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## Remedies for the wrongly deported: territoriality, finality, and the significance of departure

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# Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure

Rachel E. Rosenbloom\*

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## I. INTRODUCTION

The Department of Homeland Security (DHS) deported nearly 400,000 people in 2010, up from 50,924 in 1995.<sup>1</sup> This steep increase can be traced to two sources: legislative changes in 1996 that transformed the deportation laws<sup>2</sup> and an unprecedented new emphasis on immigration enforcement.<sup>3</sup>

One result of the recent surge in removals is an expanding diaspora of deportees, many of them former longtime legal residents whose familial, cultural, and community ties lie primarily in the United States. Scholars in a variety of disciplines are just beginning to consider the implications of this new migration flow.<sup>4</sup>

This article addresses one particular issue within this emerging field of inquiry: the plight of deportees whose removal orders are without legal basis.<sup>5</sup> My starting point is a pair of Department of Justice (DOJ) regulations that purport to bar immigration judges and the Board of Immigration Appeals (BIA) from correcting errors in removal proceedings once a deportee has left the United States.<sup>6</sup> This so-called “departure bar” on reopening and

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<sup>1</sup> In 1996, Congress consolidated proceedings formerly known as “exclusion” and “deportation” under the new term “removal.” See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)*, Pub. L. No. 104-208, 110 Stat. 3009, § 304(a)(3). In this article, I use the term “deportation” in its colloquial sense to refer collectively to orders of deportation, exclusion, and removal. In fiscal year (FY) 1995, 50,924 people were deported. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SECURITY, 2009 YEARBOOK OF IMMIGRATION STATISTICS 95 tbl. 36 (2010), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois\\_yb\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf). The corresponding number for FY 2010 was 392,862. See Andrew Becker, *Unusual methods helped ICE break deportation record, e-mails and interviews show*, WASH. POST, Dec. 6, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/05/AR2010120503230.html>.

<sup>2</sup> See *infra* notes 56-69 and accompanying text.

<sup>3</sup> See, e.g., BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SECURITY, *ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012*, at 1-2 (2003) (stating the intention of DHS to “remove every removable alien”).

<sup>4</sup> See, e.g., Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195 (2007); Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 HISP. J. BEHAV. SCI. 341 (2010); Bryan Lonagan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55 (2007); KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY (David C. Brotherton & Philip Kretsedemas eds., 2008); Bernard Headley, *Giving Critical Context to the Deportee Phenomenon*, 33 SOC. JUST. 1 (2006).

<sup>5</sup> For a discussion of types of wrongful deportations, see *infra* Part II.B.

<sup>6</sup> I have chosen to focus on the departure bar because motions to reopen or reconsider are the chief mechanism available to those with final removal orders who seek to vacate the order

reconsideration creates a stark divide between those still on United States soil and those who have crossed the border. For example, a lawful permanent resident who is ordered removed on the basis of a criminal conviction stands a good chance of having her permanent resident status restored if the criminal court vacates the conviction on the merits.<sup>7</sup> However, if she has been physically deported, even just one day before the criminal court acts to vacate the conviction, no such relief is possible. The same holds true when someone is ordered removed on the basis of a conviction that a federal court later rules should not have triggered removal in the first place. Those who happen to be in the United States at the time of the new precedent or have a petition for review pending will be restored to permanent resident status, while others will have no means available to address the error.

After many years of relative obscurity, the departure bar is enjoying newfound attention. A circuit split has emerged over the last few years on both the meaning and validity of the regulations that form the basis for the departure bar, and a petition for certiorari is currently pending before the Supreme Court.<sup>8</sup>

The *New York Times* recently ran a front-page story on erroneous deportations,<sup>9</sup> and a coalition of individuals and advocacy groups has filed a

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on the basis of a change in law, a vacated conviction, or other ground relevant to the types of cases discussed in this article. Although removal orders may be reviewed by a federal appeals court on a petition for review, such petitions are subject to a strict thirty-day filing deadline in addition to numerous other restrictions. See Immigration and Nationality Act (INA) § 242, 8 U.S.C. § 1252 (2006). In 2005, Congress eliminated habeas jurisdiction to review orders of removal. See REAL ID Act § 106(a)(1)(B), Pub. L. No. 109-13, 119 Stat. 231 (codified at INA § 242(a)(5), 8 U.S.C. § 1252(a)(5) (2006)). Prior to passage of the REAL ID Act, courts generally rejected arguments that deportees were “in custody” for purposes of habeas jurisdiction. See Peter Bibring, *Jurisdictional Issues in Post-Removal Habeas Challenges to Orders of Removal*, 17 GEO. IMMIGR. L.J. 135 (2002). But see *Rivera v. Ashcroft*, 394 F.3d 1129, 1137-39 (9th Cir. 2005) (holding deportee to be “in custody” for purposes of habeas jurisdiction where colorable claim to United States citizenship had been stated); *Gutierrez v. Gonzales*, 125 F. App’x 406 (3d Cir. 2005) (holding deportee to be “in custody” for purposes of habeas jurisdiction where individual seeking relief was erroneously denied the ability to seek a waiver of deportation by immigration judge and BIA, and was unable to have that error reviewed because of the egregious behavior of his counsel).

<sup>7</sup> See *infra* notes 80-84 and accompanying text.

<sup>8</sup> See *Estalita v. Holder*, 382 F. App’x 711 (10th Cir. 2010), *petition for cert. filed*, 2010 WL 4090962 (U.S. Oct. 15, 2010) (No. 10-517). The Supreme Court recently denied petitions for certiorari in two other cases raising challenges to the validity of the departure bar. See *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), *cert denied*, 131 S. Ct. 502 (2010); *Mendiola v. Holder*, 585 F.3d 1303 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010).

<sup>9</sup> Nina Bernstein, *For Those Deported, Court Rulings Come Too Late*, N.Y. TIMES, July 21, 2010, at A1. See also Rachel E. Rosenbloom, *Bring Back the Wrongly Deported*, NAT’L L.J., Aug. 2, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202464045164>.

petition requesting that the Attorney General eliminate the departure bar through administrative rulemaking.<sup>10</sup>

This article, the first to consider the phenomenon of wrongful deportation and the arguments for and against the departure bar, adds a new dimension to this debate. In line with the pending petitions for certiorari and for administrative rulemaking, I argue that the departure bar should be eliminated. I also, however, introduce a new notion: that amending or invalidating the relevant regulations will not, in itself, provide a meaningful remedy for many of those who are in need of one. In other words, even if the Supreme Court strikes down the departure bar or DOJ amends the regulations, those who have been wrongly deported will still face significant barriers in seeking to return to the United States.

This prediction is based on my analysis of recent BIA adjudications of post-departure motions, which reveals that the BIA has continued to deny relief to deportees even in circuits that have struck down or narrowly interpreted the regulatory departure bar.<sup>11</sup> The BIA has done so, in part, by invoking its authority to ignore judicial interpretations of agency regulations in favor of its own interpretation. More radically, the BIA has continued to use departure-based grounds to deny post-departure motions even where circuit precedent has struck down the regulations entirely. The BIA has, in effect, erected a phantom departure bar that lives on in the absence of a regulatory basis.

It is this phantom bar, rather than the regulatory departure bar, that lies at the heart of my analysis. I argue that any meaningful remedy for those who have been wrongly deported must address not only the relevant regulations but also the deep-seated assumptions that underlie the Board's reluctance to grant post-departure reopening or reconsideration. The aim of this article is to lay the groundwork for doing so, in large part by addressing the arguments offered by the BIA in its 2008 decision in *In re Armendarrez-Mendez*.<sup>12</sup> In *Armendarrez-Mendez*, the BIA provided a detailed defense of its view that physical removal from the United States is "a transformative event that fundamentally alters the alien's posture under the law."<sup>13</sup> I argue here that this conceptual framework is neither justified under current doctrine nor sound as a matter of policy.

When a deportee leaves the United States, the act of crossing the border signifies a territorial transition from United States soil to foreign territory. I thus begin my inquiry into the meaning of departure by considering what the territorial shift from "inside" to "outside" has meant for non-citizens in other

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<sup>10</sup> National Immigration Project of the National Lawyers Guild et al., *Petition for Rulemaking to Amend Regulations Governing Motions to Reopen and Reconsider Removal Proceedings for Noncitizens who Depart the United States* (Aug. 6, 2010) (on file with author).

<sup>11</sup> See *infra* Part III.C.

<sup>12</sup> 24 I. & N. Dec. 646 (B.I.A. 2008).

<sup>13</sup> *Id.* at 656.

legal contexts. I look at the way that the Supreme Court has understood departure with regard to the constitutional and statutory rights of noncitizens returning to the United States from trips abroad and at how departure affects the availability of administrative and judicial review of removal orders. These comparisons, I argue, support a flexible approach to departure that is at odds with the BIA's approach in *Armendarez-Mendez*.

At the same time, departure signifies the execution of the removal order.<sup>14</sup> Any inquiry into the meaning of departure must thus contend with what departure means from the perspective of finality—in other words, with what it means to *deport* as well as what it means to *depart*. Looking at the particular ways that the execution of an order functions within the removal context and drawing on analogies from civil and criminal procedure, I argue that finality concerns do not provide a persuasive basis for distinguishing among those with final orders of removal solely on the basis of whether they have left the United States.

The article proceeds in the following steps. Part II provides an overview of the removal process and sketches out several ways in which a wrongful deportation might occur, with a particular focus on lawful permanent residents who have been removed on the basis of erroneous applications of the statutes governing the immigration consequences of crimes. This category of wrongful deportations has become increasingly significant in the wake of a series of Supreme Court cases interpreting the scope of sweeping amendments to the immigration laws enacted in 1996. Part III describes the regulatory basis for the departure bar and the ways in which the BIA has continued to rely on departure-based distinctions even in circuits that have struck down the relevant regulations—giving rise to what I call a “phantom” departure bar.

The remainder of the article presents an argument for eliminating the departure bar in both its formal and phantom forms. In Part IV, I consider departure from the perspective of territoriality, looking at how departure from the United States affects (or, more importantly, does not affect) the rights of noncitizens in other immigration-related contexts. I argue that the variety of approaches to departure that emerge from these examples undermines the BIA's view of departure as inherently transformative and that there is thus little to justify departure-based distinctions in the absence of a congressional mandate.<sup>15</sup> In Part V, I consider the departure bar from the perspective of finality. I argue that the Immigration and Nationality Act (INA)<sup>16</sup> and agency

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<sup>14</sup> See *infra* note 23 and accompanying text.

<sup>15</sup> Although this article focuses primarily on the lack of justification for the departure bar in the absence of a congressional mandate, it should be noted that even a statutory departure bar might raise due process concerns. See *infra* notes 196-198 and accompanying text.

<sup>16</sup> Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (2006)).

regulations provide a host of mechanisms to address finality concerns in the context of reopening and reconsideration and that the imposition of additional limitations on post-departure motions is both unjust and unnecessary. Part VI addresses the prudential concerns that the BIA has cited in defense of the departure bar, including administrative efficiency and the territorial limitations of its own authority. I conclude by arguing that the elimination of the departure bar, whether through judicial invalidation, administrative rulemaking, or even legislation, must be accompanied by additional measures to ensure that all motions to reopen or reconsider are adjudicated under the same substantive standard regardless of territorial location.

## II. WRONGFUL DEPORTATION

### A. Removal and Its Consequences

Removal proceedings<sup>17</sup> commence with the issuance of a Notice to Appear (NTA) by one of the enforcement agencies within the Department of Homeland Security.<sup>18</sup> A noncitizen who has been issued an NTA then appears before an immigration judge with the opportunity to contest both alienage and deportability and to apply for the forms of relief for which she is eligible.<sup>19</sup>

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<sup>17</sup> This article focuses on “traditional” removal proceedings conducted by immigration judges pursuant to INA § 240, 8 U.S.C. § 1229a (2006). Although removals of lawful permanent residents (LPRs) (the chief focus of this article) generally occur through such proceedings, it should be noted that a growing number of removals take place through other procedures. See INA § 235(b), 8 U.S.C. § 1225(b) (2006) (expedited removal); INA § 238(b), 8 U.S.C. § 1228(b) (2006) (administrative removal); INA § 238(c), 8 U.S.C. § 1228(c) (2006) (judicial removal); INA § 240(d), 8 U.S.C. § 1229a(d) (2006) (stipulated order of removal); INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2006) (reinstatement of removal following reentry). These “fast-track” procedures, which bypass the immigration courts and include fewer procedural safeguards than traditional removal proceedings, raise additional issues outside the scope of the present article. For a discussion of wrongful deportations that occur through expedited removal, see Michele R. Pistone & John J. Hoeffner, *Rules are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167 (2006) (estimating that between 1996 and 2005, approximately 20,000 bona fide asylum seekers were wrongly turned away from United States borders).

<sup>18</sup> On March 1, 2003, the Immigration and Naturalization Service (INS) was dissolved. The responsibilities of the INS were divided among three separate agencies within the newly created Department of Homeland Security: Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

<sup>19</sup> For LPRs facing removal, the most significant form of relief is cancellation of removal, which results in the termination of the proceedings and the continuation of permanent resident status. See INA § 240A(a), 8 U.S.C. § 1229b(a) (2006).

Although the right to counsel in removal proceedings is guaranteed by statute,<sup>20</sup> counsel is not provided by the government, and the majority of respondents are pro se.<sup>21</sup>

A removal order becomes administratively final upon decision of the Board of Immigration Appeals or, absent appeal, upon the expiration of the deadline for filing an appeal.<sup>22</sup> At the moment that the person subject to the order physically departs the United States, the order is deemed executed.<sup>23</sup>

Removal carries with it a number of lasting consequences. A final order of removal deprives a noncitizen of the lawful immigration status he or she may have previously enjoyed.<sup>24</sup> In addition, departure from the United States while subject to an order of removal triggers future grounds of inadmissibility ranging from a five-year bar to lifetime inadmissibility.<sup>25</sup> As discussed in more detail below, departure also cuts off the authority of an immigration judge or the BIA to correct errors in the proceeding or to take account of changed circumstances, except in circuits that have invalidated the relevant regulations.<sup>26</sup>

The continuing effects of a removal order extend beyond inadmissibility and the departure bar. Under federal law, illegal re-entry following removal is a felony offense, and penalties range from two to twenty years of confinement for those who enter, attempt to enter, or are found in the United States following removal without prior agency consent to reapply for admission.<sup>27</sup>

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<sup>20</sup> See INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2006); INA § 292, 8 U.S.C. § 1362 (2006).

<sup>21</sup> In proceedings completed during FY 2009, thirty-nine percent of respondents were represented by counsel. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEPT. OF JUSTICE, FY 2009 STATISTICAL YEAR BOOK, at G1 (2010), available at <http://www.justice.gov/eoir/statspub/fy09syb.pdf>.

<sup>22</sup> See INA § 101(a)(47)(B), 8 U.S.C. § 1101(a)(47)(B) (2006); 8 C.F.R. §§ 1003.3, 1003.39 (2010).

<sup>23</sup> See *Stone v. INS*, 514 U.S. 386, 399 (1995); *Mrvica v. Esperdy*, 376 U.S. 560, 563-64 (1964). INA § 101(g), 8 U.S.C. § 1101(g) (2006), provides that “any alien ordered deported or removed . . . who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.”

<sup>24</sup> See INA § 241(a)(1), 8 U.S.C. § 1231(a)(1) (2006) (mandating removal within 90 days of date removal order becomes administratively final). Although INA § 241(a)(7), 8 U.S.C. § 1231(a)(7) (2006), provides employment authorization for those whose removals cannot be carried out, the statute does not provide for any other status for those with final orders of removal.

<sup>25</sup> See INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2006).

<sup>26</sup> See *infra* Part III.B.

<sup>27</sup> See INA § 276(a)-(b), 8 U.S.C. § 1326(a)-(b) (2006).

*B. Errors in Removal Proceedings*

Josue Leocal came to the United States from Haiti in 1980, at the age of 24, and subsequently became a lawful permanent resident.<sup>28</sup> Two decades after he arrived in the United States, he was involved in a car accident in which two individuals were injured.<sup>29</sup> He pleaded guilty to two counts of driving under the influence of alcohol and causing serious bodily injury and was sentenced to two and a half years in prison.<sup>30</sup> Upon his release in April 2002, he was taken into immigration custody and placed in removal proceedings on the basis of the conviction.<sup>31</sup>

Leocal's case raised a key question about the scope of the INA provisions governing the immigration consequences of crimes. An immigration judge ruled that Leocal had been convicted of an "aggravated felony,"<sup>32</sup> and that he was therefore subject to mandatory deportation without the right to apply for discretionary relief.<sup>33</sup> The BIA affirmed the immigration judge's decision, and Leocal filed a petition for review in the Eleventh Circuit.<sup>34</sup> While the petition was pending, Leocal was deported to Haiti,<sup>35</sup> leaving behind his wife and four children, all United States citizens.<sup>36</sup> Leocal lost at the Eleventh Circuit but ultimately prevailed in 2004 when a unanimous Supreme Court held in *Leocal*

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<sup>28</sup> *Leocal v. Ashcroft*, 543 U.S. 1, 3-4 (2004).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006) (defining "aggravated felony"). Leocal's offense was deemed to be an aggravated felony under § 101(a)(43)(F) ("[A] crime of violence (as defined in section 16 of title 18 [of the United States Code]) for which the term of imprisonment is at least one year[.]"). *Leocal*, 543 U.S. at 3-4.

<sup>33</sup> *Leocal*, 543 U.S. at 3. An aggravated felony conviction renders a lawful permanent resident ineligible for several different forms of relief from removal. See INA §240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2006) (barring those with aggravated felonies from cancellation of removal); INA § 212(h), 8 U.S.C. § 1182(h) (2006) (barring those with aggravated felonies from waivers of criminal grounds of inadmissibility); INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (2006) (barring those who have been convicted of a "particularly serious crime" from asylum); INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (2006) (deeming "an alien . . . convicted of an aggravated felony . . . to have been convicted of a particularly serious crime").

<sup>34</sup> *Leocal*, 543 U.S. at 5.

<sup>35</sup> *Id.*

<sup>36</sup> Brief of Petitioner-Appellant at 2, *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (No. 03-583).

