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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GURMIT SINGH, aka)
Manjeet Singh,)
Agency No. A72-691-014 &)
Agency No. A72-482-782)
Petitioner,)
v.)
CHRIS VASQUEZ, KATRINA KANE,)
JULIE L. MEYERS, JONATHAN)
SCHARFEN, MICHAEL CHERTOFF,)
MICHAEL B. MUKASEY,)
Respondents.)
_____)

CIV 08-01901 PHX MHM (MEA)
REPORT AND RECOMMENDATION

TO THE HONORABLE MARY H. MURGUIA:

Mr. Gurmit Singh ("Petitioner), who is represented by
counsel in this matter, filed a Petition for Writ of Habeas
Corpus pursuant to 28 U.S.C. § 2241 on October 16, 2008. On
October 23, 2008, the Court ordered Respondents to answer the
petition within 20 days of service. See Docket No. 6.
Respondents were instructed not to file a motion to dismiss the
petition rather than an answer to the petition without first
receiving leave of the Court to do so. See id.

On November 29, 2008, Respondents lodged a Motion to
Dismiss the Petition for a Writ of Habeas Corpus and Complaint
for Declaratory Judgment, and filed a motion seeking permission
to file a motion to dismiss rather than an answer to the

1 petition on December 1, 2008. See Docket No. 18 & Docket No.
2 21. The motion for leave to file a motion to dismiss was
3 granted. See Docket No. 22. Petitioner filed a response in
4 opposition to the motion to dismiss on January 3, 2009. See
5 Docket No. 24 ("Response"). Respondents filed a reply in
6 support of their motion on January 9, 2009. See Docket No. 25.

7 **I. Relevant terms and statutory and regulatory regime**

8 The "entry fiction" of United States immigration law
9 provides that a non-citizen individual has not "entered" the
10 United States unless and until they have been inspected by
11 federal immigration officials and officially allowed into the
12 United States, notwithstanding the non-citizen's actual physical
13 presence within the geographical boundaries of the country. The
14 non-citizen may be allowed into the United States from a port of
15 entry without having "entered" the United States, via a grant of
16 parole. See, e.g., Allison Miller, *Lock Them Up and Throw Away*
17 *the Key*, 52 Wayne L. Rev. 1503 (2006); Allison Wexler, *The Murky*
18 *Depths of the Entry Fiction Doctrine*, 25 Cardozo L. Rev. 2029
19 (2004).

20 A "paroled" alien is one who is temporarily permitted
21 to remain in the United States pending a decision on an
22 application for their formal admission. See 8 U.S.C. §
23 1182(d)(5) (2005 & Supp. 2008). Although a paroled alien is
24 "given liberty to roam the country," the alien is considered
25 legally detained at the border within the custody of the
26 relevant federal agency as it determines the alien's immigration
27 status. Chavez-Rivas v. Olsen, 207 F. Supp. 2d 326, 328 (D.N.J.
28 2002). In the context of whether a paroled alien has "entered"

1 the United States, "[parole] amounts to permission by the
2 Attorney General for ingress into the country but is not a
3 formal 'admission'" under the Immigration and Naturalization Act
4 ("INA")." Chi Thon Ngo v. INS, 192 F.3d 390, 392 (3d Cir. 1999)
5 (citations omitted); see also 8 U.S.C. § 1182(d)(5)(A) (2005 &
6 Supp. 2008). Accordingly, pursuant to the entry fiction
7 doctrine, an alien within the United States who is there by
8 means of parole has not "entered" the United States.

9 The distinction between aliens who have "entered" the
10 country and those who have not is significant because aliens who
11 have entered the country are entitled to procedural due process,
12 whereas aliens who may be physically within the country but who
13 are requesting admission to the United States (including paroled
14 and inadmissible aliens) must be content with "whatever process
15 Congress has authorized" with regard to their immigration
16 proceedings and any resulting loss of their liberty. See
17 Borrero v. Aljets, 325 F.3d 1003, 1007 (8th Cir. 2003). See
18 also Zadvydas v. Davis, 533 U.S. 678, 693, 121 S. Ct. 2491, 2500
19 (2001).¹

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The distinction between an alien who has effected
an entry into the United States and one who has
never entered runs throughout immigration law.
[.]. It is well established that certain
constitutional protections available to persons
inside the United States are unavailable to
aliens outside of our geographic borders. [.]. But
once an alien enters the country, the legal
circumstance changes, for the Due Process Clause
applies to all "persons" within the United
States, including aliens, whether their presence
here is lawful, unlawful, temporary, or
permanent.

