

**WHEN “FEAR OF PERSECUTION...” *REQUIRES*
DEPORTATION: “CATCH-22” FALSE-DOCUMENT
PROSECUTIONS *AFTER* A GRANT OF ASYLUM**

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I. INTRODUCTION.....	226
II. FALSE DOCUMENTS AND ASYLUM UNDER INTERNATIONAL LAW.....	228
III. FALSE DOCUMENTS AND ASYLUM UNDER DOMESTIC LAW	229
IV. PROOF OF A “WELL-FOUNDED FEAR...”	232
V. FALSE DOCUMENTS, ENTRY AND ASYLUM	233
VI. “ENTRY” INTO THE U.S. AND ASYLUM CLAIMS	235
VII. IMMIGRATION REMOVAL/ASYLUM HEARINGS	236
XII. CRIMINAL PENALTIES FOR ENTRY ON FALSE DOCUMENTS.....	237
IX. REMOVAL FOR POST-ASYLUM CRIMINAL CONVICTIONS.....	238
X. DISCRETIONARY EXERCISE OF EXECUTIVE BRANCH POWER ..	240
XI. THE FIFTH AMENDMENT AND POST-ASYLUM CRIMINAL PROSECUTION	241
XII. COLLATERAL ESTOPPEL AND ASYLUM PROCEEDINGS	242
XIII. JUDICIAL ESTOPPEL AND “CHANGE OF POSITION”	244
XIV. CONCLUSION	245

I. INTRODUCTION

A Muslim citizen of a North African country entered the United States through an international airport on a false French passport in January 1999. He admitted that he was traveling on false documents and immediately requested political asylum. He was held in detention for three months while his asylum claim was investigated by immigration authorities, who sought his removal from the United States. In April 1999, an executive branch immigration judge suspended his removal from the United States, and granted the immigrant’s request for asylum under 8 U.S.C. section

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1158 after a hearing in which the refugee was compelled to testify and his use of false documents was fully disclosed.

Without having committed any other immigration or criminal offenses, the refugee was again detained in December 2003, one month before the running of the five-year statute of limitations for criminal charges for the January 1999 use of false documents. The refugee was interrogated by federal officials about his knowledge, contacts and ties with Islamic groups in his home country and in the United States. He was threatened with prosecution for his admitted use of false documents if he did not comply by providing information. He was indicted in January 2004 while maintaining he had no information to give.

He was held without bail until April 2004, when he was released on the condition that he wear an electronic bracelet pending trial. He subsequently agreed to a “no-incarceration” plea agreement, when the court denied his motion to dismiss the indictment based on the original grant of asylum. Ironically, the conviction for use of false documents, to which he admitted when claiming asylum in 1999, exposed the refugee to removal and deportation again.

– Summary of an actual false documents prosecution.¹

The foregoing example of how the “War on Terrorism” is actually being “fought” is merely one more instance of the exercise of broad executive-branch powers that ranges from torture of detainees,² to ethnically-targeted enforcement of immigration laws,³ to electronic surveillance of virtually all international electronic communication.⁴ But this example is the result of a Kafka-esque contradiction between: (a) the executive branch grant of asylum, and (b) subsequent criminal prosecution by another arm of that same executive branch, in which the grant of asylum is not a

1. See Brief of Appellant at 1–4, *Hafid Bradei v. United States*, No. 05-2771 (8th Cir. Oct. 17, 2005).

2. James C. McKinley, Jr., *A Prosecutor Indicts Foes, and Cheney and Gonzales*, N.Y. TIMES, Nov. 20, 2008, at A24.

3. Laura Isabel Bauer, *They Beg For Our Protection and We Refuse: U.S. Asylum Law's Failure to Protect Many of Today's Refugees*, 79 NOTRE DAME L. REV. 1081, 1092–93 (2004). Due to the lack of documentation, asylum officers could easily hide discriminatory motivations or arbitrary decisions from concerned investigators. See GOV'T ACCOUNTING OFFICE, REPORT NO. GGD-87-33BR, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED 13–14 (1987) (finding that INS officials were not required to document their asylum decisions, and thus it was “uncertain whether all applications were treated fairly and were held to the same standards”).

4. Editorial, *Spies, Lies and FISA*, N.Y. TIMES, Oct. 14, 2007, § 4, at 11.

defense to acts the refugee was required to admit, (c) once again exposes the refugee to deportation. It is a modern version of the unwinnable “Catch-22” that Joseph Heller lampooned in his iconic anti-war novel of the same name.⁵

But that was then, this is now, and the new “Catch-22” facing refugees who have been granted asylum after using false documents to enter the United States makes use of an apparent contradiction between the federal criminal code on the one hand and asylum/refugee statutes and treaties on the other. These unresolved contradictions arguably subject all improperly documented on-arrival asylees to subsequent criminal prosecution, even though they have established the “well-founded fear of persecution” necessary for the grant of asylum.⁶

This article describes the contradictions between: (a) standards and procedures for seeking and receiving asylum status under 8 U.S.C. § 1158 and Article 31(1) of the United Nations Refugee Convention; (b) removal proceedings described in 8 U.S.C. §§ 1225 and 1227; and (c) felony criminal prosecution for false documents under 18 U.S.C. §§ 1543, 1544 and 1546, for which full disclosure of entry on false documents and a grant of asylum has not been recognized as a defense by Congress or the courts.

