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# Illegal Emigration: The Continuing Life of Invalid Deportation Orders

Richard H. Frankel

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# ILLEGAL EMIGRATION: THE CONTINUING LIFE OF INVALID DEPORTATION ORDERS

*Richard Frankel\**

## ABSTRACT

*Federal appeals courts overturn more than one thousand deportation orders every year. A significant number of those reversals involve non-citizens who are abroad because they have been deported as a result of losing their cases at the administrative level. Although an order overturning a deportation order ordinarily restores non-citizens to their prior status of being lawfully present in the United States, federal immigration authorities have used the fact of the non-citizen's now-invalidated deportation to subject such non-citizens to a new and previously inapplicable set of standards that effectively prevents them from returning. Under this practice, non-citizens who seek to return after winning from abroad are treated as "arriving aliens," meaning that because they are now outside the United States, the government can keep them out, even if they never should have been removed in the first place.*

*Neither courts nor scholars have addressed the lawfulness of applying the law's more stringent "arriving alien" standards to non-citizens who prevail from abroad rather than the more lenient "deportability" standards that apply prior to the non-citizen's removal. This Article examines the competing arguments for and against the government's practice and concludes that relying on non-citizens' wrongful deportations to apply new rules that keep non-citizens from returning deprives them of meaningful judicial review of their deportation orders in violation of both federal immigration law and the U.S. Constitution. Instead, requiring the government to apply the same "deportability" standards throughout a non-citizen's removal proceedings will best ensure that erroneously deported individuals are permitted to reenter the United States, reunite with their families, and resume their lives as they existed prior to their removal.*

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\* Associate Professor of Law, Earle Mack School of Law at Drexel University. B.A. 1997, Yale University; J.D. 2001, Yale Law School. I would like to thank Nancy Morawetz, Rachel E. Rosenbloom, Beth Lyon, Jessica Chicco Daniel Filler, Adam Benforado, Tabatha Abu El-Haj, Alex Geisinger, Anil Kalhan, Trina Realmuto, the Drexel Junior Faculty Workshop, Matthew Borowski, Rebecca Trela, and Alex Scanlon for their helpful and insightful feedback.

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## I. INTRODUCTION

NUMEROUS immigrants—"aliens" in legal parlance<sup>1</sup>—who have been deported by the government have succeeded in overturning their deportation orders, but only after the government has removed them from the United States.<sup>2</sup> Although overturning deportation orders ordinarily restores non-citizens to their prior status of being lawfully present in the United States, federal immigration authorities have used the fact of the non-citizen's (now invalidated) deportation to apply a previously inapplicable set of standards in order to prevent such non-citizens from returning. These entry standards, which typically are reserved for non-citizens seeking permission to enter the United States for the first time, are in many ways more stringent than deportation standards. Thus, under the government's practice, wrongfully deported immigrants can be kept out of the United States even if they never should have been removed in the first place, simply because they happened to be outside the United States, rather than inside, when they won their case.

The inability of wrongly deported immigrants to return is a significant and growing concern. Federal courts are hearing record numbers of de-

1. The term "alien" is a legal term of art that encompasses "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2006).

2. For example, federal courts grant more than 1,000 petitions for review of deportation orders every year. *See infra* note 105 and accompanying text.

portation challenges and reverse deportation orders at substantially higher rates than for other appeals.<sup>3</sup> Many of those reversals involve non-citizens who have already been deported.<sup>4</sup> For non-citizens, the stakes could not be higher. Deportation, which is the equivalent of banishment from one's home, family, and community, is one of the most severe punishments that the government can inflict upon non-citizens.<sup>5</sup> Moreover, the government's actions in subjecting wrongly deported aliens to new standards even after courts overturn their deportation orders cast light on a larger problem of treating wrongfully deported immigrants differently from immigrants who remain inside the United States. The example of Ronaldo Quinones illustrates the consequences that non-citizens suffer as a result of this differential treatment.<sup>6</sup>

Mr. Quinones is a lawful permanent resident who has lived in the United States since he emigrated from Honduras as a young child. Soon after turning eighteen, he was found with marijuana rolling papers and charged with a misdemeanor offense of possession of drug paraphernalia near a school zone.<sup>7</sup> Upon advice of counsel, he pleaded guilty, received a sentence of probation, and the case was closed.

