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Administrative Notice in Political Asylum Appeals: Does the Motion to Reopen Preserve the Alien's Due Process Rights

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NOTE

Administrative Notice in Political Asylum Appeals: Does the Motion to Reopen Preserve the Alien's Due Process Rights?

Over the past few years, the immigration and asylum laws of the United States have been spotlighted by major events. The mass exodus from Haiti, the Chinese asylum seekers from the "Golden Venture," and the bombing of the world trade center have raised concerns that the current system is out of control. The government is under pressure to reform the laws,[1] and the courts feel pressure to implement the current law in a more expeditious manner. In political asylum cases, however, the complex facts specific to each case make a quick determination difficult. If all the relevant facts are not addressed, an alien may be returned to an unsafe country and face persecution.

In one effort to expedite some asylum cases, the Board of Immigration Appeals ("BIA")[2] uses an evidentiary technique known as administrative notice.[3] Used properly, administrative notice allows the BIA to focus on the differences of each case. The BIA does, however, administratively notice some facts improperly. This has arisen frequently where the BIA takes administrative notice of an official change in power in the alien's home country and then takes notice that the alien no longer has an asylum claim. The BIA does this without giving the alien any warning or opportunity to respond.

This Note will focus on this type of administrative notice and the split in the Federal Circuits on the proper way to remedy the

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1 *See, e.g.*, Patrick J. McDonnell & William J. Eaton, *Political Asylum System Under Fire*, L.A. TIMES, July 19, 1993, at A1.

2 The BIA is a division of the Executive Office for Immigration Review in the Department of Justice. The BIA, as a delegate of the Attorney General, hears appeals from certain decisions made by the Immigration and Naturalization Service and Immigration Judges. GITTEL GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 150.03 (1993).

3 Administrative notice and official notice are interchangeable terms used to describe the process of admitting a fact without evidence in an administrative proceeding. Judicial notice is the judicial counterpart. CHARLES MCCORMICK, LAW OF EVIDENCE § 359 (3d ed. 1984).

possible due process violations.[4] The Seventh Circuit requires that an alien file a motion to reopen[5] with the BIA before granting an appeal on the due process issue.[6] The Ninth Circuit does not require that an alien file a motion to reopen.[7] Part I of this Note will identify the area of dispute. Part II explains the Immigration and Naturalization Service's ("INS") motion to reopen process and the Supreme Court cases addressing the proper use of the motion. Finally, in Part III, the Note argues that the Ninth Circuit's approach better ensures that the alien's due process arguments are heard.

I. IDENTIFYING THE DISPUTE

A. An Overview of the Typical Fact Situation

Before exploring the cases in detail, an overview of the typical setting in which the BIA takes administrative notice of a power change in the alien's home country will identify the area of disagreement within the circuits.

In the typical case,[8] the alien's asylum claim is denied at the initial hearing level by the Immigration Judge (IJ). The applicant then appeals to the BIA. Before the BIA renders an opinion on the IJ's findings, an official change in power occurs in the alien's home country. Without notifying the alien, the BIA then takes administrative notice that the alien's fears of persecution are no longer well founded due to the shift in political power. Thus, the alien does not meet the elements necessary to receive political asylum.[9] In making this determination, the BIA does not give the alien the opportunity to present evidence that the change in power may mean little because those who were in office have not relinquished their power. For example, the alien may still have a

4 The United States Supreme Court has twice refused to grant certiorari to resolve the circuit split. *See Supreme Court Declines to Review Conflicts on Administrative Notice in Asylum Cases,* 70 INTERPRETER RELEASES 641 (1993).

5 *See infra* Part II.

6 Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir. 1991), *cert. denied,* 112 S.Ct. 583 (1991).

7 Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992).

8 *See, e.g., id.*

9 To be eligible for asylum, the alien must show that he or she has a "well-founded fear" of future persecution based on his or her race, religion, nationality, membership in a particular social group, or political opinion. Immigration and Nationality Act (INA), § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988).

well-founded fear of persecution from the former official powers because they may continue to control the military.

The Circuits disagree not on whether the Due Process Clause[10] applies, but rather on when the deprivation occurs.[11] The issue is whether the BIA should review its decision to take administrative notice through a motion to reopen by the petitioners. The Circuits that require the motion to reopen agree that if the BIA refuses to reopen the case, the due process deprivation occurs then, and the alien's Fifth Amendment rights may have been infringed.[12]

B. The Split in the Circuits

1. The Seventh Circuit

The Seventh Circuit's principal case is *Kaczmarczyk v. INS*,[13] decided in 1991. Mr. Kaczmarczyk was a member of the Solidarity student movement in Poland, and he participated in anti government activities from 1981 to 1983.[14] Although never arrested, Mr. Kaczmarczyk was beaten at these demonstrations.[15] He arrived in the United States in December 1984 and continued his protests of the Polish government in this country.[16] The IJ rejected his asylum claim, finding that Mr. Kaczmarczyk did not meet the asylum requirements.[17] He appealed to the BIA who affirmed the IJ's opinion on April 6, 1990.[18] The BIA based its decision on the change of power in Poland. As reprinted in the Seventh Circuit's opinion, "the Board took administrative notice of the fact, that because, beginning in September 1989, Solidarity joined with the Communist Party . . . [Solidarity] members were no longer being persecuted . . . ."[19] The BIA did not give Mr. Kaczmarczyk the

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10 "No person shall . . . be deprived of life, liberty, or property without due proce. . of law." U.S. CONST. amend. V.