*v. Ashcroft* that his conviction was not an aggravated felony.<sup>37</sup> By that point, he had been in Haiti for two years.<sup>38</sup>

Leocal was, in short, removed on the basis of a conviction that did not render him deportable. His return to the United States is the exception rather than the rule.<sup>39</sup> If the Court had denied Leocal's petition for certiorari and instead decided the DUI question in another case the following year, Leocal would, like the vast majority of people in such circumstances, be unable to return home to his family in the United States. As the following section explains, DOJ regulations provide that a motion to reopen or reconsider "shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States."<sup>40</sup>

The effect of the departure bar is illustrated by two cases with similar facts but contrasting outcomes. Manuel Navarro-Miranda was ordered removed by an immigration judge in Texas in January 1999 on the basis of a DUI conviction and was physically removed to Mexico following the October 1999 denial of his administrative appeal.<sup>41</sup> Less than two years later, the Fifth Circuit held that a DUI conviction is not an aggravated felony.<sup>42</sup> Within a few months of the Fifth Circuit's decision, Navarro-Miranda sought reopening from the BIA.<sup>43</sup> The BIA denied the motion on jurisdictional grounds due to his departure from the United States, and the Fifth Circuit affirmed.<sup>44</sup>

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<sup>37</sup> *Leocal*, 543 U.S. at 11-13. Leocal was charged with deportability solely on the ground of an aggravated felony conviction. *Id.* at 4-5. Thus, the Court's holding meant that he was no longer subject to removal.

<sup>38</sup> Leocal was removed to Haiti on November 18, 2002. See Brief of Petitioner-Appellant at 2, *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (No. 03-583). The Supreme Court issued its decision on November 9, 2004. See *Leocal*, 543 U.S. at 1.

<sup>39</sup> Leocal's case stands out from others in several respects. First, he not only filed an administrative appeal but also sought judicial review of the BIA's decision and then petitioned for certiorari after losing at the Court of Appeals. Many others, lacking access to legal representation and facing the prospect of prolonged detention as a condition for pursuing their rights, have given up meritorious appeals. See *infra* notes 62-63 and accompanying text. In addition, the Supreme Court granted certiorari in his case, which it does in only a tiny fraction of the cases it receives every year. See *The Supreme Court, 2008 Term: The Statistics*, 123 HARV. L. REV. 382, 389 (2009) (noting that only 87 petitions for certiorari were granted out of 7,868 filed for the October 2008 Term).

<sup>40</sup> 8 C.F.R. §§ 1003.2(d) (with regard to BIA), 1003.23(b)(1) (2010) (with regard to immigration judge). This regulation has been struck down in several circuits. See *infra* Part III.B.

<sup>41</sup> See *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 675-76 (5th Cir. 2003); *In re Navarro-Miranda*, No. A41 310 520, 2007 WL 4699892 (B.I.A. Dec. 7, 2007) (recounting procedural history of 2001 motion to reopen).

<sup>42</sup> See *United States v. Chapa-Garza*, 243 F.3d 921, 926-927 (5th Cir. 2001).

<sup>43</sup> *Chapa-Garza* was decided on March 1, 2001. See *id.* at 921. The BIA issued its decision

Like Navarro-Miranda, Juan Francisco Gomez was also ordered removed by an immigration judge in Texas in 1999 on the basis of a DUI conviction and was unsuccessful in his appeal to the BIA.<sup>45</sup> Unlike Navarro-Miranda, however, he was not physically removed, for reasons that are not entirely clear from the record.<sup>46</sup> In 2008, nine years after his removal order became final and seven years after the Fifth Circuit held that a DUI conviction is not an aggravated felony, Gomez sought reopening.<sup>47</sup> The BIA noted the untimeliness of the motion, but found that the Fifth Circuit's 2001 decision constituted exceptional circumstances warranting reopening.<sup>48</sup> Citing the fact that "the basis for the respondent's order of removal and the denial of relief no longer exists," the BIA vacated the removal order and terminated the removal proceeding, restoring Gomez to his status as a lawful permanent resident.<sup>49</sup> The BIA noted in its decision that this action was possible only because Gomez remained on United States soil.<sup>50</sup>

It would be difficult to arrive at an estimate of the overall number of former permanent residents who, like Navarro-Miranda, are barred from the United States as a result of removal orders that have no legal basis.<sup>51</sup> One can begin,

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on Navarro-Miranda's motion to reopen on January 25, 2002, *see In re Navarro-Miranda*, No. A41 310 520, 2007 WL 4699892 (B.I.A. Dec. 7, 2007), which means that Navarro-Miranda must have filed his motion prior to that date.

<sup>44</sup> *Navarro-Miranda*, 330 F.3d at 675-76.

<sup>45</sup> *See In re Gomez*, No. A91 200 176, 2008 WL 2783059 (B.I.A. June 11, 2008).

<sup>46</sup> *Id.* at \*1. The decision does not indicate why removal was not carried out. Gomez was taken into immigration custody following the completion of his criminal sentence in December 2000, but was released in May 2001. *Id.* He was subsequently incarcerated again from 2003 to 2008; although Immigration and Customs Enforcement placed a detainer on him during his incarceration, the detainer was lifted in 2006 and no further attempts were made to remove him. *Id.* He sought reopening after being released on parole from his criminal sentence in 2008. *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> A first step in making such an estimate would be to calculate the number of permanent residents removed on criminal grounds and the nature of the convictions at issue in their removals. Human Rights Watch, together with the Post-Deportation Human Rights Project at Boston College, filed a request under the Freedom of Information Act in 2006 for ICE data regarding removals based on criminal convictions. The agency's lack of response to this request is detailed in Appendix: A History of Human Rights Watch's FOIA Request for Deportation Data, *in* HUMAN RIGHTS WATCH, FORCED APART (2007), available at <http://www.hrw.org/en/node/10856/section/10> [hereinafter FORCED APART]. After two and a half years, the agency finally responded to a revised request with records of 897,099 people who were removed on criminal grounds between April 1, 1997 and August 1, 2007. *See* Analyzing the ICE Data Set, *in* HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS) (2009), available at <http://www.hrw.org/en/node/82159/section/6> [hereinafter FORCED APART (BY THE NUMBERS)]. In its analysis of this data set, Human Rights Watch found significant gaps in the

however, by considering the potential scope of just the one question of statutory interpretation at issue in his case: the erroneous designation of DUI convictions as aggravated felonies. In 2001, the year that the Fifth Circuit put a stop to such removals,<sup>52</sup> a spokesperson for the former Immigration and Naturalization Service (INS) stated that 400 to 500 noncitizens were being deported annually from the INS Central Region, comprising eighteen states, on the basis of such convictions.<sup>53</sup> Removals based on DUI convictions continued in the Eighth and Eleventh Circuits until the Supreme Court decided *Leocal* in 2004.<sup>54</sup> It is quite possible that several thousand people were removed on the basis of DUI convictions between April 1997, when the new aggravated felony definition went into effect, and 2004, when *Leocal* was decided.

Wrongful deportations are not a new phenomenon.<sup>55</sup> However, it is likely that they have become more frequent in recent years. Beyond the rise in errors that would presumably accompany any surge in immigration enforcement, there are particular characteristics of recent removals that may make them more prone to error than the deportations of years past. Congress enacted substantial changes to the INA in 1996 through passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>56</sup> and the Illegal Immigration

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data. *Id.* Immigration status was not indicated for 7% of the individuals, and the nature of the criminal conviction that formed the basis for removal was not indicated for 44% of the individuals. *Id.*

<sup>52</sup> See *United States v. Chapa-Garza*, 243 F.3d 921, 926-927 (5th Cir. 2001).

<sup>53</sup> See Edward Hegstrom, *INS Ignores Ruling, Will Deport DWI Violators*, HOUS. CHRONICLE, Mar. 3, 2001 at A1. The Central Region of the former INS comprised eighteen states stretching from New Mexico to the Dakotas and Wisconsin to Texas. See Teresa Puente, *Congressmen Oppose INS 'Hubs'*, CHI. TRIBUNE, Apr. 16, 1999, at N6 (describing geographic span of Central Region). Another indication of the scope of these removals is the fact that in one three-day period in 1998, in a sweep dubbed "Operation Last Call," the INS rounded up over 500 noncitizens with DUI convictions in Texas and placed them in removal proceedings. See *Texas drunken drivers arrested for deportation 537 legal immigrants with 3 convictions are rounded up by INS*, BALT. SUN, Sept. 4, 1998, at 4A. See also Maro Robbins, *Judge halts DWI deportation; The decision to dismiss the case fuels controversy over removing convicted immigrants*, SAN ANTONIO EXPRESS-NEWS, Apr. 5, 2001, at 1B. It should be noted that some of those deported for DUI convictions may have been deportable on other grounds, including lack of lawful status.

<sup>54</sup> See *Leocal v. Ashcroft*, 543 U.S. 1, 6 (2004) (discussing circuit split).

<sup>55</sup> See, e.g., *In re Farinas*, 12 I. & N. Dec. 467 (B.I.A. 1967); *In re Malone*, 11 I. & N. Dec. 730 (B.I.A. 1966). See also *In re S-----*, 3 I. & N. Dec. 83 (B.I.A. 1947) (citing several unpublished decisions in which deportees were successful in collateral challenges to prior orders of deportation or exclusion). For an account of the wrongful deportation of Mexican-Americans in the 1930s and 40s, see Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror"*, 26 PACE L. REV. 1 (2005).

<sup>56</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 40, 42, and 50 U.S.C.).

Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>57</sup> greatly expanding the grounds of deportability and reducing the availability of discretionary relief.<sup>58</sup> The 1996 legislation was hastily drafted and included numerous ambiguities.<sup>59</sup> In the wake of its passage, government attorneys aggressively pursued broad interpretations of the new laws<sup>60</sup>—interpretations that in many cases were later rejected by the courts.<sup>61</sup> In addition, the 1996 amendments created new obstacles to legal representation<sup>62</sup> and discouraged

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<sup>57</sup> Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 U.S.C.).

<sup>58</sup> Together, AEDPA and IIRIRA transformed the statutory scheme governing removal on the basis of criminal convictions. One of the most significant changes was the expansion of the scope of the definition of “aggravated felony,” a term of art under the INA. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006). The definition now encompasses many offenses classified as misdemeanors under state law. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-43 (2000).

<sup>59</sup> *See* FORCED APART, *supra* note 51, at Part IV (discussing drafting ambiguities in IIRIRA and AEDPA). AEDPA has been widely criticized for its poor drafting by commentators in the field of criminal procedure. *See* John H. Blume, *AEDPA: The ‘Hype’ and the ‘Bite,’* 91 CORNELL L. REV. 259 (2006) (noting that AEDPA was “poorly drafted” and that “the use of new statutory language combined with the speed with which Congress enacted AEDPA left the Supreme Court, and lower federal courts, with little guidance regarding Congress’s intent”); LARRY YACKLE, *FEDERAL COURTS: HABEAS CORPUS 57* (2003) (“AEDPA is notorious for its poor drafting. The Act is replete with vague and ambiguous language, apparent inconsistency, and plain bad grammar.”). *See also* *Lindh v. Murphy*, 531 U.S. 320, 336 (1997) (“[I]n a world of silk purses and pigs’ ears, [AEDPA] is not a silk purse of the art of statutory drafting.”). With regard to IIRIRA, *see* 142 Cong. Rec. S11514-01, 1996 WL 565566 (Sept. 27, 1996) (statement of Sen. Robert Graham) (“[W]e have a product today which has not had the kind of thoughtful dialog and debate which we associate with a conference report which is presented to the US Senate for final consideration.”).

<sup>60</sup> *See* Hegstrom, *supra* note 53 (paraphrasing an INS spokesperson, in the wake of the Fifth Circuit’s decision holding that DUI convictions are not aggravated felonies, as stating that “instead of changing its policy based on the 5th Circuit ruling, the agency will wait until the issue works its way down to immigration judges. Even then, the INS will likely appeal any ruling not in its favor.”).

<sup>61</sup> Immigrants challenging the government’s interpretation of the aggravated felony definition have won several decisive victories at the Supreme Court. *See* *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (7 justices in the majority, 2 concurring); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (8-1 decision); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (unanimous).

<sup>62</sup> Chief among these obstacles is the mandatory detention provision added in 1996. *See* INA § 236(c), 8 U.S.C. § 1226 (2006). Detention, and in particular the transfer of detainees to remote locations far from where they were taken into custody, creates significant barriers to representation. *See* HUMAN RIGHTS WATCH, *LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 4* (2009), <http://www.hrw.org/sites/default/files/reports/us1209web.pdf> (noting that “challenges inherent in conducting legal representation across thousands of miles can completely sever the attorney-client relationship.”) [hereinafter *LOCKED UP FAR AWAY*]; *see also* Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29

those in removal proceedings from appealing adverse decisions,<sup>63</sup> while a subsequent reorganization of the BIA greatly reduced its ability to function as an administrative safeguard.<sup>64</sup>

*Navarro-Miranda* provides an example of one type of wrongful deportation: removal on the basis of a conviction that should not have triggered grounds of inadmissibility or deportability.<sup>65</sup> A related scenario involves someone who

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CONN. L. REV. 1647, 1664-65 (1997).

<sup>63</sup> For an extreme example of the effect that detention can have on a respondent in removal proceedings, see *In re Cortez-Rodriguez*, No. A37 200 195, 2006 WL 2427914 (B.I.A. July 21, 2006). Cortez-Rodriguez, a lawful permanent resident who faced removal on the basis of criminal convictions, appeared pro se in his removal proceeding. *Id.* at \*1. The immigration judge initially found that Cortez-Rodriguez was ineligible for cancellation of removal due to not having the requisite length of residence in the United States. *Id.* The BIA decision (which concerned a post-departure appeal by Cortez-Rodriguez) notes that “[t]he Immigration Judge fully explained to the respondent the process for filing an appeal with the Board” but that “[w]hen the respondent learned that he was going to be held in custody, he decided to waive his right to appeal to the Board.” *Id.* (citing hearing transcript). Subsequently, the immigration judge realized that he had made an error and called Cortez-Rodriguez back, explaining that he was, in fact, eligible to apply for cancellation of removal. *Id.* The BIA decision notes that Cortez-Rodriguez “then asked whether he would remain in detention until the cancellation hearing. When told that he would remain incarcerated, the respondent decided to waive his right to submit a cancellation application.” *Id.* (citing transcript). Another example, described in a newspaper article, is “Carlos Roybal,” a former detainee who explained to the reporter that “[a]fter five months at the Port Isabel Detention Center near Brownsville and the South Texas Detention Center in Pearsall, he gave in. ‘I had no shoes for two-and-a-half weeks, and the food was so awful I wouldn’t even feed it to a dog,’ he says. ‘They just wore you down.’” Melissa del Bosque, *Deportation Madness*, TEX. OBSERVER, July 21, 2010, available at <http://www.texasobserver.org/cover-story/deportation-madness>. The individual profiled in the article was deemed an aggravated felon on the basis of a conviction for possession of half of a marijuana cigarette. *Id.* The immigration judge made the determination based on the fact that the conviction was a second drug possession offense. *Id.* It is now clear, under the Supreme Court’s decision in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), that someone in these circumstances should have been deemed eligible for relief.

<sup>64</sup> Changes to the BIA implemented by Attorney General John Ashcroft in 2002 have been subject to widespread criticism. See Stephen Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1657-1665 (2010); Susan Benesch, *Due Process and Decision-Making in U.S. Immigration Adjudication*, 59 ADMIN. L. REV. 557 (2007); Lenni B. Benson, *You Can’t Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 417-423 (2007); Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals’s Summary Affirmance Procedures*, 16 STAN. L. & POL’Y REV. 481 (2005).

<sup>65</sup> An LPR apprehended within the United States will be placed in removal proceedings on grounds of deportability, contained in INA § 237(a), 8 U.S.C. § 1227(a) (2006). If placed in removal proceedings upon return from a trip abroad, an LPR will be subject to removal on grounds of inadmissibility, contained in INA § 212(a), 8 U.S.C. 1182(a) (2006). The criminal grounds included in sections 237(a)(2) and 212(a)(2) overlap to a large extent but are not identical.

falls within the grounds of deportability or inadmissibility but is erroneously denied the opportunity to apply for relief from removal.<sup>66</sup> This category includes those who have convictions that predate the effective date of the 1996 amendments and who were denied the opportunity to apply for relief under the erroneous conclusion that the 1996 amendments applied retroactively to old convictions.<sup>67</sup> It also includes those who were barred from applying for relief because their convictions were erroneously deemed to be aggravated felonies (for example, those with certain types of drug possession convictions).<sup>68</sup> Fourteen years after IIRIRA went into effect, the courts are still answering

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<sup>66</sup> For purposes of the removals at issue in this article, the most significant form of relief is cancellation of removal, which is available to lawful permanent residents who have had LPR status for at least five years and have resided in the United States continuously for at least seven years. See INA § 240A(a), 8 U.S.C. § 1229b(a) (2006). Those with aggravated felony convictions are barred from seeking cancellation of removal. See INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2006). Thus, it is possible that an immigration judge might make an accurate determination that an LPR is removable, but deny the person an opportunity to apply for relief based on an erroneous determination that the conviction in question is an aggravated felony.

<sup>67</sup> Former section 212(c) provided a means for immigration judges to take into account family ties, rehabilitation, and other equities in deciding whether to grant relief to longtime lawful permanent residents facing deportation. See INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996). The Supreme Court ruled in 2001 that those who pleaded guilty to criminal charges prior to the 1996 amendments remain eligible to apply for the waiver if it would have been available at the time of the plea. See *INS v. St. Cyr*, 533 U.S. 289, 326 (2001). In *St. Cyr*, the Court cited statistics indicating that in the years 1989-1995, 51.5% of applications for 212(c) relief were granted. *Id.* at 296 n.5 (citing Julie K. Rannik, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. MIAMI INTER-AM. L. REV. 123, 150 n.80 (1996)). The Court noted the likelihood that an even higher proportion of such applications would be granted post-1996, in light of the fact that many individuals with minor or old convictions were now being placed in removal proceedings. *Id.* at 296 n.6.

