This Article underscores the challenges faced by undocumented immigrants who, after removal, once again flee their countries of origin to seek safe haven in the United States. Many of them are apprehended again by immigration authorities, who may reinstate the prior removal order and severely limit the immigrants’ legal options. Although the government takes the position that such illegal reentrants are foreclosed from applying for asylum, this is a challengeable appellate issue currently contested in at least one federal circuit.

I. INTRODUCTION

What rights do those who have been previously removed from the United States have upon reentry and re-apprehension? Although many reentrants fear a second removal due to the risk of persecution in their countries of origin, United States immigration authorities have discretion to reinstate prior removal

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* This is a continuing piece in a series of articles published to bring to light the challenges faced by immigrants post-deportation, and intends to highlight the unfairness that asylum seekers face in the appellate process after they are removed from the country. For more information regarding other articles published in this series, please see: http://www.houstonlawreview.org/hlre-off-the-record.

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orders and severely limit access to relief from removal, including asylum. Foreclosing asylum, however, effectively sounds a death knell for many illegal reentrants, as alternative forms of relief are difficult to obtain and less desirable.

Yesenia Marisol Maldonado Lopez was one illegal reentrant who faced just such a dilemma. Her family in El Salvador—believing that marriage would “cure” her of being a lesbian—forced her to marry a 68-year-old man when she was just 14 years old. The man drugged and raped her. Yesenia fled El Salvador and attempted to enter the United States only to be removed. Upon her return to El Salvador, she was brutally attacked because of her sexual orientation, and reentered the United States only to be once again apprehended by immigration officials.

Stories like Yesenia’s—of apprehension, removal, and re-apprehension interlaced with trauma and violence—are rife in our immigration system. What follows is a discussion on the law and procedure behind reinstatement of removal, its draconian consequences, and the appellate litigation options available to illegal reentrants like Yesenia who seek asylum. Though this area remains complex and challenging, there are ways in which practitioners can creatively advocate on behalf of clients whose prior removals have been reinstated.

3. Id. at 7.
4. Id. at 8.
5. Id. at 9.
6. Although there is no exact way to quantify the number of such cases, statistics from the Executive Office of Immigration Review (“EOIR”), which houses immigration courts and the Board of Immigration Appeals (“BIA”), show that in fiscal year 2014, immigration courts rendered a total of 12,515 decisions regarding eligibility for withholding of removal, the typical form of relief sought by individuals who have previously been removed and who now fear removal. See U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2014 STATISTICAL YEAR BOOK at K5 (2015), available at http://www.justice.gov/sites/default/files/oir/pages/attachments/2015/03/16/fy14syb.pdf (granting 1,463 applications for withholding of removal and denying 11,052); see also 8 C.F.R. § 208.31 (describing the procedures an immigrant must go through to gain withholding).
II. UNDERSTANDING REINSTATEMENT

Congress enacted the current reinstatement statute of the Immigration and Nationality Act (“INA”) in 1996.7 The statute, codified at 8 U.S.C. § 1231(a)(5), reads:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Unlike a prior version of the statute, the current version “applies to all illegal entrants, explicitly insulates the removal orders from review, and generally forecloses discretionary relief from the terms of the reinstated order.”8 Implementing regulations state that an illegal reentrant whose prior order is reinstatable has no right to a hearing before an immigration judge (“IJ”), but instead, “shall be removed from the United States by reinstating the prior order.”9

Though there are limited statutory and judicial exceptions that can preclude reinstatement,10 the statute has generally been applied broadly. It can, for instance, be applied retroactively.11 Moreover, litigants who have brought constitutional claims challenging the regulations that implement reinstatement procedures have failed without exception.12 At the same time, the reinstatement of a prior removal order has draconian effects, as it

