ARTICLE

PUTTING THE IMMIGRATION RULE OF LENITY IN ITS PROPER PLACE: A TOOL OF LAST RESORT AFTER *CHEVRON*

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TABLE OF CONTENTS

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INTRODUCTION

Immigration policy towards aliens[1] is inextricable from considerations of national security, foreign relations, and the economy.[2] These interests sometimes align, but not always. It is Congress that decides, in the first instance, how to harmonize the nation's foreign and domestic policies in crafting immigration law.[3] Where Congress has intentionally (or unintentionally) left gaps in that law, it has authorized the Attorney General to fill them.[4]

The Supreme Court has historically deferred to the political branches' policy decisions in immigration matters.[5] However, in part to offset the politically disadvantaged position of aliens, the Court fashioned a rule requiring courts to interpret ambiguous immigration statutes leniently in favor of aliens.[6] The intent of this immigration rule of lenity is to provide

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1. The Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(3) (2000) (defining "alien" as "any person not a citizen or national of the United States").

2. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (stating "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"); H.R. REP. NO. 104-469(I), at 106 (1996) (discussing the interrelationship of alien interests with broader national considerations); *see also* Ana Cristina Torres, *Preface*, 9 GEO. PUB. POL'Y REV. 1, 1 (2004) (discussing how "[a] wide range of economic, humanitarian, ethical and security issues shape the arguments supporting the current immigration debate").

3. *See infra* Part I.A; *see also* H.R. REP. NO. 104-469(I), at 108 (explaining that "Congress has the task to set legal immigration policy that serves the national interest").

4. *See* 8 U.S.C. § 1103(a)(1) (providing that in connection with the administration and enforcement of the INA, the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). The Attorney General, in turn, has delegated interpretational authority to the Board of Immigration Appeals (BIA). *See* 8 C.F.R. § 1003.1 (2006) (creating the BIA and providing that Board members shall "act as the Attorney General's delegates in cases that come before them"). For purposes of this Article, no distinction is drawn between the interpretations of the Attorney General and the BIA as his delegate.

5. *See infra* Part I.A.

6. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 568 (1990) (citing the immigration rule of lenity as a tool developed by the Supreme Court "to offset the disadvantaged position of aliens in constitutional immigration law"); Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 522 (2003) ("The Court's use of lenity may . . . stem from its recognition that noncitizens

aliens a modicum of protection against the harsh consequences of deportation,[7] by giving them the benefit of the doubt where Congress has been less than clear in its legislative enactments.[8]

While the rule of lenity calls for "favorable" statutory interpretations of ambiguous immigration statutes, the Supreme Court's landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council* more broadly demands that courts defer to "reasonable" agency interpretations.[9] Specifically, under *Chevron*'s familiar two-step statutory analysis, a reviewing court must first determine, through use of "traditional tools of statutory construction,"[10] whether Congress has directly spoken to the precise question at issue. If it has, that is the end of the matter. But if the statute is silent or ambiguous on the issue, the court must proceed under *Chevron*'s second step to determine whether the agency's interpretation is reasonable. If the interpretation is reasonable, the court may not substitute its own judgment for that of the agency.[11]

The *Chevron* doctrine rests on the presumption that when Congress leaves statutory gaps or ambiguity, it intends to vest primary interpretational authority in the agencies that are best equipped to make difficult policy choices in the laws they administer.[12] However, a conflict exists between *Chevron* and the rule of lenity in immigration cases where the Attorney General's statutory interpretation inures to the alien's detriment, but where the interpretation is otherwise reasonable in light of competing governmental interests.[13] The Supreme Court has yet to reconcile this tension in the law, and the decisions from the circuit courts are disparate.[14]

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typically have no political voice or access to political power and its desire to counteract possible prejudice against them and ensure that the political process treats them fairly."). For similar rules of lenity that apply to criminal statutes, see Bell v. United States, 349 U.S. 81, 83 (1955), and for statutes that implicate the relevant rights of Native Americans, see Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (citations omitted) (interpreting a similar rule of lenity that applies to cases involving Native Americans).

7. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (noting that "[t]o deport [an alien] . . . may result . . . in loss of both property and life; or of all that makes life worth living") (citation omitted).

8. *See infra* Part II.

9. 467 U.S. 837, 843-44 (1984).

10. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, ch. 7 (3d ed. 2002) (providing a general discussion of the different types and uses of canons.) Canons of statutory construction are principles used by courts to glean Congress's intent and to promote uniform decision making in construing statutes. *See id.*

11. *Chevron*, 467 U.S. at 842-43.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See, e.g.*, Ali v. Ashcroft, 395 F.3d 722, 728-29 (7th Cir. 2005) (ignoring the rule of lenity); Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1028-29 (9th Cir. 2005) (applying the rule of lenity after determining that the Attorney General's interpretation of an ambiguous statute was not reasonable); Okeke v. Gonzales, 407 F.3d 585, 593-97 (3d Cir. 2005)

Some commentators have suggested that the rule of lenity should be considered at *Chevron*'s first step, on the theory that the rule is a traditional tool of statutory construction by which judges may glean Congress's intent.[15] Other commentators have pressed for the rule's application at *Chevron*'s second step in determining whether the Attorney General's interpretation is reasonable.[16] Both of these suggested approaches are fundamentally flawed. Models that attempt to reconcile lenity within *Chevron*'s framework unduly limit—or worse, trump—a congressional delegation of authority to the Attorney General.[17] In doing so, these models distort the relative strengths and purposes of both the lenity and *Chevron* doctrines.

This Article argues that the rule of lenity should be used as a tool to resolve lingering statutory ambiguities only after *Chevron*'s second step, that is, only if the reviewing court deems the Attorney General's interpretation unreasonable. This approach is preferable because it affords the Attorney General an unencumbered first bite at balancing the competing policies undergirding the immigration law when the statute at issue is ambiguous. This approach also best comports with the judicial deference that judges traditionally afford to the political branches in immigration matters.[18] To say that the rule of lenity has no place in *Chevron*'s two-step framework is neither an abdication of the rule itself nor the venerable policy interests it aims to advance. It simply puts those

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(applying the rule of lenity at *Chevron*'s second step in determining whether the Attorney General's interpretation was reasonable); Padash v. INS, 358 F.3d 1161, 1173 (9th Cir. 2004) (applying the rule of lenity at *Chevron*'s first step in determining Congress's intent); *see also infra* notes 130-41 and accompanying text.

15. *See, e.g.*, John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 623 (2004) ("To the extent that the rule of lenity . . . is applicable at step one of the *Chevron* analysis, it would tend to serve as a tie breaker resolving any otherwise irresolvable ambiguities in favor of a construction contrary to that reached by the [BIA]."); David A. Luigs, Note, *The Single-Scheme Exception to Criminal Deportations and the Case for* Chevron*'s Step Two*, 93 MICH. L. REV. 1105, 1131 n.110 (1995) (arguing that the rule of lenity should be considered at *Chevron*'s first step); *see also In re* Small, 23 I. & N. Dec. 448, 454 (Bd. of Immigration Appeals 2002) (Rosenberg, dissenting) (arguing that the rule of lenity "applies even to interpretations of the plain language of the statute under the first prong of the test prescribed in *Chevron*").

16. *See, e.g.*, Slocum, *supra* note 6, at 576-82 (arguing that the immigration rule of lenity should be applied at step two in varying degrees, depending on the nature of the statute at issue); Jeffrey A. Bekiares, Note, *In Country, On Parole, Out of Luck—Regulating Away Alien Eligibility for Adjustment of Status Contrary to Congressional Intent and Sound Immigration Policy*, 58 FLA. L. REV. 713, 725 (2006) (stating that courts in a step two analysis may apply the immigration rule of lenity to determine if the agency action was unreasonable, but recognizing that "[s]uch an analysis . . . would not be without . . . controversy").

17. *See infra* Part V.

18. *See infra* Part V; *see also* Guendelsberger, *supra* note 15, at 618 (asserting that "[e]ven before *Chevron*, the Court had required a deferential reasonable person standard for review of [agency interpretation] of the immigration law").

policy considerations in their proper place, in relation to the institutional policies that *Chevron* advances in the immigration context.

Part I of this Article begins with a discussion of the political branches' plenary authority over immigration law and concludes with a general discussion of the civil nature of immigration proceedings. Part II discusses the genesis and application of the immigration rule of lenity. Part III provides a summary of *Chevron*, its practical benefits to the administrative state, and the source of its deferential dictate. Part IV highlights the conflict between the immigration rule of lenity and *Chevron*, and outlines how the courts have side-stepped or dealt with the conflict. Finally, Part V explains why the rule of lenity has no place in *Chevron*'s two-step framework, and resolves the conflict in favor of applying the rule of lenity only where the court deems the Attorney General's interpretation unreasonable.

I. IMMIGRATION LAW IN CONTEXT

A. The Political Branches' Plenary Authority Over Immigration

"[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" alienage and immigration.[19] The source of this authority is amorphous. It is sometimes said to derive directly from the Naturalization Clause in the Constitution[20] and other times from more general principles of sovereignty, international law, and national security.[21]

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19. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 340 (1909) (further describing Congress's power over the "right to bring aliens into the United States" as "absolute").

20. *See* U.S. CONST. art. I, § 8, cl. 4 ("Congress shall have the Power . . . [t]o establish an uniform Rule of Naturalization."); *see also* INS v. Chadha, 462 U.S. 919, 940 (1983) (stating that "[t]he plenary authority of Congress over aliens under [the Naturalization Clause] is not open to question"); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (asserting that the immigration power "is vested in the national government, to which the constitution has committed the entire control of international relations"); Ping v. United States, 130 U.S. 581, 609 (1889) (describing the power over immigration as "delegated by the Constitution"). *But cf.* Jean v. Nelson, 711 F.2d 1455, 1465 (11th Cir. 1983) *aff'd*, 472 U.S. 846 (1985) (noting that "the Constitution fails to delegate specifically the power over immigration").

21. *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 534 (1952) ("So long . . . as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.") (footnote omitted); Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only . . . upon such conditions as it may see fit to prescribe."); *Ping*, 130 U.S. at 604 ("Any restriction upon [the power to exclude aliens], deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.") (quoting Schooner Exch. v. M'Fadden, 11 U.S. (7 Cranch) 116, 136 (1812));

Whatever its source,[22] congressional authority to prescribe substantive immigration law is only as secure as the Judiciary will allow.[23] Under the banner of the "plenary doctrine," however, history has proven the Supreme Court to be a pillar of deference, standing uncharacteristically idle even in the face of legislation that "would be unacceptable if applied to citizens."[24]

The plenary doctrine is an institutional recognition that, as between the Judiciary and Congress, it is Congress's role to set immigration law and policy.[25] As the Supreme Court explained, "nothing in the structure of our [g]overnment or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress."[26] That "the formulation of [admission and expulsion]

Jean, 727 F.2d at 964 ("For centuries, it has been an accepted maxim of international law that the power to control the admission of foreigners is an inherent attribute of national sovereignty."); *see also* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340 (2002) (arguing that "[t]he inherent international element of immigration decisionmaking perhaps best explains the origins of the plenary power doctrine").

22. Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 378-90 (2004) (analyzing in detail the origins, purpose and scope of congressional plenary power).

23. With regards to Congress's plenary authority, a distinction has been drawn between substantive immigration law, over which Congress has the last and only say, and the non-substantive application of such laws, which is subject to important constitutional guarantees. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (acknowledging the government's plenary power to expel immigrants, but explaining that "Congress must choose a 'constitutionally permissible means of implementing'" its immigration power) (quoting *Chadha*, 462 U.S. at 941); *Chadha*, 462 U.S. at 940-41 (striking down legislative veto and noting that "[t]he plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power"); Detroit Free Press v. Ashcroft, 303 F.3d 681, 686-87 (6th Cir. 2003) ("Although acknowledging the political branches' plenary power over all substantive immigration laws and non-substantive immigration laws that do not implicate constitutional rights, the Supreme Court has repeatedly allowed for meaningful judicial review of non-substantive immigration laws where constitutional rights are involved.").

24. *See* Demore v. Kim, 538 U.S. 510, 521 (2003) (explaining that in the exercise of its broad power over immigration, "Congress regularly makes rules that would be unacceptable if applied to citizens" (quoting Mathews v. Diaz, 426 U.S. 67, 79-80 (1976))); *see also* Dia v. Ashcroft, 353 F.3d 228, 243 (3d Cir. 2003) ("What is 'fair' within the context of immigration proceedings . . . need not always measure up to the requirements of fairness in other contexts, especially because aliens only have those statutory rights granted by Congress.") (internal marks and citations omitted); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (arguing that "no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system" as immigration has been); Motomura, *supra* note 6, at 547 (explaining that the plenary "doctrine has dominated immigration law since the Court adopted it almost one hundred years ago in rejecting constitutional objections to Congress' first immigration statutes").

25. *See* Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 32-40 (characterizing the plenary power doctrine as a matter of "institutional deference").

26. Harisiades v. Shaughnessy, 342 U.S. 580, 590 (1952).

policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."[27]

While the law entrusts Congress with the creation of our country's immigration law in the first instance, Congress has delegated the bulk of the enforcement and administration of that law to department heads within the executive branch.[28] To the extent that such delegation has yielded administrative rules enforced by the Attorney General, the plenary doctrine has generally been recognized to attach with equal (or near equal) force and effect.[29]

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27. Galvin v. Press, 347 U.S. 522, 531 (1954).

28. Prior to 1940, the administration and enforcement of the immigration laws were assigned to the Department of Commerce and Labor. *See Dia*, 353 F.3d at 234 (discussing Congress's delegation of power to regulate immigration). In 1940, these immigration responsibilities were transferred to the Department of Justice, headed by the Attorney General, and were largely re-delegated to the Immigration and Naturalization Service (INS), which was an agency within that department. *See* Alien Registration Act of 1940, ch. 439, 54 Stat. 670, 675 (1940) (delegating congressional authority over immigration policy); *see also In re* L, 1 I. & N. Dec. 1 n.1 (Bd. of Immigration Appeals 1940). In 1983, the Attorney General established a quasi-judicial agency within the Department of Justice, called the Executive Office for Immigration Review (EOIR), to operate independently of the INS. Under EOIR's umbrella are currently more than fifty Immigration Courts and the Board of Immigration Appeals, or BIA, which is a single administrative appellate body that decides appeals from decisions of Immigration Judges. *See* 48 Fed. Reg. 8037, 8038-40 (Feb. 25, 1983) (establishing the BIA); U.S. Department of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, http://www.usdoj.gov/eoir/ocijinfo.htm (discussing the Immigration Court system) (last visited July 8, 2007). Following the September 11, 2001 terrorist attacks, Congress enacted the Homeland Security Act of 2002, which abolished the INS and transferred its administration and enforcement functions to the newly erected Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 402-03, 116 Stat. 2135, 2177-78 (2002) (establishing DHS to replace the INS in carrying out immigration enforcement). The DHS Secretary is now charged with "[c]arrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service)." Pub. L. No. 107-296, § 402(3), 116 Stat. 2135, 2178 (2002); *see also* INA § 103(a), 8 U.S.C. § 1103(a) (2000). Despite the transfer of this authority, EOIR was left untouched within the Department of Justice, and the Attorney General retained the final authority on matters of law. *See* INA § 103(a), 8 U.S.C. § 1103(a) (discussing the balance of power over immigration policy).

29. *See* Alvarado v. Gonzales, 449 F.3d 915, 923 (9th Cir. 2006) ("Congress delegated plenary authority to the Attorney General to enforce the INA." (citing 8 U.S.C. § 1103(a) (2000))); Hall v. INS, 253 F. Supp. 2d 244, 248 (D.R.I. 2003) ("The plenary authority of Congress may be delegated in part to the Executive branch." (citing U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950))); Cox, *supra* note 22, at 381 (recognizing that "[a]lthough it may be possible to interpret plenary power doctrine as operating differently in the context of congressional and executive action, courts typically treat the two contexts indistinguishably") (citation omitted); Schuck, *supra* note 24, at 15 (observing that "the Court has not hesitated to extend this 'special judicial deference to congressional policy choices in the immigration context, to administrative officials as well as to Congress"); Spiro, *supra* note 21, at 339 ("Since the advent of federal regulation of immigration in the late nineteenth century, the courts have persistently abjured any significant role in policing political branch conduct in the area.") (citation omitted). *But cf.* Motomura, *supra* note 6, at 580-83 (suggesting that plenary power doctrine may be understood as operating differently

As the Supreme Court has explained, "[a]ppropriate deference must be accorded" to "the [immigration] agency primarily charged by Congress to implement the public policy underlying these laws."[30] That is largely because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."[31] These matters, the Court explained, "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[32]

Several commentators have criticized the plenary doctrine and have called for its end.[33] The margins of the plenary doctrine may have narrowed in recent years, at least in cases where non-substantive immigration law appears to impinge constitutional norms.[34] The Supreme Court's decision in *Zadvydas v. Davis* provides one such example.[35] In *Zadvydas*, the Court declined to apply the plenary doctrine when construing a non-substantive immigration statute that contained no express time limit for executive detention of certain classes of aliens pending their removal.[36]

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in the context of congressional and executive action, but recognizing that the doctrine supports broad Congressional and executive control over immigration decisions).

30. INS v. Miranda, 459 U.S. 14, 19 (1982).

31. *Harisiades*, 342 U.S. at 588-89.

32. *Id.*; *accord* Reno v. Flores, 507 U.S. 292, 305 (1993) (emphasizing "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"); Sad v. INS, 246 F.3d 811, 814 (6th Cir. 2001) (stating that "immigration matters [are] particularly appropriate for judicial deference because executive 'officials exercise especially sensitive political functions that implicate questions of foreign relations'" (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999))).

33. *See, e.g.*, GERALD E. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); Gabriel J. Chin, *Is there a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Motomura, *supra* note 6, at 580-93; Spiro, *supra* note 21 (opining that the Supreme Court has indicated abandonment of plenary power). *But see* Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 384 (2002) (describing the continued vitality of the plenary doctrine in modern immigration law); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to* Is there a Plenary Power Doctrine?, 14 GEO. IMMIGR. L.J. 289 (2000) (countering Professor Chin's plenary doctrine analysis).

34. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (citing INS v. Chadha, 462 U.S. 919, 941-42 (1983)) (stating that the plenary power doctrine is "subject to important constitutional limitations").

35. *See id.*

36. *Id.* at 688-89. The detention statute at issue in *Zadvydas* provides in pertinent part: "An alien ordered removed who is inadmissible . . . , removable or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the [general ninety-day] removal period . . . ." INA § 241(a)(6), 8 U.S.C. §1231(a)(6) (2000). The Court, in rejecting any application of the

The Court found that the Attorney General's interpretation, which could have resulted in indefinite executive detention of aliens, raised a "serious constitutional problem."[37] In order to side-step this constitutional issue, the Court read into the statute an implicit "reasonable time" limitation.[38]

While *Zadvydas* illustrates the limits of the plenary doctrine when serious constitutional issues arise, the Court has shown no signs of retreating from its deferential posture when reviewing immigration laws that do not implicate constitutional norms.[39] In the non-constitutional context—which is the only context in which the *Chevron* versus lenity issue arises[40]—the plenary doctrine continues to apply with full force and effect.[41]

B. Immigration Proceedings Are Civil in Nature

Aliens have "ambiguous status" in this country.[42] In several respects they stand on equal footing with citizens, but in other respects they do not enjoy "legal parity."[43] In unwavering terms, the Supreme Court explained some time ago that for an alien "to protract ambiguous status within the country is not his [or her] right but is a matter of permission and

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plenary doctrine, explained that "Executive and Legislative Branch decisionmaking . . . is subject to constitutional limits." *Zadvydas*, 533 U.S. at 679.

37. *Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem.").

38. *Id.* at 689 ("In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention."). *See id.* at 701-02 (holding further that the application of the "reasonable time" limitation is subject to federal court review, and that if removal of the alien was foreseeable, a six-month detention to accomplish that purpose would be presumptively reasonable); *id.* at 701 (declaring that after six months, and if the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must respond with evidence sufficient to rebut that showing in order to warrant further detention).

39. *See* Demore v. Kim, 538 U.S. 510, 531 (2003) (using plenary doctrine reasoning in upholding immigration statute); INS v. Aguirre-Aguirre, 526 U.S. 415, 423-26 (1999) (using plenary doctrine reasoning in demanding deference to the BIA's statutory interpretation); Detroit Free Press v. Ashcroft, 303 F.3d 681, 693 (6th Cir. 2003) ("Undoubtedly, . . . where a constitutional right is not implicated, the political branches retain unfettered discretion to determine both substantive and non-substantive immigration policy and laws."); *see also* Aleinikoff, *supra* note 33, at 384 (arguing that "the Court has not jettisoned the plenary power doctrine with its decision in *Zadvydas*").

40. As explained in Parts III and IV, no conflict exists between the rule of lenity and *Chevron* when constitutional problems arise because *Chevron* is displaced in this context, leaving the rule of lenity unchallenged.

41. *See* Aleinikoff, *supra* note 33, at 384 (explaining how the plenary power doctrine remains viable).

42. Harisiades v. Shaughnessy, 342 U.S. 580, 586-87 (1952).

43. *Id.*

tolerance."[44] Harsh words, but the message holds true today: Aliens are guests here, and if they abuse or overstay this country's hospitality,[45] they may be asked—and then forced—to leave.[46]

Despite the often significant consequences for the alien wrought by deportation,[47] deportation is not a "punishment."[48] Indeed, since the question first arose, the Supreme Court has repeatedly explained:

> The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.[49]

Categorizing deportation as something other than punishment goes beyond semantics; it impacts the rights of aliens facing removal.[50] Most notably, because immigration proceedings are civil in nature, many

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44. *Id.*

45. *See* Fiallo v. Bell, 430 U.S. 787, 796 (1977) (explaining that "the conditions of entry for every alien, . . . the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of Congress and wholly outside the power of this Court to control" (quoting *Harisiades*, 342 U.S. at 596-97 (Frankfurter, J., concurring))); Peters v. Ashcroft, 383 F.3d 302, 307 (5th Cir. 2004) ("Congress has clearly spoken against aliens who abuse the hospitality of the United States by committing drug-related crimes." (quoting Coronado-Durazo v. INS, 123 F.3d 1322, 1326 (9th Cir. 1997))).

46. Illegal aliens generally fall into one of the following classes: (1) those that are detained at a port of entry or paroled into the country; (2) those that entered the country without authorization or inspection by an immigration official; or (3) those that entered the country legally, but are no longer entitled to remain, either because their time to do so has expired, or because they have committed acts (usually criminal acts) which render them deportable. *See generally* INA §§ 212(a), 237, 8 U.S.C. §§ 1182(a), 1227 (2000) (providing grounds of inadmissibility and grounds of deportation).

47. *See* Woodby v. INS, 385 U.S. 276, 285 (1966) ("This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.").

48. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (describing how the Court did not consider deportation to be a form of punishment).

49. *Id.*; *see* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (stating that deportation is not "a punishment; it is simply a refusal by the Government to harbor persons whom it does not want"); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) (stating that the purpose of enforcing the immigration law is not to "punish past transgressions but rather to put an end to a continuing violation of the immigration laws").

50. *Cf.* Schuck, *supra* note 24, at 25. Professor Schuck noted:

> This distinction [between punishment or not] possesses little logical power: at least concerning aliens who have established a foothold in American society, it is a legal fiction with nothing, other than considerations of cost and perhaps administrative convenience, to recommend it. Nevertheless, it has proved to possess the staying power that [Justice] Holmes knew to be far more important in law than logic.

Id.

constitutional protections afforded in criminal proceedings are not triggered in the immigration context.[51] For example, aliens have no Sixth Amendment right to an attorney;[52] are not immune from retroactive application of statutes under the Constitution's Ex Post Facto Clause;[53] and cannot benefit from the criminal evidentiary exclusion rule.[54]

Moreover, the criminal rule of lenity does not apply to immigration proceedings. The criminal rule of lenity is a well-entrenched substantive canon of construction,[55] under which lingering ambiguities in criminal

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51. *See Lopez-Mendoza*, 468 U.S. at 1038 ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.").

52. *See* Uspango v. Ashcroft, 289 F.3d 226, 231 (3d Cir. 2002) (holding that "there is no Sixth Amendment right to counsel in deportation hearings"); Romero v. INS, 399 F.3d 109, 112 (2d Cir. 2005). While aliens have no Sixth Amendment right to counsel, Congress has afforded aliens a statutory right to counsel at an alien's own expense. *See* INA § 292, 8 U.S.C. § 1362 (2000); *see also* 8 C.F.R. § 1240.10(a)(1) (2006). In light of this statutory entitlement, courts have generally held that if an alien receives ineffective assistance of counsel, it could upset the fundamental fairness of the hearing in a way that violates the alien's Fifth Amendment right to due process. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Batanic v. INS, 12 F.3d 662, 667 (7th Cir. 1993) (explaining that the statutory right to counsel is "an integral part of the procedural due process to which the alien is entitled"); *see also* United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003) (announcing that "to prevail on a claim of ineffective assistance of counsel, [an alien] 'must show that his counsel's performance was so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the [F]ifth [A]mendment [D]ue [P]rocess [C]lause'") (quoting Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 241 (2d Cir. 1992)).

53. U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . *ex post facto* law."). The ex post facto clause prohibits the government from applying laws that "'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" Cal. Dep't of Corrs. v. Morales, 514 U.S. 499, 504 (1995) (quoting Collins v. Youngblood, 497 U.S. 37, 41 (1990)). Since the question first arose, the Supreme Court has held that the ex post facto clause does not apply to immigration proceedings on the ground that such proceedings are civil rather than criminal in nature. *See Bugajewitz*, 228 U.S. at 591; Harisiades v. Shaughnessy, 342 U.S. 580, 594-95 (1952); Galvin v. Press, 347 U.S. 522, 531 (1954). *But cf.* Scheidemann v. INS, 83 F.3d 1517, 1526-27 (3d Cir. 1996) (Sarokin, J., concurring) (imploring the Supreme Court to revisit its precedent on this issue).

54. *See Lopez-Mendoza*, 468 U.S. at 1040-50 (declining to apply the criminal exclusionary rule in immigration proceedings). In *Lopez-Mendoza*, the Supreme Court held that two aliens were deportable as charged, even if—as the aliens had claimed—their arrests by INS officials were unlawful. *Id.* The Court explained:

> Applying the exclusionary rule in [immigration] proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law. This Court has never before accepted costs of this character in applying the exclusionary rule . . . . His release would clearly frustrate the express public policy against an alien's unregistered presence in this country. Even the objective of deterring Fourth Amendment violations should not require such a result. The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.

Id. at 1046-47.

55. "Substantive" or "normative" canons are those that reflect policy judgments or normative values that when applied generally dictate a particular outcome. *See* ESKRIDGE,

statutes must be construed in favor of criminal defendants.[56] The rule—which presumes that Congress does not intend to impose criminal liability beyond that which the statute explicitly provides[57]—advances the constitutional protections of fair notice, non-retroactivity of criminal statutes, and separation of powers.[58] The criminal rule of lenity is generally

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supra note 10, at 634 (positing that substantive canons are "essentially presumptions about statutory meaning based upon substantive principles or policies drawn from the common law, other statutes, or the Constitution"); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596 (1992) (noting that substantive canons "represent value choices by the Court").

56. *See, e.g.*, United States v. Bass, 404 U.S. 336, 348 (1971) (stating that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant"); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term-Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 104 (1994) (describing the rule of lenity as the "rule against applying punitive sanctions if there is ambiguity as to underlying criminal liability or criminal penalty"). For a general discussion of the criminal rule of lenity, see John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345; Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885 (2004).

57. *See* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952).

> [W]hen [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Id.; Bell v. United States, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."); *see also* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 8 (2006) ("The rule of lenity can be also formulated as a presumption about congressional intent: a court will presume that Congress intended the narrower interpretation unless it clearly specifies otherwise.").

58. In *United States v. Bass*, Justice Marshall explained:

> [T]wo policies . . . have long been part of our tradition. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should. Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

404 U.S. at 347-48 (internal quotations and citations omitted); *accord* United States v. Lanier, 520 U.S. 259, 266 (1997) (discussing the three manifestations associated with the fair warning requirement: the vagueness doctrine, the rule of lenity, and due process); *see also* Dunn v. United States, 442 U.S. 100, 112 (1979) (stating that lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate . . . whether his conduct is prohibited"); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000) ("The rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes. While it is not itself a constitutional mandate, it is rooted in a constitutional principle . . . .").

regarded as a "clear statement rule." This demands a favorable statutory interpretation for a criminal defendant unless Congress has clearly and unambiguously stated otherwise.[59]

II. THE IMMIGRATION RULE OF LENITY

A similar rule of lenity exists in the immigration context. However, because the rule is not constitutionally inspired and competes with a long tradition of judicial deference to the political branches of government, the rule of lenity applies with less muscle in immigration cases.[60]

The genesis of the immigration rule of lenity traces to the Supreme Court's decision in *Fong Haw Tan v. Phelan*.[61] The issue in *Phelan* was whether an alien, convicted of two separate counts of murder in the same criminal proceeding, was deportable under the immigration law as an alien "sentenced more than once" for a crime of moral turpitude.[62] The Court held that the alien's convictions did not fall within the ambit of the deportation statute.[63] Relying on excerpts from the relevant legislative history, the Court held that Congress designed the statute to target repeat offenders—aliens who commit a crime after an earlier conviction—not aliens convicted of two counts in the same trial.[64] According to the Court, any doubt about the statute's scope should be construed in the alien's favor "because deportation is a drastic measure and at times the equivalent of banishment or exile."[65] The Court further explained:

> To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.[66]

Thus, the Court intended the immigration rule of lenity to provide aliens some protection against the harsh consequences of deportation by providing them the benefit of the doubt when their immigration status turns

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59. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 413-14 (1991) (describing the rule of lenity as a "clear statement rule"); Eskridge & Frickey, *supra* note 55, at 595 n.4 (describing "clear statement rules" as those that "require a 'clear statement' on the face of the statute to rebut a policy presumption the Court has created").

60. *See supra* Part I.A; *see also infra* notes 80-84 and accompanying text.

61. 333 U.S. 6, 9-10 (1948) (holding that in deportation cases, courts should apply the narrowest reading of a statute to protect the freedom of aliens).

62. *See id.* at 7-8 (interpreting § 19(a) of the Immigration Act of 1917, to determine the meaning of the statutory phrase "who is sentenced more than once").

63. *See id.* at 9-10 (reversing the decision of the lower courts).

64. *See id.* (quoting Congressman Sabath, Congressman Burnett, and the Senate Committee Report).

65. *Id.* at 10.

66. *Id.*

on the interpretation of ambiguous statutes.[67] Indeed, in such cases, the rule of lenity requires the "narrowest" of meanings that may reasonably be extracted from the statutory language at issue.[68]

Since the *Phelan* decision, the Supreme Court has repeatedly paid homage to the principle that courts should construe ambiguous immigration statutes favorably for aliens.[69] The circuit courts, for their part, have followed suit.[70] In practice, however, the rule of lenity is seldom, if ever, dispositive on its own. Rather, the rule often serves as a court's alternative

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67. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (stating that "[d]eportation is always a harsh measure"); Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963) ("[D]eportation is a drastic sanction, one which can destroy lives and disrupt families . . . ."); Barber v. Gonzales, 347 U.S. 637, 642 (1954) ("Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile' . . . ." (quoting *Phelan*, 333 U.S. at 10)); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted."). Although the rule of lenity, as originally fashioned, was intended to apply to statutory provisions that render aliens deportable, see *Phelan*, 333 U.S. at 9-10, it has since been applied to a wide variety of immigration provisions, including those that provide discretionary relief from deportation. *See, e.g.*, Rosario v. INS, 962 F.2d 220, 225 (2d Cir. 1992) (applying the rule of lenity to interpret a statute governing the suspension of deportation); Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977) (stating that recognition of the immigration rule of lenity was "especially pertinent" in a case involving relief from deportation); *see also* David A. Martin, *Major Issues in Immigration Law*, 1987 WL 123658, at *9 n.73 (F.J.C.) (noting that courts sometimes apply the rule of lenity in "questionable settings," such as to benefit an alien who had been in the country for only a few days).

68. *See Phelan*, 333 U.S. at 10 (explaining that the courts should err on the side of the alien because deportation is a severe penalty for specific types of misconduct); *see also* Jobson v. Ashcroft, 326 F.3d 367, 376 (2d Cir. 2003) (stating that the immigration rule of lenity requires the narrowest meaning that may be adopted); 6 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, § 71.01[4][b], 71-16 (MB rev. ed. 2006) (clarifying that under rule of lenity deportation provisions "must be limited to the narrowest compass reasonably extracted from their language").

69. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 320 (2001) (analyzing the rule of lenity alongside the general "presumption against retroactive application of ambiguous statutory provisions" to determine that Congress had not fully considered the costs and benefits of applying a statute to pre-enactment convictions); *Cardoza-Fonseca*, 480 U.S. at 449 (noting the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); INS v. Errico, 385 U.S. 214, 225 (1966) (weighing the humanitarian values of keeping families together with the statutory language at issue to determine that the statute should be read in favor of the alien); Costello v. INS, 376 U.S. 120, 128-29 (1964) (determining that under the § 241(a)(4) of the INA, an alien who committed crimes while a naturalized citizen could not be deported after being denaturalized); Bonetti v. Rogers, 356 U.S. 691, 699 (1958) (describing the principle as the "rule of lenity").

70. *See, e.g.*, Okeke v. Gonzales, 407 F.3d 585, 596-97 (3d Cir. 2005); Padash v. INS, 358 F.3d 1161, 1173 (9th Cir. 2004); De Osorio v. INS, 10 F.3d 1034, 1043 (4th Cir. 1993); *Rosario*, 962 F.2d at 225 (all applying rule of lenity in reaching a favorable statutory interpretation for the alien); *see also* Castellano-Chacon v. INS, 341 F.3d 533, 543 (6th Cir. 2003) (acknowledging the presumption of favoring an alien when a statutory clause is ambiguous, but concluding that the clause in question was not ambiguous); *infra* notes 130-41 and accompanying text.

rationale after it has determined the outcome.[71] And in cases where the rule of lenity actually plays a role in the disposition of a case, lenity is generally considered as merely one factor among others.[72]

Like the criminal rule of lenity, its immigration counterpart is a doctrine of last resort that comes into operation only after other interpretive aids fail to yield sufficient insight into Congress's intent.[73] Thus, before invoking the rule of lenity to construe either criminal or immigration statutes, courts will first look to the statute's language and structure, its legislative history, and its motivating policies.[74] Unlike the criminal rule of lenity, however,

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71. *See, e.g.*, *Errico*, 385 U.S. at 225 ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."); *Costello*, 376 U.S. at 128 (stating that even if the statutory interpretation issue before the Court was in doubt, it "would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the [alien]"); Ki Se Lee v. Ashcroft, 368 F.3d 218, 224-25 (3d Cir. 2004) ("In the end, after considering various tools of statutory construction, we believe that Congress' intent is clear . . . . To the extent that any ambiguity lingers, we note that there is a longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.") (internal marks and citation omitted); Francis v. Reno, 269 F.3d 162, 168-71 (3d Cir. 2001) (determining that classification of crimes should be determined by state law with respect to the Immigration and Nationality Act as a means of reducing redundancy and noting that this approach is consistent with the rule of lenity); *see also Cardoza-Fonseca*, 480 U.S. at 449 ("We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.").

72. *See, e.g.*, *St. Cyr*, 533 U.S. at 320 (indicating that "[t]he presumption against retroactive application of ambiguous statutory provisions, buttressed by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," foreclosed the retroactive application of the statute at issue) (internal quotation marks omitted); *Phelan*, 333 U.S. at 7, 9-10 (finding a "trace" of congressional purpose in the statute's legislative history before declaring that it would resolve the doubt in the alien's favor); *Okeke*, 407 F.3d at 596 ("A final reason [the BIA's] interpretation of [the statute at issue] is impermissible is that, because of the serious consequences of deportation, rules of statutory interpretation relating to immigration statutes require that ambiguities be construed in the favor of the alien."); *Padash*, 358 F.3d at 1172-73 (relying on rule of lenity in conjunction with several factors, including legislative history and other canons of construction); *see also* Slocum, *supra* note 6, at 572 n.358 ("[I]n many of the decisions which cite to the immigration rule of lenity, the canon is not used in a dispositive manner, but, rather, as further and perhaps superfluous justification for rejecting the government's interpretation."); *cf.* Jeffries, *supra* note 56, at 198-99 (stating that the criminal rule of lenity "survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation").

73. *Compare* Callanan v. United States, 364 U.S. 587, 596 (1961) ("The [criminal] rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed . . . ."), *with* Valansi v. Ashcroft, 278 F.3d 203, 214 n.9 (3d Cir. 2002) (acknowledging that immigration rule of lenity "may be applied as a canon of last resort").

74. *Compare* Lara-Ruiz v. INS, 241 F.3d 934, 942 (7th Cir. 2001) (declaring that the immigration rule of lenity "applies only when 'a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute'" (quoting Moskal v. United States, 498 U.S. 103, 108 (1990))) (internal quotations and citation omitted), *with* Reno v. Koray, 515 U.S. 50, 65 (1995) ("The [criminal] rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.'" (quoting Smith v. United States, 508 U.S. 223, 239 (1993) (internal quotations and citation omitted) and Ladner v. United States, 358 U.S. 169, 178 (1958))).

the immigration rule is not rooted in constitutional protections.[75] Rather, it is "best viewed as a judicial creation that is based on important concerns and public values, but not on constitutional rights."[76] This distinction is important because it impacts whether, and to what extent, the immigration rule of lenity can displace, or be displaced by, other judicially created doctrines, including—as pertinent here—the *Chevron* doctrine.[77]

III. THE *CHEVRON* DOCTRINE

A. Chevron*'s Two-Step Framework*

Chevron is a landmark decision that, more than twenty years later, continues to "dominate[] modern administrative law."[78] In *Chevron*, the Supreme Court articulated a two-step framework for "review[ing] an agency's construction of the statute which it administers."[79] The Court stated:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[80]

The Court continued:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress . . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[81]

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75. *See supra* notes 54-58 and accompanying text (discussing the constitutional protections advanced by the criminal rule of lenity).

76. Slocum, *supra* note 6, at 528.

77. For a general discussion of how the criminal rule of lenity may operate within *Chevron*'s framework, see Greenfield, *supra* note 57, at 51-61.

78. Sunstein, *supra* note 58, at 329.

79. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

80. *Id.*

81. *Id.* at 843-44 (internal marks and citation omitted).

Thus, *Chevron* demands that "unless Congress has decided the 'precise question at issue,' agencies are authorized to interpret ambiguous terms as they see fit, so long as the interpretation is reasonable."[82] Prior to *Chevron*, courts were generally obliged to defer to agency interpretations only when Congress *expressly* delegated authority to the agency "to define a statutory term or prescribe a method of executing a statutory provision."[83] As Professors Merrill and Hickman explained:

> *Chevron* expanded the sphere of mandatory deference through one simple shift in doctrine: It posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering.[84]

Chevron's gap-filling framework left many gaps of its own. For example, *Chevron* noted that a court may use "traditional" canons of statutory interpretation to discern whether Congress has directly spoken to the precise question at issue.[85] But canons come in many flavors,[86] and whether a particular canon is traditional can be a matter of much debate.[87] While the use of canons in step one should be limited to determining whether Congress has unambiguously expressed its intent,[88] the "wide range of potentially applicable rules of statutory construction afford the courts considerable leeway in determining whether a plain meaning may be uncovered in any particular provision."[89] Thus, "[t]he outcome using the 'traditional tools of statutory construction' . . . depends largely on who gets

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82. Sunstein, *supra* note 58, at 329.

83. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833 (2001) (quoting Rowan Cos., Inc. v. United States, 452 U.S. 247, 253 (1981)) [hereinafter Chevron*'s Domain*]; *see* Herweg v. Ray, 455 U.S. 265, 274-75 (1982) (discussing a statutory clause that expressly delegated authority to the Secretary of Health and Human Services); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981) (declaring that when Congress delegates authority explicitly to an agency, any interpretation of the statute by the agency is entitled to "legislative effect"); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972-75 (1992) (describing the pre-*Chevron* practice of courts) [hereinafter *Judicial Deference to Executive Precedent*].

84. Chevron*'s Domain*, *supra* note 83, at 833. *But cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (stating that the *Chevron* doctrine should not be considered "entirely new law" as "courts have been content to accept 'reasonable' executive interpretations of law for some time").

85. *See Chevron*, 467 U.S. at 843 n.9.

86. *See* ESKRIDGE, *supra* note 10, at 669-816 (discussing the types and uses of common canons).

87. *See* Slocum, *supra* note 6, at 540 ("While most would agree that at least some canons of statutory construction are 'traditional tools of statutory construction,' the question of which canons are applicable and how they should be incorporated into the *Chevron* framework, if at all, is a subject of much debate and confusion.") (citation omitted).

88. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 446-48 (1987) (explaining that it is up to the courts to determine the intent of Congress).

89. Guendelsberger, *supra* note 15, at 623.

to choose the tools."[90] Whatever canons apply, however, their aim must be to shed light on Congress's actual—or at least presumed—intent.[91] After all, that is the ultimate thrust of the step one analysis.[92]

The *Chevron* decision provides even less guidance on whether and how courts should use canons of construction in step two. The general approach of the courts seems to rely on many of the same interpretive aids used in step one, with perhaps the addition of others, to determine whether an agency's interpretation is reasonable.[93] As in step one, the use of canons in step two provides courts with considerable discretion as to which interpretive aids to employ. The difference is that unlike the use of canons in step one to discern whether Congress has directly spoken to the issue, the use of canons in step two is with an eye towards measuring the reasonableness of the agency's interpretation.[94]

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90. Mark Burge, Note, *Regulatory Reform and the* Chevron *Doctrine: Can Congress Force Better Decisionmaking by Courts and Agencies?*, 75 TEX. L. REV. 1085, 1096 (1997).

91. *See* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 23 (1997) (describing canons as "judicially crafted maxims for determining the meaning of statutes"); Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 83 (2006) (describing certain canons as "presumptions which courts apply based upon their perceived correlation to legislative intent"); Robert M. Zinman, *Precision in Statutory Drafting: The* Qualitech *Quagmire and the Sad History of § 365(h) of the Bankruptcy Code*, 38 J. MARSHALL L. REV. 97, 157 (2004) ("Canons are designed to carry out a presumed intent of the legislature."); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation . . . ."). Indeed, even the "plain language" canon of construction, which looks to the plain words of the statute, reflects only a presumption that "a legislature says in a statute what it means and means in a statute what it says." *Germain*, 503 U.S. at 253-54.

92. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

93. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring) ("[D]eference is not abdication, and it requires [the Court] to accept only those interpretations that are reasonable in light of the principles of construction courts normally employ."); Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 59 (D.C. Cir. 1991) (explaining that the use of canons in step one "is limited to an attempt to determine whether or not Congress has unambiguously expressed its intent. . . . Any further resort to the canons of construction in our review of administrative decisions would normally be limited to determining whether or not the agency interpretation is 'rational and consistent with the statute'") (citation omitted); *see also Judicial Deference to Executive Precedent*, *supra* note 83, at 977 ("[B]y 'reasonable,' the Court [in *Chevron*] seemed to mean reasonable in light of the text, history, and interpretive conventions that govern the interpretation of a statute by a court . . . .").

94. *See, e.g.*, Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1049 (D.C. Cir. 1997).

> We note that step two of *Chevron* requires us to evaluate the same data that we also evaluate under *Chevron* step one, but using different criteria. Under step one we consider text, history, and purpose to determine whether these convey a plain meaning that *requires* a certain interpretation; under step two we consider text, history, and purpose to determine whether these *permit* the interpretation chosen by the agency.

Id.

B. Chevron*'s Practical Benefits*

The *Chevron* doctrine promotes our country's tripartite system of governance while effectuating the primary benefits of the administrative state.[95] For at least three reasons, "[f]illing [statutory] gaps . . . involves difficult policy choices that agencies are better equipped to make than courts."[96] First, agencies generally have better information and more expertise than Congress or the Judiciary, and are in the best position to choose among conflicting policies.[97]

Second, agencies have flexibility in creating and modifying policies.[98] Unlike courts, which are constrained by the principle of stare decisis, agencies have much more flexibility to change their rules and policies.[99] Indeed, the administrative rule at issue in *Chevron* was a departure from a pre-existing rule.[100] Moreover, while Congress is constrained by the slow grind of bicameral lawmaking, agencies can respond to changing information and conditions relatively quickly by enacting regulations or through case-by-case adjudications.[101]

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95. *See* Greenfield, *supra* note 57, at 20 (discussing justifications for *Chevron* deference).

96. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865-66).

97. *See Chevron*, 467 U.S. at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.").

98. *See* Greenfield, *supra* note 57, at 20 ("Agencies can respond relatively quickly to a dynamic environment, adjusting regulations and interpretations to meet changing conditions and new information."); Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) ("*Chevron*'s importance is its recognition that . . . agencies . . . maintain a comparative institutional advantage over the judiciary in interpreting ambiguous legislation that the agencies are charged with applying.").

99. *See Brand X*, 545 U.S. at 981 ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."). *But cf.* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (citing Watt v. Alaska, 451 U.S. 259, 273 (1981) and Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976)). For a discussion of the Court's seemingly conflicting positions on the issue of whether, and to what extent, deference may be afforded to an agency interpretation that is inconsistent with an agency's previously held view, see Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995 (2005).

100. *See Chevron*, 467 U.S. at 857-58 (discussing a recent reversal in agency policy).

101. *See* Greenfield, *supra* note 57, at 20 ("Agencies can respond relatively quickly to a dynamic environment, adjusting regulations and interpretations to meet changing conditions and new information."); *see also* Rust v. Sullivan, 500 U.S. 173, 186-87 (1991) ("An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances.") (internal marks and citations omitted); United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72, 78 (1957) (noting that it was proper for INS to consider "present-day conditions and congressional attitudes" in exercising discretion).

Third, unlike the courts, agency heads are politically accountable through the Executive.[102] Presumably, that accountability would tend to favor rules and policies that are consistent with the public's needs and desires.[103] As the Court explained in *Chevron*, "resolving the struggle between competing views of the public interest are not judicial [concerns]: 'Our Constitution vests such responsibilities in the political branches.'"[104]

C. The Source of Chevron*'s Deferential Dictate*

While institutional competence, flexibility, and accountability provide "good practical reason[s]" for deferring to an agency's views, they are, in the words of Justice Scalia, "hardly a valid theoretical justification for doing so."[105] Indeed, from its inception, legal commentators have suggested at least three candidate sources for *Chevron*'s authority: "(1) the Constitution, in the form of the doctrine of separation of powers; (2) the courts, in the form of a common-law norm of self-governance; and (3) the Congress, in the form of a presumption about congressional intent."[106] This debate is relevant insofar as it bears on *Chevron*'s flexibility or resistance in the face of competing doctrines. If *Chevron* deference is

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102. *See* Greenfield, *supra* note 57, at 20 (explaining that policy decisions are usually a crucial part of judicial interpretation but should not be used to defeat an agency interpretation because the courts lack political accountability); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 506 (1985) (citing *Chevron* for the recognition "that policy choices should be made by the most politically accountable branch of government, and that the judiciary is the least politically accountable branch").

103. As the Fourth Circuit explained:

> [*Chevron*] insures that agencies—which are more politically accountable than federal courts—have final say on matters of policy not resolved by Congress. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Rehab. Ass'n of Va., Inc. v. Kozlowski, 42 F.3d 1444, 1471 (4th Cir. 1994) (citation omitted).

104. *Chevron*, 467 U.S. at 866 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)).

105. Scalia, *supra* note 84, at 514. Justice Scalia has been regarded as "*Chevron*'s leading judicial champion." *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2132 (2002); *see also* Greenfield, *supra* note 57, at 5-6 (describing Justice Scalia as the "Supreme Court's most energetic proponent of a broad reading of *Chevron*").

106. Chevron*'s Domain*, *supra* note 83, at 836; *cf.* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212-13 ("The *Chevron* doctrine began its life shrouded in uncertainty about its origin. *Chevron* barely bothered to justify its rule of deference, and the few brief passages on this matter pointed in disparate directions."); Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead *and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 173 (2002) ("*Chevron* is in the throes of a prolonged, difficult, and confused adolescence.").

constitutionally mandated, it would tend to be immutable. By contrast, if *Chevron* deference is merely a gesture of judicial self-governance, it would tend to be most flexible.

As it turns out, *Chevron* falls somewhere in the middle. The prevailing scholastic view, and the one most supported by Supreme Court precedent,[107] is that *Chevron* deference rests on a theory of congressional intent.[108] Thus, as the Court has explained, *Chevron* rests on a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather then the courts) to possess whatever degree of discretion the ambiguity allows."[109] And, as the Court later stated, "*Chevron* deference is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[110]

There are at least two byproducts of the congressional-intent model of *Chevron* deference. The first is that courts must determine whether Congress's intent to delegate is present in any given case.[111] In *United States v. Mead Corp.*, the Court articulated two prerequisites to find such intent: first, it must appear that "Congress delegated authority to the agency generally to make rules carrying the force of law"; second, the agency's interpretation must have been "promulgated in the exercise of that

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107. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (describing the holding in *Chevron* by stating that ambiguities in a statute that an agency is supposed to administer are congressional delegations of authority); United States v. Mead Corp., 533 U.S. 218, 229-32 (2001) (explaining that *Chevron* deference is not warranted where there is no evidence that Congress intended to delegate particular interpretive authority to an agency); United States v. Haggar Apparel Co., 526 U.S. 380, 392-93 (1999) (explaining that Congress delegates authority to agencies because it cannot anticipate all circumstances to which a statute may apply); Smiley v. Citibank, 517 U.S. 735, 740-41 (1996) (clarifying that when Congress leaves ambiguity in a statute, it does so with the intent that the agency resolve such issues in the future).

108. *See* Chevron*'s Domain*, *supra* note 83, at 836 ("*Chevron* should be regarded as a legislatively mandated deference doctrine."); Barron & Kagan, *supra* note 106, at 212 ("*Mead* represents the apotheosis of a developing trend in *Chevron* cases: the treatment of *Chevron* as a congressional choice, rather than either a constitutional mandate or a judicial doctrine."); Scalia, *supra* note 84, at 516 ("The extent to which courts should defer to agency interpretations of law is ultimately a function of Congress's intent on the subject . . . .") (internal quotations and citations omitted).

109. *Smiley*, 517 U.S. at 740-41.

110. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 123 (2000).

111. *See Mead Corp.*, 533 U.S. at 226-27 (offering different ways to determine whether Congress intended to delegate authority to an agency); *see also* Chevron*'s Domain*, *supra* note 83, at 872 ("[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply."); Greenfield, *supra* note 57, at 25 (arguing that *Mead* clarifies that the "presumption [of] delegation is inferred not simply from the presence of ambiguity, but only when additional factors, such as rule-making authority, are present"); *see also* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 267 (2002) (explaining that *Chevron* deference is required only where Congress would have wanted it).

authority."[112] Generally, where the first condition is met, the second will be presumed if the rule at issue was promulgated either under the Administrative Procedure Act's notice-and-comment procedure or otherwise through formal administrative adjudication.[113]

The second byproduct of the congressional-intent model, and more central to the analysis here, is that *Chevron* deference is not as immutable as it might otherwise be if it were constitutionally required. Indeed, the Supreme Court has bypassed *Chevron* deference on a few occasions.[114] For example, in *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, the Court held that although the statute at issue was ambiguous, the governing agency's construction of the provision was not entitled to deference because serious constitutional problems would arise if the agency's interpretation were accepted.[115] Essentially, the Court used the constitutional avoidance canon "to oust the *Chevron* framework altogether."[116]

Similarly, in *EEOC v. Arabian American Oil Co.*, the Court declined to defer to the relevant agency's "plausible" interpretation of an ambiguous statute where the agency's interpretation called for extraterritorial

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112. 533 U.S. at 226-27.

113. As the *Mead* Court explained:

> It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.

533 U.S. at 230 (citation omitted); *see also* Barron & Kagan, *supra* note 106, at 227-28 (describing "notice-and-comment rulemaking [and] formal adjudication" as "safe harbors" in which the "agency will know that its reasonable resolution of statutory ambiguity will govern"). Whether and under what circumstances the Court should afford *Chevron* deference outside of the formal rulemaking and adjudication safe-harbors is a matter of much debate, and is beyond the scope of this Article. For a discussion of the issue, see generally, Chevron*'s Domain*, *supra* note 83, and Barron & Kagan, *supra* note 106. In cases where *Chevron* does not apply, agency decisions may be entitled to deference to the extent that such decisions possess "those factors which give [the agency's interpretation] power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *accord Mead Corp.*, 533 U.S. at 235-36 (explaining that when a regulatory scheme is complex and the specialized experience of the agency may be beneficial, an agency may make a *Skidmore* claim if *Chevron* is inapplicable); Lin v. U.S. Dep't of Justice, 416 F.3d 184, 191 (2d Cir. 2005) (holding that decisions by Immigration Judges are not entitled to *Chevron* deference but may be entitled to *Skidmore* deference).

114. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (rejecting the EEOC's claim for deference in its decision that Title VII should apply abroad); DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568-69 (1988) (refusing to grant deference to the NLRB because its interpretation raised constitutional concerns).

115. *See DeBartolo*, 485 U.S. at 577 ("Even if [the agency's] construction of the [statute at issue] were thought to be a permissible one . . . we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [the statute].").