<sup>68</sup> In *Lopez v. Gonzales*, the Court held that a first-time conviction for simple drug possession is not an aggravated felony even if classed as a felony under state law. 549 U.S. 47, 60 (2006). In *Carachuri-Rosendo v. Holder*, the Court held that a second or subsequent conviction for simple possession of a controlled substance does not constitute an aggravated felony unless charged as a recidivist offense. 130 S. Ct. 2577, 2589 (2010). Although such convictions will render an LPR deportable, they will not bar her from cancellation of removal. See *supra* note 66. An example of an LPR removed on the basis of an erroneous determination of ineligibility for relief is Ruben Ovalles, who was convicted of attempted possession of a controlled substance and sentenced to probation. See *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009) (affirming BIA denial of post-departure motion to reopen). An immigration judge found Ovalles subject to removal under the controlled substance ground of deportability, but granted him cancellation of removal. *Id.* at 291. The BIA reversed, holding that the conviction, although it was a first-time simple possession conviction that carried no jail time, was an aggravated felony. *Id.* Mr. Ovalles was removed in 2004. *Id.* In 2006, the Supreme Court held in *Lopez* that a first-time drug possession conviction is not an aggravated felony. Thus, the immigration judge had been correct in granting Mr. Ovalles relief, and the BIA's reversal was based on an erroneous interpretation. For an account of three other individuals erroneously found ineligible for relief on the basis of drug convictions, see Bernstein, *supra* note 9.

questions about the scope of the 1996 amendments,<sup>69</sup> and thus new categories of wrongful deportations may well emerge in the future.

Other scenarios that might be categorized as wrongful deportations include a removal order predicated on a criminal conviction that has since been vacated;<sup>70</sup> an in absentia removal order where the respondent's absence was due to lack of notice of the hearing or exceptional circumstances; and a removal order based on a proceeding in which the respondent was prejudiced by ineffective assistance of counsel.<sup>71</sup>

### III. THE DEPARTURE BAR ON REOPENING AND RECONSIDERATION

#### A. Motions to Reopen and Reconsider

Motions to reopen and to reconsider (MTRs) provide an important means of correcting errors in removal proceedings, and the only available means of taking into account changed circumstances or new legal precedent. A person subject to a final order of removal may seek reopening or reconsideration from the forum that last had jurisdiction over the case—either the immigration judge or the BIA.<sup>72</sup> Motions to reopen address new facts unavailable in the original proceeding,<sup>73</sup> while motions for reconsideration address legal or factual errors

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<sup>69</sup> A recent example is *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, decided in June 2010.

<sup>70</sup> For example, Fredy Pena Muriel, a lawful permanent resident since the age of one, was deemed an aggravated felon and deported to Bolivia based on a domestic assault conviction for which he had received a suspended sentence. *See Pena-Muriel v. Gonzales*, 489 F.3d 438, 440 (1st Cir. 2007). The conviction was later vacated. *Id.* However, Pena-Muriel was barred from seeking reopening of the removal proceeding due to his departure from the United States. *Id.* (denying petition for review of the BIA's denial of his motion to reopen). The Supreme Court's recent decision in *Padilla v. Kentucky* may result in the vacatur of many convictions that resulted in removal. *See Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (holding that criminal defendants may bring ineffective assistance of counsel claims based on counsel's failure to properly advise on immigration consequences of guilty plea).

<sup>71</sup> There are undoubtedly other scenarios that may fit within the rubric of wrongful deportation, some of which raise additional issues that are beyond the scope of this article. One such scenario would be an asylum-seeker who is erroneously denied an individualized consideration of the merits of her claim. *See Pistone & Hoeffner, supra* note 17.

<sup>72</sup> The BIA's authority to reopen removal proceedings and reconsider a prior decision is governed by 8 C.F.R. § 1003.2 (2010). The authority of immigration judges to do so is governed by 8 C.F.R. § 1003.23 (2010). Since passage of IIRIRA, motions to reopen and reconsider have also been governed by statute. *See* INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2006) (motions to reopen); INA § 240(c)(6)(C), 8 U.S.C. § 1229(c)(6)(C) (2006) (motions to reconsider).

<sup>73</sup> A motion to reopen is based on "facts or evidence not available at the time of the original decision." *Patel v. Ashcroft*, 378 F.3d 610, 612 (7th Cir. 2004). It must be supported by affidavits or other evidence, and must establish that the evidence is material, was unavailable at

in the original proceeding.<sup>74</sup> The Supreme Court has recognized that motions to reopen are “an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings.”<sup>75</sup>

Prior to the passage of IIRIRA, Congress and the courts expressed anxiety on several occasions about the potential for abuse of such motions by those seeking to delay their departure.<sup>76</sup> These concerns led to the promulgation of regulations imposing new time and number limits on MTRs.<sup>77</sup> These limits were incorporated into the statute in 1996, when Congress codified for the first time the right to file such motions.<sup>78</sup> In the post-IIRIRA era, a person who has

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the time of original hearing, and could not have been discovered or presented at the original hearing. See INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2006); 8 C.F.R. § 1003.2(c)(1) (2010); see also *Kaur v. BIA*, 413 F.3d 232, 234 (2d Cir. 2005).

<sup>74</sup> A motion to reconsider asks that a decision be reexamined “in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case that was overlooked earlier,” including errors of law or fact in the previous order. *In re Ramos*, 23 I. & N. Dec. 336, 338 (B.I.A. 2002). See INA § 240(c)(6)(C), 8 U.S.C. § 1229a(c)(6)(C) (2006); 8 C.F.R. § 1003.2(b)(1) (2008).

<sup>75</sup> *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)) (internal quotation marks omitted).

<sup>76</sup> See *INS v. Abudu*, 485 U.S. 94, 107 (1988) (“There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.”); *INS v. Doherty*, 502 U.S. 314, 323 (1992) (“This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.”) (citing *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985)). In the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, Congress directed the Attorney General to “issue regulations with respect to . . . the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations [should] include a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions.” *Id.* § 545(d)(1), 104 Stat. at 5066. Congress issued this directive in order to “reduce or eliminate . . . abuses” of regulations that, at that time, permitted respondents to file an unlimited number of motions to reopen without any limitations period. See *Stone v. INS*, 514 U.S. 386, 400 (1995). There is evidence that the agency did not share this concern. See *Zhang v. Holder*, 617 F.3d 650, 657 (2d Cir. 2010) (quoting *Dada v. Mukasey*, 554 U.S. 1, 13 (2008)) (“Although the Attorney General expressed doubt about the need to impose such limitations because there was ‘little evidence of abuse,’ she ultimately promulgated regulations that, subject to certain exceptions, permitted an alien to ‘file one motion to reopen within 90 days.’”). For a discussion of the Court’s continuing preoccupation with the use of dilatory tactics by noncitizens facing deportation, see Peter J. Spiro, *Leave for Appeal: Departure as a Requirement for Review of Deportation Orders*, 25 SAN DIEGO L. REV. 281 (1988); Daniel Kanstroom, *The Long, Complex, and Futile Deportation Saga of Carlos Marcello*, in IMMIGRATION STORIES 113 (David A. Martin & Peter H. Schuck eds., 2005).

<sup>77</sup> See *Stone*, 514 U.S. at 400 (discussing congressional directive to agency to promulgate regulations).

<sup>78</sup> See INA § 240(c)(6)(B), 8 U.S.C. § 1229(c)(6)(B) (2006) (motion to reconsider); INA § 240(c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(C)(i) (2006) (motion to reopen).

been ordered removed has the statutory right to file one motion to reopen within ninety days of the decision by the immigration judge or the BIA, and one motion to reconsider within thirty days.<sup>79</sup>

Although MTRs are subject to time and number limits, there are circumstances in which a person ordered removed may have hope of vacating the removal order regardless of timeliness or of how many prior motions have been filed. The INA carves out a number of exceptions to time and number limits,<sup>80</sup> and DOJ regulations provide that immigration judges and the BIA have sua sponte authority to reopen or reconsider any case in which they have made a decision “at any time.”<sup>81</sup> In addition, several circuits have held that deadlines for MTRs are subject to equitable tolling.<sup>82</sup> Between statutory exceptions, equitable tolling, and the established practice of the immigration courts, untimely MTRs are commonly granted in a number of circumstances that are relevant to those who have been wrongly deported, including vacatur of a conviction that formed the basis for the removal order<sup>83</sup> and a subsequent change in law.<sup>84</sup>

### B. *The Regulatory Departure Bar*

While time and number limits may yield under compelling circumstances, the obstacle posed by departure from the United States has proven to be far less

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<sup>79</sup> See INA § 240(c)(6)(B), 8 U.S.C. § 1229(c)(6)(B) (2006) (establishing thirty-day deadline for filing motion to reconsider); INA § 240(c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(C)(i) (2006) (establishing ninety-day deadline for motion to reopen).

<sup>80</sup> See, e.g., INA § 240(c)(7)(C)(ii), 8 U.S.C. § 1229a(c)(7)(C)(ii) (2006) (allowing motion to reopen asylum application based on changed country conditions to be filed at any time); INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv) (2006) (allowing battered spouses and children seeking certain forms of relief under the Violence Against Women Act to file motion to reopen within one year, or at any time under enumerated circumstances); INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) (2006) (allowing motion to reopen in absentia proceeding to be filed at any time if the basis for reopening is lack of notice of the hearing, or confinement in federal or state custody and the failure to appear was no fault of the person subject to the order; or within 180 days if basis for reopening is exceptional circumstances).

<sup>81</sup> 8 C.F.R. §§ 1003.23(b)(1), 1003.2 (2010). The immigration judge may reopen only if jurisdiction has not vested with the BIA. 8 C.F.R. § 1003.23(b)(1) (2010).

<sup>82</sup> See *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000). *But see* *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999).

<sup>83</sup> See *Cruz v. Attorney Gen.*, 452 F.3d 240, 242 (3d Cir. 2006) (observing that “[i]n cases where the BIA has found an alien’s conviction vacated for purposes of the INA, it has routinely considered this fact to be an ‘exceptional situation’ that provides the basis for granting a motion to reopen sua sponte, without regard to the timing of the filing”).

<sup>84</sup> See *In re Vasquez-Muniz*, 23 I. & N. Dec. 207, 208 (B.I.A. 2002).

flexible. Two regulations, 8 C.F.R. § 1003.23(b)(1) and 8 C.F.R. § 1003.2(d), form the basis of the departure bar. They apply respectively to the jurisdiction of immigration judges and the BIA and contain identical language providing that a motion to reopen or reconsider “shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States.”<sup>85</sup> The regulations also provide that departure from the United States during the pendency of such a motion shall constitute a withdrawal of the motion.<sup>86</sup>

From the inception of the departure bar in 1952, the BIA has interpreted it as jurisdictional.<sup>87</sup> In 2008, in response to the invalidation of the departure bar in

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<sup>85</sup> 8 C.F.R. §§ 1003.2(d) (with regard to the BIA), 1003.23(b)(1) (2010) (with regard to an immigration judge). The departure bar first entered the regulations in 1952. *See* 17 Fed. Reg. 11469, 11475 (Dec. 19, 1952) (codified at 8 C.F.R. § 6.2). In 1961, following amendments to the INA, the DOJ re-promulgated the departure bar. *See* 27 Fed. Reg. 96, 96-97 (January 5, 1962) (redesignating 8 C.F.R. § 6.2 as 8 C.F.R. § 3.2). Former 8 C.F.R. § 3.2, which applied to the BIA, provided that “a motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.” This language was moved in 1996 to a newly created subsection (d) of 8 C.F.R. § 3.2. *See* 61 Fed. Reg. 18900 (Apr. 29, 1996). The DOJ promulgated regulations implementing IIRIRA in 1997, retaining the departure bar and only slightly modifying the wording of the regulation to read as follows:

*Departure, deportation, or removal.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

This regulation was later redesignated as 8 C.F.R. § 1003.2(d) in 2003. *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003). Following the creation of immigration judges in 1983—replacing former INS Special Inquiry Officers—the DOJ promulgated regulations for the adjudication of MTRs by immigration judges, and included the departure bar. *See* 52 Fed. Reg. 2931 (Jan. 29, 1987) (codified at 8 C.F.R. § 3.22 (1988)). Section 3.22 was redesignated as § 3.23 in 1992. *See* 57 Fed. Reg. 11568 (Apr. 6, 1992). It was redesignated as § 1003.23 in 2003. *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

<sup>86</sup> 8 C.F.R. §§ 1003.2(d) (with regard to the BIA), 1003.23(b)(1) (2010) (with regard to an immigration judge). In addition, a separate departure bar appears in a regulation promulgated in the wake of the Supreme Court’s decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). *See* 8 C.F.R. § 1003.44(k) (2010). The regulation created a special motion to reopen for those erroneously denied the opportunity to apply for section 212(c) relief, but barred those who “have departed the United States and are currently outside the United States,” those who have been deported or removed and “then illegally returned to the United States[,]” and “those who have not been admitted or paroled.” *Id.* § 1003.44(k)(1)-(3).

<sup>87</sup> *See, e.g., In re G- Y- B-*, 6 I. & N. Dec. 159 (B.I.A. 1954); *In re G-N-C-*, 22 I. & N. Dec.

two circuits, the BIA set forth its first detailed defense of the bar. In *In re Armendarez-Mendez*, the BIA concluded that the bar not only prevents a deportee from filing a post-departure motion to reopen or reconsider, but also trumps the sua sponte jurisdiction that the immigration judge or BIA would otherwise have to reopen or reconsider.<sup>88</sup> The BIA reasoned that its inability to entertain post-departure motions is “not just a matter of administrative convenience.”<sup>89</sup> Rather, it is “an expression of the limits of our authority within the larger immigration bureaucracy. Removed aliens have, by virtue of their departure, literally passed beyond our aid.”<sup>90</sup> In the BIA’s view, physical removal from the United States is “a transformative event that fundamentally alters the alien’s posture under the law.”<sup>91</sup> The consequence of a deportee’s departure is “a nullification of legal status, which leaves him in no better position after departure than *any other alien* who is outside the territory of the United States.”<sup>92</sup>

The BIA has carved out only one exception to this reading of the departure bar. Concurring with a conclusion reached earlier by the Eleventh Circuit,<sup>93</sup> the BIA held in 2009 in *In re Bulnes-Nolasco* that a person who seeks to challenge an in absentia order of removal based on lack of notice retains the right to seek reopening and rescission of the order from outside the United States.<sup>94</sup>

The Supreme Court has yet to consider the departure bar,<sup>95</sup> and the lower courts have reached varying conclusions about both the bar’s scope and its

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281, 288 (B.I.A. 1998); *Matter of Okoh*, 20 I. & N. Dec. 864, 864-65 (B.I.A. 1994); *In re Estrada*, 17 I. & N. Dec. 187, 188 (B.I.A. 1979), *rev’d on other grounds*, *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981); *In re Palma*, 14 I. & N. Dec. 486, 487 (B.I.A. 1973); *accord In re Wang*, 17 I. & N. Dec. 565 (B.I.A. 1980).

<sup>88</sup> 24 I. & N. Dec. 646, 660 (B.I.A. 2008) (citation omitted).

<sup>89</sup> *Id.* at 656.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (emphasis in original).

<sup>93</sup> See *Contreras-Rodriguez v. Attorney Gen.*, 462 F.3d 1314 (11th Cir. 2006).

<sup>94</sup> 25 I. & N. Dec. 57 (B.I.A. 2009). See *infra* Part IV.D.

<sup>95</sup> A petition for certiorari is currently pending. See *supra* note 8. Although the Court has not yet directly addressed the departure bar, it has alluded to post-departure issues in a number of recent cases. In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Court found that the question of Lopez’s eligibility for relief on remand was not moot because Lopez could pursue his reopened proceedings from Mexico. See *infra* note 253 and accompanying text. See also Transcript of Oral Argument at 3-6, *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (No. 09-60) (discussing effects of illegal reentry following removal on ability to apply for discretionary relief upon remand to immigration judge). In *Dada v. Mukasey*, 554 U.S. 1 (2008), the Court suggested in dictum that DOJ should consider elimination of the departure bar, and Chief Justice Roberts suggested at oral argument that he might question the validity of the departure bar should it come under review. See *infra* note 201.

validity. The Fourth,<sup>96</sup> Sixth,<sup>97</sup> Seventh,<sup>98</sup> and Ninth<sup>99</sup> Circuits have held under various theories that immigration judges and the BIA retain jurisdiction over motions to reopen and reconsider following departure, while the First,<sup>100</sup>

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<sup>96</sup> The Fourth Circuit struck down the departure bar as ultra vires on the grounds that it directly conflicts with the plain meaning of INA § 240(a)(7)(A), 8 U.S.C. § 1229a(c)(7)(A) (2006), which provides that “[a]n alien may file one motion to reopen proceedings” within ninety days of the date of entry of a final administrative order of removal, without reference to territorial location. *See William v. Gonzales (William I)*, 499 F.3d 329, 332 (4th Cir. 2007).

<sup>97</sup> As this article was going to press, the Sixth Circuit held that the BIA, as an administrative agency, does not have the authority to limit its own jurisdiction. *See Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011).

<sup>98</sup> The Seventh Circuit has confronted the departure bar in two recent cases. In *Marin-Rodriguez v. Holder*, the court struck down the departure bar on the grounds that the BIA, as an administrative agency, does not have the authority to limit its own jurisdiction. *See Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010). Previously, in *Munoz de Real v. Holder*, the court found the motion in question to be time-barred, and therefore declined to consider the validity of the departure bar. *See Munoz de Real v. Holder*, 595 F.3d 747, 749 (7th Cir. 2010). However, the court appeared to accept the proposition that immigration judges retain jurisdiction to reopen or reconsider following a respondent’s departure under the broad grant of sua sponte authority, and applied an abuse of discretion standard to the review of the judge’s decision. *See id.* at 750 (“The [immigration judge]’s decision makes clear, however, that she did in fact reach the question of whether to exercise her discretion to reopen the case but chose not to do so. Munoz de Real offers nothing that suggests that this finding was an abuse of discretion, and we see no reason to overturn it.”).

<sup>99</sup> The Ninth Circuit has adopted a novel reading of the regulatory language, holding that the bar does not apply to someone who has departed the United States subsequent to being ordered removed because such a person is no longer “the subject of” removal proceedings. *See Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007) (interpreting 8 C.F.R. § 1003.23(b)(1)); *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007) (interpreting 8 C.F.R. § 1003.2(d)). The Ninth Circuit has also held that a related provision within the regulation, deeming a motion to reopen to be withdrawn upon the departure of the respondent, is ultra vires. *Coyt v. Holder*, 593 F.3d 902, 906-07 (9th Cir. 2010). Because the two parts of the regulation are so closely related, the court’s decision in *Coyt* suggests that the court would find the other manifestations of the departure bar to be ultra vires as well. Finally, in a long line of cases covering a variety of contexts, the Ninth Circuit has held that where a conviction that formed a “key part” of the deportation or removal proceeding has been vacated, the deportation or removal has not been legally executed and the departure bar therefore does not apply. *See Wiedersperg v. INS*, 896 F.2d 1179, 1183 (9th Cir. 1990); *Estrada-Rosales v. INS*, 645 F.2d 819, 821-22 (9th Cir. 1981). The court has reaffirmed the continuing relevance of this line of cases post-IIRIRA. *See Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006).