For Mr. Quinones, however, the case was not closed. Soon after starting probation, federal immigration authorities detained him and placed him in deportation proceedings pursuant to the Immigration and Nationality Act (INA).<sup>8</sup> Even though Mr. Quinones never had any drugs on him, the government charged him as being deportable as an immigrant who has been convicted of an offense "relating to a controlled substance."<sup>9</sup>

Mr. Quinones appeared before an immigration judge and argued that he was not deportable because his conviction falls within a statutory exception for crimes involving possession of thirty grams or less of marijuana.<sup>10</sup> The immigration judge rejected his argument and ordered Mr.

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3. See *infra* Part II.B.

4. See *id.*

5. See *id.*

6. The name "Ronaldo Quinones" is a pseudonym used to protect privacy. However, the story described here is closely based on the real experiences of immigrants who have succeeded in overturning their deportation orders from abroad.

7. In addition to outlawing the possession of drugs, many states also criminalize the possession of drug paraphernalia, even if the accused possessed no drugs at all. See, e.g., N.J. STAT. ANN. § 2C:36-2 (West 2005).

8. See 8 U.S.C. § 1229a (2006). This section lays out framework for subjecting non-citizens to removal proceedings.

9. *Id.* § 1227(a)(2)(B)(i). The federal Immigration and Nationality Act (INA) makes deportable any immigrant who has been convicted of a controlled substance offense. *Id.* Numerous courts have held that possession of drug paraphernalia relates to a controlled substance and therefore constitutes a removable offense. See, e.g., *Barma v. Holder*, 640 F.3d 749, 751 (7th Cir. 2011); *Luu-Le v. INS*, 224 F.3d 911, 915-16 (9th Cir. 2000).

10. The statute includes an exemption stating that an individual is not deportable if the controlled substance conviction was for a "single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. § 1227(a)(2)(B)(i).

Quinones to be deported back to Honduras.<sup>11</sup> Mr. Quinones appealed to the Board of Immigration Appeals (BIA) and by law received an automatic stay of the deportation order for the pendency of the appeal.<sup>12</sup> The BIA also found that the thirty-gram exception did not apply and affirmed the immigration judge's deportation order.

Mr. Quinones then filed a petition for review with the federal circuit court of appeals.<sup>13</sup> Unlike when a case is pending before the BIA, federal law does not provide for an automatic stay of deportation when a case is pending in federal court.<sup>14</sup> Mr. Quinones filed a request for a discretionary stay, but the court denied it.<sup>15</sup> Soon after, federal immigration authorities executed the immigration judge's deportation order and removed Mr. Quinones to Honduras.

One year after Mr. Quinones was deported, the court of appeals overturned the immigration judge's removal order, finding that the thirty-gram exception could be applied to Mr. Quinones's offense. The court remanded to the immigration judge for a determination of whether, in Mr. Quinones's specific case, his conviction involved thirty grams or less of marijuana.

By then, Mr. Quinones was abroad, but was no longer subject to a deportation order, as the court's ruling vacated the order. He wanted to return to the United States so that he could be reunited with his family, all of whom live in the United States. Upon contacting the relevant federal authorities about reentering the country, he was told that he would be denied entry if he tried to return. The reason, according to the government, was that because he was now outside the United States and seeking to enter, as opposed to someone inside the United States whom authorities were seeking to remove, the authorities would treat him as an "arriving alien" subject to the statute's more restrictive admissibility provisions rather than the deportability provisions under which he was originally charged.