1 Federal statutes limit the Attorney General's authority
2 to parole a refugee into the United States rather than admitting
3 them as a refugee. See 8 U.S.C. § 1182(d)(5)(B) (2005 & Supp.
4 2008). An immigrant is a "refugee" if they are unwilling or
5 unable to return to their native country because of persecution
6 or a well-founded fear of persecution on account of race,
7 religion, nationality, membership in a particular social group,
8 or political opinion. 8 U.S.C. § 1101(a)(42)(A) (2005 & Supp.
9 2008); Karapetyan v. Mukasey, 543 F.3d 1118, 1125 (9th Cir.
10 2008). The Attorney General is authorized, in his discretion,
11 to confer a grant of asylum upon a refugee. See 8 U.S.C. §
12 1158(a) (2005 & Supp. 2008); Gulla v. Gonzales, 498 F.3d 911,
13 915 (9th Cir. 2007).² An alien who is a refugee may apply for
14 either asylum or a restriction on their removal. See Wiransane
15 v. Ashcroft, 366 F.3d 889, 893 (10th Cir. 2004) ("A grant of
16 asylum permits the alien to remain in this country; a
17 restriction on removal forbids removal of the alien to the
18 country where persecution may occur").

19 A grant of asylum is provisional in nature and may be
20 terminated at the discretion of the Attorney General. See 8
21 U.S.C. § 1158(c)(2) (2005 & Supp. 2008) (providing that a grant
22 of asylum "does not convey a right to reside permanently in the
23 United States" and may be terminated); Nuru v. Gonzales, 404
24 F.3d 1207, 1229 (9th Cir. 2005) (noting the discretionary nature
25 of the Attorney General's authority under section 1158). A

26
27 ² "Asylum is a two-step process, requiring the applicant
28 first to establish his eligibility for asylum by demonstrating that
he meets the statutory definition of a 'refugee,' and second to show
that he is entitled to asylum as a matter of discretion..."

1 grant of asylum is not equivalent to a finding that an immigrant
2 is entitled to the withholding of removal based on a well-
3 founded fear of persecution and requires a lesser showing than
4 that required for withholding of removal. See Delgado v.
5 Mukasey, 546 F.3d 1017, 1030-31 (9th Cir. 2008) (Berzon, J.,
6 dissenting); Burger v. Gonzales, 498 F.3d 131, 136 (2d Cir.
7 2007) ("an applicant who fails to qualify for asylum necessarily
8 fails to qualify for withholding of removal.").

9 In 1993, when Petitioner first arrived in the United
10 States, the Immigration and Naturalization Service ("INS") could
11 institute exclusion proceedings against an alien who had not
12 "entered" the United States. Exclusion proceedings were
13 ordinarily begun when an examining immigration officer at a port
14 of entry detained an arriving alien who was not entitled to
15 enter the United States because they did not have a valid visa
16 or passport. Generally, the alien was ordered to appear at a
17 hearing conducted before an Immigration Judge ("IJ"). See 8
18 U.S.C. § 1225(b) (1995). The IJ would determine whether the
19 alien was admissible, i.e., eligible for lawful immigrant or
20 non-immigrant status, whether the alien was excludable and
21 should be physically removed, and whether an excludable alien
22 might be entitled to relief from exclusion, *inter alia*, based on
23 their request for asylum.

24 The Immigration and Nationality Act creates
25 two types of proceedings by which aliens may
26 be removed from the United States.
27 Deportation proceedings are used when aliens
28 have already entered the United States and
are sought to be removed. Exclusion
proceedings are employed when the alien has
not yet entered the country, but is detained
in effect at the border.[] Generally, an

1 alien in deportation proceedings possesses
2 greater substantive rights than one in
3 exclusion proceedings.[].
4 An individual may obtain relief from a
5 deportation or exclusion decision by seeking
6 asylum pursuant to 8 U.S.C. § 1158 or
7 withholding of deportation pursuant to 8
8 U.S.C. § 1253(h). *An alien granted asylum
9 may not be deported absent revocation of that
10 status.* While one as to whom deportation is
11 withheld may not be deported to a specific
12 country in which he would be persecuted, he
13 may still be deported to some other country
14 should one be found that will accept him.
15 See Pierre v. Rivkind, 825 F.2d 1501, 1504
16 (11th Cir. 1987).

17 Singh v. United States INS, 965 F. Supp. 724, 728 (D. Md. 1997)
18 (emphasis added).³

19 Federal immigration statutes provide that, if an asylum
20 officer who interviews an arriving alien who does not have a
21 proper visa determines that the alien has a credible fear of

22 ³ In 1996, the Illegal Immigration Reform and Immigrant
23 Responsibility Act ("IIRIRA") eliminated the distinction between
24 "exclusion" and "deportation" proceedings, and replaced these two
25 types of proceedings with a single "removal" proceeding. See, e.g.,
26 Abebe v. Mukasey, ___ F.3d ___, 2009 WL 50120, at *14 n.2 (9th Cir.);
27 Zamora-Mallari v. Mukasey, 514 F.3d 679, 687 n.2 (7th Cir. 2008).
28 However, the "removal" procedures apply only to immigration
proceedings initiated on or after April 1, 1997. See Barapind v.
Reno, 225 F.3d 1100, 1106 (9th Cir. 2000).

21 "Excludable aliens" was the term used prior to
22 the enactment of IIRIRA to describe aliens who
23 were ineligible for admission or entry into the
24 United States. IIRIRA now refers to inadmissible
25 aliens in the place of excludable aliens. ... the
26 distinction now turns on whether an alien has
27 been 'admitted' to the United States, rather than
28 on whether the alien gained 'entry.'
"Inadmissible" aliens therefore include aliens
who have not entered the United States (formerly
considered excludable) and those who, like
petitioners, entered illegally (formerly
deportable).