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9. 8 C.F.R. § 241.8(a).
11. The Supreme Court has held that the statute applies retroactively to individuals who were deported and reentered the country prior to the April 1, 1997 effective date for the reinstatement statute. See Fernandez-Vargas, 548 U.S. at 30. The Court also found that applications for relief filed after the effective date of the statute are similarly barred. Id.
12. See Morales-Izquierdo v. Gonzales, 486 F.3d 484, 489 (9th Cir. 2007) (en banc) (“Morales argues that the Attorney General exceeded his authority in promulgating the regulation . . . . However, the First, Sixth, Eighth and Eleventh Circuits have upheld the regulation against similar challenges.”); see also Ponta-Garcia v. Att’y Gen. of the U.S., 557 F.3d 158, 162–63 (3d Cir. 2009); Garcia-Villeda v. Mukasey, 531 F.3d 141, 148 (2d Cir. 2008); Lorenzo v. Mukasey, 508 F.3d 1278, 1283–84 (10th Cir. 2007); Gomez-Chavez v. Perryman, 308 F.3d 796, 800–02 (7th Cir. 2002).
is broadly understood to preclude asylum.\textsuperscript{13} And though reinstatement does not prevent an applicant from seeking withholding of removal and relief under the Convention Against Torture ("CAT"), these forms of relief are much more difficult to obtain than asylum.\textsuperscript{14} In addition, withholding of removal and relief under the CAT do not allow the applicant to petition for his or her spouse or children to receive status,\textsuperscript{15} nor do they provide a pathway to lawful permanent residency.\textsuperscript{16}

III. APPELLATE LITIGATION STRATEGIES FOR ASYLUM SEEKERS IN REINSTATEMENT CASES

Past and Current Litigation Efforts

Given the myriad challenges faced by applicants\textsuperscript{17} in reinstatement cases, attorneys must explore all appellate litigation options and adequately preserve issues for appeal. This is especially true given that between 1999 and approximately 2007, only three identifiable cases out of 211,000 total reinstatement orders were reversed for reasons other than retroactivity.\textsuperscript{18} Blanket constitutional challenges to reinstatement procedures, however, are unlikely to succeed,\textsuperscript{19} though some individuals in reinstated proceedings can and should challenge the validity of the initial removal order.\textsuperscript{20}

\textsuperscript{13} Reinstatement does not necessarily preclude a reentrant from seeking adjustment of status under the Violence Against Women Act or relief as a victim of trafficking or certain types of crimes. \textit{See supra} note 10, at 5–7.

\textsuperscript{14} Withholding of removal, for example, requires that an applicant establish a greater than 50 percent chance that he or she would be harmed on account of one of five protected grounds, while asylum requires only a greater than 10 percent chance of risk of harm. \textit{See} I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987); I.N.S. v. Stevic, 467 U.S. 407, 424–29 (1984). In addition, a judge cannot grant withholding of removal where there is no risk of future harm, whereas an asylum applicant can be granted relief based solely on the past harm that he or she experienced. \textit{Compare} 8 U.S.C. § 1231(b)(3)(A), \textit{with Matter of Chen}, 20 I. & N. Dec. 16, 16, 1989 WL 331860 (BIA 1989) ("An applicant for asylum . . . may establish his claim by presenting evidence of past persecution"), \textit{and Matter of L-S-}, 25 I. & N. Dec. 705 (BIA 2012) (same). In fiscal year 2014, immigration judges around the country granted under 12% of applications for withholding of removal, as opposed to 49% of applications for asylum. \textit{See} EOIR FY 2014 \textit{YEARBOOK}, \textit{supra} note 6, at K5.

\textsuperscript{15} \textit{See} 8 C.F.R. § 208.16(e).


\textsuperscript{17} Applicants for asylum can be known by various names during various stages of their asylum office, immigration court, and appeals proceedings. For example, during immigration court and BIA proceedings, an applicant is typically known as "respondent," and in federal appeals court proceedings, he or she is known as "petitioner" if he or she petitioned for review. For clarity, applicants for asylum are referred to as "applicants" in this article.

\textsuperscript{18} Morales-Izquierdo v. Gonzales, 486 F.3d 484, 496 (9th Cir. 2007).

\textsuperscript{19} \textit{See supra} note 12.