In other words, even if Mr. Quinones's conviction did not necessarily provide a basis for removing him from the United States in the first place, once he was removed (even on grounds that were subsequently overturned), the statute provided a basis to prevent him from reentering the

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11. An alien like Mr. Quinones would also be eligible for a form of relief from removal called cancellation of removal. *See id.* § 1229b(a). However, cancellation of removal is a discretionary remedy that the immigration judge is under no obligation to provide. *See, e.g., In re C-V-T-*, 22 I. & N. Dec. 7, 10–12 (B.I.A. 1998). Moreover, for individuals other than lawful permanent residents, the number of aliens who can receive cancellation of removal is capped at 4,000, regardless of the number of aliens who may be eligible. 8 U.S.C. § 1229b(e).

12. *See* 8 C.F.R. § 1003.6(a) (2006) (stating that, with certain exceptions, orders relating to immigrants shall not be carried out while an appeal with the Board of Immigration Appeals is pending).

13. *See* 8 U.S.C. § 1252(a) (2006) (allowing aliens to file petitions for review of final deportation orders to the federal courts of appeals).

14. *See infra* notes 34–40 and accompanying text.

15. *See infra* notes 41–43 and accompanying text for an explanation of the process for seeking a stay of removal.

country. Just as a controlled substance conviction makes a non-citizen residing in the United States deportable, it also makes a non-citizen seeking to enter the United States “inadmissible.”<sup>16</sup> However, while the deportability provisions provide an exception for convictions involving thirty grams or less of marijuana, the inadmissibility provisions do not.<sup>17</sup> For Mr. Quinones, this switch makes all the difference.

One might consider such behavior to be changing the rules in the middle of the game. In the realm of immigration law, however, it has been common practice. Executive branch attorneys have repeatedly taken the view that aliens who succeed in overturning their deportation orders after their removal must now, as a result of their deportation, be treated as “arriving aliens” subject to the Act’s inadmissibility provisions.<sup>18</sup> This creates unfair results for individuals like Mr. Quinones who fall within what others have termed the “inadmissibility gap.”<sup>19</sup> The INA’s inadmissibility provisions, which apply to arriving aliens, are in many ways more onerous than its deportability provisions, which apply to aliens who have been living inside the country. As a result, certain aliens fall in the “gap” where their conduct renders them inadmissible but not deportable.<sup>20</sup>

Consequently, under the government’s practice, a non-citizen who was wrongly deported may find himself barred from reentry because of the very act of removal that was held to be wrongful. In other words, the alien will remain deported simply because he was outside the country when he won his case rather than inside the country.

Although the government has suggested publicly that aliens who prevail from abroad should be restored to their prior immigration status,<sup>21</sup> in many cases the government has relegated them to a lesser status by taking aliens who were lawful permanent residents (LPRs) prior to deportation and reclassifying them as “arriving aliens” following their post-deportation success in court. This Article examines the government’s practice and concludes that it is inconsistent with federal immigration law and denies aliens their right to meaningful judicial review of deportation orders. From the alien’s perspective, the right to judicial review is of little value if an alien can win his case only to find that the government can use the fact of deportation to apply new rules that bar the alien from reentering the country.

As this Article was going to press, the federal government announced

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16. 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2006).

17. Compare 8 U.S.C. § 1227(a)(2)(B)(i) (2006) with *id.* § 1182(a)(2)(A)(i)(II).

18. See *infra* Part II.

19. See Nancy Morawetz, *The Invisible Border: Restrictions on Short-Term Travel by Noncitizens*, 21 GEO. IMMIGR. L.J. 201, 207 (2007) (using the term “inadmissibility gap” to describe situations where an individual is inadmissible but not deportable).

20. See *infra* Part II.B; see also *Judulang v. Holder*, 132 S. Ct. 476, 479 (2011) (explaining that the inadmissibility and removability provisions of the INA are “sometimes overlapping and sometimes divergent”).