116. Scalia, *supra* note 84, at 988.

jurisdiction.[117] The Court assumed that Congress had legislated against the backdrop of the presumption against extraterritoriality, and thus declined to extend a statute beyond the United States absent a clear statement of Congress's intent to do so.[118]

IV. THE CONFLICT BETWEEN *CHEVRON* AND THE IMMIGRATION RULE OF LENITY

In immigration cases where *Chevron* applies, a conflict exists between *Chevron* deference and the rule of lenity.[119] On the one hand, *Chevron* demands that courts defer to reasonable agency interpretations of ambiguous statutes. On the other hand, the rule of lenity requires courts to construe ambiguous immigration statutes favorably for aliens.[120] Thus, in immigration cases involving statutory interpretation that reach federal court,[121] the agency almost always argues that a statutory construction inuring to the alien's detriment is nevertheless reasonable, whereas the alien advances a more favorable interpretation.[122]

In light of the Supreme Court's apparent willingness to consider certain substantive canons within the *Chevron* framework,[123] the following two related issues arise: (1) is the rule of lenity one such canon and if so, (2) where in the *Chevron* framework does it fit? The Supreme Court has yet to decide either issue.

In *INS v. Cardoza-Fonseca*, the Court mentioned the immigration rule of lenity for the first time since *Chevron*, but did not rely on the rule and failed to explain where in the statutory analysis it would have fit, if necessary.[124] Specifically, in *Cardoza-Fonseca*, the Court interpreted the

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117. *See* 499 U.S. at 253 ("If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.").

118. *See id.* at 248 ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.") (internal quotations and citations omitted).

119. *See* Slocum, *supra* note 6, at 539 ("In deportation proceedings reaching federal court . . . the potential for conflict between a strong version of *Chevron* deference and the immigration rule of lenity is vast.").

120. *See* Ali v. Reno, 22 F.3d 442, 446 (2d Cir. 1994) (stating that a court must construe "[l]ingering ambiguities in a statute" favorably for the alien, but still must accord *Chevron* deference to an agency's reasonable statutory interpretation).

121. While aliens have a statutory right to petition the courts of appeals to review final orders of removal under the terms and conditions of INA § 242, 8 U.S.C. § 1252 (2000), the Government does not have the right to a federal appeal. Thus, if the case is in federal court, it means that the alien received some unfavorable agency decision.

122. *See* Slocum, *supra* note 6, at 539 ("If the court should find the relevant statute ambiguous, the agency invariably argues that its (broad) interpretation should be granted *Chevron* deference, and the noncitizen argues (if her attorney thinks of it) that the immigration rule of lenity should be invoked and the statute narrowly construed.").

123. *See supra* notes 85-92 and accompanying text.

124. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).

Immigration and Nationality Act's (INA) definition of a refugee for asylum purposes,[125] and held that to qualify as a refugee an alien must demonstrate only a "well-founded fear of persecution," not that persecution in the alien's home country is "more likely than not."[126] The Court expressly decided the issue at *Chevron*'s step one, based on an "analysis of the plain language of the [INA], its symmetry with the United Nations Protocol, and its legislative history."[127] The Court found these "ordinary canons" of statutory construction compelling, "even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[128] Thus, while the Court in *Cardoza-Fonseca* made clear that the rule of lenity persists in some form in post-*Chevron* jurisprudence, the Court was not required to review, and thus did not reach, the issue of how the rule is to be reconciled with *Chevron* in cases where the statute or its interpretation is unfavorable to aliens.

The Court arguably shed additional light on the issue in *INS v. Aguirre-Aguirre*, where it held that the Board of Immigration Appeals (BIA)—as the Attorney General's delegate—is entitled to *Chevron* deference even where the BIA's interpretation of an ambiguous statute at issue is unfavorable to the alien.[129] The Court, however, did not expressly refer to the rule of lenity, and thus did not expressly resolve the issue of how it should be reconciled with the principle of *Chevron* deference.

Absent definitive guidance from the Supreme Court, the circuit courts' treatment of the issue has, understandably, been quite varied.[130] Indeed, just about every conceivable approach has been employed or suggested by the circuit courts, which can be summarized as follows: (1) applying

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125. *Id.* at 425 (interpreting the INA's definition of "refugee"). Under the INA, "[t]he term 'refugee' means . . . any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

126. *Cardoza-Fonseca*, 480 U.S. at 449.

127. *Id.* at 446-47 ("Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical.") (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

128. *Cardoza-Fonseca*, 480 U.S. at 449 (citing, for the principle of lenity, INS v. Errico, 385 U.S. 214, 225 (1966); Costello v. INS, 376 U.S. 120, 128 (1964); and Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)). Justice Powell, in his dissenting opinion in *Cardoza-Fonseca*, found the statutory language "far more ambiguous than the Court," and argued that the Court should have deferred to the Attorney General's reasonable interpretation, without explaining how the rule of lenity would have factored into that analysis. *Cardoza-Fonseca*, 480 U.S. at 459-63 (Powell, J., dissenting).

129. 526 U.S. 415, 423-26 (1999); *see also infra* notes 225-36 and accompanying text (discussing *Aguirre-Aguirre* in detail).

130. *See* Slocum, *supra* note 6, at 553-55.

Chevron and ignoring the rule of lenity;[131] (2) applying the rule of lenity and ignoring *Chevron*;[132] (3) recognizing both doctrines and not deferring to the agency's interpretation because the statute was clear on its face;[133] (4) recognizing both doctrines and rejecting the principle of lenity because the statute was clear on its face;[134] (5) applying the rule of lenity where *Chevron* was found not to apply;[135] (6) considering the rule of lenity at *Chevron*'s first step in determining whether Congress's intent was clear;[136] (7) considering the rule of lenity at *Chevron*'s second step in determining whether the agency's interpretation was reasonable;[137] (8) applying *Chevron* deference and finding that the rule of lenity did not apply at step

131. *See, e.g.*, Ali v. Ashcroft, 395 F.3d 722, 728-29 (7th Cir. 2005); Acosta v. Ashcroft, 341 F.3d 218, 225 (3d Cir. 2003); Sad v. INS, 246 F.3d 811, 818-19 (6th Cir. 2001); Shaar v. INS, 141 F.3d 953, 957-58 (9th Cir. 1998); Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1296-98 (11th Cir. 1990); Kim v. Meese, 810 F.2d 1494, 1496-97 (9th Cir. 1987) (applying *Chevron* and implicitly rejecting Judge Norris's dissenting opinion calling for application of the rule of lenity).

132. *See, e.g.*, Vlaicu v. INS, 998 F.2d 758, 760 (9th Cir. 1993); *see also* Solorzano-Patlan v. INS, 207 F.3d 869, 874 n.9 (7th Cir. 2000) (applying the criminal rule of lenity in construing whether the alien was convicted of an aggravated felony for removal purposes).

133. *See, e.g.*, Khalayleh v. INS, 287 F.3d 978, 980 (10th Cir. 2002); Marincas v. Lewis, 92 F.3d 195, 200 n.6 (3d Cir. 1996).

134. *See, e.g.*, Boatswain v. Gonzales, 414 F.3d 413, 417-18 (2d Cir. 2005); Castellano-Chacon v. INS, 341 F.3d 533, 543 (6th Cir. 2003); Cedano-Viera v. Ashcroft, 324 F.3d 1062, 1066 (9th Cir. 2003); Valansi v. Ashcroft, 278 F.3d 203, 214 n.9 (3d Cir. 2002); Lara-Ruiz v. INS, 241 F.3d 934, 942 (7th Cir. 2001); United States v. Zavala-Sustaita, 214 F.3d 601, 607 n.11 (5th Cir. 2000).

135. *See, e.g.*, Chrzanoski v. Ashcroft, 327 F.3d 188, 191, 197 (2d Cir. 2003); Ojeda-Terrazas v. Ashcroft, 290 F.3d 292, 300 n.53 (5th Cir. 2002) (finding that *Chevron* deference is not applicable in determining the retroactive effect of immigration statutes and stating that the rule of lenity supported its decision); Francis v. Reno, 269 F.3d 162, 168-71 (3d Cir. 2001) (finding that the court did not owe *Chevron* deference to the agency's interpretation of a criminal statute that was incorporated into the immigration statute, and then using the immigration rule of lenity to buttress the court's interpretation in favor of the alien); Velasquez-Gabriel v. Crocetti, 263 F.3d 102, 106 (4th Cir. 2001).

136. *See, e.g.*, Padash v. INS, 358 F.3d 1161, 1173-74 (9th Cir. 2004) (using the rule of lenity to support the court's interpretation of a statute under *Chevron*'s step one); *see also infra* Part V.A.

137. *See, e.g.*, Okeke v. Gonzales, 407 F.3d 585, 593-97 (3d Cir. 2005) ("A final reason [the BIA's] interpretation of [the statute at issue] is impermissible is that, because of the serious consequences of deportation, rules of statutory interpretation relating to immigration statutes require that ambiguities be construed in the favor of the alien."); De Osorio v. INS, 10 F.3d 1034, 1043 (4th Cir. 1993) (explaining that while the rule of lenity should be considered at step two, the rule is not dispositive, and did not overcome the otherwise reasonable agency interpretation of the statute at issue); Rosario v. INS, 962 F.2d 220, 225 (2d Cir. 1992) ("Our conclusion that the INS's interpretation is unreasonable is supported by the principle that in light of the harshness of deportation, ambiguous deportation provisions should be construed in favor of the alien.") (citations omitted); *see also infra* Part V.B.

two because the agency's interpretation was otherwise reasonable;[138] and (9) employing the rule of lenity after determining that the agency's construction was unreasonable.[139]

Of these, ignoring one doctrine or the other obviously cannot be the answer—especially if the doctrine being ignored is *Chevron*.[140] Moreover, this Article is not concerned with cases where *Chevron* does not apply; for example, where the interpretation is of a non-immigration statute or raises serious constitutional questions. That is because where *Chevron* does not apply, there simply is no conflict.[141]

Thus, what follows is an analysis of the only three potentially viable options for reconciling *Chevron* and the rule of lenity: (1) lenity as a consideration at step one; (2) lenity as a consideration at step two; and (3) lenity as a consideration, if at all, only after determining that the statute is ambiguous and that deference is not warranted because the agency's interpretation is unreasonable.

V. PUTTING THE IMMIGRATION RULE OF LENITY IN ITS PROPER PLACE

Commentators who have considered the issue have suggested that the courts should apply the immigration rule of lenity as a factor in *Chevron*'s step one[142] or step two.[143] But neither approach is correct. Rather, lenity should be applied only at the very end of the process—after the court determines both that the statute is ambiguous under step one and that the agency's interpretation is unreasonable under step two. Any other approach distorts the relative strengths and purposes of the competing doctrines at issue.

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138. *See* Ruiz-Almanzar v. Ridge, 485 F.3d 193, 198-99 (2d Cir. 2007) (holding that "even were the statute ambiguous, we would defer to the BIA's permissible construction of it" and not apply the rule of lenity); Amador-Palomares v. Ashcroft, 382 F.3d 864, 868 (8th Cir. 2004); Mizrahi v. Gonzales, No. 05-0010-ag, 2007 U.S. App. LEXIS 15303, at *56-57 (2d Cir. June 27, 2007) (citing *Ruiz-Almanzar*, 485 F.3d at 198) ("The rule of lenity is a doctrine of last resort, and it cannot overcome a reasonable BIA interpretation entitled to Chevron deference."); *see also infra* Part V.C.

139. *See* Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1028-29 (9th Cir. 2005); *see also infra* Part V.C.

140. *See* INS v. Aguirre-Aguirre, 526 U.S. 416, 424 (1999) (reversing the Ninth Circuit, and explaining that "[b]ecause the [circuit court] confronted questions implicating an agency's construction of the statute which it administers, the court should have applied the principles of deference described in *Chevron* . . . ") (internal marks and citations omitted).

141. Slocum, *supra* note 6, at 539 ("In cases where *Chevron* deference is not applicable there is no conflict with the immigration rule of lenity, and courts are free to apply lenity where applicable without fear that doing so will conflict with deference to agency interpretations.").

142. *See* Guendelsberger, *supra* note 15.

143. *See* Slocum, *supra* note 6.

A. Not at Step One

As noted above, the step one inquiry is directed at discerning whether Congress has "directly spoken to the precise question at issue," because if it has, "that is the end of the matter."[144] *Chevron*'s invitation to the courts to consider "traditional tools of statutory construction" in determining whether Congress has directly spoken[145] provides an opening to argue that the immigration rule of lenity applies at step one. This approach is possible, the theory goes, "because substantive canons in general can be viewed as background conventions Congress considers when legislating and, thus, they could be employed at [s]tep-[o]ne as guides to legislative intent."[146] Indeed, Justice Scalia has expressed the view that traditional tools include not only textual canons[147] and some extrinsic source canons (such as dictionaries and legislative history),[148] "but also, quite specifically, the consideration of policy consequences."[149]

To date, only a select class of substantive canons that have attained the status of "clear statement rules" have permeated *Chevron*'s first step.[150] Indeed, that was the case in *INS v. St. Cyr*, where the Supreme Court declined the Immigration and Naturalization Service's (INS) invitation to afford *Chevron* deference to the BIA's interpretation of an immigration provision as having retroactive effect.[151] The Court explained:

> We only defer . . . to agency interpretations of statutes that, applying the normal "tools of statutory construction," are ambiguous. Because a statute that is ambiguous with respect to retroactive application is

144. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

145. *Id.* at 843 n.9.

146. Slocum, *supra* note 6, at 574-75; *see* Greenfield, *supra* note 57, at 48 ("Canons of construction that allow inferences about congressional intent serve the court's purpose at Step One, and hence their use is consistent with the *Chevron* framework."); *see also* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."); King v. St. Vincent's Hosp., 502 U.S. 215, 221 n.9 (1991) (stating that the Court "will presume congressional understanding of . . . interpretive principles").

147. Textual canons are those that "set forth inferences that are usually drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the 'whole' statute." ESKRIDGE, *supra* note 10, at 634.

148. Extrinsic source canons are a variety of devices extrinsic to the statutory text that act as aids in attributing meaning to it. *Id.*

149. Scalia, *supra* note 84, at 515; *see also* Eskridge & Frickey, *supra* note 56 (discussing substantive canons).

150. Other clear statement rules, such as the constitutional avoidance canon and presumption against extraterritoriality, have been found to trump *Chevron* deference altogether. *See supra* notes 114-18 and accompanying text.

151. INS v. St. Cyr, 533 U.S. 289, 320 & n.45 (2001).

> construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.[152]

The Court further explained that the presumption against retroactivity is one "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."[153]

In stark contrast, the immigration rule of lenity enjoys no such status.[154] Rather, it was introduced to immigration jurisprudence sixty years ago,[155] and has since generally been regarded as a mere "tie-breaker canon"[156]—a thumb on the scale when there is nothing left to choose from.[157] To apply such a weak policy presumption at step one would defeat the purpose of the *Chevron* doctrine (not to mention the plenary doctrine), which demands that policy gaps left by Congress be filled in the first instance by the administering agency, not the courts.

Although not in the context of a *Chevron* analysis, the Supreme Court in *Fernandez-Vargas v. Gonzales* all but dispelled of any notion that the immigration rule of lenity is a traditional tool of construction.[158] The issue in *Fernandez-Vargas* was whether a statute enacted in 1996 could be applied retroactively to an alien who had illegally re-entered the country in 1982.[159] In resolving the issue against the alien, the Court applied its familiar *Landgraf* retroactivity analysis.[160] Under the first step of that analysis, the Court determines whether Congress intended the statute to apply retroactively by looking to the statute's express language and to

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152. *Id.*

153. *Id.* at 316 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)); *accord* Landgraf v. USI Film Prods., 511 U.S. 244, 265-66 (1994).

154. *See* Cedano-Viera v. Ashcroft, 324 F.3d 1062, 1066 (9th Cir. 2003) (distinguishing *St. Cyr*, 533 U.S. at 289, and explaining that the rule of lenity, unlike the presumption against retroactivity, is not a clear statement rule).

155. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

156. *See* Guendelsberger, *supra* note 15, at 623 ("To the extent that the rule of lenity . . . is applicable at step one of *Chevron* analysis, it would tend to serve as a tie breaker resolving any otherwise irresolvable ambiguities in favor of a construction contrary to that reached by the [BIA]."); Slocum, *supra* note 6, at 574 (classifying the immigration rule of lenity as a tie-breaker canon).

157. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 341 (2000) (explaining that in general tie-breaker canons are triggered only if the court is left in doubt about the meaning of the statute after the more common sources of construction—such as text, legislative history, and statutory purpose—are exhausted); *cf.* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1989) (noting, with respect to the criminal rule of lenity, that the "judicial thumb" on the scale "depends on how much the thumb weighs").

158. 126 S. Ct. 2422, 2428-30 (2006).

159. *Id.* at 2425-27.

160. *Id.* at 2427-28 (citing Landgraf v. USI Film Prods., 511 U.S. 244 (1994)).

"normal rules of construction."[161] This inquiry is akin to *Chevron*'s first step, where courts must determine whether Congress has directly spoken to the issue with the aid of "traditional tools" of construction.[162] Instructively, the Court in *Fernandez-Vargas* rejected the alien's suggestion that the Court apply the rule of lenity to glean Congress's intent concerning the temporal reach of the statute at issue.[163] Just as the Court declined to treat the rule of lenity as a "normal rule of construction" for *Landgraf*'s retroactivity analysis, the Court should not consider the rule to be a "traditional tool" of construction for *Chevron* purposes.

Canonical classifications aside, the fundamental shortcoming of employing lenity at step one is that it would tend to frustrate—rather than promote—Congress's intent because one cannot fairly say that the rule of lenity sheds light on Congress's actual intent as to any "precise question."[164] Instead, lenity is a transmutable concept that affords the most favorable interpretation to the alien in any given case, whatever that may be.[165] In this way—and unlike the presumptions against retroactive and extraterritorial statutes[166]—the rule of lenity does not inform Congress, at the time of legislative enactment, as to the particular result if the statute is later deemed ambiguous.

Congress could have enacted a statute demanding that ambiguous immigration provisions be interpreted liberally in favor of aliens. But it did not. Instead, Congress expressly delegated interpretational and rulemaking authority to the Attorney General.[167] Applying the rule of lenity at step one

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161. *Id.* at 2428 (quoting Lindh v. Murphy, 521 U.S. 320, 326 (1997)). If the Court is unable to glean Congress's clear intent, then the Court proceeds under the *Landgraf* analysis to determine whether applying the statute to the person objecting would impair or affect substantive rights, liabilities, or duties on the basis of conduct arising before the statutes enactment. *See id.* (citing *Landgraf*, 511 U.S. at 278). If the answer is yes, then the Court applies a presumption against retroactivity by construing the statute as inapplicable to the event or act in question. *Id.* (citing INS v. St. Cyr, 533 U.S. 289, 316 (2001)).

162. *See supra* Part III.A.

163. *Fernandez-Vargas*, 126 S. Ct. at 2428-29.

164. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (explaining that the first query is whether Congress has "directly spoken to the precise question at issue").

165. *See supra* Part II.

166. *See* INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001) ("Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve."); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("[U]nless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.") (citations omitted).

167. *See* INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2000); *see also* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (holding that *Chevron* deference was owed to the BIA, as the Attorney General's delegate, because Congress had conferred the Attorney General with authority to determine questions of law arising under the INA); Lin v. U.S. Dep't of Justice, 416 F.3d 184, 189 (2d Cir. 2005) ("[I]t is beyond cavil that Congress has, as a general matter, delegated the authority to make immigration rules carrying the force of law; the INA, after all, unambiguously vests such power in the Attorney General, among others.").

would eviscerate Congress's intent to delegate this authority in every case where a statutory ambiguity arises.[168] As a practical matter, it would handcuff Congress by requiring it to legislate with absolute specificity[169] in an area of the law where the agency is far better suited to fill in the details.

Further, there is an inherent conflict in applying the immigration rule of lenity at *Chevron*'s first step. If a statutory ambiguity does not exist, the step one inquiry ceases.[170] By its own terms, however, the rule of lenity comes into operation only *after* an ambiguity is found to exist.[171] Thus, the step one inquiry and the rule of lenity are mutually exclusive: the latter comes into play only where the former is already complete. To use the rule of lenity to first beget an ambiguity, and then to cure it, would elevate the rule well beyond its intended purpose as a tie-breaker canon.[172] Certainly, the Supreme Court has offered no support for employing the rule of lenity in this way.[173]

In the pre-*Chevron* case of *Phinpathya v. INS*,[174] for example, the Supreme Court made it abundantly clear that notions of lenity could not displace Congress's otherwise clear intent. The Court was called upon to review the Ninth Circuit's interpretation of a statute under former INA § 244(a)(1), which required an alien to demonstrate seven years of "continuous physical presence" as a condition for suspension of deportation.[175] Specifically, the issue was whether the alien's three-month

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168. *See* Slocum, *supra* note 6, at 542 ("[I]f the immigration rule of lenity is a 'traditional tool of statutory construction' in the sense meant by the Court in *Chevron*, reviewing courts would never defer to the agency's interpretation because the issue would be resolved at Step One."); *cf.* INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring) (warning that use of certain canons would be "an evisceration of *Chevron*").

169. *See* Slocum, *supra* note 6, at 568 ("Congress sometimes legislates with deliberate ambiguity and often lacks sufficient time to make language clear . . . . If courts require Congress to legislate with clarity in order to overcome substantive canons, Congress may not be able to pass a statute at all.").

170. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

171. *See supra* notes 71-77 and accompanying text.

172. *Cf.* Slocum, *supra* note 6, at 572 (arguing that the rule of lenity should be employed at step two, although recognizing that "[t]he immigration rule of lenity . . . has only been used by courts as a tie-breaker canon and has never required the level of clarity associated with clear statement rules").

173. As the Supreme Court has explained in the criminal context: "[T]he rule of lenity applies only when an ambiguity is present; 'it is not used to beget one . . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'" Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 262 (1994) (citing United States v. Turkette, 452 U.S. 576, 587-88 (1981)).

174. 464 U.S. 183 (1984).

175. *Id.* at 185-86. Former INA § 244(a)(1) authorized the Attorney General, at his discretion, to suspend the deportation of an otherwise deportable alien who "has been physically present in the United States for a continuous period of not less than seven years [and] is a person of good moral character . . . whose deportation would result in extreme hardship to the alien or his spouse, parent, or child." 8 U.S.C. § 1254(a)(1) (1982), *repealed by* Pub. L. No. 104-208, Div. C, Title III, § 308(b)(7), 110 Stat. 3009-615 (1996).

departure to Thailand disrupted her otherwise seven-year continuous presence in the United States.[176] The Ninth Circuit held that because the alien had "intended at all times to return to the United States," her absence was not meaningfully interruptive, and that she could thus satisfy the seven-year requirement.[177]

The Supreme Court reversed. It explained that the Ninth Circuit's generous interpretation was belied by the plain language of the statute, which required seven years of "*continuous* physical presence" in the United States.[178] Instructively, the Supreme Court also expressly rejected the alien's claim that, in light of the ameliorative purposes of the suspension of deportation remedy, the Court should have adopted the more "generous" and "liberal" construction espoused by the Ninth Circuit.[179] Such a construction, the Court explained, was "impermissible in our tripartite scheme of government. Congress designs the immigration laws, and it is up to Congress to temper the laws' rigidity if it so desires."[180]

Similarly, in the post-*Chevron* case of *INS v. Hector*,[181] the Supreme Court was called upon to determine whether under former INA § 244(a)(1)[182] the "extreme hardship" to an alien's nieces was sufficient to qualify the alien for suspension of deportation.[183] The statute at issue expressly provided relief only where the hardship was to a "spouse, parent, or child."[184] During the administrative proceedings, the BIA held, as a matter of law, that a niece is not a "child" for purposes of the statute, and thus, the alien was ineligible for the relief she sought.[185] The Third Circuit, however, determined that the BIA had erred "in not giving sufficient consideration to whether [the alien's] relationship with her nieces was the functional equivalent of a parent-child relationship."[186] The Supreme Court reversed, citing *Phinpathya*, and explained: "even if [the alien's] relationship with her nieces closely resembles a parent-child relationship, we are constrained to hold that Congress, through the plain language of the statute [and as corroborated by the legislative history], precluded this functional approach to defining the term 'child.'"[187]

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176. *Phinpathya*, 464 U.S. at 185-86.
177. *Id.* at 187.
178. *Id.* at 189-91 (emphasis added).
179. *Id.* at 193-96.
180. *Id.* at 196.
181. 479 U.S. 85 (1986) (per curiam).
182. *Id.* at 86.
183. *Id.*
184. *See* 8 U.S.C. § 1254(a)(1) (1982) (repealed 1996); *see also Phinpathya*, 464 U.S. at 185-86.
185. *Hector*, 479 U.S. at 86-87.
186. *Id.* at 87.
187. *Id.* at 90 & n.6.

While the Supreme Court in *Phinpathya* and *Hector* did not expressly refer to the immigration rule of lenity, the Court did reject any notion that lenity has a role in statutory interpretation where the terms of the statute are clear. There is nothing in *Chevron* that eclipses this general principle, as borne out by the majority of circuit courts that have directly addressed the issue.[188] The rule of lenity simply has no place at step one.

B. Not at Step Two

Whereas *Chevron*'s step one inquiry aims to determine whether Congress has directly spoken to the issue, the step two inquiry turns on whether the agency's statutory construction is reasonable.[189] As the Supreme Court explained in *Chevron*, a "reasonable" agency interpretation is not necessarily the "reading the court would have reached if the question initially had arisen in a judicial proceeding," or "the only one [the agency] permissibly could have adopted."[190] In this way, reasonableness is a spectrum on which there are no "right" answers, only wrong ones that lie beyond it.[191]

Scholars have suggested two different approaches for using the immigration rule of lenity at step two of *Chevron*.[192] The first approach would require the Attorney General and his delegates to employ the rule of lenity when construing ambiguous immigration provisions.[193] The agency's failure to consider the rule of lenity under this approach would render the agency's interpretation unreasonable for *Chevron* purposes.[194] Under the second approach the court would review the agency's ultimate interpretation for reasonableness, and regardless of whether the agency

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188. *See* Castellano-Chacon v. INS, 341 F.3d 533, 543 (6th Cir. 2003); Valansi v. Ashcroft, 278 F.3d 203, 214 n.9 (3d Cir. 2002); Lara-Ruiz v. INS, 241 F.3d 934, 942 (7th Cir. 2001); United States v. Zavala-Sustaita, 214 F.3d 601, 608 n.11 (5th Cir. 2000) (all declining the opportunity to apply the rule of lenity to the interpretation of an unambiguous INA provision). *But see* Padash v. INS, 358 F.3d 1161, 1173 (9th Cir. 2004) (using the rule of lenity to buttress courts' interpretation of statute under *Chevron*'s step one).

189. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

190. *Id.* at 843 n.11.

191. *See* Barnhart v. Walton, 535 U.S. 212, 226 (2002) (Scalia, J., dissenting) (stating that there is not "only one 'correct' interpretation of a statutory text" but rather "a range of permissible interpretations"); *see also* Daniel Kanstroom, S*urrounding the Hole in The Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 735 (1997) (observing that under *Chevron* deference, the courts' inquiry is not whether the agency's interpretation is correct, but rather whether the interpretation is reasonable).

192. *See* Slocum, *supra* note 6, at 576.

193. *See id.*; *cf.* Alex Tallchief Skibine, *The* Chevron *Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes as States" Section of the Clean Water Act?*, 11 ST. THOMAS L. REV. 15, 28-29 (1998) (arguing that an agency must consider the canon favoring liberal interpretation of statutes as applied to Native Americans, and that a reviewing court should consider under step two whether the agency has applied this canon).

194. *See* Slocum, *supra* note 6, at 576.

applied the rule of lenity, the court would do so.[195] Both of these approaches are inappropriate because they impose undue constraint on the agency and are squarely at odds with *Chevron*'s deferential policy.

1. Courts Should Not Require Agencies to Construe Immigration Statutes Liberally

The first approach is flawed because, while the agency is certainly *free* to consider the rule of lenity in its role as a statutory gap filler (and indeed has done so on many occasions),[196] courts should not *require* the agency to apply the rule as a prerequisite for deference.[197] Immigration law represents an intricate web of policy considerations, ranging from those designed to protect the rights of aliens to those that preclude or strip away such rights. Applying the rule of lenity at step two would upset this delicate balance.[198]

Specifically, if the courts required the agency to apply lenity in every case where a statutory gap or ambiguity arose, it would unduly marginalize competing national interests—such as national security and foreign policy. A model that favors alien interests above all others could not be what Congress intended in delegating interpretational authority to the Attorney General.[199] Indeed, it would be an abdication of the Attorney General's delegated duty to blindly side with the alien in the face of competing public considerations.

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195. *See id.*

196. *See In re* Farias-Mendoza, 21 I. & N. Dec. 269, 273-75 (Bd. of Immigration Appeals 1996) (considering rule of lenity to favorably construe former INA § 241(a)(1)(E)(iii), 8 U.S.C. § 1251(a)(1)(E)(iii) (1994), relating to a waiver of deportability); *In re* Hou, 20 I. & N. Dec. 513, 520 (Bd. of Immigration Appeals 1992) (holding that an attempted firearms offense did not support a charge of deportability under former INA § 241(a)(2)(C), 8 U.S.C. § 1251(a)(2)(C) (1988), and citing to the immigration rule of lenity); *In re* Tiwari, 19 I. & N. Dec. 875, 881 (Bd. of Immigration Appeals 1989) ("Considering that there is apparently no legislative history to support the [INS's] position regarding the respondent's deportability, we note that any lingering ambiguities regarding the construction of the Act are to be resolved in the alien's favor."); *In re* G—, 9 I. & N. Dec. 159, 164 (Bd. of Immigration Appeals 1960); *In re* H—, 7 I. & N. Dec. 616, 617 (Bd. of Immigration Appeals 1957); *see also In re* Crammond, 23 I. & N. Dec. 9, 30 (Bd. of Immigration Appeals 2001) (noting that the BIA has "recognized and applied [the rule of lenity] with approval in over 30 precedent decisions issued since 1949") (Rosenberg, concurring).

197. *Cf.* Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & POL. 105, 132-33 (1997) (arguing that agencies should decide whether to invoke non-clear statement substantive canons).

198. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (requiring the "narrowest of several possible meanings"); *see also supra* notes 61-68 and accompanying text.

199. *See* INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2000).

2. The Courts Should Not Limit the Spectrum of Reasonableness in the Immigration Context

Nor would it be appropriate, under the second proposed approach, for the courts to use the rule of lenity as a litmus test for reasonableness. Professor Slocum, who is a proponent of this approach, largely bases his argument on the notion that some substantive canons of construction are appropriate for determining reasonableness, and that sound policy justifications exist for including the rule of lenity in that class.[200] However, even if one accepts the general proposition that substantive canons are an appropriate consideration in *Chevron*'s second step—and several commentators do not[201]—the immigration rule of lenity does not fit the mold of those that should be considered. Indeed, Professor Slocum himself recognizes that the rule would have to be "reconfigured" from a tie-breaker canon into a non-dispositive balancing factor in order to fit within *Chevron*'s framework.[202]

That was the apparent approach taken by the Second Circuit in *Rosario v. INS*,[203] and by the Fourth Circuit in *De Osorio v. INS*.[204] In *Rosario*, the Second Circuit found the BIA's interpretation of the term "domicile" in former INA § 212(c)[205] to be unreasonable, and supported its holding, in part, on "the principle that . . . ambiguous deportation provisions should be construed in favor of the alien."[206]

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200. Slocum, *supra* note 6, at 559-82.

201. *See Judicial Deference to Executive Precedent*, *supra* note 83, at 988 ("[I]f an agency interpretation is consistent with the language and purpose of a statute, it is hard to see how it could be condemned as unreasonable simply because a judicial canon would suggest a contrary result."); Chevron*'s Domain*, *supra* note 83, at 873 ("All norms and canons grounded in common law must give way to the *Chevron* doctrine."); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 576-90 (1997-1998) (arguing that *Chevron* deference should prevail over various substantive canons); *see also* Mich. Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1292 (D.C. Cir. 1989) (holding that *Chevron* deference trumps substantive canons, and thus declining to consider the canon requiring narrow constructions of antitrust law exceptions).

202. Slocum, *supra* note 6, at 543.

203. 962 F.2d 220 (2d Cir. 1992). *But cf.* Ruiz-Almanzar v. Ridge, 485 F.3d 193 (2d Cir. 2007) (declining to apply the rule of lenity at *Chevron*'s step two where the agency's interpretation was deemed reasonable, and not discussing or distinguishing its prior ruling in *Rosario*). For a discussion of the Second Circuit's treatment of the *Chevron*-lenity conflict in *Ruiz-Almanzar*, see *infra* note 237 and accompanying text.

204. 10 F.3d 1034 (4th Cir. 1993).

205. 8 U.S.C. § 1182(c), *repealed by* Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597 (1996)).

206. *Rosario*, 962 F.2d at 224-25 (finding the BIA's interpretation unreasonable because the BIA's construction of the term "domicile" was "inconsistent with its traditional common law meaning," and because the agency's interpretation "result[ed] in adding to the domicile requirement a residency requirement, which is not included in the language of the [INA]").

In *De Osorio*, the Fourth Circuit considered the rule of lenity in interpreting a different provision in former INA § 212(c), but nevertheless held that the BIA's interpretation was reasonable.[207] The court explained that the BIA's interpretation was permissible because, as opposed to the alien's interpretation, the BIA's interpretation was "most consistent with [congressional] intent."[208] The court further noted that while "lenity to the alien is an important principle in interpreting immigration statutes," the court did "not believe" lenity to have "the dispositive effect that the [aliens sought] to give it."[209]

De Osorio illustrates how courts may use the rule of lenity as a non-dispositive factor at step two, without necessarily trumping *Chevron* deference altogether. While this flexibility is certainly preferable to using the rule of lenity dispositively, even this measured approach goes too far. This is because a court's use of the rule of lenity as a balancing factor in step two effectively narrows the broad spectrum of reasonableness that *Chevron* affords.[210] Whatever merit there might be in limiting the concept of reasonableness in other administrative contexts,[211] it is absent in immigration matters, where the Judiciary has traditionally afforded heightened deference to the political branches.[212]

Such deference was exemplified in *INS v. Jong Ha Wang*, where the Supreme Court held—in unwavering terms—that the Attorney General was entitled to construe an immigration statute narrowly, if he so wished.[213] While *Wang* pre-dated *Chevron*, it may be regarded as a step two case, and indeed, was cited in *Chevron* as an example of implied delegation to which deference was due. [214]

In *Wang*, the agency deported the aliens (husband and wife) for having overstayed their visas.[215] While here illegally, they filed a motion with the BIA to reopen their deportation proceedings for the purpose of applying for

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207. *De Osorio*, 10 F.3d at 1036, 1043 (interpreting INA § 212(c), 8 U.S.C. § 1282(c) (1988)).
208. *Id.* at 1043.
209. *Id.*
210. *Cf.* Mich. Citizens for an Indep. Press v. Thornburgh, 68 F.2d 1285, 1292 (D.C. Cir. 1989) ("*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes.") (emphasis omitted); *see also supra* notes 189-91 and accompanying text.
211. *Cf.* Greenfield, *supra* note 57, at 47 (arguing in favor of applying the criminal rule of lenity at step two, and noting that doing so would "narrow[] the range of 'reasonable' or 'permissible' interpretations that fall within the scope of the agency's delegated authority").
212. *See supra* Part I.A; *see also* Motomura, *supra* note 6, at 604 (recognizing that the immigration rule of lenity invites undue intrusion into the agency's decision-making).
213. INS v. Wang, 450 U.S. 139, 144 (1981).
214. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 n.13 (1984) (citing *Wang*, 450 U.S. at 144).
215. *Wang*, 450 U.S. at 141.

suspension of deportation under former INA § 244.[216] The BIA denied the motion on the ground that the aliens failed to demonstrate a prima facie case that their deportation would result in "extreme hardship" to either them or their children so as to warrant the discretionary relief they sought.[217] In this regard, the BIA explained that "a mere showing of economic detriment is not sufficient to establish extreme hardship under the [INA]."[218] The BIA further held that "the alleged loss of educational opportunities to the young children of relatively affluent, educated Korean parents did not constitute extreme hardship within the meaning of [the statute]."[219] The Ninth Circuit, sitting en banc, remanded the case to the BIA, in part on the ground that the "statute should [have been] liberally construed to effectuate its ameliorative purpose."[220]

The Supreme Court reversed because "fundamentally, the [Ninth Circuit] improvidently encroached on the authority which the [INA] confers on the Attorney General and his delegates."[221] In this regard, the Court explained:

> The crucial question in this case is what constitutes "extreme hardship." These words are not self-explanatory, and reasonable men could easily differ as to their construction. But the [INA] commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.[222]

The Court continued: "The Attorney General and his delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so. Such a narrow interpretation is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy."[223]

While there is no express mention of the rule of lenity in *Wang*, the Supreme Court made clear that the Judiciary owed appropriate deference to the agency's statutory interpretation, notwithstanding its harsh effect on the alien. Nothing in the nature of the *Chevron* doctrine upsets this analysis. Indeed, the Supreme Court has explained that *Chevron* deference, as buttressed by the plenary power doctrine, is "especially appropriate in the immigration context."[224]

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216. *Id.* at 142; *see also supra* note 175 (discussing eligibility requirements for suspension of deportation).
217. *Wang*, 450 U.S. at 142-43.
218. *Id.* at 142.
219. *Id.* at 142-43.
220. *Id.* at 143.
221. *Id.* at 144.
222. *Id.*
223. *Id.* at 145.
224. INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999); *see also supra* Part I.A.

Specifically, in *INS v. Aguirre-Aguirre*,[225] the Supreme Court confronted the issue of whether *Chevron* deference applies to the legal interpretations adopted by the BIA through formal adjudication.[226] The BIA had held that the respondent, a native and citizen of Guatemala, was not entitled to withholding of deportation because he had committed a "serious nonpolitical crime" prior to his arrival in the United States.[227] The BIA considered the crime to be non-political because the criminal nature of the alien's acts outweighed the political nature of his acts.[228] The Ninth Circuit held that the BIA should have "supplement[ed] this weighing test by examining additional factors" and remanded the case to the BIA for that purpose.[229]

However, the Supreme Court reversed the Ninth Circuit on the ground that it had failed to accord the required level of deference to the interpretation espoused by the BIA.[230] Specifically, the Court explained that because the Ninth Circuit decision involved questions that implicated an agency's construction of the statute it administers, the Ninth Circuit should have applied *Chevron*'s two-step inquiry.[231] The Court pointed out that the INA charged the Attorney General with its administration and enforcement, and that the Attorney General had in turn delegated power to the BIA.[232] Based on that allocation of authority, the Court explained, the BIA should be accorded *Chevron* deference because the BIA gives ambiguous statutory terms concrete meaning through case-by-case adjudication.[233] Resonant of the plenary doctrine, the Court also emphasized that "judicial deference to the Executive Branch is *especially* appropriate in the immigration context, where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"[234]

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225. *Id.* at 415.
226. *Id.* at 418-19, 424-25.
227. *Id.* at 418, 421-22 (explaining that the BIA began its analysis by examining the respondent's involvement in various political protests in Guatemala and that those protests resulted in destruction of property and assaults on civilians).
228. *Id.* at 421-23 (repeating respondent's description of the political protests and the BIA's conclusion that the respondent had engaged in a "serious nonpolitical crime" under INA § 243, 8 U.S.C. § 1253(h)(2)(C)).
229. *Id.* at 423-24.
230. *Id.* at 424-25.
231. *Id.* at 424.
232. *Id.* at 425 ("The Attorney General, while retaining ultimate authority, has vested the BIA with power to exercise the 'discretion and authority conferred upon the Attorney General by law' in the course of 'considering and determining cases before it.'") (citing 8 C.F.R. § 3.1(d)(1) (1998)).
233. *Id.* (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 448-49 (1987)).
234. *Id.* (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)) (emphasis added); *see also supra* Part I.A (discussing the political branches' plenary authority over immigration matters).

Thus, as the Supreme Court has made clear, any notion of constricting agency discretion in the immigration context not only upsets *Chevron*, but also defies the traditional deference afforded under the plenary power doctrine.[235] That is not to suggest that the plenary doctrine itself displaces the rule of lenity; nor could it, as the two co-existed prior to *Chevron*. However, the plenary doctrine demands the maximum degree of deference that *Chevron* affords. To limit that deference in the immigration context would upset volumes of immigration jurisprudence and the fundamental principles on which that tradition was built.[236]

Consistent with this approach, the Second and Eighth Circuits have both expressly declined to apply the rule of lenity at step two in cases where the agency's interpretation was reasonable. Specifically, the Second Circuit in *Ruiz-Almanzar v. Ridge*—in deferring to the BIA's reasonable interpretation—explained:

> The rule of lenity . . . is one of last resort, to be used only after the traditional means of interpreting authoritative texts have failed to dispel any ambiguities. It cannot be the case, as Ruiz-Almanzar suggests, that the doctrine of lenity must be applied whenever there is an ambiguity in an immigration statute because, if that were true, it would supplant the application of *Chevron* in the immigration context . . . . We apply the rule of lenity only when none of the other canons of statutory construction is capable of resolving the statute's meaning and the BIA has not offered a reasonable interpretation of the statute. That is not the case here and thus we need not construe the statute in favor of Ruiz-Almanzar under the rule of lenity.[237]

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235. *See Aguirre-Aguirre*, 526 U.S. at 425 (indicating that the judiciary is not in the best position to "shoulder primary responsibility" from any repercussions that flow from a decision on whether a perpetrator should remain in the United States); *see also* INS v. Abudu, 485 U.S. 94, 110 (1988) ("INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context."); Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 278 (4th Cir. 2004) (stating that in giving deference to the Attorney General's regulation, it was "mindful of the fact that 'the power to expel or include aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control'" (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))).

236. *See supra* Part I.A.

237. 485 F.3d 193, 198-99 (2d Cir. 2007) (internal marks and citations omitted) (deferring to the BIA's interpretation of § 440 of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214, 1277). As noted above, the Second Circuit's treatment of the *Chevron*-lenity conflict in *Ruiz-Almanzar* appears to be in tension with its decision fifteen years earlier in *Rosario v. INS*, 962 F.2d 220 (2d Cir. 1992). In *Rosario*, the court appears to have considered lenity as a factor at step two in deeming the BIA's interpretation of a different immigration provision unreasonable. *Rosario*, 962 F.2d at 224-25. The Second Circuit in *Ruiz-Almanzar* did not cite to or otherwise distinguish *Rosario*. In *Mizrahi v. Gonzales*, the Second Circuit affirmed its ruling in *Ruiz-Almanzar* that the rule of lenity had no application at *Chevron* step two, but again, did not mention or discuss *Rosario*. *See* No. 05-0010-ag, 2007 U.S. App. LEXIS 15303 (2d Cir. June 27, 2007).

In similar fashion, the Eight Circuit in *Almador-Polameres* held:

> [T]he [BIA's] interpretation of the INA is entitled to deference, and we cannot say its interpretation was unreasonable . . . . And while Mr. Amador-Palomares urges us to invoke the rule of lenity, he ignores that the rule is applied only where there still exists an ambiguity after the reviewing court applies traditional methods of statutory construction. It does not supplant *Chevron* deference merely because a seemingly harsh outcome may result from the [BIA's] interpretation. [238]

As these courts properly held, the rule of lenity has no place in *Chevron*'s second step.

C. A Role For Lenity After Chevron

While the rule of lenity has no place within *Chevron*'s two-step framework, a role for lenity exists beyond *Chevron*—after the court determines that: (1) the statute is ambiguous; and (2) the agency's interpretation is unreasonable. The Ninth Circuit's decision in *Cuevas-Gaspar v. Gonzales*[239] illustrates this approach. The issue before the court in *Cuevas-Gaspar* was whether an alien's presence in the United States as a minor residing with his lawfully admitted mother should count towards the seven-year residency requirement for cancellation of removal eligibility.[240] The alien had been admitted to the United States as a lawful permanent resident in 1997, although his mother had attained that status in 1990.[241] The alien was placed in removal proceedings in 2003—less than seven years after he had acquired lawful permanent status—and the Immigration Judge ordered him removable based on his conviction for a crime of moral turpitude.[242] Specifically, the Immigration Judge pretermitted the alien's application for cancellation of removal on the ground that he had not acquired the requisite seven years of continuous

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If and when the Second Circuit attempts to reconcile these decisions, *Rosario* likely will yield, as the holding in that case arguably did not depend on the rule of lenity, which was but one of several factors that "supported" the court's conclusion that the BIA's interpretation of the statute was unreasonable. Moreover, *Rosario*—unlike *Ruiz-Almanzar*—did not directly address the conflict between *Chevron* deference and lenity.

238. 382 F.3d 864, 868 (8th Cir. 2004) (internal marks and citations omitted). *Amador-Polamares* involved an alien who entered the country illegally without inspection and was later convicted for possession of marijuana and solicitation of a prostitute. In the course of the alien's removal proceedings, the Immigration Judge denied his application for suspension of deportation on the ground that his solicitation offense rendered him lacking, per se, in good moral character, and thus ineligible for the relief he sought. On appeal to the BIA, the alien contended that his single conviction for solicitation did not render him per se lacking in good moral character under the relevant statutory provisions. The BIA affirmed without a separate opinion, and the Eighth Circuit affirmed the BIA. *See generally id.*

239. 430 F.3d 1013 (9th Cir. 2005).

240. *Id.* at 1021.

241. *Id.*

242. *Id.* at 1016-17.

residence in the United States prior to being placed into proceedings.[243] The alien argued on appeal to the BIA that he had satisfied the seven-year continuous resident requirement because his presence in the United States as a minor residing with his lawfully admitted mother should have counted towards the period. The BIA rejected the claim.[244]

In reviewing the BIA's decision, the Ninth Circuit applied *Chevron*'s two-step framework.[245] First, it found that the relevant statute was "silent as to whether a parent's status may be imputed to the parent's emancipated minor child for purposes of satisfying" the seven-year continuous residence requirement.[246] The court then proceeded, under *Chevron* step two, to determine whether the BIA's interpretation was reasonable.[247] After considering the "context of the statute as a whole," the court determined that the "BIA's interpretation [was] unreasonable," and thus the court owed the BIA no deference.[248] The court then proceeded to justify its own interpretation—that a parent's lawful permanent status could be imputed to minor children—as being consistent with the legislative purpose and intent of the cancellation of removal statutory scheme and the rule of lenity.[249]

Employing the rule of lenity as a consideration *after* determining that the court owes no *Chevron* deference—as the court did in *Cuevas-Gaspar v. Gonzales*—is the proper approach because it best effectuates Congress's intent that the Attorney General and his delegates (not the courts) resolve statutory ambiguities in the first instance.[250] Courts are then free to consider the rule of lenity in construing the statute in favor of aliens if, and only if, the agency's interpretation is unreasonable.

This approach is not only most consistent with the principles underlying the *Chevron* and plenary doctrines, but is also most consistent with the rule of lenity, which courts traditionally employ only as a doctrine of "last

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243. *Id.* Under the so-called "stop-time rule" enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(d), 110 Stat. 3009-587 (1996), the accrual of continuous residence required for cancellation of removal ends when deportation proceedings commence, or when the alien commits certain offenses. *See* INA § 240A(d), 8 U.S.C. § 1229b(d).

244. *Cuevas-Gaspar*, 430 F.3d at 1017.

245. *Id.* at 1022-26.

246. *Id.* at 1022.

247. *Id.* at 1024-26.

248. *Id.* at 1026.

249. *Id.* at 1028-29 ("Finally, we note that our interpretation adheres to the general canon of construction that resolves ambiguities in favor of the alien.") (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)).

250. *Cf.* Krzalic v. Republic Title Co., 314 F.3d 875, 877-78 (7th Cir. 2002) (Posner, J.) (explaining that *Chevron* "hands over (with certain qualifications) interpretive responsibility to the officials responsible for making policy judgments, when the ordinary interpretive tools used by courts, such as textual interpretation, do not work well").

resort."[251] To say that the immigration rule of lenity has no place within *Chevron* is neither an abdication of the rule itself nor of the venerable policy interests it aims to promote. It simply puts those policy considerations in their proper place in relation to more compelling policy interests advanced by the *Chevron* and plenary doctrines.

CONCLUSION

This Article reconciles the conflict between the rule of lenity and *Chevron* in cases where the Attorney General's interpretation of ambiguous immigration statutes inures to an alien's detriment. While the rule of lenity calls for favorable statutory interpretations of ambiguous immigration statutes, *Chevron* more broadly demands that courts defer to reasonable agency interpretations. Approaches that seek to reconcile the conflict by incorporating the rule of lenity within *Chevron*'s two-step framework do violence to the competing doctrines at issue. The better approach is for courts to employ the rule of lenity as a tool of last resort only after the court first finds that the statute is ambiguous and that the agency's interpretation is unreasonable. This approach comports most with the principles underlying both the *Chevron* and plenary doctrines. It is also most consistent with the rule of lenity itself, which is meant to be applied as a thumb on the scale only when there is nothing left from which to choose.

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251. Ruiz-Almanzar v. Ridge, 485 F.3d 193, 198 (2d Cir. 2007); *see also* Valansi v. Ashcroft, 278 F.3d 203, 214 n.9 (3d Cir. 2002); *supra* notes 60-71 and accompanying text.

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SYMPOSIUM

HOLES IN THE FENCE: IMMIGRATION REFORM AND BORDER SECURITY IN THE UNITED STATES

FOREWORD

MICHAEL L. CULOTTA* & AIMEE J. FREDERICKSON**

"Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!" –from the Statue of Liberty[1]

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* J.D., May 2007, American University Washington College of Law. Senior Symposia Editor, *Administrative Law Review*, 2006-2007. I would like to thank Professor Andrew Popper, Quynh Vu Bain, and David McConnell for your insight and advice with respect to the symposium and for shaping my understanding of immigration law, to Aimee Frederickson for your patience and diligence on this endeavor, to the Staff of the *Administrative Law Review* for your tireless effort, and to Maria Raccuglia for your endless support.

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1. EMMA LAZARUS, THE NEW COLOSSUS (1883) (internal quotations omitted), *available at* http://www.libertystatepark.com/emma.htm.

TABLE OF CONTENTS

INTRODUCTION

The terrorist attacks of September 11, 2001, dramatically demonstrated the shortcomings of the United States immigration system. Not only did 9/11 expose a real and tragic security risk, but its aftermath also demonstrated spectacular inefficiency in the system when the then Immigration and Naturalization Service (INS) approved the visas of two hijackers nearly six months after they died in the attacks.[2] Since 9/11, immigration—particularly to the extent that it is intertwined with terrorism and border control—has been at the forefront of the nation's consciousness.[3] Legislative responses to the perceived crisis in immigration have included the USA PATRIOT Act,[4] the Homeland Security Act,[5] the Intelligence Reform and Terrorism Prevention Act,[6] and the REAL ID Act.[7] These acts have impacted the immigration system substantively and administratively, reorganizing the agencies overseeing immigration,[8] increasing corroboration requirements,[9] increasing the

2. Catherine Etheridge Otto, *Tracking Immigrants in the United States: Proposed and Perceived Needs to Protect the Borders of the United States*, 28 N.C. J. INT'L L. & COM. REG. 477, 477-78 (2002).

3. *See id.* (noting that after 9/11, Congress immediately began evaluating immigration policy and border security issues).

4. Pub. L. No. 107-56, 115 Stat. 272 (2001) (allowing the Attorney General to indefinitely detain any non-citizen believed to be a threat to national security and further adding a bar to asylum for any individual connected to terrorism in any way).

5. Pub. L. No. 107-296, 116 Stat. 2135 (2002) (abolishing the Immigration and Naturalization Service, establishing the Department of Homeland Security (DHS), and placing DHS in control of immigration and asylum).

6. Pub. L. No. 108-458, 118 Stat. 3638 (2004) (increasing the number of personnel patrolling the border).

7. Pub. L. No. 109-13, Div. B § 101, 119 Stat. 302 (2005) (amending 8 U.S.C. § 1158 by altering the evidentiary burdens in asylum cases, allowing judges to require corroborating evidence in such cases, even where the asylee is determined to be credible, and allowing both DHS and the Department of Justice (DOJ) to make determinations regarding asylum and asylum status).

8. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

9. REAL ID Act, Pub. L. No. 109-13, Div. B § 101, 119 Stat. 302.

number of personnel patrolling United States borders,[10] and expanding authorization for detaining immigrants—particularly for immigrants who are undocumented or fall under the new and extremely expansive definition of "terrorists."[11] Political pressure to control the borders resulted in the Secure Fence Act of 2006.[12]

Efforts to relieve the backlog of cases that already burdened the Board of Immigration Appeals (BIA or Board) have not entirely improved the efficiency or efficacy of the immigration system.[13] The system is characterized by long waits for legal entrance,[14] with an estimated 3.7 million immigrants since 2000 who did not—or could not—wait for legal documents before entering.[15]

The *Administrative Law Review*'s 2007 symposium, *Holes in the Fence: Immigration Reform and Border Security in the United States*, examined administrative issues presented as the country considers how to handle an overburdened immigration system that is vital to protecting and promoting the nation's humanitarian, economic, and security interests. Perhaps the greatest challenge is writing—and implementing—laws and regulations that balance the humanitarian concerns facing immigrant populations while simultaneously protecting the nation's security and economic interests. The panelists in the symposium focused specifically on issues relating to border control and adjudication. Collectively, the panelists responded to recent changes in immigration laws and regulations, discussed the impact of these laws and regulations, and proposed changes that might better serve the system.

