctions between the access to legal information and representation that exist for detainees in their early days (pre-CFI) and after their screening process has been completed. When an asylum seeker first encounters a CBP or ICE official and indicates a fear of return to their home country, the individual will likely be detained and referred for a CFI. While existing regulations require an asylum officer to verify that an asylum seeker has received in writing “the relevant information regarding the fear determination process,” and to determine that the individual has “an understanding of the fear determination process,”\textsuperscript{142} this amounts in practice to less than the language might suggest. The asylum applicant will receive a Form M-444 fact sheet containing information about the credible fear process, and a copy of the same list of pro bono legal service providers that is distributed to parties in Immigration Court. In reality, that information is of limited use to a detainee with a CFI coming up in just two or three days. The Form M-444 fact sheet provides general information about the credible fear process, the interview itself, its purpose, and the roles of the persons involved. It does not provide applicants with information about eligibility for asylum, explain statutory requirements, discuss nexus or the definition of each of the five grounds, discuss bars to asylum or suggest necessary corroborative evidence or the like. For the reasons described above, most asylum seekers lack representation in their CFI interview.

In contrast, after the screening process has been completed and an asylum seeker has been placed in removal proceedings, some detainees do receive access to basic legal information in the form of a presentation called the Legal Orientation Program (LOP). The LOP is funded by the DOJ, through EOIR, and administered by the Vera Institute of Justice in several regions around the country. It is important to note that LOP is not funded in every detention site; less than half of immigration detention centers around the country have an organized LOP. The ABA programs in Harlingen, Texas and in San Diego, California are the LOP providers for those two courts. And since 2019, the ABA Washington, DC office has operated a remote LOP Information line. By virtue of the ABA programs’ appearance on the list pro bono legal service providers, ABA staff and volunteers come into contact with many detainees who have gone or are going through the expedited removal process. They see the paperwork that the asylum applicants receive and, in some cases, are able to see their credible fear determination or CFI interview transcripts. It is this experience that equips

fewer unmeritorious claims, are more likely to be released from custody, and, once released, are more likely to appear at their future deportation hearings. See ABA, supra note 124 at 5-8, n. 33 (Volume II of the 2019 Update Report). See, e.g., Eagly & Shafer, supra, A National Study of Access to Counsel in Immigration Court, 164 U. of Pa. L. Rev. at 2. Indeed, there here is widespread agreement among immigration judges regarding the efficiencies and benefits of applicants being represented by counsel. See, e.g., Lenni B. Benson & Russell R. Wheeler, Report for the Admin. Conference of the U.S., Enhancing Quality & Timeliness in Immigration Removal Adjudication (2012), at 56.

\textsuperscript{140} Credible Fear Determinations Involving Stowaways, 8 C.F.R. § 208.30(e)(5) (proposed June 11, 2020).

\textsuperscript{141} 8 C.F.R. § 208.30(e)(1)(ii).

\textsuperscript{142} Id. at § 208.30(d)(2).
the ABA to comment on the need for lawyers at the Credible Fear stage to preserve the possibility for a fair hearing, even when that consists only of a screening interview.

In most cases, detainees have the option to attend the in-person LOP general orientation in the facilities that have established programs if they choose to do so, but participation is not mandatory. If detainees are sick, if a pod is on lockdown, or now during the pandemic, detainees miss out on LOP although court hearings are continuing. The LOP is normally a live presentation, in English and in Spanish, with visual aids including pictures and flip charts. It is often interactive and includes an explanation of the detention and removal process, why participants are in detention and whether or not they might be able to seek release, a discussion of the types of hearings that take place in Immigration Court and what happens at each, and then a basic explanation of the various forms of relief from removal, including asylum, and the corresponding eligibility requirements. The LOP programs also typically review the Notice To Appear (NTA) (charging document) form, and explain to detainees that the Immigration Judge will expect them to respond to those charges when they go to court. The LOP may include a brief Q & A session along with general information provided, but no individualized legal representation is allowed using LOP funds. In a small percentage of cases, referrals for pro bono representation may result from an LOP. Most often, however, the LOP is best described as a pro se workshop or brief orientation clinic with no ongoing relationship formed between the LOP provider and the detainees. For the vast majority, the LOP will be the only legal information they receive prior to their court hearings, if they are even in a location that provides access to a program.