21. See *infra* notes 72–74 and accompanying text.

new measures pertaining to aliens prevailing from abroad.<sup>22</sup> The government acknowledged that immigrants who prevail from abroad were not always restored to their prior status, and expressed a commitment to help facilitate the return of such aliens to the United States.<sup>23</sup> The new measures deal in large part with the administrative aspects of ensuring that a deported alien can return, such as issuing proper travel documents and border crossing authorizations.<sup>24</sup> They also indicate that aliens who prevail will be restored to the immigration status they had prior to removal.<sup>25</sup>

While the government's new measures may mitigate the "inadmissibility gap" problem to some degree, they do not ensure that the problem will go away. The government did not make these changes because it felt compelled to do so as a matter of law,<sup>26</sup> but did so as a policy decision—one that could be reversed just as quickly as it was adopted. It remains important to address the legality of the government's practices in the event that the policy changes or evolves. Additionally, the new measures do not explicitly address the inadmissibility gap and do not expressly prohibit charging a prevailing alien under inadmissibility standards rather than deportability standards. In fact, in certain ways treating prevailing aliens as subject to inadmissibility standards would appear to be perfectly consistent with the government's new policies.<sup>27</sup>

The question of what rights and remedies are available to non-citizens who succeed in overturning their deportation orders from abroad has been little explored by scholars or the courts.<sup>28</sup> In particular, no article

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22. See Letter from Stuart Delery, Acting Assistant Attorney Gen., Civil Div., U.S. Dep't of Justice (Apr. 25, 2012), available at <http://www.ilw.com/immigrationdaily/news/2012,0426-dreeben.pdf> [hereinafter Delery Letter].

23. See *id.*; Letter from Michael R. Dreeben, Deputy Solicitor Gen. for William K. Suter, Clerk of the Supreme Court of the United States, at 3–4 (Apr. 24, 2012), available at <http://www.ilw.com/immigrationdaily/news/2012,0426-dreeben.pdf> [hereinafter Dreeben Letter].

24. See Delery Letter, *supra* note 22.

25. See Dreeben Letter, *supra* note 23, app. B.

26. In fact, the government appears to believe that the law does not dictate one result over another, as it stated that "[t]he issue was not addressed by statute." Dreeben Letter, *supra* note 23, at 2.

27. See *infra* notes 41–43, 75–76, and accompanying text.

28. See, e.g., Rachel E. Rosenbloom, *Will Padilla Reach Across the Border?*, 45 NEW ENG. L. REV. 327 (2011) [hereinafter Rosenbloom, *Will Padilla Reach Across the Border?*] (addressing the ramifications of the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), for aliens who have already been deported); Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139 (2010) [hereinafter Rosenbloom, *Remedies for the Wrongly Deported*] (arguing that the Board of Immigration Appeals' rule prohibiting it from considering motions to reopen filed by aliens who are outside the United States is unreasonable); TRINA REALMUTO, PRACTICE ADVISORY: RETURN TO THE UNITED STATES AFTER PREVAILING IN FEDERAL COURT (Legal Action Center 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). The most extensive discussion of the problems facing this group of aliens comes from practice advisories and a Freedom of Information Act (FOIA) complaint filed in federal court by a number of groups represented by the New York University Immigrant Rights Clinic. See Complaint, Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., No. 11-cv-3235 (S.D.N.Y. May 12, 2011) [hereinafter FOIA Complaint]. That complaint alleges that fed-



has analyzed whether any statutory or other legal basis exists to justify the government's practice of classifying such immigrants as arriving aliens. Similarly, neither the BIA nor any court of appeals has issued an authoritative opinion regarding the government's practice.