11 *Castillo-Villagra*, 972 F.2d 1017; Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir. 1991).

12 Rhoa-Zamora v. INS, 971 F.2d 26, 35 (7th Cir. 1992).

13 933 F.2d 588 (7th Cir. 1991). Mr. Kaczmarczyk's case was consolidated with two others in the Seventh Circuit's opinion. Those cases involved the identical administrative notice of the changed country conditions in Poland. This Note will only address the specific facts of Mr. Kaczmarczyk's case.

14 *Id.* at 591.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

opportunity to present contradictory evidence before taking notice of the changed political condition in Poland.

The Seventh Circuit first dismissed the argument that the administrative notice was too broad. The court made clear that administrative agencies have a wide degree of discretion in noticing "uncontroverted facts concerning political conditions in asylum seeker's home country . . . ."[20]

The court then turned its attention to the petitioner's due process arguments.[21] After holding that the Administrative Procedure Act ("APA") does not apply to deportation proceedings,[22] the court stated that aliens in deportation proceedings are entitled to constitutional due process guarantees.[23] These guarantees, at a minimum, require that the alien be given the opportunity "to meet the case made against him . . . ."[24] Therefore, the court held that the asylum seeker must be given the opportunity to rebut noticed facts.[25]

All the circuits addressing this issue agree that due process requires that contradictory evidence be introduced. The dispute concerns the proper mechanism to ensure that the evidence is heard. For the Seventh Circuit, a motion to reopen was deemed necessary.

After finding that the applicant must be given the opportunity to rebut, the court stated that the "existing procedural framework provides asylum petitioners with a mechanism to rebut administratively noticed facts."[26] In other words, the court found that the motion to reopen procedure gave the applicant a "meaningful opportunity to be heard."[27] The court continued that "[p]resumably, where the motion to reopen presents evidence sufficient to call into question the Board's decision, the Board would then reopen the asylum proceeding to allow for a more extensive inquiry into the disputed facts."[28] If the BIA then de-

20 *Id.* at 594 (citing Kubon v. INS, 913 F.2d 385 (7th Cir. 1990)).

21 *Id.* at 595.

22 *Id.* The INA states that its provisions are the "sole and exclusive" procedures governing deportation proceedings. INA § 242(b), 8 U.S.C. § 1252(b) (Supp. IV 1992).

23 *Kaczmarczyk*, 933 F.2d at 595 (citing Mathews v. Eldridge, 424 U.S. 319, 348 (1976) and The Japanese Immigrant Case, 189 U.S. 86, 101 (1903)).

24 *Kaczmarczyk*, 933 F.2d at 588.

25 *Id.*

26 *Id.* at 596-97.

27 *Id.* at 596.

28 *Id.* at 597.

nied the motion to reopen, that decision would be appealable to the Circuit court.

The Seventh Circuit recently upheld *Kaczmarczyk* in *Rhoa-Zamora v. INS.*[29] In *Rhoa-Zamora*, the applicant sought political asylum from Nicaragua and the Sandinista government.[30] The IJ denied asylum, and the petitioner appealed to the BIA.[31] In denying asylum, the BIA took administrative notice that the Sandinistas were no longer in power, so the threat of persecution did not exist.[32] Once again, the BIA took notice without giving the applicant the opportunity to respond.[33] The Seventh Circuit, addressing the due process argument, stated that "[i]n *Kaczmarczyk*, this court made clear that due process does not require the Board to give an asylum applicant the opportunity to rebut noticed facts *prior* to reaching a decision. Rather, we found that the mechanism of the motion to reopen . . . provides a sufficient opportunity to be heard . . . ."[34] The Seventh Circuit has not since departed from *Kaczmarczyk*.

2. The Ninth Circuit

The benchmark decision in the Ninth Circuit is *Castillo-Villagra v. INS.*[35] This case was decided after *Rhoa-Zamora*. Ms. Castillo-Villagra opposed the Sandinistas in Nicaragua, and she and her two daughters applied for political asylum in the United States.[36] The IJ denied their petitions, and they appealed to the BIA.[37] As in *Rhoa-Zamora*, elections took place in Nicaragua while the petitioners' appeals were pending, and the Sandinistas, who were in control, were defeated.[38] Once again, the BIA took administrative notice that the Sandinistas were out of power, and therefore, the petitioners no longer had a well-founded fear of persecu-

29 971 F.2d 26 (7th Cir. 1992). The Seventh Circuit consolidated three cases in this decision. Two petitioners applied for certiorari to the United States Supreme Court and were denied. *See infra* note 4.