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10. Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108-458, § 5202, 118 Stat. 3734 (2004).

11. *See* Immigration and Nationality Act, 8 U.S.C. § 1226 (c)(1) (2000) (mandating detention for aliens who are inadmissible or deportable because they committed certain types of crimes or are suspected of terrorist activity); 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) (defining "terrorist activity" as the use of any "explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain)"); 8 U.S.C. § 1226(a) (allowing mandatory indefinite detention for any non-citizen the Attorney General certifies, under the expansive definition of terrorism); 8 C.F.R. § 1003.19(i)(2) (2006) (requiring that, where DHS challenges an Immigration Judge's release of a detainee, the non-citizen must continue to be detained for the duration of the appeal).

12. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006) (to be codified in scattered portions of 8 U.S.C.).

13. *See* Stephan Ohlemacher, *Number of Illegal Immigrants Hits 12M*, BREITBART.COM, Mar. 7, 2007, http://www.breitbart.com/article.php?id=D8G6U2KO8&show_article=1 (discussing how efforts to curb illegal immigration have not slowed the pace of people entering the United States illegally).

14. *See* DEP'T OF STATE, VISA BULLETIN FOR AUGUST 2007 (2007), http://travel.state.gov/visa/frvi/bulletin/bulletin_3269.html (indicating that the wait to enter the country may be more than ten years).

15. Steven A. Camarota, *Immigrants at Mid-Decade: A Snapshot of America's Foreign Born Population in 2005*, BACKGROUNDER (Dec. 2005), http://www.cis.org/articles/2005/back1405.pdf.

This Foreword seeks to introduce some of the major issues and debates in the arena of immigration and administrative law. Part I of this Foreword outlines recent developments in the law following the 9/11 terrorist attacks and highlights the major challenges facing the United States with respect to border control and national security. Part II examines the adjudicatory system for aliens once they cross the border and highlights the major drawbacks of the "streamlined" immigration adjudicatory process.

I. BORDER CONTROL AND COMPREHENSIVE IMMIGRATION REFORM

A. Legislative and Administrative Changes

With over fourteen million newcomers—legal and illegal—the 1990s witnessed the most immigration in one decade in American history.[16] Because of this massive wave of immigration, the United States has experienced rapid changes and challenges in integrating these diverse new populations.[17] With many Americans turning their attention to immigration issues, the 9/11 terrorist attacks exposed many holes in the U.S. immigration system, particularly with respect to regulating the border.[18]

Congress responded to these issues with a flurry of activity. In 2002, Congress passed the Homeland Security Act which reshuffled a series of federal government agencies into the newly created United States Department of Homeland Security (DHS).[19] The main purpose of the Act was to provide for the common defense of the American people by uniting into a single agency those federal elements which carry the primary responsibility of securing the United States homeland.[20] Congress disbanded INS, moved most of the immigration responsibilities to DHS, and made U.S. border security one of its primary responsibilities.[21]

To carry out this mandate, Congress, in conjunction with the Secretary of Homeland Security, divided the responsibilities of DHS into three main agencies. First, in the Homeland Security Act, Congress created the

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16. *See* U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS: 2005, Table 1 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/table01.xls (indicating that approximately 9.8 million immigrants gained lawful permanent resident status between 1990 and 1999); JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 2 (2006) (indicating that, between 1990 and 1999, approximately 4.9 million aliens entered the United States illegally and remained in the United States without authorization).

17. DORIS MEISSNER ET AL., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER, at xiii (2006).

18. *See generally* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 383-94 (2004) [hereinafter 9/11 COMMISSION REPORT].

19. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

20. H.R. REP. NO. 107-609, at 63 (2002).

21. Homeland Security Act §§ 101, 471(a).

Bureau of Citizenship and Immigration Services (BCIS) and gave BCIS the responsibility of overseeing adjudications of immigrant visa petitions, naturalization petitions, asylum and refugee applications, and adjudications performed at immigration service centers.[22] Second, under the statutory authority granted by Congress in the Homeland Security Act, Secretary Tom Ridge created the United States Customs and Border Protection (CBP) and charged it with the oversight of the movement of goods and people across U.S. borders.[23] Third, Secretary Ridge created the Bureau of Immigration and Customs Enforcement (ICE) and charged it with enforcing the full range of immigration and customs laws within the interior of the United States.[24]

This massive reorganization was not the last congressional mandate to significantly impact immigration. In 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act,[25] which mandated that the Secretary of Homeland Security dramatically increase (1) the number of border patrol agents, (2) the number of full-time immigration and customs enforcement investigators, and (3) the amount of bed space available for detained aliens.[26] The REAL ID Act, passed in 2005, increased the standards for federal acceptance of state identification cards.[27] Additionally, Congress granted the Secretary of Homeland Security the authority to waive all legal requirements necessary to ensure the expeditious construction of barriers and roads along the border.[28]

DHS quickly responded to this legislation. In 2005, DHS established the Secure Border Initiative (SBI)—a comprehensive plan to secure United States borders and reduce illegal migration.[29] SBI includes a series of long-term goals, namely: to increase the number of United States Border Patrol agents securing the border; to expand detention and removal capabilities with respect to aliens attempting to gain illegal entry into the United States; to use and upgrade technology to control the border; to increase investment in infrastructure improvements which will allow DHS to more effectively secure the border; and to increase interior enforcement of immigration laws.[30]

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22. Homeland Security Act § 451(b).
23. Press Release, Dep't of Homeland Sec., Border Reorganization Fact Sheet (Jan. 30, 2003), *available at* http://www.dhs.gov/xnews/releases/press_release_0073.shtm.
24. *Id.*
25. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).
26. *Id.* §§ 5202-04, 118 Stat. at 3734-35.
27. REAL ID Act, Pub. L. No. 109-13, Div. B § 202, 119 Stat. 231, 311-15 (2005).
28. *Id.* § 102, 119 Stat. at 306.
29. Press Release, Dep't of Homeland Sec., Fact Sheet: Secure Border Initiative (Nov. 2, 2005), *available at* http://www.dhs.gov/xnews/releases/press_release_0794.shtm.
30. *Id.*

Facing pressure to close the holes in immigration legislation, Congress passed the Secure Fence Act, which aims to control the international land and maritime borders of the United States.[31] Most significantly, Congress mandated the Secretary of Homeland Security to provide for at least two layers of reinforced fencing and to install additional physical barriers, roads, lighting, cameras, and sensors for over 800 miles along the United States-Mexico border.[32]

B. Holes in the Fence

Many Americans have criticized the piecemeal approach of Congress and DHS, perceiving it as a failure to secure the nation's borders. The Secure Fence Act raises numerous practical and theoretical considerations. The feasibility and cost of constructing nearly 800 miles of new fencing along the United States-Mexico border is a major concern. Although Congress authorized up to $1.2 billion to build a fence, some estimate that the actual cost is as high as $6 billion.[33] Further complicating matters, shortly after passing the Secure Fence Act, Congress gave DHS leeway to distribute the $1.2 billion earmark to a combination of projects—not just the physical barrier along the southern border.[34] DHS has voiced its preference for building a much cheaper "virtual fence," and this discretion could eliminate any chance that a major physical barrier will be built.[35] The United States will incur additional costs in the operation and maintenance of a multi-layered fence along the border.[36] In light of these cost issues, former Undersecretary for Border and Transportation Security Asa Hutchinson quipped that despite a multi-billion dollar fence, a determined alien with a five dollar ladder can climb the fence and enter the United States.[37] Alternatively, one could simply walk to the end of the fence, or a hole in the fence, and illegally cross the border.

The timing of the fence construction is also a key issue. The Secure Fence Act mandated DHS to achieve operational control over U.S. borders in eighteen months; however, the appropriations act, which sets aside

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31. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).
32. *Id.* § 3.
33. Suzanne Gamboa, *Bush Signs U.S.-Mexico Border Fence Bill*, WASH. POST, Oct. 26, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/26/AR2006102601094.html?referrer=emailarticle.
34. Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, 120 Stat. 1355, 1359-60 (2007).
35. Spencer S. Hsu, *In Border Fence's Path, Congressional Roadblocks*, WASH. POST, Oct. 6, 2006, at A1.
36. John Pomfret, *Fence Meets Wall of Skepticism*, WASH. POST, Oct. 10, 2006, at A3.
37. Asa Hutchinson, *Keynote Address*, 59 ADMIN. L. REV. 533, 541 (2007).

the $1.2 billion, envisions a five-year plan.[38] Secretary Chertoff has set an internal goal at DHS of two to three years.[39] Recent government reports indicate that DHS is failing to meet proposed benchmarks with respect to its border control programs—further stalling the process.[40]

Another political and practical consideration involves comprehensive immigration reform. It will be difficult, and some argue impossible, for DHS to achieve successful border control without the complementary enforcement of immigration laws.[41] Critics posit that DHS must reduce the economic incentive to illegally migrate to the United States by investigating and prosecuting businesses that hire illegal aliens.[42] Additionally, President Bush has continuously called for a temporary guest worker program to provide employers with foreigners willing "to do jobs Americans are not doing," but critics argue that such a move would amount to amnesty and would undermine the current immigration system and, essentially, the rule of law.[43]

There are many other topics of concern with respect to the Secure Fence Act. Environmentalists are concerned that the construction of a fence could interfere with the natural habitat of many species along the border.[44] Federal, state, and local governments may need to build roads to the border to facilitate the construction of the fence, which could facilitate entry into the United States rather than prohibit it.[45] Some federal officials are concerned that Congress is imposing on states most familiar with border terrain a political calculus to determine exactly where a fence should be built.[46]

Finally, general opposition to the construction of a physical barrier between the United States and Mexico is prevalent. Making a parallel to the Berlin Wall, Mexican President Felipe Calderón said that the proposed fence is "a grave mistake" which would strain relations between the two allies and ultimately lead to more Mexican deaths along the border.[47] Critics of the fence also stress the human rights considerations for aliens

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38. Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, 120 Stat. at 1359-60.
39. Hsu, *supra* note 35.
40. *See, e.g.*, GOV'T ACCOUNTABILITY OFFICE, SECURE BORDER INITIATIVE: SBINET EXPENDITURE PLAN NEEDS TO BETTER SUPPORT OVERSIGHT AND ACCOUNTABILITY 2-9 (2007).
41. *See* Gamboa, *supra* note 33.
42. *Id.*
43. *Id.*
44. *See* Pomfret, *supra* note 36.
45. *See id.*
46. *See* Hsu, *supra* note 35.
47. *Mexico Anger Over US Border Fence*, BBC NEWS, Oct. 27, 2006, http://news.bbc.co.uk/2/hi/americas/6090060.

illegally crossing the border and urge government officials to ensure these aliens will be treated with due process.[48] Many wonder whether the Secure Fence Act will be successful.

II. RACE TO THE CIRCUIT COURTS: STREAMLINING PROCEDURES AND INCREASED LITIGATION

When immigration agencies were reorganized under DHS following 9/11, the Executive Office of Immigration Review (EOIR)—the agency that adjudicates immigration cases—remained housed in the Department of Justice (DOJ).[49] Included in EOIR are Immigration Judges (IJs) and the BIA. At the time Attorney General John Ashcroft announced the final rule instituting the streamlining procedures in 2002, a backlog of 56,000 cases were pending before the BIA, 10,000 of which had been pending for at least three years.[50] Particularly in a post-9/11 world, it was clear that some measure needed to be taken. The result was 8 C.F.R. § 1003.1, more commonly referred to as the "streamlining regulations."

A. Changes to the Adjudication Process

Immigration cases can be long and complex, involving several levels of appeal. An IJ first hears the case.[51] After the IJ issues a decision, both the government and the immigrant may appeal to the BIA.[52] After the BIA issues a decision, only the immigrant has the right to appeal, and the appeal is filed directly in the federal circuit court corresponding to the jurisdiction in which the IJ sits.[53]

In 1999, in an effort to increase the speed of the appellate procedure, the Attorney General issued the precursor to the streamlining procedures, which, among other things, allowed the BIA to use an affirmance without opinion (AWO).[54] Use of the AWO began to speed up adjudication, and by

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48. *See* Sara Ibrahim, *Panel: United States Border Control and the Secure Fence Act of 2006*, 59 ADMIN. L. REV. 569, 572 (2007) (citation omitted).

49. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

50. Press Release, Dep't of Justice, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002), *available at* http://www.usdoj.gov/eoir/press/02/BIARestruct.pdf.

51. 8 C.F.R. § 1003.14 (2006).

52. *Id.* § 1003.1(b).

53. 28 U.S.C. § 1491(a) (2000).

54. 8 C.F.R. §§ 1.1-3.11 (1999) (describing the BIA appellate procedures prior to the institution of the streamlining regulations); Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135-36 (Oct. 18, 1999) (introducing affirmances without opinion).

2001, the BIA decided 31,846 appeals.[55] However, with a remaining backlog of over 56,000 cases, the Attorney General decided to further streamline the appellate process. During the year 2002, when the new regulations were put in place, the BIA decided 47,311 cases—a 50% increase from 2001 and an average of nearly 4,000 cases decided per month.[56]

Prior to the institution of the streamlining regulations, every case was decided by a three-member panel. The streamlining regulations changed this system, making single-judge decisions the norm.[57] Only in certain types of cases, including where there are inconsistencies between decisions of immigration judges, where there is the need to establish precedent, or where resolution of particularly important controversies is necessary, may the single judge recommend a case to the three-member panel for consideration.[58] The streamlining regulations not only expanded the permitted use of AWOs, but mandated their use in certain types of cases.[59] The regulations also changed the standard of review. Previously, the Board reviewed IJ findings de novo; since the regulations were put in place, the Board has used a clearly erroneous standard.[60] The DOJ noted that implementing this standard would "bring the Board's standards of review into conformity with appellate courts throughout the country."[61] Finally, the streamlining procedures reduced the number of members of the Board from twenty-three to eleven.[62]

The stated goals of the streamlining procedures were to increase the speed of the adjudication process and to reduce the BIA backlog, and these goals have clearly been met. However, the result has not reduced the current burden or caseload for the BIA, and it has significantly increased the burden in the federal courts.

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55. DORSEY-WHITNEY LLP, STUDY CONDUCTED FOR: THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE, AND PRO-BONO Appendix 9 (2003), http://www.ilw.com/articles/2003,1126-dorsey.pdf [hereinafter DORSEY-WHITNEY STUDY].

56. *Id.*

57. 8 C.F.R. § 1003.1(e) (2007).

58. *Id.* § 1003.1(e)(6).

59. *Id.* § 1003.1(e)(4).

60. *Id.* § 1003.1(d)(3).

61. Press Release, Dep't of Justice, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002), *available at* http://www.usdoj.gov/eoir/press/02/BIARestruct.pdf.

62. Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878, 54,881 (Aug. 26, 2002).

B. Due Process Concerns and Proposed Reasons for Increased Appeals

Since 2002, the Board's use of AWOs has risen from 10% to over 50% of all the decisions it issues.[63] Before the institution of the streamlining regulations, petitioners appealed approximately 100 cases per month from the BIA to the federal circuit courts.[64] By January 2003, the number of appeals per month peaked at 910.[65] Before the regulations, petitioners challenged only about 7% of the BIA decisions.[66] Now, petitioners challenge about 25% of BIA decisions generally, and 40% of those arising in the Second and Ninth Circuits.[67]

Many petitioners have challenged the regulations as a violation of due process.[68] All of these challenges have failed.[69] Courts have consistently held that the BIA's use of the AWO does not detract from the noncitizen's ability to receive an individualized determination, nor is there a constitutional requirement for the BIA to issue reasons for its decisions.[70] Although appellants have made arguments that *Mathews v. Eldridge* requires "meaningful review," courts have found that this does not entitle appellants to "meaningful review" *by the BIA*.[71] Rather, appellants are entitled to an opportunity to be heard and to have review by the federal courts.[72] As such, the streamlining regulations do not violate due process.

Although the streamlining procedures are constitutional, they nevertheless have caused an influx of cases at the federal circuit level. Some believe that immigrants languished in the United States for years waiting for appeals before the Board; now that the process takes significantly less time, immigrants appeal to the federal circuit, seeking to

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63. DORSEY-WHITNEY, SUMMARY OF FINDINGS AND CONCLUSIONS 2 (2003), http://www.dorsey.com/files/upload/Summary-Conclusion_DorseyABAStudy.pdf.

64. *Id.* at 3.

65. DORSEY-WHITNEY STUDY, *supra* note 55, at Appendix 26.

66. John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. Sch. L. Rev. 13, 20 (2006-2007).

67. *Id.*

68. *See* Dia v. Ashcroft, 353 F.3d 228, 238-45 (3d Cir. 2003) (analyzing due process issues and concluding that the streamlining regulations violate neither the Immigration and Nationality Act nor the Constitution); *accord* Falcon Carriche v. Ashcroft, 350 F.3d 845, 850 (9th Cir. 2003); Georgis v. Ashcroft, 328 F.3d 962, 967 (7th Cir. 2003); Mendoza v. United States Att'y Gen., 327 F.3d 1283, 1289 (11th Cir. 2003); Saodjede v. Ashcroft, 324 F.3d 830, 832 (5th Cir. 2003); Albathani v. INS, 318 F.3d 365, 377 (1st Cir. 2003).

69. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,881 (Aug. 26, 2002).

70. *See Dia*, 353 F.3d at 240 (noting that the AWO process is not substantially different from the process where federal courts issue judgments without decisions, and further that the process of using an AWO indicates there was, in fact, individualized review).

71. *See id.* at 242 (stating that an alien has neither a constitutional right to a meaningful administrative appeal, nor a constitutional right to an administrative appeal at all).

72. *Id.*

extend their time in the United States.[73] Another theory proposes that the Board's increased use of AWOs and increased number of cases has caused an increased rate of final orders resulting in removal, and thus accounts for the increased number of appeals.[74]

Practitioners have also raised concerns about the quality of the IJ decisions being affirmed by the BIA. The AWO affirms the result of the case—though not necessarily the reasoning—and leaves the IJ decision as the final agency decision on the matter. Practitioners have voiced concern about the quality of IJ decisions. Federal courts have similarly critiqued the quality of many of the decisions coming from the IJs and BIA. The Second Circuit went so far as to strongly recommend that the BIA review every decision made by a particul ar judge.[75]

Creating regulations to remedy the problems challenging the appeals process is difficult because, as John R.B. Palmer notes, whether to appeal a case is "ultimately a question of human behavior that depends on many individual choices."[76] Regardless of the ultimate reason for the increase in appeals, the court systems still must find a way to manage the new immigration case load. The Board, likewise, should carefully balance the need to maintain an efficient system with the need to produce just and fair results.

CONCLUSION

In a post-9/11 world, border control and immigration reform are high priorities for the United States. As legislators and regulators push forward with drafting new laws and regulations in this arena, they must balance the need for national security and the rule of law with the compassion of a nation built on immigration. DHS must consider the consequences of building a wall along the border of an ally. Additionally, DOJ must weigh the expenditure of limited resources with the due process rights of aliens.

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73. Thomas Hussey, Director, Office of Immigration Litigation, U.S. Dep't of Justice, Remarks at the American University Washington College of Law Administrative Law Review Symposium: Holes in the Fence: Immigration Reform and Border Security in the United States (Mar. 20, 2007) (recording available at http://www.wcl.american.edu/secle/video.cfm); *see also* Executive Office of Immigration Review, Fact Sheet (Sept. 15, 2004), *available at* http://65.36.162.162/files/BIAStreamlining.pdf (noting that to the extent that courts are routinely granting stays of deportation pending their review, the incentive to file an appeal and to request a stay will be high).

74. *See* DORSEY-WHITNEY STUDY, *supra* note 55, at Appendix 24 (graphing the increased rate of denials as the number of AWOs increased during the period from 2000 to 2002).

75. *See* Ray Rivera, *Court Urges Review of New York Judge's Immigration Cases That Are on Appeal*, N.Y. TIMES, Feb. 25, 2007, at A25 (reporting that a federal appeals court recommended that "'it may improve judicial efficiency' if the Board of Immigration Appeals 'closely re-examined'" all cases still on appeal from Judge Jeffrey S. Chase).

76. Palmer, *supra* note 66, at 20.

The United States is standing at the doorstep of an opportunity to transform its immigration system into a vehicle of prosperity for generations to come.

The panelists in this symposium will offer insight and solutions with respect to these issues. We hope that the perspectives presented in this symposium will impact the outcome of this national debate.

KEYNOTE ADDRESS

THE HONORABLE ASA HUTCHINSON*

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW
WASHINGTON, DC
MARCH 20, 2007

I am delighted to be with you, and it's good to be on the campus of American University Washington College of Law. My time at Homeland Security was an extraordinary period in my life and I'm delighted to see that, on a subsequent panel, you're going to have some real heroes of homeland security who have worked in the field and provided great leadership in border security. You've got an exciting group of panelists later on today.

My role today is to provide a bit of an overview of immigration reform, border security, and the direction in which our country is headed. I left Congress because the President asked me to head up the Drug Enforcement Administration. One month after going there, the events of 9/11 occurred, which changed the scope of America and the emphasis of the government. The President subsequently asked me to leave the Department of Justice to help set up the new Department of Homeland Security (the Department or Homeland Security).

I have never had a tougher job in my life. In fact, if the doctor called me into his office and told me that I only had one year to live and asked me how I wanted to spend it, I would respond that I would want to spend it at Homeland Security, because the year I spent there was the longest of my life. Even though it was—and still is—a tough environment, it is probably one of my most rewarding experiences because it allowed me to engage in a national mission that is critical to our future—critical to the security of America.

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* Under Secretary for Border and Transportation Security, U.S. Department of Homeland Security (2003-2005); J.D., University of Arkansas School of Law; B.S., Bob Jones University.

I appreciate American University for hosting this symposium on immigration law at a time when our nation has never been more focused on the challenge of immigration enforcement, immigration reform, and immigration fairness. The *New York Times* talks about immigration as the hot topic in the presidential race. Senator Sam Brownback, Senator McCain in Iowa, and others get hit constantly with immigration questions in their town meetings. I can identify with that because I have held a lot of town meetings myself.

Also, today in the *Washington Post*, there is a story about the Inspector General's report finding that the Department of Homeland Security is ill-equipped to oversee the growing detention caseload resulting from the Department's increased emphasis on enforcement.[1] Immigration is on the forefront of issues facing our nation, and you have an opportunity to influence the debate and the outcome.

Those of you who are practitioners and judges have a heavy load to carry, and I thank you for your service. When I was in Homeland Security, I was able to reconnect with a friend of mine, George Proctor, who was a United States Attorney in the Department of Justice back in the 1980s with me. He too was from Arkansas. He eventually went to Los Angeles and became an administrative law judge handling immigration cases. I went out to Los Angeles to do a border inspection and see the work firsthand. I actually went out with a fugitive apprehension team at about 5:00 A.M., saw all the field agents working, and then went to an immigration judge's courtroom. This experience showed me the struggles that immigrant families, judges trying to make the right decisions, and practitioners trying to apply a rule of law in a challenging and complex area, face every day.

Immigration courts have a heavy caseload with completion rates having increased by 34% between 2002 and 2006.[2] The caseload is increasing. The workload is increasing. Immigration judges' decisions increased by 61% during the same period, which is a significant increase.[3] It is a challenge for those who represent aliens. It is significant that from 2002 to 2006, attorneys represented between 35% and 48% of the aliens in court, showing that the attorney caseloads have increased.[4]

This is a hot topic. I know it's a hot topic because I came off of the campaign trail last year in a race for governor of Arkansas. Yes, I ran as a Republican, and, yes, I lost. Let me give you some advice: do not run for office after overseeing immigration enforcement and drug enforcement.

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1. *See U.S. Agency Ill-Equipped to Deport Immigrants*, WASH. POST, Mar. 20, 2007, at A4.
2. *See* OFFICE OF PLANNING, ANALYSIS, & TECH., U.S. DEP'T OF JUSTICE, FY 2006: STATISTICAL YEAR BOOK A1 (2006).
3. *See id.*
4. *See id.* at G1.

The ads can really be funny if you have a sense of humor; seeing me wave in—literally wave in—on TV, one million illegal aliens to the United States, saying, "Welcome. Our doors are open." Obviously, that is not the case—but truth can get lost in a campaign. There is a high level of accountability whenever you are in immigration enforcement—and there should be.

As one of the fastest growing Hispanic areas of the nation, with a significant Asian-American population as well, Arkansas is an interesting case study. While I served in Congress, immigration casework was the largest area of casework that our office handled. I found the immigration system perplexing in terms of the volume of cases, the backlog we experienced, the task of case management, and the complexity of the issues. There is a reason for the challenge and the complexity of the issues in immigration cases—there are two great American values in conflict.

The first value is the integrity of the law. As a federal prosecutor and someone who has sworn to uphold the Constitution of the United States, I believe in the integrity of the law and I believe in the rule of law. Consequently, I come down, in terms of immigration law, on the enforcement side. This belief is also a great American value. You go to law school because you understand that value; you want to uphold that value.

At the same time we are a compassionate nation that has our roots in welcoming immigrants to this country. We are conflicted between these two great values: the rule and integrity of the law versus the compassion of our country. While I was in the enforcement arena at Homeland Security, I was often asked why we weren't arresting the illegal aliens and why our agents weren't doing their work. Well, they *were* doing their work. However, many times, when they were out there, we would find out that we apprehended the valedictorian of the class or the star of the football team. Then, the entire community would rise up and ask us why we were picking on these people. These experiences exemplify the conflict between the compassion of America and the rule of law.

In a small town in Arkansas, there is a timber mill, and the owner of that mill told me a story that illustrates the challenges and complexity of immigration enforcement. Immigration officials once raided the plant, and as the officials checked the paperwork, as they always do, they found no violations. They found all the paperwork perfectly in order and documented on the employer side. After examining the paperwork, they went into the plant. In the plant they found twenty illegal workers. The paperwork was fine and in full compliance; however, illegal workers were still working in the plant. This exemplifies the obvious challenge of documents and the legitimacy of those documents. They arrested those

twenty workers and deported them. On average, those illegal workers had been in the country for five years. They were settled in the community. Their children were going to school. They were active in the churches, and so the community had compassion. Then the employer tried to fill those twenty slots. He went through two hundred applicants, found twenty finally, but only two of them lasted more than two weeks. It was hard to find workers who were willing to do the work. The government enforced the law, but the uprooting of the families tore at the heartstrings of the community.

The rule of law must prevail. If the enforcement of the law runs counter to the best traditions of our nation, then the reform debate is set in motion. This is what we are seeing today.

The reason I focused on the enforcement side of the immigration debate is that Americans can remember that we've done this before. In the 1980s, under President Ronald Reagan, we had comprehensive immigration reform where we addressed the issue of illegal aliens who were in our country. We gave them a legal status and a path to citizenship.

The promise that we made then was that this was going be a once-and-for-all reform and that we were going to tighten our borders so that we wouldn't have to deal with the problem of illegal aliens in our country again. That was the 1980s. Twenty years later we have twelve million illegal aliens in our country. People wonder what we'll do ten years from now even if we have comprehensive reform and give legal status to those who are presently here. That's the fundamental question we have to ask: whether ten years from now we'll again be dealing with another ten million who have illegally crossed our border and an immigration system that is moth-eaten and void of integrity.

We do not want to be in the same conflict ten years from now. Therefore, we must concentrate on the security side, the enforcement side, the side of integrity. Once people have confidence in the system, then we can address the twelve million who are here and give them a legal status. I fully support, once we have created confidence in the system and address the enforcement side, giving a legal status to those twelve million here, or whatever that number will be.

The big debate is whether legal status for those twelve million people will be a temporary worker permit, which would require immigrants to return home before they can start on the path to citizenship, or whether it will be some type of path that allows them to earn their citizenship. The

solution must address the compassionate side of America and comprehensive reform cannot ignore those who already live here, have their families here, and are part of the fabric of our society.

I know from experience that reform is difficult. Former Attorney General John Ashcroft was entirely too gleeful when he learned about the transfer of the former Immigration and Naturalization Service (INS) from the Department of Justice to the new Department of Homeland Security. When he handed off INS to me, he wished me luck.

Reform is difficult and it was difficult at the newly created Department of Homeland Security. It was my responsibility to take the fragmented pieces of the dissolved INS, because the responsibility was still there, as well as to realign those pieces to function together.

We reorganized the elements of INS and divided the responsibilities between a service side and an enforcement side.[5] People today continue the debate of whether this reorganization works, or whether we should change things again. However, we should be mindful as we look at Homeland Security and evaluate its reorganization; it takes several years before a reorganization can be successfully completed. I assert it is more difficult to reorganize in the government environment, and yet, we measure the success for the Department of Homeland Security every day. We should remind ourselves that next March, it will have only been five years since Congress created the Department. Therefore, there still has to be a level of patience. There has to be time to judge the success of the reorganization.

I believe that the reorganization has been helpful in terms of INS having divided the service responsibility from the enforcement side. The reorganization placed the inspection services into Customs and Border Protection (CBP) and the enforcement agents into the Immigration and Customs Enforcement (ICE). Immigration services were separated into Citizenship and Immigration Services (CIS). Hopefully this will help all the agencies to be more effective.

I want to make four quick points. First, the momentum is in place for a fundamental change in the handling of immigration cases. Second, comprehensive immigration reform will happen. Third, the reform must

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5. The service aspects, including asylum and naturalization, became the responsibility of the U.S. Citizenship and Immigration Services, while the enforcement side became the responsibility of the U.S. Immigration and Customs Enforcement and the U.S. Customs and Border Protection. *See* U.S. Citizenship and Immigration Services, *About Us*, http://www.uscis.gov/portal/site/uscis (follow "About USCIS" hyperlink) (last visited Aug. 2, 2007); U.S. Immigration and Customs Enforcement, *About Us*, http://www.ice.gov/about/operations.htm (last visited Aug. 2, 2007); U.S. Customs and Border Protection, *Protecting Our Borders Against Terrorism*, http://cbp.gov/xp/cgov/toolbox/about/mission/cbp.xml (last visited Aug. 2, 2007).

include tools for employers to verify the legal status of workers. Finally, the reform package must include resources for adjudicating and processing immigration cases.

We cannot have a system in which the notice to appear turns into permission to disappear. This is why we must seize the opportunity to fundamentally reform the processing of cases. In 2003, I was down in Laredo, Texas. I went to the border—fellow panelist Lee Bargerhuff remembers this—and I tried to get ingrained in the process in order to understand how it worked. I was Under Secretary for Border Security at this time and had oversight responsibilities, but I didn't understand the ins and outs of immigration law. Therefore, while I was getting briefed on this, I started asking questions such as, "What happens to people from Central America when agents apprehend them?" The answer was that since we didn't have the detention space for them, we had to give them a notice to appear in immigration court. 80% of these people didn't show up. The notice to appear turned into permission to disappear because when they didn't show up, they were already in our country. They're into the system, and they can be lost. At that time, there was no expedited removal, there was insufficient detention space, and immigration courts gave undocumented immigrants who came into our country the notice to appear.

Much of that has changed. As a person who values the rule of law, this was unacceptable to me. So, I asked how much it would cost to develop expedited removal along the southern border. Congress had previously given broad authority to the old INS, but INS failed to use it. The answer was that it would cost over $100 million to have the detention space and the processes in place to accomplish this.

I didn't have $100 million in my budget, so I asked what it would take to do it just along the Arizona border in the Sonora Desert. They gave us a figure and we implemented it as a part of our Arizona Border Control Initiative. We squeezed the dollars together and increased the detention space. This started to change the dynamic. Now if someone comes in from Central America, you can use expedited removal instead. And if they insist upon going to court, you can detain them in a detention space. You don't simply give them a notice to appear. Suddenly the immigration courts were able to process the cases more quickly. Detention space increased, so we saw a reduction in immigration case filings between 2005 and 2006.[6] I hope some of the later panelists will address why there has been that decrease. I'm sure there are a lot of different reasons for it, but one possibility is that expedited removal has had an impact on the filing of

6. *See* OFFICE OF PLANNING, ANALYSIS, & TECH., U.S. DEP'T OF JUSTICE, *supra* note 2.

those immigration cases. As we increase border enforcement, expand expedited removal, and reduce the use of the notice to appear, we start changing the dynamics of the entire system.

I like to illustrate border security in terms of the person from Guatemala who sits in his home, looking at a family that he wants to feed. He hears from his brother-in-law in the United States that he could sneak across the border illegally, get a job, make money, and be able to send it back home to provide for his family. Well, this is obviously tempting to this gentleman, so he analyzes the risks. He could pay a coyote $2,000 and risk capture by the Border Patrol—a risk which has substantially increased. He could risk death in the Sonora Desert. He might take those risks because he knows that when he gets through, he can get a job in the United States. However, we change the dynamics if the immigrant knows he is going to sit in a detention facility when the government catches him, instead of the authorities releasing him into our society. We change the dynamics further if, in the event that he makes it into our society, he still cannot get a job for lack of proper documentation. If the person knows this, will he still come? I think the answer is no, because his motivation for immigrating is economic relief. If he is unable to obtain economic relief due to the security system, he will not come. All of a sudden the dynamics change along the border. So, the entire system needs comprehensive change. And I think we are on the verge of just such an opportunity.

The second point I will make is that immigration reform will happen. It will happen because those two great values in our nation of compassion and respect for the rule of law are in conflict right now, which created this enormous debate. People are flouting the rule of law and the integrity of the immigration system in many ways; our current system is not working to any casual observer. You have shows like *The Broken Border* that illustrate the issue. The media drives the issue. It's a boiling point for people who are saying we have to have tighter enforcement, we have to have immigration laws that work, and we have to confront the issue of the twelve million illegal aliens already in this country.[7]

As one columnist reported, if you wanted to export illegal aliens, you would have to line up buses from San Francisco to Alaska to have enough.[8] Further, the question remains as to whether the American people would stand for this type of action. This calls for immigration reform. With the

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7. *See* JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 1 (2006), http://pewhispanic.org/files/reports/61.pdf.

8. *See* George F. Will, Op-Ed, *Guard the Borders—and Face Facts, Too*, WASH. POST, Mar. 30, 2006, at A23.

President supporting it, and with the Democratic Congress saying it is needed and criticizing the Republican Congress for not accomplishing it, the political dynamics are in place to move the issue forward.

Immigration reform will require allocation of additional resources for technology and personnel. We have already seen some of these investments, whether it's 6,000 National Guard members replaced by 6,000 border patrol agents, or physical barriers and fencing for various areas of the border. These are all part of the reforms taking place.

It should also be a reminder that 40% of the illegal aliens in the United States do not sneak across our border. 40% of the twelve million illegal aliens are here because they came legally but then overstayed their visas.[9] This is why the technology for United States Visitor and Immigrant Status Indicator Technology (US-VISIT) is critical to comprehensive border security. It's about the Border Patrol agents, but it is also about technology and programs, such as US-VISIT, which promotes the use of biometric checks. We now know who comes into our country, who leaves it, and who overstays his or her visa.

This program of the Department of Homeland Security has been a huge success. To illustrate how it works, I will give you an example of a lady who came into our country from Nigeria in 1996. She came legally; she had a visa. She went to North Carolina and overstayed her visa. She committed a crime and then decided to flee our system of justice. She then went back to Nigeria and seven years later, wanted to reenter the United States. This is not an uncommon story. Before returning, she got a false identity and a false passport and entered the Atlanta International Airport. The difference, however, is the presence of Homeland Security and the US-VISIT biometric checks. She arrived in Atlanta and presented her false passport to the inspector. He swiped it through his system, and nothing came up on his monitor, which alerted the inspector that the woman's identity was fraudulent. The inspector then asked the woman to place her two index fingers on a scanning device. This system identified the crime that the woman committed in North Carolina and the visa overstay. We will continue to phase in and to develop this system and America will be more secure because of it.

Part of the comprehensive approach to immigration reform should include more money for detention facilities. There needs to be an expansion of the interior enforcement capability. Until the person who

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9. *See* PEW HISPANIC CENTER, MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 1 (2005), http://pewhispanic.org/files/factsheets/19.pdf.

wants to come into our country knows that when he or she enters, he or she will not be able to get a job, we will not be able to have comprehensive and successful reform.

The Secure Fence Act of 2006 (Act) dictates that the Department of Homeland Security must have operational control over U.S. borders within eighteen months as part of an effort to curb illegal immigration along the southern border. I remember going down to Arizona and announcing the Arizona Border Control Initiative back in 2004. We said one of the objectives was to get operational control of the border. The next question was what the definition of operational control was. So, we tried to define it. The Act defines operational control to mean the prevention of all illegal entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband. In the Arizona Border Control Initiative, we did not define it quite as narrowly or stringently as the Act had done.

It would probably be easier to get operational control of the southern border than the northern border. The last statistic I am familiar with stated that the United States has approximately 11,000 border patrol agents on the southern border and between 1,000 and 2,000 on the massive expanse of our northern border.[10] Historically we have evidence of more terrorists coming across our northern Canadian border than our southern border. But much of the public's attention is on the southern border.

We have enormous challenges in terms of our northern border, and I think we are going to have to do more than just talk about the southern border. We will have to put resources along the northern border as well. A fence is not the total answer. It is going to involve new technology, as well as our federal government's partnership with local governments. The best border security on the northern border is the grandmother who has lived in her house on the border for seventy years. She sits in her home and watches that border and calls border patrol when she sees something suspicious. This is probably the most effective tool we can have on the northern side.

Only by investing adequate resources and through comprehensive reform of immigration will we be able to achieve operational control of the southern border in eighteen months. We will not be able to obtain operational control of that border without dealing with interior enforcement and employer tools. To illustrate, people selling a five dollar ladder can defeat a thirty million dollar fence by climbing over it at certain points. This is a little simplistic. But, the greatest border fence can be overcome

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10. *See* CONG. RESEARCH SERV., RL32562, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL 18 (2005).

by someone with an intense desire for freedom or economic benefits. One's will can overcome a lot of fences. Therefore, we have to have comprehensive reform and enforcement.

A third point is that immigration reform requires tools or ways for employers to detect false documentation. Some people talk about this in terms of employer sanctions, which are important—you have to have the enforcement side. But we have to give our employers, such as the employer from a small town in Arkansas, tools to distinguish between illegal and legal workers. All of his documents were in perfect order, but the illegal aliens were still able to get jobs because they had false documentation.

We must develop an online system similar to the one used by credit card companies—where you give a restaurant your visa, they swipe it through a system, and they can check your credit very quickly. Employers must have the capacity to verify a potential employee's legal status here by checking with INS, Social Security, and other agencies to make sure that the job applicant has a legal presence here before the employer hires them. This type of online system will give employers the necessary tools to reduce the magnetic power that brings illegal workers to our country.

Although we will not be successful without giving employers the tools to know of a worker's legal status, there will always be some unscrupulous corporation or employer that tries to circumvent the system by bringing in lower cost, illegal workers. Therefore, we must have the capability to enforce the process. That responsibility falls within Immigration and Customs Enforcement. The government has provided more resources to them, and they are continuing to develop their capacity.

We received a lot of criticism after 9/11 because the government shifted the limited resources allocated for employer enforcement to national security targets—for example, verifying the workers in the Sears Tower or at a nuclear facility. That led to a great deal of skepticism by the American public that we weren't really serious about employer sanctions. We are starting to shift the focus back, but our lack of tools with which we can provide employers has handicapped our enforcement. Prosecution for immigration violations is not always easy. For example, the federal government prosecuted Tyson Foods in Mississippi for employing illegal aliens. However, the jury acquitted Tyson because it did not find that the company had the requisite intent.[11] This shows how hard it is for the

11. Greenberg Traurig, LLP, *Immigration News Flash: Update on Tyson Food Immigration Conspiracy Case* (Mar. 28, 2003), http://www.gtlaw.com/practices/immigration/news/2003/03/28a.htm (last visited Aug. 2, 2007).

agents to prove an employer's intent to hire illegal workers when the employer has insufficient tools and criteria to make sure they are not hiring illegal workers.

Congress needs to address reform in terms of resources for immigration judges, attorneys, and case personnel. Every time we presented a reform package to the Office of Management and Budget (OMB), to the administration, and ultimately to Congress, we made the case that if there will be more agents, there must also be more immigration lawyers and judges. There must be more resources to handle the cases and more Assistant U.S. Attorneys on the border states. This way, border states can process the cases that are criminal in nature. Consequently, comprehensive reform must include the ability to handle the caseload. The entire system will not work unless the front-end border enforcement complements the back-end's ability to provide relief and fair adjudication of cases in a timely manner.

It is also important that we develop an effective online system for immigration cases. I mentioned that when I was in California, I went out with the fugitive operations team. After we went out and made our arrest that morning, they showed me the files. I was startled to see the A files—the paper file that the agency had to physically transport if the courts transferred the case to a different jurisdiction. In today's world, with millions of pending cases, you cannot have an effective paper system. The agencies have tried, but they need more resources and more funding to complete the online filing system for immigration cases. The physical A file is a recipe for lost files, slow processes, and bad outcomes. This will take an investment, but it's essential. And the public's voice is important to Congress as they look at immigration reform, to make sure that it is truly comprehensive in terms of the front-end border security and the back-end processing and day-to-day handling of those cases.

For immigration reform to be effective, there has to be cooperation and partnership at the international, state, and local levels. The partnership needs to start between our nations. This is why we worked to develop cooperation and partnerships with former Mexican President Vicente Fox and with the leadership in Canada. We also had a good working group of ambassadors at the consular offices to certain Central American countries with whom we regularly met. We worked with them as they went to the detention facilities along the border and interviewed the citizens from their countries. We also needed their cooperation if their citizens would return to their countries, because these leaders had to give us permission to land. They legitimately wanted to know what their citizens' records were and

what kind of crimes they might have committed. These leaders also wanted to know whether their citizens were legitimate asylum seekers. Cooperation at the international level was very, very important.

There must also be cooperation at the state level. Historically, the states have pushed the responsibility for immigration onto the federal government. I have noticed, since I just ran for governor, that many of the possible solutions to these issues come from governors. When Governor Napolitano and Governor Bill Richardson said the federal government was not doing an adequate job, and that they were going to start addressing it with some state resources, these comments drove Congress to act. Consequently, some of the states are helping to drive the issue of immigration reform.

This partnership must include an exchange of information. The state and federal governments can share resources. We have contributed funding so that the border patrol could create a partnership with local law enforcement. This partnership allowed the federal government to reimburse local law enforcement for overtime. This was a good partnership and a good use of resources.

Cooperation also needs to be in terms of the REAL ID Act,[12] which has had enormous consequences as states toughen up the requirements to get a driver's license. The states are balking at it, but it is a good example of our federalism in action. I don't think it's necessarily the federal government's job to fund every state's identification for its citizens and create all of the databases for identification across our country. I think it's a fair partnership because the state must do a better job and the states are going to have to invest in it. There are going to be real consequences when the REAL ID Act is in place.

I talked about two competing values. If we can accomplish comprehensive immigration reform, if we can improve the handling of cases, if we can provide meaningful access to our courts by those seeking admission to our country, then we will have a system that respects the rule of law and is consistent with the compassion of this great nation. It is important to remember the place of asylum cases. We have to remember the place of legitimate claims that have to be brought before immigration judges. We have to remember our history of immigration and that immigrants are a part of the fabric of America. We cannot lose that.

Asylum deserves to be talked about. When I was in Homeland Security, I saw a movie about asylum. The movie showed that when asylum seekers arrive in the United States, some might have fraudulent documents because that might have been the only way to get on the plane in order to get here.

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12. *See* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005).

However, those fraudulent documents also mean that these asylum seekers have committed a crime. Thus, they face imprisonment. These people deserve a fair hearing. When Homeland Security implemented expedited removal, we went through very stringent training requirements to ensure we addressed the issue of asylum seekers. We did this to make sure that we did not ignore the legitimate requests of these people in utilizing expedited removal and that we trained the officers in appropriate measures.

I struggled with the values and the enforcement responsibilities while I was in Homeland Security. I'll end with a story. My wife and I were on a short vacation when she asked me to go into an antique store. There were some old books in the store that I started perusing through until I saw a book that was published over 100 years ago. Henry van Dyke, who was a Princeton University professor, had written the book and entitled it, *The Spirit of America*.[13] The book was a series of lectures in Europe—actually at the University of Paris—in 1910, when he had tried to build better U.S.-French relations.[14] Over 100 years later, I thought his message was still timely. I got that book and I started looking through some of his lectures in which he described the character of America. He used one phrase in particular: "Americans are a people of idealists set about to accomplish a very practical task." I think that comment was in reference to the founding of our country and the creation of our country, but I'll also apply it to today.

Historically, America has been unique because the country has not had two different classes of people: the citizen class and a temporary worker class. The American people viewed those who came to the United States as future citizens of this great country. It might take years and learning the language, but, ultimately, the goal was to become citizens.

Europe is paying the price for keeping those two distinctions. Those countries did not strive for assimilation. The result has been a feeling of isolation in the immigrants, particularly in the Islamic community. They were simply there as temporary workers. They were different from everybody else. They did not weave themselves into the fabric of Europe. In the United States, we've done it differently. We've been much more successful in assimilating immigrants. Historically, anytime somebody has been here seven, eight, or nine years, temporary status or otherwise, our inclination is to make them part of America. Then the question becomes, is that going to change?

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13. *See* HENRY VAN DYKE, THE SPIRIT OF AMERICA (1910).
14. *See id.* at vii.

I think that we need to create a meaningful path for workers to come to our country. The workers provide the energy that helps keep the economy moving. But there has to be a legal path. We can debate changing the legal side and the quotas system. Those are not arbitrary, but they are subjective judgment calls; we can debate the specifics as to how they should be changed. When I sat on the Judiciary Committee of Congress, in the Immigration Subcommittee, we dealt with quotas and the question of raising them. I am familiar with the political pressure from constituents not to raise those quotas because Americans might need those jobs. Also, there was a sense that we had too much pressure from illegal immigrants.

Again, I believe that you have to have a meaningful legal path for alien workers. You can increase the quotas, but you first have to convince Americans that we are going to have a system with integrity. There will always be more people seeking to come to this country than we can allow, so there is always going to be waiting involved. But we have to have a process in place to fairly evaluate these cases. We cannot simply tell them that it's going to be twelve years before a court can hear their case due to a backlog or lack of resources. There's a great work demand, and I have no problem with changing the quotas and legal process. My home state of Arkansas is an agricultural state that needs agricultural workers. The legal process of helping them move from their countries is very, very cumbersome. We need to improve it.

When you're talking about securing America or protecting America from terrorists, please understand that we have not lost our love of civil liberties, commerce, and cherished constitutional liberties, but we have the practical task to secure our country. When it comes to immigration reform, we've not lost our compassion. We've not lost the fabric of immigrants as being a part of our society. However, we do have a practical task to once again give integrity to our immigration system. That is what I think immigration enforcement is all about, and that is what I hope will become the hallmark of immigration reform as it moves forward this year.

WHEN THE DELUGE HITS AND YOU NEVER SAW THE STORM: ASYLUM OVERLOAD AND THE SECOND CIRCUIT

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TABLE OF CONTENTS

INTRODUCTION

In 2002, federal circuit courts began to experience an unprecedented surge of immigration appeals. Within a relatively short period of time, waves of petitions for review from agency decisions in asylum cases were washing ashore. The volume was unexpected, and the circuits where the bulk of the cases were being filed, primarily the Second and Ninth Circuits, had to face the problem and make decisions on how to deal with the increasing caseload. This paper describes what occurred in the Second Circuit (the Court), the options that the Court considered, and the unique and creative way the Court ultimately dealt with the problem. It will not

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discuss in any depth explanations for the deluge.[1] Rather, the focus will be on solutions for handling such a crisis and a short description of general legal issues relevant to asylum cases.

I. REVIEW OF ASYLUM, WITHHOLDING OF REMOVAL AND CONVENTION AGAINST TORTURE CLAIMS IN FEDERAL COURT

Prior to enactment of the REAL ID Act of 2005,[2] expulsion orders[3] were challenged in the federal courts under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[4] Petitioners challenging a final order of removal within the meaning of 8 U.S.C. § 1252(a)(1) could file a petition for review in the circuit where the immigration judge (IJ) issued the order of expulsion.[5] An order of expulsion by an IJ becomes final either when the time for filing an appeal expires, and no appeal is filed, or when the Board of Immigration Appeals (BIA) affirms the order.[6] The deadline for filing an appeal to the BIA is thirty days from the date on which the IJ decision is orally stated or, if the decision is written, mailed.[7] If the IJ grants relief but the BIA reverses, then the BIA decision is considered the final expulsion order.[8]

The REAL ID Act made significant changes to IIRIRA relating to the jurisdictional bars that purport to strip the courts of the authority to review, among other things: determinations that an asylum application is untimely,[9]

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1. For an in-depth examination of this subject, see John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005) and John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 14 (2007) [hereinafter Palmer, *Immigration Surge*].

2. Pub. L. No. 109-13, § 106, 119 Stat. 231, 310 (2005) (to be codified as amended at 8 U.S.C. § 1252).

3. "Expulsion" is a general term used to denote three types of proceedings and orders: exclusion, deportation, and removal. Exclusion and deportation were used prior to April 1, 1997 when the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) replaced them with the removal proceeding. Exclusion was used for aliens who had not entered the United States, while deportation was used for those who had. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW & POLICY 380-82 (3d ed. 2002).

4. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (amending the Immigration and Nationality Act (INA) of 1952).

5. *See* 8 U.S.C.A. § 1252(b)(2) (West 2005).

6. *See* 8 U.S.C.A. § 1101(a)(47)(B) (West 2005).

7. *See* Executive Office of Immigration Review, 8 C.F.R. §§ 1003.3(a)(1), 1003.38(b), 1240.15 (2006).

8. *See* Del Pilar v. U.S. Att'y Gen., 326 F.3d 1154, 1156-57 (11th Cir. 2003); *see also* Huang v. INS, 421 F.3d 125, 128 (2d Cir. 2005) (implicitly treating this type of BIA decision as the final order).

9. *See* 8 U.S.C.A. § 1158(a)(3) (West 2005).

denials of certain discretionary relief other than asylum,[10] and removal orders against aliens who have committed certain crimes.[11] Prior to the REAL ID Act, the federal courts had interpreted the IIRIRA's jurisdictional bars as applying to petitions for review under 8 U.S.C. § 1252 or 1105a, but not to habeas corpus petitions filed in the district courts under 28 U.S.C. § 2241.[12] The rationale was, at least in part, that preventing review in any court would raise serious concerns under the Suspension Clause of the U.S. Constitution.[13] Therefore, the Supreme Court interpreted IIRIRA to mean that those barred under the law from requesting review in the circuit courts could still file habeas corpus applications in district courts.[14]

Under the REAL ID Act, Congress explicitly stated that final orders of removal could not be challenged under, among other things, 28 U.S.C. § 2241 or "any other habeas corpus provision."[15] Suddenly, habeas corpus cases pending in the district courts were instead supposed to be in the circuit courts as petitions for review. Consequently, shortly after the date of enactment, May 11, 2005,[16] the district courts began transferring a significant number of § 2241[17] immigration habeas corpus cases to the circuits as petitions for review.[18] This change in the law has been a major factor in the continuing surge of immigration cases into the circuit courts.

The two questions before a circuit court in reviewing a final order of expulsion are: (1) what decision is being reviewed; and (2) what is the standard of review. In the immigration context, the court has two agency decisions: that of the IJ and the BIA. The court must ultimately decide which reasoning the agency intended to rest its decision. However, this reasoning is not always clear. This will be more fully explored in the discussion of the BIA streamlining process.

The circuit court reviews de novo both questions of law and the application of law to undisputed facts.[19] Nevertheless, where the BIA's interpretation of statutory and regulatory language resolves a question of law, the court must defer to that interpretation in certain situations.[20]

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10. *See id.* § 1252(a)(2)(B).
11. *See id.* § 1252(a)(2)(C).
12. *See* Gorsira v. Chertoff, 364 F. Supp. 2d 230, 231-34 (D. Conn. 2005).
13. *See* U.S. CONST. art. I, § 9, cl. 2.
14. *See* INS v. St. Cyr, 533 U.S. 289, 299-314 (2001).
15. *See* Pub. L. No. 109-13, § 106, 119 Stat. 231, 310 (2005) (to be codified as amended at 8 U.S.C. § 1252(a)(2)(A)).
16. *See* Pub. L. No. 109-13, 119 Stat. 231 (2005).
17. 28 U.S.C.A. § 2241 (West 2006).
18. As an aside, issues are coming up under the REAL ID Act in the Second Circuit, which possibly implicate the Suspension Clause of the Constitution. For example, because the REAL ID Act precluded habeas corpus review in the district court, dismissing a petition for review as untimely for having been filed beyond the thirty-day deadline creates Suspension Clause issues.
19. *See* Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003).
20. Where the INA is silent or ambiguous as to a particular legal standard, the court gives *Chevron* deference to the Attorney General's and BIA's construction as long as it is

Most denials of asylum, withholding, and Convention Against Torture (CAT) claims are based on evidentiary issues and, therefore, require the circuit court to review administrative findings of fact. Review is under the substantial evidence standard.[21] However, an agency's reliance on an improperly stringent standard constitutes legal, not factual error, and the court reviews de novo whether such a standard has been used.[22] The Second Circuit has held that it "will *reverse* the BIA only if no reasonable fact-finder could have failed to find the past persecution or fear of future persecution necessary to sustain the petitioner's burden"[23] or "will *vacate* BIA conclusions, as to the existence or likelihood of persecution, that a perfectly reasonable fact-finder *could* have settled upon, insofar as the BIA either has not applied the law correctly, or has not supported its findings with record evidence."[24]

II. THE STORM GATHERS

The Second Circuit encompasses the states of New York, Connecticut and Vermont, with its courthouse residing in lower Manhattan. Following the events of September 11, 2001, it was not unexpected that there could have been an immigration crackdown and that the Court could have seen an increase in filings. As the Court began to see such an increase, many assumed that it was due to a crackdown. In fact, this assumption was erroneous. It became clear that there was another element at work which was more likely responsible for the surge.