This Article undertakes that analysis by examining the competing arguments for and against applying inadmissibility standards to non-citizens who prevail from abroad. It concludes that the practice of reclassifying such aliens as arriving aliens lacks a statutory basis and violates the Due Process and Equal Protection Clauses of the U.S. Constitution. Non-citizens who win their appeals while abroad should be fully restored to their prior status, which means that they should be subject to the same deportability standards that applied the first time around rather than to the more stringent inadmissibility standards. That is not to suggest that inadmissibility and deportability standards must be collapsed together in all circumstances. There may be legitimate reasons for treating arriving aliens differently from aliens already present in the United States. What is important is that the government not be allowed to apply a different set of standards to an individual during different stages of the same case. A non-citizen should not suffer prejudice by virtue of having been wrongfully removed from the United States.

Part II provides statutory background by detailing the differences between the INA's deportability and inadmissibility standards and by discussing the procedures for allowing aliens to challenge deportation orders from abroad that were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

Part III documents how the government often has classified aliens who win their appeals from abroad as arriving aliens, with the consequence that those aliens now become subject to the Act's inadmissibility standards when they were formerly subject to the Act's deportability standards. Part III also explores the significance of the government's practice by discussing the high volume of appeals of deportation orders and the high rate of federal court reversals.

Part IV evaluates the competing arguments concerning whether the INA and IIRIRA permit the government to apply inadmissibility standards to aliens who prevail from abroad and concludes that the government's practice is not authorized by statute. First, applying inadmissibility standards appears to be inconsistent with congressional intent to allow aliens to fully vindicate their rights from abroad. Congress specifically amended the INA to remove the automatic right to a stay of removal and replace it with a new right to pursue a petition for review from abroad following deportation. Second, although proponents of applying inadmissibility standards can point to support in the statutory text, those portions of the statute were intended to apply only to voluntary

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eral agencies have failed to adequately assist aliens in returning to the United States after they win their appeals and details how the government has stated on repeated occasions that successful aliens who do return will be treated as arriving aliens. *Id.* at 2-4.

removals rather than to involuntary removals that are subsequently invalidated.

Part V addresses the constitutional concerns raised by the government's approach. First, allowing the government to remove a non-citizen and then rely on that removal order after it is subsequently overturned to prevent him or her from reentering substantially curtails the non-citizen's right to judicial review in a way that gives rise to significant due process concerns. Second, the practice creates potential equal protection problems by applying the Act's more favorable deportability standards to aliens who win their appeals while inside the United States and applying the Act's far more restrictive inadmissibility standards to aliens who win after removal. This part questions whether a rational basis exists for this distinction and concludes that in the absence of any legitimate rationale, the government's practice violates equal protection.

Part VI discusses potential solutions and examines the feasibility of requiring the government to continue to apply deportability standards to aliens who prevail from abroad.

## II. STATUTORY FRAMEWORK

The problem facing aliens who prevail in their petitions for review from abroad stems from two unrelated portions of the INA: the procedural rules regarding who can file a petition for review and the substantive rules regarding the conduct that renders an alien deportable or inadmissible. This part first describes the procedural framework for filing petitions for review and then identifies the differences between the Act's deportability and inadmissibility standards.

### A. THE RIGHT TO PURSUE A PETITION FOR REVIEW FROM ABROAD

An alien lawfully residing in the United States enjoys certain protections prior to deportation. If the government believes that a legal resident is deportable, it initiates a deportation proceeding by filing a Notice to Appear that identifies the alleged grounds for deportation.<sup>29</sup> Grounds for deportation can range from overstaying a visa to becoming a public charge to committing various criminal offenses.<sup>30</sup> The alien then appears before an immigration judge. In the case of an LPR, the government must prove deportability by "clear and convincing evidence."<sup>31</sup> The immigration judge issues a decision, and either the government or the alien can appeal that decision to the BIA.<sup>32</sup> If the BIA finds that the alien is not deportable, that is the end of the matter and the deportation proceedings are terminated. If the BIA finds that the alien is deportable, then

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29. 8 C.F.R. § 1239.1(a) (2011).

30. 8 U.S.C. § 1227(a)-(b) (2006).