30 *Id.* at 28.

31 *Id.* at 29.

32 *Id.*

33 *Id.*

34 *Id.* at 34.

35 972 F.2d 1017 (9th Cir. 1992).

36 *Id.* at 1021.

37 *Id.* at 1022.

38 *Id.* at 1020.

tion.[39] The BIA did not give the petitioners the opportunity to rebut the noticed facts.

The Ninth Circuit first addressed two preliminary issues before deciding the due process claim. First, the court determined that they had jurisdiction to hear the claim.[40] Second, they held that the INA, and not the APA, controlled the proceedings.[41]

In resolving the administrative notice issue, the court agreed with the Seventh Circuit that notice of facts that are deemed indisputable in administrative proceedings is broader than in judicial courts. "A case before an administrative agency, unlike one before a court, 'is rarely an isolated phenomenon, but is rather merely one unit in a mass of related cases . . . [which] often involve fact questions which have frequently been explored by the same tribunal.'"[42] The court stated that administrative notice was a valuable tool which allows administrative judges to notice common facts which consistently reoccur in numerous similar asylum claims so that they can efficiently focus on facts that differ in individual cases.[43] The court warned, however, that an administrative judge who takes administrative notice without giving an alien an oppor-

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39 *Id.* at 1023. The court reproduced part of the BIA's opinion:

> Given that the Sandinista party no longer governs Nicaragua, under the present circumstances we do not find that the record now before us supports a finding that the respondents have a well-founded fear of persecution by the Sandinista government were they to return to Nicaragua.

Id. The *Castillo-Villagra* court also pointed out that the BIA did not consider the IJ's determination, but relied solely on the administrative notice. *Id.* at 1022. Furthermore, the BIA "used language identical to that used in a large number of other cases . . . " involving Nicaraguan asylum claims. *Id.* at 1023.

40 The circuit courts have standing to review final deportation orders under the INA § 106, 8 U.S.C. § 1105a (1988 & Supp. IV 1992). First, however, the alien must exhaust all his administrative remedies "available to him as of right." INA § 106(c), 8 U.S.C. § 1105a(c) (1988). The Ninth Circuit has held, however, that the motion to reopen procedure is discretionary and not available "as of right." Berroteran-Melendez v. INS, 955 F.2d 1251 (9th Cir. 1992). The Seventh Circuit agreed with the Ninth Circuit in Rhoa-Zamora v. INS, 971 F.2d 26 (7th Cir. 1992). Therefore, a motion to reopen does not have to be filed in order for the alien to have standing in the Seventh or Ninth Circuit.

In contrast, the Eleventh and Sixth Circuits have held that a motion to reopen must be filed before the appellate courts have jurisdiction to hear the asylum claim. Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), and Dokic v. INS, 899 F.2d 530 (6th Cir. 1990). Given the discretionary nature of the motion to reopen, however, the Seventh and Ninth Circuits' holding that the motion to reopen is not available "as of right" is more consistent with the statutory language.

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

42 *Id.* at 1026 (quoting Walter Gellhorn, *Official Notice in Administrative Adjudication*, 20 TEX. L. REV 131, 136 (1941)).

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

tunity to respond may "amount to 'condemnation without a trial.'"[44]

The court then broke down the facts administratively noticed by the BIA into three parts: "(1) that Violeta Chamorro had been elected president, (2) that her non-Sandinista coalition had gained a majority in parliament, and (3) that the Sandinistas were ousted from power."[45] The Ninth Circuit agreed that introducing evidence to prove the first two facts was not necessary.[46] However, with respect to the third fact, the court stated: "that the Sandinistas were ousted from power, was debatable . . . ."[47] Accordingly, the court held that the BIA should have given the petitioners the opportunity to present contradictory evidence to show why the BIA should not have noticed that the petitioners no longer had a fear of persecution.[48] The BIA should "have warned, *prior to final decision,* that it intended to take notice that . . . any well-founded fear of persecution that the applicants might have had . . . could no longer be well-founded . . . ."[49] The court stated the BIA's assumption that the fear was no longer well founded, without granting an opportunity to respond, simply "assumed away [the] petitioners' case."[50]

The court further stated that the INS's established motion to reopen procedure was inadequate to ensure due process. "The availability of a motion to reopen was not adequate, because the agency might have denied it, and deportation would not have been automatically stayed by the motion."[51] In other words, the

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44 *Id.* at 1027 (quoting Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 300 (1937)).