American-Arab Anti-Discrimination Comm. v. Ashcroft, 272 F. Supp. 2d
650, 668 (E.D. Mich. 2003) (internal citations and quotations
omitted).

1 persecution, the alien shall be detained for further
2 consideration of their application for asylum. See 8 U.S.C. §
3 1252(a)(2)(B)(ii) (2005 & Supp. 2008). The Attorney General
4 can, and often does, release the alien on parole pending a
5 resolution of their application for asylum. See id.; id. §
6 1182(d)(5)(A); 8 C.F.R. § 212.5 (2008).

7 **II. Factual and procedural background**

8 Petitioner is a native and citizen of India. See
9 Motion to Dismiss the Petition for a Writ of Habeas Corpus and
10 Complaint for Declaratory Judgment ("Motion to Dismiss") (Docket
11 No. 18), Exh. A. While in India, Petitioner was an active
12 member of an organization which advocated for the creation of an
13 independent Sikh state within the territorial boundaries of
14 India. See Response (Docket No. 24) at 2. Petitioner alleges
15 that members of this organization, including Petitioner, were
16 arrested and beaten by police for their activities. Id.

17 On April 9, 1993, Petitioner came to the United States
18 from India, arriving at a port of entry at a New York area
19 airport on a British Airways flight. See Motion to Dismiss,
20 Exh. A & Exh. B. Upon his arrival in the United States
21 Petitioner told agents of the Immigration and Naturalization
22 Service ("INS") that his name was Manjeet Singh and that his
23 date of birth was June 25, 1955. Id., Exh. A & Exh. B & Exh. D.
24 At that time, the INS detained Petitioner "at the border" as an
25 alien who was excludable from the United States. Id., Exh. B.⁴

27 ⁴ Petitioner was deemed excludable pursuant to 8 U.S.C. §§
28 1182(a)(7)(A)(i)(I) and 1182(a)(7)(b)(i)(I) and (II), because he did
not have valid traveling documents.

1 Petitioner told the INS inspectors that he wished to apply for
2 political asylum in the United States, citing a fear of
3 persecution if he returned to India. Id., Exh. C & Response at
4 2.

5 The same day Petitioner arrived and was detained at the
6 border the INS initiated exclusion proceedings against
7 Petitioner. Motion to Dismiss, Exh. E. The INS initiated those
8 proceedings by serving Petitioner with a "Form I-122", charging
9 Petitioner with being excludable from the United States because
10 he did not possess a valid visa or traveling documents. See
11 id., Exh. B & Exh. E. The Form I-122 notified Petitioner that
12 an Immigration Judge ("IJ") would hold a hearing to determine
13 whether or not Petitioner should be allowed to enter the United
14 States. Id., Exh. E. The Form I-122 notified Petitioner the
15 hearing would be held in New York on August 12, 1993. Id., Exh.
16 B & Exh. E. Petitioner was released, i.e., "paroled" into the
17 United States on April 9, 1993, and his presence in the United
18 States was classified as "deferred admission." Id., Exh. D.

19 On August 12, 1993, an IJ held the noticed hearing in
20 New York, from which hearing Petitioner was absent. Id., Exh.
21 F. The IJ concluded Petitioner was excludable from the United
22 States pursuant to section 212 of the INA, codified at 8 U.S.C.
23 § 1182. Id., Exh. F. At that time the IJ ordered Petitioner,
24 be excluded from and deported from the United States pursuant to
25 8 U.S.C. § 1182(a)(7)(A)(i)(I).⁵ Id., Exh. F

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27 ⁵ In 1993 this section provided:
28 Except as otherwise specifically provided in this
 chapter, any immigrant at the time of application
 for admission--

1 On May 25, 1993, approximately six weeks after his
2 arrival in New York but before the date of the IJ hearing from
3 which Petitioner was absent, Petitioner applied for asylum at an
4 INS office in San Francisco, California. Petitioner applied
5 using his real name, i.e., Gurmit Singh, and using his real
6 birth date of June 28, 1955. Id., Exh. G. Petitioner now
7 alleges that he did not appear for the IJ hearing because, upon
8 his release from INS custody in New York pending the hearing, he
9 was "still afraid and confused about his future in the United
10 States...." Response at 2. Accordingly, Petitioner "departed
11 New York for California" and filed his application for asylum
12 using his real name prior to the date set for the hearing in New
13 York regarding his excludability.

14 On the asylum application filed in San Francisco on May
15 25, 1993, Petitioner asserted he entered the United States in
16 April of 1993 at San Ysidro, California. See Motion to Dismiss,
17 Exh. G. Petitioner alleged he had entered the United States
18 without inspection. Id., Exh. G. Petitioner further requested
19 asylum for his wife and four children. Id., Exh. G.