As discussed earlier, in order to exhaust administrative remedies, an asylum petitioner whose claim is denied by an IJ must first appeal that decision to the BIA. If the Board issues a decision affirming a denial by the IJ, this decision may be appealed to the circuit court. For reasons that are unclear, the BIA, an agency located within the Department of Justice, began to experience a backlog of appeals from IJ decisions during the 1990s,[25] which grew to over 56,000 cases.[26]

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reasonable. *See* INS v. Aguirre-Aguirre*,* 526 U.S. 415, 424-25 (1999); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*,* 467 U.S. 837 (1984). The court will reject the interpretation of the agency if it is unreasonable or contrary to clear congressional intent. *See* INS v. Cardoza-Fonseca*,* 480 U.S. 421, 447-48 (1987).

21. 8 U.S.C.A. § 1252(b)(4)(B) (West 2005) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.").

22. *See* Edimo-Doualla v. Gonzales*,* 464 F.3d 276, 281 (2d Cir. 2006).

23. Qiu v. Ashcroft, 329 F.3d 140, 149 (2d Cir. 2003) (emphasis in original) (quoting Diallo v. INS, 232 F.3d 279, 287 (2d Cir. 2000)).

24. *Id.*

25. One commentator has hypothesized that the backlog may have grown as a result of a number of factors: an increase in appealable immigration judge (IJ) decisions resulting from increased migration and expulsion; an increased number of IJ's issuing decisions; an increased enforcement of sanctions against those who hire illegal aliens; frequent

In late 1999, the Department of Justice first began addressing the growing backlog with a regulation meant to streamline procedures within the BIA.[27] The regulation contained two provisions relevant to this discussion. Under the regulation: (1) cases could be assigned to single BIA members rather than panels; and (2) BIA members could affirm IJ decisions without issuing an opinion (AWO) in limited types of cases.

As the number of outstanding cases continued to grow, Attorney General John Ashcroft decided in 2002 to further streamline BIA procedures and eliminate the backlog.[28] As a result, most cases could be AWO, and three member panels would become the exception rather than the rule.[29] This move became especially relevant to circuit courts since such courts began to notice the change. The expanded streamlining procedures included:

(1) allowing AWO's in claims for asylum, withholding, and CAT relief;
(2) allowing AWO's in claims for suspension of deportation and cancellation of removal;
(3) almost all cases would be eligible to be heard by one member;
(4) BIA could no longer engage in fact finding; and
(5) the number of Board members was reduced from twenty-three to eleven.[30]

Thus, cases were being decided more quickly, and many of them ended up at the Court's door. The BIA's rate of decision-making doubled, and the rate of applications to the circuits increased five-fold.[31]

III. THE DELUGE

Between April 2002 and September 2005, the number of petitions for review rose by more than three times the amount in the previous thirty years combined.[32] To put this into context, in 2001, administrative appeals accounted for just 5.8%, or 262 cases filed in the Second Circuit. In just one year, the number of appeals grew to 603. By 2004, there were 2,747

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amendments to INA by Congress; internal management problems. *See* Palmer, *Immigration Surge*, *supra* note 1, at 17 n.18.

26. *See* Attorney General John Ashcroft, News Conference, Administrative Changes to Board of Immigration Appeals (Feb. 6, 2002), *available at* http://www.yale.edu/lawweb/avalon/sept_11/ashcroft_011.htm; *see also* Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed,* L.A. TIMES, Jan. 5, 2003, at A1.

27. *See* Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999).

28. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

29. *See id.* at 54,880.

30. *See* Palmer, *Immigration Surge*, *supra* note 1, at 17-19.

31. *See id*. at 19-20. However, the reasons for the discrepancy in the rate of appeals to the circuit courts will not be addressed herein.

32. *See id.* at 14.

such cases or 39.2% of the Court's caseload.[33] The vast majority of those were immigration appeals.[34] By August 2005, the backlog reached almost 5,000.[35]

A large number of the petitions for review have been asylum-related, where petitioners claim refugee status, and as a result, seek to avoid expulsion from the United States. Between April 2002 and March 2006, the Second Circuit received, on average, 171 petitions for review *per month*. This is more than the Court had previously seen in an entire year. Prior to 2002, petitions for review accounted for less than 4% of the Court's docket. By 2006, it was over 36%.[36] According to the Third Branch, between 2002 and 2003 the percentage increase in BIA appeals was 781%.[37]

IV. HANDLING IMMIGRATION CASES BEFORE AND AFTER THE SURGE

Before the streamlining at the agency level, the Second Circuit had a manageable immigration caseload. Essentially, the Court handled the cases in the ordinary course as with all other appeals. Nevertheless, the Court stood apart from other circuits in addressing immigration cases. Generally, the Second Circuit hears oral argument on all appeals—even those which are pro se—except for most prisoner cases.[38] Unlike other circuits, the Second Circuit sits approximately forty-two weeks per year and hears oral argument every day in which it sits. In addition, the Circuit had a unique arrangement with immigration cases. In every other circuit, the Office of Immigration Litigation (OIL) represented the government in immigration cases.[39] Until May 15, 2005, the U.S. Attorneys' Office for the Southern District of New York (USAO) represented the government in the Second

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33. John M. Walker, Jr., Chief Judge, U.S. Court of Appeals, Second Circuit, Keynote Address at the New York Law School Law Review Symposium: Seeking Review: Immigration Law and Federal Court Jurisdiction (Sept. 26, 2005), *available at* http://www.nyls.edu/pages/3733.asp.

34. *See id.*

35. Press Release, John M. Walker, Jr., Chief Judge, U.S. Court of Appeals, Second Circuit, Non-Argument Calendar in the Second Circuit Court of Appeals (Aug. 4, 2005), *available at* http://www.nywd.uscourts.gov/document/Non-Argument%20Calendar.pdf.

36. These figures are based on data from the Administrative Office of the United States Courts. *See generally* U.S. Courts: Statistical Reports, http://www.uscourts.gov/library/statisticalreports.html.

37. *See Immigration Appeals Surge in Courts*, THE THIRD BRANCH (Fed. Courts, Washington D.C.), Sept. 2003, at 2, *available at* http://www.uscourts.gov/ttb/sep03ttb/immigration/index.html.

38. 2D CIR. LOCAL R. 34.

39. *See* U.S. ATTORNEYS' MANUAL, Title 4, Immigration Litigation, § 4-7.010, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/7mciv.htm (The Office of Immigration Litigation (OIL) litigates in the federal courts on behalf of the Immigration and Naturalization Service). The handling of immigration litigation by the U.S. Attorneys' Office (USAO) for the Southern District of New York pre-dated the establishment of OIL.

Circuit. This long-standing arrangement had another unique component: when a motion for stay of removal[40] was filed, the government, through the USAO, agreed to "forebear" from deporting an individual if the government did not contest the stay or the Court decided the motion.[41] This arrangement reduced the need for extensive and excessive motion practice.

Originally, when the immigration caseload was manageable, the fully counseled immigration cases would go through the Court's Civil Appeals Management Plan (CAMP).[42] CAMP participation is mandatory for all fully counseled civil appeals, and since approximately 80% of the asylum cases were counseled, the staff counsel in CAMP saw most of the immigration cases. At these confidential conferences, petitioner's counsel and the government attorney would meet with staff counsel to discuss the case and attempt to resolve it. Perhaps surprisingly, CAMP was especially effective in removing a significant number of immigration cases from the Court's docket. For example, a petitioner might instead decide to withdraw the petition or accept voluntary departure, the government might agree to remand the case to the agency, or there might have been a change in circumstances that would make the petitioner eligible for adjustment of status. If settlement was unsuccessful, the case would proceed to briefing and oral argument.

To deal with the surge, CAMP set up "immigration days" where eight to twelve immigration cases would be scheduled for conferences on each day. As the number of filings continued to rise, more immigration days were scheduled. CAMP was the only federal circuit court mediation program that routinely handled counseled immigration appeals.

The settlement program was successful. The disposition rate after conference was as high as 64%.[43] However, the numbers of cases continued to rise, making scheduling the consequential additional conferences difficult. One of the largest obstacles in dealing with this volume was the lack of certified administrative records being filed by the

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40. Prior to the enactment of IIRIRA, stays of deportation were automatic. *See* Michael v. INS, 48 F.3d 657, 661 (2d Cir. 1995) (citing 8 U.S.C. § 1105a(a)(3)) ("Upon the timely filing of an alien's petition to review a final deportation order, and absent an aggravated felony conviction, an alien's deportation is automatically stayed pending review of that petition by the court of appeals."). This stay is no longer automatic. *See* IIRIRA, Pub. L. No. 104-208, § 309(c)(4), 110 Stat. 3009-626; 8 U.S.C.A. § 1252(b)(3)(B) (2005).

41. The policy of forbearance began in 1995 whereby the USAO agreed not to deport or return an alien who has filed a motion for stay of deportation until and unless the Court decides the motion for stay. That policy was reaffirmed in 2002. *See* Memorandum For Second Circuit Chambers and Staff, Revised (Sept. 5, 1995) (on file with author).

42. 2D CIR. LOCAL R., Appendix, Part C, Civil Appeals Management Plan, *available at* http://www.ca2.uscourts.gov/Docs/Forms/CAMP.pdf.

43. John R.B. Palmer, *The Second Circuit's 'New Asylum Seekers': Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 972 (2006).

agency. The cases could not be scheduled for conference without this record, and at the agency level, the backlog of record requests was staggering.

As the surge continued, the Court grew more concerned about managing the case volume. The Court hired another staff counsel to handle only conferences in immigration cases. The Court also began a pro bono mediator program to assist staff counsel in grappling with the backlog of cases. In spring 2004, the Court began issuing briefing schedules in large numbers of immigration cases without automatic settlement conferences to speed the process and included strict filing deadlines.

It became more difficult to set up conferences because there were only a limited number of Assistant U.S. Attorneys and petitioners' counsel to handle the cases. Even with extra assistance, the settlement process could not respond because the rate of filing continued to soar. Thus, the Court had to decide, as discussed in the introduction, whether to allow the backlog to accumulate and lay the blame at the feet of the agency, or attempt a new method of attack. Thus was born the non-argument calendar (NAC). Essentially, NAC is a separate, parallel track from the regular argument calendar, along which asylum-related cases proceed.

The Court was committed not only to it administrative goal of reducing, and ultimately eliminating its backlog, but also to providing speedier determinations in these cases. The Court, however, first had to overcome its long-standing commitment to providing oral argument in the majority of cases filed. When compared to other circuits, the Second Circuit has the highest oral argument-to-disposition ratio or, said differently, it has the lowest percentage of cases decided without the benefit of oral argument.[44] Allowing oral arguments is a hallmark of appellate practice in the Court.

The NAC offered a solution that would ensure that cases would not languish in the backlog. While not perfect, it was both a creative and fair way of dealing with an overwhelming problem.

An NAC calendar was developed whereby four panels of three judges sat each week and considered twelve asylum cases a piece. According to the Local Rules implementing NAC, where a party seeks appeal or petition for review concerning a claim for asylum, the proceeding will be placed on the NAC. Proceedings on the NAC will be heard by a three-judge panel, without oral argument, unless the Court transfers it to the Regular Argument Calendar (RAC).[45]

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44. *See* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 22 (1998).

45. 2D CIR. LOCAL R. § 0.29, Non-Argument Calendar (NAC).

To assist in this process, the Staff Attorneys' Office within the Office of Legal Affairs became authorized to hire a supervisor and twelve attorneys to establish an immigration unit. The NAC officially began on October 3, 2005. Cases are sent to panels where judges consider the appeals sequentially and any one of them has the authority to transfer the case to the RAC,[46] where it would be heard by a separate merits panel. In fact, despite concerns that the NAC would somehow violate petitioners' due process rights or result in reduced analyses,[47] the opposite has occurred. First, many cases have been referred by NAC panels to the RAC. From December 2005 through March 2007, with the exception of three weeks, the Court has heard transferred NAC cases every week. In fact, at many sittings the panels have heard numerous NAC transfers. Further, despite not having oral argument automatically available, NAC cases get a full review by panels of this Court.

NAC has proven to be very useful in lowering the number of cases the Court hears. Additionally, the Court recently expanded its use of NAC, enlarging the eligible pool of cases for NAC to include withholding of removal and CAT relief even where there is no underlying asylum claim.[48]

One of the most beneficial results of the NAC is an incredibly rich pool of opinions on immigration issues. While the majority of cases are disposed of by summary order (unpublished decisions), the Court has significantly increased its immigration jurisprudence. The Court is encountering a wealth of issues ranging from adverse credibility determinations and the substantial evidence standard to complicated issues such as whether 8 U.S.C. § 1158(a)(2)(D) permits the filing of successive asylum applications on the basis of changes in personal circumstances, where such applications should be filed, and whether a boyfriend can claim refugee status based on the forced sterilization or abortion performed on his girlfriend in China.

CONCLUSION

Despite early concerns and misgivings, the development of NAC was a creative, innovative and responsible way of responding to a crisis faced by the Second Circuit. The investment of time and effort by the judges, staff attorneys, staff counsel and Clerk's Office personnel in implementing NAC, while daunting and challenging, has transformed this idea into a successful solution to fending off this deluge.

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46. Palmer, *supra* note 43, at 975.

47. Erick Rivero, Note, *Asylum and Oral Argument: The Judiciary in Immigration and the Second Circuit Non-Argument Calendar*, 34 HOFSTRA L. REV. 1497, 1521-29 (2006) (analyzing NAC cases under the *Mathews v. Eldridge* balancing test).

48. 2D CIR. INTERIM LOCAL R. § 0.29 (amended February 2007).

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DUE PROCESS AND DECISIONMAKING IN U.S. IMMIGRATION ADJUDICATION

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Thank you to the Washington College of Law and to the *Administrative Law Review*, for the invitation to participate here. As the only non-government panelist, I will address immigration adjudication as an academic and also a practitioner. I will do my best to speak, albeit indirectly, from the point of view of the main stakeholders in that system—the people whose cases are decided by it.

It is important to understand the extent of the power the immigration system wields, particularly in the cases of refugees—people who fear persecution if they lose their appeals for relief from expulsion.[1] Expelling a person from the United States disrupts a life. In the worst cases, it destroys one and often many lives. Therefore, courts must make decisions to expel carefully and with adequate due process. With that in mind, I will discuss the recent major administrative changes at the Board of Immigration Appeals (BIA), which are commonly known as "BIA streamlining," to determine whether the "streamlined" BIA provides adequate due process.

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1. Following the example of John Palmer, Stephen Yale-Loehr, and Elizabeth Cronin in their 2005 study of Board of Immigration Appeals (BIA) streamlining, I use "expulsion" as a shorthand for the terms "deportation," "exclusion," and the most recent euphemism, "removal." *See* John R.B. Palmer et al., *Why Are So Many People Challenging the Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 10 (2005).

Attorney General Janet Reno adopted the first set of streamlining rules in 1999[2] to clear the large backlog of cases that had accumulated during the 1990s, when the system saw great increases in both expulsion orders from immigration courts, and appeals of those orders to the BIA.[3] In December 2001, after the (first) streamlining rules went into effect, independent auditors hired by the Executive Office for Immigration Review (EOIR) reported that streamlining had been "an unqualified success."[4] According to the auditors, the backlog diminished after this first streamlining, with no apparent adverse effect on petitioners.

Nonetheless, in 2002, only a few months after the auditors' report, then-Attorney General John Ashcroft proposed and quickly implemented much more drastic changes to the BIA.[5] The 2002 rules sharply restricted the BIA's traditional use of three-member panels to decide cases and write full opinions, making single-member review the new norm. The rules directed single BIA members to affirm the immigration judge's decision without opinion in most cases, using two sentences of boilerplate language.[6] This means that when federal courts attempt to review such BIA decisions, they have no way of knowing on what basis a decision was made.

At the same time, Ashcroft reduced the size of the BIA from twenty-three members (as the judges at the BIA are called) to eleven.[7] To many of the sixty-eight individuals and organizations that submitted comments on the proposed rules it seemed counterproductive to slash the

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2. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999).

3. *See, e.g.*, Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 945 (describing how, in the wake of 1996 legislation, enforcement actions increased immediately, with concomitant jumps in cases brought before immigration judges, and appeals to the BIA).

4. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW (EOIR), BOARD OF IMMIGRATION APPEALS (BIA) STREAMLINING PILOT PROJECT ASSESSMENT REPORT, 1, 5-7 (2001), *reprinted in* DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR: THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO, RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT app. 21 (2003), http://www.ilw.com/articles/2003,1126-dorsey.pdf [hereinafter DORSEY & WHITNEY REPORT].

5. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,879 (Aug. 26, 2002) (to be codified at 8 C.F.R. Part 3) [hereinafter Procedural Reforms]; *see also* U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, BIA RESTRUCTURING AND STREAMLINING PROCEDURES (rev. 2006), *available at* www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf (describing the "final" streamlining regulation issued by the Attorney General on Aug. 23, 2002, which "expanded on the first streamlining procedures" implemented in late 1999).

6. 8 C.F.R. § 1003.1(e)(4)(ii) (2007)) ("The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination.").

7. Procedural Reforms, *supra* note 5, at 54,901 ("[T]he Board shall be reduced to eleven members as designated by the Attorney General.").

number of judges, in order to clear a backlog of more than 50,000 cases.[8] Commenters worried, particularly, that the new regime would "eviscerate the due process protections for individuals with Board appeals . . . ."[9] In addition, the proposed changes seemed to be aimed at goals other than clearing the backlog, such as purging adjudicators who seemed to be sympathetic to non-citizens, and making it more difficult to appeal an expulsion order.

The Department of Justice (DOJ) explained, in its written responses to the public comments,[10] that the board's growth in the 1990s[11] had diminished the "cohesiveness and collegiality of the [its] decision making process, and the Department's perception of the uniformity of its decisions."[12] Streamlining the Board, in other words, would streamline its jurisprudence—bringing it more into line with the views of the Administration.

Ashcroft's 2002 streamlining rules also prohibited the BIA from conducting de novo review of factual issues, including immigration judges' findings with respect to credibility, unless those findings are "clearly erroneous."

Almost as soon as Ashcroft's 2002 streamlining rules went into effect, they faced constitutional challenges in eleven federal circuits[13] as well as an Administrative Procedure Act (APA) suit.[14] In general, the courts noted that they owed tremendous deference to the administrative agencies, especially in the immigration realm, as immigration "'officials exercise especially sensitive political functions that implicate questions of foreign

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8. *See* Michael L. Sozan, CAIR Coalition v. DOJ: *A Victory for Standing and Reviewability; A Hurdle for the APA Challenge to BIA "Streamlining,"* 8 BENDER'S IMMIGR. BULL. 1198, 1200 (July 15, 2003) ("The overwhelming majority of commenters supported DOJ's general goal of creating an efficient adjudicatory process at the Board, but sharply disagreed with the proposed mechanisms to achieve that goal.").

9. *Id.*

10. The final regulations were published on August 26, 2002, virtually unchanged despite all of the comments. The regulations took effect within thirty days of publication, on September 25, 2002. Procedural Reforms, *supra* note 5, at 54,878.

11. Palmer et al., *supra* note 1, at 18 (describing the growth of the BIA from five members in 1988 to twenty-three authorized positions in 2001).

12. Procedural Reforms, *supra* note 5, at 54,894.

13. *See, e.g.*, Zhang v. U.S. Dep't of Justice, 362 F.3d 155, 158-59 (2d Cir. 2004); Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 280-283 (4th Cir. 2004); Loulou v. Ashcroft, 354 F.3d 706, 708-09 (8th Cir. 2004); Yuk v. Ashcroft, 355 F.3d 1222, 1229-32 (10th Cir. 2004); Albathani v. INS, 318 F.3d 365, 376-79 (1st Cir. 2003); Dia v. Ashcroft, 353 F.3d 228, 238-45 (3d Cir. 2003). The D.C. Circuit Court of Appeals was not a proper venue because there are no immigration courts in its jurisdiction.

14. Capital Area Immigrants' Rights' Coal. v. U.S. Dep't of Justice, 264 F. Supp. 2d 14 (D.D.C. 2003).

relations.'"[15] In addition, the judiciary found it owed extra deference to the executive branch because the Immigration and Nationality Act gives such broad authority to the Attorney General to enforce the immigration law.[16]

The Capital Area Immigrants' Rights (CAIR) Coalition and the American Immigration Lawyers' Association (AILA) filed the first challenge in the U.S. District Court for the District of Columbia on October 24, 2002, less than a month after the new streamlining rules took effect.[17] Asking the court to vacate the new rules, CAIR and AILA argued that they were arbitrary and capricious, and therefore violated the APA.[18] CAIR and AILA challenged single-member review and summary decisions, asserting that the DOJ had failed to make reasoned administrative decisions in issuing two of the rules.[19] First, CAIR and AILA argued that in order for the DOJ to clear the BIA backlog in six months, it would require the BIA's members to decide at least one case every fifteen minutes.[20] Second, CAIR and AILA argued that the DOJ reduced the number of BIA members from twenty-three members to eleven members pursuant to discretionary and subjective criteria. In its responses to the public comments, DOJ refused to adopt any of the objective criteria suggested by the commenters to reduce the size of the BIA, such as seniority and expertise in immigration law.[21]

Although the court found that DOJ's decision to adopt streamlining was "not altogether free from doubt,"[22] it held that DOJ had provided "substantial evidence" in support of its decision.[23] In negotiations with the plaintiffs, DOJ agreed not to reassign or terminate any BIA members for a few months. Soon afterward, however, the Attorney General reassigned five BIA members. Three other members chose to leave their positions. Most of the departing members had many years of experience at the BIA and the Immigration and Naturalization Service and they were widely seen as "the most immigrant-friendly Board Members."[24]

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15. *Dia*, 353 F.3d at 236 (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)).
16. *See id.* at 237.
17. *CAIR*, 264 F. Supp. 2d 14; *see also* Sozan, *supra* note 8, at 1200.
18. *CAIR*, 264 F. Supp. 2d. at 20.
19. *Id.* at 25.
20. *See id.* at 37; *see also* Human Rights First, *New Justice Department Rules Gut Due Process for Refugees Seeking Asylum in the United States*, ASYLUM PROTECTION NEWS: SPECIAL EDITION, May 13, 2002, http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_si1.htm.
21. *See CAIR*, 264 F. Supp. 2d at 31; *see also* Procedural Reforms, *supra* note 5, at 54893 ("Several commenters have suggested that the Attorney General must appoint individuals to the Board who are expert in immigration law. The Department believes that this argument rests on the faulty premise that immigration law is the only area of the law where Board members must have expertise.").
22. *CAIR*, 264 F. Supp. 2d at 26.
23. *See id.* at 31.
24. Sozan, *supra* note 8, at 1201 n.14; s*ee also* Peter J. Levinson, The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications 9-10 (Sept. 2, 2004)

From 2002 to 2004, eleven federal circuit courts decided facial challenges to the 2002 streamlining rules. Most of the challenges focused on Affirmances Without Opinion (AWOs)—the one-line decisions in which the BIA merely states that it agrees with the decision of the immigration judge below. AWOs were a major feature of the new rules, and quickly became predominant among the BIA's decisions. During 2001, AWOs accounted for between 3% and 10% of the BIA's cases, but by the following year, the BIA was issuing AWOs in nearly 60% of its cases.[25]

Many challenges to BIA "streamlining" argued that the AWOs inherently violated due process. In *Albathani v. INS*,[26] for example, the petitioner's lawyers brought a facial due process challenge to the AWO regulations.[27] First, the petitioner argued that the BIA ruling was the agency's final decision but did not provide a reasoned basis for review by the appeals court.[28] The First Circuit found that under *SEC v. Chenery Corp.*,[29] the requisite reasoned basis for an agency's decision need only come from somewhere within the agency, not from a particular part of it. "*Chenery* does not require that this statement come from the BIA rather than the IJ."[30] Even though the BIA might have based its AWO on different grounds than the IJ used, the court found that the immigration judge's opinion and the record below were sufficient to permit the federal appeals court "to carry out an intelligent review."[31]

Albathani's second argument was that the AWO procedure's cursory review process violates the BIA's regulations, and federal courts are unable to determine whether the BIA is following those regulations.[32] The appeals court noted that the BIA faced an enormous caseload and pressure to clear it in only six months, and mentioned pointedly that "the Board member who denied Albathani's appeal is recorded as having decided over fifty cases on October 31, 2002, a rate of one every ten minutes over the course of a nine-hour day."[33] In *Albathani*, the court observed that not even "the

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(unpublished manuscript, presented at the Annual Meeting of the American Political Science Association), http://65.36.162.162/files/peter_article.pdf.

25. DORSEY & WHITNEY REPORT, *supra* note 4, at Appendix 25.

26. Albathani v. INS, 318 F.3d 365 (1st Cir. 2003). Albathani, a Maronite Christian from Lebanon, appealed an immigration judge's denial of asylum, withholding of removal, and relief under the United Nations Convention Against Torture (CAT). Albathani asserted that he feared persecution from Hezbollah guerrillas, but the immigration judge found him not credible and denied his claim. A three-judge panel from the First Circuit did not find evidence sufficient to *compel* reversal of the denial. *Id.* at 367.

27. *Id.* at 372.

28. *Id.* at 377.

29. 332 U.S. 194, 196 (1946).

30. *Albathani*, 318 F.3d at 377.

31. *See id.* at 378.

32. *Id.* at 377.

33. *Id.* at 378.

record of the hearing itself" could have been reviewed in ten minutes.[34] However, without further evidence of systemic violation by the BIA of its regulations, the First Circuit was not prepared to "infer from these numbers alone that the required review is not taking place."[35] The due process challenge to the AWO failed.

Like several of the cases that followed it, *Albathani* presents a "Catch-22". The First Circuit found that the AWO procedure did not violate due process, in part because the error in this case was harmless. The Court addressed a due process challenge to the streamlining rules by reverting to the facts in the case at hand; however, the doctrine guarantees a fair process, regardless of the outcome. Moreover, if, as the court held, caseload statistics are insufficient "evidence of systemic violation by the BIA of its regulations,"[36] it is difficult to imagine how any plaintiff could prove that the BIA was not reviewing IJ decisions, because the First Circuit was satisfied that the immigration judge below had not erred. This raises questions regarding all AWOs that were never appealed (the high cost of a federal appeal is the main obstacle for many would-be petitioners). The only way for a federal court of appeals to verify that a particular AWO was an adequate review (or an unnecessary one, if the immigration judge's ruling was correct) is to conduct yet another review. When it does so, the court can assure itself that the petitioner received an adequate review, but not necessarily from the BIA.

This would seem to automatically punt the task of reviewing the immigration judges' work from the BIA to federal courts in cases where the BIA issues an AWO. The federal court's review of the immigration judge turns the BIA's review into a mere stepping-stone on the path from the immigration court to the circuit court. This is precisely what has happened in thousands of cases. Since the dramatic increase in AWOs, there has been a deluge of immigration cases appealed past the BIA to the federal courts of appeals.[37]

All of the arguments involving AWOs and the adequacy of due process crumbled in the federal courts of appeals on a more fundamental point. As the First Circuit bluntly stated in *Albathani*, "[a]n alien has no constitutional right to any administrative appeal at all."[38] As an unadmitted alien, Albathani had even fewer rights than other non-citizens.[39] Yet even

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34. *Id.*
35. *Id.* at 379.
36. *Id.* at 378.
37. *See generally* Palmer et al., *supra* note 1, at tbl. 20.
38. *See Albathani*, 318 F.3d at 376 (citations omitted).
39. Albathani got off a plane in Miami without a U.S. visa and was immediately taken into custody by U.S. immigration officers. Aliens who have not been formally admitted to the United States, like Albathani, are legally "inadmissible" and therefore not entitled to

documented immigrants can be denied the right to appeal decisions to expel them, according to statute and U.S. courts' interpretation of the Constitution. For example, in the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Congress explicitly denied the right of judicial appeal (not merely administrative appeal) to certain classes of non-citizens facing expulsion orders.[40]

Immigrants facing expulsion brought challenges to the streamlining regulations in the rest of the federal circuit courts, but none of the courts found that they had a right to an appeal.[41] In *Dia v. Ashcroft*, for example, the Third Circuit was even more blunt than the First Circuit in *Albathani*. The Third Circuit found "[q]uite clearly, an alien has no constitutional right to any administrative appeal at all, and, therefore, no constitutional right to a 'meaningful' administrative appeal."[42]

However, even as they were noting that the petitioners had no right to an administrative appeal, the federal courts found that some of the petitioners' cases had been wrongly decided, and reversed the immigration courts below. The *Dia* court, after expressing lengthy outrage at the immigration judge's work, vacated the AWO and remanded the case to the BIA.[43] For more than six pages, the appeals court attacked the immigration judge's conduct during the hearing and criticized her opinion as flawed, sloppy, and biased against the respondent. The court was "left wondering how the IJ reached the conclusions she ha[d] drawn."[44] Her opinion was "an aggregation of empty rationales that devolve[d] into an unsupported finding of adverse credibility."[45] Further, the Third Circuit found that the immigration judge had discouraged "if she did not indeed prohibit" Dia from presenting corroborating evidence[46] and she chose to ignore the testimony of a U.S. government-trained expert witness who had testified in other courts more than one hundred times.[47]

U.S. rights even though they are physically present in the United States. *See* 8 U.S.C. § 1128(a)(6)(A)(i) (2000).

40. John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 8 GEO. IMMIGR. L.J. 605, 606 & n.4 (2004).

41. Palmer et al., *supra* note 1, at 29 ("These facial challenges were based on both due process and basic rules of administrative law, but every one of them has now been rejected.").

42. Dia v. Ashcroft, 353 F.3d 228, 242 (2003).

43. *Id.* at 250.

44. *Id.*

45. *Id.* at 251.

46. *Id.* at 253.

47. *See id.* at 258.

In yet another challenge to the AWO procedure, the Seventh Circuit followed *Albathani* and other cases and found that an AWO did not violate the petitioner's due process rights.[48] As in *Dia*, however, the court also found that the immigration judge's reasoning was poor. It vacated the AWO and remanded the case for further proceedings.[49] The immigration judge had previously denied Z.H. Georgis asylum mainly because of apparent discrepancies among dates in her application. However, as the Seventh Circuit noted, Ethiopia uses a Julian calendar, not a Gregorian one, leading to confusion about the dates at the hearing.[50] The appeals court found that the immigration judge had refused to admit corroborating evidence into the record.[51] The Seventh Circuit remanded, censuring the immigration judge with this unusual additional guidance: "Although the choice of a presiding judge is left to the discretion of the BIA, we strongly urge the BIA to assign a different judge to Georgis's case on remand."[52]

In the very same decisions in which federal courts have held that aliens had no right to an administrative review, they have reviewed the record and reversed the immigration judge below. The judicial review made all the difference in individual cases and this irony has not been lost on the federal appellate judges themselves. Although they have correctly noted the limits on aliens' right to due process *in law*, some of them have inveighed against what seem to be failures of *justice*. The federal courts recognize that, as a matter of law, they must concede great discretion to the executive branch in immigration adjudication. Nevertheless, the judges are not prevented from complaining about how that discretion is used. Streamlining provoked a burst of outrage from federal judges because the surge in appeals has obliged federal judges to read the records of many immigration cases.

In *Benslimane v. Gonzales*, for example, Judge Posner of the Seventh Circuit took the opportunity to begin his opinion with a blistering review of his own court's criticisms of the immigration courts and the BIA:

> In the year ending on the date of this argument, different panels of this court reversed the Board of Immigration Appeals in whole or in part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits . . . [O]ur criticisms of the Board and of the immigration judges have frequently been severe.[53]

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48. Georgis v. Ashcroft, 328 F.3d 962, 967 (2003).
49. *Id.* at 970.
50. *Id.* at 968 ("The transcript of the hearing reveals that everyone, and not just Georgis, seemed unclear about converting the dates from Ethiopian to Gregorian. Moreover, each time Georgis was asked to clarify a date, she tried to place the event in question in its proper chronology even if she could not calculate the correct date in our calendar system.").
51. *Id.* at 969.
52. *Id.* at 970.
53. Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005).

Judge Posner also quoted seven critical cases, including these two: "The IJ's opinion is riddled with inappropriate and extraneous comments,"[54] and "[t]his very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case . . . ."[55]

Federal judges have hardly been alone in their criticism of the decisions produced by the desperately overworked immigration judges and the BIA. A study by Dorsey & Whitney, LLP of the 2002 streamlining rules highlighted five cases in which an immigration judge "made a patently obvious mistake" in ordering an expulsion, but the BIA "summarily affirmed the erroneous decision without opinion or explanation."[56] One of those five cases was that of Ms. Georgis, the Ethiopian asylum-seeker mentioned above. Another highlighted case was Yong Tang, a leader of the Tiananmen Square protest in China. The Third Circuit reversed and remanded in the latter case, finding that the immigration judge based his decision on "inferences, assumptions, and feelings that range from overreaching to sheer speculation."[57]

Following these critiques from the circuit courts, Attorney General Alberto Gonzales publicly chided immigration judges for what he called "intemperate and abusive" behavior towards aliens. He issued memos in January 2006, asking judges to improve their behavior. He noted "reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work that I expect from employees of the Department of Justice."[58] In view of these reports, he commissioned a study of the work of the immigration judges.[59] After receiving the study, he announced twenty-two "measures" to create performance standards, increase resources, discipline incompetent or intemperate immigration judges, and to improve conditions at the BIA.[60] However, the Attorney General formulated most of the measures in very general terms, and by early 2007, there was still no sign that the plan had been implemented.[61]

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54. Dawoud v. Gonzales, 424 F.3d 608, 610 (7th Cir. 2005).
55. Ssali v. Gonzales, 424 F.3d 556, 563 (7th Cir. 2005).
56. DORSEY & WHITNEY REPORT, *supra* note 4, at 6.
57. *Id.*
58. Memorandum from Attorney General Alberto Gonzales to Immigration Judges (Jan. 9, 2006), *available at* http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf.
59. *Id.*
60. U.S. DEP'T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS (Aug 9, 2006), *available at* http://trac.syr.edu/tracatwork/detail/P104.pdf.
61. Pamela A. MacLean, *Immigration Judging Overhaul Stalled*, NAT'L L.J., Feb. 27, 2007.

The widespread criticism of immigration adjudication and lack of reform thus far, call on those of us interested in the system to examine the question, "what is due process for non-citizens?" more deeply than asking merely, "what does the law require?" The challenges to BIA streamlining have only explained what the law does *not* require, i.e., a meaningful appeal of a decision to expel a non-citizen from the United States. These cases do not explain what due process *does* require, even as a matter of law, never mind as a matter of justice. I would like to propose a two-pronged definition.

First, the system must produce accurate, fair decisions, as often as is reasonably possible. Immigration judges, as the critical first tier of the system, must be competent. They must be familiar with their complex branch of the law, and must not be biased against the people whose cases they decide. Second, the system must be perceived as fair, so that people who lose their cases feel that there was some rational basis for the decisions against them. Social psychology studies have found that the perception that the decision-maker has given "due consideration" to the "respondent's views and arguments" is crucial to individuals' acceptance of both the decision and the authority of the institution that imposes the decision.[62]

Unfortunately, the Attorneys General have been appointing immigration judges based more on their personal political views than on jurisprudential competence. Attorney General Gonzales' former senior counselor and White House liaison, Monica Goodling, recently testified before Congress that she had "crossed the line" by using political criteria in hiring immigration judges.[63] She was not alone—of the thirty-seven immigration judges appointed by Attorneys General Ashcroft and Gonzales, half lacked immigration law experience, according to a newspaper investigation, and at least one-third had Republican ties or were Bush Administration insiders.[64] Among the recent appointees who did have some experience in immigration law, all had been prosecutors or enforcement officers.[65] Finally, two newly appointed immigration judges had failed as candidates for judgeships on the U.S. Tax Court and one judge even filed inaccurate tax returns.[66] Handing out immigration judgeships in such a blatantly

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62. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 80-81, 104-06 (1988).

63. *See* Dan Eggen & Paul Kane, *Goodling Says She 'Crossed the Line,'* WASH. POST, May 24, 2007, at A1.

64. Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST, June 11, 2007, at A1.

65. *Id.*

66. *Id.*

politicized manner increases the chances that the judges will make poor decisions and decreases the chances that non-citizen petitioners will perceive the administration of justice as fair.

If the Attorney General was to make a serious effort to reform immigration adjudication, tens of thousands of non-citizens who go before immigration judges would likely gain those perceptions of fairness and competence , which are so vital to the right of due process. As a result, federal courts would see fewer appeals. To the contrary, Ashcroft and Gonzales took steps that undermined public perceptions of due process and fairness. When former Attorney General Ashcroft decreased the size of the BIA by reassigning several of its members who were most likely to rule in favor of non-citizens, his streamlining initiative lost credibility even as it began. The fact that non-citizens do not have a constitutional right to a meaningful appeal does not diminish the damage that such a step causes to perceptions of fairness and effective due process.

More recently, Attorney General Gonzales has been under scathing public criticism, not, as far as we know, because he committed an unlawful act, but rather because he created an appearance of bias by firing federal prosecutors who apparently did not tow a political line. Similarly, former Attorney General Ashcroft reassigned certain BIA members, perhaps because they failed to follow a certain jurisprudential posture, and forced them to issue tens of thousands of rapid-fire AWOs—which in turn dramatically diminished the number of cases in which the BIA reversed immigration judges' decisions to expel non-citizens.

In both cases, the Attorneys General seem to have allowed politics to interfere unduly with decisions that, in turn, affect the administration of justice. This temptation would be avoided in immigration adjudication if the BIA and immigration judges were made independent of the Department of Justice. As far back as 1981, the Select Commission on Immigration and Refugee Policy, a joint presidential-congressional body, has recommended the creation of an immigration court with both first-instance and appellate divisions to replace the immigration judges and the BIA.[67] Reform of this scale would surely improve due process in U.S. immigration adjudication.

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67. Levinson, *supra* note 24, at 14.

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PANEL: UNITED STATES BORDER CONTROL AND THE SECURE FENCE ACT OF 2006

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TABLE OF CONTENTS

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I. REMARKS OF SARA IBRAHIM

The American Friends Service Committee (AFSC) is a ninety-year-old[1] faith-based organization grounded in Quaker beliefs respecting the dignity and worth of every person.[2] The AFSC works for peace, justice, and reconciliation throughout the world[3] and received the Nobel Peace Prize in 1947.[4] The AFSC's Project Voice immigrants' rights initiative presses for immigration legislation that does not diminish the civil and human rights of immigrants, refugees, or asylees. In 1977, the AFSC initiated the U.S.-Mexico Border Program to address economic imbalances between the U.S. and Mexico and to document systemic human rights abuses.[5] Over the years, the program evolved into a human rights monitoring project, documenting human and civil rights abuses by law enforcement agencies. The program also provides human rights workshops for migrant communities to promote human rights and empower the community. Today the program is based at the AFSC San Diego office.

The U.S.-Mexico border region is woven together by family, economic, and cultural ties that have grown over many generations. Movement back and forth across the border has been a part of life for as long as the border has existed. The recent border build-up severed the heart of the region, separating merchants from their customers, grandparents from their grandchildren, and communities from their cultural roots. With the goal of educating others, AFSC, the American Civil Liberties Union, and WITNESS co-produced *Rights on the Line: Vigilantes at the Border*, a documentary filmed by human rights activists and residents of border communities.[6] The film tells the story of border tensions from the point of view of those most affected and reveals the underlying motivations of vigilantes through interviews and disturbing footage of their night-time patrols.

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1. American Friends Service Committee, AFSC History, http://www.afsc.org/about/history.htm (last visited June 12, 2007).
2. American Friends Service Committee, Mission and Values, http://www.afsc.org/about/mission.htm (last visited June 12, 2007).
3. *Id.*
4. American Friends Service Committee, History of Organization, http://nobelprize.org/nobel_prizes/peace/laureates/1947/friends-committee-history.html (last visited May 29, 2007).
5. News Release, American Friends Service Committee, *Home* of the Free or Land of the Raids?, http://www.afsc.org/news/2006/HOMEOFTHEFREEORLANDOFTHERAIDS.htm (last visited May 29, 2007).
6. RIGHTS ON THE LINE: VIGILANTES AT THE BORDER (AFSC 2006), http://www.afsc.org/immigrants-rights/rightsontheline/default.htm.

Migrant and refugee communities across the nation deserve to be treated with dignity and respect. Any proposed legislation that addresses comprehensive immigration reform must contain provisions that guarantee the protection of all civil and human rights. Reform means a change for the better, yet too many reform proposals include measures that worsen the livelihoods of communities and undermine current human rights protections.

The rationale for more vigorous border security has transformed every few years from narcotics trafficking to illegal immigration to counter-terrorism. The "solution"—increased Border Patrol and detention—always remains the same, despite the fact that the solution is unsuccessful. The AFSC believes that constructing physical barriers and detaining immigrants will not resolve the root causes of this immigration influx. The AFSC further believes that such enforcement-only policies are not practical steps in the effort to repair the United States' broken system of immigration. "Building physical barriers and a fence will not deter immigrants or diminish their desperate situation," states Pedro Rios, the director of the AFSC's San Diego office.[7] The AFSC joins the voices of border communities in their rightful demand for justice and dignity. The Secure Fence Act[8] impedes the status adjustment of immigrants, ignores human rights and destroys families in the process. Current border enforcement policies, laws and practices, without provision for safe and legal entry, have resulted in the detention and criminalization of tens of thousands of people at a significant daily cost to taxpayers.

The U.S. Customs and Border Protection's Border Patrol struggles with issues of accountability for violations of constitutional rights, a lack of transparent complaint processes, and insufficient protection of border communities. This struggle has become more apparent with the increase in the number of border apprehensions of immigrants. In 1994, U.S. government agents apprehended over 4,000 immigrants in the one-month period after the institution of Operation Gatekeeper.[9]

In 2005, the AFSC's San Diego office produced a report, *San Diego: A Case Study on the Impact of Enforcement on Border Communities*, discussing the effects of enforcement for migrant communities in San

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7. News Release, Janis D. Shields & Esther Nieves, American Friends Service Committee, Fencing in Immigration Reform: Repairs to Broken System Derailed (Oct. 5, 2006), http://www.afsc.org/news/2006/fencing-in-immigration-reform.htm.

8. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638.

9. U.S. DEP'T OF JUSTICE, BACKGROUND TO THE OFFICE OF THE INSPECTOR GENERAL INVESTIGATION 5, 7 (Oct. 1994), http://www.usdoj.gov/oig/special/9807/gkp01.htm.

Diego.[10] This report is the product of multiple sources: first-hand accounts, news reports, victims' complaints, personal interviews and telephone conversations with victims and the U.S. Department of Homeland Security (DHS) representatives, and official immigration enforcement documents. The report's recommendations included the following:

- "DHS agents who conduct immigration and customs investigations and those involved in detention and removal operations must be held accountable for actions that lead to civil and human rights abuses."[11]
- "DHS policies and initiatives that promote or encourage civil and human rights abuses should be reviewed and rescinded. Therefore, it is necessary to establish an independent body with full review and subpoena powers to monitor and hold immigration enforcement agents accountable for egregious actions, and to review questionable policies and initiatives and rescind when necessary if those policies are found to promote and encourage civil and human rights violations."[12]
- "We need clear policy on what drives operations based on 'national security concerns' and assurances that [such a policy] does not become a pretext for fomenting a state of siege and confusion for migrant communities."[13]
- "Border Patrol must clarify policy on protocol for deporting people and it must ensure that detainees are afforded all due process rights, and that no coercion or physical and verbal abuse occur at any point of contact between migrants and federal agents."[14]
- "Border Patrol must ensure that new detention methods are humane and provide migrants access to food and water, and to appropriate restroom facilities. The tents, which are a questionable detention facility, should not house migrants for prolonged periods especially given the extreme weather conditions. Border Patrol should find ways to remedy the concerns surrounding these types of detention facilities."[15]

In conclusion, the AFSC believes that all communities need to feel secure. To accomplish this goal, immigration policies must uphold the principles of human rights and community safety, both on the border and within the interior of the United States, while also ensuring that immigrant workers have opportunities, both for economic parity and also participation

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10. AMERICAN FRIENDS SERVICE COMMITTEE, SAN DIEGO: A CASE STUDY ON THE IMPACT OF ENFORCEMENT ON BORDER COMMUNITIES (2005), *available at* http://www.afsc.org/immigrants-rights/documents/border-enforcement.pdf.
11. *Id.* at 4.
12. *Id.*
13. *Id.* at 6.
14. *Id.*
15. *Id.* at 7.

as equal members of the nation's social, political, and cultural landscape. Immigrant workers, families, and communities deserve legalization with rights, full labor protections, and the opportunity to reunite with their loved ones.

Bold and visionary leadership is needed to convert these legislative proposals into reality. With such leadership, the AFSC firmly believes that both immigrants and non-immigrants welcome the opportunity to live, work, and thrive in—as well as contribute to—a nation that is just and inclusive in its policies and laws. The AFSC believes that this is the spirit and substance of fair and comprehensive immigration reform.

II. REMARKS OF LEE BARGERHUFF

I want to thank American University Washington College of Law for this opportunity. I am here on behalf of Chief David Aguilar, the highest official in the United States Customs and Border Protection (formerly, the United States Border Patrol) here in Washington, D.C., who was not able to be here today.

I have seen, felt, smelled, sweated, and bled immigration enforcement. I have been involved in the area for over twenty-nine years, and it is new and exciting for me to be able to discuss these issues in an academic environment. I cannot fully begin to communicate to you the true nature of immigration enforcement; no video or demonstration could effectively communicate its essence.

You, as the taxpayers of this great country, have decided to put men and women like myself out on the front lines of this nation, and I would like to add that you have purchased and supported some wonderful and talented Americans to complete this mission. It is very difficult work. Our work is based on policy that we do not decide. We are civil servants. The American people have decided that this border protection policy is appropriate, and men and women step forward to complete this task for their country.

The history of border protection really begins in 1924.[16] During the time of prohibition there was a need—again, as dictated by the people and government in this country—to maintain a presence on our borders in order to fulfill what has remained the same mission: to protect this country, our labor force, and our citizenry from a multitude of threats. These threats have manifested themselves in different ways over time, such as the threat of illegal drug importation or the post-9/11 threat of terrorism.

I am from Indiana, so I had no prior knowledge of the United States Border Patrol before joining. The first Border Patrol agent I ever saw was myself when I donned the uniform and looked in the mirror. Being from the Midwest, I had never seen a United States border. However, during my senior year of college, when I decided to complete the examinations in order to become a federal law enforcement officer, I noticed an opening for the United States Border Patrol. The posting described the job as going to "wild places" and having the opportunity to "learn a new language." I am old enough that cowboys like Will Rogers were my heroes, so I decided to apply.

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16. *See* U.S. Border Patrol – Protecting Our Sovereign Borders, http://www.cbp.gov/xp/cgov/toolbox/about/history/bp_historcut.xml (last visited Aug. 11, 2007).

The reality of my career presented itself immediately. I began my career in Texas, and it was very eye-opening to come into contact with the people who attempt to cross our border. The Rio Grande River formed the border in my area, and sometimes temperatures would drop below freezing. On any given day, even during freezing conditions, you could find dozens of people, stripped to their underwear or completely naked, getting into the water and battling the current to come to this nation. That spectacle spoke volumes to me regarding the type of people we would interact with on the border.

The United States Border Patrol apprehends between 1.1 and 1.3 million illegal aliens a year, with over 95% of those on the southern border.[17] However, only a small number of these people are criminals, and most are simply people who strive for a better life. There is no doubt that we would be attempting to accomplish the same goals if we were in their shoes.

It is a common misconception that Border Patrol agents simply play a game of catch, process, and release with illegal aliens, only to repeat the process over again. However, the reality is much more serious. When I worked in the San Antonio office, handling mainly employment cases, we would investigate employers in an attempt to apprehend aliens. I recall one instance when we visited a lumberyard in Austin, Texas. When Border Patrol agents make these appearances, the situation usually becomes animated and people begin to flee the scene. When we arrived at this particular lumberyard, we found that two individuals had climbed to the top of a stack of lumber in an attempt to cross over the fence to escape. One of them crossed the fence and fell to the ground, breaking his leg. We accompanied the young man to the hospital to ensure he received medical attention. Once he was declared fit to travel, we began the trip back down south. During the car ride, I asked him—and I did not ask the question to be flippant or demeaning, but simply wanted to learn—"Are you going to try this again next time?" The man clenched his jaw in a determined but not threatening way, and answered that he would continue this until his death. I knew, then, that this cycle is not a game to those involved. You learn this lesson incredibly quickly when you work in this area.

September 11th changed not only all of our lives, but my profession as well. As Mr. Asa Hutchinson already mentioned, our office was formerly part of the Immigration and Naturalization Service. However, with the March 2003 creation of the Department of Homeland Security, we merged

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17. *See* Amy Wu, *Border Apprehension: 2005*, FACT SHEET (Office of Immigration Statistics, U.S. Dep't of Homeland Sec.) Nov. 2006, http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_apprehensions_fs_2004.pdf.

into a new agency.[18] This change in configuration did not change our mission. We must still handle all threats to our border security and must maintain what Mr. Hutchinson referred to as "operational control" of the border.[19]

Over the last year, I have taken part in a program entitled the Secure Border Initiative.[20] The Secure Border Initiative has defined our goals for the past year and will continue to guide our goals. We are currently working to achieve a system of operational control over every mile of border. We are increasing our monitoring efforts in an attempt to ascertain and identify the presence of entities at the border. We are attempting to refine our sensor equipment in order to identify if the entity is human or animal, and if the human is in the region for a permissible reason. Only then will we know the type of law enforcement response, if any, we should institute.

This approach brings with it the understanding that no single means of protection will best serve a given area. To give an example, we are currently monitoring almost 6,000 miles of border, but the border changes depending on the type of environment in which the border appears. In an urban environment, the placement of a physical barrier is appropriate because the agency has a very short amount of time to call out a response to a potential breach. While the fence will not stop humans from moving across the border, it will buy our agency enough time to execute the appropriate response. In a rural environment, the time frame changes drastically. Our agency may have between minutes and hours to formulate a response. Therefore, fencing in rural areas makes less practical sense. It is in these areas where tactical infrastructure, air assets, and video surveillance integrate to form a layer of protection.

"Operational control" requires more Border Patrol agents to enact this goal. When I joined the Border Patrol in 1978, there were 2,100 Border Patrol agents for the whole country. Now, our total number of agents is just over 12,000. Further, the President has expressed a commitment to raising that number to between 18,000 and 19,000 by the end of his administration.[21]

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18. *See* DEP'T OF HOMELAND SEC. REORGANIZATION PLAN (Nov. 25, 2002), http://www.dhs.gov/xlibrary/assets/reorganization_plan.pdf.

19. *See* Asa Hutchinson, *Keynote Address*, 59 ADMIN. L. REV. 533, 541 (2007).

20. *See* Press Release, U.S. Dep't of Homeland Security, Fact Sheet: Secure Border Initiative (Nov. 2, 2005), http://www.dhs.gov/xnews/releases/press_release_0794.shtm (detailing the ways the Secure Border Initiative will help accomplish the goal of "operational control" of the northern and southern borders within five years).

21. *See* Press Release, President George W. Bush, Fact Sheet: The Secure Fence Act of 2006 (Oct. 26, 2006), http://www.whitehouse.gov/news/releases/2006/10/20061026-1.html (noting that the Bush Administration has overseen the increase of the Border Patrol force by approximately 30% with plans to double the number of agents by the end of 2008).

It is important to see the current border crisis through the eyes of the enforcement community. Although pundits and politicians politicize and discuss immigration and border control in abstract terms with purported clear-cut answers, when viewing things from the enforcement aspect, the answer does not appear so simple. While my office does not deal with public sentiment and legislation, as the men and women on the front lines, we can offer a unique perspective. Through this lens, one is able to see another facet of border enforcement and the multitude of roles we play.

I would also like to touch on what Mr. Hutchinson said about our philosophy as a country.[22] While Border Patrol agents are part of the enforcement branch and do enforce the law, we see our mission as including humanitarian assistance to those we watch for and apprehend. I liken our job to that of a football player who, by playing within the rules of the game, may knock down his opponent, but who will also help the opponent to his feet. While we take great expense, effort, and determination to apprehend those seeking to enter our country illegally, we also put forth great expense, determination, and passion to deliver them from danger. We have units in the field called BORSTAR.[23] These are EMT-style units whose sole purpose is to find people who are in distress and provide them medical assistance, including beginning intravenous medication and providing airlift transportation to medical facilities. It is this philosophy which I believe to be the noblest aspect of our profession, and it helps dispel the myth that border enforcement officials are callous or xenophobic.

We are on the front lines, and we understand the situation and its problems. We have seen it. This makes for a very difficult mission—to protect the border while, at the same time, experiencing the human aspect up-close on a daily basis.

I learned the reality of my role as an enforcement official after a conference on the Organized Crime Drug Enforcement Task Force, which was one of the leading initiatives in the war on drugs. During the conference, then-Attorney General Janet Reno explained to us that though we might all be law enforcement officials, and the conception is that it is our job to stop the problem—whether it be drugs or illegal immigration—we cannot fix the problem. These were sobering words from our leader. However, I found that she was absolutely correct. I have learned that we must begin to view these issues in other institutions: our homes, churches,

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22. *See* Hutchinson, *supra* note 19, at 535.