This article suggests that full disclosure of entry on false documents and a subsequent grant of asylum should be a full defense to a post-asylum criminal prosecution for use of those same false documents. This defense should arise by Congressional enactment, through judicial use of the Fifth Amendment, or through common-law concepts of estoppel or *res judicata*.

II. FALSE DOCUMENTS AND ASYLUM UNDER INTERNATIONAL LAW

Those seeking asylum status who have arrived in a member country of the United Nations cannot be punished for presenting false documents under the United Nations Refugee Convention, Article 31(1). The Convention states that member countries cannot impose penalties on asylum seekers who enter illegally so long as they: (a) come directly from the country from which they are seeking asylum, (b) present themselves to authorities without

5. *See generally* JOSEPH HELLER, *CATCH-22* (University of Michigan 1970).

6. A general trend toward criminalization of immigration issues has been noted by other commentators. *See generally* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007).

delay and (c) show good cause for their illegal entry.⁷

Although the Convention does not specifically apply to asylum seekers who have traveled through third countries before seeking asylum, the principle that asylum seekers cannot be punished for presenting false documents when entering a United Nations member country in order to seek political asylum has found support in other national jurisdictions.⁸ There is also considerable debate over whether the Refugee Convention is self-executing with respect to the provisions of Article 31(1),⁹ and therefore also part of domestic law.¹⁰

Also, the United States is a signatory to the 1967 Protocol relating to the Status of Refugees, which incorporates the 1951 Convention, particularly with respect to refugees who have already had a determination of asylum status, as described in a public opinion letter by the United Nations High Commissioner for Refugees.¹¹ Further, even if the Convention and Protocol are not held to be self-executing, and thus not incorporated into domestic law, the same principles enunciated in the Convention and Protocol have already been recognized in domestic United States jurisdictions.¹²

III. FALSE DOCUMENTS AND ASYLUM UNDER DOMESTIC LAW

Under the Immigration Code, a non-citizen who lacks proper documentation to remain in the United States may be placed in removal proceedings, under 8 U.S.C. § 1225 (for those who have not formally entered the United States relying on valid immigration

7. Convention relating to the Status of Refugees, ch. V, art. 31(1), July 28, 1951, 189 U.N.T.S. 137 [hereinafter "Refugee Convention"].

8. See *Regina v. Uxbridge Magistrate's Court ex parte Adimi*, [2001] Q.B. 667 (U.K.).

9. Refugee Convention, *supra* note 7.

10. *I.N.S. v. Stevic*, 467 U.S. 407 (1985); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1984); Douglas Gross, *The Right of Asylum Under U.S. Law*, 80 COLUM. L. REV. 1125, 1129 & n.30 (1980); Deborah Cohan, et al., *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 493, 504 (1986).

11. OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES [UNHCR], UNHCR'S POSITION ON THE CONTINUED INTERNATIONAL PROTECTION NEEDS OF INDIVIDUALS FROM KOSOVO, ¶ 29 (2006), available at <http://www.unhcr.org/refworld/pdfid/449664ea2.pdf>.

12. See *Akinmade v. I.N.S.*, 196 F.3d 951, 955 (3rd Cir. 1999) (citing *In re O-D.*, 21 I. & N. Dec. 1079 (BIA 1998)). See also *Damaize-Job v. I.N.S.*, 787 F.2d 1332 (9th Cir. 1986).

documents) and 8 U.S.C. § 1227 (for those who have entered the United States lawfully but who no longer have authorization to remain).¹³ In either case, an immigrant may seek asylum status under 8 U.S.C. § 1158 by establishing that he or she is a “refugee” as defined by section 101(a)(42) of the Immigration and Nationality Act.¹⁴ An applicant that carries his or her burden of

13. The following compares the methods of obtaining asylum in the United States:

The two main ways of obtaining asylum in the United States are through the *affirmative* process and through the *defensive* process. . . .

In the *affirmative asylum process*, individuals who are physically present in the United States, regardless of how they arrived . . . may apply for asylum. . . . [A]sylum-seekers must apply for asylum within one year from the date of last arrival in the United States. . . . If the applicant’s case is not approved . . . the case is referred to an Immigration Judge (IJ) at the Executive Office for Immigration Review (EOIR) for *de novo* consideration of the application.

U.S. Citizenship and Immigration Services, Obtaining Asylum in the United States: Two Paths, <http://www.uscis.gov/portal/site/uscis> (select “Services and Benefits” from the menu bar, then “Humanitarian Benefits,” “Asylum,” and “Obtaining Asylum in the United States: Two Paths”) (last visited Dec. 14, 2008). Affirmative asylum applicants are subject to deportation if found ineligible by USCIS and an immigration judge.

In the *defensive asylum process*, applicants seek asylum as a defense against removal from the United States. Immigration judges hear these applications in adversarial proceedings: “If the applicant is found eligible, the judge orders asylum to be granted. If the applicant is found ineligible for asylum, the [judge] determines whether the applicant is eligible for any other forms of relief from removal. . . . [D]ecisions can be appealed by either the government or the applicant.” *Id.*

Aliens generally are placed into defensive asylum processing in one of two ways:

- they are referred to an IJ by USCIS after a finding of ineligibility at the conclusion of the “affirmative” asylum process, or
- they are placed in removal proceedings because they:
 - were apprehended in the United States or at a U.S. port-of-entry without proper legal documents or in violation of their status, or
 - were caught trying to enter the United States without proper documentation and were placed in the expedited removal process and found to have a credible fear of persecution or torture by an Asylum Officer.