<sup>100</sup> The First Circuit has held that Congress did not implicitly repeal the departure bar to reopening through its 1996 repeal of the statutory bar to judicial review. *See Pena-Muriel v. Gonzales*, 489 F.3d 438 (1st Cir. 2007). However, the court did not consider the argument that the regulation conflicts with the statute governing motions to reopen. *See Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007) (denying petition for rehearing and noting that ultra vires argument was not raised by the parties).

Second,<sup>101</sup> Fifth,<sup>102</sup> and Tenth<sup>103</sup> Circuits have upheld the BIA's interpretation of the regulations to varying degrees.

### C. *The Phantom Departure Bar*

While the circuit split is notable, the more interesting story lies in the fact that the BIA has continued to apply the departure bar even in circuits that have narrowly interpreted or eliminated the relevant regulations. The BIA has done so in two distinct ways.

First, the BIA has rejected judicial interpretation of the regulations in favor of its own reading of the regulatory language. In *Armendarez-Mendez*, the Board announced that it would not apply the Ninth Circuit's extremely narrow reading of the departure bar<sup>104</sup> even in the Ninth Circuit. It did so by invoking its interpretive authority under *National Cable & Telecommunications Association v. Brand X Internet Services*.<sup>105</sup> A review of recent BIA cases arising in the Ninth Circuit reveals that the BIA has stuck to its word since *Armendarez-Mendez*, denying post-departure motions and reversing cases in which immigration judges have granted them.<sup>106</sup>

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<sup>101</sup> The Second Circuit considered the departure bar in the context of an untimely motion and thus did not reach the question whether the regulation is ultra vires. See *Zhang v. Holder*, 617 F.3d 650, 664 (2d Cir. 2010). With regard to the effect of the departure bar on the BIA's sua sponte authority to reopen, the court deferred to the BIA's interpretation of the regulation while suggesting its own disagreement with the BIA's conclusion. See *id.* at 660 ("Were we writing on a blank slate, we might reach a different conclusion than that of the BIA regarding the relationship between these portions of 8 C.F.R. § 1003.2.").

<sup>102</sup> The Fifth Circuit has reserved consideration of the ultra vires question, upholding the departure bar only insofar as it is applied to untimely motions on the grounds that the relationship between the departure bar and sua sponte authority to reopen or reconsider is ambiguous and that the agency's interpretation is reasonable. See *Ovalles v. Holder*, 577 F.3d 288, 296 (5th Cir. 2009); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 675-76 (5th Cir. 2003). See also *Mansour v. Gonzales*, 470 F.3d 1194 (6th Cir. 2006) (favorably citing *Navarro-Miranda* in dicta).

<sup>103</sup> The Tenth Circuit is the only court to have directly disagreed with the Fourth Circuit's conclusion that the departure bar is ultra vires. See *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1156 (10th Cir. 2009). It did so, however, in a fractured opinion that included a lengthy dissent finding the regulation to be ultra vires, and a concurrence by the third member of the panel stating that he would have preferred to decide the case on the narrower grounds cited in the Fifth Circuit's decision, but that he joined the majority opinion only to avoid leaving the issue unresolved in the circuit. See *id.* at 1171 (Lucero, J., dissenting); *id.* at 1161 (O'Brien, J., concurring).

<sup>104</sup> See *supra* note 98.

<sup>105</sup> *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 650-53 (B.I.A. 2008) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 976 (2005)).

<sup>106</sup> See, e.g., *In re Chong-Verduzco*, No. A090 834 756, 2010 WL 1607009 (B.I.A. Mar. 30, 2010) (denying MTR where order was based on erroneous denial of opportunity to apply for

Second, where the regulations have been struck down entirely, the BIA has resurrected the departure bar through alternative means. In *Armendarez-Mendez*, the BIA expressed its “respectful disagreement” with the Fourth Circuit’s decision striking down the departure bar in *William v. Gonzales (William I)* and declared its intention not to follow *William I* outside of the Fourth Circuit.<sup>107</sup> Subsequent developments in the Fourth Circuit, however, show that *William I* has had little effect even within the circuit.

In *William I*, the Fourth Circuit considered the relationship between the departure bar and the statute governing motions to reopen.<sup>108</sup> Tunbosun Olawale William, a lawful permanent resident married to a United States citizen, was ordered removed in 2002 based on a conviction for receipt of a stolen credit card.<sup>109</sup> Following the denial of his BIA appeal, William was physically removed from the United States in July 2005.<sup>110</sup> He sought reopening five months later, soon after the criminal court vacated his criminal conviction.<sup>111</sup> The BIA denied his motion on the ground that it lacked jurisdiction due to his departure from the United States.<sup>112</sup> On a petition for review, the Fourth Circuit struck down the departure bar as ultra vires, finding that it conflicted with the plain language of the statute, which imposes no territorial requirement on the filing of motions to reopen.<sup>113</sup> The court remanded the case to the Board to adjudicate on the merits.<sup>114</sup>

Two years after invalidating the departure bar in *William I*, the Fourth Circuit confronted two more petitions for review involving post-departure motions to

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212(c) relief); *In re Haro-Perez*, No. A092 515 273, 2009 WL 2171613 (B.I.A. July 9, 2009) (denying MTR where order was based on erroneous determination that DUI constituted aggravated felony conviction); *In re Alvarez-Briseno*, No. A021 611 209, 2009 WL 773178 (B.I.A. Feb. 27, 2009) (denying MTR where order was based on erroneous determination that second drug possession conviction constituted aggravated felony conviction); *In re Romero-Romero*, No. A042 326 903, 2009 WL 263146 (B.I.A. Jan. 13, 2009) (denying MTR based on vacatur of underlying conviction); *In re Ortiz-Romero*, No. A076 713 230, 2008 WL 5181827 (B.I.A. Nov. 7, 2008) (denying MTR based on change of law); *In re Estrada*, No. A092 408 863, 2008 WL 5025206 (B.I.A. Oct. 27, 2008) (reversing immigration judge’s grant of 212(c) relief in the context of post-departure MTR).

<sup>107</sup> See *Armendarez-Mendez*, 24 I. & N. Dec. at 653, 660.

<sup>108</sup> *William I*, 499 F.3d 329, 331-34 (4th Cir. 2007). The statute governing motions to reopen, added by IIRIRA, is INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2006).

<sup>109</sup> *William I*, 499 F.3d at 331.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 333 (finding that “§ 1229a(c)(7)(A) clearly and unambiguously grants an alien the right to file one motion to reopen, regardless of whether he is present in the United States when the motion is filed”).

<sup>114</sup> *Id.* at 334.

reopen. One was *Sadhvani v. Holder*,<sup>115</sup> which concerned an asylum application that an immigration judge had denied in 1998.<sup>116</sup> The immigration judge's decision was affirmed by the BIA in 2002.<sup>117</sup> Sadhvani subsequently filed a motion to reopen with the BIA, which was denied.<sup>118</sup> In December 2005, while still in the United States, Sadhvani filed a second motion to reopen, based on changed country conditions.<sup>119</sup> The BIA granted his second motion in March 2006, finding that Sadhvani "met the standards for reopening based on new evidence of changed circumstances."<sup>120</sup> However, the government then filed a motion to reconsider the grant of reopening, pointing out that Sadhvani had been removed to Togo two weeks after filing his motion to reopen and that, pursuant to 8 C.F.R. § 1003.2(d), Sadhvani's motion to reopen was to be considered withdrawn.<sup>121</sup> The BIA agreed and granted the government's motion to reconsider.<sup>122</sup> Sadhvani then sought review in the Fourth Circuit, which remanded the case to the BIA for further consideration in light of the court's recent decision in *William I.*<sup>123</sup>

Given that the departure bar had been struck down by the Fourth Circuit's decision in *William I.*, it might be reasonable to assume that the BIA would reinstate its grant of Sadhvani's motion to reopen. After all, the BIA originally granted his motion on the merits before becoming aware of his departure, and then changed its decision solely on the basis of the now-invalidated regulation. But on remand, the BIA offered two new rationales for denying the motion. First, Sadhvani's motion was number-barred.<sup>124</sup> Second, the BIA found that even if the motion were not number-barred, it should be denied because under the statute governing asylum, only an alien who is "physically present in the United States" may apply for such relief.<sup>125</sup> Sadhvani once again sought review

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<sup>115</sup> 596 F.3d 180 (4th Cir. 2009).

<sup>116</sup> *Id.* at 181.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 181-82.

<sup>120</sup> *Id.* at 182.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* This argument seems specious under the circumstances; it is entirely within the BIA's authority to grant a motion to reopen even if it is number-barred, and the BIA was fully aware of the procedural history when it initially granted Sadhvani's motion.

<sup>125</sup> *Id.* This interpretation of the asylum statute raises questions that are beyond the scope of this article and would be a worthy topic for future research. Briefly, however, at least two points could be raised in favor of allowing reopening under such circumstances. First, the fact that a person must be within the United States to *file* an application for asylum does not necessarily mean that the applicant must remain continuously in the United States thereafter; in particular, there may be grounds to excuse an absence when, as in Sadhvani's case, it is involuntary. Second, the issue of territorial presence could have been remedied by permitting

in the Fourth Circuit, but the court held that the BIA's decision was a valid exercise of discretion.<sup>126</sup>

The other case to raise a post-*William I* question was none other than *William II*.<sup>127</sup> On remand from the Fourth Circuit, the BIA acknowledged that, pursuant to the court's decision, it had jurisdiction over William's motion to reopen.<sup>128</sup> The BIA further acknowledged that it had authority to grant reopening sua sponte regardless of timeliness and noted that vacatur of a criminal conviction can justify invocation of such authority.<sup>129</sup> However, the BIA found that, in this case, vacatur of William's criminal conviction was not an exceptional circumstance warranting reopening:

[W]hen a motion to reopen is filed long after the relevant removal order has become final, long after the statutory deadline for seeking reopening has passed and, indeed, long after the movant has in fact been physically removed from the United States (thereby consummating the removal proceedings in every legal sense), we believe the imperative of finality forbids reopening except upon a showing that enforcement of the removal order would constitute a gross miscarriage of justice.<sup>130</sup>

The BIA went on to explain that a removal order results in a gross miscarriage of justice "only if the order clearly could not have withstood judicial scrutiny under the law in effect at the time of its issuance or execution."<sup>131</sup> The BIA then noted that "the result might have been different if William sought vacatur before his removal or if the vacatur was based on new evidence that was not reasonably available until after he was removed."<sup>132</sup>

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Sadhvani to return to the United States during the pendency of the reopened proceeding. The BIA has taken the position that it lacks the authority to order such a return. *See infra* Part VI.A. Even if this were the case, however, the BIA could have reopened the case and left Sadhvani to deal with the relevant agencies in order to secure his return. This is, in effect, what has happened where federal courts have granted petitions for review or habeas petitions deeming a deported respondent to be eligible to apply for discretionary relief. *See, e.g., Lopez v. Gonzales*, 549 U.S. 47 (2006); *Gutierrez v. Gonzales*, 125 F. App'x 406 (3d Cir. 2005). It is rare that a person in such circumstances is able to secure permission to return to the United States while the removal proceeding is still pending (as opposed to after relief has been granted). However, I represented one client who obtained such permission and was able to appear in person at his hearing. Such cases suggest a model that is particularly relevant where, as in Sadhvani's case, the government might argue that the statute requires territorial presence.

<sup>126</sup> *Sadhvani*, 596 F.3d at 183.

<sup>127</sup> *William v. Holder (William II)*, 359 F. App'x 370 (4th Cir. 2009) (per curiam).

<sup>128</sup> *Id.* at 372. The Fourth Circuit's decision in *William II* quotes extensively from the BIA's unpublished decision, *In re William*, No. A073 561 811, 2008 WL 5537807 (B.I.A. Dec. 23, 2008).

<sup>129</sup> *William II*, 359 F. App'x at 372-73 (citing BIA decision under review).

<sup>130</sup> *Id.* at 372 (quoting BIA decision under review).

<sup>131</sup> *Id.* (quoting BIA decision under review).

<sup>132</sup> *Id.* at 373 (quoting BIA decision under review).

Finally, the BIA asserted that even if it granted the motion to reopen, William would not be able to regain his lawful permanent resident status because “his 2005 removal [would preclude] him from seeking admission for a period of 10 years.”<sup>133</sup>

There are several notable aspects of the BIA’s reasoning. First, William sought reopening shortly after his conviction was vacated,<sup>134</sup> and the BIA routinely grants untimely motions to reopen in such circumstances when the individual in question is still in the United States.<sup>135</sup> Second, the “gross miscarriage of justice” standard has not traditionally been employed by the BIA in adjudicating ordinary motions to reopen.<sup>136</sup> Rather, this standard derives from cases involving collateral attacks on prior removal orders brought within a *new* proceeding after a deportee has reentered the United States.<sup>137</sup> Finally, it is simply untrue that William would, if successful before the BIA, be unable to reenter the United States. If the BIA were to vacate the removal order and terminate the proceedings, William would be restored to his permanent resident status and the removal order would be without legal effect. Other permanent residents have returned to the United States under precisely such circumstances.<sup>138</sup>

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<sup>133</sup> *Id.* (quoting BIA decision under review). The ten-year bar in question can be found in INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2006), which provides for inadmissibility bars of varying lengths depending on the nature of a removal order.

<sup>134</sup> In ruling on the original petition for review, the Fourth Circuit noted that the government made clear at oral argument that the timeliness of the motion was not at issue in the case. *See William I*, 499 F.3d 329, 334 n.5 (noting that “the Government does not argue that a remand to the BIA would be futile because of a procedural or other defect in William’s motion or that the BIA would necessarily refuse to exercise its discretion to reopen proceedings. In fact, at oral argument, the Government noted that none of the statutory or regulatory limitations [besides the departure bar] is currently at issue.”). In addition, the Fifth Circuit subsequently distinguished a post-departure case from *William I* on the ground that *William I* concerned a timely filed motion. *See Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009).

<sup>135</sup> *See Cruz v. Attorney Gen.*, 452 F.3d 240, 249 (3d Cir. 2006).

<sup>136</sup> Of the BIA decisions that are publicly available, there are only two other cases in which the standard has been invoked in the context of an MTR, and both are recent cases that involve post-departure MTRs. *See Munoz de Real v. Holder*, 595 F.3d 747 (7th Cir. 2010) (affirming BIA affirmance of the immigration judge’s denial of a post-departure MTR on the basis of the “gross miscarriage of justice” standard); *In re Sandoval-Ortiz*, No. A092 538 275, 2010 WL 1251016 (B.I.A. Feb. 23, 2010) (denying MTR on the basis of “gross miscarriage of justice” standard where removal order was based on erroneous classification of DUI conviction as an aggravated felony). For further discussion of the BIA’s application of this standard to MTRs, *see infra* Part V.E.

<sup>137</sup> *See infra* Part V.E.

<sup>138</sup> *See, e.g., Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). These cases are procedurally distinct in that they involved petitions for review rather than motions to reopen or reconsider; however, they provide examples of cases in which individuals who have departed the United States pursuant to administratively final orders of removal have

It is, in the end, only William's departure from the United States that distinguished his case from many others in which the BIA has granted reopening based on vacatur of the underlying conviction. William's second petition for review thus presented the Fourth Circuit with the same question it had confronted the first time around: can the agency impose an additional requirement (that is, territorial presence) not mandated by the enabling statute? Yet, this time, the BIA's decision survived. The court denied the petition for review on the grounds that the BIA's decision not to exercise sua sponte authority to reopen is one of unfettered discretion not amenable to judicial review.<sup>139</sup>

*William II*, even more clearly than *Sadhvani*, marks the advent of a new chapter in the evolution of the departure bar. The bar, struck down as ultra vires, has been reincarnated in phantom form under the guise of discretion.<sup>140</sup>

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been permitted to return to the United States when such orders are vacated. They thus raise precisely the same issue with regard to the inadmissibility implications of a vacated order of removal. I am not aware of any cases in which the government has argued that a vacated order of removal renders an LPR inadmissible. In fact, the government argued just the opposite in *Lopez v. Gonzales*, and the Supreme Court agreed with the parties that the case was not moot because Lopez could continue to pursue relief from abroad. *See infra* note 253. In addition, the BIA has, on occasion, permitted consideration of discretionary relief on a post-departure motion to reopen when the government has consented to or sought such consideration. *See, e.g., In re Campos-Mendez*, No. A34 065 088, 2006 WL 3485570 (B.I.A. Oct. 27, 2006).

<sup>139</sup> *William II*, 359 F. App'x. 370, 373-74 (4th Cir. 2009). *See* 8 C.F.R. § 1003.2(a) (2010) ("The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.").

<sup>140</sup> I am indebted to the work of Hiroshi Motomura for the notion of "phantom" norms. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). The BIA has repeatedly defended the departure bar as a jurisdictional limitation, and in this respect the BIA's decision on remand subsequent to *William I* marks the introduction of a new rationale for the bar. However, it is worth noting that the "jurisdictional" nature of the departure bar has always been somewhat questionable. While stating that it lacks jurisdiction over post-departure motions, the BIA has been willing on occasion to adjudicate such motions when the government has lent its support. It has even done so where the person seeking relief has reentered the United States without authorization prior to seeking reopening. *See In re Campos-Mendez*, No. A34 065 088, 2006 WL 3485570 (B.I.A. Oct. 27, 2006) (remanding to immigration judge for consideration of application for 212(c) relief, following Ninth Circuit's granting of government's motion to remand to BIA, where respondent was removed without being provided with the opportunity to apply for relief, and respondent subsequently reentered without authorization). Arguably, the regulation even in its broadest interpretation permits reopening or reconsideration under such circumstances, since it bars only those motions filed "by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States." 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) (2010). Yet this insight begs the question whether the "jurisdictional" nature of the bar extends to the BIA's own power to grant sua sponte reopening or reconsideration. *See also* *Marin-Rodriguez v. Holder*, 612 F.3d 591, 594-595 (7th Cir. 2010) (holding that the BIA,

## IV. TERRITORIALITY AND THE SIGNIFICANCE OF DEPARTURE

The persistence of this phantom departure bar suggests that judicial invalidation of the relevant regulations—or even the elimination of the regulations through administrative rulemaking or legislation—will not necessarily provide deportees with an effective means of correcting erroneous removal orders. In the remainder of the article, I seek to lay the groundwork for a more comprehensive approach to dismantling the departure bar. Such an approach goes beyond arguments about the meaning or validity of the regulatory language and instead challenges the deep-seated assumptions that underlie the BIA’s reluctance to grant post-departure reopening or reconsideration. The present section considers how the courts and Congress have grappled with the territorial aspects of departure in a number of other immigration law contexts, and the implications of these examples for administrative reopening and reconsideration. The sections that follow discuss finality and prudential considerations.