20 More than three years later, on October 15, 1996, the
21 San Francisco Asylum Office of the INS granted Petitioner's
22 application for asylum, finding he had established a well-

23 _____
24 (I) who is not in possession of a valid unexpired
25 immigrant visa, reentry permit, border crossing
26 identification card, or other valid entry
27 document required by this chapter, and a valid
28 unexpired passport, or other suitable travel
document, or document of identity and nationality
if such document is required under the
regulations issued by the Attorney General under
section 1181(a) of this title... is excludable.

1 founded fear of persecution if he returned to India. Id., Exh.
2 G. On October 29, 1996, the INS informed Petitioner via a
3 letter that his application for asylum had been granted in
4 accordance with section 208 of the INA, codified at 8 U.S.C. §
5 1158. Id., Exh. H. The notification included an "I-94"
6 document. Id., Exh. H.⁶ Petitioner was informed that he could
7 apply for adjustment of his alien status to that of a lawful
8 permanent resident, pursuant to section 209(b) of the INA,
9 codified at 8 U.S.C. § 1159, provided he remained physically
10 present in the United States until October 15, 1997. Id., Exh.
11 H.

12 Petitioner filed for an adjustment of status to that of
13 lawful permanent resident on February 20, 1998. Id., Exh. I.
14 The application for adjustment of status was filed in the name
15 Gurmit Singh and stated Petitioner's date of birth as June 28,
16 1955. Id., Exh. I. The application averred Petitioner had
17 entered the United States "without inspection" in California.
18 Id., Exh. I. In response to the question "Have you ever been
19 deported from the U.S., or removed from the U.S. at government
20 expense, excluded within the past year, or are you now in
21 exclusion or deportation proceedings?", Petitioner answered
22 "No." Id., Exh. I.⁷ Petitioner also declared he had not by fraud
23 nor misrepresentation attempted to gain documentation, entry

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25 ⁶ At least one federal court has concluded, in a completely
26 different context, that the issuance of a Form I-94 granting asylum
27 constitutes "admission" of the alien to the United States. See Tanov
28 v. I.N.S., U.S. Dep't of Justice, 443 F.3d 195, 201 (2d Cir. 2006).

⁷ The undersigned notes Petitioner had not, at that time,
been deported or removed from the United States, nor had he been
excluded within the year previous to his application.

1 into the United States, or any other "benefit." Id., Exh. I.

2 On May 13, 1999, Petitioner drafted a sworn document
3 "amending" his prior application for a change of status to
4 lawful permanent resident. Id., Exh. J. Petitioner informed
5 the INS that he had been subject to exclusion proceedings. Id.,
6 Exh. J. Petitioner admitted that, when he arrived in New York in
7 1993, he was apprehended by the INS and granted deferred
8 inspection. Id., Exh. J.

9 Petitioner alleges that, on August 5, 1999, the INS
10 asked Petitioner to furnish the name and date of birth he used
11 at the time he entered the United States in April of 1993.
12 Response at 3. Petitioner alleges: "Said letter requesting
13 further information did not state or provide notice or warning
14 to Mr. Singh that his asylum status could be affected in any way
15 by information regarding his exclusion proceedings." Id. at 3.
16 Through his then-counsel, Petitioner supplied the required
17 information regarding his attempted 1993 entry in New York. Id.

18 On October 13, 1999, the INS rescinded the grant of
19 asylum afforded Petitioner. See Motion to Dismiss, Exh. K. The
20 INS informed Petitioner via a letter that, because Petitioner
21 had filed his California asylum application under a different
22 name than the one used when arriving in New York, the INS did
23 not realize Petitioner had been ordered excluded when it granted
24 him asylum. Id., Exh. K. The letter notified Petitioner that,
25 because immigration judges have "exclusive jurisdiction over
26 asylum applications filed by an alien who has been served [with
27 a] ... Form I-122 ...," Petitioner's asylum status was revoked
28 as improperly granted. Id., Exh. K.

1 The INS correspondence to Petitioner concluded:

2 The INS did not have jurisdiction over your
3 asylum application, because you were placed
4 in exclusion proceedings on April 9, 1993.
5 Therefore, the decision to grant your asylum
6 is rescinded as of October 13, 1999 ... You
7 may pursue your request for asylum before the
8 Executive Office for Immigration Review
9 ("EOIR").

10 Id., Exh. K.

11 The undersigned notes that Petitioner did not,
12 apparently, seek to challenge the rescission of asylum on any
13 basis prior to filing this habeas petition.

14 On January 13, 2000, the INS sent Petitioner a "Form
15 I-166," informing him that he was to be removed from the United
16 States pursuant to the 1993 order of exclusion. See id., Exh.
17 L. The form notified Petitioner that arrangements had been made
18 for his removal and instructed him to appear at an immigration
19 office on February 9, 2000. Id., Exh. L. Petitioner failed to
20 appear at the time and place noticed in the Form I-166.

21 On April 10, 2000, Petitioner filed a motion to reopen
22 his exclusion proceedings with the Executive Office for
23 Immigration Review ("EIOR"). Id., Exh. M. Petitioner asked
24 the EOIR to reopen his exclusion proceedings and also sought a
25 change of venue from New York. See id., Exh. M. Petitioner
26 alleged that "extreme and exceptional circumstances,"
27 specifically the medical ailments of cramps and high fever, had
28 prevented his appearance at the exclusion hearing before the
immigration judge in 1993. Id., Exh. M. The INS responded to
the motion to reopen on August 29, 2000, arguing that Petitioner
had failed to show reasonable cause for failing to appear for

1 his exclusion hearing in 1993. See id., Exh. N. The motion to
2 reopen was denied on November 1, 2000. Id., Exh. P.