Id.

14. The Immigration and Nationality Act defines “refugee” in section 101(a)(42) as:

(A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a

proof before an executive branch immigration judge will be permitted to remain in the United States under the conditions mandated for asylum status.¹⁵ The highest immigration administrative appeal authority, the Board of Immigration Appeals (BIA), has held that “there may be reasons, fully consistent with the claim of asylum, that will cause a person to possess false documents, such as the creation and use of a false document to escape persecution by facilitating travel.”¹⁶ This view has found support in the U.S. Courts of Appeals for the Ninth Circuit:

[t]he BIA set forth a clear division between two categories of false document presentations:

- (1) the presentation of a fraudulent document in an asylum adjudication for the purpose of establishing the elements of an asylum claim; and
- (2) “the presentation of a fraudulent document for the purpose of escaping immediate danger from an alien’s country of origin or resettlement, or for the purpose of gaining entry into the United States.”¹⁷

Congress has also provided that those granted “asylum status” (whether an entry has been on false documents or not) be permitted to:

particular social group, or political opinion, or
(B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

15. INA § 208(c), 8 U.S.C. § 1158(c) (2006).

16. *In re O-D*, 21 I. & N. Dec. at 1083.

17. *Akinmade*, 196 F.3d at 955 (quoting *In re O-D*, 21 I. & N. Dec. at 1081).

1. remain in the United States, not subject to removal or return;¹⁸
2. seek and secure employment in the United States; and¹⁹
3. travel within the United States and without.²⁰

Apparently, Congress intended that a grant of asylum includes the right to remain indefinitely in the United States and to exercise many of the same benefits granted to permanent legal residents.²¹

However, on its face, the statute does not discuss the relationship between the grant of asylum through executive branch administrative adjudication and subsequent criminal prosecution initiated by that same executive branch based on the same acts upon which asylum had been granted. Because the statute does not specifically provide that the immigration court's grant of asylum also provides a defense to subsequent prosecution for the use of false documents, and because the adversary immigration proceedings would have required the asylum applicant to fully reveal and admit under oath the same facts upon which the criminal prosecution is based, there is no meaningful defense to a false-documents indictment following the grant of asylum.

IV. PROOF OF A "WELL-FOUNDED FEAR..."

The President has the power to determine refugee status as an outgrowth of executive branch authority over immigration matters, and can delegate that decision-making authority as he or she "may specify."²² The asylum process is governed by the Immigration and Naturalization Act under section 208 which establishes the guidelines and procedures for an asylum application to be granted.²³ An asylum applicant must carry the burden of proving a "well founded fear of persecution" on account of race, religion, nationality, membership in a particular social group, or political opinion,²⁴ but cannot prevail without testifying under oath and

18. INA § 208(c)(1)(A), 8 U.S.C. § 1158(c)(1)(A) (2006).

19. INA § 208(c)(1)(B), 8 U.S.C. § 1158(c)(1)(B) (2006).

20. INA § 208(c)(1)(C), 8 U.S.C. § 1158(c)(1)(C) (2006).

21. INA §§ 208(c)(1)(A), (B), (C), 8 U.S.C. §§ 1158(c)(1)(A), (B), (C) (2006).

22. INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2006).

23. INA § 208(b), 8 U.S.C. § 1158(b) (2006).

24. DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 93 (2nd ed. American Immigration Law Foundation 1991).

being subjected to cross examination.²⁵

V. FALSE DOCUMENTS, ENTRY AND ASYLUM

There are several ways in which document fraud can arise during the entry/asylum process, depending on whether the alien has intentionally attempted to perpetrate a fraud by presenting false documents without revealing their falsity.²⁶

First, an alien can present false documents and claim before an immigration official that they are properly issued documents. If the documents are found to be false, the alien is barred from entry

25. *In re Fefe*, 20 I. & N. Dec. 116, 118 (BIA 1989).

26. Under revisions of the Immigration and Naturalization Act to address the problems of document fraud, Congress enacted the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996" (IIRAIRA). Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009. The changes to INA § 274C increased the penalties for document fraud. Juan P. Osuna, *The 1996 Immigration Act: Document Fraud and Alien Smuggling*, 73 No. 44 INTERPRETER RELEASES 1605, 1605 (Nov. 18, 1996). Section 274C(a) makes it unlawful for a person or entity knowingly:

- (1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this chapter or to obtain a benefit under this chapter,
- (2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter,
- (3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this chapter or obtaining a benefit under this chapter,
- (4) to accept or receive or to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of complying with section 1324a(b) of this title or obtaining a benefit under this chapter, or
- (5) to prepare, file, or assist another in preparing or filing, any application for benefits under this chapter, or any document required under this chapter, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted, or
- (6) (A) to present before boarding a common carrier for the purpose of coming to the United States a document which relates to the alien's eligibility to enter the United States, and (B) to fail to present such document to an immigration officer upon arrival at a United States port of entry.