45 *Id.*

46 *Id.* The court continued:

> The agency would not have to accord any opportunity to the applicants to offer evidence to rebut the propositions that Chamorro won the election and that UNO won a majority in parliament, since those facts are legislative, indisputable, and general. The agency should have warned that it would consider these facts even though they were not in existence at the time of the hearing and appellate briefs, so that the parties could have moved for leave to supplement their briefs, supplement the evidence, withdraw their applications for asylum, or seek other relief.

Id. at 1029.

47 *Id.* at 1027.

48 *Id.* at 1028 (citing Banks v. Schweiker, 654 F.2d 637 (9th Cir. 1981)). *See also* MCCORMICK, *supra* note 3, § 333.

49 *Castillo-Villagra,* 972 F.2d at 1029 (emphasis added).

50 *Id.*

51 *Id.*

court found that the motion to reopen inadequately protects the alien's due process rights for two reasons. First, the alien must file a motion to reopen with the BIA, the same agency that previously refused to hear the petitioner's evidence. Furthermore, the BIA then has great discretion to deny the petitioner's motion. Second, the petitioner is under the threat of deportation during the BIA's consideration of whether to grant the motion to reopen.[52]

Thus, the Seventh and Ninth Circuits are split as to the adequacy of the motion to reopen procedure to preserve and correct due process violations. The Ninth Circuit questioned the Seventh Circuit's unrealistic presumption[53] that the INS will stay deportation pending a decision on the motion to reopen. The Ninth Circuit stated, "[w]e are not satisfied that we can make this presumption, in view of the 'broad discretion' the agency has to deny motions for rehearing, which are 'disfavored.'"[54] The court then remanded the case to allow the petitioners an opportunity to present evidence concerning their fear of persecution.[55]

3. The Other Circuits

The other circuits that have addressed the issue have either simply cited the Seventh and Ninth Circuit cases or not dealt with the issue directly. Of these circuits, most have agreed with the Seventh Circuit.[56] The Sixth Circuit is alone in adopting the Ninth Circuit's reasoning in an unpublished opinion decided in 1991.[57] The Sixth Circuit, like the Ninth Circuit, was concerned that the petitioner would be subject to deportation while the motion to reopen was pending.[58]

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52 *See* discussion *infra* part IV.A.

53 *See supra* notes 74-79 and accompanying text.

54 *Castillo-Villagra*, 972 F.2d at 1030 (citing INS v. Doherty, 112 S.Ct. 719, 724 (1992)).

55 *Id.* at 1031.

56 *See* Chavez-Robles v. INS, 1992 U.S. App. LEXIS 13618 (4th Cir. 1992) (unpublished decision) (BIA noticed Sandistas' victory in Nicaragua); Gutierrez-Rogue v. INS, 954 F.2d 796 (D.C. Cir. 1992) (Nicaragua); Wojcik v. INS, 951 F.2d 172 (8th Cir. 1991) (Poland); Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991) (Nicaragua); Janusiak v. INS, 947 F.2d 46 (3d Cir. 1991) (BIA took notice of the Solidarity movement in Poland); Kapcia v. INS, 944 F.2d 702 (10th Cir. 1991) (Poland).

57 Ulloa v. INS, 1991 U.S. App. LEXIS 22288 (6th Cir. 1991) (unpublished opinion).

58 The court stated that "[t]he filing of a motion to reopen does not serve to stay the execution of an order of deportation . . . and thus such a procedure imposes the unreasonable risk that a petitioner may be deported before the Board considers the rebuttal evidence in his motion to reopen." *Id.* at *5 n.1.

II. THE MOTION TO REOPEN

The adequacy of the motion to reopen procedure is at the heart of the split between the Ninth and Seventh Circuits. Therefore, a closer look at the requirements and court interpretations of the motion to reopen is warranted.

A. Motion to Reopen Distinguished From the Motion to Reconsider

The motion to reconsider and the motion to reopen are creatures of regulation not mandated by statute.[59] Both allow the petitioner to ask the BIA to review their decision. The motion to reconsider[60] is appropriate when the underlying law, not the facts of the case, has changed so as to give new merit to the petitioners case.[61] The motion to reopen, however, is used to present new facts.[62] Therefore, an alien who is seeking a review of administratively noticed facts would use a motion to reopen since the underlying facts may have changed but the underlying law has remained unchanged.[63]

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59 GORDON, *supra* note 2, § 138.09[1].

60 8 C.F.R. § 3.8 (1993) provides that "[m]otions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent."

61 *See* Rhoa-Zamora v. INS, 971 F.2d 26, 29 n.1.; GORDON, *supra* note 2, § 138.09[1].

62 8 C.F.R. § 3.8 (1993) provides that "[m]otions to reopen shall state the new facts to be proved at the reopened hearing . . . ."