3 Petitioner sought review of the denial of his motion to
4 reopen his removal proceedings by the Board of Immigration
5 Appeals ("BIA"). Id., Exh. O. The BIA dismissed the appeal in
6 a decision issued February 5, 2001. Id., Exh. O. Petitioner
7 sought reconsideration of this decision, which was denied by the
8 BIA on March 28, 2001. Id., Exh. P.

9 Petitioner filed a Motion to Reopen and Request for
10 Stay of Exclusion and Deportation with the BIA on August 16,
11 2005. See id., Exh. Q. Petitioner sought to re-apply for
12 asylum and also sought to stay his removal, citing 8 C.F.R. §
13 1003.2. Id., Exh. Q. Petitioner acknowledged, however, that
14 his motion to reopen was filed beyond the 90-day limit for
15 filing motions to reopen under 8 C.F.R. § 1003.2. Id., Exh. Q.
16 On March 12, 2007, the BIA dismissed Petitioner's motion to
17 reopen. See id., Exh. S.

18 Petitioner sought review of the denial of his motion to
19 reopen his immigration proceedings by the United States Court of
20 Appeals for the Second Circuit. See id., Exh. T. On December
21 13, 2007, the Second Circuit Court of Appeals dismissed the
22 petition for review. See id., Exh. T. In its opinion the
23 Second Circuit presumed that Petitioner was in exclusion
24 proceedings, rather than removal proceedings, and determined
25 that Petitioner's motion to reopen his exclusion proceedings was
26 time-barred. See id., Exh. T.

27 On or about September 23, 2008, the Department of
28 Homeland Security ("DHS"), and Immigration and Customs

1 Enforcement ("ICE"), successor agencies to the INS, located
2 Petitioner in Modesto, California. See id., Exh. A.⁸ Petitioner
3 was arrested on an immigration warrant for his failure to leave
4 the United States when ordered to leave in 2000, and taken into
5 ICE custody. Id., Exh. A. Citing the order of exclusion issued
6 in 1993, Petitioner was deemed subject to a final order of
7 removal. Id., Exh. A.

8 On September 29, 2008, and again on October 7, 2008,
9 shortly after Petitioner was taken into ICE custody, the DHS
10 sent letters to the India Consulate requesting travel documents
11 for Petitioner. Id., Exh. U. On November 8, 2005, the Board of
12 Immigration Appeals re-opened Petitioner's exclusion
13 proceedings. See id., Exh. V. In the granted motion to re-
14 open, Petitioner did not, apparently, argue the validity of the
15 rescission of his asylee status, but noted he had been in asylee
16 status when the deadline passed for seeking relief from removal
17 based on the Convention Against Torture. See id., Exh. V.

18 In his habeas pleading, filed October 16, 2008, prior
19 to the date his removal proceedings were re-opened, Petitioner
20 challenges both the legitimacy of his detention and the validity
21 of Respondents' authority to remove him from the United States.
22 Petitioner asserts the rescission of the grant of asylum was
23 "unlawful and wholly unconstitutional..." Response at 4.
24 Petitioner contends the rescission of the grant of asylum is

26
27 ⁸ The border enforcement functions of the Immigration and
28 Naturalization Service were transferred to the Department of Homeland
Security, and to some extent the Immigration and Customs Enforcement
agency, on March 1, 2003. See Homeland Security Act of 2002, Pub. L.
No. 107-296, 116 Stat. 2135.

1 void because it occurred in violation of his right to procedural
2 due process of law. Petitioner contends that, because he is
3 still an asylee, the rescission being void, Petitioner may not
4 be removed, or detained pending his removal or further removal
5 proceedings. Petitioner seeks his release predicated on a
6 declaratory judgment that the revocation of the grant of asylum
7 is void and, accordingly, that Respondents have no basis for
8 detaining Petitioner.

9 Respondents contend the petition for habeas relief
10 should be dismissed or, alternatively, that relief should be
11 denied. Respondents assert that, to the extent Petitioner
12 challenges the validity of his order of exclusion subsequent to
13 the grant of asylum and its rescission, the District Court does
14 not have jurisdiction over Petitioner's claims, citing the REAL
15 ID Act of 2005.

16 Respondents also argue:

17 Because the matter has been remanded, Singh
18 is no longer under a final order of
19 exclusion, and will appear before an
20 immigration judge for further proceedings. At
21 that time, Singh may ask for a hearing on the
22 lawfulness of his detention before the
immigration judge under Matter of Joseph, 22
I&N Dec. 799 (BIA 1999), which gives the
immigration judge authority under 8 C.F.R. §
1003.19 to determine if the Government's
basis for detention is sustainable.