23. BORSTAR is the acronym for Border Patrol Search, Trauma, and Rescue Teams. *See* U.S. CUSTOMS & BORDER PROT., BORSTAR (June 9, 2003), http://www.cbp.gov/xp/cgov/border_security/border_patrol/borstar/borstar.xml.

schools, and institutions of higher learning. We, the law enforcement community, are cognizant of this truth and attempt to promote it professionally within our ranks.

In closing, I would like to say a few more words about the Secure Border Initiative. I know that Ms. Canty is very well-versed in that area, and I do not want to steal any of her thunder, but I was involved with that program for the longest fourteen months of my life. However, like Mr. Hutchinson mentioned, I would not trade my experiences for anything. The people working for the Secure Border Initiative are knowledgeable and well-trained, and they strive to put these ideals into practice. Nevertheless, the success of border security will depend on the will of the nation to see this idea through. In my experience, immigration issues have ebbed and flowed throughout the years. The public gets animated at different times when hot-button issues arise. With the will of the people of this nation, however, this program can and will be a success, and we will continue to strive for completion of our mission while always keeping in mind the ideals which we, as a nation, hold so dear.

III. REMARKS OF MARK KRIKORIAN

I am here today to discuss immigration control and, more specifically, border control. However, I would like to point out that focusing on the border is only looking at one piece of the immigration problem. Border control is an important part of immigration control, but it is just one part of the bigger picture.

The fencing that last year's legislation authorized is an important tool in controlling the borders.[24] The fencing along the border near San Diego, as some of you may know, consists of two different levels of border fencing. These two different levels of fencing are the old fencing and more modern fencing. The old fencing, which was made from leftover landing mats, did little to prevent illegal border crossings. However, the more modern mesh fencing has proven to be remarkably effective in controlling illegal border crossings. But just like lights, motion sensors, and helicopters, fencing is just another tool that the Border Patrol uses to manage the border.

Congress takes the view that the fence is one of, if not *the* most, important aspect of border control enforcement. The Secure Fence Act of 2006[25] (the Act) illustrates this point. The Act further illustrates Congress's distrust of the administration's ability to enforce the Act's regulations. Ideally, with the passage of such an Act, Congress should say to the administration, "You tell us where you want a fence and where you do not want a fence, and we'll take your word for it because we trust you, and you are the experts." However, the truth is that Congress does not trust this administration. That is why Congress describes the construction of the fence in such detail within the text of the legislation.

A good analogy is a donor giving money to a non-profit group. If the donor trusts the non-profit group to effectively manage the money given to them, the donor will just write the non-profit a check and say, "You decide how to use it best." When a donor does not trust the non-profit group, the donor will say, "Use ten percent of it for this and eight percent of it to do that." It is not Congress's micromanaging that is the problem with regard to the Act. The problem is that Congress felt it necessary to micromanage because this administration is absolutely untrustworthy with regard to immigration enforcement.

For example, recently, Representative Bennie Thompson stated that the new Democratic-controlled 110th Congress would closely reexamine the Act and may decide to abandon it altogether.[26] Such an action would cut

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24. *See* Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).
25. *Id.*
26. *See* Shaun Waterman, *Democratic Congress May Scrap Border Fence*, UNITED PRESS INTERNATIONAL, Nov. 10, 2006, http://www.upi.com/Security_Terrorism/Analysis

off additional funding for construction of the fence. If Congress refuses to fund a fence that has already been authorized, or if it actually changes the law and eliminates the fence—something the President would certainly sign because he loathes the idea of a fence (or any enforcement on the border for that matter)—it would only serve to reinforce the perception among the public regarding the lack of commitment to enforce the law.

I think the basic issue is that if Congress cuts off funding for the bill, it would reinforce the sense that the new Democratic majority in Congress has no commitment to border enforcement. Therefore, in a sense, the Democrats find themselves in a tight spot. If they refuse to fund the fence—with all of the caveats about whether the fence is actually a good idea in the micromanaged way that it is laid out—such inaction would be the ripest fruit for a political Republican challenger in 2008.

With that said, the micromanagement of the construction of the fence under the Act is not the biggest issue concerning modern border enforcement. A bigger issue is that not all illegal immigrants are border-jumpers. The estimates vary, but approximately one-third of the total illegal population are overstayers: those people who entered legally, but then never left the United States upon the end of their permitted visit.[27] So fencing—even if it were a "silver bullet" that magically prevented all crossings—would not address that issue because those people never illegally crossed the border between ports of entry.

Overall, a focus on border control, as has been the debate in the Legislature during the last year, is simply an extension of a longstanding political trend. The fact is that the other elements of immigration enforcement, such as work site enforcement and better identification are politically more controversial. Business simply does not like work site enforcement and would rather the government not engage in such practices. These businesses have made their feelings known directly to Congress and administrative officials. As a result, the United States has ended up with the "lowest common denominator" of immigration enforcement for the past decade. During this time, much of immigration enforcement has focused on border issues alone.

2006/11/10/dem_congress_may_scrap_border_fence/5259/ (reporting that provisions for the border fence within the Act may be replaced or integrated with "a set of monitors, cameras and other integrated surveillance systems" commonly referred to as the "Secure Boarder Initiative").

27. *See generally* Editorial, *Enforcement Sense*, NAT'L REV. ONLINE, Dec. 17, 2005, http://www.nationalreview.com/editorial/editors200512120713.asp; *see also* U.S. GEN. ACCOUNTING OFFICE, GAO-04-82, OVERSTAY TRACKING: A KEY COMPONENT OF HOMELAND SECURITY AND A LAYERED DEFENSE, REPORT TO THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES (2004), http://www.gao.gov/new.items/d0482.pdf (describing available data on the extent of overstaying).

We have seen roughly a doubling of the Border Patrol over the past ten years.[28] The administration has a target of essentially tripling the number of Border Patrol over a period of fifteen years or so. The target number is to have 18,000 or 19,000 by the end of the Bush administration.[29] This goal is perhaps too lofty, but Border Patrol numbers will certainly increase. There is a lot of turnover in the Border Patrol, and it takes a lot of money and time to continually train Border Patrol agents. Nonetheless, even if the Administration achieves its goal, it would result in an optimistic average of two agents per mile per shift. But, even that would be an incredibly inadequate number of agents. Regardless, the Administration has decided to focus only on this one aspect of enforcement.

As the number of Border Patrol agents has increased, the level of work site enforcement was minimal until just about a year ago. In 2004, only three employers in the entire nation were fined for knowingly employing of illegal immigrants.[30] The current Administration simply continued the Clinton Administration's decision not to enforce the prohibition against employing illegal immigrants. As some of you may have noticed through reading the newspapers, the policy has recently changed. But this recent step-up of work site enforcement is only a political ploy. Moving the focus beyond the border is useful, but it is unfortunately not happening for the right reasons.

The Administration is pursuing what I call the "spoonful of enforcement helps the amnesty go down" strategy. The administration, after years and years in power, has now just woken up and thought, "Why didn't we start enforcing immigration law a long time ago? Now we are going to do it." The Administration is enforcing immigration law in order to "dupe"

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28. *See* Press Release, The White House, President George W. Bush, Fact Sheet: The Secure Fence Act of 2006 (Oct. 26, 2006), http://www.whitehouse.gov/news/releases/2006/10/print/20061026-1.html (explaining that since President Bush took office, the White House has increased the number of Border Patrol agents from about 9,000 to over 12,000, and that by the end of 2008, the number will have doubled).

29. *See* Dannielle Blumenthal, *President Bush to Accelerate Border Patrol Strategy with National Guard*, CUSTOMS & BORDER PROTECTION TODAY, May 2006, http://www.cbp.gov/xp/CustomsToday/2006/may/president_bush.xml. The [U.S. Customs and Border Protection] agency has received funding to double the Border Patrol agent force to 18,000 by 2008.

30. *See* Editorial, *Enforcement First*, NAT'L REV. ONLINE, Mar. 27, 2006, http://www.nationalreview.com/editorial/editors200603270825.asp (citing government statistics on immigration enforcement in urging the Senate to make enforcement a centerpiece of immigration reform efforts); *see also* Steven Camarota, Editorial, *Use Enforcement to Ease Situation*, ARIZ. REPUBLIC, Oct. 23, 2005, http://www.azcentral.com/arizonarepublic/viewpoints/articles/1023camarota23.html (last visited May 17, 2007) (noting that in 2004 only three employers were fined for hiring illegal workers and arguing for increased enforcement as a solution to America's "illegal-immigration problem").

members of Congress into thinking that since it is now credible on enforcement it will, therefore, enforce future immigration rules in a way that they simply refused to do in the past.

Disregarding its motivation, the enforcement that we are seeing now is in fact real. It is showing real results, and this illuminates the future path we need to take with regard to enforcement. In my view, the whole premise of the immigration debate in Congress and in the public over the past couple years is flawed. It is presented as a kind of Hobson's choice: either we deport all illegal immigrants, or, if we cannot do that, we legalize them. We can call that legalization amnesty, regularization, normalization, or phased-in access to a path to citizenship. There is an office in the White House thinking up appropriate euphemisms. But no matter what it is called, it all ends up being the same thing—the illegal immigrants get to stay.

Those, however, are not the only two choices we have. The one choice, deportation of all illegal immigrants, is not a choice at all because we do not have the capacity to do so even if we wanted. Last year, we deported fewer than 40,000 illegal aliens.[31] In fact, most of these 40,000 did not become illegal aliens until they committed a crime. In other words, those deported were criminal aliens, not ordinary illegal immigrants. At present, the United States basically deports almost no ordinary illegal immigrants. If we tripled, quadrupled, or quintupled the number of ordinary illegal immigrants that we deported—and we probably should and certainly can do that—it is still not going to deal with the bulk of the problem.

The other half of the Hobson's choice—legalizing illegal immigrants—will not work. First, it stimulates additional illegal immigration because the illegal aliens know perfectly well that we will not enforce the law in the future. Second, the supporters of legalization make many promises about screening people—checking backgrounds, forcing people to pay back taxes, ensuring jobs—but these promises are surreal. The U.S. Citizenship and Immigration Services is the organization which would run a legalization program. It does not even have the administrative capacity to properly complete its present job. Therefore, dumping 12 million additional cases into their inbox is not going to improve the quality of their adjudications.

In 1986, the last time we had an amnesty, about 3 million people applied, 90% were approved, and we saw fraud on a level that the U.S. government has never seen in its history.[32] The stories of fraudulent agricultural

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31. *See generally supra* note 27.

32. *See* David S. North, *Lessons Learned From the Legalization Programs of the 1980s*, CTR. FOR IMMIGRATION STUDIES, BACKGROUNDER, JAN. 2005, http://www.cis.org/articles/2005/back105.pdf (detailing the flaws, including widespread fraud, large numbers of

workers were so numerous and flamboyant, it was almost comical. The problem was that the capacity and the political support to turn these people down for amnesty or to properly screen them did not exist. I guarantee you this will happen again if we have another amnesty. A grant of amnesty will undoubtedly fail.

The solution then is not the false choice between legalization or forcible deportation of the illegal population, but rather something in between—what I call attrition through enforcement. We enforce the immigration laws, which we have not bothered to do in the past, consistently across the board. Because of the natural churn that is continuously ongoing within the population of illegal aliens, the illegal population will naturally shrink over time. Enforcement will reduce the inflow and increase the outflow of those choosing to go home because they have given up and cannot find work. This is not some fantasy. We have actually seen this work. In fact, it is working now with the enforcement initiatives that the administration has begrudgingly undertaken. And that, it seems to me, is the way to move, at least for the next five, six, seven, or eight years: shrink the problem, reassert control, and restore the sense among the public that the government actually is interested in enforcing the immigration laws. That is what it really boils down to.

While I think there are legal changes that might benefit that process, the real change that needs to be made is not something that Congress can take a vote on and the President can sign. The real change that must occur is a change in perception that the political elite does in fact have the will to enforce the law. The real change will occur when the political elite begin to tell businessmen, or racial and ethnic pressure groups, when they call to complain about enforcement, "I feel your pain but that is too bad. We need to enforce the law. That is what we are going to do. And look, it is showing results." We are now seeing the results from recent enforcement. Therefore, we must not short circuit the process through some of the measures Congress is debating, which include legalizing illegal immigrants and gutting enforcement efforts.

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legalizations and seldom enforced sanctions, in the implementation of the Immigration Reform and Control Act of 1986).

IV. REMARKS OF RACHEL CANTY

I would like to begin by discussing my background with the Secure Border Initiative. I began as an attorney for the Coast Guard, working mainly on law enforcement issues, specifically migrant interdiction. This was the time of the great wave of Haitian immigrants, and their apprehension and humane treatment was of great interest to me. To me, the U.S. Coast Guard and U.S. Customs and Border Protection (formerly, U.S. Border Patrol) are very similar organizations—one is on land and one is on water. Both want to enforce the law, but both also want to treat people humanely. Mr. Asa Hutchinson communicated that ideal beautifully.[33] His former director of operations, Randy Beardsworth, was very, very enforcement-minded, yet the only picture on his wall was of this Haitian girl who was about six years old. On Christmas Day, he interdicted her and her family at sea. They were drowning—their boat had capsized—and he picked them up out of the water, gave them food, gave them shelter, and even had presents for them. There were tears of joy on this girl's face. That was the only picture he had on his wall. So when you think about people that work in immigration enforcement, please remember that these are people who really care about immigrants.

As I mentioned, I started with the Coast Guard doing migration interdiction on the water. At that time, I said, "Never again will I do migration interdiction or immigration." But then I received a call from somebody inviting me to the Office of Detention and Removal (DRO), in the former Immigration and Naturalization Service (INS), now Immigration and Customs Enforcement (ICE). I asked, "Why am I doing this?" But, through this opportunity, I was able to see immigration from an entirely different perspective. I was able to see the detention of people. I was able to see the removal of people. I was at DRO as they were developing detention standards. We worked very closely with the American Bar Association and human rights groups to come up with standards for those people in detention. People in detention receive all kinds of rights. If you are not familiar with detention standards, and you are interested, the standards are on the web.[34] They are very comprehensive. So, I was able to understand the processes of detention and removal.

Then I left DRO to work for Border and Transportation Security (BTS). I worked for Asa Hutchinson and others, and did things such as expedited removal and coordination between different components as the Department

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33. *See* Hutchinson, *supra* note 19, at 535.

34. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DETENTION OPERATIONS MANUAL, http://www.ice.gov/partners/dro/opsmanual/index.htm (last visited June 23, 2007) (detailing the standards for detainees).

of Homeland Security (DHS) took shape. Out of that work evolved the Secure Border Initiative (SBI). SBI was basically individuals taking a step back and saying, "You know what, we have Border Patrol and interdicting, and we have detention and removal, but we really do not have a connection between the two." SBI started as a resource project. Border Patrol numbers were increasing. No one was giving any money to detention. People were being interdicted and then turned loose because those responsible for their detention did not have the capacity for them.

One of the first things SBI did was bring people from all over together into a huge room. No one wanted to be there. There was no air conditioning. We made them map out the entire process from interdiction to removal. We had charts, and we had logs. We had all kinds of things. Out of that meeting came the program to end the practice of catch-and-release: the process of releasing people after they are interdicted because of the lack of room to detain them.

It was not one specific thing that began the end of catch-and-release. It was the addition of more detention beds—though adding only about 6,000 beds is not many in the grand scheme. It was working more closely with foreign countries. Because you need a travel document, such as a passport, to remove someone, coordinating with other countries makes removal faster. It was expanding expedited removal. It was giving more tools to the different DHS components to make everything more streamlined so that people did not have to spend more time in detention. When people were detained, they were given a piece of paper and told, "Show up for your immigration hearing in three months." As you can imagine, the vast majority do not show up, and therefore, add to the illegal population.

With the change in policy, these people were no longer released, but instead were kept in detention and went before an immigration judge. If they had a valid asylum claim or another reason to stay, they were afforded the opportunity to assert this to an immigration judge. If they did not have a valid reason to stay, they were removed and sent home.

An important aspect of the SBI was not just that it aligned those within DHS, but that it aligned those within the United States government as well. An interesting point about coordination is that the immigration judges do not work for DHS; rather, they work for the Department of Justice (DOJ). We have an entire system that involves different components. The Department of State grants visas, but DHS identifies and takes enforcement actions against visa over-stays. DHS may do interdictions. They may do employer enforcement. But DOJ then adjudicates as to who gets to stay. And if they say, "Yes, you get to stay," then the immigrant goes back to DHS for Citizenship and Immigration Services (CIS) issues. In sum, the

process is a complicated mess. If all of those involved in the process are not on the same page, and if they are not talking and coordinating, then the result is an even larger mess.

That mess is what the SBI was created to address. The initiative was designed to assemble everyone together in the same room and say, "Okay, what is going on? How can we talk to each other? How can we make sure that our budget requests are in alignment? How can we make sure that our operations are in alignment?" And the biggest success we have had so far is in the area of catch-and-release.

Another major thing that SBI is known for is SBI*net*, which behaves like a fence—but not in physical form. *S*BI*net* is technology on the border used to interdict faster. If you were to ask a Border Patrol agent, "Do you need 700 miles of fence?" he or she will say "no." He or she will say that you have to look at the terrain. A fence does different things. Sometimes you want to buy time. In a rural area, you do not want a fence. You do not want to catch them at the border. You want to catch them maybe 200 miles inside, where you can choose the time and place. In contrast, in a crowded urban environment like San Diego, you want to catch them at the border because five minutes later they are in downtown San Diego. You need something to stop them. So bills or ideas that say, "We know the answer: it is 700 miles of fence," are nonsense from a practical perspective.

What SBI*net* is trying to do is evaluate the border, section by section. What kind of sensors do we need? What kind of agents do we need? What kind of infrastructure do we need? If we build a partial fence of sensors, then for every sensor, how many agents do we need to respond to those sensors? What kind of roads do we need to respond to those sensors? What kind of detention capacity do we need? What kind of immigration judges do we need? We are trying to take a systematic approach to the entire immigration problem.

Taking such an approach means looking beyond the border. It is not just a border problem. It is an interior problem.[35] We cannot stop people from coming—people want to come to the United States. We have to accept that as a fact. No matter what we do, no matter what laws we pass, people are going to want to come to the United States, unless we become a society that says, "You execute intruders when protecting the border." That, however, is a society that we do not want to become.

In order to stop individuals from entering the United States illegally, we need a legal avenue to entry, such as the Temporary Worker Program. We also need worker enforcement. We need the employers to have a reason to want to comply with the law. Employers need the tools to comply with the

35. *See supra* p. 576 and notes 20-21 (discussing the Secure Border Initiative).

law, and they need to have the ability to comply with the law. My idea of a perfect situation would involve one employer suing another employer for unfair competition for using illegal immigrants when the first employer could not. In such a case, DHS would not have to spend resources, and people would realize that we are all in this together; we really need to work on this together.

It is somewhat of a combination: if you want to stop them at the border, then you want to make it more difficult at the border. But you have to recognize that people are going to come in anyway. Therefore, SBI was very involved with worksite enforcement. As you can tell, it is not about fines anymore. It is about working to make sure that employers are hiring legal people. We are also very much pushing for a legal way into the United States, taking a very comprehensive look and realizing that you cannot do one without the other. We understand the current political environment. No one believes us. No one trusts us anymore. Frankly, I would not trust us either. We have done a poor job at immigration enforcement. We need to prove that we are effective at immigration enforcement in order to then set up a three-legged system that considers the interior, the border, and a temporary worker program.

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FEARING THE UNITED STATES: RETHINKING MANDATORY DETENTION OF ASYLUM SEEKERS

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TABLE OF CONTENTS

* J.D. 2007, *magna cum laude*, American University Washington College of Law; B.A. 2002, Interdisciplinary Humanities, *magna cum laude*, Michigan State University. I would like to dedicate this Article to the memory of Daniel C. Learned, an ever-remembered immigration attorney and mentor who patiently instructed me in the foundations of law and immigration, which carried me through three years of law school and beyond. I would like to thank my family, particularly my grandmother, Antonia Marie Jarvis, who I am glad to resemble in all aspects of life. Also, my gratitude goes to Brittney Nystrom with the Capital Area Immigrants' Rights Coalition for her insight and assistance with this Article and her strong resolve to advocate for individuals struggling through the United States immigration system. I also thank Jared Rodrigues, Professor Muneer Ahmad, and the helpful staff of the *Administrative Law Review*.

INTRODUCTION

When asylum seekers arrive at a United States point of entry without valid travel documents or with fraudulent documents, the Department of Homeland Security (DHS) must place them in detention.[1] These "defensive" asylum seekers typically remain in detention while waiting for credible fear interviews and final adjudication of their claims through an adversarial process.[2] The time asylum seekers spend in detention facilities, which include criminal jails, ranges from several months to several years.[3] Although Congress has provided that the United States Attorney General, acting through DHS, may provide parole in limited situations,[4] DHS rarely grants such parole prior to a finding of credible fear. Similarly, DHS grants

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1. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2000) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); 8 C.F.R. § 235.3(c) (2007) (requiring mandatory detention of inadmissible aliens with limited parole opportunities); *see also* LAWYERS' COMM. FOR HUMAN RIGHTS, REVIEW OF STATES' PROCEDURES AND PRACTICES RELATING TO DETENTION OF ASYLUM SEEKERS 119-20 (2002), *available at* http://www.humanrightsfirst.org/refugees/reports/cntry_rev_02/Full_countryreview.pdf (explaining the difference between asylum seekers who are inadmissible and subject to expedited removal due to invalid travel documents and those who enter the United States on valid documents and later affirmatively apply for asylum); AMNESTY INT'L, UNITED STATES OF AMERICA LOST IN THE LABYRINTH: DETENTION OF ASYLUM-SEEKERS 1-2 (1999) [hereinafter LOST IN THE LABYRINTH] (reporting that not only are asylum seekers detained, but the length and conditions of their detention often violate international standards, including co-mingling with and treatment as criminals). This Article focuses on "defensive" asylum seekers—those who are subject to mandatory detention because they lacked valid travel documents when trying to enter the United States. Affirmative asylum seekers are not generally detained and are outside the scope of this Article. For purposes of this Article, the term "asylum seekers" generally refers to defensive asylum seekers.

2. *See* 8 U.S.C. § 1229a (2000) (detailing the removal proceeding process, which applies to defensive asylum seekers); 8 C.F.R. § 1240.2(a) (2007) (providing for government attorneys to present the government's case for removability).

3. *See infra* notes 125-27 and accompanying text.

4. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(d)(5) (2000)) (granting the Attorney General discretion to parole inadmissible aliens into the United States for "emergent reasons or for reasons deemed strictly in the public interest").

parole after a finding of credible fear in a highly unpredictable manner.[5] These parole decisions are made without reference to formal administrative guidelines and follow vague regulations.[6]

Defensive asylum seekers may escape fears of persecution in their countries of origin only to face fears of imprisonment in the United States. Detaining asylum seekers with legitimate claims, many of whom experienced persecution and wrongful incarceration in their home countries, can cause unexpected and undue trauma at the hands of the U.S. government.[7] The harshness of mandatory detention in the United States and lack of agency parole regulations often makes the United States a fearful destination, rather than a safe haven for the persecuted.[8]

Stories of unjustifiable detention are frequent. Take, for example, the account of a Somali woman who sought asylum in the United States, arriving with two bullets lodged in her body and suffering from uncontrolled diabetes and high blood pressure.[9] Her attorney requested parole, informed the government of a local cousin who could support her, and provided refugee identification. Despite these factors, Immigration and Customs Enforcement (ICE) detained the Somali asylum seeker for eight months and provided only basic medical care.[10] When the time arrived for an immigration judge to hear her case, the judge immediately granted her asylum without governmental objection.[11]

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5. *See, e.g.*, Cory Fleming & Fritz Scheuren, *Statistical Report on Detention, FY 2000-2003*, *in* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME II: EXPERT REPORTS, 323, 332 (2005), *available at* http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/ [hereinafter USCIRF ASYLUM SEEKERS] (reporting that after the credible fear hearing, without clear guidelines, release rates vary from 0.5% to 98% at different holding facilities).

6. *See* 8 C.F.R. § 212.5(b) (2007) (authorizing parole of aliens within the United States under limited circumstances for "urgent humanitarian reasons" or "significant public benefit" where "the aliens present neither a security risk nor a risk of absconding"); LOST IN THE LABYRINTH, *supra* note 1, at 73 (listing the vague standards that exist for guiding officers in granting parole). *But see* HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SEC. 47 (2004), *available at* http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf [hereinafter IN LIBERTY'S SHADOW] (recommending the promulgation of regulations that provide understandable and realistic methods of obtaining parole, including an appeals process and the ability to sign affidavits testifying to identification).

7. For a discussion of the negative impact of detention on individuals who were traumatized through persecution, see *infra* Part II.A.

8. This Article later discusses how international refugee law prohibits refoulement—forcibly returning refugees to areas where they are likely to be persecuted. *See infra* notes 45-48 and accompanying text.

9. See *infra* Part II.B for the detailed case study.

10. Interview with Brittney Nystrom, Asylum Project Director, Capital Area Immigrants' Rights Coalition, in Washington, D.C. (Jan. 10, 2007); E-mail from Jared D. Rodrigues, Attorney for the Somali Asylum Seeker, to Kristen M. Jarvis Johnson, (Feb. 17, 2007, 13:23:55 EST) (on file with author).

11. *See supra* note 10.

Problems such as this can deter legitimate seekers of asylum. In addition, mandatory detention of asylum seekers implicates violations of international refugee and human rights treaties, including the Convention Against Torture.[12] Deterring refugees from seeking protection in the United States likely violates the principle of non-refoulement,[13] which has led many nongovernmental organizations to be highly critical of U.S. mandatory detention policies.[14] It also sets a poor example for the international community, which looks to the United States for leadership in setting human rights and civil rights standards. Given the fundamental purpose behind asylum law—to provide refuge for individuals with a credible fear of persecution, in addition to advances in modern monitoring technology—mandatory detention policies deserve legislative and administrative reconsideration.

This Article challenges the current policy and regulations behind mandatory detention for defensive asylum seekers and suggests that Congress and DHS should implement thorough and efficient credible fear interviews, define clear parole guidelines, and use humane detention alternatives. Part I of this Article discusses the failure of current asylum laws and regulations to strike a balance between the United States' international obligations to protect refugees with recent counter-terrorism and national security efforts. Part II of this Article identifies the inequitable burden that mandatory detention places on asylum seekers. Part III explains how detention must serve a rational purpose and how administrative reform of the credible fear review process would justify alleviating harsh mandatory detention requirements. In Part IV, this Article highlights how DHS should focus on clarifying asylum and parole guidelines by increasing the thoroughness of credible fear interviews and providing detention alternatives.

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12. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 11, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (requiring "systematic review" of interrogation and custody procedures for anyone a State Party detains). For a discussion on the legal implications of mandatory detention, see *infra* Part I.B.

13. For an understanding of the principle of non-refoulement, which prohibits forcibly returning an individual to a country where he or she will be persecuted, see *infra* note 45.

14. *See* AMNESTY INT'L ET AL., COMMON PRINCIPLES ON REMOVAL OF IRREGULAR MIGRANTS AND REJECTED ASYLUM SEEKERS (2005), *available at* http://www.hrw.org/europe/eu090105.pdf [hereinafter COMMON PRINCIPLES] (declaring in the preamble that "[t]he undersigned NGOs deplore the increasing use of detention to deter asylum-seekers and migrants. Governments often justify detention as the only way to ensure an effective removal policy"). The declaration was signed by Amnesty International, EU Office; Caritas Europa, Churches' Commission for Migrants in Europe; European Council on Refugees and Exiles; Human Rights Watch; Jesuit Refugee Service, Europe; Platform for International Cooperation on Undocumented Migrants; Quaker Council for European Affairs; Save the Children; Cimade, France; Iglesia Evangelica Espanola; Federazione delle Chiese Evangeliche in Italia; and SENSOA, Belgium. By deterring or preventing legitimate asylum claims, the United States could be "forcing" an asylum seeker to return to persecution.

I. STRIKING A BALANCE BETWEEN REFUGEE PROTECTION AND NATIONAL SECURITY

Current U.S. asylum policy and regulations subject defensive asylum seekers claiming a fear of persecution to mandatory detention.[15] The immigration regulations do not consider arriving asylum seekers as having legally entered the United States because their request for asylum is a request for admittance.[16] Therefore, having not legally crossed the border, it is debatable whether defensive asylum seekers receive full constitutional protections through the due process of law.[17] In many cases, DHS places asylum seekers in jail or jail-like institutions, alongside convicted criminals.[18]

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15. This Article includes a detailed discussion of the U.S. regulations subjecting defensive asylum seekers to mandatory detention. *See infra* Part I.A.

16. *See* 8 C.F.R. § 1.1(q) (2007) (defining "arriving aliens" as aliens who arrive at a U.S. port-of-entry and seek entry into the United States, which includes those temporarily paroled in the United States under 8 U.S.C. § 1182(d)(5)(A)(2000)); *see also* 8 U.S.C. § 1225 (2000) (codifying the Immigration and Nationality Act that governs inspection and admission of arriving aliens, including asylum seekers); Matter of Sanchez, 17 I. & N. Dec. 218, 220 (Bd. of Immigration Appeals 1980) (reiterating that aliens do not enter, even if paroled into the United States, until they are officially released from custody and admitted into the United States).

17. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 523 (2003) ("[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens," which include liberty rights); Zadvydas v. Davis, 533 U.S. 678, 693-94 (2001) (drawing a legal "distinction between an alien who has effected an entry into the United States and one who has never entered. . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders"); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) ("[A]liens who have *once passed through our gates*, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.") (emphasis added) (citations omitted); AM. BAR ASS'N, DUE PROCESS & JUDICIAL REVIEW 1 (Feb. 2006) (remarking that the immigration system fails to provide basic due process rights to asylum seekers and immigrants and supporting due process rights for removal hearings and immigration trials), *available at* http://www.abanet.org/poladv/priorities/immigration/Due%20Process%20&%20Judicial%20Review.pdf; *see also infra* note 47 (discussing *Zadvydas* and the due process rights afforded by the U.S. Constitution). *Kim* noted that aliens receive due process of law in deportation proceedings, but this is balanced with the government's need to detain such aliens during those proceedings. 538 U.S. at 523.

18. *See* USCIRF ASYLUM SEEKERS, *supra* note 5, at 358 (showing that from fiscal year 2000 to fiscal year 2003, the majority of aliens (55%) detained for credible fear hearings were placed in state and local jails, federal prisons, and contract facilities and the remainder (45%) were held in service processing centers); *see also* MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 227-31 (2004) (quoting Superintendent James O'Mara of the Hillsborough County House of Corrections in New Hampshire who stated that most immigration detainees were not allowed educational, work-release, or community-based programs because they were classified as "detained," which is a higher security classification than many of the criminal inmates). Other accounts from attorneys and immigration officials familiar with the detention system reported that separation of immigration detainees and criminals is impractical, if not impossible.

This creates a paradoxical problem: Those who knock on the door to the United States in search of a place of refuge are greeted with a welcome mat to the criminal corrections system.[19]

Ironically, current asylum regulations allow certain asylum seekers, who sneak over the border or enter the United States using fake travel documents, to live freely while having one year to prepare and file their asylum applications.[20] In fact, immigration experts attest that the current asylum system can actually diminish national security because it is "dysfunctional."[21] "National security, if that is the primary goal of our immigration system, is most effectively enhanced by improving the mechanisms for identifying actual terrorists, not by implementing harsher or unattainable standards or blindly treating all foreigners as potential terrorists."[22] Although holding asylum seekers who do not have entry documents may prevent undocumented individuals from entering the United States, increased biometrics, data collection, and thorough screening can eliminate the need for detention while still protecting national interests.

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19. Note that asylum seekers are typically claiming to fear persecution that likely involved incarceration and mental or physical abuse, and detention can cause asylum seekers to relive or intensify their fears. *See, e.g.*, PHYSICIANS FOR HUMAN RIGHTS, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS 50 (2003), *available at* http://www.physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf [hereinafter FROM PERSECUTION TO PRISON] (reporting in its study of mental and physical effects of detention on asylum seekers that 67% of asylum detainees were incarcerated in their home countries in relation to their persecution, 59% knew a friend or family member who had been murdered, 26% had been sexually assaulted, and 74% reported being subject to torture); *see also infra* notes 75-76 and accompanying text.

20. If an asylum seeker manages to enter the United States unlawfully using false documentation, then she may still apply for asylum under 8 U.S.C. § 1158, regardless of admissibility. *See* 8 C.F.R. § 208.14(c)(1) (2007) (allowing an immigration judge or asylum officer to grant asylum to aliens even if they entered the United States on fraudulent documents or in secret as defined in the Immigration and Nationality Act § 212(a) and 237(a)). *See generally* REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 103-09 (2d ed. 2000) (outlining the affirmative asylum process, which allows unlawful entrants to apply for asylum so long as the INS (now DHS) has not arrested and instigated removal proceedings against them).

21. *See Refugees: Seeking Solutions to a Global Concern: Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary*, 108th Cong. 62 (2004) [hereinafter Kuck Testimony] (statement of Prof. Charles H. Kuck) (construing a harsh and confusing asylum system as an impediment to effective anti-terrorism and enforcement efforts).

22. *Id.*

A. United States Regulations Relating to Defensive Asylum, Mandatory Detention, and Credible Fear Interviews

U.S. immigration law and DHS regulations place inadmissible aliens into an expedited removal process upon arrival at a U.S. port of entry.[23] This includes asylum seekers who are inadmissible because they lack valid entry documents.[24] Aliens subject to expedited removal must be detained, unless granted parole,[25] until an immigration judge adjudicates their asylum claims.[26] Title 8 of the U.S. Code, § 1225(b)(1)(B) states, "If the officer determines at the time of the interview that an alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum. . . ."

When an alien arrives at a port of entry and claims to fear returning to her country, or appears to have false travel documents during the initial screening process, the screening officers place her into secondary inspection.[27] During secondary inspection, an inspection officer will ask questions to determine whether the individual is claiming to fear returning

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23. 8 U.S.C. § 1225 (2000); 8 C.F.R. § 235.3 (2007); *see also* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002) (delineating the procedures for expedited removal and detention of inadmissible aliens).

24. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) (2000) ("If an immigration officer determines that an alien . . . arriving in the United States . . . is inadmissible under section 1182 (a)(6)(C) or 1182 (a)(7) of this title and the alien indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer . . ."); 8 C.F.R. § 235.3(b)(4) (2007) (noting that the inspecting officer must discontinue the removal process until an asylum officer interviews the alien); *see also* 8 U.S.C. § 1182(a)(7)(A)(i)(I) (2000) (stating that any immigrant "who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document . . . is inadmissible").

25. For a discussion of parole see *infra* note 32.

26. *See* 8 U.S.C. § 1225(b)(1)(B)(ii) (2000) (detailing the credible fear determination procedure where after an asylum officer makes a positive determination, the case is referred for "further consideration of the application for asylum"); *id.* § 1229a(a)(1) (providing the immigration court with jurisdiction to hear removal cases). Because the asylum seeker has already been placed in removal proceedings, even though an asylum officer may make a determination of credible fear, once that determination is made, the case will be referred to an immigration court for determination of removability and the asylum claim. For a detailed explanation of the expedited removal process, including asylum officer determination of credible fear and immigration judge final determination, see ALLISON SISKIN & RUTH ELLEN WASEM, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS, CRS REPORT FOR CONGRESS, RL33109 (Sept. 5, 2005), *available at* http://trac.syr.edu/immigration/library/P13.pdf.

27. 8 U.S.C. § 1225(b)(1)(A)(ii) (2000); *see also* Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, *in* USCIRF ASYLUM SEEKERS, *supra* note 5, at 235-37 (outlining an arriving alien's entry process into the United States). For a general description of the asylum process for immigrants who lack valid travel documents, see Amy Langenfeld, Comment, *Living in Limbo: Mandatory Detention of Immigrants Under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041, 1045-47 (1999).

to the her country of origin.[28] The officer will also make a determination regarding the alien's travel documents. If the alien does not possess adequate entry documents, the officer will initiate expedited removal proceedings.[29] In addition, if the inspection officer determines the alien may have a fear of returning to her country, the officer will place that individual in detention while waiting for a "credible fear interview."[30] During the credible fear interview, an asylum officer will determine whether the alien has a credible fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion."[31]

The law provides for discretionary parole only in limited circumstances, and the regulations provide no guidelines to expand or define these statutory provisions.[32] In practice, defensive asylum seekers are rarely released prior to undergoing a credible fear interview.[33] DHS has the authority to grant parole to defensive asylum seekers, but 8 U.S.C. § 1182(b)(5)(A) determines parole on "a case-by-case basis [and allows parole only] for urgent humanitarian reasons or significant public benefit." DHS has not expanded upon or clarified how it grants parole under this

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28. *See* Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, *in* USCIRF ASYLUM SEEKERS, *supra* note 5, at 235-37 (explaining that the "officer is required to ask the arriving alien a series of questions, which are designed to ascertain whether the arriving alien has a fear of immediate return to the home country").

29. *See id.* (remarking how an alien must demonstrate a "'credible fear' of return to his or her home country," or risk being quickly removed from the United States).

30. *See* 8 U.S.C. § 1225(b)(1)(B)(v) (defining credible fear as a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum").

31. 8 C.F.R. § 208.13(b)(1) (2007); *see also* Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, *in* USCIRF ASYLUM SEEKERS, *supra* note 5, at 235-37 (explaining that "an alien expressing a fear to return to the immigration inspector must be referred to an asylum officer, who then determines whether that fear is 'credible'").

32. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) tightened standards for parole, removing the Attorney General's ability to grant parole to select refugee populations deemed to be in a state of emergency. Pub. L. No. 104-208, § 602, 110 Stat. 3009-689 (amending 8 U.S.C. § 1182(d)(5)); *see also supra* note 6 and accompanying text regarding the lack of regulatory guidelines for granting parole.

33. *See* Lori A. Nessel, *"Willful Blindness" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71, 89 n.66 (citing Karen Musalo et al., *The Expedited Removal Study Releases Its Third Report*, 77 INTERPRETER RELEASES 1189, 1190 (2000)) ("Once an applicant establishes a credible fear of persecution and is referred to an immigration judge, she is no longer in expedited removal proceedings and is eligible to apply for parole from detention."); *see also* USCIRF ASYLUM SEEKERS, *supra* note 5, at 330 (finding an average detention time of sixty-four days before an asylum officer conducts a credible fear interview with an asylum seeker).

code.[34] Additionally, after undergoing a credible fear interview, asylum seekers have disparate chances of receiving parole depending simply upon their port of entry.[35]

During the credible fear interview, if the asylum officer, through careful examination, determines the alien claiming asylum has a credible fear of persecution, then detention serves little valid purpose.[36] To the contrary, detention can cause harm to aliens who experienced persecution in the forms of mental or physical violence and incarceration.[37] In the case of detained asylum seekers found to have a credible fear of persecution, Congress should consider whether detention serves any reasonable goal, and DHS should develop clear standards for paroling such asylum seekers.

B. International Refugee Obligations: Foundations for United States Asylum Law

The United States' international obligations under the 1951 Convention[38] and the 1967 Protocol[39] form the basis of U.S. asylum law when it relates to the status of refugees.[40] These treaties codify international consensus on providing refuge for humans who have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. . . ."[41] The international community agreed to protect refugees based on recognition of universal

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34. *See supra* note 6 and accompanying text.

35. For more detailed information on discretion and statistics regarding parole release rates, see *infra* Part IV.A.

36. For a more thorough discussion of why thorough interviews would lessen the need for detention, see *infra* Part III.B.

37. *See infra* Part II.A.

38. Convention relating to the Status of Refugees art. 1(A)(2), July 28, 1951 [hereinafter Refugee Convention].

39. *See* Protocol Relating to the Status of Refugees art. I.2, Oct. 4, 1967 [hereinafter 1967 Protocol] (removing date limitations on the definition of "refugee").

40. *See* United States Citizenship and Immigration Servs., *Asylum Overview*, http://www.uscis.gov/ (follow "Services & Benefits" hyperlink; then follow "Humanitarian Benefits" hyperlink; then follow "Asylum" hyperlink; then follow "Overview of Asylum" hyperlink) (last visited June 24, 2007) (noting additionally that U.S. asylum law is rooted in the 1948 Universal Declaration of Human Rights' concepts that recognize persecution as a problem and declare in Article 14 that all humans have the right to seek asylum from such persecution); *see also* Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention* 17 AM. U. INT'L L. REV. 1131, 1132 & n.5 (2002) (identifying the 1951 Refugee Convention, as amended by the 1967 Protocol, as the "most significant" multilateral treaty governing states' obligations to hear asylum claims).

41. Refugee Convention, *supra* note 38, art. 1(A)(2); 1967 Protocol, *supra* note 39, art. I.2; *see also* LOST IN THE LABYRINTH, *supra* note 1, at 86 (noting that the same international agreements that condemn return of asylum seekers to hostile countries also "require that the detention of asylum-seekers should normally be avoided" and if necessary should be demonstrated "by means of a prompt, fair individual hearing before a judicial or similar authority").

human rights,[42] particularly fundamental rights to life and liberty.[43] Protecting such rights is the purpose and ultimate policy goal that U.S. asylum laws aim to achieve. The U.S. government must carefully preserve those rights.[44]

The United States must not only protect refugees, but it also must not take actions that would impose penalties or deter refugees from seeking asylum.[45] Article 31 of the Refugee Convention proscribes state penalization of refugees who enter a territory to escape threats on their lives, even if the refugees enter without authorization. Under its international treaty obligations, the United States must (1) hear asylum claims and respect the principle of non-refoulement, which prohibits returning an asylum seeker to a country where she faces persecution,[46] and (2) respect international human rights by treating asylum seekers at and within U.S. borders with dignity and allowing them freedom of movement.[47] If mandatory detention deters refugees from entering the

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42. *See, e.g.*, CHRISTINA BOSWELL, THE ETHICS OF REFUGEE POLICY 27 (2005) (discussing the progression of international recognition of refugee rights and the development of the 1951 Convention, which was "clearly based on a universalist theory of human rights").

43. *See id*. (affirming that "[t]hose party to Convention were obliged not to expel or send refugees back to countries where their 'life or liberty' would be at risk, thereby establishing the right to *non-refoulement*"); Universal Declaration of Human Rights art. 3, Dec. 10, 1948 (mandating that "[e]veryone has the right to life, liberty and security of person"). Article 14 of the Universal Declaration of Human Rights also states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." The United States has continued to enter into obligations that guarantee refugee rights, including the Convention Against Torture and the International Covenant on Civil and Political Rights, *entry into force* Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

44. *See* LOST IN THE LABYRINTH, *supra* note 1, at 85 (prioritizing state preservation of human rights, including the right to seek asylum, in immigration laws designed both to adhere to international refugee and human rights commitments and also to guard the state's security and national population).

45. *See* Refugee Convention, *supra* note 38, arts. 26, 31-33 (mandating that states shall allow refugees freedom of movement, shall not penalize refugees for entering unlawfully in order to seek asylum, and shall not return ("refoul") refugees whose lives and freedoms are threatened by such return); United Nations High Commissioner for Refugees, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Feb. 1999, Guideline 3, *available at* http://www.unhcr.org.au/pdfs/detentionguidelines.pdf [hereinafter UNHCR *Guidelines*] (prohibiting detention in order to discourage asylum seekers); ICCPR, *supra* note 43, art. 9 (prohibiting arbitrary detention); Convention Against Torture, *supra* note 12, art. 11 (requiring that states systematically review procedures and policies relating to "arrangements for the custody and treatment of persons subjected to any form of arrest, detention, or imprisonment").

46. *See, e.g.*, Refugee Convention, *supra* note 38, art. 33 (principle of non-refoulement); Convention Against Torture, *supra* note 12, art. 3 (principle of non-refoulement); Langenfeld, *supra* note 27, at 1055-56 (1999) (describing how United States obligations require "that a country not return (in French, *refouler*) a refugee to his home country when the refugee would be persecuted or killed upon return," meaning that the United States must at least hear asylum claims to provide temporary refuge, not necessarily permanent asylum).

47. *See, e.g.*, ICCPR, *supra* note 43, preamble and art. 9 (conforming with the Universal Declaration of Human Rights, protecting individual liberty and security, and prohibiting arbitrary arrest or detention); Convention Against Torture, *supra* note 12, art. 16

United States to seek asylum, then the United States risks violating its obligations to hear asylum claims.[48] Similarly, detention that serves no reasonable purpose, or is excessive in nature, risks violating international obligations to protect liberty, dignity, and freedom of movement.

C. National Security and Recent Immigration Policy Changes

Recent events of terrorism within the United States and concerns over immigration policy distract from refugee protection, which polarizes asylum policy between protection of fundamental human rights and protection of national interests.[49] Protection of the nation, especially in light of recent terrorism, remains a vital interest. However, it should not result in asylum laws that overlook or trivialize fundamental rights. Although effective protection of national security requires border security,[50] balance is necessary and enforcement efforts cannot disregard human rights and refugee protection obligations.[51]

(requiring states to prevent acts of "degrading treatment"). Degrading treatment plausibly includes placing legitimate asylum seekers who have faced real persecution in jail for extended periods of time and alongside criminal convicts. *See* U.S. CONST. amend. V (requiring due process of law to protect security of life, liberty, and property); Universal Declaration of Human Rights, arts. 6-7 ("[6] Everyone has the right to recognition everywhere as a person before the law. [7] All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."); Langenfeld, *supra* note 27, 1057-59 (describing due process protections afforded to immigrants). *But see* Zadvydas v. Davis, 533 U.S. 678, 693-94 (2001) (holding that the Due Process Clause only applies to aliens who have officially entered the United States and not to those not yet admitted or paroled into the United States).

48. ICE has reported that it uses detention to deter certain asylum seekers. *See* Bill Frelick, *US Detention of Asylum Seekers and Human Rights*, MIGRATION INFO. SOURCE, Mar. 1, 2005, http://www.migrationinformation.org/Feature/print.cfm?ID=296 (reporting the ICE response to the U.S. Commission on International Religious Freedom's report on asylum seekers in expedited removal as stating, "Aliens who arrive by boat are subject to a national policy of continued detention post-credible fear in order to deter others from taking the life-threatening boat trip and ensure our maritime defense assets are not diverted from their national security mission"); *see also infra* note 71 (discussing reports of cruel detention conditions).

49. *See* BOSWELL, *supra* note 42, at 6-7 (noting that the debate on refugee protections is "polarised around two apparently incompatible perspectives" of refugee protections and "national economic, strategic, and social goals"); *The Need for Comprehensive Immigration Reform: Strengthening Our National Security: Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary*, 109th Cong. 6 (2005) (statement of Hon. Asa Hutchinson) [hereinafter Hutchinson Testimony] (underscoring the heightened focus on national security post 9/11); *cf.* Kuck Testimony, *supra* note 21, at 62-65 (discussing the historic role of the U.S. refugee program as a tool to promote freedom and democracy and highlighting the undefined role of the current refugee system).

50. *See* Hutchinson Testimony, *supra* note 49, at 6 (asserting that "in order to be effective in the war against terrorism, our Nation must be able to secure its borders").

51. Current refugee admittance statistics in the United States show a drastic decline after September 11, 2001. Kuck Testimony, *supra* note 21, at 61. The asylum admittance rate has declined, but not as sharply as the refugee numbers. Jeanne Batalova, *Spotlight on*

After the terrorist attacks of September 11, 2001, U.S. immigration policy came to the forefront of congressional and executive attention. Increased homeland security and anti-terrorism efforts led to changes in law and policy.[52] In the immediate aftermath of September 11, congressional actions such as the USA PATRIOT Act[53] closed public immigration hearings of special interest cases,[54] tightened detention policies,[55] and heightened efforts towards stringent border controls.[56] The House and Senate passed many proposals relating to travel restrictions, including an increase in using and developing biometric data,[57]

Refugees and Asylees in the United States, MIGRATION INFO. SOURCE, Aug. 1, 2006, http://www.migrationinformation.org/USFocus/display.cfm?ID=415.

52. *See* RICHARD PEÑA, ABA COMM'N ON IMMIGRATION, REPORT TO THE HOUSE OF DELEGATES 4 (2006) (reviewing reports that ICE detention and enforcement activities after 9/11 were highly reactive and often unreasonable); Bill Frelick, *supra* note 48 ("The issue of detaining asylum seekers has recently risen on the US political agenda . . . . Members of Congress have introduced [terrorism-related security measures in their] legislation both to limit grounds for asylum, arguing that terrorists use the asylum system to gain a foothold in the United States, and to expand detention of aliens, including asylum seekers.").

53. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 272 U.S.C.). *See generally* Shirin Sinnar, Note, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA PATRIOT Act*, 55 STAN. L. REV. 1419, 1420-21 (2003) (scrutinizing the constitutionality of Section 412 of the Patriot Act's requirement to mandatorily detain "certified" aliens).

54. *See* USA PATRIOT Act § 412 (allowing the Attorney General discretion to take suspected terrorist aliens into custody); North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 199 (3d Cir. 2002) (defining "special interest cases" as those that the Attorney General identified as potential terrorist cases after September 11, 2001); *War on Terrorism: Immigration Enforcement Since September 11, 2001, Hearing Before the Subcomm. on Immigration, Border Security, and Claims, H. Comm. on the Judiciary*, 108th Cong. 32 (2003) (statement of Laura W. Murphy and Timothy H. Edgar, ACLU Washington National Office) ("The detentions and deportations of immigrants deemed 'special interest' to the government were accomplished under an unprecedented veil of secrecy."); Press Release, Human Rights First, *Supreme Court Allows Secret Deportation Hearings To Stand* (May 27, 2003), http://www.humanrightsfirst.org/media/2003_alerts/0527.htm (drawing attention to the holding in *North Jersey Media Group, Inc. v. Ashcroft* as potentially jeopardizing basic civil liberties by allowing the Chief Immigration Judge Michael Creppy's instructions to bar the public from "special interest cases"); DOW, *supra* note 18, at 22-24 (noting that after September 11, 2001, "[i]mmigration hearings, traditionally open to the press and to the public, were closed in the so-called special interest cases").

55. *See, e.g.*, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960-65 (2002) (presenting a grim picture for immigrants placed in detention after September 11, 2001 who were subject to arbitrary detention often without having any formal charges against them for over a month and whose hearings were kept secret from the public and press).

56. *See* USA PATRIOT Act §§ 401-403, 405, 411-418 (placing greater protections on border security).

57. Biometric data increases particularly focused on documenting non-U.S. citizens. *See* MICHAEL JOHN GARCIA & RUTH ELLEN WASEM, 9/11 COMMISSION: CURRENT LEGISLATIVE PROPOSALS FOR U.S. IMMIGRATION LAW AND POLICY, CRS REPORT FOR CONGRESS 3-4 (2004) (proposing a "hastening of the development and installation of a biometric entry and exit data system that is integrated with various databases and data systems that process or contain information on aliens").

securitizing travel documents, and inspecting fraudulent travel documents at airports in foreign countries.[58]

Many recent immigration reforms specifically target asylum seekers and issues of detention. The 2004 Intelligence Reform and Terrorist Prevention Act authorized construction of up to 40,000 additional detention bed spaces, nearly twice the current average daily detainee bed space.[59] This could potentially increase detention costs by $3.2 million per day.[60] The immigration reform bills of 2005 and 2006 proposed provisions that could allow the Department of Justice (DOJ) to prosecute asylum seekers for carrying false passports.[61] House Resolution 4437 proposed returning asylum seekers to their country of origin, presumably where they experienced persecution, while any appeals were pending in federal court.[62] It also proposed to expand expedited removal procedures.[63] U.S. Citizenship and Immigration Service's (USCIS) Ombudsman, Prakash Khatri, recommended limiting affirmative asylum to those with valid immigration status, which represent only five to ten percent of the total affirmative asylum applicants.[64] These attempts to further restrict asylum availability and to create additional complications within an overly

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58. *See id.* (proposing, among other things, improvements of "the security of passports and other travel documents," expansion of "pre-inspection programs in foreign countries and assistance to air carriers at selected foreign airports in the detection of fraudulent documents" and improvement of "the security of the visa issuance process by providing . . . greater training in detecting terrorist indicators, terrorist travel patterns and fraudulent documents").

59. During the first two quarters of FY 2004, the average daily detainee rate for the Department of Homeland Security was 22,812 non-citizens. *See* ALISON SISKIN, 9/11 COMMISSION: IMMIGRANT-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES, CRS REPORT FOR CONGRESS 12 (2004); 9/11 COMMISSION: IMMIGRANT-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES, CRS REPORT FOR CONGRESS 12 (2004)

60. This figure is the total increase in detention costs if the beds were filled at the approximate $80 per detainee, per day cost. *Id.* at 13.

61. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 213 (2d Sess. 2005); *see also* Human Rights First, *The U.S. Immigration Reform Debate: Senate Immigration Bill Passes, But Puts Refugees at Risk*, http://www.humanrightsfirst.org/asylum/asylum_12_reform.asp (last visited June 30, 2007) (discussing the problematic sections of H.R. 4437 as well as Senate bill S. 2611 passed in 2006). This sort of highly reactive provision reaches near absurdity when considering that many legitimate asylum seekers escape life-threatening situations that often leave them with no choice but to use false travel documents.