63 *See Rhoa-Zamora*, 971 F.2d at 29 n.1. Judge Fletcher, however, concurring in Gomez-Vigil v. INS, 990 F.2d 1111 (9th Cir. 1993), felt that the motion to reopen procedure was not appropriate for the reconsideration of officially noticed facts. He constructs two arguments for his proposition from the wording of the regulations.

First, 8 C.F.R. § 3.2 states "that motions to reopen 'shall not be granted unless it appears that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing.'" Judge Fletcher argues that the previous evidence was available at the previous hearing, and the BIA chose not to give the petitioner the opportunity to present it. Therefore, the motion to reopen procedure does not apply in this context. *Gomez-Vigil*, 990 F.2d at 1124.

Second, 8 C.F.R. § 3.8 reads that the motion to reopen must "state the new facts to be proved." The petitioner's argument is that no new facts exists; that is, they existed at the time notice was taken, so they cannot be considered "new." *Id.*

The basis of Judge Fletcher's argument is that the motion to reopen mechanism was not created to remedy this type of due process deprivation. Although his logic is sound, none of the Circuits have adopted his reasoning. This Note will, therefore, assume the motion to reopen procedure is the appropriate mechanism.

B. Filing a Motion to Reopen

Filing a motion to reopen involves much more than simply filling out a form. The alien must support the motion with a legal memorandum and evidentiary material.[64] The motion must state whether the applicant has been or is involved in any criminal proceedings, and whether the deportation order is, or was, subject to judicial appeal and the result of that appeal.[65] Furthermore, the procedural requirements of how and where to file require an attorney's assistance.[66]

The motion to reopen must be as convincing as possible. Thus, filing a motion to reopen to consider rebuttal evidence requires the attorney to address two distinct issues. First, the motion must address the threshold issue that the BIA should not have administratively noticed certain facts. Second, the alien must argue through the motion that the asylum claim should be granted after the rebuttal evidence is heard concerning those facts.

The motion to reopen places an extra burden on the alien. The alien must not only establish his asylum claim, which he is required to do anyway, but the alien must also show that the noticed facts should not have been noticed. If the BIA had provided the alien an opportunity during the initial hearing to present evidence that the political change had no effect on the alien's still well-founded fear of persecution, the issue of whether administrative notice was proper would never be created.

Given the formalities of and the expertise needed to draft the motion to reopen, an alien who is not represented by an attorney will not be as capable to challenge the administrative notice through a motion to reopen. The Ninth Circuit's holding does not create this additional hurdle, which allows the alien to continue more easily without an attorney.

C. Discretion in the BIA to Grant a Motion to Reopen

The United States Supreme Court has held that the INS has wide discretion in deciding whether to grant motions to reopen. However, the Court has insisted that motions to reopen should be

64 GORDON, *supra* note 2, § 150.08[4][a].
65 *Id.* § 138.09[1].
66 *Id.* § 150.08[4][a].

granted sparingly. In *INS v. Abudu*,[67] the Supreme Court stated that the regulation establishing the motion to reopen procedure

> is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened.[68]

More recently, the Supreme Court held in *INS v. Doherty*[69] that "[t]he granting of a motion to reopen is . . . discretionary . . . [and] . . . disfavored."[70]

The Seventh Circuit's reliance on motions to reopen to cure due process violations is inconsistent with the Supreme Court's disfavor toward such motions. The Seventh Circuit may have presumed, however, that the BIA would grant the motion to reopen if it believed that a prior BIA hearing had erroneously noticed the fact that the new political power posed no threat to the asylum seeker. However, the Seventh Circuit's presumption is inaccurate. In their initial decision to reject the petitioner's asylum claim, the BIA had determined that rebuttal evidence was unnecessary because the evidence would not influence their decision. If the BIA believed that the evidence was important to the petitioner's claim, the BIA would have considered this evidence during the initial hearing. Given the disfavored status of reopening cases and the BIA's belief that the evidence was unimportant at the time of the initial hearing, the likelihood that the BIA will grant a motion to reopen is slim. Therefore, requiring the petitioner to ask the BIA to reopen their previous decision is not efficient.

III. DOES THE MOTION TO REOPEN PRESERVE DUE PROCESS RIGHTS?

Several due process concerns result from this split in the circuits. First, the INS could deport the alien while the motion to reopen is pending, and filing a writ habeas corpus at the verge of deportation does not remedy the problem. Second, the administra-

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67 485 U.S. 94 (1988).
68 *Id.* at 105 (quoting Jong Ha Wang, 450 U.S. 139, 144 n.5 (1981)).
69 112 S. Ct. 719 (1992).
70 *Id.* at 724.

tively noticed facts may make the alien's asylum claim more difficult to prove. Third, financial restraints will hamper the indigent alien's attempt to vindicate his due process rights. This Part addresses each of these concerns.[71] Intertwined within these issues is the general concern that judicial and administrative resources be utilized efficiently.