A. *The “Exit Fiction” Doctrine*

The notion that the reach of laws and of courts is territorially limited lies at the heart of the American legal system.<sup>141</sup> Within the realm of immigration law, the Bill of Rights has proven to be “a futile authority for the alien seeking admission for the first time to these shores.”<sup>142</sup> However, “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies

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as an administrative agency, does not have the authority to limit its own jurisdiction).

<sup>141</sup> Notions of territorial sovereignty have generally been traced back to the Treaty of Westphalia, in 1648, which ushered in a new era of secular nation-states, replacing the overlapping loyalties and allegiances of medieval Europe. *See generally* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) [hereinafter NEUMAN, STRANGERS TO THE CONSTITUTION]; Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 366–67 (2009); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2508–09 (2005). The Supreme Court did not hold that a constitutional right applied outside the United States until 1957, when it recognized that United States citizens living as civilians on military bases abroad could not be tried by court-martial. *See Reid v. Covert*, 354 U.S. 1, 5 (1957). The Court declined to extend constitutional protections to noncitizens outside United States borders on several occasions in the decades following *Reid v. Covert*. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). It is in the context of these cases that commentators have hailed the significance of the Court’s recent decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), to extend habeas rights to detainees held at Guantanamo Bay.

<sup>142</sup> *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring). As the Court has famously stated, “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>143</sup>

Although this distinction is in a broad sense territorial, it does not run strictly along geographic lines.<sup>144</sup> An “arriving alien” who is detained on United States soil while awaiting a hearing on admissibility retains the legal status (or rather, lack thereof) that she had at the border.<sup>145</sup> So does a noncitizen who is paroled into the United States upon arrival.<sup>146</sup> This territorial sleight of hand is known as the “entry fiction” doctrine.<sup>147</sup> Through the entry fiction, the Court withholds due process protections within immigration proceedings from some noncitizens even if they are physically located within the territorial jurisdiction of the United States.<sup>148</sup> In effect, the border bends inward, carried along by a person who is physically present but not accorded the procedural protections associated with such presence.

In several cases ostensibly dealing with the meaning of “entry,” the Supreme Court has also confronted the meaning of departure. In a line of cases stretching from the 1950s to the 1980s, the Court considered whether returning permanent residents could avoid the harsh statutory or constitutional

<sup>143</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The Supreme Court has long held that a noncitizen who is territorially present and facing removal has the right to notice and an opportunity to be heard. *See Yamataya v. Fisher*, 189 U.S. 86, 101 (1903). On territorial personhood, *see generally* LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006); NEUMAN, *STRANGERS TO THE CONSTITUTION*, *supra* note 141.

<sup>144</sup> For insightful discussions of “moving borders,” *see* Ayelet Shachar, *The Shifting Border of Immigration Enforcement*, 30 MICH. J. INT’L L. 809 (2009); Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115 (2009).

<sup>145</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953).

<sup>146</sup> *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958).

<sup>147</sup> Although the Supreme Court has never used this term, the doctrine has been widely recognized in the lower courts. For recent examples, *see Bayo v. Napolitano*, 593 F.3d 495, 502 (7th Cir. 2010); *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1253 (9th Cir. 2008). The constitutional implications of entry, and the development of the entry fiction doctrine, have attracted considerable commentary. *See, e.g.*, T. Alexander Aleinikoff, *Aliens, Due Process, and “Community Ties”: A Response to Martin*, 44 U. PITT. L. REV. 237 (1983); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373 (2004); David Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983); Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017 (2007).

<sup>148</sup> This could be viewed as the denial of constitutional personhood, or alternatively as a diminished form of personhood. *See* Linda Bosniak, *Persons and Citizens in Constitutional Thought*, 8 INT’L J. CONST. L. 9, 14 (2010) (“Personhood may not be formally withdrawn, and yet it may be diminished in its effect, evaded, effaced, diluted, displaced. This is the real risk to constitutional personhood for noncitizens and for some citizens, as well; not outright removal but depreciation—at times specifically imposed by government and at others, perhaps, a function of the inherent incompleteness of the category itself.”).

consequences of being outside a territorial border or having newly entered.<sup>149</sup> These cases provide examples of returning residents who avoided statutory grounds of exclusion<sup>150</sup> or deportation<sup>151</sup> that would have ensnared them if they were first-time entrants, or who were provided with the procedural protections that come with territorial presence.<sup>152</sup> Even in *Shaughnessey v. United States ex rel. Mezei*, a much-criticized case in which the Court held that a longtime legal resident had no greater rights upon return than a first-time entrant, the Court's decision was based not on any absolute rule regarding departure but rather on the Court's (highly questionable) conclusion that Mezei's nineteen-month stay "behind the Iron Curtain" was sufficiently suspicious to divest him of the privileges normally possessed by a returning resident.<sup>153</sup> Taken together, these cases demonstrate that the Supreme Court long ago confronted the question of the effects of departure from the United States. The Court's answer was a functional one rather than a formal one: that the determination hinges not on physical location but on the length and nature of the absence.<sup>154</sup>

These cases reveal, I would argue, an unstated doctrine that might be called the "exit fiction." Like the entry fiction, the exit fiction works a kind of

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<sup>149</sup> In chronological order, these cases are *Delgado v. Carmichael*, 332 U.S. 388 (1947), *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), *Shaughnessey v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Landon v. Plasencia*, 459 U.S. 21 (1982).

<sup>150</sup> See *Fleuti*, 374 U.S. at 452. *Fleuti*, had his return to the United States been deemed an entry, would have been subject to exclusion for being "afflicted with psychopathic personality" (i.e. homosexuality), a ground of exclusion but not deportation. The Court held that a permanent resident whose absence is "brief, casual, and innocent" would not be deemed to be making an entry. *Id.*

<sup>151</sup> See *Delgado*, 332 U.S. at 390-91. *Delgado*, had he been deemed to have made an entry, would have been deportable for having committed a crime involving moral turpitude within five years of entry. *Id.*

<sup>152</sup> See *Plasencia*, 459 U.S. at 33-34 (holding that returning permanent resident had the right to procedural due process in exclusion proceeding, and applying the balancing test established by *Mathews v. Eldridge*, 424 U.S. 319, 336 (1976)); *Chew*, 344 U.S. at 600 (holding that former 8 C.F.R. § 175.57(b), which provided for exclusion without hearing of noncitizens deemed to be prejudicial to the public interest, did not apply to LPR returning from five-month voyage on United States merchant ship). Although *Chew* was technically a case of regulatory construction, its constitutional dimensions have been widely recognized. See *Motomura*, *supra* note 139, at 569-73 (discussing *Chew* as an example of the use of a "phantom" constitutional norm); *Plasencia*, 459 U.S. at 33 (noting that although the holding in *Chew* "was one of regulatory interpretation, the rationale was one of constitutional law").

<sup>153</sup> See *Mezei*, 345 U.S. at 214.

<sup>154</sup> The Court's decision in *Mezei* can be read as being based on both the length ("19 months") and nature ("behind the Iron Curtain") of Mezei's trip. See *id.* At least one court, however, has interpreted the Court's later decision in *Plasencia* to stand for the proposition that entitlement to due process is based solely on the length (and not the nature) of time spent outside the United States. See *Rafeedie v. INS*, 880 F.2d 506, 521-22 (D.C. Cir. 1989).

territorial magic, but in the opposite direction. While the entry fiction pulls the border inward with the person who is territorially but not yet constitutionally present, the exit fiction extends the border outward to envelop the returning resident who has left the territorial United States physically but not, in some sense, legally.<sup>155</sup> Just as (in the Court's view) not all of those who are territorially present benefit from constitutional or statutory protections, not all of those who are outside lose such protections. There is a difference, in other words, between having left the United States and having not yet arrived. This difference has been cast largely in terms of affiliation.<sup>156</sup> The "exit fiction" cases recognize that the ties accrued by those who are territorially present do not evaporate upon departure.

If this line of cases illustrates the Court's penchant for flexibility when it comes to the rights of returning permanent residents, an instructive counterpoint can be found in the Court's 1984 decision in *INS v. Phinpathya*.<sup>157</sup>

The case concerned an undocumented immigrant who was seeking a form of relief that required a showing of continuous physical presence.<sup>158</sup> The government asked the Court to find, as the BIA had, that the applicant's three-month absence from the United States, during which she procured a visa under false pretenses, was not "brief, casual, and innocent" and thus precluded a finding of continuous physical presence.<sup>159</sup> The Court, however, went much

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<sup>155</sup> The entry fiction and the exit fiction at times serve to cancel each other out: for example, a returning LPR is charged with inadmissibility, detained on United States soil or paroled into the United States, and given the procedural protections that come with being "inside" (which she in fact is) rather than "outside" (as the entry fiction would otherwise dictate). Importantly, though, the exit fiction doctrine is not merely an exception to the entry fiction doctrine—that is, a way for a territorially present returning LPR to avoid a doctrine that would otherwise deny her the rights that territorial presence confers. Maria Plasencia's right to procedural due process did not stem from being detained or paroled: she was entitled to due process at the moment that, standing at the border, she presented herself for admission. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). The exit fiction thus represents a significant exception to the territorial notions of constitutional personhood that have otherwise dominated Supreme Court doctrine on immigration proceedings.

<sup>156</sup> See *id.* ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.")

<sup>157</sup> 464 U.S. 183 (1984).

<sup>158</sup> The statutory provision at issue in the case allowed the Attorney General to suspend the deportation of an applicant who could establish that he "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, . . . that during all such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence . . ." See INA § 244(a)(1), 8 U.S.C. § 1254(a)(1) (repealed 1996).

<sup>159</sup> *Phinpathya*, 464 U.S. at 187. For the origin of the "brief, casual, and innocent" standard, see *supra* note 150.

further than the government asked it to. In a decision that has been described as a “bombshell,”<sup>160</sup> the Court held that the statute was to be interpreted literally and that any departure from the United States would preclude continuous physical presence.<sup>161</sup>

*Phinpathya* suggests a fault line dividing those noncitizens with what the Court has traditionally considered to be the strongest affiliational claims—lawful permanent residents—from others. However, the aftermath of *Phinpathya* tells another story altogether. Congress reacted swiftly to the decision: five months later, the House of Representatives voted 411-4 to amend the statute so that it would bar only those absences that were meaningfully interruptive.<sup>162</sup> Although the Senate did not immediately act, two years later Congress added a provision to the statute codifying the application of the “brief, casual, and innocent” exception for the form of relief at issue in *Phinpathya*.<sup>163</sup> Even at the height of Congress’s efforts to restrict relief from removal, when this form of relief was eliminated through the passage of IIRIRA and replaced with a far less generous version, Congress nevertheless codified an exception for brief departures.<sup>164</sup> The reaction to *Phinpathya* suggests that a functional approach to departure has been of interest to Congress as well as to the courts, and that Congress has extended this approach beyond returning permanent residents to encompass even some undocumented immigrants.

### B. Departure and Judicial Review

Judicial review presents another arena in which Congress and the courts have engaged in an ongoing dialogue regarding the significance of departure. Between 1961 and 1996, former INA section 106 deprived the federal courts of jurisdiction to review a deportation or exclusion order following a deportee’s

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<sup>160</sup> STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 604 (5th ed. 2009).

<sup>161</sup> *Phinpathya*, 464 U.S. at 195-96.

<sup>162</sup> See 130 Cong. Rec. 16348-50 (June 14, 1984) (statement of Rep. Roybal) (purpose of the amendment was “to express the intent of Congress that the requirement [of continuous physical presence] not be literally or strictly construed in light of the recent Supreme Court opinion that did so”). For an account of the case and its aftermath, see LEGOMSKY & RODRIGUEZ, *supra* note 160, at 604-605.

<sup>163</sup> Former INA section 244(b)(2) was amended by section 315(b) of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, Title III (repealed 1996).

<sup>164</sup> Suspension of deportation, the form of relief at issue in *Phinpathya*, was replaced in 1996 by cancellation of removal, INA § 240A(b), 8 U.S.C. § 1229b(b) (2006). The new statute provides that continuous physical presence will be destroyed by single absences of more than 90 days, or an aggregate absence of more than 180 days. INA § 240A(d)(2), 8 U.S.C. § 1229b(d)(2) (2006).

departure from the United States.<sup>165</sup> As Peter Spiro has chronicled, Congress enacted section 106 in the wake of several celebrated cases in which noncitizen “subversives” managed to delay their deportations for years on end through skillful use of the appeals process.<sup>166</sup> The departure bar was just one element of the new statute, and was not the subject of extensive debate.<sup>167</sup>

Although the departure bar was perhaps symbolically important, its practical effect on judicial review was limited. A person seeking review of a deportation order during this period rarely found herself in the position of needing to invoke the jurisdiction of the court from abroad because the filing of a petition for review automatically stayed the execution of the deportation order.<sup>168</sup> There were, however, several instances in which deportees did seek review from the courts following departure, and an echo of the exit fiction doctrine can be seen in these cases. In the 1977 case *Mendez v. INS*,<sup>169</sup> the Ninth Circuit held that departure under circumstances that violate due process did not bar the court’s jurisdiction to review the legality of the deportation order.<sup>170</sup> The Third Circuit

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<sup>165</sup> INA § 106(c), 8 U.S.C. § 1105a(c) (repealed 1996) (“An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.”).

<sup>166</sup> See Spiro, *supra* note 76, at 283-87; Kanstroom, *supra* note 76. The case that inspired the departure bar on judicial review was that of Finnish immigrant and former Communist Party member William Heikkila, who was ordered deported in 1948 but deferred his deportation for many years through appeals. See Spiro, *supra*, at 283-87. At one point during this saga, Heikkila was essentially kidnapped by immigration authorities: he was seized in San Francisco, flown to Vancouver, Canada, and then put on a plane to Finland, without being permitted to contact his family, his attorney, or the Finnish consul. See *Immigration: Round Trip to Helsinki*, TIME, May 5, 1958, available at <http://www.time.com/time/magazine/article/0,9171,863303,00.html>. Under order from a Federal District Court, the INS permitted Heikkila to reenter the United States two weeks later to continue pursuing his appeal. *Id.* Upon his death in 1960, Heikkila was still residing in the United States.

<sup>167</sup> See Spiro, *supra* note 76, at 285.

<sup>168</sup> 8 U.S.C. § 1105a(a)(3) (repealed 1996) (“The service of the petition for review . . . shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs[.]”). In 1990, Congress excluded those with aggravated felony convictions from the automatic stay provision. See Immigration Act of 1990 § 513(a), Pub. L. No. 101-649, 101 Stat. 4978. However, those with such convictions were entitled to a stay if they could establish that they met the traditional standard: “(1) a likelihood of success on the merits; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the movant outweighs the harm to the opposing party if a stay is not granted; and (4) that the granting of the stay would serve the public interest.” *Ignacio v. INS*, 955 F.2d 295, 299 (9th Cir. 1992).

<sup>169</sup> 563 F.2d 956 (9th Cir. 1977).

<sup>170</sup> *Id.* at 958 (noting that “‘departure’ in the context of [former INA § 106] cannot mean ‘departure in contravention of procedural due process’”). *Mendez* concerned a lawful permanent resident who had been ordered deported based on a criminal conviction that fit

agreed, commenting that former section 106 “says only that we lack jurisdiction when the alien has ‘departed.’ We are reluctant to substitute the word ‘deported’ when a right so fundamental as due process is at stake.”<sup>171</sup> This approach met with mixed reception in other circuits,<sup>172</sup> and has been criticized on the ground that the legislative history of former section 106 evinces Congress’s intent to apply the bar without regard to circumstances.<sup>173</sup>

With the passage of IIRIRA in 1996, Congress turned the statutory scheme governing judicial review on its head. Where previously the INA imposed a departure bar but provided an automatic stay while a petition for review was pending, “IIRIRA ‘inverted’ [these] provisions of the INA, encouraging prompt voluntary departure and speedy government action, while eliminating prior statutory barriers to pursuing relief from abroad.”<sup>174</sup> It did so by eliminating the automatic stay of deportation that used to result from the filing of a petition for review,<sup>175</sup> mandating that removal be effected within ninety days,<sup>176</sup> and eliminating the departure bar on judicial review.<sup>177</sup> In short, IIRIRA ensured that most respondents in removal proceedings left the United States soon after

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within the grounds of deportability. *Id.* at 957-58. Prior to Mendez’s departure from the United States, the criminal court vacated his sentence, which altered the immigration consequences of the conviction. *Id.* The INS mailed the petitioner a notice to appear for deportation soon thereafter but provided no notice (as required by relevant regulations) to the petitioner’s attorney. *Id.* When the petitioner appeared as instructed, he informed the INS that his sentence had been vacated, but was deported that day without being given the opportunity to contact his attorney. *Id.* His motion for reconsideration, filed post-departure, was denied on the grounds that the departure deprived the BIA of jurisdiction, and his petition for review was opposed by the government on the grounds that the court lacked jurisdiction to review. *Id.*

<sup>171</sup> *Marrero v. INS*, 990 F.2d 772, 777 (3d Cir. 1993).

<sup>172</sup> The Sixth and Eighth Circuits adopted versions of the *Mendez* holding. See *Camacho-Bordes v. INS*, 33 F.3d 26, 27 (8th Cir. 1994); *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984). Other circuits have rejected it. See *Baez v. INS*, 41 F.3d 19, 23 (1st Cir. 1994); *Roldan v. Racette*, 984 F.2d 85, 90 (2d Cir. 1993) (observing that “[t]he pertinent language of § 1105a(c) constitutes a clear jurisdictional bar, and admits of no exceptions”); *Quezada v. INS*, 898 F.2d 474, 476 (5th Cir. 1990) (quoting *Umanzor v. Lambert*, 782 F.2d 1299, 1303 (5th Cir. 1986)) (“*Mendez* has become a sinkhole that has swallowed the rule of 1105a(c).”). See also *Joechar v. INS*, 957 F.2d 887, 890 (D.C. Cir. 1992) (declining to consider the *Mendez* exception with respect to noncitizen who had departed voluntarily).