62. H.R. 4437 § 407.

63. *Id.*

64. Letter from Dr. Emilio T. Gonzalez, Director, U.S. Citizenship & Immigration Serv., to Prakash Khatri, U.S. Citizenship & Immigration Serv. Ombudsman (June 20, 2006), http://www.humanrightsfirst.info/pdf/06721-asy-uscis-resp-omb-rec-2324.pdf (responding to USCIS Ombudsman Khatri's recommendation to limit USCIS adjudication of asylum applications). Khatri also proposed eliminating USCIS expedited decisionmaking, thereby placing all asylum seekers with invalid immigration status in removal proceedings to be heard by immigration judges. *Id.*

complex asylum system do not place immigration restrictions aimed at national security protection in balance with U.S. obligations to protect the persecuted.

II. THE PROBLEM OF MANDATORY DETENTION FOR ASYLUM SEEKERS

Legitimate asylum seekers have faced traumatic, life-threatening situations; yet, U.S. asylum laws and regulations continue to require mandatory detention. Those who are granted asylum often report that they felt degraded and treated as criminals while they were in detention. The question must be raised: If detention is failing to serve any rational purpose, such as containing serious flight risks or criminal threats, then why does U.S. law continue to demand that asylum seekers be locked up? In most cases, not only do the laws appear to serve little valid purpose, they impose additional and severe burdens on many legitimately traumatized asylum seekers.

A. Mandatory Detention Penalizes the Persecuted

Numerous problems arise from mandatory detention of asylum seekers, presenting a compelling case for rethinking current asylum detention laws and regulations. Take for example, Marie Jocelyn Ocean, who was ultimately granted asylum to escape violent persecution in Haiti for her political opinions. Upon arriving in the United States, she was "thrown in jail" and treated like a criminal.[65] Initially she was locked in a hotel room with three other women for two months and allowed to "breathe fresh air" on only four days.[66] Once she was transferred to jail, guards strip-searched her and, at night, they would wake her up by banging flashlights on doors, which often caused her to relive trauma she had experienced in Haiti.[67] Relative to the detention of other asylum seekers, Marie's detention period was rather short: a mere five months.[68]

Marie's story is too common; many asylum seekers are treated like criminals. Often, prison and jail guards do not know the difference between immigrant detainees and those incarcerated for criminal punishment.[69] This is contrary to the United Nations High Commissioner

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65. *The Detention and Treatment of Haitian Asylum Seekers: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 83-85 (2002) (statement of Marie Jocelyn Ocean, Haitian Asylee and Former INS Detainee).

66. *Id.*

67. *Id.*

68. *See id.* (describing the conditions of her detention from December 2001 to May 2002).

69. *See, e.g.*, U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2006: RIGHTS AND RISKS 103 (2006) [hereinafter WORLD REFUGEE SURVEY] (reporting commingling of criminal and asylum detainees who were held for an average of ten months and up to 3.5 years); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, REPORT TO

for Refugees (UNHCR) Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, which prohibit commingling of detainees and criminal convicts.[70] Even separate detention facilities seem prison-like and are often overcrowded.[71] Detainees are commonly physically abused or restrained, which has lead to desperate attempts to return to the dangerous conditions in the detainee's home country and even suicide.[72] Poor detention conditions compound the trauma that legitimate asylum seekers have already experienced from persecution in their home countries.[73]

The prison-like conditions and criminal-like treatment of asylum seekers are deterrents to those seeking asylum in the United States. Many asylum seekers could easily perceive the detention system as penalizing them for attempting to seek refuge in the United States.[74] Two prevalent considerations emerge to question the policy of detaining asylum seekers alongside of criminal convicts in jails and prisons.

CONGRESS: DETAINED ASYLUM SEEKERS, FISCAL YEAR 1999 5, *available at* http://www.immigration.com/newsletter1/fy99reportasylumseeker.pdf (reporting an average of 145.1 days of detention for detained asylum seekers; it is unclear whether this number includes the time spent in detention before the credible fear interview); LOST IN THE LABYRINTH, *supra* note 1, at 48-51 (expressing concern that guards are often unaware that the detainees are asylum seekers, will treat detainees as if they pose a security threat, and will commonly limit access to legal counsel).

70. *See* UNHCR *Guidelines*, *supra* note 45, Guideline 10(iii) (recommending that criminal facilities should rarely be used in lieu of separate immigration detention centers).

71. *See The Detention and Treatment of Haitian Asylum Seekers: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judciary*, 107th Cong. 65 (2002) (statement of Cheryl Little, Executive Director, Florida Immigrant Advocacy Center) [hereinafter Little Testimony] (remarking that the Krome Service Processing Center in Florida was holding 800 detainees in May 2002 when the total capacity was limited to 538); CATHOLIC LEGAL IMMIGRATION NETWORK, INC., THE NEEDLESS DETENTION OF IMMIGRANTS IN THE UNITED STATES 15 (Aug. 2000) [hereinafter THE NEEDLESS DETENTION], *available at* http://www.cliniclegal.org/Publications/AtRisk/atrisk4.pdf (noting that in recent years the population at the Krome Service Processing Center has risen from 300 to over 600). The problems and allegations of "sexual molestation, harassment, and even rape" at Krome were so extensive that many female Haitian asylum seekers were transferred to a maximum-security jail where they were verbally abused by the guards, locked into cells, and bereft of proper nutrition and healthcare. Little Testimony, *supra*, at 6-7.

72. *See, e.g.*, WORLD REFUGEE SURVEY, *supra* note 69, at 103 (citing specific examples of beatings and suicide attempts at Passaic County jail in New Jersey); LOST IN THE LABYRINTH, *supra* note 1, at 22 (reporting on the handcuffing and shackling of asylum seekers); THE NEEDLESS DETENTION, *supra* note 71, at 3, 6-10 & n.32 ("For certain asylum-seekers, detention can evoke and even mirror the conditions they fled.").

73. *See, e.g.*, Langenfeld, *supra* note 27, at 1050-51 (1999) (emphasizing the "stressful conditions . . . that aggravate the trauma already experienced by asylum-seekers before arriving in the United States").

74. *See* U.N. High Comm'r for Refugees, Div. of Int'l Protection Servs., *Legal and Protection Policy Research Series: Alternatives to Detention of Asylum Seekers and Refugees*, ¶ 15, U.N. Doc. POLAS/2006/03 (Apr. 2006) (*prepared by* Ophelia Field) (explaining that associating asylum seekers with criminals and using criminal incarceration methods could amount to a penalty for asylum seekers and refugees); *see also supra* note 48 and accompanying text.

First, mandatory detention poses significant risks of intensifying trauma already experienced by asylum seekers with legitimate claims of persecution.[75] The psychological impact of detention can be devastating to many asylum seekers who are experiencing anxiety, depression, and post-traumatic stress disorder.[76] A harrowing report by the United Nations revealed that DHS regularly uses handcuffs, belly chains, and leg restraints.[77] DHS also conducts occasional strip searches of asylum seekers at entry ports.[78]

Second, mandatory detention of asylum seekers, if it amounts to a penalty, violates article 31(1) of the 1951 Refugee Convention and sets a poor example within the international community for upholding international obligations and commitments to preserve human and civil rights.[79] The United States initiated world leadership in developing and promoting the International Covenant on Civil and Political Rights

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75. Even if an asylum seeker does not meet the criteria for asylum, this does not indicate that he or she was not traumatized. For example, many victims of gang violence do not meet the asylum criteria of persecution "on the account of race, religion, nationality, membership in a particular social group, or political opinion." *See generally* 8 C.F.R. § 208.13(b)(1) (2007). To confine such individuals to criminal prison settings may still create undue trauma. For a discussion on the mental and physical consequences that poor detention standards have on asylum seekers, see generally FROM PERSECUTION TO PRISON, *supra* note 19.

76. *See* FROM PERSECUTION TO PRISON, *supra* note 19, at 55-57.

> [The] study team documented extremely high levels of anxiety, depression and post-traumatic stress disorder (PTSD) among the sample of detained asylum seekers interviewed. . . . Although many of the detainees had suffered substantial pre-migration trauma . . . the large majority said that their symptoms grew much worse while in detention. In fact, the levels of anxiety, depression, and PTSD observed in this sample of detained asylum seekers were substantially higher than those reported in several previous studies of refugees living in refugee camps . . . .

Id.

77. *See* Rachel L. Swarns, *Threats & Responses: Immigration; U.N. Report Cites Harassment of Immigrants Who Sought Asylum at American Airports*, N.Y. TIMES, Aug. 13, 2004, at A11 (reporting on a confidential U.N. report conducted in cooperation with DHS that also found an incident where officers had sexually and racially mocked a Liberian asylum seeker who was subject to a strip search). The U.N. report additionally noted that officers initially screening asylum seekers "discouraged some from seeking political asylum and often lacked an understanding of asylum law." *Id.*; *see also* THE NEEDLESS DETENTION, *supra* note 71, at 13-14 (citing specific examples of substandard detention conditions and officer abuse).

78. *See* Swarns, *supra* note 77.

79. Refugee Convention, *supra* note 38, art. 31(1); *see* Field, *supra* note 74, at ¶ 15 (stating that because Article 31(1) of the Refugee Convention has been interpreted to mean that entering a country for asylum reasons is not an unlawful act, "restricting [asylum seekers'] freedom of movement . . . could amount to a penalty within the meaning of article 31"); *see also* LOST IN THE LABYRINTH, *supra* note 1, at 70-71 (discussing the ICCPR in relation to U.S. asylum detention standards). A possible third problem with mandatory detention is violation of the Convention Against Torture. The Convention Against Torture proscribes using degrading treatment towards humans, and disregarding the trauma that legitimate asylum seekers have experienced by placing them in criminal jails, which could possibly amount to such degrading treatment. *See* Convention Against Torture, *supra* note 12, art. 16.

(ICCPR), which specifically condemns the arbitrary or unlawful deprivation of liberty.[80] Although detention of asylum seekers has not been found to be arbitrary per se, if the asylum seekers cooperate with immigration officials and are unlikely to abscond, then detention appears to violate ICCPR Article 9.[81]

Detention conditions, however, are merely the start of a laundry list of problems arising from mandatory detention of asylum seekers.[82] When placing asylum seekers in detention, the government confiscates their documents, which interferes with asylum seekers' ability to prepare an asylum case to present before an immigration judge. With respect to detention facilities, the remote rural locations, limited visiting hours, and frequent transfers impede access to attorneys and medical and psychological evaluations, which are often necessary to document persecution and treat trauma.[83] In fact, off-site psychological or medical examinations are often more difficult for asylum seekers to obtain than criminal inmates because the asylum seekers must get ICE permission rather than the jail's permission. Because ICE officials only make periodic visits to detention facilities, delays occur in receiving approval for necessary examinations.[84] The list goes on, but the problems could easily amount to an overall message to asylum seekers not to seek refuge in the United States, which contradicts international refugee standards.[85]

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80. *See* ICCPR, *supra* note 43, art. 9 (identifying the right to liberty and prohibiting arbitrary and unlawful detention).

81. *See* Field, *supra* note 74, ¶¶ 21-32 (postulating factors for determining whether detention is arbitrary and citing A v. Australia, HRC Case No. 560/1993, an Australian case assessing whether detention of asylum seekers violated ICCPR Article 9).

82. Amnesty International reported the following complaints from asylum seekers during a study of detention facilities in 1997: (1) unfamiliarity with asylum law and infrequent or no access to lawyers or other guidance; (2) poor communication abilities both linguistically and physically with limited phone access; (3) isolation, particularly in rural detention centers; (4) commingling with and fear of criminal convicts; and (5) frequent transfers, resulting in confusion and impeding attorney access. *See* LOST IN THE LABYRINTH, *supra* note 1, at 39-50.

83. Interview with Brittney Nystrom, Asylum Project Dir., Capital Area Immigrants' Rights Coal., in Washington, D.C. (Jan. 10, 2007) (on file with author); *see also* LOST IN THE LABYRINTH, *supra* note 1, at 44 (1999) (describing the negative experience of a Ugandan asylum-seeker).

84. Interview with Brittney Nystrom, Asylum Project Dir., Capital Area Immigrants' Rights Coal., in Washington, D.C. (Jan. 10, 2007).

85. *See* UNHCR *Guidelines*, *supra* note 45, Guideline 3(iv) (stating that detention should not be used as a punishment for illegal entry into the country, a dissuasion from bringing claims, or a deterrence for future asylum seekers); *see also* Frelick, *supra* note 48 (discussing the UNHCR Guidelines relating to the current U.S. detention system).

B. Case Study: An Injured Somali Refugee Spends Eight Months in Jail Without Medical Attention or Parole

When applied to a specific case, U.S. detention policies for asylum seekers appear strikingly arbitrary and place an inequitable burden on those individuals claiming fear of persecution. Take, for example, the recent case of a Somali asylee who was persecuted in Mogadishu.[86] During the intense fighting in Mogadishu in 1994, where her daughter died in her arms, this asylee was shot. Two bullets were lodged in her body. She escaped to an Ethiopian refugee camp where she developed diabetes and high blood pressure. The bullets remained in her body, and she was unable to firmly resettle. After the refugee camp closed in 1998, she was forced to illegally live in Ethiopia. Her relatives in the United Kingdom pooled together money for her trip to the United States.

The woman arrived in the United States with a fraudulent refugee card from the black market in Addis Abba and attempted entry with this document. Though she carried an old identification card issued by the Ethiopian government, the woman panicked and did not present this document to the immigration officer. Instead, she handed it to the person in line behind her, a recent acquaintance from the plane. When interviewed she promptly admitted her fraudulent use of a refugee card, but ICE officials placed her in detention because she no longer had possession of her original Ethiopian identification card. Her attorney requested parole, but because she had no identification, ICE would not release her.[87] Her family eventually relocated her Ethiopian identification card, but the government argued it was not sufficient to prove her identity. Eventually, family members in Somaliland located her original Somali identification card and forwarded the document to her attorney. This document was also insufficient proof of identity for ICE.[88]

For seven months, the Somali asylum seeker stayed in the Hampton Roads Jail in Virginia. The majority of this time she was the only Somali and she did not speak English. Early in her detention she experienced panic attacks and emotional fits, exacerbated by her diabetes. In addition, her attorney had to drive 390 miles roundtrip to the jail every time he visited her. When her case finally went to trial in January 2005, the Department of Homeland Security conceded her eligibility for asylum

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86. E-mail from Jared D. Rodrigues, Attorney for the Somali Asylum Seeker, to Kristen M. Jarvis Johnson (Feb. 17, 2007, 13:23:55 EST) (on file with author); Interview with Brittney Nystrom, Asylum Project Dir., Capital Area Immigrants' Rights Coal., in Washington, D.C. (Jan. 10, 2007) (on file with author).

87. Attorney Jared D. Rodrigues represented the Somali asylum seeker.

88. *See* sources cited *supra* note 86.

before her attorney even completed the presentation of her case-in-chief. Meanwhile, a local cousin offered the woman a place to live, but because of the government's insistence on more identification, she was never given parole.[89]

In the case of this Somali asylee, the United States achieved no compelling policy objectives to justify depriving this woman of her liberty for an extended period of time. Detaining the woman subjected her to unnecessary trauma by isolating her and neglecting her serious medical conditions. The U.S. government justifies its harsh detention policy by citing risks of absconding and threats to national security. However, it did not achieve either of these policy objectives by detaining the Somali woman. Immigration experts postulate, and Executive Office of Immigration Review (EOIR) statistics verify, that entering defensive asylum seekers, if released on parole, are unlikely to be flight risks.[90] Here, the Somali asylee provided evidence that she would not abscond in that she had a relative who offered her shelter while she awaited trial. Additionally, nothing in this case indicated that the Somali woman was a national security risk; to the contrary, she had physical evidence of being abused, rather than being an abuser.

In contrast, if ICE had released the Somali woman from detention, it would have achieved several additional policy objectives. Financially, the woman would not have cost the government the daily rate for holding her in detention because her relative would have provided her with a residence and living assistance. Release would have enabled the woman to seek timely medical attention for her bullet wounds, high blood pressure, and diabetes. Also, subjecting her to jail conditions intensified the trauma from the violence she endured in Somalia, as was apparent by her emotional outbursts in prison. Releasing the Somali asylum detainee would have also given her attorney better access to communicate with her in preparing her

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89. *See* sources cited *supra* note 86.

90. According to EOIR asylum statistics for fiscal years 2003-2006, only 5-7% of asylum seekers failed to appear for their court dates. EOIR, FY 2006 STATISTICAL YEAR BOOK K1, K4 (Feb. 2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf (reporting the asylum completions by disposition, including the number of abandoned cases, which are typically, but not always, abandoned due to a failure to appear, relative to the total number of cases). This is compared with the general flight rate for all aliens who fail to appear in court. *Id.* at H1-H4 (showing recent increases in overall failures to appear for all immigration cases before the EOIR, particularly in Harlingen and San Antonio, Texas, including non-detained cases and those where the alien was released on bond, to 39% for fiscal years 2005 and 2006—an increase from 22% in fiscal year 2003 and 25% in fiscal year 2004); *accord* Frelick, *supra* note 48 (showing that current absconder statistics are highly debated, but asylum seekers are more likely to appear for immigration court); *see also* FROM PERSECUTION TO PRISON, *supra* note 19, at 184-85 (showing a study of alternative detention programs for asylum seekers that had high appearance rates (93-96% is higher than the government-reported appearance rates)).

case by eliminating the physical barriers of the jail and 390 miles roundtrip drive the attorney made to the jail. Finally, by allowing the woman freedom of movement pending the processing of her asylum application, the United States would have upheld its obligation to preserve her human and civil rights.

III. PROTECTING REFUGEE RIGHTS WHILE STRENGTHENING ENFORCEMENT: RATIONALE FOR CHANGING THE SYSTEM

An efficient and humane asylum system need not imply a weak enforcement system. An alternative system may, in fact, strengthen enforcement by encouraging court appearances and discouraging unlawful entries into the United States.[91] U.S. immigration enforcement laws must be administered in balance with due process rights and the obligations of U.S. international refugee rights. The current process to determine whether defensive asylum seekers have a credible fear of persecution encourages reviewing officers to nearly always find credible fear in order to avoid thorough administrative review.[92] As a result, asylum seekers are detained on a mandatory basis while waiting for an immigration judge to make a final determination.[93] A more thorough initial process of determining credible fear for asylum seekers could narrow the gap between aliens recommended for an immigration judge's review and aliens who are ultimately approved.

Underlying the entire credible fear interview and asylum process are fundamental premises upon which mandatory detention policies are based. Congress ostensibly has passed each statute directing DHS to detain certain aliens predicated upon specific rationales or policy objectives. The next section addresses these predicates and questions whether the goals outlined in detaining asylum seekers are reasonable and effective. The following section then discusses how more thorough credible fear interviews can address these goals and alleviate the need for mandatory detention.

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91. *See supra* note 22 and accompanying text.

92. For a detailed discussion on the credible fear determination process and its flaws, see *infra* Part III.B.

93. 8 U.S.C. § 1225(b)(1)(B) (2000); *id.* § 1229a(a)(1).

A. Due Process: Deprivation of Liberty Must Have a Rational Basis

Detaining asylum seekers deprives them of liberty, which is fundamental to the due process of law afforded by the Fifth Amendment.[94] Depriving such liberty requires at least a rational basis, such as the one the Supreme Court found in *Demore v. Kim*.[95] The Court held that detention of an alien, due to criminal convictions, was "a constitutionally valid aspect of the deportation process" because it served the purpose of preventing flight of criminal aliens while their removal proceedings were pending.[96] Although the Court did not explicitly reference *Mathews v. Eldridge*[97] in the *Kim* opinion, essentially it applied the balancing test set forth in *Mathews*. The balancing test requires that administrative procedures must balance the governmental and private interests at stake.[98] In *Kim*, the Court balanced the government purpose of preventing flight, which could potentially endanger the community by releasing a convicted criminal, against the agency temporarily depriving aliens of liberty without bail.[99] In that case, the Court found that Congress's purpose passed constitutional muster.[100]

In contrast with *Kim,* the Court in *Zadvydas v. Davis* granted a writ of habeas corpus to Kestutis Zadvydas, an alien with criminal convictions who was ordered to be removed; however, Zadvydas could not be returned to his native country.[101] There, the balance tipped in favor of the alien's

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94. U.S. CONST. amend. V; *see also* Reno v. Flores, 507 U.S. 292, 315-16 (1993) (O'Conner, J., concurring) (pointing towards liberty as a core element of the Due Process Clause); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (suggesting that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); United States v. Salerno, 481 U.S. 739, 755 (1987) (limiting detention in pre-trial situations due to the heightened importance of liberty in United States society). *But see supra* notes 17, 47 (outlining the debate whether aliens who have not yet been admitted into the United States have full due process protections).

95. 538 U.S. 510, 523, 527-28 (2003).

96. *Id*. at 523.

97. 424 U.S. 319 (1976).

98. *Id*. at 334-35. In *Mathews v. Eldridge*, the Court explained:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

99. *See Kim*, 538 U.S. at 527-28.

100. *Id*. at 531. The dissent in *Kim* argued that the Court should have applied an even higher standard of scrutiny since liberty was at stake, and argued that such liberty interests overweighed the governmental purposes for detention. *Id.* at 557-58 (Souter, J., concurring in part and dissenting in part).

101. 533 U.S. 678, 690 (2001).

liberty.[102] The Court held that such an alien must be released after a six-month period unless the U.S. government can show reasons why the alien should remain detained.[103] Applying 8 U.S.C. § 1231(a)(6),[104] the Court emphasized that the Immigration and Naturalization Service (INS) would only consider release if the alien did not pose a flight risk or present harm to the community. Otherwise, detention was serving a valid purpose.[105] Considering these goals, the Court held that indefinite detention of Zadvydas was unreasonable, even though he had convictions for serious drug offenses, theft, and attempted robbery and burglary.[106]

In *Kim*, the predicate behind the statute that required holding convicted criminal aliens was to protect the community from harm. Ostensibly, a criminal convicted of an aggravated felony could threaten this protection.[107]

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102. *Id.* at 702 (determining that the lower courts had not given proper weight to the "likelihood of successful future negotiations," resulting in the Court vacating the judgments below).

103. *Id.* at 700-02 (remarking that the six-month period is only a presumed reasonable time). The Government can show evidence that the alien will be removed in the "reasonably foreseeable future," which could extend the period without being unreasonable. *Id.* at 701. Therefore, it is not mandatory that every alien be automatically released after six months. *Id.*

104. 8 U.S.C. § 1231(a)(6) (2000) provides:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

105. *Zadvydas*, 533 U.S. at 683-85 (citing the agency regulations that allow for release unless there is a finding of danger to the community or risk of flight).

106. *Id.* at 690-91 (finding that Zadvydas was unlikely to be removed in the foreseeable future and reiterating that "detention is reserved for the most serious of crimes") (internal citations and quotations omitted). Defensive asylum seekers would not likely prevail on an argument that their release from detention is not reasonably foreseeable. *See* Demore v. Kim, 538 U.S. 510, 528-29 (2003) (differentiating *Zadvydas* from *Kim* because detention in *Kim* was for determining removability, rather than waiting for a foreign government to cooperate with an alien already removed). However, even *Kim* was distinct from the situation facing defensive asylum seekers. In *Kim*, the alien was a convicted criminal who had conceded deportability and was detained while the government processed his removal. *Id.* at 530-31. In contrast, asylum seekers may have been victims of crimes and abuse, and may have compelling reasons to be *released* rather than detained. The dissent in *Kim* reminds the Court that "due process requires a 'special justification' for physical detention that 'outweighs the individual's constitutionally protected interest in avoiding physical restraint' as well as 'adequate procedural protections.'" *Id.* at 557 (Souter, J., concurring in part and dissenting in part) (quoting *Zadvydas*, 533 U.S. at 690-91) (suggesting that, in the dissent's opinion, this justification for incarceration typically should be punitive in nature, indicating that asylum seekers should not be detained).

107. *See Kim*, 538 U.S. at 523, 527-28 (agreeing with the immigration agency's cited justification for mandatory detention to keep criminal aliens from fleeing and missing their proceedings or harming the community); *see also* GAO, CRIMINAL ALIENS: INS' EFFORTS TO IDENTIFY AND REMOVE IMPRISONED ALIENS NEED TO BE IMPROVED 5 n.8 (July 15, 1997) (reporting that INS could only release detained criminal aliens who were found to not pose a flight risk or a threat to the safety of the community). The GAO report also described increases in criminal aliens as the impetus for much of the 1996 legislative reforms requiring increased detention and expedited removal of such aliens. *Id.* at 3-4; *see also* U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY

The Court in *Kim* held that Congress had a rational basis for legalizing such policy.[108] In *Zadvydas*, the predicate behind the statute requiring DHS to detain aliens ordered to be removed and the agency regulations limiting parole is to prevent flight and harm to the community.[109] There, the Court required Zadvydas' release, emphasizing that his detention no longer served any valid purpose.[110]

In the case of defensive asylum seekers, the predicate behind the statute that requires mandatory detention and stringent parole standards is the lack of valid entry documents and the claim of asylum.[111] It appears that Congress intended for asylum officers to conduct credible fear interviews immediately and in a similar fashion to affirmative asylum claims, in order to determine the alien's credibility and the possibility of establishing the asylum claim.[112] DHS has remarked that asylum seekers understandably lack valid documents, given that many enter the United States under extreme conditions that might not allow the alien to obtain proper documentation.[113] Congress's intent of the mandatory detention provisions was to streamline the defensive asylum requests and to hold the asylum seekers for a minimal amount of time while their claims were being heard. It is apparent from the extensive times that asylum seekers are held in

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153 (1994) ("[T]he top priority of enforcement strategies should be the removal of criminal aliens from the U.S."). *Compare* H.R. REP. NO. 104-828, at 223 (1996) (Conf. Rep.) (describing criminal alien provisions in IIRAIRA that increased the aliens classified as having committed an "aggravated felony"), *with id.* at 209-10 (expounding on the purpose of IIRAIRA's provisions requiring detention of asylum seekers who lack proper entry documents only to the extent necessary to allow hasty and thorough review of the asylum seeker's claim).

108. 538 U.S. at 523. The dissent in *Kim* notably opined for an even higher standard of scrutiny towards the law requiring detention, since detention involved a deprivation of liberty and thus implicated the Due Process Clause of the Fifth Amendment. *Id.* at 557-58 (Souter, J., concurring in part and dissenting in part).

109. 533 U.S. at 683-84.

110. *Id.* at 690. The purpose of detaining Zadvydas was to hold him while his removal was processed. *Id.* at 684-85. The Court required his release even though Zadvydas had an extensive criminal record, and the court did not find that detention was necessary to prevent harm to the community. *Id.* at 690-91. Detention to protect the community should only be used for the "most serious of crimes." *Id.* at 691 (internal quotation omitted).

111. *See* 8 U.S.C. §§ 1225(b)(1)(A)(ii), (b)(1)(B) (2000) (detention of asylum seekers with fraudulent documents or lacking documents); 8 U.S.C. § 1182(d)(5)(A) (2000) (parole in limited, humanitarian situations); H.R. REP. NO. 104-828, at 209 (1996) (Conf. Rep.) ("The purpose of these provisions is to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted to the United States, while providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims.").

112. H.R. REP. NO. 104-828, at 209-10 (1996) (Conf. Rep.).

113. *See, e.g.*, Dep't of Homeland Sec., Obtaining Asylum in the United States: Two Paths, http://www.uscis.gov (search "Obtaining Asylum in the United States") (last visited June 30, 2007) ("Because of the circumstances of their flight from their homes and departure from their countries, [asylum seekers] may arrive in the U.S. with no documents or with fraudulent documents obtained as the only way out of their country.").

detention that DHS has not met Congress's intent.[114] However, despite the lengthy detention times, DHS still maintains harsh parole standards without clear guidelines for release,[115] and Congress has not alleviated the mandatory detention procedures delegated to DHS.

The predicate behind requiring mandatory detention for defensive asylum seekers is materially distinct from requiring detention for aliens inadmissible due to criminal convictions, as in *Kim*, and from requiring detention for aliens ordered removed, as in *Zadvydas*.[116] For constitutional purposes, asylum seekers are differently situated than criminal aliens. Defensive asylum seekers are inadmissible because they do not possess the necessary travel documents to lawfully enter the United States.[117] Under current law, DHS detains inadmissible asylum seekers until an immigration judge adjudicates their asylum claims.[118] However, using the same approach as in *Kim*, where the Court balanced the government's interests against the alien's due process rights, the case for releasing asylum seekers strengthens. The underlying fear of flight by undocumented asylum seekers is a far less compelling interest than preventing harm to the community by a convicted criminal.[119] As opposed to criminals, asylum seekers with legitimate claims are victims of crime and seek refuge in the U.S. asylum system.

The concern then turns to a task that falls squarely on the shoulders of DHS. DHS is tasked with interviewing asylum seekers to determine whether they have a credible fear of persecution. Through the credible fear interview process, asylum officers can use biometrics and databasing to create an identity for each asylum seeker. DHS can then issue regulations that require thorough screening of each asylum seeker in a manner consistent with the affirmative asylum process to ensure that findings of credible fear are accurate. This is one step towards alleviating a current regulatory scheme that unnecessarily deprives precious liberty from aliens seeking refuge from persecution.

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114. *See infra* notes 125-27 (discussing the lengthy detention times for asylum seekers).

115. 8 U.S.C. § 1182(d)(5)(A) (authorizing parole); *see also supra* notes 32-35 and accompanying text.

116. *Compare* 8 U.S.C. § 1225(b)(1)(A)(ii), *and* 8 U.S.C. § 1225(b)(1)(B)(IV) (2000) (mandatory detention for asylum seekers without valid travel documentation), *with* 8 U.S.C. § 1226(c) (2000) (mandatory detention for certain criminal aliens without bail), *and* 8 U.S.C. § 1231(a)(6) (2000) (allowing for detention after ordering an alien removed).

117. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 U.S.C. § 1182(a)(7). Otherwise, with proper documents, asylum seekers enter the United States and follow the non-adversarial affirmative asylum process. *See* 8 U.S.C. § 1158 (2000) (setting out authority to apply for asylum in the United States as well as the procedure followed); 8 C.F.R. § 208.13 (2007) (establishing eligibility requirements to obtain asylum).

118. 8 U.S.C. § 1225(b)(1)(B); 8 U.S.C. § 1229a(a)(1).

119. Asylum seekers are less likely to abscond than other classes of aliens. *See supra* note 90 and accompanying text.

B. Thorough Credible Fear Hearings Can Lower Risks and Promote Release

Currently, when a screening officer refers an alien for a credible fear interview, that person is already a fraction—a mere five percent—of the total number of aliens who attempt to enter the United States with improper documentation and who are placed in expedited removal.[120] This puts those aliens in a limited class—a class of those determined to have a "significant possibility"[121] that they could establish the grounds for an asylum grant. In other words, aliens who receive a credible fear interview should already show a high chance of being granted asylum.[122] Unfortunately, the current system for determining credible fear does not promote thorough reviews.[123] Changes to this system could increase ICE's confidence that releasing asylum seekers will not likely cause harm to the community or threaten national security.

The process for determining credible fear currently encourages findings of credible fear without detailed scrutiny because many inspection officers wish to avoid the strict review requirements of a negative finding.[124] In 2003, according to ICE, the average detention period for aliens referred for a credible fear interview was sixty-four days.[125] Additionally, many aliens are detained between the credible fear interview and the long court process of presenting their asylum claims. ICE reported an average detention time

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120. *See* USCIRF ASYLUM SEEKERS, *supra* note 5, at 286-87 (using DHS statistics to chart the percentages of aliens whom the government either expeditiously removes, refers for a credible fear determination, or who withdraw their applications). On its face, this policy appears unreasonable because asylum seekers often leave their countries of origin in haste and without identification or travel documentation that other immigrants may possess.

121. 8 U.S.C. § 1225(b)(1)(B)(v); *see* Mark Hetfield, *Report on Credible Fear Determinations*, *in* USCIRF ASYLUM SEEKERS, *supra* note 5, at 170 (suggesting that § 1225 was enacted by Congress in opposition to the language recommended by UNHCR to make the asylum screening standard "not manifestly unfounded," meaning "not clearly fraudulent").

122. It could be argued that just as there is no significant likelihood of actual deportation for aliens whose home countries refuse to allow them to return, asylum seekers who have received and passed a credible fear interview also should have a diminished likelihood of deportation. *But see supra* note 106 (discussing how the Court in *Demore v. Kim* distinguished aliens who are waiting for removal proceedings to be finalized and Zadvydas, who was already ordered removed but could not be returned to his country of origin).

123. *See* Hetfield, *supra* note 121, at 171-72 (criticizing inconsistencies in the credible fear review process).

124. *Id.*

125. USCIRF ASYLUM SEEKERS, *supra* note 5, at 330. The average processing time of sixty-four days may still be excessive for persecuted aliens who may experience additional trauma by being kept in detention, particularly if the facility conditions are poor and the aliens are comingled with criminal convicts. Considering the Congressional reports surrounding the credible fear interview and judicial adjudication processes, which required interviews and judicial referrals to be completed within seven days, the processing times are more than excessive. H.R. REP. NO. 104-828, at 209 (1996) (Conf. Rep).

in 2003 of 145.1 days.[126] A study by Physicians for Human Rights of forty detained asylum seekers reported an average detention period of ten months, with detention periods of over three years.[127] In 1998, when the government first implemented expedited removal, asylum officers approved credible fear in 83% of the cases. This number increased and stabilized at 93% in 2004.[128] This high number of approvals has been attributed to the credible fear interview procedure rather than the standard of "significant possibility."[129] Negative findings create additional burdensome work that many asylum officers avoid. If an officer denies credible fear, the Asylum Office automatically reviews it, which heightens the officer's documentation requirements.[130]

The problem of avoiding negative credible fear findings, if corrected, could greatly contribute to solving the detention problem for incoming asylum seekers. If immigration regulations refined the standards and increased the thoroughness required for credible fear interviews, affirmative decisions would become strong grounds for granting parole to the asylum seekers.[131] Statistics from the EOIR show that immigration judges approve approximately one quarter of all asylum cases heard after an affirmative credible fear determination.[132] If asylum officers were able to weed out weak claims in the initial screening stages, the likelihood of deportation for the remaining asylum seekers will decrease. Recall that absconder rates for asylum seekers are much lower than for other classes of released aliens, and that asylum seekers are likely to appear for court

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126. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, REPORT TO CONGRESS: DETAINED ASYLUM SEEKERS, FISCAL YEAR 1999, *supra* note 69, at 5.

127. FROM PERSECUTION TO PRISON, *supra* note 19, at 50; *see also* WORLD REFUGEE SURVEY, *supra* note 69, at 103. Release rates during the period between the credible fear interview and the asylum determination appear to be a statistical gamble. The statistical range for release between Asylum Offices varies from 0.5% (New Orleans) to 98% (Harlingen and Los Angeles). USCIRF ASYLUM SEEKERS, *supra* note 5, at 332. Also, the release rate between the credible fear interview and the final immigration judge adjudication declined over 20% after the terrorist attacks of 2001. *Id.* at 333.

128. Hetfield, *supra* note 121, at 168-69.

129. 8 U.S.C. 1225(b)(1)(B)(v) (2000); *see also* Hetfield, *supra* note 121, at 171-72.

130. *See* Hetfield, *supra* note 121, at 172 (stating that negative credible fear determinations are subject to "100% quality assurance reviews," while positive findings receive only random checks).

131. Asylum officers who conduct credible fear interviews should already possess training and knowledge similar to officers who hear asylum claims through the affirmative asylum process. *See* H.R. REP. NO. 104-828, at 209 (1996) (Conf. Rep.) (clarifying the training and role of asylum officers who conduct credible fear interviews in relation to asylum officers who process affirmative asylum claims).

132. USCIRF ASYLUM SEEKERS, *supra* note 5, at 398-99. This low number of defensive asylum admittance is logical considering that asylum entrants only make up approximately 8% of lawful permanent admittances per year. *See* CONG. BUDGET OFFICE, IMMIGRATION POLICY IN THE UNITED STATES 5 (2006) (citing nearly one million permanently admitted immigrants in 2004, of which 8% were asylum grantees). This percentage becomes even smaller when considering the massive transit of nonimmigrants into the United States each year. *Id.* at 11 (reporting nearly 5 million nonimmigrant entrants in 2003).

hearings.[133] Therefore, if DHS implements regulations that more clearly define standards and that require more thorough reviews at the credible fear interview level, detention after a determination of credible fear would serve little valid purpose.[134]

Governmental agencies and non-governmental organizations strongly support releasing asylum seekers found to have a credible fear of persecution.[135] ICE is pursuing alternatives to detention that involve managing detention space and promoting cost-effective enforcement.[136] The Vera Supervised Release Model, for example, resulted in a 55% cost reduction compared with detention.[137] The United States can alleviate its harsh mandatory detention requirements by providing viable alternatives and still maintain, and even strengthen, its national security. Providing viable alternatives will make the asylum process more humane and sensitive to refugee needs and simultaneously diminish the risk that asylum seekers, fearful of the process, will enter the United States clandestinely or while using false travel documents.[138]

IV. COMPREHENSIVE REFORM EMPHASIZING THE LEAST RESTRICTIVE METHODS FOR MONITORING ASYLUM SEEKERS

In light of the issues raised above, several changes can significantly contribute to restoring the United States' leadership in hearing asylum claims and prioritizing human and civil rights. First, asylum and parole procedures should be consistently applied throughout the United States. Second, asylum officers should have the authority to conduct thorough credible fear hearings and to make decisions under clear guidelines that require the officers to document the interview process and rationale for the decision. Third, asylum officers, being specially trained to work with asylum seekers and having

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133. *See supra* note 90 and accompanying text.

134. This assumes that improved standards and thorough reviews would make a determination of whether the asylum seeker is a threat to national security, which provides a valid basis for detention under 8 U.S.C. § 1226a(a) (2000).

135. *See, e.g.*, LOST IN THE LABYRINTH, *supra* note 1, at 31 (quoting INS Commissioner Doris Meissner, who stated that the International and Naturalization Service (INS) (now DHS) is committed to pursuing non-detention alternatives for asylum seekers).

136. *See, e.g.*, OFFICE OF MGMT. & BUDGET, DEP'T OF HOMELAND SEC., http://www.whitehouse.gov/omb/budget/fy2005/homeland.html (last visited June 30, 2007), (describing the FY 2005 budget for DHS and ICE, which recommends pursuing cost-effective detention or detention alternative methods); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEETS: ICE OFFICE OF DETENTION & REMOVAL, Nov. 2, 2006, http://www.ice.gov/pi/news/factsheets/dro110206.htm (listing various detention alternatives that ICE is working towards developing and using).

137. *See* IN LIBERTY'S SHADOW, *supra* note 6, at 42 (describing the program, which was contracted with the INS between 1997 and 2000).

138. For a discussion of how the current immigration code and regulations allow affirmative asylum applications for clandestine or fraudulent entrants, see *supra* note 20 and accompanying text.

in-depth understanding of asylum policies and procedures, should have the authority to grant parole to asylum seekers who the officers determine not to be significant flight risks or national security threats.[139] Lastly, if an asylum seeker must be monitored, with the exception of the rarest and most serious cases, DHS should use alternatives to detention.

A. Consistent and Clear Defensive Asylum and Parole Procedures

Inconsistent decisionmaking presents a significant procedural obstacle to asylum seekers. Statistically, the chance of receiving parole varies by office, ranging from 0.5% to 98%.[140] The ability of lawyers and social workers to access different detention facilities depends on the individual rules of each facility.[141] Complete discretion and lack of guidance increases frustrations for asylum seekers and those assisting them. ICE officials possess few guidelines for releasing asylum seekers on parole or for maintaining detention facility standards.[142] Compounding this problem is the lack of distinction in detention facilities between asylum seekers, who claim fear of persecution, and all other immigrant detainees.[143]

In contrast with defensive asylum, DHS provides training and guidelines to the asylum officers who make determinations on affirmative asylum applications. A similar system could easily be transferred to defensive asylum applicants. DHS has the ability to regulate consistent handling of asylum cases, which could eliminate confusion from the asylum system. Congress could also present a mandate, as part of its immigration reform efforts, that requires streamlined procedures, including (1) determining credible fear, (2) granting parole, (3) monitoring asylum seekers, and (4) reviewing denials of parole and asylum.

B. Increased Thoroughness of Credible Fear Determinations

Asylum officers should have the training and capacity to make credible fear determinations that carry significant weight towards determining whether the asylum seeker is likely to meet the asylum criteria. This would provide additional justification for releasing asylum seekers until the courts

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139. In the alternative, regulations could provide that all asylum seekers found to have credible fear of persecution have a presumption of eligibility for release on parole *unless* the officer has valid reason to believe the alien is a flight risk or national security risk.

140. USCIRF ASYLUM SEEKERS, *supra* note 5, at 332.

141. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 554 (2003) (Souter, J., concurring in part and dissenting in part) (stating that detention can place an obstacle in the way of developing the asylum case); LOST IN THE LABYRINTH, *supra* note 1, at 35-36 (providing an account of difficulties a refugee faces in obtaining information and legal assistance while in detention).

142. *See* Frelick, *supra* note 48 ("[T]he US criteria for the detention and release of asylum seekers nor the standards establishing acceptable conditions of detention are prescribed in law or regulations.").

143. *Id.*

make a final determination.[144] Optimally, asylum officers could make final determinations as do asylum officers who hear affirmative asylum claims. At a minimum, asylum officers who hear credible fear claims could be trained similarly to the officers who process affirmative asylum claims. USCIS Director Emilio Gonzalez reasoned that asylum officers are best equipped to adjudicate affirmative asylum claims.[145] He stated that private, non-court hearings are more neutral environments for asylum-seekers to present their claims, which preserves Congress's intent "to set into place 'a policy which will treat all refugees fairly and assist all refugees equally.'"[146] Immigration courts, in contrast, process asylum claims at a significantly slower pace and use adversarial methods.[147]

Similarly, defensive asylum seekers should have the opportunity to present their claims in the most neutral environment possible and should be treated equally to affirmative asylum seekers. Congress could propose to make the defensive asylum procedures similar to the affirmative asylum process. This could be facilitated by allowing asylum officers to conduct thorough credible fear or initial interviews and allowing asylum officers, rather than immigration judges, to adjudicate defensive claims. Alternatively, asylum officers could follow a clear procedure for granting parole to those found to have credible fear.

Asylum seekers often remain in detention without parole because asylum officers lack the authority to grant parole. Instead, the enforcement arm of the Department of Homeland Security, ICE, must make all parole determinations; asylum seekers have no right to appeal this decision.[148] As stated earlier, DHS has no concrete guidelines or regulations for granting such parole. Thus, the resulting release rates are disparate.[149] Compounding the problem, the rigid guideline requiring proof of identification prevents many asylum seekers from being granted parole.[150]

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144. A change in policy could also move the final determination from the immigration courts to Asylum Officers, subject to review. Currently 8 C.F.R. § 1208.2(b) (2007) gives the immigration courts the authority to determine defensive asylum claims where the alien is in removal proceedings.

145. Letter from Dr. Emilio T. Gonzalez, Director, U.S. Citizenship & Immigration Serv., to Prakash Khatri, U.S. Citizenship & Immigration Serv. Ombudsman at 8 (June 20, 2006), http://www.humanrightsfirst.info/pdf/06721-asy-uscis-resp-omb-rec-2324.pdf (quoting the Refugee Act, S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1979)).

146. *Id.*

147. *Id.*

148. LOST IN THE LABYRINTH *supra* note 1, at 13-14.

149. *See, e.g.*, IN LIBERTY'S SHADOW, *supra* note 6, at 47 (2004) (recommending that regulations be clearly promulgated to allow understandable and realistic methods of obtaining parole, including an appeals process and the ability to sign affidavits testifying to identification); LOST IN THE LABYRINTH, *supra* note 1, at 73 (listing the vague standards that do exist for guiding officers in granting parole).

150. *See, e.g.*, Memorandum from Human Rights First to Members of the Human Rights Comm., 14 n.58 (Jan. 18, 2006), *available at* http://www.ohchr.org/english/bodies/hrc/docs/ngos/hrfirst.doc (referencing "Expedited Removal: Additional Policy Guidelines," Dec. 30,

This policy ignores the fact that many asylum seekers fled violent situations and may not have access to such documents. The identification policy also fails to take into account advancing biometrics systems that the United States can use to identify and track individuals.[151]

C. Detention Alternatives

Lastly, if DHS determines an asylum seeker must be monitored, then DHS should use alternatives to detention, reserving detention as a last resort. Many alternatives are viable and some are ready to be immediately implemented.[152] Congress has supported moving towards alternatives to detention, recently providing several million dollars to ICE for development of alternative detention plans.[153] Non-correctional environments could eliminate the problem of commingling asylum seekers and criminal convicts and could specially train monitors to handle individuals who have experienced trauma. One case study of this sort of environment has proven highly successful. In Broward County, Florida, the ICE Detention and Removal Office developed a minimal security, non-criminal-oriented facility solely for asylum seekers. It "appears to be a much more humane and far less intrusive form of confinement that bears only minimal resemblance to a traditional prison or jail."[154] However, these situations are not always ideal, and even family centers have been criticized as "fundamentally anti-family and anti-America."[155]

Modern technology provides an ever-developing landscape of options for monitoring asylum seekers without unnecessarily intruding on their freedom of movement or disregarding their traumatic experiences. Detention facilities already take biometric data, which provides increasingly reliable methods for identifying and tracking asylum

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1997, a memorandum from Michael A. Pearson, INS Executive Associate Commissioner for Field Operations, to Regional Directors, District Directors, and Asylum Office Directors, which states that officers may not grant parole unless the alien can prove identity and community ties).

151. *See* LOST IN THE LABYRINTH, *supra* note 1, at 13, 14 n.14 (noting the harshness of such a policy and commenting that the restriction on review for parole decisions is unique to immigration policy among U.S. law).

152. *See generally* Field, *supra* note 74, at 22-35 (listing and describing alternatives to detention of asylum seekers).

153. *See* Dep't of Homeland Sec. Appropriations Act, Pub. L. No. 109-90, § 119 Stat. 2064, 2068-69 (2006).

154. Craig Haney, *Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal*, *in* USCIRF ASYLUM SEEKERS, *supra* note 5, at 182.

155. Sylvia Moreno, *Detention Facility for Immigrants Criticized: Organizations Laud DHS Effort to Keep Families Together but Call Center a 'Prison-Like Institution'*, WASH. POST, Feb. 22, 2007, at A3 (internal quotations omitted) (reporting that the T. Don Hutto Family Residential Facility in Texas even requires three-year-olds to follow rigid daily reporting requirements and limits outdoors recreational time for all residents to one hour per day "inside a concrete compound sealed off by metal gates and razor wire." The residents are also required to have picture identification visible at all times).

seekers.[156] According to Victor Cerda, former Acting Chief of Staff and Counsel to the Assistant Secretary of ICE,[157] all field offices are equipped with the technology to implement ankle bracelets.[158]

Ankle bracelets and other electronic monitoring devices (EMDs) provide less intrusive means of monitoring asylum seekers who might be a flight risk. However, if an asylum officer does not find an asylum seeker to be a flight risk or a security threat, then even EMDs could be an unnecessary interference with that seeker's freedom of movement. ICE has already begun working with an Intensive Supervision Appearance Program (ISAP), which is designed to supervise released asylum seekers.[159] This program requires various phases of accountability to ICE, which gradually provides freedoms upon a showing of cooperation. EMD programs can be used separately or in combination with supervised release, requiring registration and periodic check-ins with the government to prevent flight and to provide updates to the asylum seekers.

CONCLUSION

Detention isolates asylum seekers from the outside world and degrades them to the level of criminals facing punishment. Many men and women who escape harrowing situations where their lives are endangered seek refuge in the United States; however, U.S. laws maintain harsh mandatory detention requirements for these individuals. The case of the Somali refugee who suffered in U.S. jails for eight months before the government heard her case raises serious questions of whether her detention served a rational purpose.[160] She posed neither a serious flight risk nor a criminal threat; in fact, the humanitarian reasons to release her were overwhelmingly compelling. For the thousands of asylum seekers

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156. *See, e.g.*, Field, *supra* note 74, ¶ 123 (citing biometric data used in Zambia).

157. For Victor Cerda's biography, see http://www.hrpolicy.org/about/staff_vc.asp (last visited June 30, 2007).

158. Interview with Brittney Nystrom, Asylum Project Dir., Capital Area Immigrants' Rights Coal., in Washington, D.C. (Jan. 10, 2007) (on file with author).

159. *See* USCIS, FACT SHEET: DETENTION AND REMOVAL OPERATIONS: ALTERNATIVES TO DETENTION (Mar. 2007), http://www.ice.gov/pi/news/factsheets/061704detFS2.htm (introducing ISAP as a voluntary program where certain aliens can periodically check in with DHS; however, the fact sheet is unclear whether this would be of use to asylum seekers since it limits the program to "aliens who are not subject to mandatory detention"); Kathleen Glynn & Sarah Bronstein, CATHOLIC LEGAL IMMIGRATION NETWORK, SYSTEMIC PROBLEMS PERSIST IN U.S. ICE CUSTODY REVIEWS FOR "INDEFINITE" DETAINEES 28 (2005), *available at* http://www.cliniclegal.org/DSP/Indefinite2005FINALforRELEASE.pdf (describing the ICE supervision program).

160. For the details of this case, see *supra* Part II.B.

currently in detention, every day that passes without rethinking mandatory detention policies diminishes their dignity and deprives them of their basic rights to liberty and movement.[161]

The current statutory and regulatory scheme towards persons who seek refuge from persecution in the United States is excessive in light of available reasonable alternatives to detention. The United States is party to, and an international leader in, treaties that aim to protect refugees and to uphold individual human rights. These protections form the foundation of U.S. asylum law. Detaining asylum seekers for months, and sometimes years, before granting relief directly undermines this foundation. When considering comprehensive immigration reform, Congress should focus on mandating clear and consistent standards for credible fear determinations, parole, and defensive asylum claims and it also should focus on funding for detention alternatives. Detention should remain a tool of last resort, rather than the primary tool for monitoring asylum seekers.

161. Consider the Universal Declaration of Human Rights arts. 1-3, 9, 13-14, which declares the fundamental human rights of equality, dignity, life, liberty, freedom from arbitrary detention, freedom of movement, and the right to seek asylum from persecution. The U.S. government should not disregard these rights except in the most exigent of circumstances. Unless the United States has a reasonable foundation to believe an asylum seeker poses a high risk to national security, it should refrain from detaining that person and should use the least intrusive method possible to monitor and ensure that asylum seekers appear for adjudication of their claims.

CLOSING REMARKS

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MARCH 20, 2007

First, I would like to congratulate the *Administrative Law Review* for returning to this extremely important issue of immigration reform[1]—and to thank this distinguished panel for coming and providing us with so much food for thought.

We are a nation of immigrants. Most of us—myself included—do not have to go very far back in our family trees to find ancestors who made it to the United States, often with great hardship, to start better lives for themselves and their families.

This fact will always give the issue of immigration great resonance in this country. How can we keep the lamp of the Statue of Liberty lit for those who want to follow in the footsteps of our own ancestors, while keeping our borders secure from those who would do us harm or inundate our system of social services? This is the main dilemma posed by most of our immigration legislation, including the Secure Fence Act.[2]

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1. The ADMINISTRATIVE LAW REVIEW published a symposium on immigration issues in 2000. *See Recent Developments Federal Agency Focus: Immigration and Naturalization Service*, 52 ADMIN. L. REV. 213-421 (2000). Articles included: Jeffrey S. Lubbers, *Introduction*, at 213; David H.E. Becker, *Judicial Review of INS Adjudication: When May the Agency Make Sudden Changes in Policy and Apply its Decisions Retroactively?*, at 219; Peter W. Billings, *A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims*, at 253; Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, at 305; and John A. Scanlan, *American-Arab—Getting the Balance Wrong—Again!*, at 347.

2. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

And in the administration of immigration adjudication—designed to implement a set of laws governing entry and removal of immigrants, with a special two-tiered administrative court that has been set up to decide disputed issues of material fact[3]—we face the familiar administrative law issue of how to balance the essential needs of fairness, efficiency, and acceptability.[4]

I will focus on the second question because I am a teacher (and student) of administrative law. However, I do want to make a few remarks about the Secure Fence Act.

First, I would like to comment on the name of the Act. Like the USA PATRIOT Act and the No Child Left Behind Act, its name contains a high quotient of PR spin. We are not talking about a fence in the sense that Robert Frost wrote about—meaning "[g]ood fences make good neighbours."[5] (Although I humbly suggest that a better title for this symposium would be "Do Fences Make Good Neighbors?: Immigration Reform and Border Security in the United States.")

But make no mistake about it—we are talking about a wall, like what one sees outside of maximum security prisons, or what we used to see between East and West Berlin.

Such a wall should never be built between two allies. The United States and Mexico are not enemies—we are friendly neighbors. The symbolism is terrible. It poisons our relations with Mexico[6] and damages the United States' image around the world. How can we maintain any moral authority to criticize other countries for building walls when we are embarking on a 700-mile wall of our own? It is ironic that we are doing this at the same time that Europe is removing travel barriers between the twenty-seven countries of the EU, even though several of the countries of the expanded

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3. The immigration judges "completed" 323,845 "proceedings" in FY 2006, of which 317,032 (98%) were removal (formerly called "deportation") proceedings. U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, FY 2006 STATISTICAL YEAR BOOK C4 (2007), http://www.usdoj.gov/eoir/statspub/fy06syb.pdf (last visited June 10, 2007). This was the highest number in any recent year. The Board of Immigration Appeals completed 39,707 cases in FY 2006, down from a high of 48,705 in FY 2004. *Id.* at S2.