\textsuperscript{20} Such appellate litigation is beyond the scope of this article. For more information, see Realmuto, \textit{supra} note 10, at 18–22.
Significantly, applicants may also challenge the assumption that the reinstated order precludes them from applying for asylum. Indeed, several have already petitioned for federal court review of the availability of asylum relief in reinstatement cases.\textsuperscript{21} Yesenia Maldonado Lopez, for example, brought her case before the Ninth Circuit, arguing that undercutting the asylum statute with the reinstatement statute would be “contrary to the plain meaning of the INA and traditional canons of statutory interpretation.”\textsuperscript{22} After an opening brief and two amicus briefs were submitted on Ms. Maldonado’s behalf, the case was ordered into mediation,\textsuperscript{23} and the government exercised its discretion in allowing her to apply for asylum.\textsuperscript{24} More recently in \textit{Perez-Guzman v. Lynch}, Petitioner similarly argued that he was eligible to apply for and be granted asylum relief.\textsuperscript{25} The case was referred to and subsequently released from the Ninth Circuit’s mediation program.\textsuperscript{26} The case remains pending.\textsuperscript{27}

The petitioners and amici in \textit{Perez-Guzman} and \textit{Maldonado Lopez} argued that precluding applicants from asylum under 8 U.S.C. § 1231(a)(5) is problematic in several respects. For example, immigration officers—not judges—have the authority to reinstate a prior order.\textsuperscript{28} Though regulations state that a reinstatable individual “shall” be removed, immigration officers do not always reinstate the prior order of removal.\textsuperscript{29} Thus, despite the seemingly mandatory nature of the statutory and regulatory language, a particular respondent’s ability to apply for and be granted asylum may be left to the whim of an immigration officer.

\begin{enumerate}
\item \textsuperscript{21} See, \textit{e.g.}, Brief of Petitioner, \textit{supra} note 2, at 2; \textit{Perez-Guzman v. Lynch}, No. 13-70579 (9th Cir. filed Feb. 15, 2013).
\item \textsuperscript{22} Brief of Petitioner, \textit{supra} note 2, at 13. Petitioner’s arguments are discussed in more detail below.
\item \textsuperscript{23} Maldonado Lopez v. Holder, No. 12-72800 (9th Cir. Aug. 22, 2013) (order for mediation).
\item \textsuperscript{24} \textit{See} Brief of Amici National Immigrant Justice Center, Lawyers’ Committee for Civil Rights of the San Francisco Bay Area, American Immigration Lawyers Association at 27–28, \textit{Perez-Guzman v. Lynch}, No. 13-70579 (9th Cir. filed Feb. 15, 2013).
\item \textit{Perez-Guzman}, at 1.
\item \textit{Perez-Guzman v. Holder}, No. 13-70579 (9th Cir. Oct. 23, 2014) (order to release case from mediation program).
\item \textit{Perez-Guzman v. Lynch}, No. 13-70579 (9th Cir. filed Feb. 15, 2013).
\item 8 C.F.R. § 241.8(a)(1)–(3).
\item \textsuperscript{29} See, \textit{e.g.}, Alcala v. Holder, 563 F.3d 1009, 1014 (9th Cir. 2009) (“Here, the government has taken no action to fulfill the requirements of 8 C.F.R. § 241.8(a) and (b); indeed, there is no evidence in the record the government has taken any steps whatsoever to reinstate the prior removal order against [Petitioner].”). In the author’s own experience, immigration officials are also somewhat inconsistent in \textit{when} they reinstate a prior removal order. Although removal is often reinstated very early in removal proceedings, it can also occur in the later stages of proceedings, after pleadings have been taken on the charges against the respondent. Indeed, in some cases, officials do not undertake reinstatement procedures until some time after appeals have been filed. \textit{See, \textit{e.g.}, id.} at 1014.
\end{enumerate}
Further, barring asylum in reinstated proceedings creates unfair outcomes for individuals who willingly depart the United States pursuant to an order of removal, because those who remain in the country in spite of such an order may file motions to reopen removal proceedings.\textsuperscript{30} If proceedings are successfully reopened, the movant may then apply for asylum.\textsuperscript{31} In contrast, those in reinstated removal proceedings who departed voluntarily and lawfully are—according to the government’s reading of the reinstatement statute—ineligible to apply for asylum. Accordingly, the legal framework in place creates perverse incentives for immigrants who have been ordered deported to remain illegally rather than depart lawfully.