<sup>173</sup> See *Spiro*, *supra* note 76, at 285-87.

<sup>174</sup> *Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010) (quoting *Nken v. Holder*, 129 S. Ct. 1749, 1755 (2009)).

<sup>175</sup> See 8 U.S.C. § 1252(b)(3)(B) (2006) (“Service of the petition on the officer or employee does not stay the removal of an alien pending the court’s decision on the petition, unless the court orders otherwise.”). This provision was added by IIRIRA section 306(b).

<sup>176</sup> See INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A) (2006). This provision was added by IIRIRA section 305(a)(3).

<sup>177</sup> IIRIRA section 306(b) replaced former section 106 with INA § 242, 8 U.S.C. § 1252 (2006). The new section 242 does not include the departure bar.

their removal order became final, but at the same time enabled them to pursue their appeals from outside the United States.

### C. Departure and Administrative Appeals

Another area in which the courts have confronted the meaning of departure is within the context of administrative appeals. DOJ regulations provide that a pending appeal to the BIA is deemed withdrawn if the respondent in the removal proceeding departs the United States.<sup>178</sup> However, as in the case of judicial review prior to 1996, execution of a removal order is automatically stayed during the pendency of an administrative appeal,<sup>179</sup> and the practical effect of this regulation has thus been limited.

Like the departure bar on judicial review, the departure bar on administrative appeals has received mixed reactions from the courts.<sup>180</sup> Some circuits have suggested that a departure must be voluntary and intentional in order to withdraw an appeal,<sup>181</sup> while other courts have found that the regulation applies even to inadvertent departures.<sup>182</sup> No court, however, has found that forcible removal by the government could serve to withdraw an appeal.<sup>183</sup>

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<sup>178</sup> 8 C.F.R. § 1003.4 (2010) (“Departure from the United States of a person who is the subject of deportation or removal proceedings, except for arriving aliens as defined in § 1001.1(q) of this chapter, subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.”).

<sup>179</sup> 8 C.F.R. § 1003.6 (2010) (automatic stay pending administrative appeal).

<sup>180</sup> For an analysis of this case law, see Marianna C. Mancusi-Ungaro, Comment, *Defining “Departure” in the Context of 8 C.F.R. § 1003.4*, 76 U. CHI. L. REV. 467 (2009).

<sup>181</sup> See *Mansour v. Gonzales*, 470 F.3d 1194 (6th Cir. 2006); *Aguilera-Ruiz v. Ashcroft*, 348 F.3d 835 (9th Cir. 2003); *Mejia-Ruiz v. INS*, 51 F.3d 358 (2d Cir. 1995). Courts have been unanimous, however, in rejecting the application of the *Fleuti* doctrine, *supra* note 150. See *Mansour*, 470 F.3d at 1199; *Aguilera-Ruiz*, 348 F.3d at 837; *Mejia-Ruiz*, 51 F.3d at 365.

<sup>182</sup> See *Long v. Gonzales*, 420 F.3d 516 (5th Cir. 2005); *Moreno v. Gonzales*, 206 F. App'x 815 (10th Cir. 2006). The BIA itself has shown some ambivalence on the matter. It first held that “the lone term ‘departure’ . . . as to withdrawals of appeals is not meant to reach involuntary removals from the country[.]” *Long*, 420 F.3d at 518, and remanded to the immigration judge for a determination as to voluntariness. When the case came back up on review with a finding that the departure had been involuntary, the BIA concluded that the appeal was nevertheless withdrawn. See *id.*

<sup>183</sup> This question was reserved by the Fifth Circuit. See *Long*, 420 F.3d at 520 n.6. It was addressed directly by the Sixth Circuit. See *Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) (expressing agreement with *Long* but distinguishing on the basis of the government’s improper removal).

*D. Departure and Rescission of In Absentia Orders of Removal*

The BIA has arguably adopted an exit fiction of its own within the limited context of in absentia removal orders. In *In re Bulnes-Nolasco*,<sup>184</sup> the BIA carved out an important exception to the departure bar for those seeking to reopen and rescind in absentia orders based on lack of notice.<sup>185</sup>

The crux of the BIA's reasoning in *Bulnes-Nolasco* is that a person ordered removed in an in absentia proceeding without proper notice should not be considered to have been truly removed.<sup>186</sup> The BIA reasoned that an in absentia removal order issued in proceedings of which the respondent had no notice is voidable from its inception and becomes a legal nullity upon its rescission, with the result "that the respondent reverts to the same immigration status that he or she possessed prior to entry of the order."<sup>187</sup> Secondly, the BIA noted that the regulation governing in absentia orders permits rescission "at any time," suggesting that "an alien ordered deported in absentia possesses a robust right to challenge the removal order on improper notice grounds."<sup>188</sup> The BIA concluded that "[a]pplying the jurisdictional bar to reopening in a case involving an inoperative in absentia deportation order would give that order greater force than it is entitled to by law and would, as a practical matter, impose a limitation on motions to rescind that is not compatible with the broad language of [the regulation governing rescission]."<sup>189</sup>

*E. Implications for Administrative Reopening and Reconsideration*

At a minimum, these comparisons suggest that there is nothing inherently transformative about departure. In a variety of contexts, noncitizens retain legal rights after crossing a territorial border. They retain such rights even, in some cases, after crossing a territorial border while subject to an order of removal.

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<sup>184</sup> 25 I. & N. Dec. 57 (B.I.A. 2009).

<sup>185</sup> *Id.* at 60.

<sup>186</sup> *Id.* at 59.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* The regulation governing rescission is 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2) (2010). It could be noted, in this context, that the broad "at any time" language that the BIA finds so significant in *Bulnes-Nolasco* also appears in the regulations regarding the authority of immigration judges and the BIA to reopen or reconsider sua sponte. See *supra* note 81 and accompanying text. The language with regard to in absentia orders also appears in the statute, see INA § 240(b)(5)(C)(ii), 8 U.S.C. § 1229a(b)(5)(C)(ii) (2006), which is perhaps an important distinction. However, the BIA cited only to the regulation, not the statute. The BIA did note, however, that the "at any time" language regarding in absentia motions is (in contrast to the language with regard to regular MTRs) both more specific and more recent than the regulations imposing the departure bar. See *Bulnes-Nolasco*, 25 I. & N. Dec. at 60 n.3.

Where courts have imposed departure-based distinctions, they have generally done so pursuant to their interpretation of congressional intent<sup>190</sup>—a factor entirely absent within the realm of the departure bar on administrative reopening or reconsideration. Moreover, courts have often shown an inclination to skirt the effects of departure even in the face of seemingly inflexible statutory language.<sup>191</sup>

If there is nothing inherently transformative about departure, and no congressional mandate to impose departure-based distinctions, courts might fairly ask—as the Fourth, Sixth, Seventh, and Ninth Circuits<sup>192</sup> have—what authority DOJ has to impose the requirement of territorial presence through regulation. By the same token, it is worth asking whether the BIA may impose such a requirement of its own accord without even a regulatory basis, as it has done in the wake of the *William I* decision in the Fourth Circuit.

The difficulty of challenging a BIA decision such as the one at issue in *William II* is that it is cloaked in the mantle of agency discretion. Most post-departure MTRs will be untimely<sup>193</sup> and will thus rely on the adjudicator's exercise of sua sponte authority to reopen or reconsider. Courts have generally deemed the BIA's decision not to exercise sua sponte authority to be unreviewable.<sup>194</sup> However, recent Supreme Court case law on judicial review

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<sup>190</sup> See *supra* notes 157, 172 and accompanying text.

<sup>191</sup> *Kwong Hai Chew v. Colding* is one of the leading examples of “creative” statutory or regulatory interpretation. See Motomura, *supra* note 140, at 571 (referring to the Court's decision in *Chew* as “a highly questionable reading of the regulation's text that Louis Henkin rightly called one of the Court's ‘feats of creative interpretation’ in immigration law”) (quoting Louis Henkin, *The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 861 n.40 (1987)). See also Spiro, *supra* note 76, at 285-87 (criticizing statutory interpretation in *Mendez* as being far-fetched).

<sup>192</sup> See *supra* notes 96-99.

<sup>193</sup> As a practical matter, the time limits are so short (thirty days for motions to reconsider and ninety days for motions to reopen) that it is often not possible for the government to effect removal before the time limit has run, meaning that timely motions will tend to be filed pre-departure. There are, in addition, a number of factors that may contribute to the untimely filing of post-departure MTRs. A motion that is based on a subsequent change in law will be possible only when the law has changed, which may be months or years after an order becomes final. A motion based on the vacatur of an underlying conviction can only be filed after the conviction is vacated, which will depend on the pace of the criminal courts. Those who are seeking reopening based on ineffective assistance of counsel may not learn of their counsel's error or fraud until much later. These are all factors that Congress, the BIA, and the courts have accounted for in creating exceptions to the time limits on MTRs (for those who have not left the United States). See *supra* notes 80-84 and accompanying text.

<sup>194</sup> The regulation governing sua sponte reopening and reconsideration by the BIA provides that “[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.” 8 C.F.R. § 1003.2(a) (2010). Most circuits have held that they lack jurisdiction to review the BIA's decision not to exercise sua sponte authority to reopen or reconsider because of the unfettered discretion granted to the Board in such matters. See,

of motions to reopen may present a new opportunity to challenge such precedent.<sup>195</sup> Unless advocates succeed in piercing this veil of non-

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*e.g.*, *Tamenut v. Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249-50 (5th Cir. 2004); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003); *Belay-Gebbru v. INS*, 327 F.3d 998, 1001 (10th Cir. 2003); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Luis v. INS*, 196 F.3d 36, 40-41 (1st Cir. 1999); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999). *But see* *Riley v. INS*, 310 F.3d 1253, 1257-58 (10th Cir. 2002) (finding abuse of discretion where BIA failed to consider whether case warranted equitable tolling of deadline for motion to reopen based on ineffective assistance of counsel); *Cevilla v. Gonzales*, 446 F.3d 658, 660 (7th Cir. 2006) (holding that a BIA decision not to exercise sua sponte authority to reopen was reviewable where the BIA based its decision on its finding that a person seeking reopening had not established eligibility for relief and reserving nonreviewability for denials that are “indeed based on an exercise of uncabined discretion rather than on the application of a legal standard”). *See also* *Munoz de Real v. Holder*, 595 F.3d 747 (7th Cir. 2010) (reviewing the BIA’s affirmance of an immigration judge’s decision not to grant sua sponte reopening under an abuse of discretion standard). In *Cruz v. Attorney General of the United States*, the Third Circuit held that even a decision regarding the exercise of sua sponte authority may not deviate, without explanation, from a settled practice of decision-making:

Where there is a consistent pattern of administrative decisions on a given issue, we would expect the BIA to conform to that pattern or explain its departure from it. Should the Board determine on remand that [the petitioner] is no longer “convicted” under the INA, we would expect it to reopen his proceedings despite the untimeliness of his motion, as it has routinely done in other cases where a conviction was vacated under *Pickering*, or at least explain logically its unwillingness to do so.

452 F.3d 240, 250 (3d Cir. 2006) (citations omitted). *Cruz* is particularly relevant to post-departure cases such as *William* because it involves an untimely motion to reopen based on the vacatur of the underlying conviction.

<sup>195</sup> A recent panel decision in the Sixth Circuit called into question the nonreviewability of sua sponte denials in light of the Supreme Court’s recent decision in *Kucana v. Holder* and urged the court to consider the matter en banc. *See* *Gor v. Holder*, 607 F.3d 180, 186-91 (6th Cir. 2010). In *Kucana*, the Court construed the jurisdiction-stripping provision of 8 U.S.C. § 1252(a)(2)(B)(ii) (2006), added by IIRIRA, which bars judicial review of “any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security . . . .” The Court read the phrase “specified under this subchapter” to mean that “Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General’s discretionary authority in the statute.” *Kucana v. Holder*, 130 S. Ct. 827, 836-37 (2010). Thus, the Court held, “[a]ction on motions to reopen, made discretionary by the Attorney General only, therefore remain subject to judicial review.” *Id.* at 840. The Court further commented that

[t]o read § 1252(a)(2)(B)(ii) to apply to matters where discretion is conferred on the Board by regulation, rather than on the Attorney General by statute, would ignore that congressional design. If the Seventh Circuit’s construction of § 1252(a)(2)(B)(ii) were to prevail, the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions “discretionary.” Such an extraordinary delegation of authority cannot be extracted from the statute Congress enacted.

reviewability, those who have been wrongly deported have little hope of returning to the United States regardless of the status of the regulatory departure bar.

The various “exit fictions” that emerge from the case law on departure may provide another possible avenue for challenging the application of the departure bar. To the extent that the adjudication of an MTR triggers due process considerations—for example, where a motion to reopen raises questions of ineffective assistance of counsel<sup>196</sup>—the exit fiction cases provide a basis for arguing that a *Mathews v. Eldridge*<sup>197</sup> analysis should apply in deciding whether reopening or reconsideration should be available.<sup>198</sup>

The most compelling argument to emerge from these comparisons may well be the normative one suggested by Congress’s 1996 repeal of the departure bar: that there is no need for a departure bar in the context of an overall legislative scheme that now insures the prompt removal of most individuals with final orders of removal. The departure bar on judicial review is in many ways the closest parallel to the departure bar on administrative reopening and reconsideration,<sup>199</sup> and its repeal provides a strong argument for analogous policy changes within the realm of agency adjudication. This parallel, and its implications, have been recently noted by the Supreme Court, which commented in *Dada v. Mukasey*<sup>200</sup> that a “solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen post-departure, much as Congress has permitted with respect to judicial review of a removal order.”<sup>201</sup>

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*Id.* at 839-40.

<sup>196</sup> Courts have been extremely deferential in reviewing agency denials of motions to reopen or reconsider. *See, e.g.,* *Cevilla v. Gonzales*, 446 F.3d 658, 662 (7th Cir. 2006) (noting that though an agency’s haphazard analysis of a petitioner’s claim might violate due process in other contexts, there is no liberty interest in a discretionary grant of relief). However, there has also been some recognition that the refusal to consider the merits of such a motion may implicate due process. *See Saakian v. INS*, 252 F.3d 21, 26 (1st Cir. 2001) (finding due process violation where the respondent’s ineffective assistance of counsel claim “[had] not been examined, despite [his] persistent efforts to have it heard”).

<sup>197</sup> 424 U.S. 319 (1976).

<sup>198</sup> *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (applying *Mathews v. Eldridge* balancing test of private and government interests to determine the sufficiency of a governmental procedure, and characterizing Plasencia’s interest as a “weighty one” that includes the right “to stay and live and work in this land of freedom” and “to rejoin her immediate family, a right that ranks high among the interests of the individual”) (citation omitted).

<sup>199</sup> *See Wiedersperg v. INS*, 896 F.2d 1179, 1181 n.2 (9th Cir. 1990) (noting that the departure bar on reopening “operates parallel to 8 U.S.C. § 1105a(c)”).

<sup>200</sup> 554 U.S. 1 (2008).

<sup>201</sup> *Id.* at 22. *Dada* concerned the potential conflicts that may arise between the requirement that a person granted voluntary departure leave the United States within sixty days, INA §

It is worth noting in this context that the repeal of the departure bar on judicial review has arguably been a success. In the wake of IIRIRA, some commentators have raised concerns regarding the demise of the automatic stay pending a petition for review,<sup>202</sup> and advocates have criticized DHS and the Department of State for lacking a coordinated policy for providing the necessary documentation to facilitate the reentry of those who prevail on a petition for review from abroad.<sup>203</sup> Notably, however, there has been no criticism from any corner regarding the demise of the departure bar itself. Indeed, it appears to be one of the few aspects of IIRIRA that has been uncontroversial.

If the departure bar on reopening and reconsideration is dismantled through administrative rulemaking or other means, it is crucial that such a change be accompanied by additional action to ensure that existing practices regarding the exercise of sua sponte reopening and reconsideration be applied to post-departure cases.<sup>204</sup> Such a policy could be mandated by the courts or implemented through an administrative rulemaking procedure or certification to the Attorney General of a BIA decision that involves a discretionary decision such as the one at issue in *William II*.<sup>205</sup> Otherwise, as *William II* illustrates, the elimination of the departure bar may have little practical effect.

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240B(b)(2), 8 U.S.C. § 1229c(b)(2) (2006), and regulations deeming motions to reopen withdrawn upon the respondent's departure. At oral argument, Chief Justice Roberts went even further, commenting, "[I]f I thought it important to reconcile the two [statutes governing motions to reopen and voluntary departure], I would be much more concerned about that interpretation—that the motion to reopen is automatically withdrawn [upon departure]—than I would suggest we start incorporating equitable tolling rules and all that." Transcript of Oral Argument at 8, *Dada v. Mukasey*, 554 U.S. 1 (2008) (No. 06-1181).

<sup>202</sup> See, e.g., Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1719 (2010) (arguing for a return to automatic stay).

<sup>203</sup> See Trina Realmuto, Practice Advisory: Return to the United States After Prevailing in Federal Court (2009), available at [http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_11607.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_11607.pdf) (noting that there are "no formal procedures for arranging the return of someone who has been deported" and proposing potential strategies for litigation and administrative advocacy).

<sup>204</sup> Such a change would not entirely solve the problems relating to the Board's broad discretion to decline to exercise sua sponte authority to grant untimely motions to reopen. See, e.g., *In re Beckford*, 22 I. & N. Dec. 1216, 1227-31 (B.I.A. 2000) (Rosenberg, J., dissenting) (criticizing the majority for its narrow interpretation of the exceptions to time limits on filing MTRs). However, it would go a long way to eliminating the phantom departure bar that is evident in *William II*.

<sup>205</sup> See 8 C.F.R. § 1003.1(h) (2010) (providing for certification for decision by Attorney General).