4. This formulation is a variation of the statement of the criteria for evaluating administrative procedures of accuracy, efficiency, and acceptability developed by Roger Cramton. *See* Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591-93 (1972); *see also* Margaret Gilhooley, *The Administrative Conference and the Progress of Food and Drug Reform*, 30 ARIZ. ST. L.J. 129, 133 & n.24 (1998) (citing Cramton, *supra*, and using the formula of "efficiency, reliability, fairness and public accountability").

5. Robert Frost, *Mending Wall*, NORTH OF BOSTON 12 (1914).

6. *See, e.g.*, Deb Riechmann, *Bush Seeks Better Ties in Latin America*, WASH. POST, Mar. 14, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031300894.html (citing Mexican President Calderon's denunciation of the proposed fence).

EU, including Bulgaria, Romania, and Latvia, have per capita GNPs that rank below Mexico's.[7] Yet instead of building walls, Europe is removing them.

I am not advocating open borders. We need to use modern law enforcement measures to secure our borders, but we also need to take other steps. First, we should make it easier for legal immigrants and visitors to cross the border. The long lines at the San Diego border crossing are legendary. Although these problems began to occur in the 1990s, current plans to reconstruct the crossing to accommodate more people call for completion only by 2012.[8] Second, we should enforce the laws on the books, such as targeting for prosecution the "coyotes" who lure illegal immigrants across the border, and enforcing our employer sanction and anti-discrimination laws[9] so that the magnet produced by illegal hiring is diminished. And third, we should agree on a sufficient guest worker program and a realistic path to citizenship for those immigrants who are willing to work and pay taxes in the United States for a reasonable number of years.

Secretary Hutchinson remarked that a fence is not the answer on our northern border.[10] I would suggest that it is not the answer on our southern border either. The panel members from the Department of Homeland Security (DHS) today seem to agree that the 700-mile fence is not necessary. So, let us not build that wall between the United States and Mexico.

With respect to the immigration adjudication system in the Executive Office of Immigration Review (EOIR), it is clear that the system is suffering from extreme duress. Changes in the substantive immigration laws have created strong incentives for immigrants threatened with removal to litigate to the nth degree. Meanwhile, the immigration bar has clearly lost faith in the administrative adjudication system—due largely to the procedural changes made between 2000 and 2002 and the increasingly low rate of success at EOIR—and has turned to the courts for relief. At the

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7. *See* Global Income Per Capita–Published 2006, FINFACTS IRELAND, http://www.finfacts.com/biz10/globalworldincomepercapita.htm (last visited June 27, 2007) (showing Mexico's per capita GNP ranking as forty-fifth in the world; Latvia is forty-ninth, Romania is seventieth, and Bulgaria is seventy-fifth).

8. *See* U.S. Customs and Border Protection, *San Ysidro Seeks to Add Security, Reduce Wait Time*, http://www.cbp.gov/xp/cgov/newsroom/full_text_articles/tours_cbp_facilities/san_ysidor_wait.xml (last visited June 27, 2007) (emphasizing that this improvement is a long way off).

9. *See* Immigration Reform and Control Act of 1986 § 101, 8 U.S.C. §§ 1324(a), 1324(b) (2000)*; see also* Matt Hayes, *INS Fails to Enforce Employer Sanctions*, FOX NEWS, Jan. 9, 2003, http://www.foxnews.com/story/0,2933,75009,00.html (reporting that in 2002, INS fined 320 U.S. employers $5.3 million for hiring illegal aliens, although only $2.6 million was collected).

10. Asa Hutchinson, *Keynote Address*, 59 ADMIN. L. REV. 533, 541 (2007).

same time, Congress has sought to modify and shrink avenues of relief in court. This has created extreme pressures on the overall adjudication system to the point that efficiency concerns have trumped fairness concerns.

The result is an exploding caseload in the federal courts of appeals. After Attorney General Ashcroft issued his regulation expanding the "streamlining" of the Board of Immigration Appeals (BIA) case handling procedures in August 2002,[11] the volume of petitions for review that reached the federal courts almost immediately began to rise by about five-fold.[12]

Empirical studies have shown that "[w]hereas about 7% of the BIA's decisions were challenged nationwide before March 2002, about 25% are now being challenged . . . . For BIA decisions arising within the Second and Ninth Circuits, the appeal rate has now surpassed 40%."[13] And conservative judges like Richard Posner have probably stimulated such appeals by repeatedly castigating EOIR decisions that deny asylum or relief from removal as based on insufficient evidence.[14]

These problems have clearly mushroomed since the BIA procedures were radically changed, but the roots of this problem lie in the draconian immigration legislation enacted by the 104th Congress in 1996. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[15] as well as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[16] explicitly stripped courts of jurisdiction to review immigrants' claims in several crucial areas.[17]

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11. *See* Board of Immigration Appeals; Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

12. *See* John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 20 (2006-2007). This issue of the NEW YORK LAW SCHOOL LAW REVIEW, vol. 51, number 1, contains an excellent symposium, *Seeking Review: Immigration Law and Federal Court Jurisdiction*.

13. *See* Palmer, *supra* note 12, at 20 (stating that there were not only more Board of Immigration Appeals (BIA) decisions subject to challenge, but that a larger proportion of these decisions were actually being challenged).

14. For example, see the consolidated cases of *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004) (Posner, J.) (finding the Immigration Judge's (IJ) decision denying relief to a Sudanese asylum seeker was riddled with errors) and *Blagoev v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004) (Posner, J.) (finding that the IJ ignored evidence of persecution in the record pertaining to the Bulgarian asylum applicant). These cases and others are discussed in Michael Asimow, *Adjudication*, *in* DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 3, 8-10 (Jeffrey S. Lubbers ed., ABA Publishing 2004).

15. Pub. L. No. 104-132, tit. III & IV, 110 Stat. 1247-81 (1996).

16. Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (part of the Omnibus Consolidated Appropriations Act of 1997).

17. *See* Jeffrey S. Lubbers, *Closing the Courthouse to Immigrants*, 24 ADMIN. & REG. L. NEWS. 1 (1999), and, more extensively, David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of the REAL ID (1996-2005)*, 51 N.Y.L. SCH. L. REV. 76, 82-90 (2006-2007).

Non-citizens charged with "aggravated felonies" are subject to deportation (now called "removal") and, since 1996, may not challenge a final decision by the BIA.[18] "Aggravated felons" have been deportable since 1988, but when this concept was introduced twenty years ago, it covered only the crimes of murder, drug trafficking, and firearms trafficking. Since then, Congress has expanded "aggravated felonies" to the point that a plethora of crimes are now covered, including some where the minimum sentence is as short as one year.[19] It also includes *suspended sentences and probation*—thus embracing crimes such as shoplifting and driving while intoxicated (DWI) in some states.[20] In many such cases, the defendants accepted a plea bargain on advice of counsel.[21] But when IIRIRA made the effect of this provision retroactive and eliminated any appeal in such cases, it created a great potential of unfairness that cannot be challenged in court.

The 1996 laws also cut to the bone the possibility of discretionary relief earlier known as "suspension of deportation" (now called "cancellation of removal"). Under prior law, a deportable immigrant could ask for relief if he or she could show physical presence in the United States for seven years and that either the immigrant or his or her citizen/permanent-resident family members would suffer "extreme hardship" if the immigrant were deported. IIRIRA not only barred aggravated felons from seeking such relief, but it also increased the physical presence requirement to ten years and required an immigration judge to find that the immigrant's family members (*not* including the immigrant) would suffer "exceptional and extremely unusual hardship"—a standard that few applicants are able to meet.[22] Moreover, even where INS (now U.S. Citizenship and Immigration

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18. Section 440(a) of AEDPA amended section 106(a) of the Immigration and Nationality Act (INA) to provide that the deportation orders of such criminal aliens "shall not be subject to review in any court." This was carried over into Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). *See* McConnell, *supra* note 17, at 86. While courts upheld this provision, in a decision released just before September 11, 2001, the Supreme Court ruled that this did not prevent courts from hearing habeas corpus petitions. *See* INS v. St. Cyr, 533 U.S. 289 (2001).

19. The current provision states that the parts of the INA providing for inadmissibility and for the bar on judicial review do not apply to an alien who committed only one crime if the maximum penalty possible for the crime for which the alien was convicted "did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentences was ultimately executed)." 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (2000).

20. *Id.*

21. Note also that most courts have held that an attorney's failure to inform a non-citizen client of the immigration-related consequences of pleading guilty to an aggravated felony does not constitute ineffective assistance of counsel. *See* United States v. Fry, 322 F.3d 1198, 1200-01 (9th Cir. 2003) and cases cited therein. *But see* United States v. Couto, 311 F.3d 179, 187 (2d Cir. 2002) ("[A]ttorney's affirmative misrepresentations on the subject might well constitute ineffective assistance." (emphasis omitted)).

22. *See* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review*

Services (CIS)) does retain some discretion to waive requirements, such as to adjust one's status, IIRIRA precludes judicial review of the exercise of that discretion.[23]

These statutory preclusion provisions led to a Supreme Court decision that held that habeas corpus review was preserved in such cases.[24] But Congress, in the Real ID Act of 2005,[25] sought to eliminate habeas relief as well—providing that "constitutional claims or questions of law" may only be brought in direct petitions to the courts of appeals.[26]

The cumulative effect of these substantive and procedural changes is that immigration lawyers now have few options to advise their at-risk, non-citizen clients in many cases, other than to "lay low." This hardly breeds respect for the law. And once ensnared in the detention/removal net, immigrants and their lawyers have every reason to litigate to the hilt.

What can we do about this? As a general matter, I think that our mindset about the purpose of immigration adjudication must change.

First, we need to recognize the value of thorough and fair adjudications. The BIA streamlining of 2002 clearly went too far. Mr. Guendelsberger, from the BIA staff, seemed to acknowledge as much today when he recounted some of the changes afoot at the BIA. These changes included adding more BIA members, allowing more panel reviews, and having fewer decisions without opinions.[27]

But Congress, too, needs to focus on the entire EOIR process and the need for independent adjudications.[28] The Administrative Procedure Act (APA) has produced a system of independent Administrative Law Judges

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and the Administrative Process Increase Immigration Cases in the Federal Courts, 51 N.Y.L. SCH. L. REV. 37, 50 (2006-2007) (citing INA § 240A, 8 U.S.C. § 1229b (2000)).

23. After the 1996 laws, the INA provided in 8 U.S.C § 1252(a)(2)(B)(2000) that:

> [N]o court shall have jurisdiction to review—(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

The REAL ID Act of 2006 has tightened this restriction even more. *See id.* (amended). For an extended discussion of the problems posed by this provision, see Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 162 (2006-2007).

24. *See* INS v. St. Cyr, 533 U.S. 289 (2001).

25. Pub. L. No. 109-13, Div. B, 119 Stat. 302 (2005).

26. *Id.* § 106, 119 Stat. at 310. What is meant by "questions of law" is not entirely clear. *See* Aaron G. Leiderman, Note*, Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367 (2006).

27. John Guendelsberger, Bd. Member, Bd. of Immigration Appeals, Remarks at the American University Washington College of Law Administrative Law Review Symposium: Holes in the Fence: Immigration Reform and Border Security in the United States (Mar. 20, 2007) (recording available at http://www.wcl.american.edu/secle/video.cfm).

28. For an excellent review of these independence issues, see Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370 (2006).

(ALJs) for most of our important types of agency adjudications; but Immigration Judges (IJs) are not ALJs. IJs lack the statutory independence that ALJs have. That should change.[29]

The BIA is one administrative appeal board that needs to be independent too.[30] Given the Attorney General's power to review BIA decisions *sua sponte*, and the severe limits on judicial review, there is more reason for *both* the IJs and BIA members to be independent adjudicators. Lives are at stake in these cases and they need to be subjected to a fair hearing and review. It goes without saying that EOIR needs better funding and increased support, including more law clerks, to accomplish the large adjudication task before it. We also need to rethink the division of responsibilities between the Department of Justice, which houses the EOIR, and DHS, which houses the former INS.

Second, we need to recognize the value of the judicial review process. Rather than shying away from, or even trying to limit judicial review in, immigration law, we should embrace a carefully constructed system of judicial review. This is not an impossible task. We have provided for judicial review in other mass justice programs. In 1988, we ended the long history of preclusion of judicial review of denials of veterans' benefits by creating a special court.[31] In the Social Security program, where we have 600,000 administrative hearings a year, we allow judicial review in federal district courts.[32] An appropriate system can be designed for judicial review in the immigration context if we devote the necessary attention and resources to the problem.

Third, Congress needs to establish reasonable incentives to comply with our immigration laws. I agree with Professor Lenni Benson of New York Law School, who recently wrote that "[i]f Congress would more carefully tailor its use of deportation and consider more generous exceptions or waivers, it is likely that many of the people now litigating so fiercely would either not be in the removal system" or would feel like they were getting

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29. *See* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 73 (1996).

30. Unlike administrative law judges, who are guaranteed significant independence by the Administrative Procedure Act (APA), agency appeal board members are not. *See* Kalaris v. Donovan, 697 F.2d 376, 393 (D.C. Cir. 1983). Furthermore, unless Congress specifies otherwise, the APA leaves the structure of the agency appeal process to the agency's discretion. And, since most appeals boards "stand in the shoes" of the agency head, the need for independence is lessened. *See generally* Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 252 (1996). However, due to the importance of removal cases and the Attorney General's residual review authority, independence for the BIA seems warranted.

31. *See* Veterans' Judicial Review Act—Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, tit. III, § 4052, 102 Stat. 4105, 4113 (1988) (describing the jurisdiction and partial finality of decisions of the U.S. Court of Veterans Appeals).

32. *See* Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 785 app. B (2003).

fairer treatment at the administrative levels.[33] As she said, "When we make the forgiveness boundaries too small, people will litigate about the boundaries of the net or the box."[34]

One way to reduce the incentive to fight would be to create adequate forms of relief from removal. As Professor Benson asked, if a person being deported has the skills and qualities that would otherwise make him or her eligible for immigration through our employment system or has the close relatives that qualify the person for immigration through the family system, does it really make sense to subject him or her to a permanent bar upon departure? Why not allow the bar to be waived in appropriate equitable circumstances?[35]

I agree wholeheartedly with Professor Benson's conclusion that if we provide reasonable and realistic opportunities for a person who has been found deportable (especially where it was simply for immigration violations) to *legally* immigrate in the future, it will create an incentive for that person to play by the rules and stop litigating about the boundaries.[36]

In conclusion, as an administrative lawyer, I worry that this corner of administrative law has lost the appropriate balance between fairness and efficiency. Efficiency need not always be the enemy of fairness, but it certainly can be, and I think it has been with respect to immigration adjudication. I hope that panels like this one will help our lawmakers and administrators focus on ways to restore that balance.

Thank you.

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33. Benson, *supra* note 22, at 65-66.
34. *Id.* at 66.
35. *See id.*
36. *See id.* at 68.

COMMENT

CREATING A VIABLE ALTERNATIVE: REFORMING PATENT REEXAMINATION PROCEDURE FOR THE SMALL BUSINESS AND SMALL INVENTOR

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TABLE OF CONTENTS

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INTRODUCTION

Once lauded for its utility in fostering scientific innovation, the United States patent system has endured considerable criticism over the past years. No longer are patents viewed solely as a driving force behind the development of technology; today they are utilized extensively as investment tools for large companies. In 2000, New Technologies Products, Inc. (NTP)[1] demanded that Research In Motion (RIM) pay licensing fees for use of NTP's wireless email technology in RIM's Blackberry device.[2] After five years of litigation, RIM agreed to pay NTP a settlement of $612.5 million in order to avoid an injunction on the wireless service RIM provided to its Blackberry users.[3] The Blackberry case, although certainly one of the most notable, is just one of many instances where so-called "patent trolls" have exploited companies and the U.S. patent system for profit, without the expectation or purpose of developing or advancing any new type of technology.[4] Although patents function on one level as federally licensed monopolies, they also serve to encourage innovation and research for the betterment of competition and

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1. *See* Kim Eisler, *Blackberry Blues*, WASHINGTONIAN, Sept. 1, 2005, http://www.washingtonian.com/articles/businesscareers/1758.html (discussing generally the NTP litigation).

2. *See* NTP, Inc. v. Research In Motion, Ltd., 418 F.3d 1282, 1325 (Fed. Cir. 2005) (holding that Research In Motion's (RIM) Blackberry device and service infringed NTP's wireless email patents).

3. CBSNews.com, *Settlement Ends Blackberry Patent Suit*, Mar. 4, 2006, http://www.cbsnews.com/stories/2006//03/03/tech/main1368894.shtml (discussing the settlement in the *NTP* case and noting that the settlement figure of $612.5 million was on the low end considering that no agreement for future royalties was involved).

4. *See* David G. Barker, *Troll or No Troll? Policing Patent Usage With An Open Post-Grant Review*, DUKE L. & TECH. REV., Apr. 2005, at ¶ 7, *available at* http://www.law.duke.edu/journals/dltr/articles/2005dltr0009.html (defining the term "patent troll" as a business that accumulates patents with the exclusive purpose of seeking settlements from large companies and implying the unfairness of this practice). NTP, Inc. would certainly meet this qualification. NTP, Inc., founded by a patent attorney, is a holding company that focuses exclusively on the development of its patent-portfolio with the purpose of extracting licensing fees and settlements from companies wishing to use its technologies. *See* Ian Austen & Lisa Guernsey, *A Payday For Patents 'R' Us*, N.Y. TIMES, May 2, 2005, http://www.nytimes.com/2005/05/02/technology/02patent.html?ei=5088&en=21b9a37a48136f11&ex=1272686400&partner=rssnyt&emc=rss&pagewanted=all&position= (discussing the foundation of NTP, Inc. by Donald Stout, who started the company with a series of wireless-email patents).

the economy.[5] The recent onslaught of patent trolls has prompted businesses and legislators to call for patent reform.[6]

However, the voices of the small inventor, the group for whom the patent system was originally intended, are increasingly lost in the debate and calls for change.[7] Today, the ability to compete extends far beyond acquiring the money and resources necessary to produce and market a product.[8] Start-ups and small businesses also need to consider the legal costs associated with the desired, yet burdensome, success.[9] In a society where major corporations engage in the development of extensive patent portfolios, new businesses must give careful consideration to whether their products infringe on existing patents.[10] The costs of litigating a patent infringement dispute are often quite substantial and can thus be prohibitive for a small inventor or small business.[11]

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5. *See* 35 U.S.C. § 101 (2000) (providing that "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title"); *see also* 1 DONALD S. CHISUM, CHISUM ON PATENTS § 1.01 (2007) (highlighting that the goal of permitting patent protection is to provide an incentive for technological development by promoting useful arts and applied technology while limiting monopolies).

6. *See generally* ADAM B. JAFFE & JOSH LERNER, INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT 2 (2004) [hereinafter INNOVATION AND ITS DISCONTENTS] (referring to the recent changes in patent procedures that effectively allow patent holders to manipulate claim language in order to achieve a broader coverage than what should be allowed); Doug Harvey, Comment, *Reinventing the U.S. Patent System: A Discussion of Patent Reform Through an Analysis of the Proposed Patent Reform Act of 2005*, 38 TEX. TECH. L. REV. 1133, 1172-77 (2006) (referring to problems with the current patent system, including its lack of protection for universities accused of infringement and the general disregard for the small inventor); Frank M. Washko, Current Development, *Should Ethics Play a Special Role in Patent Law?*, 19 GEO. J. LEGAL ETHICS 1027, 1028 (2006) (emphasizing the ethical concerns posed by the practices of large businesses of developing extensive patent portfolios and effectively monopolizing certain areas of technology).

7. *See* U.S. CONST. art. I, § 8, cl. 8 (conferring upon Congress the power to grant inventors exclusive rights for the use of their work in order to encourage technological development); *see also* Daniel Hamberg, *Invention in the Industrial Research Laboratory*, 71 J. POL. ECON. 95, 96 (1963) (postulating that a substantial portion of the major inventions in the first half of the twentieth century were the products of independent inventors and small firms, rather than large, industrial laboratories).

8. *See* Marvin Motsenbocker, *Proposal to Change the Patent Reexamination Statute to Eliminate Unnecessary Litigation*, 27 J. MARSHALL L. REV. 887, 887 (1994) (discussing the high costs associated with a jury trial and the inability of a small business to endure such a burden).

9. *See* Hal Meyer, *David Beats Goliath*, PATENT CAFE MAG., Dec. 15, 1997, http://www.ipfrontline.com/depts/article.asp?id=107&deptid=3 (demonstrating the leverage that large companies have over small inventors by noting that the perspective of many large corporations seems to be: "[W]hy pay for an idea, when we can steal it? Especially when the only way anybody can prove we stole it is to undertake a lengthy and expensive lawsuit, in which we outnumber them by overwhelming odds.").

10. *See id.* (exemplifying how patent procurement is rarely the only legal cost associated with selling a new product).

11. *See* Motsenbocker, *supra* note 8, at 887 (estimating the costs of jury trial litigation at up to $100,000 per day).

An alternative method for the resolution of patent disputes is patent reexamination, a process in which the Patent and Trademark Office (PTO) conducts a reassessment of a patent's validity at the request of anyone, including a third-party.[12] However, reexamination has been less effective than originally intended for two principal reasons: (1) collateral estoppel prevents the requesting party from raising issues in subsequent litigation that "could have [been] raised during the inter partes reexamination proceedings," but were neglected;[13] and (2) companies, through what could be termed an exploitation of the amendment process, assert a different scope[14] with regard to the disputed patent, thereby achieving a beneficial interpretation for their cause.[15]

This Comment argues for the establishment of procedural revisions to transform reexamination into a more practical and effective option for small businesses and small inventors. Part II provides a background on the history of reexamination. Part III discusses the shortcomings of reexamination in fulfilling its designated purpose of providing a viable alternative to patent litigation, particularly for smaller businesses. Part IV advocates two changes to resolve or curb the shortfalls of reexamination: (1) the establishment of an administrative estoppel provision within a post-reexamination phase to prohibit the patent holder from asserting a different scope than what was claimed in the initial examination phase; and (2) the expanded use of Director-ordered reexamination for situations involving potentially unbalanced proceedings between financially disparate parties.

I. BACKGROUND ON REEXAMINATION

Reexamination is a process administered by the PTO to determine the validity of a previously issued patent.[16] Congress created the first reexamination procedure in the Patent Act of 1980.[17] Reexamination purportedly serves three goals: (1) reexamination based on new "prior

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12. *See* 35 U.S.C. § 302 (2000) (permitting any person to request reexamination of a patent). A third-party requester refers to anyone other than the Patent and Trademark Office (PTO) or the patent holder. *See* Michael J. Mauriel, *Patent Reexamination's Problem: The Power to Amend*, 46 DUKE L.J. 135, 140 (1996) (highlighting how the primary parties to any prosecution or reexamination proceeding are really the PTO and the patent applicant).

13. 35 U.S.C. § 315 (2000).

14. *See infra* notes 69-75 and accompanying text.

15. *See* Mauriel, *supra* note 12, at 145-46 (highlighting how patent holders frequently abuse the amendment process by modifying the scopes of their claims). Essentially, this modification allows the patent holder to shift the scope of his claim to coincide with the art of the accused. Although prohibited in practice, these changes in scope occur due to the difficulty in determining which alterations to a claim are permissible and which go too far. *Id.*

16. *See* 35 U.S.C. §§ 301-307 (2000) (defining the reexamination procedure).

17. *Id.*

art"[18] can resolve validity disputes more quickly than litigation; (2) courts can rely on the expertise of the PTO in analyzing the presence of new "prior art"; and (3) reexamination can strengthen pre-existing patents.[19] Any third-party may initiate reexamination of a patent with regard to new issues of prior art.[20] Thus, reexamination of a patent on the same grounds as the initial examination is prohibited.[21] Occasionally, the PTO will grant reexaminations based upon the Director's discretion in cases that have a substantial societal or economic effect, but these instances have been rare.[22]

A. Ex Parte Reexamination

Ex parte reexamination is the original form of reexamination created by Congress through the Patent Act of 1980.[23] A third-party may make a request for ex parte reexamination on a "substantially new question of patentability" based on new prior art.[24] The law defines new "prior art" as new information related to technology, in existence at the time of initial review, that was neglected in the examination process.[25] If the PTO grants

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18. Prior art is a broad term used to refer to technical information within the public sphere. BLACK'S LAW DICTIONARY 119 (8th ed. 2004) (defining "prior art" as "[k]nowledge that is publicly known, used by others, or available on the date of invention to a person of ordinary skill in an art, including what would be obvious from that knowledge"). An invention must be new and non-obvious in light of prior art in order to be patentable. *See* 35 U.S.C. §§ 102-103 (2000). Therefore one method of challenging the validity of a patent is to present *new* prior art—prior art that was erroneously omitted during the prosecution of the patent.

19. *See* 126 CONG. REC. 29,895 (1980) (statement of Rep. Kastenmeier) (noting that the bill has four major thrusts, the first being that "it strengthens investor confidence in the certainty of patent rights by creating a system of administrative reexamination"); *see also* Patlex Corp. v. Mossinghoff, 758 F.2d 594, 603 (Fed. Cir. 1985) (articulating how the purpose of the reexamination procedure was to restore confidence in the PTO by providing a method through which to remedy administrative errors).

20. *See* 35 U.S.C. § 303(a) (2000) (stipulating that reexamination of a patent can only take place if there is a new issue of patentability). In theory, reexamination would be a practical tool for small businesses seeking to determine whether their products infringe on existing patents or to question the validity of patents which they have been accused of infringing. *See also* Motsenbocker, *supra* note 8, at 887 (exemplifying how the cost of patent litigation can be extremely burdensome for a small business).

21. 35 U.S.C. § 303(a).

22. *See, e.g.*, NTP, Inc. v. Research In Motion, Ltd., 418 F.3d 1282, 1325 (Fed. Cir. 2005) (offering an example where following the initial settlement and pending injunction on RIM, the PTO granted an ex parte reexamination on four of NTP's patents). The reexamination in this case was not requested by a third-party (RIM), but rather the PTO for what it deemed substantial public and social concerns. *See* J. Scott Orr, *Congress Enters Struggle Over Blackberry Patent*, NEWHOUSE NEWS SERV., Feb. 2003, http://newhouse.live.advance.net/archive/orr022003.html (providing a summary of the events surrounding the settlement in the NTP case, including Congress's interest in preventing an injunction).

23. *See* 35 U.S.C. §§ 301-307 (2000) (defining the reexamination procedure).

24. *Id.*

25. 35 U.S.C. § 301; *see also* H.R. REP. No. 96-1307, at 3 (1980) (explaining that § 301 makes clear that a citation of prior art is not to be included in the official file on a patent unless the "citer submits a written statement as to the pertinency and applicability to the patent"). The "substantial question of new prior art" requirement ensures that a reexamination will only be issued where it appears that the PTO has made a mistake during

the request, a reexamination on the accepted claims[26] will commence.[27] Although a third-party requester may initiate the process, the requester is substantially limited in his involvement.[28] Effectively, the requesting party may not participate in any stage of the reexamination, with the exception of responding to an optional response by the patent owner at the beginning of the proceeding.[29]

B. Inter Partes Reexamination

In order to encourage greater use of reexamination, Congress passed the American Inventor's Protection Act of 1999, which created the inter partes reexamination procedure.[30] Inter partes reexamination follows a similar rubric to its ex parte counterpart.[31] Third parties may still request reexamination of a patent on new issues of prior art. However, unlike in an ex parte proceeding, a third-party seeking an inter partes reexamination may participate throughout the process, including the appeals process.[32] In essence, inter partes reexamination permits the requester to respond to the patent owner's arguments.[33] In theory, an inter partes reexamination would result in a higher percentage of invalidations. In recognition of this fact,

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the patent prosecution process. New prior art is essentially anything at the time of prosecution that should have prevented the patent from being issued in its current form. *See* Mauriel, *supra* note 12, at 140 (commenting on the curative purpose of reexamination).

26. A claim consists of specifications of the invention in question. These specifications contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

35 U.S.C. § 112 (2000).

27. 35 U.S.C. § 304.

28. *See* 35 U.S.C. §§ 134(c), 141, 145, 306 (2000) (describing appeals limitations for third-party requesters). Ex parte reexamination has garnered considerable scrutiny for this limitation. *See generally* INNOVATION AND ITS DISCONTENTS, *supra* note 6, at 2-3 (discussing the costs and benefits associated with changes in U.S. patent policy).

29. *See* INNOVATION AND ITS DISCONTENTS, *supra* note 6, at 2 (commenting on the "alarming growth in legal wrangling over patents").

30. 35 U.S.C. §§ 311-318 (2000). *See* 145 Cong. Rec. E1788, E1790 (daily ed. Aug. 5, 1999) (statement of Rep. Coble) (identifying the purpose of inter partes reexamination as an alternative, in addition to ex parte reexamination, to costly civil litigation); *see also* Eric B. Chen, *Applying the Lessons of Re-Examination to Strengthen Patent Post-Grant Opposition*, 10 COMP. L. REV. & TECH. J. 193, 195-96 (2006) (discussing the purpose of the inter partes reexamination procedure as an alternative method to ex parte reexamination).

31. *See* David M. O'Dell & David L. McCombs, *The Use Of* Inter Partes *and* Ex Parte *Reexamination in Patent Litigation* (Hayes & Boone, LLP, Dallas, Tex.), Feb. 2006, at 5-6, http://www.martindale.com/corporate-law/article_Haynes-Boone-LLP_215600.html [hereinafter *Reexamination in Patent Litigation*] (describing the inter partes reexamination process, and revealing that its initiation stage and requirements, such as the new prior art restriction, are principally the same as those in an ex parte reexamination and that the notable difference is within the level of participation of the third-party requester as well as the estoppel provision precluding an assertion of the invalidity of a claim deemed to be valid in the proceeding).

32. 35 U.S.C. § 302 (2000).

33. *Id.*

patent holders actually opt for ex parte reexamination as a way to validate and thus strengthen an already existing patent.[34] In a way, it seems that inter partes reexamination was tailor-made for third-party requesters. Unfortunately, however, inter partes reexamination has not garnered the participation intended by Congress.[35] This under-utilization is largely due to a collateral estoppel provision, which in civil litigation prevents any requesting third-party from raising any issue that the requester raised or could have raised during the inter partes reexamination.[36]

C. Director-Ordered Reexamination

The Manual of Patent Examining Procedure (MPEP) permits the Director of the PTO to order a reexamination based on new prior art discovered by anyone, including himself.[37] Such instances are rare, but do occur where there is a substantial public policy interest. For example, in the RIM (Blackberry) case, the Director of the PTO, perhaps in response to an outcry from Congress, ordered a reexamination of NTP's patents.[38] The public policy considerations in that case were understandable, given the nature of the product involved and its widespread use.[39] However, the PTO has seldom found such strong public policy interests to warrant reexamination.[40]

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34. *See* Paula Heyman, *Using Your Patent Portfolio to Defend Against a Patent Infringement Suit*, INTELL. PROP. REP. (Baker Botts, LLP, Austin, Tex.) Apr. 2005, *available at* http://www.bakerbotts.com/file_upload/HeymanArticle.htm (discussing how reexaminations can be a valuable tool for the patent holder in that they "may also be used in a precursive attempt to bolster a company's own patents").

35. *See* Amy L. Magas, Comment, *When Politics Interfere With Patent Reexamination*, 4 J. MARSHALL REV. INTELL. PROP. L. 160, 166 (2004), *available at* http://www.jmripl.com/Vol4/Issue1/magas.pdf (discussing the potential for abuse in the current reexamination process and suggesting the need for reform).

36. *See* 35 U.S.C. § 315(c) (2000). The collateral estoppel provision, despite its drawbacks, encourages the use of reexamination over litigation. This provision effectively prohibits the re-litigation of issues, which surely would happen in instances involving businesses who are willing to expend significant resources in court. It would be to the advantage of a large business to hedge its bets by considering both. *See also* Mauriel, *supra* note 12, at 138 (discussing the collateral estoppel provision included in the inter partes reexamination procedure and emphasizing the positives of the provision in furthering Congress's goal of establishing reexamination as a substitute rather than an "add-on" to litigation).

37. *See* MANUAL OF PATENT EXAMINING PROCEDURE § 2212 (2006) ("[T]here are no persons who are excluded from being able to seek reexamination."); *see also* 35 U.S.C. § 302 (2000) ("Any person at any time may file a request for reexamination.").

38. *See* Orr, *supra* note 22 (detailing the reaction of Congress to the settlement and impending injunction on RIM's line of Blackberry products in light of the fact that Congressional lawmakers had been issued such devices prior to the settlement). This article highlights a letter sent from Congress to the PTO. The reexamination ordered by the PTO Director, former Republican Rep. James Rogan of California, was supposedly made prior to the receipt of the letter. *Id.*

39. *Id.*

40. *See* Magas, *supra* note 35, at 168 (discussing the rarity of Director-ordered reexaminations and implying how they are typically reserved for high profile cases).

D. Reexamination's Amendment Process

Unlike litigation where any alterations to the patent claims are prohibited, a patent holder may make changes to patent claims during the reexamination stage.[41] The reason for this difference is rooted in the similarity between patent reexamination and patent prosecution (i.e., the initial examination process through which a patent is first granted).[42] Patent prosecution involves the creation of the patent itself.[43] The PTO and the patent applicant engage in a back and forth dialogue regarding the merits of the application. If the PTO rejects an applicant's patent claim, the applicant may amend his application and re-submit.[44] The customary practice is for the applicant to submit a broad claim and then to narrow it based on the input and suggestions of the PTO.[45] Reexamination is viewed as a continuation of this process rather than a true evaluation of a patent's validity.[46] Therefore, reexamination addresses the errors committed during the initial examination phase.[47] Consistent with the "examination" process, the patent holder may amend his claim in a reexamination just as he was permitted to do during the prosecution of the patent.[48] Unlike litigation, the party challenging the patent in a reexamination is the PTO itself and not a third-party or defendant to an infringement action.[49]

II. THE SHORTFALLS OF REEXAMINATION

Despite Congress's attempt to provide attractive alternatives for the resolution of patent infringement disputes, interested parties have not exercised these methods to the extent originally intended.[50] Because third

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41. *See* Mauriel, *supra* note 12, at 139-41 (explaining the patent holder's ability to amend claims in the reexamination process).

42. *See id.* at 143 (noting the use of the broadest reasonable construction standard in the PTO's analysis of a patent as the reason for permitting patent holders to amend their claims).

43. *See id.* at 139-40 (noting how the initial "examination" stage involves an ongoing discussion between the patent holder and the PTO in order to develop a patent that is not overly broad).

44. 35 U.S.C. § 305 (2000).

45. *See* Mauriel, *supra* note 12, at 140 (discussing the use of amendments to address concerns raised by the PTO during the prosecution or reexamination of a patent).

46. *See In re* Etter, 756 F.2d 852, 857 (Fed. Cir. 1985) (discussing reexamination's purpose of curing some of the defects from the initial examination stage). This is contrary to what is done in a court proceeding where the court tries to evaluate the patent's validity; the patent is presumed valid in this instance. *Id.*

47. *Id.*

48. *See* Mauriel, *supra* note 12, at 140 (discussing the necessity for the amendment process within the reexamination process due to the fact that reexamination implies that the patent prosecution process is still open).

49. *See* Etter, 756 F.2d at 857-58 (contrasting the role of the third-party requester in a reexamination with that of a litigant in an infringement dispute).

50. *See* Dale L. Carlson & Jason Crain, Speech, *Reexamination: A Viable Alternative to Patent Litigation?*, 3 YALE SYMP. L. & TECH. 2, 6-7 (2000) (examining the paltry use of

parties are unable to actively participate throughout the process, ex parte reexamination is only attractive as a supplement, rather than as a substitute, to civil litigation.[51] Similarly, the presence of an estoppel provision prohibiting one from claiming the invalidity of a patent that was determined valid during reexamination makes inter partes reexamination a risky option, despite the ability of the requester to actively participate in the reexamination process.[52] Even Director-ordered reexamination, which one would expect to see fairly often given the percentage of issued patents later found to be invalid, has seen limited use. In short, reexamination does not appear to be fulfilling its purpose.

A. Ineffectiveness of Ex Parte and Inter Partes Reexamination

Because of the third-party requester's inability to participate actively in the proceedings, ex parte reexamination is not a particularly attractive option.[53] This drawback prompted Congress to institute the inter partes reexamination procedure, which permits the active participation of the third-party requester during the reexamination process.[54] However, a collateral estoppel provision that prohibits the requester from raising any issue regarding a patent's validity that has been raised during reexamination, including inter partes reexamination, has not garnered the use Congress had hoped for when it enacted the statute.[55] Consequently, inter partes reexamination is not used as a true alternative.[56] It is more beneficial for a defendant to litigate the matter and resort to reexamination

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reexamination procedures since their inception despite the intention not only to supplement civil litigation in patent disputes but to substitute for it as well).

51. *See* Betsy Johnson, Comment, *Plugging the Holes in the Ex Parte Reexamination Statute: Preventing a Second Bite at the Apple for a Patent Infringer*, 55 CATH. U. L. REV. 305, 315 (2005) (addressing the ineffectiveness of reexamination procedures due to the failure to allow participation of the third-party requester in a practical manner).

52. *See Reexamination in Patent Litigation*, *supra* note 31, at 5-6 (highlighting the risks of inter partes reexamination despite the theoretical benefits to a third-party requester).

53. *See* Magas, *supra* note 35, at 166 (stressing the shortfalls of ex parte reexamination).

54. *See* Mauriel, *supra* note 12, at 138 (discussing the purpose of inter partes reexamination within the scope of the Reform Act before its passage).

55. *See* Magas, *supra* note 35, at 164 (articulating the precarious situation that that the inter partes reexamination procedure's estoppel provision places on third-party requesters who want to be involved in the process but do not want an unfavorable reexamination proceeding to preclude them from litigation).

56. *But see* Patlex Corp. v. Mossinghoff, 758 F.2d 594, 602 (Fed. Cir. 1985) (noting the intent of the reexamination procedures to act as an alternative to litigation for patent infringement disputes, and restore confidence in the PTO).

only if his chances of success in the courtroom appear bleak.[57] Unfortunately, not everyone has the luxury of playing the "wait and see" game; instead, many are left with a "take it or leave it" scenario.[58]

B. Restrained Use of Director-Ordered Reexamination

The Director of the PTO has the power to order an ex parte reexamination when a patent appears to be overly broad or when pending litigation or a dispute has substantial societal effects.[59] These Director-ordered proceedings bring to light an important consideration: the fact that the PTO has the authority to reexamine patents previously presumed to be valid indicates that there is a legitimate policy interest in making a precise determination on these issues.[60]

The use of Director-ordered reexamination has been limited.[61] To date, the procedure has been reserved for cases involving large companies with substantial amounts of money at stake.[62] While it is understandable that the potential shutdown of a service used in the daily course of business by millions (including Congress) presents a public policy concern,[63] it should not be the sole instance where such concerns receive attention.[64] Given the policy goal of the patent system to foster the development of technology, it appears likely that the PTO would arrange a procedure for helping the

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57. *See, e.g.*, NTP, Inc. v. Research In Motion, Ltd., 418 F.3d 1282 (Fed. Cir. 2005) (illustrating one of many instances where rich defendants in patent infringement disputes can afford trial and then resort to reexamination as a backup plan when needed). The use of reexamination and litigation combined is common for companies who can afford it. Unfortunately, this practice is in direct contrast to Congress's intent. *See also Patlex*, 758 F.2d at 604 (commenting on Congress's intent in enacting reexamination procedure).

58. *But see, e.g.*, *NTP, Inc.,* 418 F.3d at 1282 (exemplifying a case where the two companies involved did have the resources to sustain a drawn out litigation process in court).

59. *See, e.g.,* Orr, *supra* note 22 (discussing Director-ordered reexamination granted in the NTP, Inc. v. RIM case and emphasizing that a shutdown of RIM's service would affect a substantial number of users).

60. *See generally* Donald W. Banner, *Patent Law Harmonization*, 1 U. BALT. INTELL. PROP. L.J. 9, 12 (1992) (implying that large corporations do not need the patent system, and would be perfectly fine without it).

61. *See, e.g.*, Orr, *supra* note 22 (discussing the PTO's initiation of reexamination in the NTP, Inc. v. RIM case where the impact of the impending injunction was deemed to have a substantial social impact).

62. *See, e.g.*, *NTP, Inc.*, 418 F.3d at 1282 (providing an example of a patent infringement dispute between two large companies, where the resulting settlement was $612.5 million).

63. *See* Orr, *supra* note 22 (discussing *NTP, Inc. v. RIM* and emphasizing that a shutdown of RIM's service would affect a substantial number of users).

64. Director-ordered reexamination appears to be reserved for instances where the interest of the public is involved. But it would seem that the public has at least as strong an interest in the promotion and development of technology, as it has in the proper resolution of a dispute between two companies fighting over a large sum of money. *See* U.S. CONST. art. I, § 8, cl. 8 (articulating the policy goal of "promoting [the progress of] science and useful arts," presumably for the general public).

small business or small inventor.[65] For the small business accused of patent infringement by a large company, reexamination of the patent in question would be the most logical step.[66] The Director-ordered reexamination would eliminate both the litigation costs as well as the almost $9,000 fee for inter partes reexamination.[67] Unfortunately, the Director-ordered reexamination procedure is not aimed at advancing this policy concern.[68]

C. Loopholes in the Amendment Process

In both the initial examination and reexamination stages, a patent claim receives the broadest reasonable interpretation.[69] The reasoning behind this standard is based upon the patent holder's ability to amend his claim.[70] By construing the language of a claim broadly, the PTO is more likely to discover conflicts between the claim and existing "prior art."[71] The patent holder, through the amendment process, is thus able to clarify these ambiguities and narrow the scope[72] of the patent accordingly.[73] In theory, the end result is a concise patent that does not overlap with any existing prior art.[74] The important issue with the amendment process in reexamination is the scope of this change.[75]

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65. *See id.*

66. *See* Motsenbocker, *supra* note 8, at 887 (emphasizing the high costs of litigation and implying the near impossibility for a small business to successfully compete against larger businesses in the courtroom).

67. *See Reexamination in Patent Litigation*, *supra* note 31, at 7-8 (discussing the $8,800 cost of inter partes reexamination).

68. *See* Orr, *supra* note 22 (suggesting that the policy concerns necessary for Director-ordered reexamination may only be implicated in disputes involving large businesses).

69. *See In re* Reuter, 651 F.2d 751, 756 (C.C.P.A. 1981) (establishing that claims before the PTO receive "the broadest reasonable interpretation" because of the applicant's right to amend his claim and to make it more concise).

70. *See* Mauriel, *supra* note 12, at 139-40 (discussing the use of the amendment process as a method for the patent applicant to narrow the language of the claim, thus increasing the likelihood that the patent will be issued).

71. *See id.*

72. The term "scope" refers to the breadth of the technology mentioned in the patent claim. A claim whose language covers more of a technology than is necessary (i.e., extends past the technology actually covered by the invention in question) is said to be "broad." Thus by narrowing the scope of a patent claim, one can obtain a patent claim whose language does not overlap with existing patents or non-patentable public knowledge. The PTO has been routinely criticized for granting broad patents, which often do not hold upon in court or upon reexamination. *See generally* INNOVATION AND ITS DISCONTENTS, *supra* note 6, at 2 (commenting on the tendency of the PTO to grant overly broad patents and the ability of rich companies to exploit administrative procedures in order to obtain favorable rulings regarding patents).

73. *See* Mauriel, *supra* note 12, at 139-40 (describing the amendment process in the patent prosecution and reexamination processes).

74. *See id.*

75. *See generally id.* at 141 (discussing the problems with the use of the amendment process in reexamination and advocating for its elimination).

The reexamination statute states that "[n]o proposed amended or new claim enlarging the scope of a claim of the patent will be permitted in a reexamination proceeding under this chapter."[76] However, it is questionable whether this requirement is actually fulfilled in practice.[77] Technically, a substantive amendment to a claim has no retroactive effect.[78] An amendment is substantive if it changes the scope of the claim.[79] Unfortunately, it is difficult to accurately determine whether the patent holder has made a substantive change.[80] The failure to distinguish between a change of scope and a mere change in language has large ramifications, particularly for the third-party requester who wants to determine if his work will infringe on the patent and also for the requester already accused of patent infringement. In this instance, reexamination is transformed into a tool to effectively change a patent in order to match the relevant art of the potential infringer. After this occurs, the so-called infringer then has no legal recourse due to the collateral estoppel provision.[81] There is no penalty or disincentive for effectively attempting to alter the scope of a claim to match the potentially infringing art.[82]

III. REFORMING REEXAMINATION

Fundamentally, reexamination should be the preferred course of action.[83] In a court proceeding, the patent is presumptively valid, and the defendant in the infringement action must prove beyond a reasonable doubt that the patent is invalid.[84] By contrast, in reexamination proceedings, the challenging party only needs to prove the invalidity of the patent by a

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76. 35 U.S.C. § 305 (2000).

77. *See* Mauriel, *supra* note 12, at 145-46 (commenting on the difficulty in preventing the patent holder from altering the scope of a claim through the amendment process). It would follow that those with the best legal representation would be able to achieve this alteration of scope, again giving the small business a disadvantage.

78. *See* Kaufman Co., Inc. v. Lantech, Inc., 807 F.2d 970, 976 (Fed. Cir. 1986) (stipulating that in the case of a substantive amendment "the patentee has *no* rights to enforce before the date of reissue").

79. *See id.* ("[I]f the claims in the original and reissued patents are 'identical,' the reissued patent is deemed to have effect from the date of the original patent.").

80. *See* Mauriel, *supra* note 12, at 146 (highlighting the difficulty in distinguishing between a mere clarification and a change in scope).

81. *See id.*

82. *See id.* (stipulating that the patent holder is free to alter the language of a claim as long as the scope does not change).

83. *See* Patlex Corp. v. Mossinghoff, 758 F.2d 594, 604 (Fed. Cir. 1985) (discussing the original intent of Congress in adopting ex parte and inter partes reexamination procedures, through which Congress hoped to curb the large number of patent dispute cases in light of the fact that a large number of patents are overly broad).

84. *See Reexamination in Patent Litigation*, *supra* note 31, at 5-6 (discussing the higher standard of proof in a court proceeding and thus the preference, in an ideal sense, for the use of reexamination over patent litigation).

preponderance of the evidence.[85] Reexamination proceedings are also more likely to result in predictable outcomes.[86] The PTO has experts with technical backgrounds who are better qualified to make validity determinations, whereas judges presumably lack the desired expertise.[87] Additionally, reexamination is considerably less expensive for the requester than civil litigation and generally takes less time as well.[88]

The benefits for the small business or start-up are thus quite evident.[89] For a small business being sued for patent infringement by a mega-corporation holding an extensive patent portfolio, reexamination would theoretically be ideal.[90] The hybridist approach that larger companies have taken is not as viable an option for smaller entities that are just bringing their product to market.[91] Reexamination should thus be modified in two principal ways: (1) the PTO should adopt an administrative estoppel provision preventing patent holders from asserting a different scope than what was asserted during patent prosecution; and (2) the Director-ordered reexamination, as a matter of public policy, should be extended to instances involving financially disparate parties.[92] With these two changes, reexamination would present a more viable alternative to court litigation and would further the patent system's goal of encouraging the progress of technological development.[93]

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85. *See id.*

86. *See Patlex*, 758 F.2d at 602 (admitting the expertise that the PTO lends to the situation when reexamining the validity of a patent, as opposed to a judge or jury—neither of whom may be as qualified to make the determination).

87. *Cf. In re* Etter, 756 F.2d 852, 856-57 (Fed. Cir. 1985). The lack of expertise coupled with the presumption of validity favors the patent holder considerably, particularly if it is a large business, which is often the case.

88. *See Reexamination in Patent Litigation*, *supra* note 31, at 7-8 (highlighting the relatively inexpensive cost of reexamination compared to litigation).

89. *See id.* (stipulating that inter partes reexamination is $8,800 and that ex parte reexamination is $2,200). Although third-party requester participation in inter partes reexamination would likely require attorney's fees for an active role, such fees would be considerably less than those for litigating the case in court.

90. *See* Banner, *supra* note 60, at 10 (implying that the patent system is designed to protect the small business).

91. *See generally id.* The hybridist approach is only an option for those who can afford litigation in the first place. Ten thousand dollars stacked onto hundreds of thousands of dollars is relatively miniscule.

92. *But see* Orr, *supra* note 22 (articulating that public policy concerns arise when the litigating parties are large businesses).

93. *See* U.S. CONST. art. I, § 8, cl. 8 (establishing that "Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); *see also* H.R. REP. NO. 96-1307, at 3 (1980) (highlighting reexamination's original purpose of providing a legitimate alternative to litigation for patent infringement disputes).

A. Administrative Estoppel via Post-Reexamination Procedure

In order to truly create a less expensive, viable alternative to litigation, the PTO should adopt an administrative estoppel provision to prevent the alteration of a claim's scope within the reexamination process.[94] Although reexamination is based on the notion of the PTO's prior error, the patent has already been issued, and the patent holder has already benefited from the right to exclusive use.[95] While some have called for the elimination of the amendment process within the reexamination procedure altogether, such action would severely curtail the patent holder's rights by prohibiting the holder from clarifying the language of a claim.[96] A preferrable method would be to institute a post-reexamination phase for patents deemed valid during reexamination.[97]

A large number of patents are determined invalid upon reexamination—almost as many as those found valid.[98] Just as reexamination is based on the notion that mistakes occur in the preceding process, so too should the PTO acknowledge similar mistakes that occur during reexamination.[99] Directly following the affirmation of a patent's validity, a post-reexamination phase should take place where the scope of the claim is analyzed in both its pre-reexamination and reexamination forms. Upon discovery of a disparity in scope, the patent holder should be estopped from asserting the patent's validity.[100]

The post-reexamination phase should take place immediately after the reexamination proceeding. In the new phase, the patent holder will not be permitted to make any amendments to his claim.[101] The effect of this

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94. *See* Mauriel, *supra* note 12, at 146 (highlighting the process to amend claims and the difficulties it creates in determining whether the claims' scope has changed).

95. *See In re* Etter*,* 756 F.2d 852, 856 (Fed. Cir. 1985) (stipulating that reexamination is a continuation of patent prosecution rather than an evaluation of the patent's validity, due to the presumption of a PTO-committed error).

96. *See generally* Mauriel, *supra* note 12 (calling for an end to the amendment process in reexamination in order to eliminate the instances where patent holders successfully alter the scope of a claim and achieve a retroactive effect).

97. *See In re* Etter, 756 F.2d at 857 (implying that the use of the amendment process with the broadest reasonable interpretation standard is a necessary means of achieving a valid patent).

98. *See* Chen, *supra* note 30, at 193 (indicating that 46% of all litigated patents are held invalid).

99. *See* Mauriel, *supra* note 12, at 140 (articulating that reexamination is actually a remedy for mistakes or errors made during the prosecution stage). Mauriel also discusses the errors that occur during the reexamination through the patent holder's exploitation of the amendment process. The proposition in Part IV.A is thus based on the notion of filling this gap.

100. *See id.* at 146 (discussing patent holders' ability to amend claims in the hopes of changing the scope of their claims and attain retroactive effect).

101. The purpose of this requirement is to eliminate the amendment process for some period of time to allow the PTO complete and total discretion. In theory, the reexamination process could recommence, allowing the patent holder to again amend his claim, this time trying to conceal the alteration of scope. This process, however, may discourage the patent

procedure is that the patent holder's ability to modify and clarify the language of a claim will be preserved while still prohibiting (or at least making a concertedly better effort at prohibiting) the patent holder from modifying the actual scope of the claim.[102] Similar to how the inter partes reexamination procedure restricts a party from making claims contrary to the reexamination holding, the patent holder will be prohibited from arguing for application of the newly changed scope with regard to prior cases.[103]

The post-reexamination procedure would ultimately make reexamination a more attractive option, and thus, a viable alternative to litigation.[104] The change would level the playing field by prohibiting patent holders (often large companies) from filing amendment after amendment in order to change the scope of the patent.[105] This procedure would similarly advance the goal of restoring faith in the PTO and the patents that it issues.[106]

B. Expanded Use of Director-Ordered Reexamination

The PTO should expand the application of Director-ordered reexamination to disputes between financially disparate parties.[107] Understandably, Director-ordered reexaminations are purely discretionary and historically have taken place in instances where public policy concerns

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holder who would have to initiate the process all over again. The presumption is that this type of fruitless repetition would raise a red flag. While there is no administrative proposition in this regard, an application in this instance would probably receive a second look.

102. *See* Mauriel, *supra* note 12, at 147-50. Mauriel's solution to this problem is to eliminate the amendment process during reexamination altogether.

103. *See generally id.* at 146 (discussing the reexamination process and the risks imposed on the patent holder). The administrative estoppel provision would only prohibit retroactive effect. The change in scope could apply to subsequent cases involving future art.

104. Reexamination would be more attractive to the extent that it would theoretically remove some of the unfair leverage that patent holders currently enjoy. If the third-party knows that he will receive a fair chance, then he is more likely to take part. In contrast, the chances of success in court would remain bleak, particularly considering the presumption of validity for the patent and not withstanding the substantial advantage that a large business with ample resources has in the courtroom. *Cf.* John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 205-07 (1998).

105. *See* Mauriel, *supra* note 12, at 146 (indicating ineffectiveness in the provision that prohibits changing the scope of a claim in the filing of an amendment).