\textit{Appellate Arguments in Favor of Asylum Eligibility}

Attorneys can advance various arguments in support of an applicant’s eligibility for asylum in reinstated proceedings. First, a comparison of the reinstatement and asylum statutes shows that Congress intended for asylum to be available to respondents in reinstated proceedings; specifically, when Congress revised the asylum statute in 1996, it simultaneously enacted the reinstatement statute without allowing the latter to undercut the former.\textsuperscript{32}

Codified at 8 U.S.C. § 1158, the asylum statute logically establishes a closed universe of circumstances where an individual cannot be eligible to apply for or be granted asylum:

- 8 U.S.C. § 1158(a)(1) is a general provision that allows “any alien . . . irrespective of such alien’s status” to apply for asylum;
- 8 U.S.C. § 1158(a)(2) contains a specific enumerated list of circumstances under which an individual may \textit{not} apply for asylum, and never refers to the reinstatement statute codified at 8 U.S.C. § 1231(a)(5);  
- 8 U.S.C. § 1158(b)(1) is a general provision that allows an adjudicator to grant asylum to anyone who fulfills the definition of “refugee” under the INA; and

\textsuperscript{30} See 8 U.S.C. §§ 1158(a)(2) (explaining when asylum does not apply to an individual), 1229a(e)(7)(C)(ii) (describing motions to reopen); 8 C.F.R. § 1003.2(c)(3)(ii) (applying for asylum through changed circumstances); Joseph v. Holder, 579 F.3d 827, 828 (7th Cir. 2009) (allowing the filing of a motion to reopen when the BIA wrongfully interpreted the governing regulation); Chen v. Mukasey, 524 F.3d 1028, 1030 (9th Cir. 2008) (denying to review a motion to reopen)

\textsuperscript{31} See supra note 30.

8 U.S.C. § 1158(b)(2) contains a specific enumerated list of circumstances under which an individual may not be granted asylum, and never refers to the reinstatement statute codified at 8 U.S.C. § 1231(a)(5).

Despite the fact that the reinstatement statute was enacted at the same time that the asylum statute was revised, Congress did not refer to the reinstatement statute anywhere in 8 U.S.C. § 1158. In contrast, the asylum statute specifically cross-references another section of the INA to bar individuals who engage in terrorist activities from applying for asylum. In addition, subsections (a) and (b) vest only limited power with the Attorney General to establish regulations and procedures to effectuate the asylum statute.

A closer reading of the reinstatement statute also leads to the conclusion that the section does not circumscribe the reaches of the asylum statute. Under well-established case law, “however inclusive may be the general language of a statute, 'it will not be held to apply to a matter specifically dealt with in another part of the enactment...'. Here, the broadly-written reinstatement statute cannot be added to the specific exceptions enumerated in 8 U.S.C. § 1158(a)(2) or 8 U.S.C. § 1158(b)(2), as § 1231(a)(5) does not mention 8 U.S.C. § 1158 or asylum at all.

Second, as discussed earlier, 8 U.S.C. § 1158(a)(2) allows individuals who “previously applied for asylum and had such application denied” to again apply for asylum if the applicant reopens his or her immigration court proceedings. The applicant can do so by, for example, demonstrating that the subsequent asylum application is based on changed circumstances that materially affect his or her eligibility for asylum. 8 U.S.C. § 1158(a)(2) makes no distinction between individuals who depart the country pursuant to a removal order and those who remain illegally. A broad reading of the reinstatement statute, however, would read such a distinction into 8 U.S.C. § 1158(a)(2) and render the former group ineligible to apply, though members of this group may experience new or heightened threats by virtue of having returned to their countries of origin.