A. The Risk of Deportation

The mere filing of a motion to reopen by an alien, whose asylum claim has been rejected, does not stay deportation.[72] In

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71 One other concern that appears to exist is the seemingly different standard of review used by each circuit. Under the Seventh Circuit's holding, review of the due process issue takes place after the BIA denies the motion to reopen under an abuse of discretion standard. Under the Ninth Circuit's holding, the court will review the due process issue as part of the deportation order using a different standard of review that is mandated by statute. However, as the analysis below reveals, the standard of review in both circuits is identical.

Under the Seventh Circuit's holding, the alien's appeal will follow the BIA's refusal to reopen the case. Therefore, the court will be asked to scrutinize the BIA's denial of the motion to reopen. The court will review the BIA's decision under an abuse of discretion standard. INS v. Abudu, 108 S. Ct. 904 (1988). In determining whether the INS did abuse its discretion in denying the motion, the court will be directed by the petitioner to review the administrative notice. If the court finds that administrative notice was taken improperly and violates due process, the BIA's denial of the motion to reopen will be an abuse of discretion. The court will remand the case back to the BIA for further consideration, thus remedying the due process violation. Therefore, the inquiry is whether taking administrative notice violated the Due Process Clause.

Under the Ninth Circuit's holding, the alien is not required to file a motion to reopen. As the alien has no appeal beyond the IJ following the denial of asylum, the alien cannot directly appeal the administrative notice issue to the circuit court. INA § 106a, 8 U.S.C. § 1105a(a) (Supp. IV 1992); GORDON, *supra* note 2, § 138.02[2]. Instead, the INS will attempt to deport the alien for remaining in the United States after asylum is denied. The alien will have to appeal the taking of administrative notice, therefore, in the context of a deportation order. 8 C.F.R. § 208.18(b) (1993). Congress has established that the standard of review for deportation orders shall be "reasonable, substantial, and probative evidence on the record considered as a whole." INA § 106(a)(4), 8 U.S.C. § 1105a(a)(4) (1993). Under this standard, the court would review the record as established by the BIA to determine whether "reasonable, substantial, and probative" evidence exists to sustain the deportation order. The record submitted by the BIA will include the administratively noticed facts, and those will be used to determine whether "reasonable, substantial, and probative" evidence exists. Gutierrez-Rogue v. INS, 954 F.2d 769 (D.C. Cir. 1992). The petitioner, however, will argue that notice was taken improperly, and the court will then look at the correctness of the BIA's taking notice. The requirements of the Constitution will control the inquiry. The statutory standard of review for deportation orders thus no longer controls. If the due process requirements are not met, the court will find a constitutional violation and remand the case for a proper hearing. Therefore, the controlling issue is, once again, whether administrative notice was wrongly taken as to violate the Due Process Clause.

72 GORDON, *supra* note 2, § 138.09[4].

contrast, an applicant in an asylum adjudication cannot be deported.[73] When an alien files the motion to reopen as required by the Seventh Circuit, the alien leaves the asylum proceedings and may be deported before the possible due process violation is addressed. If a motion to reopen is not required, the appeal to the circuit court is part of the asylum proceeding and the deportation is stayed while the due process issue is resolved.

From any perspective, the deportation of an individual before fully addressing possible due process deprivations presents a serious problem. The Seventh Circuit in *Kaczmarczyk* made a leap of faith when it stated in a footnote that it "presume[s] that when an asylum applicant uses a good faith motion to reopen to dispute administratively noticed facts, the Board will exercise its discretion to stay the [deportation]."[74] The Ninth[75] and Sixth[76] Circuits prudently did not make this same presumption.

Basically, trust in the INS's discretion is at issue in this argument. During the oral argument of *Rhoa-Zamora*, the Seventh Circuit asked the INS for assurances that the petitioner would not be deported while the motion to reopen was pending.[77] The INS would not give this assurance, and the court simply restated its presumption that the INS would exercise its discretion and not deport Mr. Rhoa-Zamora.[78] Furthermore, the INS has admitted that aliens are routinely deported while motions to reopen are pending.[79]

Without a statute or regulation automatically staying deportation upon the filing of a motion to reopen, the Seventh Circuit's presumption is misguided. The BIA had an opportunity in its initial hearing to ask the petitioner for contradictory evidence if it believed the evidence was necessary. Administrative efficiency would dictate that the BIA attempt to gather all the facts it be-

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73 8 C.F.R. § 208 (1993).

74 *Kaczmarczyk*, 933 F.2d at 597 n.9. This presumption was adopted by the District of Columbia Circuit in *Gutierrez-Rogue*, 954 F.2d at 773.

75 Castillo-Villagra v. INS, 972 F.2d 1017, 1030 (7th Cir. 1992) ("We are not satisfied that we can make this presumption . . . ").