106. *See* Patlex Corp. v. Mossinghoff, 758 F.2d 594, 603 (Fed. Cir. 1985) (discussing Congress' belief that reexamination could serve to restore faith in the PTO through the admission and resolution of administrative defects).

107. "Disputes involving financially disparate parties" refers to patent disputes between a large corporation and a small inventor accused of infringement during the course of developing a new product. The small business in this scenario has two options: (1) pay a licensing fee; or (2) go to court. This is a precarious situation, even when the small business has a very good case. *See* Bob Sullivan, *Patent Piracy, or Goliath's Comeuppance? Small Firms often Targeted in Obscure Infringement Cases*, MSNBC, Apr. 30, 2004, http://www.msnbc.msn.com/id/4837371/ (explaining the strategy that companies with extensive patent portfolios use in accusing small companies of patent infringement when the relationship between the two technologies is attenuated at best).

have been a major issue.[108] However, the PTO should give careful consideration to what actually satisfies this public policy rationale. If the purpose of patent protection is to encourage innovation and research, then it would naturally follow that small inventors and small businesses should, as a matter of policy, be protected first and foremost.[109] Though reexamination is significantly less expensive than courtroom litigation, it still can be quite costly, particularly in the case of an inter partes reexamination.[110] In consideration of this cost factor, and in addition to the fact that 46% of all litigated patents are found to be invalid, the Director of the PTO should intercede in disputes involving a substantial financial disparity between parties and order a reexamination of the patent.[111]

While some may argue that a small business's autonomy in selecting its method of legal recourse would be undermined by this provision, the reexamination of the patent does not actually involve the small business.[112] Rather, the small business is merely a third-party and the validity issue is a matter between the PTO and the patent holder.[113] The premise that the potential infringer would not request reexamination is irrelevant.[114] Permitting the presumption of validity for a patent that is actually invalid makes little sense.[115] An error that the PTO commits is an issue for the PTO, just as is the notion of promoting research and technological advancement.[116] By isolating the critical disputes, the PTO can rectify these errors without incurring a substantial burden.[117]

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108. *See, e.g.*, NTP, Inc. v. Research In Motion, Ltd., 418 F.3d 1282 (Fed. Cir. 2005) (providing an example where the PTO interceded and ordered a reexamination of NTP's allegedly infringed patent).

109. *See* U.S. CONST. art. I, § 8, cl. 8. The Constitution permits the issuance of intellectual property rights in order to advance technological development. Such development would start with the small-scale inventor and move on to the small business. Following this logic, the large corporation would be the last entity on the line deserving and needing protection.

110. *See Reexamination in Patent Litigation*, *supra* note 31, at 7-8 (indicating the $8,800 cost for inter partes reexamination).

111. *See* Chen, *supra* note 30, at 193 (stipulating that 46% of litigated patents are held invalid and that 95% of patents issued in the United States are never challenged).

112. This would not likely infringe on any of the potential third-party requester's rights. In reexamination, the third-party requester is not truly a party. The matter concerns the PTO and the patent holder. Mauriel, *supra* note 12, at 140-41.

113. *See id.*

114. *See id.*

115. The validity of the patent is the PTO's issue. The PTO's interest in correcting its own error trumps any interest of a third-party determining the forum with which to resolve a dispute. *See id.*

116. *See In re* Etter, 756 F.2d 852, 858-59 (Fed. Cir. 1985) (articulating the purposes of patent protection and the system in general).

117. Naturally, requiring that the PTO double check every patent it issues would impose an undue burden. The goal of this Comment is to demonstrate a method through which to select a group of "questionable" patents and to subject them to further scrutiny.

CONCLUSION

Reexamination should be the first line of defense for a party accused of patent infringement.[118] In a business culture where broad patents are increasingly common, a mechanism is needed to weed out mistakes before money and time are wasted in court.[119] This is particularly critical for small businesses.[120] The threat of stepping into a five-year courtroom battle is daunting for the small inventor or start-up business.[121] As a matter of public policy, and as a method of fulfilling the purpose for which the patent system was created,[122] such a battle should only occur as a last resort.

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118. *See* Patlex Corp. v. Mossinghoff, 758 F.2d 594, 604 (Fed. Cir. 1985) (stipulating the real purpose of reexamination, which entails limiting the number of patent infringement disputes that make it to the courtroom).

119. *See* Chen, *supra* note 30, at 193 (commenting on the substantial percentage of litigated patents found to be invalid and the broad patents routinely issued by the PTO).

120. *See* Banner, *supra* note 60, at 12 (noting the disparity in available methods of resolution for big and small companies).

121. *Id.*

122. U.S. CONST. art. I, § 8, cl. 8.

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RECENT DEVELOPMENTS

SIGNING STATEMENTS: A PRACTICAL ANALYSIS OF THE ABA TASK FORCE REPORT

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TABLE OF CONTENTS

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INTRODUCTION

In August 2006, an American Bar Association (ABA) Task Force issued a report (the Report) criticizing the recent Administration's practice of issuing signing statements, which accompany the signing of legislation and inform the public of provisions the President believes are unconstitutional on separation of powers grounds.[1] While the Report discussed the records of several recent Presidents, the Task Force focused on signing statements issued by George W. Bush who, by its count, has challenged the constitutionality of more provisions than all of his predecessors combined.[2]

The Task Force concluded that if the President believes part of a bill presented for his consideration is unconstitutional, he should either sign or veto the measure—he should not follow the approach adopted by his predecessors of signing the bill while announcing his belief that a provision is unconstitutional and that the administration will interpret it, if possible, to avoid constitutional problems.[3] The Report recommended enacting legislation that would allow "Congress, or other entities or individuals, to seek judicial review of such signing statements, to the extent constitutionally permissible," of a signing statement that asserts that an enacted provision is unconstitutional.[4] Senator Arlen Specter introduced such a bill in the last Congress. It would have vested federal courts with jurisdiction to entertain declaratory judgment actions concerning the legality of any presidential signing statement and given the House or the Senate standing to bring such a lawsuit.[5] Days into the new Congress the president of the ABA submitted a letter to the leaders of Congress

1. AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf [hereinafter TASK FORCE REPORT].
2. TASK FORCE REPORT, *supra* note 1, at 6, 14 & n.52.
3. *Id.* at 5.
4. *Id.* at 5, 25-26.
5. S. 3731, 109th Cong. § 5 (2006).

reiterating the recommendation that Congress adopt legislation allowing judicial review of signing statements to the extent constitutionally permissible.[6]

The Task Force's conclusions are misguided in three fundamental respects. First, they mistakenly focus on one method by which recent Presidents have communicated their constitutional concerns to the public—the signing statement—rather than on the merits of their substantive positions. Signing statements have no legal force and effect. They have the same legal significance as other mechanisms the President could use to deliver the same message, such as a speech, a radio address, or an answer to a question at a press conference: none at all.

Second, the Task Force's recommended solution would not work. Under Article III of the Constitution, only a person who has suffered concrete harm from a government action may invoke judicial review. No individual will suffer particularized harm from the issuance of a signing statement; an injury can occur only when a government agency acts consistent with a President's construction, and that agency action generally is already subject to judicial review. Further, since a signing statement has no legal effect, there is no harm that could be redressed by a court overturning the statement's interpretation of separation of powers principles.

Third, the Task Force restricted the level of its analysis to constitutional theory. It ignored the practical question of whether successive administrations have been willing to work around their formal separation of powers objections to congressional action and have accommodated the Legislative Branch's interests in practice.

Most signing statements that raise separation of powers concerns inform the public that the President will interpret the potentially objectionable provision in the narrower manner that he believes to be constitutional and that he will try to address congressional interests. Successive administrations have acted in this manner to minimize the risk of unnecessary constitutional confrontations because they have recognized that: (a) the separation of powers issues raised in signing statements are rarely justiciable in federal court; and (b) Congress has effective political weapons to compel the President to respect its policy preferences, even if that intention is set forth in a provision that contains a technical constitutional flaw. Taken together, these factors mean that in most instances, the President and Congress will be forced to reach a political

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6. Letter from Karen J. Mathis, President, Am. Bar Ass'n, to Harry Reid, Majority Leader, U.S. Senate, Mitch McConnell, Minority Leader, U.S. Senate, Nancy Pelosi, Speaker, U.S. House of Representatives, and John Boehner, Minority Leader, U.S. House of Representatives (Jan. 17, 2007), http://www.abanet.org/poladv/letters/aniterror/2007jan17_signingstmts_1.pdf.

resolution of their policy differences. The "narrow interpretation" and "accommodation" approaches followed by recent Presidents arethe first steps in the process of compromise.

Given the non-justiciable nature of many persistent separation of powers disputes, the Task Force should have asked whether the approach taken by recent Presidents has proved successful in accommodating Congress's institutional interests. Unfortunately, the Task Force had neither the time nor the mandate from ABA leadership to consider this issue. The Task Force, therefore, failed to generate the information necessary to answer the ultimate question of whether the approach followed by successive administrations has served the public interest by permitting the work of the government to continue, while deferring the need for the two Branches to face off over the question of their respective constitutional powers.

As the Task Force noted, most separation of powers concerns raised in signing statements involve formulaic objections to minor provisions of little policy consequence.[7] However, in a small number of cases involving the use of military force abroad or international diplomacy, separation of powers disputes are intertwined with policy issues of great significance.[8] The Task Force addressed the less significant part of the question by focusing on the raw number of instances where recent Presidents have articulated separation of powers concerns in matters of little policy import. It thereby failed to raise the critical questions that need to be answered to assess the use of signing statements in the national security realm: whether the positions taken by a particular President in a specific signing statement were substantively valid and whether they were consistent with the positions taken by his predecessors when similar issues arose.

In the final analysis, the Task Force Report illustrates the management consultant's adage that when you have a hammer, everything looks like a nail. Lawyers are trained to litigate, and the members of the Task Force were true to their training. They correctly identified in signing statements one manifestation of the recurring struggle between Congress and the President for primacy in national security matters and sought to recast the issue in a manner amenable to judicial resolution. The Task Force did not consider the messy, practical question of whether, despite their disagreement over the scope of their respective constitutional authorities,

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7. TASK FORCE REPORT, *supra* note 1, at 9, 17.

8. *See* TASK FORCE REPORT, *supra* note 1, at 15-16 (listing prominent examples of President Bush's refusals in signing statements to carry out laws dealing with Commander in Chief powers); Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 524 (2005) (describing President Bush's assertions that he can ignore any act of Congress that seeks to regulate the military); Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1.

the two Branches have been able to reach policy agreement in specific cases without the benefit of the Judiciary. It also did not address the consequences for our system of government if the courts assumed responsibility for deciding core issues of political authority through the backdoor mechanism of reviewing a presidential press release with no legal effect.

Congress should not follow the Task Force's recommendation for enactment of legislation that would purport to empower the courts to decide separation of powers issues without regard to normal justiciability requirements. The Task Force failed to make the case that such an approach would improve the longstanding system where the political branches grapple with each other to resolve most separation of powers issues. If a President issues a signing statement that objects to a provision on separation of powers grounds and thereafter does not respect the Legislative Branch's policy preferences, the better solution is for Congress to assert its institutional authorities in an aggressive manner and compel the President to recognize its coordinate policymaking role under the Constitution.

I. SALIENT CHARACTERISTICS OF SIGNING STATEMENTS

A. Legal Status of Signing Statements

A signing statement is a press release issued by the White House at the time the President signs a bill into law. Signing statements are developed by Presidential advisers as part of the "enrolled bill" process, where senior White House staff and Cabinet agencies advise the President whether he should sign or veto a bill that passed Congress. In that process, the President's advisers may suggest that he publicly present his views on the legislation, such as by remarks at a bill signing ceremony or issuance of a signing statement. On occasion, the White House staff will recommend that the President include a discussion of constitutional issues in a signing statement.

The President has unfettered discretion whether to issue a signing statement and as to its contents. Issuance of a signing statement is neither required nor limited by law. It is one of several mechanisms the President may use to communicate with the public, depending upon his policy judgment as to what approach would best serve his political interests. As such, a signing statement has no legal force or effect.[9] It has the same

9. *See* Cooper, *supra* note 8, at 519 (stating that signing statements are often viewed as "hortatory and ceremonial rather than substantive").

standing as other informal mechanisms the President may use to make his views known, such as remarks at photo opportunities or comments to reporters while boarding his helicopter.

The Task Force recognized that, to date, federal courts have given signing statements "little or no weight,"[10] but suggested that this practice might change in the future.[11] The Report provides no support for this concern. In a few instances, federal courts have quoted signing statements to describe the Presidents' views on the proper interpretation of a law.[12] Federal courts have not, however, treated these documents as having legal effect or given the interpretations they contain any deference. For example, the White House press release that accompanied the signing of the Detainee Treatment Act of 2005 stated that the Executive Branch would "construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005."[13] In *Hamdan v. Rumsfeld*,[14] the Supreme Court rejected, without citation to the signing statement, the Department of Justice's argument that section 1005 repealed federal jurisdiction over pending habeas corpus actions that challenge the President's authority to convene military commissions to try foreign prisoners charged with violating the laws of war.[15] The Court pointedly noted that "[w]e have not heretofore, in evaluating the legality of Executive action, deferred to comments made by such officials to the media."[16]

The fact that signing statements have no legal force and effect highlights one of the principal problems with Senator Specter's bill—it would not work. The signing statement is simply a press release and constitutes one of the many means used by the President to communicate his views to the public. Even if the courts were to hold that Congress could enact a statute that made issuance of signing statements justiciable, the President could avoid application of the law simply by expressing his views on separation of powers issues through an alternative format, such as a letter to a constituent or a press conference. The President could also decide not to

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10. TASK FORCE REPORT, *supra* note 1, at 26.
11. *See id.* at 26-27 (listing several cases where courts have given attention to signing statements).
12. *See id.*; s*ee also* Cooper, *supra* note 8, at 519 (indicating that courts have concluded that signing statements were at least worthy of mention in the courts' interpretation of a statute).
13. Statement by President George W. Bush Upon Signing H.R. 2863, Pub. L. No. 109-148, 2005 U.S.C.C.A.N. S51.
14. 126 S. Ct. 2749 (U.S. 2006).
15. *Id.* at 2762-69.
16. *Id.* at 2792 n.52.

inform Congress and the public of his position and quietly ignore the provision to which he objects, thereby reducing the transparency of his actions.

The Task Force also overlooked the fact that the Executive Branch has long stated its views on constitutional issues presented by legislation pending before Congress without engendering concerns of presidential abuse of power. For decades, Assistant Attorneys General for Legislative Affairs have submitted letters to congressional committees drafted by the Office of Legal Counsel, and formally cleared by the White House, objecting to the constitutionality of provisions under consideration. The courts have occasionally considered, but not given deference to, the constitutional views expressed in these letters.

The recent media attention given to signing statements may reflect that, with the advent of the Internet, these documents are now easily accessible on-line, while the letters in which the Executive Branch traditionally has made the same points to Congress during the bill formulation process are not readily accessible. Presidential signing statements generally repeat, in compressed form, the constitutional views expressed in Department of Justice letters and testimony at earlier stages in the legislative process. The Committee Report may, but need not, inform the public of the Department of Justice's position. Further, the White House often restates its constitutional views in Statements of Administration Position, which are made available to members of Congress prior to the final vote on bills. These documents also are not collected systematically or published. The White House website, however, does contain a chronological file of public presidential statements, including signing statements.[17]

Thus, the apparent proliferation of separation of powers objections in signing statements may not be a reliable indicator of whether the Executive Branch overall, or a President in particular, has taken a more aggressive position concerning the scope of congressional authority under the Constitution. The reported numbers may represent nothing more than a change in the administration's external communications strategy.

B. Evolution of Signing Statements

Signing statements in their modern form are the product of two impulses that coalesced early in President Reagan's second term. First, the Administration was frustrated that, in interpreting statutes, federal courts relied heavily on legislative history generated by Congress, but largely ignored the Executive Branch's pre-enactment views as to what the law

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17. *See generally* The White House, Presidential News and Speeches, http://www.whitehouse.gov/news/ (last visited June 21, 2007).

meant.[18] To redress what was considered a form of unilateral disarmament, the Attorney General recommended that the President include a more detailed understanding as to how the new law should be interpreted in signing statements. This initiative has diminished in importance over time. With the appointment of more conservative Justices, the Supreme Court has emphasized a literal approach to statutory interpretation that downplays all extra-textual sources originating from both Congress and the Executive.

Second, as part of the Administration's initiative to reassert presidential power vis-à-vis Congress, the Department of Justice developed the theoretical basis for more aggressive assertions of executive authority and sought opportunities to advance those positions.[19] As part of that process, the Department emphasized separation of powers issues in its testimony and letters to Congressional committees during the bill drafting process. Where appropriate, these constitutional concerns were repeated in the Statements of Administration Position that were distributed to Members before the final vote on the bill.

On many occasions, Congress ignored the Executive Branch's position and included in the final text of the law provisions to whose constitutionality the Department of Justice had technical objections, notably committee veto provisions that were clearly unconstitutional after *Chadha*.[20] When the Department raised these constitutional objections in the enrolled bill process, the White House staff faced a dilemma. As a practical matter, the President could not veto important legislation where there was no policy disagreement based on constitutional flaws in minor provisions. At the same time, the White House did not want to discourage the Department of Justice from identifying and objecting to legislative provisions it believed infringed upon presidential authority, but needed to avoid having the Department delay presidential action routinely recommending vetoes due to technical flaws.

The White House's solution was to carry forward into a signing statement, in selected cases, a summary of the technical constitutional objections that the Administration previously had submitted to Congress.[21]

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18. *See* Cooper, *supra* note 8, at 517 (describing the Reagan Administration's efforts to provide an opportunity for the chief executive to participate more actively in the creation of legislation as part of a three-part strategy developed by President Reagan's Attorney General).

19. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 716 (1986) (holding unconstitutional the exercise of executive authority by an officer not appointed by the President); INS v. Chadha, 462 U.S. 919, 921 (1983) (declaring the legislative veto unconstitutional).

20. *See, e.g.*, Statement on Signing Legislation on the Codification of Public Buildings, Property, and Works, 38 WEEKLY COMP. PRES. DOC. 1427 (Aug. 23, 2002) (going beyond general statements to provide a kind of declaratory judgment).

21. William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 701 (1991) (describing the components of signing statements and attaching an

In many cases, the President expressed an intention to interpret the objectionable provisions narrowly to avoid a possible constitutional problem. In this way, the Administration attempted to signal Congress that it sought to preserve the Executive Branch's formal legal position but was not seeking to create a policy impasse over the specific provision that included the challenged language. This approach appeared to address Congress's practical concerns and has been followed by subsequent Presidents of both parties.

II. SIGNING STATEMENTS INVOLVING "ROUTINE" SEPARATION OF POWERS DISPUTES

A. The Positions of the Two Branches on Potentially Unconstitutional Laws

The Legislative and Executive Branches have long disagreed about whether the President has authority to refuse to implement or defend a provision of law he believes to be unconstitutional. This recurring dispute is the point of departure for the controversy concerning signing statements.

Congress's traditional position is that under the Constitution, the President does not have a "dispensing" power to determine which parts of legislation to enforce. The entire statute becomes law upon his signature, and he is bound to apply all parts of it unless and until a court declares a provision to be invalid. These principles apply whether the President's objections are founded on separation of powers or policy grounds. If the President believes a provision is unconstitutional, his only recourse is to veto the entire bill. Having decided to sign the legislation, the President cannot selectively choose which provisions he will enforce.

Successive Presidents and their legal advisers generally have agreed with this position, subject to a limiting principle. The traditional Executive Branch position is that the President has a duty to enforce and defend all parts of a statute.[22] When there is a potential conflict between the Constitution and the provisions of a statute, it is almost always the case that the President can best discharge his duties by enforcing and defending the statute, so that there is a final judicial determination as to its validity. The President has no general privilege to disregard laws he deems unconstitutional. However, in exceptional cases, if he believes a statute is

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appendix, which lists more than one hundred instances of constitutional objections in signing statements).

22. *See* The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55 (1980) (responding to the Chairman's questions concerning the legal authority supporting the Justice Department's assertion that it can deny the validity of acts of Congress).

unconstitutional on separation of powers grounds and might alter the balance of forces between the Executive and Legislative Branches, the President may properly determine that he "could best preserve our constitutional system by refusing to honor . . . the Act, thereby creating, through opposition, an opportunity for change and correction that would not have existed had the Executive acquiesced."[23]

As the process for issuing signing statements has evolved, the current practice differs sharply from the original rationale. Recent Presidents have raised frequent separation of powers objections to Congress's inclusion of provisions in statutes that are technically objectionable under the Executive Branch's understanding of constitutional principles, without regard to whether their inclusion in a particular bill creates a significant policy issue. President Bush has followed this approach systematically and perhaps to its logical conclusion. There are two problems with the present approach. First, it ignores the "in exceptional cases" limitation that was part of the traditional Executive Branch position on when a President might refuse to enforce a law he believes to be unconstitutional. The assertion of unconstitutionality has become a matter of routine, without regard to the significance of the provision to which the White House objects.[24]

Second, the ritualistic and non-strategic invocation of separation of powers objections has trivialized the constitutional issues and bred congressional indifference to the President's positions, without generating public support for his views. Congress has continued to enact the same types of provisions to which the White House objects, no matter how frequently or forcefully it has expressed its constitutional position.

The Task Force concluded that the sheer number of separation of powers objections now being raised in signing statements "presents a critically important separation of powers issue."[25] An alternative interpretation is more plausible—that the signing statement process has assumed a defensive role, intended to forestall the possibility that a future Congress could assert that the Executive's failure to object to inclusion of such a provision in a particular law constituted a precedent that supports the constitutionality of such a provision. Having adopted this defensive use of the signing statement, the logic of the Executive Branch position may now require the President to raise such objections each time one of the standard objectionable provisions recurs, for fear of creating the precedent he seeks to avoid.

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23. *Id*. at 57.

24. *See* Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 618 (2006) (concluding that in part because of the increase in the use of signing statements, they are to be accorded the status of post-enactment legislative history and only afforded *Skidmore* deference rather than *Chevron* deference).

25. TASK FORCE REPORT, *supra* note 1, at 26.

As set forth below, analysis of how the signing statement process has worked in practice supports the conclusion that, with a few significant exceptions, the signing statement process is defensive in purpose and effect. In light of congressional indifference to the views successive administrations have expressed in these documents, the White House and the Department of Justice may at some point wish to consider whether the current approach is actually serving its originally intended purposes.

B. Signing Statements and Non-Justiciable Separation of Powers Disputes

Many separation of powers disputes between the Legislative and Executive Branches have persisted for extended periods of time because the issues are rarely framed in a manner subject to judicial review.[26] Policy concerns with constitutional interpretations in signing statements are focused in this area.

There is little reason for policy concerns with constitutional interpretations in signing statements that involve areas where any resulting government action will be subject to judicial review. For example, as the Task Force noted, President Bush's signing statements have stated repeatedly that "[t]he executive branch shall construe provisions . . . relating to race, ethnicity, [and] gender . . . in a manner consistent with the requirement to afford equal protection of the laws . . . ."[27] Whether the President's unarticulated interpretation of the Equal Protection Clause is right or wrong, this statement does not threaten to upset the allocation of authority between Congress and the President. If an executive agency takes an action consistent with the President's construction of the law, then judicial review of the agency action will conclusively determine the validity of the President's position. The policy problems presented by signing statements involve separation of powers issues that are not amenable to judicial review.

Three factors may defeat review of a separation of powers issue raised in a signing statement. First, in many instances where the White House raises an abstract constitutional objection to a provision in a law the President signed, there may be no actual case or controversy because the administration ultimately will implement the law in a manner consistent with Congress's wishes. As discussed below, Congress has effective political tools with which it often can induce the Executive Branch to

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26. *See* Raines v. Byrd, 521 U.S. 811, 826-28 (1997) (noting that more than half a century after President Andrew Johnson was impeached for violating the Tenure of Office Act, the Supreme Court held in *Myers v. United States*, 272 U.S. 52 (1926), that a smaller scale version of that law was unconstitutional in a lawsuit filed by a postmaster whom the President had removed from office without obtaining the consent of the Senate).

27. Statement by President George W. Bush Upon Signing H.R. 2863, Pub. L. No. 109-148, 2005 U.S.C.C.A.N. S51; TASK FORCE REPORT, *supra* note 1, at 18.

follow its policy preferences, regardless of whether the provision is drafted in a manner that is technically unconstitutional. Even if the President believes that a provision impinges upon his authority, he may conclude that it is in his self-interest to comply with the measure. In these cases, the abstract constitutional disagreement becomes moot.

Second, especially in the national security field, if the Executive Branch were to ignore a provision that it believes violates separation of powers principles, there may not be a person with standing to sue. Members of Congress do not have standing to sue based on a claim that they have suffered an institutional injury from the President's implementation or non-implementation of a statute. In *Raines v. Byrd*,[28] the Supreme Court held that legislators lack standing under Article III based on allegations that an executive official has taken actions that damage all members equally, and where the claim is based on an alleged loss of political power by Congress as an institution, rather than on loss of a right that a member enjoyed personally.

Further, members of the public may not have standing to challenge a separation of powers interpretation in a signing statement because they do not suffer any concrete and particularized injury from its issuance.[29] The injury that any one individual suffers from a separation of powers dispute between Congress and the President is often no greater or more particularized than that suffered by any other member of the public, and thus, it fails to satisfy Article III requirements.[30]

Third, even if a person could demonstrate individualized harm from a government action or inaction, that injury would not be redressable by an order invalidating a signing statement. In general, the harm suffered by an individual will not be caused by issuance of a press release articulating the President's views on separation of powers, but by application of that interpretation in a specific action by an Executive agency. In such cases, judicial review will address the legality of the agency action on the merits, not on the validity of a theoretical discussion in a signing statement that has no independent legal force and was not the direct cause of the harm allegedly suffered by the plaintiff.

The injury-in-fact and redressability problems highlight the second major flaw in the Specter bill.[31] A declaratory judgment invalidating a constitutional interpretation set forth in a signing statement would not rectify the harm suffered by the plaintiff, and thus, would constitute an advisory opinion that lies beyond the powers of an Article III court.

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28. 521 U.S. 811 (1997).
29. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992).
30. *See* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1860-65 (U.S. 2006); United States v. Richardson, 418 U.S. 166, 170 (1974); Massachusetts v. Mellon, 262 U.S. 447, 488-89 (1923).
31. S. 3731, 109th Cong. § 5 (2006).

C. Use of Signing Statements to Object to Recurrent Separation of Powers Disputes of Little Practical Consequence

As the Task Force noted, most separation of powers objections in signing statements involve certain types of provisions that Congress enacts frequently, despite repeated Executive Branch objections.[32] Adoption of these provisions reflects an institutional, not partisan, disagreement. The Task Force calculated that President Bush had raised more constitutional objections in signing statements than any of his predecessors, without noting that his party controlled both Houses of Congress for most of this time.

The Task Force failed to look beyond newspaper accounts of the raw number of constitutional objections raised in President Bush's signing statements and did not consider their practical significance. In the vast majority of cases, his Administration's separation of powers objections are similar to those of his predecessors. They involve limited categories of provisions where the dispute between the two Branches is more theoretical than real, and where having preserved its position, the Executive Branch has often accommodated congressional intent.

1. Legislative Vetoes

The use of signing statements to raise separation of powers objections was prompted, to a substantial degree, by the struggle between Congress and the White House over the constitutionality of legislative veto provisions. Starting in the Wilson Administration, Presidents of both parties objected to the constitutionality of laws that purported to give one House of Congress authority to override an Executive Branch action, without concurrence by the other House or presentment to the President for his signature.

In 1975, the Department of Justice began a systematic search for a test case in which the courts would have jurisdiction to determine the constitutionality of these provisions. Two Administrations later, the Department of Justice found an appropriate vehicle, which involved the constitutionality of a law that purported to authorize one House of Congress to invalidate a decision by the Attorney General to suspend a deportation order.[33] The individual facing deportation had standing to challenge the congressional action, and the Executive Branch intervened to

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32. TASK FORCE REPORT, *supra* note 1, at 17 nn.60-61.

33. *See* INS v. Chadha, 462 U.S. 919, 925 (1983) (invalidating the Immigration and Nationality Act § 244(c)(2), 9 U.S.C. § 1254(c)(2) (1982)).

support his position.[34] The Supreme Court held that the legislative veto provision was unconstitutional for violation of the Bicameralism and Presentment Clauses of the Constitution.[35]

The decision in *Chadha* had little effect on congressional behavior. Congress continued to adopt unicameral veto provisions and has included them in hundreds of laws passed since 1983.[36] The Department of Justice quickly became frustrated with the refusal of Congress to acknowledge the Executive Branch's victory and its disregard of the many comment letters the Department submitted objecting to new legislative veto provisions. To address the congressional intransigence and preserve the fruits of the Supreme Court victory, the Department recommended that the President articulate his continuing objections to these provisions in signing statements.

After consideration by the White House staff, President Reagan adopted a policy of objecting via signing statements to the constitutionality of legislative vetoes, while simultaneously assuring Congress that as a matter of comity, the appropriate Executive official would notify the appropriate committees of any action taken. This approach reflected the Administration's recognition that, while not legally binding, these new legislative veto provisions were politically enforceable. Congress could effectively discipline an executive agency that failed to cooperate with the appropriate committees by adopting a bill to overturn the action, reducing the agency's appropriations, opposing other initiatives of the agency head, or refusing to confirm new appointees.

President Reagan's successors followed this general approach for responding to enactment of legislative veto provisions. Use of this template quickly spread to areas not covered by an explicit Supreme Court decision, in which Congress ignored the Executive Branch's views on separation of powers issues.

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34. In reaching the merits of Chadha's claim, the Supreme Court rejected an argument that he lacked standing "because a consequence of his prevailing will advance the interests of the Executive Branch in a separation-of-powers dispute with Congress . . . ." *Id.* at 935-36.

35. *See* U.S. CONST. art. I, §§ 1, 7 (stating that Congress will consist of a House and a Senate, and that all bills passed by the House and the Senate must be submitted to the President for his approval).

36. Testimony submitted by the Department of Justice at a January 2007 House Judiciary Committee hearing on Presidential Signing Statements reported that President Bush has objected to the constitutionality of legislative veto provisions in 55 of his 126 constitutional signing statements. *Concerning Presidential Signing Statements*, *Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 9 (2007) (statement of John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel), *available at* http://judiciary.house.gov/media/pdfs/Elwood013107.pdf [hereinafter JUSTICE TESTIMONY].

2. Appointments Clause

Beginning in the mid-1980s, successive administrations asserted that under the Appointments Clause, Congress could not impose experience qualifications or other requirements on the President's selection of officers who will exercise executive authority.[37] Congress nonetheless continues to adopt such restrictions. As with legislative veto provisions, recent Presidents have issued signing statements that inform Congress that their administration will interpret these requirements as advisory to avoid an unnecessary constitutional confrontation. This approach recognizes the reality that if the President declines to consider Congress's views as to the appropriate qualifications for a nominee, the Senate can simply refuse to confirm the nomination.

The Executive Branch position was heavily influenced by the experience of the Reagan Administration in dealing with the "executive" authority issue in litigation with Congress. Under President Reagan, the Department of Justice submitted many letters to congressional committees setting forth detailed constitutional objections to the inclusion of experience qualifications for appointees, but Congress disregarded the arguments and continued to adopt restrictions. Administration lawyers at first thought that the Legislative Branch's lack of response might reflect a failure in the persuasiveness of the constitutional analysis. The Department of Justice devoted substantial efforts to improving its presentation, without effect. In late 1985, passage of the Gramm-Rudman-Hollings budget reduction statute became a political inevitability.[38] Members of Congress who opposed the bill successfully negotiated for inclusion of a poison pill provision, which delegated responsibility for implementing the budget cuts to a Legislative Branch official—the Comptroller General. In the ensuing litigation, some of these members submitted an effective brief to the Supreme Court, which argued that the law should be declared unconstitutional on separation of powers grounds, in terms that mirrored the Department of Justice's analysis of Executive authority in its Appointments Clause letters. Administration lawyers then understood that the problem was not an inadequacy in their work, but that it normally was not in Congress's self-interest to acknowledge the legitimacy of the President's position about the constitutional nature of Executive authority.

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37. *See* U.S. CONST. art. II, § 2 (stating that the President "shall appoint . . . Officers of the United States"). President Bush has raised this objection in twenty-five signing statements. JUSTICE TESTIMONY, *supra* note 36, at 10.

38. *See* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. § 900).

In 1986, the Supreme Court declared that the Gramm-Rudman-Hollings law violated separation of powers principles by delegating executive authority to a Legislative Branch official.[39] Thereafter, Congress reverted to its prior institutional position of ignoring the Administration's objections under the Appointments Clause to the imposition of restrictions on the pool of nominees from which the President could choose. The White House responded by making this issue one of the standard grounds for objections in signing statements.

3. Requirements to Submit Legislative Recommendations

Successive administrations have interpreted the Constitution as providing the President with complete discretion on whether to propose legislation for consideration by Congress.[40] Accordingly, the Executive Branch has objected in comment letters and signing statements to provisions that require the President or the agency heads to submit legislative proposals. Despite Congress's awareness of this constitutional objection, Congress routinely adopts laws that require the President to submit draft legislation. Because the White House understands that its failure to comply will deprive it of influence over the contents of the resulting legislation, the White House inevitably responds in some manner to the congressional demand, either formally or informally, and either directly or through an agency.

4. Submission of Reports to Congress by Agencies Without Presidential Review

Congress repeatedly adopts provisions that purport to deny the White House authority to review or edit reports, budget requests, testimony and similar documents that executive agencies, especially the independent regulatory bodies, are required to submit to Congress. Successive presidents have objected in comment letters and signing statements to the constitutionality of these provisions, on the ground that they deny the President the authority vested in him by Article II of the Constitution to supervise officials in the Executive Branch.[41]

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39. Bowsher v. Synar, 478 U.S. 714, 736 (1986).

40. *See* U.S. Const. art. II, § 3, cl. 1 (stating the President "shall from time to time give to the Congress . . . such Measures as he shall judge necessary and expedient"); JUSTICE TESTIMONY, *supra* note 36, at 8 (noting that President Bush has raised this objection in sixty-seven signing statements).

41. *See, e.g.*, Statement by President George W. Bush Upon Signing H.R. 2744, Pub. L. No. 109-97, 2005 U.S.C.C.A.N. S37; Statement by President George W. Bush Upon Signing H.R. 3058, Pub. L. No. 109-115, 2005 U.S.C.C.A.N S42.

In reality, the White House has little alternative but to comply with these provisions. Congress inevitably will obtain copies of the agency's original submission to the President and can quickly determine what changes the White House has made. Therefore, the Administration's insistence on acting in accordance with its formal constitutional position would antagonize Congress, without producing any compensatory benefit. Despite its formal constitutional position, in reality the Executive Branch has developed various face-saving ways to avoid confronting its inability to persuade Congress to stop enacting such bypass provisions. For example, the Executive Branch has accepted a provision that permits the financial regulatory agencies to submit legislative proposals and testimony directly to Congress without prior White House review, as long as the submission states that views it expresses do not necessarily represent the views of the President.[42]

5. Congressional Earmarks

Several administrations have objected that Committee reports or other Congressional documents which purport to earmark appropriations for specific projects, but which were never formally adopted by both houses of Congress and were not presented to the President for signature, are not legally binding. For example, a signing statement issued by President Bush objected that certain provisions "purport to give binding effect to legislative documents not presented to the President. The [E]xecutive [B]ranch shall construe all these provisions in a manner consistent with the bicameral passage and presentment requirements of the Constitution for the making of a law."[43]

While the constitutional theory behind this position undoubtedly is well-founded, in practice the White House may be compelled to treat these earmarks as politically binding, for fear of antagonizing the Chairmen of the Appropriations Subcommittees and suffering retribution on its budget priorities. For example, during the Reagan Administration, one Director of

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42. *See, e.g.*, 12 U.S.C. § 250 (2000).

> No officer or agency of the United States shall have any authority to require the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Federal Housing Finance Board, or the National Credit Union Administration to submit legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the agency submitting them and do not necessarily represent the views of the President.

Id.

43. Statement by President George W. Bush Upon Signing H.R. 2863, Pub. L. No. 109-148, 2005 U.S.C.C.A.N. S52.

the Office of Management and Budget informed Congress in writing that the Administration would regard earmarks as non-binding. In response, several committee Chairmen declined to do business with him, and the Director's ability to advocate successfully for the President's policies was compromised.

6. Effects of Routine Separation of Powers Disputes and Their Resolutions

The vast majority of provisions to whose constitutionality recent Presidents have objected on separation of powers grounds falls into one these five categories. With isolated exceptions, these technical constitutional objections have not involved provisions raising policy matters of independent significance. Rather, the Executive Branch's activity has constituted one aspect of the ongoing test of strength between Congress and the President over their respective political authorities. Since these issues generally cannot be resolved through litigation, the Legislative and Executive Branches have had no other recourse except to work out their disagreements on political grounds. The White House understands that Congress has effective political weapons to force the Administration to honor its policy preferences. Out of respect for that institutional authority, many signing statements couple a formal objection with a commitment to interpret the provisions in a manner that carries out Congressional intent, without violating the Executive Branch's understanding of the Constitution.

The Task Force misinterpreted the raw number of separation of powers objections as an indicator that successive administrations have followed an aggressive policy designed to alter the current constitutional balance. Considered against the backdrop of de facto Executive Branch compliance with Congressional enactments that raise constitutional concerns, much of the White House's current approach to signing statements appears to represent a defensive effort to preserve the ability of future Presidents to raise similar constitutional objections on matters of real import, while avoiding political confrontation with a co-equal Branch that appears indifferent to the Executive Branch's stated concerns. Congress plainly has not been intimidated by the Executive Branch's use of signing statements, as evidenced by its recurrent adoption of types of provisions to which it knows the White House will object.

III. USE OF SIGNING STATEMENTS IN THE NATIONAL SECURITY AREA

By its uncritical attention to the large number of routine separation of powers objections, the Task Force failed to focus on the important policy issue within its mandate—the small number of instances in which the Bush Administration has used signing statements to articulate broad constitutional interpretations on questions of vital importance in the

national security area. Having dissipated its time and resources on low priority matters, the Task Force was unable to ask the right questions or generate the information necessary to make an informed judgment as to whether the Bush Administration has pursued an overly expansive conception of its authority at the expense of Congress's institutional prerogatives.

The Constitution provides Congress and the President with certain specific powers concerning national security, but does not attempt to define with specificity the scope of their respective authorities. When theoretical issues about their overlapping responsibilities have arisen in litigation, the Supreme Court has in many instances declined to resolve the questions on justiciability, standing, and political grounds. As in the domestic context, the inability of Congress and the President to obtain judicial determination of their respective authorities in the national security area has forced them to reach a political resolution of their policy disputes.

The process of working out these institutional differences has often been protracted and contentious. Here, as elsewhere, Congress possesses effective tools that can compel the Executive Branch to respect its policy preferences. On issues of great national significance, however, the political consequences of utilizing those institutional powers can be substantial, both for individual members of Congress and for their parties.

In the national security area, the Task Force again erred by focusing on the mechanism by which various Presidents have communicated their views to Congress and the public, rather than analyzing the substance of the constitutional positions set forth in signing statements. Further, in light of the infrequency with which these issues arise and the lack of judicial precedent, it is particularly important in the national security area to understand whether the current President's positions on separation of powers issues differ materially from those taken by his predecessors and whether, despite his formal protestations, the President in practice has been willing to accommodate the will of Congress as expressed in legislation. Unfortunately, the Task Force did not ask these questions, and the Report cannot help answer them.

The Task Force also failed to appreciate the consequences of the Bush Administration's willingness to assert unilateral presidential authority, without specific congressional authorization, in areas that directly affect the rights and liberty of individuals. In several instances, the Supreme Court has exercised jurisdiction to review presidential actions justified under the Commander in Chief power and has rejected the Executive Branch's

interpretation of the scope of the President's authority.[44] The Court's willingness to decide cases involving the most sensitive type of separation of powers disputes, when jurisdiction and standing are present under traditional Article III principles, undermines the policy rationale for the Task Force's recommendation that Congress should seek to establish a novel basis on which federal courts could exercise jurisdiction to review constitutional interpretations in signing statements.

A. Presidential Control over Disclosure of Privileged Information

Virtually all recent Presidents have asserted "constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties" that may not be overridden by statute.[45] This objection covers two types of information:

(1) Deliberative materials that reflect communications from Executive Branch officials to the President concerning policy alternatives and information generated in government investigations, similar to that which various Presidents have refused to release in other contexts by invoking executive privilege.[46]

(2) Information related to international negotiations or national security that typically can be disclosed only to persons with appropriate security clearances and on a need-to-know basis. Starting with George Washington, the Executive Branch has consistently refused to produce documents to Congress that relate to ongoing negotiations with foreign countries and whose disclosure might interfere with the success of those

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44. *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (U.S. 2006) (holding that the President lacked authority to convene a military commission to try a Yemeni national under procedures that did not comply with the Uniform Code of Military Justice); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (rejecting Executive Branch argument that out of respect for separation of powers and the limited institutional capability of judges, federal courts should not review the facts concerning individual cases of U.S. citizens held as enemy combatants, but should review only the legality of the overall detention scheme); *see also* Rasul v. Bush, 542 U.S. 466 (2004) (establishing jurisdiction of federal courts over petitions for habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo base leased from Cuba); Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) (determining the same issue under the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600), *cert. denied*, 127 S. Ct. 1478 (2007), *cert. granted*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195). On June 29, 2007 the Supreme Court took the highly unusual step of granting a petition for rehearing and granted certiorari on *Boumediene v. Bush*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).

45. Statement by President George W. Bush Upon Signing H.R. 1815, Pub. L. No. 109-163, 2005 U.S.C.C.A.N. S56; *see* JUSTICE TESTIMONY, *supra* note 36, at 10 (noting that President Bush has raised this objection in sixty-three signing statements).

46. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 706 (1974) (rejecting invocation of executive privilege concerning audio tape recordings and documents relating to conversations between the President and his advisors); 40 Op. Att'y Gen. 45, 46 (1941).

> negotiations.[47] Further, recent Presidents have refused to disclose national security information to members of Congress and their staffs on an unrestricted basis, on the ground that the government has a compelling interest in withholding such information from unauthorized persons and that the power to protect this information rests with the President in his roles as head of the Executive Branch and Commander in Chief.[48]

Despite the Executive Branch's categorical position that it can refuse to disclose information to Congress on separation of powers grounds, the Legislative Branch has proved repeatedly that it has effective political tools—including the oversight, confirmation, and appropriations processes—to compel the President to provide the information it needs to carry out its constitutional functions. The Executive Branch often has been able to delay disclosure for some time, until the issue has been raised to a sufficiently high political level and the demands for information narrowed. But in important cases, the Executive Branch ultimately has been forced to respond to congressional demands for information and has negotiated access agreements on a case-by-case basis, to determine what information will be made available to whom, under what conditions, and how the universe of information can be narrowed.

For example, for an extended period President Bush refused to disclose highly sensitive national security information to Congress concerning the program conducted by the National Security Agency, without a warrant from the court established by the Foreign Intelligence Surveillance Act (FISA), to monitor international telephone conversations when the government believed that one party was a member of a terrorist group. When Congress persisted in its demands for information about the program after the 2006 elections, the Administration sought a warrant from the FISA court and agreed to make information about the program available to thirty-six members and staff from the House and Senate Judiciary and Intelligence Committees.[49]

The critical question in this area, not addressed by the Task Force, is whether, notwithstanding their nominal separation of powers position, recent administrations have, in practice, provided Congress with sufficient information, under negotiated terms and conditions, so that it may carry out its oversight and lawmaking functions.

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47. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) ("Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.").

48. Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988).

49. Dan Eggen, *Records on Spy Program Turned Over to Lawmakers*, WASH. POST, Feb. 1, 2007, at A2.

B. Presidential Control over the Conduct of International Relations

Successive administrations have resisted on separation of powers grounds attempts by Congress to dictate either the process by which the Executive Branch discusses problems with foreign governments and multilateral bodies or the substantive positions that the United States will take in those negotiations. In the Bush Administration's formulation of this objection, the authority vested in the President by the Constitution to conduct the foreign relations of the United States prohibits Congress from enacting laws that "purport to direct the conduct of communications, negotiations, and other relations with foreign governments and international organizations" or "by directing the Executive Branch to collaborate with other entities in the development of foreign policy."[50]

The Executive Branch traditionally takes the position that the Constitution vests the President with plenary authority to conduct foreign affairs and that Congress may not require the President or subordinate Executive Branch officials to enter into negotiations or discussions with foreign countries.[51] In practice, however, successive Presidents have understood that, despite the textual commitment of the foreign relations authority to the Executive Branch, Congress has authority over international relations that must be accommodated. The Senate's rejection of the Versailles Treaty, in response to President Wilson's failure to respect congressional concerns, remains the leading object lesson of the potential consequences of the President ignoring the Legislative Branch.

Thus, despite its formal separation of powers position, the Executive Branch has developed multiple techniques for assuring congressional input into negotiating strategies, feedback on the course of the discussions, and possible revisions in substantive positions. For example, the Incompatibility Clause prohibits the President from appointing a member of Congress as a formal member of the United States delegation to a foreign negotiation.[52] Nonetheless, on many occasions the White House has asked members of Congress to serve as observers, especially in trade negotiations, so that the Legislative Branch viewpoint can be factored into the Administration's position on a continuing basis.

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50. Statement by President George W. Bush Upon Signing H.R. 6, Pub. L. No. 109-58, 2005 U.S.C.C.A.N. S17; Statement by President George W. Bush Upon Signing H.R. 3057, Pub. L. No. 109-102, 2005 U.S.C.C.A.N. S38.

51. *See Curtiss-Wright*, 299 U.S. at 316 (noting that the authority over foreign affairs passed from the Crown, not to the colonies as separate entities, but to the United States as a whole).

52. U.S. CONST. art. I, § 6, cl. 2.

C. The President as Commander in Chief of the Armed Forces

The Commander in Chief Clause goes for long periods with little notice and then becomes "one of the most highly charged provisions of the Constitution" in time of hostilities.[53] The traditional Executive Branch position is that the Constitution vests the power to command the armed forces in the President and that Congress may not abrogate that authority by affirmatively directing how the military will be employed.[54] Rather, if Congress wishes to control the use of the armed forces, it must do so through the establishment of broad policy parameters within which the President may exercise his authority to command the troops or by invocation of its negative power to withhold funds under the Appropriations Clause.[55]

In particular, the ability of Congress to control the use of the armed forces through its control over appropriations is clearly established by our constitutional history, dating back to the correspondence of General Washington with the Continental Congress.[56] Many of the persons involved in that correspondence were members of the Constitutional Convention. There is, of course, a fine line between what may be considered creation of an appropriately broad policy framework for the Executive and impermissible micromanagement of the mechanism by which the President controls the armed forces.[57]

Withholding appropriations when U.S. military forces are engaged in armed combat creates substantial political risks for members who vote for such a measure, as demonstrated by the disappearance of the Whig Party after many of its members opposed appropriations for the Mexican War.[58] The desire of members to avoid exposing themselves to attack in election campaigns creates incentives for Congress to try to impose substantive

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53. EDWIN S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1984, at 264 (Randall W. Bland et al. eds., 5th ed. 1984).

54. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139-40 (1866) ("But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President . . . . Congress cannot direct the conduct of campaigns . . . .").

55. U.S. CONST. art. I, § 9, cl. 7.

56. *See, e.g.*, JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 126-27 (Alfred A. Knopf ed., 2004); DAVID HACKETT FISCHER, WASHINGTON'S CROSSING 144-45, 369 (2004).

57. *See* TERRY GOLWAY, WASHINGTON'S GENERAL: NATHANIEL GREENE AND THE TRIUMPH OF THE AMERICAN REVOLUTION 196-97 (Oxford Univ. Press 2004) (noting that in the winter of 1778-1779, the Continental Congress impeded General Washington's ability to prosecute the war by barring the use of wheat for forage and by requiring that all supplies for the Continental Army be sent by land, rather than by water).

58. *See* JOHN S.D. EISENHOWER, SO FAR FROM GOD: THE U.S. WAR WITH MEXICO 1846-1848, at 286-87 (1989); BERNARD SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION 1835-1877, at 109-10 (1973).

restrictions on the Executive's use of force without having to resort to this device. One manifestation of this impulse was the War Powers Resolution.[59] It purports automatically to terminate the President's authority to utilize the military within sixty days after he reports the outbreak or imminence of hostilities, unless Congress thereafter adopts an affirmative authorizing resolution.[60] Successive administrations have objected to the constitutionality of this provision on the ground that Congress may not disapprove of the President's use of the armed forces by inaction.

As the Task Force noted, President Bush has raised constitutional objections on numerous occasions to statutory provisions that might be interpreted as restricting the conditions under which he may utilize the armed forces. For example, § 502(a) of the Intelligence Authorization Act for Fiscal Year 2005 authorized use of funds designated for intelligence purposes to assist and support the Government of Colombia in a campaign against terrorists. Section 502(c) further provided that "[n]o United States Armed Forces personnel . . . may participate in any combat operation in connection with assistance made available under this section, except for the purpose of acting in self-defense . . . ."[61] In approving the bill, the President issued a signing statement which stated that "[t]he executive branch shall construe the restrictions [on use of the U.S. Armed Forces in certain operations] as advisory in nature, so that the provisions are consistent with the President's constitutional authority as Commander in Chief, including for the conduct of intelligence operations . . . ."[62] The Administration thus followed the familiar pattern of preserving its theoretical separation of powers position while announcing an intention in practice to treat the statute as "advisory" and thereby avoid a direct conflict with Congress.

To assess the actual significance of the President's position, it would be necessary to understand: (1) the basis for the President's constitutional objections to this provision and the extent, to which it departs from the interpretation of the Commander in Chief power followed by his predecessors; and (2) whether the Executive Branch in fact accommodated congressional concerns.

The Task Force Report does not help answer these questions, either for the Colombian anti-terrorist campaign or other statutes where the Bush Administration has raised separation of powers concerns. The required

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59. H.R.J. Res. 542, 93d Cong. (1973).
60. Veto Message, H.R. Doc. No. 93-171, at 2 (1973).
61. Pub. L. No. 108-487, 118 Stat. 3939, 3951 (2004).
62. Statement by President George W. Bush Upon Signing H.R. 4548, Pub. L. No. 108-487, 2004 U.S.C.C.A.N. S55.

analysis certainly would have been difficult for the Task Force to perform, in light of the deliberate opacity of the signing statement. The President's top-line summary of his position, without explanation of his reasoning, makes it impossible to tell whether the objections to the provision governing use of force against Colombian terrorists were based, for example, on the potentially expansive reach of the critical term "combat operation." This term signifies an expansive notion of the Commander in Chief power, a belief that the underlying appropriations statute did not contain the limitations that were set forth in this authorizing statute and, therefore, permitted a broader range of activities. Accordingly, it is not possible to determine by reviewing the signing statement alone whether the President's constitutional interpretation differed from that of his predecessors, and if so to what extent and on what basis. On its face, however, the signing statement begs for further analysis, because at least one plausible construction would conflict with the historic understanding of the scope of congressional power to control military operations through use of its appropriations power.

In addition to ignoring the historical context of separation of powers disputes in the national security area, the Task Force did not consider whether the Bush Administration has in fact accommodated Legislative Branch concerns on these issues. For example, information about how the Executive Branch has used force in Colombia is likely highly confidential, and its dissemination is limited to a relatively small number of members of Congress and senior staff. Unless a member subsequently chooses to raise the issue, it may be impossible for the public to determine whether the President and Congress reached a quiet political accommodation on this sensitive question, or whether the President disregarded Congress's wishes and its members chose to duck a policy or institutional confrontation on the issue. The Colombian terrorist case is not unusual in this regard. In many instances, it is difficult for outsiders to determine if the differences in the two Branches' theoretical positions on their respective national security powers result in an actual institutional conflict. When there is a live dispute, Congress may prefer to quietly threaten to utilize its arsenal of powers to compel the Executive to recognize its coordinate role in the determination of national security policy.

CONCLUSION

Substantial effort may be necessary to determine whether a position announced in a signing statement generated an actual separation of powers dispute between the Branches.[63] The Task Force had neither the time nor

63. *See* Letter from Gary L. Kepplinger, Gen. Counsel, U.S. Gov't Accountability Office, to Robert C. Byrd, Chairmen, Comm. on Appropriations, U.S. Senate and John

the resources necessary to conduct that analysis. Thus, even in the area where the most significant separation of powers disputes potentially may arise, it failed to make a case that would support enactment of legislation to make signing statements reviewable. In any event, the demonstrated willingness of the Supreme Court to decide cases involving application of the President's national security powers, at the behest of individuals who demonstrate standing under established Article III precedents, suggests that there is no justification for creation of a special review mechanism to determine the validity of constitutional interpretations set forth in a presidential press release for persons who suffered no particularized injury from its issuance.

For these reasons, Congress should not follow the ABA's recommendation. Instead, it should focus on the substantive constitutional positions taken by the President and announced in signing statements. In cases where the Administration announces a constitutional objection but thereafter fails to honor the Legislative Branch's policy preferences, the proper response is for Congress to exercise its institutional authorities to force the President to respect its coordinate role for formulating policy.

Conyers, Jr., Chairman, Comm. on the Judiciary, U.S. House of Rep. (June 18, 2007), *available at* http://www.gao.gov/decisions/appro/308603.htm (reviewing provisions in the Appropriations Act to which the President objected in signing statements and determining whether the agencies responsible for their execution had in fact carried out the provisions as enacted).