23 Motion to Dismiss (Docket No. 18) at 3.

24 Respondents further maintain that relief may not be
25 granted on the merits of Petitioner's claims because Petitioner
26 did not exhaust his administrative remedies prior to filing his
27 section 2241 action. Respondents contend exhaustion is both a
28 jurisdictional and prudential prerequisite to relief.

1 Respondents also assert that Petitioner has "not requested that
2 he be released from detention on the basis of parole pursuant to
3 § 212(d)(5)(a) of the INA and 8 C.F.R. § 212.5. Accordingly,
4 under 8 U.S.C. § 1252(d)(1), he has not exhausted these
5 administrative remedies..." Id. at 3.

6 Respondents further allege that Petitioner's claim that
7 his detention is not authorized by federal law may be denied on
8 the merits because Petitioner's detention is authorized by 8
9 U.S.C. § 1225(b)(2). See id. ("The issue before this Court is
10 not whether INS properly rescinded the grant of asylum. Rather,
11 the issue is whether INS ever had authority to grant asylum in
12 the first place. It did not."). Respondents contend the grant
13 of asylum was void as ultra vires. Id. at 2.

14 Petitioner allows that the motion to reopen was granted
15 and that his removal proceedings have been,

16 remanded [] to the Immigration Judge, to
17 determine if the petitioner is eligible for
18 relief under CAT. The Immigration Judge will
19 not and cannot deal with the issue before
20 this Court, i.e. whether the petitioner was
21 unlawfully and illegally stripped of his
22 status as an asylee and consequently
23 illegally placed in custody as a result of
24 this unlawful stripping of his property
25 rights, i.e. asylee status.

22 Response (Docket No. 24) at 5.

23 Petitioner maintains he

24 is petitioning this Court strictly and
25 narrowly to reverse the illegal and unlawful
26 rescission of his asylum status by the
27 respondents and to order his release from
28 illegal detention by the Immigration Customs
Enforcement Agency ("ICE"), a detention which
only flows out of the respondent's
unconstitutional act of stripping of his
asylum. The respondents' rescission of the

1 petitioner's asylum status is illegal,
2 unlawful and violation of due process because
3 the respondents did not follow proper
4 procedure as outlined in the immigration
5 regulations for terminating asylum status....

6 Id. at 6.

7 **III. Analysis of the parties' claims**

8 **A. Jurisdiction of the District Courts over section** 9 **2241 petitions subsequent to passage of the REAL ID Act**

10 A primary effect of the REAL ID Act is to convert
11 section 2241 habeas corpus petitions seeking review of removal
12 orders into petitions for appellate review in order to "limit
13 all aliens to one bite of the apple ... [and thereby] streamline
14 what the Congress saw as uncertain and piecemeal review of
15 orders of removal, divided between the district courts (habeas
16 corpus) and the courts of appeals (petitions for review)."
17 Bonhometre v. Gonzales, 414 F.3d 442, 446 (3d Cir. 2005). See
18 also Marquez-Almanzar v. INS, 418 F.3d 210, 216 (2d Cir. 2005).

19 Section 106(a)(3) of the REAL ID Act of 2005 amended 8
20 U.S.C. § 1252 to prevent the District Courts from entertaining
21 a "claim arising from or relating to the implementation or
22 operation of an order of removal pursuant to section 1225(b)(1)
23 of this title." Subsequent to the REAL ID Act, the District
24 Courts have jurisdiction over a section 2241 petition only to
25 consider the merits of the petitioner's claim that his
26 detention, rather than the validity of the petitioner's order of
27 removal, violates federal statutes or his constitutional rights.
28 See Arreola-Arreola v. Ashcroft, 383 F.3d 956, 964-65 (9th Cir.
2004); Moallin v. Cangemi, 427 F. Supp. 2d 908, 920 (D. Minn.
2006). The Ninth Circuit Court of Appeals has concluded that

1 the District Courts have section 2241 jurisdiction only if the
2 issue of petitioner's detention is distinct from the issue of
3 the propriety of their removal. See Nadarajah v. Gonzalez, 443
4 F.3d 1069, 1075-76 (9th Cir. 2006).

5 In this matter the basis for Petitioner's challenge to
6 his detention is the assertion that Respondents violated his
7 constitutional right to due process in rescinding the grant of
8 asylum. Petitioner does not explicitly challenge the validity
9 of the order of exclusion, issued in 1993, from which Petitioner
10 is currently seeking relief pursuant to the Convention Against
11 Torture in another forum. Petitioner argues that, in essence,
12 the grant of asylum protected him from the future consequences
13 of the order of exclusion.

14 The undersigned concludes that the REAL ID Act arguably
15 prohibits the Court from exercising jurisdiction over the
16 petition and that the matter should be transferred to the Ninth
17 Circuit Court of Appeals. However, in the interest of judicial
18 economy in resolving the motion to dismiss, the undersigned will
19 address the issues raised by the parties. See Kothandaraghipathy
20 v. Department of Homeland Sec., 396 F. Supp. 2d 1104, 1106 (D.
21 Ariz. 2005).