76 Ulloa v. INS, 1991 U.S. App. LEXIS 22288 at *5 n.1 (6th Cir. 1991) (unpublished opinion).

77 Petitioner's Brief for Writ of Certiorari at 20, Rhoa-Zamora v. INS, 971 F.2d 26 (7th Cir. 1992) (No. 91-1949), *cert. denied*, 113 S. Ct. 2331 (1993).

78 *Id.*

79 *Id.* at 21 (citing Marilyn Mann, Note, *Timeliness of Petitions for Judicial Review Under Section 106(a) of the Immigration and Nationality Act*, 86 MICH. L. REV. 990, 997 n.36 (1988)).

lieved were relevant before reaching a decision. Since the BIA never gave the alien the opportunity to rebut the noticed fact, it apparently did not think the fact was disputable. Presumably, then, the evidence contained in the motion to reopen will not interest the BIA. By this time, the INS's goal is to close the case as soon as possible by deporting the alien. Therefore, the INS has no real incentive to stay the deportation pending a motion to reopen based on evidence the BIA has already determined was immaterial to the petitioner's political asylum claim.

B. Ineffectiveness of Habeas Corpus

Judge Aldisert, concurring in *Gomez-Vigil*,[80] criticized the Ninth Circuit's concern over the possibility of deportation. He stated that any alien on the verge of deportation before receiving due process could file a habeas corpus action in district court.[81] In fact, habeas corpus has been used in the past in this situation, and district courts on habeas corpus review have even reversed the INS's substantive decision not to grant asylum.[82] Once again, however, efficiency arguments do not support the reliance on habeas corpus to preserve due process.

A writ of habeas corpus will involve filing another pleading in an entirely different court system, in addition to the motion to reopen already filed with the BIA. Presumably, habeas corpus would only be necessary under the Seventh Circuit's approach since deportation is stayed automatically under the Ninth Circuit's approach. Therefore, the attempted deportation will occur while the BIA's decision is pending on the motion to reopen. A writ of habeas corpus will then be filed in federal district court to prevent the deportation.

The use of habeas corpus then shifts the burden of deciding the due process issue to the courts. If habeas corpus is denied, that decision is appealable to the circuit court. Therefore, the BIA can wait to decide on the motion to reopen until all these appeals are terminated. If the court finds no due process violation, the INS will continue its efforts to deport the individual; if a due

80 990 F.2d 1111 (9th Cir. 1993). *See also Controversy Over* Castillo-Villagra *Continues*, 70 INTERPRETER RELEASES 1102 (1993).

81 *Gomez-Vigil*, 990 F.2d at 1119.

82 Dhine v. INS, 818 F. Supp. 671 (1993) (finding that the INS wrongly took administrative notice and abused its discretion in not granting asylum).

process violation is found by the court, the BIA will grant the motion to reopen.

Either way, the BIA has shifted the responsibility of deciding the motion to reopen to the court system. The BIA will not look at the motion to reopen for new facts, but will instead wait to see if the courts require that the motion be granted. The BIA has no incentive to look at the motion to reopen before the court decides the due process issue in the habeas corpus review. The courts thus end up deciding the administrative notice issue anyway, and requiring the petitioner to file the motion to reopen does not relieve the courts from deciding the due process issue.

Furthermore, Judge Aldisert recognized the possibility that an alien may be deported before seeking a writ of habeas corpus.[83] In such a case, Judge Aldisert stated that "the applicant should be permitted to return . . . [to the United States] . . . under a State Department certificate of identity to vindicate constitutional rights."[84] This analysis presents two problems. The first is determining who will pay for the travel. If the alien is forced to pay, then only wealthy applicants will be granted due process. If the government pays, efficiency is not achieved.[85]

Besides the obvious problem of who will pay for the travel, the whole purpose of political asylum is to prevent the native country from subjecting the applicant to persecution.[86] Since possible due process violations did occur,[87] the system has not determined whether asylum was warranted. Therefore, the alien may have been deported to a persecuting country and may no longer be alive, or the foreign government may not permit the alien to return to the United States.

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83 Gomez-Vigil v. INS, 990 F.2d 1111, 1119 (9th Cir. 1993).

84 *Id.* at 1119 n.5 (citing 8 U.S.C. § 1503(b) (1988)).

85 If the government were forced to pay, perhaps this expense would create an incentive to ensure that due process rights are vindicated before deportation takes place.

86 The applicant could always request an alternative country of deportation by asking for voluntary departure under INA § 242(b), 8 U.S.C. § 1252(b) (Supp IV. 1992). This provides the alien with a possible safe alternative to his home country, but the alien is not entitled to this relief by right. If this problem were presented to the IJ, he may exercise his discretion to allow this relief.

87 Otherwise, the applicant would have no reason to return to the United States for the habeas corpus proceeding.

C. *Administratively Noticed Facts as Rebuttable Presumptions*

Rebutting administratively noticed facts through the motion to reopen procedure places an additional burden on the alien establishing an asylum claim. This argument can be illustrated through the three noticed facts described in *Castillo-Villagra*.[88] The first two facts, that Chamorro won the election and that her party held a majority of the seats in Parliament, are easily determined by simply counting votes. Thus, the court appropriately agreed that administrative notice of these facts was proper.