INA § 274C(a), 8 U.S.C. § 1324c(a) (2006).

to the United States.²⁷ Second, if the alien presents falsified documents, and the falsity of those documents is not discovered until after entry into the United States, the alien is subject to federal civil and criminal penalties in addition to immigration penalties.²⁸ Third, if an alien destroys documents en route to the United States and arrives without documents, the alien would be similarly ineligible for entry²⁹ absent a congressionally-mandated exception for asylum seekers.³⁰

However, if an alien were to arrive before an immigration official and disclose the fact that the alien has shown false documentation to board a United States common carrier abroad and presents the false documents upon entry, the alien may seek asylum.³¹ Although it is lawful to request asylum upon entry on an admittedly false document, Congress has not excluded subsequent criminal prosecution for the use of those false documents, even when the alien's asylum claim has been granted.³²

27. "Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible." INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i) (2006).

28. INA § 274C, 8 U.S.C. § 1324c (2006).

29. "[P]resent[ing] before boarding a common carrier for the purpose of coming to the United States a document which relates to the alien's eligibility to enter the United States, and . . . fail[ing] to present such document to an immigration officer upon arrival at a United States port of entry" is prohibited. INA § 274C(a)(6), 8 U.S.C. § 1324c(a)(6) (2006). Any alien in violation of INA section 274C is subject to deportation and may be found inadmissible to the United States as well as having to pay civil monetary fines.

30. INA section 274C(a)(6) establishes document fraud liability for aliens who fail to present an entry document upon arrival in the United States after having presented such a document to board a common carrier to the United States. INA § 274C(a)(6), 8 U.S.C. § 1324c(a)(6) (2006). Recognizing the fact that genuine asylum seekers are prejudiced by this part of the statute, however, Congress enacted a discretionary waiver for persons granted asylum or withholding from deportation. Juan P. Osuna, *supra* note 26, at 1607.

31. Providing for a waiver for false documents is in line with *In re D-L- & A-M-*, 20 I. & N. Dec. 409 (BIA 1991), which held that two Cuban nationals were not excludable for fraud or misrepresentation when they used fraudulent Spanish passports to board a U.S.-bound airplane. *Id.* at 413. Upon arrival the Cuban nationals revealed their true identities and immediately sought asylum. *Id.* This case provides an example of the proper use of a waiver in those situations where an alien obtains a false passport to be able to board an airplane for the purposes of arriving in the United States to seek asylum.

32. *See* 18 U.S.C. § 1543 (2006) (forgery or false use of passport); 18 U.S.C. § 1544 (2006) (misuse of passport). *See also* discussion *infra* Part VIII.

VI. "ENTRY" INTO THE U.S. AND ASYLUM CLAIMS

The asylum application process begins when an applicant arrives in the United States by presenting herself or himself at an immigration port of entry, which includes border entry points and international airports.³³ How the alien arrived in the United States matters with respect to whether the alien will be eligible for asylum or not.³⁴ An immigration official, charged with verifying passport and visa information and visa documents, is the first contact point at which applicants may seek asylum—by informing the Immigration Officer they are seeking asylum or are in fear of persecution.³⁵

The administrative decision-making process begins with a non-adversarial interview with an asylum officer within forty-five days of the arrival of the alien to the United States.³⁶ The asylum applicant has the burden of providing all information concerning identity, including name, date and place of birth, and nationality.³⁷ The asylum officer has discretion to grant or deny asylum; the officer may also refer an asylum applicant to an immigration judge for determination of the legitimacy of the asylum claim based on the testimony of the applicant and corroborative evidence produced in a trial-like administrative proceeding before an immigration judge.³⁸

33. See INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (2006).

34. Noncitizens are subject to expedited removal if the immigration officer at the port of entry denies admission based on false documents or no documents. INA §§ 212(a)(6)(C), (a)(7), 8 U.S.C. §§ 1182(a)(6)(C), (a)(7) (2006) (regarding inadmissibility); INA § 235(b), 8 U.S.C. § 1225(b) (2006) (regarding expedited removal).

35. A noncitizen who arrives on false or no documents, and is subject to expedited removal under INA section 235(b) and who indicates an intention to apply for asylum or expresses fear of prosecution, a fear of torture, or a fear of return to his or her country, must be referred to an asylum officer for a determination of credible fear of persecution or torture. 8 C.F.R. § 235.3(b)(4) (2008).

36. INA § 208(d)(5)(A)(ii), 8 U.S.C. § 1158(d)(5)(A)(ii) (2006).

37. 8 C.F.R. § 208.9(b) (2008). One of the main reasons that the verification is made is to determine if the asylum seeker is inadmissible due to criminal history or to determine if there are asylum ineligibility issues. See *id.* Asylum will not be granted unless and until the identity of the asylum seeker is verified through the Automated Visa Lookout System. INA § 208(d)(5)(A)(i); 8 U.S.C. § 1158(d)(5)(A)(i) (2006). The identity is then checked against all of the databases maintained by the Attorney General or Secretary of State. *Id.*

38. 8 C.F.R. § 208.14(b)–(c) (2008). If the individual is found to have credible fear, the individual is placed in withholding-of-removal proceedings before an immigration judge for full consideration of the request for withholding

VII. IMMIGRATION REMOVAL/ASYLUM HEARINGS

Proceedings before an immigration judge are contested hearings, in which the executive branch is represented by an attorney for the Department of Homeland Security Division.³⁹ Although evidentiary rules are relaxed as compared to proceedings in Article III trial courts,⁴⁰ the hearings are conducted in a judicial atmosphere and immigration judges are required to tape-record the reasonable-fear review proceedings.⁴¹ The burden of proof regarding the refugee status of the applicant for asylum remains on the applicant⁴² and the immigration judge may not grant asylum without the applicant's testimony under oath and exposure to cross-examination by a DHS attorney.⁴³