31. *Id.* § 1229a(c)(3)(A); accord *Woodby v. INS*, 385 U.S. 276, 286 (1966) ("[N]o deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.").

32. 8 C.F.R. § 1003.3(a)(1) (2011).

the alien has the right to seek review in a federal court of appeals by filing a petition for review.<sup>33</sup>

While a deportation proceeding is pending before the immigration judge or the BIA, the alien automatically receives a stay of removal, meaning that the alien cannot be deported until the BIA issues a final decision.<sup>34</sup> Prior to 1996, the process was similar for petitions for review in the courts of appeals. At that time, an alien could only pursue a petition for review from within the United States, and the alien's departure from the country constituted an automatic withdrawal of the petition.<sup>35</sup> Because the alien could not pursue a petition for review from abroad, any alien who filed a petition automatically received a stay of removal pending a decision on the petition.<sup>36</sup>

That structure changed following Congress's enactment of IIRIRA in 1996. Congress believed that too often aliens were using litigation as a delay tactic to avoid removal and wished to speed up the removal process.<sup>37</sup> In IIRIRA, Congress "inverted these provisions to allow for more prompt removal."<sup>38</sup> Specifically, Congress permitted aliens to pursue petitions for review from abroad by repealing the ban on post-departure petitions for review.<sup>39</sup> Accompanying that change, Congress removed the automatic stay provision and instead provided that a petition for review "does not stay the removal of an alien . . . unless the court orders otherwise."<sup>40</sup> Under current law, aliens can still seek a stay, but the decision to grant or deny a stay is discretionary rather than automatic.<sup>41</sup> The court's discretion is governed by the traditional test for stays, which looks to: (1) whether the party seeking the stay has made a "strong showing" of the likelihood of success on the merits; (2) whether the party will suffer "irreparable injury" in the absence of a stay; (3) whether the stay will

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33. 8 U.S.C. § 1252(b) (2006) (establishing the requirements for filing a petition for review).

34. 8 C.F.R. § 1003.6(a) (2011).

35. 8 U.S.C. § 1105a(c) (1994) (repealed 1996) ("An order of deportation or of exclusion shall not be reviewed by any court . . . if [the alien] has departed from the United States after the issuance of the order."). See also *Nken v. Holder*, 556 U.S. 418, 423–25 (2009) (describing the changes effected by the 1996 amendments).

36. 8 U.S.C. § 1105a(a)(3) (1994) (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.").

37. See, e.g., S. REP. NO. 104-249, at 1 (1996) (identifying the need to expedite "the removal of excludable and deportable aliens" as one of the goals of IIRIRA); H.R. REP. NO. 104-469(I), at 122 (1996) (explaining how aliens manipulated the deportation system to delay proceedings and to find ways to avoid deportation). See also *Reno v. Arab-Am. Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999) (noting that "[p]ostponing justifiable deportation (in the hope that the alien's status will change—by, for example, marriage to an American citizen—or simply with the object of extending the alien's unlawful stay) is often the principal object of resistance to a deportation proceeding").

38. *Nken*, 556 U.S. at 424.

39. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208 § 306(b), 110 Stat. 3009-612 (1996) (repealing 8 U.S.C. § 1105a); see also *Nken*, 556 U.S. at 423–25 (describing the amendments).

40. 8 U.S.C. § 1252(b)(3)(B) (2006); see also *Nken*, 556 U.S. at 423–25.

41. *Nken*, 556 U.S. at 433.

substantially injure other parties to the proceeding; and (4) whether the public interest supports granting a stay.<sup>42</sup> As the Supreme Court recently indicated, the standard is not an easy one to meet.<sup>43</sup>

Congress had two principal aims regarding this aspect of the 1996 amendments. First, Congress sought to quicken the pace of removal by eliminating the right to an automatic stay during the pendency of a petition for review.<sup>44</sup> Eliminating the automatic stay makes it harder for aliens to use legal proceedings solely for the purpose of delay. It also saves the government the substantial expense of housing aliens, many of whom are kept in prison on immigration detainers for the duration of their proceedings.<sup>45</sup> Second, allowing aliens to litigate their appeals following removal helps maintain the accuracy of removal determinations.<sup>46</sup> In other words, the gravamen of the amendments is that the act of deportation should not affect an alien's ability to fully vindicate his or her rights. The amendments allow the government to execute deportation orders more quickly but without prejudice to aliens, who can still obtain full relief if they win their appeal after being deported.