The third fact, that the Sandinistas were out of power, is not the same kind of "fact." This finding is more subjective and requires that a conclusion be drawn from raw data. One cannot simply look to raw data and see that the Sandinistas no longer pose a threat to the alien. Therefore, the *Castillo-Villagra* court held that administrative notice was not proper, and the petitioner must be given the opportunity to present evidence on his behalf.

Under the Seventh Circuit's holding, the alien would have to rebut the third fact through the motion to reopen. By the time the alien presents his evidence through this mechanism, however, the fact has already been presumed against him. That is, the BIA has transformed a debatable determination that the Sandinistas are out of power into a rebuttable presumption.[89]

An alien who must disprove a rebuttable presumption to establish an asylum claim faces a more difficult task than one who simply has to establish an asylum claim. If the alien was addressing the election issue in a normal asylum application, the alien would present evidence that the ousted power could still persecute him. This same evidence may not, however, be enough to overcome the presumption. By administratively noticing the fact and requiring the petitioner to respond through a motion to reopen, the BIA has placed an additional obstacle before the alien and made the alien's claim more difficult to prove.

Under the Ninth Circuit's holding, however, the alien presents evidence that he or she still fears persecution as part of the asylum application. Surely, the alien must still address the issue of whether a well-founded fear of persecution exists after the power

88 *See supra* text accompanying note 45.

89 MCCORMICK, *supra* note 3, § 359.

change. But the alien is not burdened with the additional obstacle of having the fact presumed against him before presenting evidence.

D. Finanaical Demands on the Alien

As illustrated in the previous discussion, the additional procedures required under the Seventh Circuit's holding prejudice those aliens who represent themselves. In addition, these procedures also take time and cost money. If an applicant cannot afford representation, the likelihood of him continuing pro se after the BIA's decision to take administrative notice is very low. Only those aliens who have personal resources will be financially able to continue through the entire appeals process. In other words, the general notice taking will discourage, or make impossible, some applicants from continuing. Because of those who drop out of the system, the load on the INS will lessen without the INS having to allocate resources to safeguard the aliens' rights through a hearing. Only those who can afford to carry on will have their opportunity to be heard.

IV. CONCLUSION

The backlog of asylum cases awaiting INS decision is growing every year.[90] This Note in no way advocates that we simply open the nation's door and let in everyone without regard to the merits of their case. We do not even want to suggest how wide we should open the door. Our argument is for a proper hearing for those that are in the system.

The burden on the BIA has created an incentive to push applicants through the system as quickly as possible. Although taking broad administrative notice, thus mooting many asylum claims, may effectively lessen the INS's burden, due process is sacrificed.[91] Instead of manipulating current rules, Congress must

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90 *See, e.g.*, Debora Sontag, *System for Political Asylum*, N.Y. TIMES, Dec. 14, 1992, at A12.

91 For example, if Jean-Bertrand Aristide were reinstated as President of Haiti, the INS might administratively notice that fact. This would be fine because no one would dispute that Aristide was the new leader. But, as has happened in the Nicaraguan and Polish cases, the BIA may go further and administratively notice that the applicants currently in the system no longer have a well-founded fear of persecution. Therefore, all the Haitian applicants would no longer have a case. Perhaps this result is correct, but without an individual determination of each applicant, the few (or perhaps many) who still have a genuine fear of persecution will be foreclosed from presenting their evidence.

pass more efficient asylum laws and increase the budget of the INS.

The Ninth Circuit's holding allows for one appeal in which all the alien's claims can be addressed. The burden placed on the BIA at the initial review simply requires that the other side be given the opportunity to rebut noticed facts. The discretion invested in INS to then deny the substantive asylum claim is not infringed upon by the Ninth Circuit's holding. The Seventh Circuit's reliance on the motion to reopen is inconsistent with Supreme Court cases and, in the end, the judicial system may ultimately decide upon the due process issue in deciding writs of habeas corpus. Furthermore, the Seventh Circuit's requirements make it much more difficult to establish an asylum claim, and make it almost impossible for those aliens without representation to continue. The INS's procedures are in need of reform, but the changes should come from Congress or internally from within the INS, not by manipulating the current rules to discourage asylum seekers from continuing.

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At the time of the publication of this Note, the October 30, 1993 reinstatement of Aristide had passed, and the return of Aristide as leader of Haiti was very uncertain. *See, e.g.*, Steven A. Holmes, *Standoff in Haiti*, N.Y. TIMES, Oct. 17, 1993, at 14.; *UN pulls monitors out of Haiti*, CHI. TRIB., Oct. 17, 1993, at C3.