This means that before an applicant who has submitted false documents to enter the United States can obtain asylum, an executive branch administrative law judge must find that the applicant's use of false documents was justified and was not a bar to the initial grant of asylum. And although this finding may be appealed by either party,⁴⁴ there is no question that once this finding has become final it is binding on further actions by either BCIS or ICE. The review of an immigration judge's decision on asylum claims will be subject to de novo review on nonfactual issues and the clearly erroneous standard on factual issues, including the credibility of testimony.⁴⁵ A decision of an immigration judge becomes administratively final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken.⁴⁶ However,

only. 8 CFR § 208.31(e) (2008).

39. See DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, OFFICE OF THE IMMIGRATION CHIEF JUDGE, IMMIGRATION PRACTICE COURT MANUAL, ch. 4 (June 20, 2008), available at 2008 WL 4335214.

40. ANKER, *supra* note 24, at 89.

41. Memorandum from the Executive Office for Immigration Review, Office of the Chief Immigration Judge, Operating Policies and Procedures Memorandum No. 99-5: Implementation of Article 3 of the U.N. Convention Against Torture (May 14, 1999), available at http://www.usdoj.gov/eoir/efoia/ocij/oppm99/99_5.pdf. But see Bauer, *supra* note 3, at 1093 (citing "The Epidavros Project 2000," Bauer states that "[n]o cameras or recording devices are allowed at these hearings, and the entire process is 'closed and confidential.'").

42. 8 C.F.R. § 208.13(a) (2008).

43. *In re Fefe*, 20 I. & N. Dec. 116, 117-18 (BIA 1989); INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (2006).

44. See 8 C.F.R. § 208.14(c) (2008).

45. 8 C.F.R. § 1003.1(d)(3) (2008); *In re S-H*, 23 I. & N. Dec. 462, 464 (BIA 2002).

46. 8 C.F.R. § 1003.39 (2008).

there is no mention of the finding of refugee status—and the grant of asylum—having any preclusive effect on criminal charges arising from the refugee’s use of false documents to enter the United States.

XII. CRIMINAL PENALTIES FOR ENTRY ON FALSE DOCUMENTS

Three sections of the U.S. Code are most directly implicated in criminal prosecutions for the use of false immigration documents. The first, 18 U.S.C. § 1543, establishes penalties for up to ten years for a person who:

willfully and knowingly uses, or attempts to use, or furnishes to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same

. . . .⁴⁷

In addition, 18 U.S.C. § 1544 criminalizes misuse of a passport:

Whoever willfully and knowingly uses, or attempts to use, any passport issued or designed for the use of another; or whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports; or whoever willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed. . . .⁴⁸

And finally, 18 U.S.C. § 1546 criminalizes fraud and misuse of visas, permits, and other documents:

Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or

47. 18 U.S.C. § 1543 (2006).

48. 18 U.S.C. § 1544 (2006).

regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained. . . .⁴⁹

These three criminal statutes, on their face, clearly impose criminal liability for acts related to entry on false documents, and are not discussed as part of the immunity from immigration or civil penalties described in the grant of asylum.⁵⁰ When asylum is granted it is granted for an indefinite period.⁵¹ The grant of asylum means that, as long as asylum is granted, the alien cannot be returned to any country.⁵² An asylee may lose status due to (1) fraud in the application, (2) the application being filed after April 1, 1997, where the person meets one of the categories of ineligibility defined in INA section 208(c)(2), or (3) the applicant having applied after April 1, 1997, where the person no longer has a well-founded fear because the conditions in the country of origin have changed.⁵³ An alien may have withholding revoked when (1) there is no longer a fear of persecution because of changes in the country of origin, (2) there is fraud in the application, or (3) he or she falls under one of the grounds (such as having been convicted of committing a serious crime) which would have initially barred withholding.⁵⁴ Congress has failed to establish a similar immunity for criminal prosecutions for commission of the same acts.

IX. REMOVAL FOR POST-ASYLUM CRIMINAL CONVICTIONS

There is no dispute that asylum is not a grant of impunity, and that the grant of asylum does not create immunity from deportation for crimes committed after the grant of asylum.⁵⁵ And the Immigration Code does permit deportation for criminal

49. 18 U.S.C. § 1546(a) (2006).

50. See 67 No. 30 INTERPRETER RELEASES 887, 888 (1990) (discussing the inability of the Immigration and Naturalization Service to detain and deny parole to a political refugee based solely on the refugee's use of false documents).

51. 8 C.F.R. § 208.14(e) (2008).

52. See *Andriansian v. INS*, 180 F.3d 1033, 1042 n.14 (9th Cir. 1999).

53. 8 C.F.R. § 208.24(a) (2008).

54. § 208.24(b); IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK* 495 (10th ed. 2006).