22 **B. Exhaustion of administrative remedies prior to**
23 **filing a section 2241 petition**

24 The exhaustion doctrine provides that, "no one is
25 entitled to judicial relief for a supposed or threatened injury
26 until the prescribed ... remedy has been exhausted." McKart v.
27 United States, 395 U.S. 185, 193, 89 S. Ct. 1657, 1662 (1969)
28 (citations and internal quotation marks omitted). Exhaustion of

1 administrative remedies is only required if either a statute
2 specifically requires exhaustion prior to judicial review or if
3 the relevant administrative scheme requires exhaustion. Id.

4 Title 28 U.S.C. § 2241, the statute providing for
5 Petitioner's filing of this habeas petition, does not
6 specifically require exhaustion of administrative remedies.
7 Accordingly, Petitioner is not statutorily obligated to exhaust
8 his claims.

9 The exhaustion requirement is also be a prudential,
10 rather than jurisdictional, limitation on the Court's authority.
11 Therefore, in some circumstances the Court may entertain claims
12 brought by petitioners subject to ongoing alienage proceedings.

13 In determining whether to waive prudential
14 exhaustion, federal courts must balance the
15 interest of the individual in obtaining
16 prompt access to a federal judicial forum
17 against institutional interests favoring
18 exhaustion.

19 "[A]dministrative remedies need not be
20 pursued if the litigant's interests in
21 immediate judicial review outweigh the
22 government's interests in the efficiency or
23 administrative autonomy that the exhaustion
24 doctrine is designed to further." [].

25 Castro-Cortez v. INS, 239 F.3d 1037, 1047 (9th Cir. 2001),
26 abrogated on other grounds, Fernandez-Vargas v. Gonzales, 548
27 U.S. 30, 126 S. Ct. 2422 (2006).

28 As a non-criminal alien, Petitioner's detention,
pursuing a resolution of his CAT claim, is discretionary and
Petitioner may request a bond determination hearing before an
IJ. See Matter of Joseph, 22 I & N Dec. 799 (BIA 1999); 8
C.F.R. § 3.19(2)(ii) (2008). If the IJ grants Petitioner's
release on bond, the habeas petition would be moot insofar as it

1 seeks Petitioner's release on detention pending the resolution
2 of his immigration proceedings, as distinct from his release
3 predicated on the desired declaratory relief. Accordingly,
4 because Petitioner's release on bond may still be granted by the
5 Immigration Court, Petitioner should be required to exhaust his
6 habeas claims to the extent he seeks his release from detention.
7 See Haddam v. Reno, 54 F. Supp. 2d 588, 599 (E.D. Va. 1999); Van
8 Eeton v. Beebe, 49 F. Supp. 2d 1186, 1189 (D. Or. 1999)(holding
9 that an alien detained pending removal proceedings was not
10 required to exhaust administrative remedies before bringing
11 federal habeas petition where he had been denied release on
12 bail).

13 The District Court does not have jurisdiction to decide
14 Petitioner's claim for declaratory relief regarding the alleged
15 violation of his purported right to due process, nor does the
16 Immigration Court have jurisdiction to determine Petitioner's
17 constitutional claim.

18 We are prohibited from exercising
19 subject-matter jurisdiction when an alien
20 fails to exhaust administrative remedies
21 "unless the petition presents grounds which
22 the court finds could not have been presented
23 in such prior proceeding." 8 U.S.C. §
24 1105a(c). We agree with the circuits that
25 have considered this issue and hold that we
26 have subject-matter jurisdiction over aliens'
27 unexhausted constitutional claims unless the
28 claims concern procedural errors correctable
by the administrative tribunal. See, e.g.,
Castaneda-Suarez v. INS, 993 F.2d 142, 144
(7th Cir. 1993); Ravindran v. INS, 976 F.2d
754, 762-63 (1st Cir. 1992); Bagues-Valles v.
INS, 779 F.2d 483, 484 (9th Cir. 1985)
(holding that aliens are not precluded from
raising due process claims on appeal that
were not raised during administrative
proceedings because the BIA has no
jurisdiction to adjudicate constitutional

1 issues).
2 Geach v. Chertoff, 444 F.3d 940, 945 -946 (8th Cir. 2006)
3 (finding the petitioner's equal protection claim was not a
4 correctable procedural claim and, accordingly, holding the
5 petitioner was not required to exhaust).

6 Pursuant to the REAL ID Act, Petitioner's assertion
7 that his deportation is barred by the grant of asylum, which he
8 asserts was void because it was rescinded only in violation of
9 his right to procedural due process, must be presented to the
10 Ninth Circuit Court of Appeals. Accordingly, to the extent
11 Respondents contend Petitioner has not exhausted this claim, the
12 undersigned concludes exhaustion is not required and Petitioner
13 should present this claim to the Ninth Circuit Court of Appeals.
14 See Wang v. Reno, 81 F.3d 808, 814 (9th Cir. 1996)(holding that
15 an alien was not required to exhaust his administrative remedies
16 before seeking judicial review of his due process claim because
17 that claim fell outside the scope of the Immigration and
18 Nationality Act); Xiao Ji Chen v. United States Dep't of
19 Justice, 471 F.3d 315, 326 (2d Cir. 2006) (discussing appellate
20 court jurisdiction after the REAL ID Act).