34. See, e.g., 1158(b)(2)(C) (“The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).”) (emphasis added).
37. See, e.g., Brief of Petitioner, supra note 2, at 9.
Preserving Issues During The Appeals Process

When an immigration officer reinstates a prior removal order, and the applicant fears return, his or her case is referred to an asylum officer to determine whether the applicant has a reasonable fear of persecution or torture. During the interview, attorneys may ask asylum officers to render a finding that the Asylum Office is without jurisdiction to grant the applicant asylum.

If the applicant passes the reasonable fear screening, and the case is referred to immigration court for withholding-only proceedings, the applicant must adequately raise with the IJ any claim that he or she might appeal to the Board of Immigration Appeals (“BIA”) or federal courts of appeals. Only when the applicant altogether fails to raise a claim in court can the appellate body refuse to consider the argument on appeal. Nonetheless, the applicant should at the very least attempt to apply for asylum before the IJ, arguing that the reinstatement statute does not preclude him or her from qualifying for asylum, in order to pursue an appeal based on asylum.

Where an IJ denies asylum by applying the reinstatement statute, the applicant may nonetheless be granted other relief, such as withholding of removal or relief under the CAT. If so, the respondent and counsel may elect not to pursue an appeal of the

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38. 8 CFR § 208.31(b).

39. The author has been successful in obtaining such a finding in two reasonable fear cases before the San Francisco Asylum Office in the last year. Although attorneys may, in the process of preserving the asylum eligibility issue for appeal, encounter pushback from adjudicators, doing so is important given that this issue is currently being litigated in at least one federal circuit court of appeals. See Perez Guzman, supra note 21.

40. See Garcia v. Lynch, No. 11-73406, 2015 WL 2385402, at *3 (9th Cir. May 20, 2015) (though Petitioner “did not spell out in so many words that his waiver should be deemed invalid because the IJ incorrectly concluded that his conviction was an aggravated felony and so failed to advise him of potential from removal. But [Petitioner] did articulate each essential part of the contention he now raises.”); Joseph v. Att’y Gen., 465 F.3d 123, 126 (3d Cir. 2006) (stating that an applicant “need not do much to alert the Board that he is raising an issue”); Matter of J-Y-C., 24 I. & N. Dec. 260, 261 n.1 (BIA 2007) (finding waiver of forced sterilization asylum claim on appeal where the only asylum claim considered below was based on applicant’s religious persecution as a Christian); Matter of R-S-H., 23 I. & N. Dec. 629, 638 (BIA 2003) (failure to object to presence of DOJ attorneys at hearing waived issue on appeal).

41. See Rodas-Mendoza v. I.N.S., 246 F.3d 1237, 1240 (9th Cir. 2001) (holding that appellant waived the issue of humanitarian asylum because she failed to raise this argument before the immigration judge or the Board of Immigration Appeals); Augustin v. Sava, 735 F.2d 32, 36 n. 10 (2d Cir. 1984) (finding that appellant waived the argument that he was deportable rather than excludable because he did not raise the issue before the immigration court or Board of Immigration Appeals). In Maldonado Lopez, for instance, the appellant requested asylum from the immigration judge, and the immigration judge found her ineligible to apply because of a prior removal order. Brief of Petitioner, supra note 2, at 4, 12.

42. See 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16.
asylum denial, because doing so puts the respondent at risk for losing all claims, leaving the respondent with no relief.

Where an IJ denies asylum and all other relief, however, the applicant does not risk losing other relief in an appeal. In such a case, the applicant must file an appeal to the BIA, as the withholding of removal and CAT claims have yet to be administratively exhausted. He or she should also argue the asylum eligibility issue before the BIA in order to adequately preserve the issue. If the BIA denies all relief, the applicant may then file a Petition for Review with the appropriate federal court of appeals.

V. CONCLUSION

Reinstatement of a prior removal order can result in harsh consequences for asylum applicants and severely limit their legal options. However, some appellate options—including challenging the assumption that individuals in reinstated proceedings do not have the right to apply for and be granted asylum—remain viable. Accordingly, as ongoing appellate litigation progresses, advocates must continue to preserve such issues for appeal, so that applicants like Yesenia Maldonado Lopez have an opportunity to end the cycle of violence they experience in their countries of origin.