55. Crimes involving moral turpitude, for example, are bars to admissibility and also make an alien removable from the United States. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006).

convictions based on the presentation of false documents or fraud after the initial asylum request has been granted.⁵⁶ Under 8 U.S.C. § 1227, aliens are subject to deportation upon conviction of crimes of moral turpitude (including fraud) which carry a sentence of one year or more,⁵⁷ and for violations under 18 U.S.C. § 1546,⁵⁸ which imposes criminal penalties for presentation of false immigration documents.⁵⁹

This means that, on its face, 8 U.S.C. § 1227 authorizes deportation for precisely the same factual admissions necessary to the initial grant of asylum before an immigration judge, when those admissions are also violations of 18 U.S.C. §§ 1543, 1544 and 1546. And although Congress enacted “asylum” provisions which act as a complete defense to deportation under 8 U.S.C. § 1225 or § 1227, these exceptions do not specifically apply as defenses to criminal prosecutions. In the absence of judicial or Congressional intervention expanding an administrative grant of asylum into a defense to subsequent criminal charges, the Justice Department Criminal Division is free to assert that:

1. Congress must have intended to limit executive branch discretion to carry out removal and deportation proceedings by imposing the asylum provisions in 8 U.S.C. § 1158;
2. Congress did not intend to limit executive branch discretion in bringing subsequent criminal charges based on the same acts at issue in the asylum claim because it did not specifically set out 8 U.S.C. § 1158 as a defense to prosecutions under either 18 U.S.C. § 1543, 1544, or 1546; or
3. conviction under 18 U.S.C. § 1543, 1544, and 1546 exposes the defendant to a second removal and deportation proceeding under 8 U.S.C. § 1225 or § 1227, since the conviction occurs following the grant of asylum.

This interpretation of the reach of 8 U.S.C. § 1158, as applied to admittedly false documents presented at the time of entry “for the purpose of escaping immediate danger from an alien’s country

56. INA § 237(a)(3)(B), 8 U.S.C. § 1227(a)(3)(B) (2006).

57. INA § 237(a)(2)(A)(i)(II), 8 U.S.C. § 1227(a)(2)(A)(i)(II) (2006).

58. *Id.* (referencing 18 U.S.C. § 1546(a) (2006)).

59. *See* 18 U.S.C. § 1546(a) (2006). An alien who admits committing a crime or who admits to committing elements of certain crimes is inadmissible. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i) (2008). *See also* KURZBAN, *supra* note 54, at 52.

of origin or resettlement, or for the purpose of gaining entry into the United States,"⁶⁰ can hardly be characterized as either logical or rational. And it renders the asylum provision of 8 U.S.C. § 1158 a practical nullity, particularly when the entry on false documents has been fully revealed and litigated in immigration proceedings which resulted in the grant of asylum in the first place.

X. DISCRETIONARY EXERCISE OF EXECUTIVE BRANCH POWER

Prior to the establishment of the Department of Homeland Security (DHS) on March 1, 2003, immigration matters were under the jurisdiction of the Justice Department's Immigration and Naturalization Service (INS) and the Attorney General.⁶¹ However, INS was absorbed into the Department of Homeland Security, headed by a new cabinet level secretary appointed by the President.⁶² Its enforcement responsibilities were assigned to the Bureau of Immigration and Customs Enforcement (BICE) and immigration decision-making was assigned to the Bureau of Citizenship and Immigration Services (BCIS).⁶³

During the period when the Justice Department had jurisdiction over immigration matters, the Department and Attorney General possessed broad discretion to initiate removal proceedings against any non-citizen, but this discretion was not without limit.⁶⁴ Similarly, the Justice Department and Attorney General had—and retained—broad discretion to initiate criminal prosecutions,⁶⁵ but this discretion, too, had limitations.⁶⁶ Prior to the separation of immigration matters from the Justice Department, the Attorney General was in the anomalous position of granting asylum through delegation of authority to an immigration judge and criminally indicting the same refugee on the same facts.

The separation of immigration enforcement and decision-

60. *Akinade v. INS*, 196 F.3d 951, 955 (3d Cir. 1999).

61. *See* 3A AM. JUR. 2D *Aliens and Citizens* § 33 (2008).

62. *See id.*

63. *Id.*

64. *See Moser v. United States*, 341 U.S. 41, 45–46 (1950); *DiPeppe v. Quarantillo*, 337 F.3d 326, 327 (3rd Cir. 2003); *Abdulah v. Ashcroft*, 239 F.3d 543, 549 (3rd Cir. 2001); *Kowalczyk v. INS*, 245 F.3d 1143, 1148 (10th Cir. 2001); *Akbarin v. INS*, 699 F.2d 839, 846 (1st Cir. 1982).

65. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

66. *See Oyler v. Boles*, 368 U.S. 448, 452 (1962); *United States v. Rushing*, 313 F.3d 428, 436 (8th Cir. 2002).

making from the Justice Department to the Department of Homeland Security makes the apparent contradiction less obvious, but no less real. Since it is the President who, in the first instance, possesses and delegates the power to determine whether an applicant is a refugee, the grant of asylum by a BCIS immigration judge, rather than an INS judge, is no less an exercise of executive branch decision-making. Similarly, the Attorney General and Justice Department are delegated certain powers by the President, and respect that must be accorded to administrative findings of an executive branch administrative law judge remains essentially the same.

In the absence of a specific congressional enactment that extends executive branch administrative findings to a defense to executive branch-initiated criminal prosecutions, it must fall to the courts to find a conceptual foundation upon which the administrative asylum finding might be interposed to prevent a subsequent indictment and conviction based on the same facts. Two possible approaches arise from Fifth Amendment principles and the possible application of estoppel principles to the factual findings upon which asylum was granted under either common law or due process principles.