LOP provides relevant and critical information that allows individuals in detention to make more informed decisions about their cases. For this reason, the ABA has advocated that LOP should be available to every detained individual in removal proceedings.143 For those unrepresented and facing a CFI interview, particularly one with the heightened standards, burdens and consequences contemplated by the Proposed Rules, it is inconceivable that the balancing of interests required in a due process analysis would not demand at least the same.

The large disparity in case outcomes between represented and unrepresented parties in removal proceedings generally confirms the obvious--that, for most people, receipt of a fact sheet in and of itself is insufficient, particularly in light of the accelerated timing of the CFI process and the context in which it occurs (typically, very quickly following a traumatic journey to the U.S., apprehension by ICE or CBP, and detention--often exacerbated by factors such as medical care issues, family separation issues, distrust of government officials based on home country experiences, and language challenges).

The need for meaningful access for asylum seekers to legal information and legal counsel has been a pressing issue for many years and is a core area of concern for the ABA, especially with respect to vulnerable populations, including those in detention.144 We strongly urge the Agencies to avoid reducing access to legal information and counsel while simultaneously enhancing the need. The procedures set forth in the Proposed Rules would create an untenable situation with potentially dire consequences for the asylum applicant. As a result, it is antithetical to the principles of fairness and due process.

**Conclusion**

The Refugee Act was enacted by Congress to provide the legal framework for providing protection in the U.S. to refugees fleeing persecution. Congress’ purpose was to codify its obligations under the 1967

143 See ABA Resolution 107A, Report to the House of Delegates (Feb. 13, 2006)

144 See ABA Resolution 107A, supra.
Protocol, and to meet its moral obligations as a world power, by establishing a “broad class” of refugees who would not be forced to return to their home countries if they would face persecution there. The Agencies cannot ease their administrative burdens associated with determining asylum claims by simply making the criteria more stringent than those provided for under international and domestic law so that few can meet them. A legally required process cannot be “streamlined” for the benefit of an agency by essentially eliminating the process afforded under federal and international law.

It is important to recognize that the consequences to refugees of denying their asylum claims when they meet the current criteria for asylum protection are extreme, including the possibility of torture or death in their home country after being deported.\textsuperscript{145} While the U.S. cannot accept every person seeking asylum, we must comply with our domestic and international legal obligations and provide a reasonable and fair process to ensure that we are doing so. The U.S. already has stringent criteria for the granting of asylum and a process that lacks important due process protections.\textsuperscript{146} The ABA supports policies which ensure that refugees, asylum seekers, immigrants, and others seeking humanitarian protection are given optimal access to legal protections in the U.S.--including through due process protections, an independent immigration judiciary, and meaningful access to counsel.\textsuperscript{147} The Proposed Rules would do the opposite--and would obliterate our asylum law and procedures in such a manner and to such an extent as to violate the language, intent and purpose of our laws.

Thank you for your consideration of our views.

Sincerely,

Judy Perry Martinez


\textsuperscript{146} Under the current system, asylum seekers, who are traumatized, do not speak English, do not know our legal system, have no financial resources, and are distrustful of government based on their experience in their home country, bear the evidentiary burden of establishing their eligibility for asylum under our complicated laws and regulations, without a right to appointed counsel and typically while detained in a remotely located facility where pro bono legal assistance is generally unavailable. In light of the already severe obstacles to establishing eligibility for asylum that exist, even currently, almost no one is granted asylum in some areas of the country and before certain immigration judges almost no one is granted asylum. \textit{Asylum Decisions Vary Widely Across Judges and Courts--Latest Results}, TRAC Immigration, https://trac.syr.edu/immigration/reports/590/ (“Twelve immigration courts accumulated denial rates above 90%.”); Noah Lanard, \textit{Inside the Courtroom Where Every Asylum Seeker Gets Rejected}, Mother Jones, https://www.motherjones.com/crime-justice/2019/07/inside-the-courtroom-where-every-asylum-seeker-gets-rejected/ (“Between 2011 and 2018, [Immigration Judge] Reese denied every single one of the more than 200 asylum claims she heard”).

\textsuperscript{147} See ABA Resolution 117, \textit{supra}. 