21 **Respondents' authority to detain Petitioner**

22 Respondents contend their custody of Petitioner is
23 pursuant to section 235(b)(2) of the INA, codified at 8 U.S.C.
24 § 1225(b)(2), governing the detention of inadmissible and
25 excludable aliens seeking relief based on the Convention Against
26
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1 Torture.⁹ Respondents initially averred their purpose in
2 detaining Petitioner was to execute the order of exclusion
3 initially issued in 1993. Respondents now assert that, because
4 Petitioner's immigration proceedings have been re-opened,
5 Petitioner is being detained at the discretion of the Attorney
6 General pending a hearing before an IJ regarding his entitlement
7 to relief from removal.

8 Petitioner's detention is authorized pursuant to
9 section 1225 if the grant of asylum was void or if the
10 rescission of asylum was valid. The undersigned concludes the
11 grant of asylum was void. See Noriega-Lopez v. Ashcroft, 335
12 F.3d 874, 884 (9th Cir. 2003) (holding order of removal issued
13 without jurisdiction was void *ab initio*); Zardui-Quintana v.
14 Richard, 768 F.2d 1213, 1219-20 (11th Cir. 1985);¹⁰
15 Ramirez-Osorio v. I.N.S., 745 F.2d 937, 941 (5th Cir. 1984).

16 Had asylum been properly granted, Petitioner would
17 arguably have been entitled to procedural due process, i.e., the
18 notice and hearing requirements of the relevant Code of
19

20 ⁹ United Nations Convention Against Torture and Other Cruel,
21 Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty
22 Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. See also 8 C.F.R. § 1208.16
(regulations implementing the CAT).

23 ¹⁰

24 For these reasons we construe the regulatory
25 framework as granting to the immigration judge
26 exclusive jurisdiction over applications to
27 withhold the deportation of excludable aliens.
28 The district director in the present case had no
authority to grant an application to withhold
deportation and therefore the application was
properly denied. The application would properly
have been before an immigration judge who had
granted a reopening of the exclusion hearing...

1 Regulations prior to rescission of this status. However this
2 section provides for the rescission of a grant made "under the
3 jurisdiction of an asylum officer or district director,"
4 jurisdiction which, in Petitioner's case, did not exist. See 8
5 C.F.R. § 208.15 (2008). Petitioner does not assert that the
6 official who granted his application for asylum did not have
7 jurisdiction to do so; Petitioner acknowledges that he had been
8 ordered excluded at the time his asylum application was
9 processed.

10 **IV. Conclusion**

11 The undersigned concludes that the District Court does
12 not have jurisdiction to resolve Petitioner's claim that the
13 rescission of the grant of asylum violated his right to due
14 process of law and that this claim should be transferred to the
15 Ninth Circuit Court of Appeals pursuant to the REAL ID Act.
16 Additionally, to the extent necessary to determine if
17 Respondents are authorized to detain Petitioner pending the
18 conclusion of his immigration proceedings, the undersigned
19 concludes Respondents are authorized to detain Petitioner
20 because the grant of asylum was void *ab initio* being entered
21 without jurisdiction.

22
23 **IT IS THEREFORE RECOMMENDED** that the Motion to Dismiss
24 be **granted** insofar as it asserts Mr. Singh must pursue his
25 constitutional claim regarding the rescission of the grant of
26 asylum in the Ninth Circuit Court of Appeals. The undersigned
27 recommends that the Motion to Dismiss be **denied** insofar as it
28 argues the petition must be dismissed for failure to exhaust

1 administrative remedies regarding Mr. Singh's constitutional
2 claims, and that the motion be **granted** insofar as it seeks
3 dismissal of Mr. Singh's claim for relief in the form of his
4 release.

5
6 This recommendation is not an order that is immediately
7 appealable to the Ninth Circuit Court of Appeals. Any notice of
8 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
9 Procedure, should not be filed until entry of the district
10 court's judgment.

11
12 Pursuant to Rule 72(b), Federal Rules of Civil
13 Procedure, the parties shall have ten (10) days from the date of
14 service of a copy of this recommendation within which to file
15 specific written objections with the Court. Thereafter, the
16 parties have ten (10) days within which to file a response to
17 the objections. Pursuant to Rule 7.2, Local Rules of Civil
18 Procedure for the United States District Court for the District
19 of Arizona, objections to the Report and Recommendation may not
20 exceed seventeen (17) pages in length.

21 Failure to timely file objections to any factual or
22 legal determinations of the Magistrate Judge will be considered
23 a waiver of a party's right to de novo appellate consideration
24 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
25 1121 (9th Cir.) (en banc), cert. denied, 540 U.S. 900 (2003).
26 Failure to timely file objections to any factual or legal
27 determinations of the Magistrate Judge will constitute a waiver
28 of a party's right to appellate review of the findings of fact

1 and conclusions of law in an order or judgment entered pursuant
2 to the recommendation of the Magistrate Judge.

3 DATED this 4th day of February, 2009.

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7 Mark E. Asper
8 United States Magistrate Judge
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