## V. FINALITY AND THE SIGNIFICANCE OF DEPARTURE

A deportee's departure from the United States serves to execute the removal order,<sup>206</sup> and thus signifies the crossing of a boundary that is not only geographic but also procedural. For this reason, the BIA's claim that departure is a "transformative"<sup>207</sup> act warrants consideration from the perspective of finality as well as territoriality.

## A. Finality in Removal Proceedings

The question of when litigation should end arises within every area of the law and has been the subject of particular attention in contexts such as habeas corpus and class actions. "The answer cannot be 'when it is done right,' or nothing would ever be final. . . . Yet equally unsatisfying is the answer 'when it is done once,' as this would relegate us to a world of first drafts, executions based on faulty trials, and binding class action judgments of questionable validity."<sup>208</sup> In crafting an approach to finality, the challenge is to seek a "balance between the sense of injustice and the needs of organized society."<sup>209</sup>

It has long been a mantra of the BIA and the courts that motions to reopen removal proceedings are disfavored due to finality concerns.<sup>210</sup> Statutory changes in 1996<sup>211</sup> and recent Supreme Court precedent affirming the importance of motions to reopen as an "important safeguard" call into question

<sup>206</sup> See *supra* note 23.

<sup>207</sup> *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 656 (B.I.A. 2008).

<sup>208</sup> William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 792-93 (2007).

<sup>209</sup> Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 100 (1965).

<sup>210</sup> See *INS v. Abudu*, 485 U.S. 94, 107 (1988) ("The reasons why motions to reopen are disfavored in deportation proceedings are comparable to those that apply to petitions for rehearing and to motions for new trials on the basis of newly discovered evidence—particularly the strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.") (footnotes omitted); *INS v. Doherty*, 502 U.S. 314, 323 (1992) ("This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States."); *In re Coelho*, 20 I. & N. Dec. 464, 471 (B.I.A. 1992) (citing *Abudu*, 485 U.S. at 110).

<sup>211</sup> Prior to 1996, motions to reopen were "couched solely in negative terms." *Doherty*, 502 U.S. at 322 (citing former motion to reopen regulation that provided that "[m]otions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . ."). Since 1996, the INA has provided an affirmative right to file a motion to reopen. See INA § 240(c)(6)(B), 8 U.S.C. § 1229(c)(6)(B) (2006); INA § 240(c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(C)(i) (2006).

whether this is still an accurate characterization.<sup>212</sup> In any case, though, my aim here is not to challenge the application of finality principles to MTRs. Rather, I ask whether departure from the United States should have any impact on this analysis. That is, are finality concerns *stronger* with regard to a post-departure MTR than with regard to a pre-departure MTR?

*B. What Does It Mean to Execute a Removal Order?*

Within the context of civil litigation, the execution of a judgment is an event of considerable significance. The principle of *res judicata* counsels against disturbing such a judgment, even if based on an error of law, due to the reliance of the parties, vested rights, and the societal interest in conserving judicial resources.<sup>213</sup>

In the case of a removal order, however, it is difficult to pinpoint the practical significance of the execution of the order (apart from, of course, triggering the departure bar). In *Armendarez-Mendez*, the BIA seeks to justify the departure bar by noting that “[a]s a rule, once an alien has been [physically] removed, his underlying removal order is deemed executed, the proceedings that led to that order are consummated, and whatever immigration status the removed alien may have possessed before departure is vitiated.”<sup>214</sup> Yet it is really only the first of these transformations (the execution of the order) that takes place upon departure. The other effects that the BIA attributes to departure take place well before any borders are crossed. A deportee’s immigration status is revoked at the moment that the removal order becomes final.<sup>215</sup> The proceedings are closed as of that moment as well—thus the need

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<sup>212</sup> See *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)).

<sup>213</sup> See *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981) (“A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Nor are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.”); *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987) (noting that “when a judgment has been executed a concomitantly greater interest in finality exists” and citing as an example a case involving vested property right pertaining to real estate titles).

<sup>214</sup> *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 656 (B.I.A. 2008). The BIA also cites INA § 101(g) as evidence of the importance placed by the statute on physical departure. *Id.* It provides that “any alien ordered deported or removed . . . who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.” INA § 101(g), 8 U.S.C. § 1101(g) (2006). See also *William II*, 359 F. App’x 370, 372 (2009) (quoting BIA decision under review as referring to physical departure as “consummating” the removal proceeding).

<sup>215</sup> See INA § 241(a)(1), 8 U.S.C. § 1231(a)(1) (2006) (mandating removal within 90 days of

to *reopen* if any future relief is sought. It is true, as the BIA points out, that departure from the United States triggers additional consequences—namely, future inadmissibility bars and potential criminal sanctions for reentry.<sup>216</sup> However, these are issues that affect only the deportee and are remote from the concerns that generally animate discussions of finality.

### C. *Departure: A Distinction without a Difference*

Any number of circumstances might keep a person from physically leaving the United States following the entry of a final removal order: statelessness, lack of a repatriation agreement with the country designated for removal, the granting of a stay, or even simply the government's failure to act. A person who remains in the United States because the government has not yet effected removal is subject to a removal proceeding that is every bit as closed as the removal proceeding of a deportee who has left the United States. Yet under the right set of circumstances, such a person can seek reopening even years after an order becomes administratively final.<sup>217</sup> Even in the face of strict time and number limits on such motions, the BIA has recognized that justice requires reopening or reconsideration in a limited set of circumstances.<sup>218</sup> These circumstances include the key issues raised within post-departure motions, such as a change in law and vacatur of an underlying conviction.

Why should the regulations distinguish between individuals whose removals have been delayed and individuals who have departed?<sup>219</sup> The finality concerns that preoccupied Congress from the early 1960s through passage of IIRIRA in 1996 do not apply to those who have departed in the way that they

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date removal order becomes administratively final). Although INA § 241(a)(7), 8 U.S.C. § 1231(a)(7) (2006), provides employment authorization for those whose removals cannot be carried out, the statute does not provide for any other status for those with final orders of removal.

<sup>216</sup> INA §§ 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2006); INA § 276(a)-(b), 8 U.S.C. § 1326 (2006).

<sup>217</sup> See *supra* notes 80-84 and accompanying text.

<sup>218</sup> See *In re Vasquez-Muniz*, 23 I. & N. Dec. 207, 208 (B.I.A. 2002); *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997).

<sup>219</sup> This line of inquiry raises the question of an equal protection challenge to the departure bar. A related regulation, 8 C.F.R. § 1003.44 (2010), was challenged unsuccessfully on equal protection grounds for barring those who had illegally reentered from filing special motions for reopening to apply for 212(c) relief in the wake of *INS v. St. Cyr*, 533 U.S. 289 (2001). See *Avila-Sanchez v. Mukasey*, 509 F.3d 1037, 1041 (9th Cir. 2007). It is possible that a deportee who remains outside the United States would have a stronger equal protection claim than one who has illegally reentered. However, equal protection claims are exceedingly difficult to litigate in light of the plenary power doctrine. See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001) (rejecting equal protection challenge to statute providing different citizenship rules for children born abroad and out of wedlock based on gender of citizen parent).

may arguably have applied during that period to those who remained inside the United States. In fact, the entire discussion of finality in the removal context was shaped not by departure but by the specter of its opposite: *failure* to depart. As the Supreme Court repeatedly noted in the days before IIRIRA, the reason that motions to reopen were particularly disfavored in the deportation or removal context was that “every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.”<sup>220</sup> For the person who is already outside the United States, there is nothing to be gained by a motion to reopen or reconsider unless it is meritorious. In addition, motions to reopen must be accompanied by applications for all relevant forms of relief,<sup>221</sup> and are unlikely to be granted unless the underlying application itself is likely to succeed.

The various measures that Congress has put in place to ensure finality would apply to post-departure motions even if the departure bar were eliminated. Should post-departure reopening be subject to additional barriers? It would seem that, as in the case of the departure bar on judicial review, the trade-off for speedy removal should be that those who are rushed out of the country retain the same rights as those whose removals happen to drag on. If anything, the departure bar creates a perverse incentive for individuals in removal proceedings to delay and evade efforts to remove them, thus undermining Congress’s stated aims in enacting IIRIRA.

Beyond the question of disparities based on nationality and individual circumstance, an even more obvious disparity lies in the differential access that the government has to reopening. There is a powerful asymmetry at work in the jurisdiction-stripping function of the departure bar. With the exception of people who are stateless or are from the small number of countries that have refused to repatriate deportees, most people with final orders of removal leave the United States within a few months after their order becomes final. A deportee who learns of a subsequent change in law is thus foreclosed by the departure bar from seeking reconsideration. If, however, that person prevails in removal proceedings and is granted relief, she may find the relief revoked at a later date if the law changes in the government’s favor. Because the person would, in such circumstances, remain in the United States, the decision-maker retains jurisdiction to reopen or reconsider *sua sponte*.<sup>222</sup> This is true even if

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<sup>220</sup> *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985)).

<sup>221</sup> 8 C.F.R. § 1003.23(b)(3) (2010) (“Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents.”).

<sup>222</sup> It is not only the fact that the person remains in the United States that creates this disparity. The departure bar arguably does not apply to motions by the government. *See* 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) (2010) (barring only those motions filed “by or on behalf of

the removal proceedings have been terminated—a procedural transformation that is arguably every bit as final as the execution of a final order.

#### D. Lessons from Civil and Criminal Procedure

In seeking an analogy for motions to reopen or reconsider, both the Supreme Court and the BIA have looked to motions for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure.<sup>223</sup> The Rule 60(b) parallel is an intriguing one in the context of post-departure motions.

Rule 60(b) motions will generally not be granted based on an intervening change in law or circumstances, particularly if the judgment has been executed.<sup>224</sup> However, it is well established that there is an exception to this

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a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States”). For an example of this disparity, consider the case of Carlos Vasquez-Muniz, who became an LPR at the age of five. *In re Vasquez-Muniz*, 23 I. & N. Dec. 207, 208 (B.I.A. 2002). At age eighteen, he was convicted of robbery, and seven years later he was convicted of being a felon in possession of a firearm. *Id.* The immigration judge held that the firearm conviction was not an aggravated felony and, after considering all of the relevant factors, granted discretionary relief. *Id.* at 208-209. The government appealed the legal determination with regard to the aggravated felony definition, and the BIA affirmed the immigration judge’s ruling. *Id.* at 209. Thus, the removal proceedings were terminated and Vasquez-Muniz was allowed to remain a permanent resident. *Id.* Subsequently, however, the Ninth Circuit held that such a conviction *does* constitute an aggravated felony. *Id.* at 207 (citing *United States v. Castillo-Rivera*, 244 F.3d 1020, 1025 (9th Cir. 2001)). The government then filed a motion with the BIA to reconsider its decision in Vasquez-Muniz’s case. *Id.* at 208. The BIA noted the untimeliness of the government’s motion but granted it anyway, finding that “[i]n view of the importance of the matter and the inconsistency between our prior decision and that of the Ninth Circuit, and upon a close examination of the statute, [it is] appropriate to reconsider the matter upon our own motion.” *Id.* The Board, exercising its authority to reconsider sua sponte, vacated its prior decision, vacated the immigration judge’s decision, and ordered Vasquez-Muniz removed. *Id.*

<sup>223</sup> See *Stone v. INS*, 514 U.S. 386, 401 (1995) (“The closest analogy to the INS’s discretionary petition for agency reconsideration is the motion for relief from judgment under Rule of Civil Procedure 60(b).”); *In re J-J-*, 21 I. & N. Dec. 976, 983 (B.I.A. 1997) (“[R]elief from judgment orders, contained in Rule 60(b), most resemble our motions to reopen or reconsider.”). Rule 60(b) provides that the court may relieve a party from a final judgment, order, or proceeding on grounds that, *inter alia*, there is newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial; the judgment is based on an earlier judgment that has been reversed or vacated; applying the judgment prospectively is no longer equitable; or there is any other reason that justifies relief. Fed. R. Civ. P. 60(b).

<sup>224</sup> 11 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2864 n.46 (2d ed. 1995 & Supp. 2010) (collecting cases); *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2d Cir. 2004) (noting that “as a general matter, a mere change in decisional law does not constitute an ‘extraordinary circumstance’ for the purposes of Rule 60(b)(6)”). Regarding execution of an order, see *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th

rule where the court is modifying or vacating a judgment with prospective effect, such as an injunctive order.<sup>225</sup> It is not merely permissible for a court to amend such a judgment in the face of a change in law or circumstances; the failure to do so is an abuse of discretion.<sup>226</sup>

From the perspective of the deportee, departure from the United States is not the end of the story but rather the beginning. An order of removal imposes an ongoing—potentially lifetime—restriction on a deportee, depriving her of the status she once held and barring her from reentering the United States.<sup>227</sup> In many cases, particularly those involving longtime residents, removal separates deportees from their children and other immediate family members.<sup>228</sup> Courts have long recognized the gravity of deportation for a longtime resident with deep roots in the United States.<sup>229</sup> Many commentators have argued that

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Cir. 1987) (“When a judgment has been executed a concomitantly greater interest in finality exists.”).

<sup>225</sup> See Fed. R. Civ. P. 60(b)(5) (providing for relief from final judgment where “applying [judgment] prospectively is no longer equitable”). Although some grounds for relief from final judgment are subject to a one-year filing deadline, there is no time limit for moving for relief from judgment under Rule 60(b)(5). See Fed. R. Civ. P. 60(c)(1). See also Sys. Fed’n No. 91, Ry. Emp. Dept., AFL-CIO v. Wright, 364 U.S. 642, 647-648 (1961) (“There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. . . . [T]he court cannot be required to disregard significant changes in law or facts if it is ‘satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.’”) (internal quotations omitted); *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992) (“A party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law.”); WRIGHT & MILLER, *supra* note 224, § 2961 (“The three traditional reasons for ordering the modification or vacation of an injunction are (1) changes in operative facts, (2) changes in the relevant decisional law, and (3) changes in any applicable statutory law.”) (footnotes omitted).

<sup>226</sup> See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437-38 (1976) (holding that where intervening clarification of constitutional law reduced obligations of state officials, district court abused its discretion by refusing to modify injunction accordingly); *Am. Horse Prot. Ass’n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982) (“When a change in the law authorizes what had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law.”).

<sup>227</sup> See INA 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2006) (imposing various terms of inadmissibility depending on circumstances of removal order).

<sup>228</sup> See INTERNATIONAL HUMAN RIGHTS LAW CLINIC, IN THE CHILD’S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 4 (2010), available at [www.law.berkeley.edu/files/Human\\_Rights\\_report.pdf](http://www.law.berkeley.edu/files/Human_Rights_report.pdf) (estimating that between April 1997 and August 2007, 103,000 children lost a lawful immigrant family member to deportation and that more than 217,000 other immediate family members were affected by the deportation of LPRs).

<sup>229</sup> See *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) (“Deportation can be the equivalent of banishment or exile.”); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (“Though

deportation should, for this reason, be considered punishment.<sup>230</sup> Viewed from the perspective of civil procedure, however, deportation could also be compared to a continuing injunctive order. It is perhaps for this reason that the BIA has recognized a change in law as an exceptional circumstance that warrants the granting of an untimely motion to reopen or reconsider.<sup>231</sup> Yet the BIA has cut off this principle at the border. Given the prospective effect of a removal order, the Rule 60(b) parallel suggests that execution of the order is irrelevant. Rather than taking away any rights that have vested in others and thus triggering traditional finality concerns, vacating the removal order would merely halt its prospective effect.<sup>232</sup>

Criminal procedure also provides instructive parallels. Although courts have generally been reluctant to import norms from criminal procedure into the removal context due to the civil nature of immigration law,<sup>233</sup> the Supreme Court has on at least one occasion suggested a parallel between motions to reopen and motions for a new trial in a criminal proceeding.<sup>234</sup> The Court's

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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.”).

<sup>230</sup> See, e.g., Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000); *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) (“[I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.”). See also DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 19 (2007) (arguing that “constitutional norms applicable to criminal cases should inform the approach to deportation for crime”).

<sup>231</sup> See *supra* notes 84, 218 and accompanying text.

<sup>232</sup> An important question that may arise in post-removal cases is whether vacating a removal order returns a deportee to the status quo ante or merely bars the order from having prospective effect. This question might be significant where a deportee is no longer deportable (under current precedent) but faces a related or separate ground of inadmissibility. This inadmissibility ground might relate to pre-removal conduct (for example, an old conviction for minor marijuana possession that would render a person inadmissible, see INA § 212(a)(2)(A)(II), 8 U.S.C. § 1182(a)(2)(A)(II) (2006) but not deportable, see INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2006)). Or it may be a new ground stemming from post-removal conduct. In the former case, there would seem to be strong arguments in favor of not subjecting a person to inadmissibility based on an involuntary departure from the United States. See *Delgado*, 332 U.S. at 391 (“Respect for law does not thrive on captious interpretations.”). However, such an argument would be difficult to make with regard to new grounds of inadmissibility that have arisen while a deportee is outside the United States.

<sup>233</sup> See Steven H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 511-515 (2007) (discussing reluctance of courts to apply norms of criminal adjudication within the context of deportation).

<sup>234</sup> *INS v. Abudu*, 485 U.S. 94, 110 (1988) (“The appropriate analogy [to a motion to reopen

intention was to invoke the disfavored status of such motions,<sup>235</sup> and it may be a stretch to pursue the implications any further. But if such a parallel is to be invoked, it bears noting that an analogy to the common law writ of coram nobis suggests that reopening may be warranted even after a removal order has been executed.<sup>236</sup> In addition, there is doctrine within the context of both coram nobis and habeas corpus to suggest that new precedent, rather than the law in effect at the time the order was entered, should govern upon reopening.<sup>237</sup>

### E. The “Gross Miscarriage of Justice” Standard

With regard to the question of the application of old law versus new law, one particular aspect of the phantom departure bar on display in *William II* merits particular attention: the BIA’s application of the “gross miscarriage of justice” standard. On remand from the Fourth Circuit, the BIA invoked the standard to explain that post-departure reopening would be granted “only if the order clearly could not have withstood judicial scrutiny under the law in effect at the

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deportation proceedings] is a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden.”).