XI. THE FIFTH AMENDMENT AND POST-ASYLUM CRIMINAL PROSECUTION

Of course, it goes without saying that due process prohibitions against compelled testimony apply to criminal prosecutions for fraud or the use of false documents, but are not relevant to the requirement that an asylum applicant must testify under oath as a necessary condition to the favorable exercise of executive branch discretion in granting asylum status.⁶⁷ However, when a discretionary grant of asylum by one agency of the executive branch is followed by a discretionary criminal prosecution on the same facts by another agency of the same executive branch, it would seem that due process principles might be employed to prevent the contradictory use of executive branch discretion. The argument is even more compelling when a conviction would expose the refugee to a second deportation proceeding based on

67. Burden of proof is placed squarely on the asylum seeker. 8 C.F.R. § 208.13(a) (2008). The testimony must be detailed and specific. *INS v. Elias-Zacharias*, 502 U.S. 478, 483 (1992).

the same false document entry into the United States.

Another possible approach might arise from the due process obligation of the prosecution in a criminal case to prove all elements of an offense beyond a reasonable doubt.⁶⁸ Once a refugee has carried the burden of proof necessary to be granted asylum status by one agency of the executive branch by testifying in a contested hearing, it would seem obvious that another agency of that same executive branch would be unable to carry the much greater burden of proof required for a criminal conviction.⁶⁹

Finally, the due process doctrine prohibits the exercise of prosecutorial discretion to punish the exercise of a defendant's rights.⁷⁰ A presumption of prosecutorial vindictiveness arises when post-trial prosecutorial discretion increases a defendant's liability, but in necessarily discretionary pre-trial prosecutorial decision-making only actual vindictiveness is prohibited.⁷¹ However, when a refugee has succeeded in "proving-up" an asylum claim, subsequent criminal prosecution on the same issues would seem to raise many of the same concerns regarding improper use of prosecutorial discretion to punish the exercise of the right to claim asylum.

XII. COLLATERAL ESTOPPEL AND ASYLUM PROCEEDINGS

Another approach might be the use of equitable principles of estoppel to prevent the re-litigation of previously determined facts. This has long been recognized as a means of preventing a defendant from having to litigate the same facts against the same plaintiff, in a defensive use of collateral estoppel.⁷² Further, the Supreme Court has held that, even in the absence of the common law requirement of "mutuality of estoppel," due process is not offended if estoppel is used to preclude a defendant from re-litigating claims it has previously litigated against a different plaintiff, provided the defendant had a full and fair opportunity to litigate the issue in a previous proceeding.⁷³

However, given the differing burdens of proof in criminal and civil cases, a criminal acquittal in which the prosecution failed to

68. See *In re Winship*, 397 U.S. 358, 363-64 (1970).

69. See *United States v. Perry*, 417 U.S. 21, 26-27 (1974).

70. See Nancy J. McCurley, *Prosecutorial Discretion*, 71 GEO L.J. 449, 451 (1982).

71. 2 DAVID S. RUDSTEIN, C. PETER ERLINDER & DAVID C. THOMAS, *CONSTITUTIONAL CRIMINAL LAW* § 9:06 (2008).

72. *Blonder-Tongue Labs. v. Univ. of Ill.*, 402 U.S. 313, 328-29 (1995).

73. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 322 (1999).

carry its burden of proof beyond a reasonable doubt does not prevent the litigation of the same facts in a civil proceeding that were at issue in the criminal proceeding. Conversely, however, failure of the government to prevail in a civil proceeding must preclude a criminal prosecution on the same facts. Proof beyond a reasonable doubt is impossible for facts not proved by either a preponderance, clear and convincing evidence, or any other lesser civil standard.

The question is whether the findings of an administrative immigration proceeding can have preclusive effect in subsequent criminal proceedings arising from the same facts. The Court's reasoning in the *Parklane* case suggests that such an application of estoppel principles is possible, and perhaps desirable.

In applying its due process analysis to prevent the re-litigation of facts previously litigated, the basis for the claimed preclusion was an administrative proceeding in which the Securities and Exchange Commission (SEC) had prevailed in claims of improper corporate conduct against Parklane Hosiery Co. In a subsequent stockholders derivative action against the corporation, the plaintiff sought to prevent the defendant corporation from re-litigating facts that had been alleged by the SEC.⁷⁴ The Court held that due process permitted the plaintiff to prevent the corporation from re-litigating factual defenses which it had asserted and upon which it had not prevailed in the SEC proceeding because the defendant had the opportunity and incentive to fully litigate the issue in the administrative proceeding.⁷⁵

Nothing in *Parklane* suggests that findings from an administrative hearing before an immigration judge, initiated by INS or ICE, should be treated any differently than administrative proceedings initiated by the SEC.⁷⁶ Because the subsequent proceeding at issue is a criminal proceeding, rather than a civil suit as was the case in *Parklane*, it would seem that the case for issue preclusion is even more compelling—particularly since the party against whom the estoppel would be asserted would be the same party (i.e. the executive branch), with the same incentive to oppose the grant of asylum, and because it is well-established that the alien in immigration proceedings has the burden of proof to establish

74. *Id.*

75. *Id.* at 351.

76. *See id.*

both identity and eligibility for asylum.⁷⁷

With respect to the factual questions of (a) the “justification” for commission of a lesser offense (presenting false documents) to prevent a larger harm (persecution),⁷⁸ and (b) the absence of culpable mens rea under 18 U.S.C. §§ 1543 and 1546, which require presentation with the willful intention to deceive U.S. authorities regarding a material fact,⁷⁹ both were fully litigated. The use of collateral estoppel to prevent the same acts from being used as the basis for a criminal prosecution would be consistent with the due process requirements set out by the Supreme Court in the *Parklane* case.

XIII. JUDICIAL ESTOPPEL AND “CHANGE OF POSITION”

However, viewed at another level, the determination by the executive branch immigration judge that the asylee had carried his burden to establish that he properly qualified for asylum, despite having presented admittedly false documents to gain entry to the United States, should be binding on other executive branch entities as well. Principles of judicial estoppel are intended to protect the integrity of the Court and should be invoked to prevent a perversion of the judicial process. It is intended to protect the Courts from a litigant changing positions in two different legal proceedings when its interests have changed.⁸⁰

Given the decision of the executive branch immigration judge granting asylum over the opposition of other executive branch lawyers, the decision to seek criminal prosecution despite the grant of asylum can be seen as a change in position by the executive branch. It was already determined that the use of false documents did not constitute a basis for denying the asylum claims. Under such circumstances, some of the Circuits have held that the district

77. *INS v. Elias-Zacharias*, 502 U.S. 478, 481 (1992); *Olujoke v. Gonzalez*, 411 F.3d 16, 21 (1st Cir. 2005); *Damaize-Job v. INS*, 787 F.2d 1332, 1339 (9th Cir. 1987); *In re Dass*, 20 I. & N. Dec. 120, 124 (BIA 1989).

78. *United States v. Bailey*, 444 U.S. 394, 409–11 (1980); *United States v. Khalje*, 658 F.2d 90, 93 (2nd Cir. 1981) (holding a justification defense available but not applicable on the facts).

79. *See United States v. Diogo*, 320 F.2d 898, 902 (2nd Cir. 1963).

80. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996); *accord Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 737 (8th Cir. 1987). *See also United States v. Rushing*, 313 F.3d 428, 436 (8th Cir. 2002) (regarding a “change in position” by the Justice Department giving rise to Due Process issues requiring a hearing as to the motivations animating the change in position).

court is obligated to hold a hearing to determine whether the change was based upon proper motive.⁸¹

Even in the absence of improper motive in the record, a drastic change in position merits a hearing into whether the change in position was a result of improper motive. Such a hearing was ordered in a case where a prosecutor claimed before a jury that the Justice Department would deport a witness who had confessed to perjury; after the trial was over, no such deportation took place. The appeals court, in remanding the case for fact-finding into improper prosecutorial motive, observed that “[t]he contrast between the government’s stated intention and what actually occurred [was] too jarring to overlook.”⁸²

However, the application of estoppel principles to government actions comes under special scrutiny.⁸³ Beyond the factors usually applicable to non-government actors, it requires that the government commit a wrongful act⁸⁴ that causes serious injustice, and that the public’s interest will not be damaged by the application of the doctrine.⁸⁵ The question for the courts to decide is whether it is in the public interest to invoke equitable principles to estop an agency of the executive branch from bringing criminal charges for the same acts that an administrative judge, of the same executive branch, found were not subject to penalty based on the defendant having carried his civil burden.⁸⁶

XIV. CONCLUSION

The apparent contradiction between a grant of asylum (which

81. See *United States v. Al Jibori*, 90 F.3d 22, 26–27 (2nd Cir. 1996).

82. *Rushing*, 313 F.3d at 436.

83. *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984).

84. *Schweiker v. Hansen*, 450 U.S. 785, 787 (1981).

85. *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1984).

86. Principles of *res judicata* may also prevent a litigant in a previous proceeding from asserting claims that *could* have been asserted but were not. Had the prior proceeding been a civil proceeding, and had the executive branch failed to prevail on a preponderance of the evidence standard, a criminal prosecution (or a subsequent civil complaint) on the same “core” of facts would be barred by principles of *res judicata*. See *Semteck Int’l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001) (which lower courts have also applied to *quasi* judicial proceedings). See, e.g., *Graybill v. United States Postal Service*, 782 F.2d 1567, 1571 (citing *Chisholm v. Defense Logistics Agency*, 656 F.2d 42 (3rd Cir. 1981)), *cert. denied*, 479 U.S. 963 (1986); *Reynolds v. Comm’r*, 861 F.2d 469, 472–74 (6th Cir. 1988).

is a defense to civil immigration penalties) and the absence of a defense to subsequent criminal prosecution for use of the same false documents upon which the asylum claim was grounded would best be resolved through Congressional action. An amendment to existing immigration statutes that clearly extended immunity from prosecution to issues considered by the immigration judge in granting asylum status would make clear that the contradictory use of executive branch discretion to grant asylum and then prosecute for the same acts does not comport with Congressional intent.

However, absent Congressional action, the courts have an obligation under common-law principles to prevent a litigant from benefiting by taking two different positions against the same party. Moreover, Fifth Amendment principles relating to coerced testimony and fundamental fairness in the federal courts also provide potential judicial remedies for the contradictory exercise of executive branch discretionary powers. In the absence of principled limitations upon the criminalization of false document asylum claims, the invitation to the abuse of the executive branch power remains undiminished.