<sup>235</sup> *Id.*

<sup>236</sup> See *Morgan v. United States*, 346 U.S. 502, 512 (1954) (affirming continuing vitality of common law writ of coram nobis to challenge validity of federal convictions by individual who is no longer in custody for purposes of habeas corpus); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

<sup>237</sup> See *Davis v. United States*, 417 U.S. 333, 346-47 (1974) (in ruling on writ of coram nobis, interpretation of criminal law at the time of review, not at the time of conviction, governs). The Supreme Court has imposed considerable limits on retroactivity in the context of habeas. See *Teague v. Lane*, 489 U.S. 288, 310 (1989) (establishing a general rule of non-retroactivity on collateral rule for new procedural rules). However, the Court has nevertheless held that a decision interpreting the substantive scope of a criminal statute is to be applied retroactively on collateral review. See *Bousley v. United States*, 523 U.S. 614, 620 (1998). Summarizing *Bousley* in a later case, the Court explained:

When a decision of this Court results in a “new rule,” that rule applies to all criminal cases still pending on direct review . . . . As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish . . . . Such rules apply retroactively because they “necessarily carry a significant risk that a defendant stands convicted of ‘an act that the law does not make criminal’” or faces a punishment that the law cannot impose upon him.

*Schiro v. Summerlin*, 542 U.S. 348, 351-52 (2004). In a removal proceeding in which the respondent was wrongly deemed an aggravated felon, or in which the scope of a substantive ground of deportability or eligibility for relief was otherwise misapplied, it would appear that *Bousley*, rather than *Teague*, provides the relevant analogy.

time of its issuance or execution.”<sup>238</sup> The BIA’s decision is unpublished and its weight should therefore not be overstated. This rationale, however, has also cropped up in two other recent unpublished cases regarding post-departure motions,<sup>239</sup> which may indicate that it will play an ongoing role in facilitating departure-based distinctions if the regulatory departure bar is eliminated.

Although presented by the BIA as a matter of well-established doctrine, the application of the gross miscarriage of justice standard in the context of administrative reopening is in fact a radical departure from decades of BIA and federal court doctrine. The standard derives from another context entirely, namely collateral attacks on prior removal orders brought within a *new* proceeding after a deportee has *reentered* the United States. For decades, the BIA and the courts have imposed strict limits on such attacks, reserving them only for rare cases in which the deportation or removal order was clearly erroneous at the time it was executed.<sup>240</sup> A contemporary expression of this impulse can be found in INA section 241(a)(5), which prohibits the reopening of proceedings following illegal reentry.<sup>241</sup>

To import this standard into the adjudication of a regular motion to reopen is highly unusual. On remand in *William I*, the only support the BIA cited for its application of this standard was *In re Roman*, a case standing for the proposition that “an alien may *collaterally* attack a final order of exclusion or deportation *in a subsequent deportation proceeding* only if she can show that the prior order resulted in a gross miscarriage of justice.”<sup>242</sup>

<sup>238</sup> *William II*, 359 F. App’x 370, 372-73 (4th Cir. 2009) (quoting BIA opinion under review).

<sup>239</sup> See *Munoz de Real v. Holder*, 595 F.3d 747 (7th Cir. 2010) (upholding BIA affirmance of the immigration judge’s denial of a post-departure MTR on the basis of the “gross miscarriage of justice” standard); *In re Sandoval-Ortiz*, No. A092 538 275, 2010 WL 1251016 (B.I.A. Feb. 23, 2010) (denying MTR on the basis of “gross miscarriage of justice” standard where removal order was based on erroneous classification of DUI conviction as an aggravated felony).

<sup>240</sup> See, e.g., *Debeato vs. Attorney Gen.*, 505 F.3d 231 (3d Cir. 2007); *Lara v. Trominski*, 216 F.3d 487 (5th Cir. 2000); *United States ex rel. Steffner v. Carmichael*, 183 F.2d 19, 20 (5th Cir. 1950); *In re Farinas*, 12 I. & N. Dec. 467 (B.I.A. 1967); *In re Malone*, 11 I. & N. Dec. 730 (B.I.A. 1966).

<sup>241</sup> INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2006) (“If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.”).

<sup>242</sup> *In re William*, No. A073 561 811, 2008 WL 5537807 (B.I.A. Dec. 23, 2008) (citing *In re Roman*, 19 I. & N. Dec. 855, 856-57 (B.I.A. 1988)) (emphasis added).

*F. Implications for Administrative Reopening and Reconsideration*

An examination of the role that the execution of an order plays within the removal context, and a comparison to relevant law within the fields of civil and criminal procedure, suggest that finality concerns do not warrant distinguishing between pre- and post-departure motions to reopen or reconsider.

If we are to take seriously the parallels that the courts and the BIA have drawn between MTRs and analogous motions in civil and criminal procedure, we should look beyond cursory descriptions of the “disfavored nature” of such motions and consider the full implications of these analogies. Viewing deportation through this lens suggests three key principles: (1) the decision-maker who ordered the removal should continue to have jurisdiction to take into account relevant changes in law or fact,<sup>243</sup> (2) decisions not to take such changes into account should be subject to judicial review, and (3) “new law” rather than “old law” should govern the outcome.

## VI. PRUDENTIAL CONCERNS

Having considered the departure bar from the perspectives of territoriality and finality, I turn here to the prudential concerns raised by the BIA as justification for the bar.

*A. The Limited Authority of Immigration Judges and the BIA*

In *Armendarez-Mendez*, the BIA states that the departure bar is “an expression of the limits of our authority within the larger immigration bureaucracy. Removed aliens have, by virtue of their departure, literally passed beyond our aid.”<sup>244</sup> In support of this conclusion, the Board points to the fact that it lacks the power to admit or parole a noncitizen into the United States for the purposes of pursuing a reopened proceeding.<sup>245</sup> This trope is also evident in the BIA’s decision on remand in *William I.*<sup>246</sup>

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<sup>243</sup> No court has yet considered these arguments in the context of MTRs. However, Justice Brennan, joined by Justices Douglas and Black and Chief Justice Warren, once took this position in dissent with regard to modification by a District Court of a denaturalization decree. See *Polites v. United States*, 364 U.S. 426, 438 (1960) (Brennan, J., dissenting) (observing that a denaturalization decree “is a determination of status which has prospective effect, and there is no reason why in modern times it should not be governed by equitable principles”).

<sup>244</sup> *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 656 (B.I.A. 2008).

<sup>245</sup> *Id.* at 656 n.8.

<sup>246</sup> See *William II*, 359 F. App’x 370, 373 (4th Cir. 2009) (per curiam) (quoting BIA’s statement that respondent’s return to the United States is “wholly out of our control”).

Post-departure challenges to removal orders do present logistical challenges regarding reentry. Some deportees who have prevailed on petitions for review from outside the United States have faced significant bureaucratic roadblocks in obtaining the documents necessary to return to the United States.<sup>247</sup> The obstacles are likely to be even greater for those seeking to return to pursue an application for relief. Such obstacles, however, could be addressed through guidelines on inter-agency cooperation.<sup>248</sup>

Moreover, it is simply untrue that deportees have “literally passed beyond [the] aid” of the BIA. The BIA’s jurisdiction is not confined to individuals who are within the territorial limits of the United States.<sup>249</sup> Immigration judges and the BIA have reopened proceedings in a number of cases involving deportees, including cases on remand from the federal courts<sup>250</sup> and a handful of cases in which the government has not contested jurisdiction.<sup>251</sup> The BIA itself concedes in *Armendarez-Mendez* that some deportees may be able to obtain permission from DHS to reenter to pursue reopening,<sup>252</sup> and that a deportee whose removal order is vacated by a federal court might also be permitted to lawfully reenter for this purpose.<sup>253</sup>

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<sup>247</sup> See Realmuto, *supra* note 203 (advising attorneys on how to address such obstacles). In my capacity as Supervising Attorney at the Post-Deportation Human Rights Project, I communicated with several attorneys whose clients had prevailed from abroad on petitions for review but were unable to obtain the documentation required to facilitate their return to the United States.

<sup>248</sup> *Id.* It is notable that the Board expressed no concerns in *In re Bulnes-Nolasco*, 25 I. & N. Dec. 57 (B.I.A. 2009), regarding the logistical questions likely to arise from post-departure reopening of an in absentia proceeding, even though the respondent was an undocumented immigrant who had originally entered without inspection—a more difficult scenario regarding reentry, it might seem, than a deportee who has been restored to LPR status.

<sup>249</sup> For examples of the BIA’s jurisdiction to determine matters affecting the status of individuals who are not within the United States, see 8 C.F.R. § 1003.1(b)(5) (2010) (jurisdiction to review denials of immigrant visa petitions); 8 C.F.R. § 1003.1(b)(6) (2010) (jurisdiction to review denials of waivers of inadmissibility for applicants for non-immigrant visas).

<sup>250</sup> See *supra* note 138.

<sup>251</sup> See, e.g., *In re Campos-Mendez*, No. A34 065 088, 2006 WL 3485570 (B.I.A. Oct. 27, 2006). See also *Guevara v. Gonzales*, 450 F.3d 173 (5th Cir. 2006) (granting respondent’s petition for review where government failed to raise jurisdictional challenge to post-departure motion to reopening, BIA granted reopening, and then BIA subsequently rescinded decision granting reopening upon government’s motion to reconsider in light of departure bar).

<sup>252</sup> See *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 656 n.8 (B.I.A. 2008) (conceding that “[i]t may be that some removed aliens could obtain permission from the DHS to lawfully reenter the United States for the purpose of pursuing reopening”).

<sup>253</sup> See *id.* at 649 n.2 (citing the Supreme Court’s statement in *Lopez v. Gonzales*, 549 U.S. 47, 52 n.2 (2006), that “[a]lthough the Government has deported Lopez, we agree with the parties that the case is not moot. Lopez can benefit from relief in this Court by pursuing his application for cancellation of removal . . .”). The BIA further notes that the government’s

### B. Administrative Efficiency

The BIA notes in *Armendarez-Mendez* that in the wake of the passage of IIRIRA, the Attorney General rejected the suggestions of commentators who urged the deletion of the departure bar from the regulations, stating that “[t]he Department [of Justice] believes that the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages this system might render.”<sup>254</sup> Although neither DOJ nor the BIA has clarified what these burdens are, the main concerns would appear to be the burden of relitigating settled matters and the logistics of holding evidentiary hearings on applications for relief from removal without the physical presence of the respondent.<sup>255</sup>

There would inevitably be costs associated with the elimination of the departure bar. Immigration judges and the BIA are overwhelmed by their caseloads<sup>256</sup> and are no doubt reluctant to invite an increase in MTRs. However, it is questionable how extensive such costs would be. The concerns that have arisen within the habeas context with regard to the retroactivity of new rules of criminal procedure—concerns of opening the prison doors and necessitating thousands of new trials<sup>257</sup>—bear little relevance in this context. Motions to reopen and reconsider are virtually always adjudicated on the briefs with no oral argument or evidentiary hearing. In the case of someone removed

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brief acquiescing in the grant of the petition for a writ of certiorari in *Lopez* stated that “were this Court to decide that [Lopez’s] cocaine conviction is not an aggravated felony, the Board would address petitioner’s request for cancellation of removal, which is a form of relief that petitioner can continue to pursue in administrative proceedings even while he is in Mexico.” *Id.*

<sup>254</sup> *Armendarez-Mendez*, 24 I. & N. Dec. at 657 (quoting Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10321 (Mar. 6, 1997) (Supplementary Information)).

<sup>255</sup> See *INS v. Abudu*, 485 U.S. 94, 108 (1988) (noting that reopened cases “waste time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations”) (quoting *INS v. Jong Ha Wang*, 450 U.S. 139, 144 n.5 (1981)) (internal citations omitted).

<sup>256</sup> See Julia Preston, *Immigration Agency Ends Some Deportations*, N.Y. TIMES, Aug. 26, 2010, at A1 (noting that the immigration courts “are swamped under a backlog that reached a record in June [2010] of 247,922 cases”).

<sup>257</sup> See, e.g., *Linkletter v. Walker*, 381 U.S. 618 (1965).

To make the [Fourth Amendment exclusionary] rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

*Id.* at 637-38.

for a DUI conviction, for example, an adjudicator considering an MTR would simply seek to establish that the sole ground for the removal order was a DUI conviction and that the conviction falls squarely within the Supreme Court's holding in *Leocal*. If such a motion had merit, the adjudicator could reopen the proceeding, vacate the prior order, and terminate the removal proceeding, thereby restoring the individual to permanent resident status, without ever holding a hearing. It is not an exaggeration to say that in many cases, the same amount of agency resources are expended in *denying* post-departure motions as would be expended in *granting* them.<sup>258</sup>

Cases that concern eligibility for discretionary relief present greater complexity because a reopened proceeding may entail a hearing on whether relief should be granted, with testimony by the respondent and others. In some cases, immigration judges may be willing to grant relief without testimony from the respondent—for instance, if a person with significant ties to the United States has only a very minor criminal record. Moreover, it is important to note that any hearing that might take place would not be duplicative in the way that a second criminal trial would be, because a hearing on the merits never took place the first time around. Nor would such hearings put a burden on the government to resurrect old fact-finding in the way that a criminal trial would. Whatever the costs of a new hearing, they are costs that would have been borne by the system had the law been properly applied in the first instance.<sup>259</sup>

In an era in which videoconferencing has become routine in removal proceedings (with an immigration judge in Virginia, for example, presiding over a respondent in Ohio),<sup>260</sup> it seems disingenuous for the BIA to raise concerns regarding the physical location of a person seeking relief. The government's own system of transferring immigrant detainees across the country within a vast network of detention facilities can present logistical

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<sup>258</sup> A case such as *Navarro-Miranda* is a perfect example. *See supra* notes 41-44 and accompanying text. In denying *Navarro-Miranda*'s motion, the Board cited all of the information necessary to grant it. If anything, applying a departure bar may in fact create *extra* work for the adjudicator; although the administrative record will include all relevant information about the criminal conviction(s) at issue in the case and the grounds of removal, it may not provide the necessary information regarding if or when physical removal from the United States occurred.

<sup>259</sup> Moreover, where such a hearing has already been held, there would be no need to hold it again. For example, Ruben Ovalles was granted relief by an immigration judge, only to find it taken away under an erroneous interpretation of the law by the BIA. *See supra* note 68. In such a case, the BIA could vacate its order and reinstate the immigration judge's grant of relief.

<sup>260</sup> See Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 59 (2006) (describing advent of videoconferencing in removal proceedings in 1996 and steady increase in its use).

problems in the reopening context that rival any problems presented by deportees who are outside the United States.<sup>261</sup>

With the lone exception of the regulations that set forth the departure bar, the current adjudication system is equipped to remedy wrongful removals. Established BIA doctrine and practices are already in place to handle a variety of claims that may arise post-departure; indeed, immigration judges and the BIA routinely encounter these same claims from those who are still in the United States and have had no problem adjudicating such motions on the merits, in most cases without the need for a hearing. The personal interests at stake for deportees and their family members in the United States far outweigh the relatively limited administrative costs of permitting post-departure motions.

### *C. The Government Interest in Expedious Removal*

One final aspect of *Armendarez-Mendez* warrants scrutiny. The BIA states that “the ultimate purpose of a removal proceeding is, with respect to removable aliens, precisely to bring about . . . physical departure.”<sup>262</sup> With this statement, the BIA invokes a key aspect of the 1996 changes embodied in IIRIRA: Congress’s desire to speed up the pace of removals.

Although the BIA offers this statement as a defense of the departure bar, the opposite inference could also be drawn. In enacting changes to the INA designed to speed up removals in 1996, Congress simultaneously repealed the departure bar on judicial review. It is not clear why a system focused on ensuring physical departure from the United States would require a departure bar on motions to reopen. In fact, it would seem that, as in the case of judicial review, a system of speedy removals would weigh in favor of *eliminating* the departure bar.

It also bears asking whether the government has a legitimate interest in deporting those who are not deportable, or in barring from discretionary relief those who are eligible. As Justice Marshall stated in his concurrence in *Landon v. Plasencia*:

Although the various other government interests identified by the Court may be served by the exclusion of those who fail to meet the eligibility requirements set out in the Immigration and Nationality Act, they are not served by procedures that deny a permanent resident alien a fair opportunity to demonstrate that she meets those eligibility requirements.<sup>263</sup>

The BIA itself has acknowledged that “immigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to

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<sup>261</sup> See LOCKED UP FAR AWAY, *supra* note 62.

<sup>262</sup> *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 656 (B.I.A. 2008).

<sup>263</sup> *Landon v. Plasencia*, 459 U.S. 21, 41 (1982) (Marshall, J., concurring).

removals at any cost. Rather, as has been said, the government wins when justice is done.<sup>264</sup>

## VII. CONCLUSION

Whether or not the regulatory departure bar conflicts with the plain language of the statutory provisions governing reopening and reconsideration, it is beyond question that Congress has never mandated a departure bar on such motions. I have endeavored to show here that neither territoriality nor finality concerns justify cutting off deportees who are outside the United States from existing procedures for rectifying erroneous removal orders, and that the benefits of allowing those who have been wrongly deported to seek reopening or reconsideration far outweigh the potential costs.

The departure bar on motions to reopen and reconsider is a vestige of an earlier era. It makes little sense in light of the fundamental shift that has occurred over the past two decades toward a system of speedy removals and extraterritorial rights. Just as the departure bar on judicial review was eliminated in 1996, the regulatory departure bar on reopening and reconsideration should be eliminated as well.<sup>265</sup>

As the courts and the Department of Justice consider the future of the regulatory departure bar, however, they must also consider the implications of the phantom departure bar that promises to take its place upon its demise. Without attention to the new rationales that the BIA has begun to employ, such as the use of the “gross miscarriage of justice” standard and the invocation of unfettered discretion, meaningful relief will not come to those who have been wrongly deported and the many family members who wait for their return. It is crucial that the elimination of the departure bar be accompanied by clear judicial interpretation or policy changes establishing that the same substantive standard should be applied to all those seeking reopening or reconsideration, regardless of the physical ground on which they stand.

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<sup>264</sup> *In re S-M-J-*, 21 I. & N. Dec. 722, 727 (B.I.A. 1997); *see also Reid v. INS*, 949 F.2d 287, 288 (9th Cir. 1991) (“Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation.”).

<sup>265</sup> My aim here has been to argue for the elimination of the departure bar. It bears mentioning, however, that even in the absence of such reforms, DHS can begin to seek reopening or reconsideration in cases where individuals have been removed based on erroneous interpretations of the law, convictions that have since been vacated, or other grounds upon which reopening or reconsideration is clearly indicated. Even broadly interpreted, the regulations appear to contemplate that an MTR filed by *the government* may be granted post-departure. *See supra* note 222.