## B. DEPORTABILITY VS. INADMISSIBILITY

Prior to 1996, cases involving aliens seeking entry into the United States were dealt with separately from cases involving aliens whom the government was seeking to remove from the United States. The former were handled in what were known as "exclusion" proceedings, and the latter were handled in what were known as "deportation" proceedings.<sup>47</sup> Substantive inadmissibility standards governed exclusion proceedings,<sup>48</sup> while substantive deportability standards governed deportation proceedings.<sup>49</sup> In 1996, Congress scrapped the separate proceedings and created

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42. *Id.* at 434.

43. *Id.* at 434–35.

44. *Lin v. U.S. Attorney Gen.*, 681 F.3d 1236, 1240 (11th Cir. 2012).

45. Federal law requires the government to detain certain classes of individuals, primarily those who have committed certain types of crimes such as drug crimes, for the duration of proceedings. *See* 8 U.S.C. § 1226(c) (2006). Even aliens not subject to mandatory detention may still be incarcerated while their proceedings are ongoing if the immigration judge determines that they should not be released on bond, or if they cannot afford the bond that the immigration judge sets. *See id.* § 1226(a) (authorizing the Attorney General to detain any alien who has pending removal proceedings). For a more general discussion and critique of federal immigration detention policies, see Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010), available at [http://www.columbialawreview.org/sidebar/volume/110/42\\_Anil\\_Kalhan.pdf](http://www.columbialawreview.org/sidebar/volume/110/42_Anil_Kalhan.pdf).

46. *See, e.g., Prestol Espinal v. Attorney Gen.*, 653 F.3d 213, 222–23 (3d Cir. 2011) (identifying "IIRIRA's dual objectives 'to expedite the physical removal of those aliens not entitled to admission to the United States, while at the same time increasing the accuracy of such determinations'" (quoting *Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010))).

47. *See Judulang v. Holder*, 132 S. Ct. 476, 479 (2011) (describing the different proceedings); *Landon v. Plasencia*, 459 U.S. 21, 25 (1982) ("The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.").

48. These standards are now codified at 8 U.S.C. § 1182 (2006).

49. These standards are now codified at *Id.* § 1227.

a single “removal” proceeding to govern both admission and deportation.<sup>50</sup>

Congress, however, retained the distinct admissibility and removability standards. In many ways, the two standards overlap. For example, an alien who has been convicted of certain types of crimes, such as drug crimes, violent crimes, and “crimes of moral turpitude,” can be both inadmissible and deportable.<sup>51</sup> Similarly, aliens who have become, or are at risk of becoming, a public charge or who present a risk to national security are both inadmissible and deportable.<sup>52</sup>

In other important ways, however, the two standards diverge. The grounds for inadmissibility are generally considered to be broader than the grounds for deportability.<sup>53</sup> Thus, there are numerous ways in which conduct that makes a person inadmissible would not make the same person deportable, creating what Professor Nancy Morawetz termed the “inadmissibility gap.”<sup>54</sup>

First, the criminal grounds for deportability and inadmissibility differ in significant ways. As the example at the beginning of this Article shows, while drug crimes render an individual both inadmissible and deportable, the deportability grounds provide an exception for a single offense involving possession of thirty grams or less of marijuana.<sup>55</sup> The inadmissibility grounds, however, provide no parallel exception.<sup>56</sup>

50. See *id.* § 1229a(a).

51. See *id.* §§ 1182(a), 1227(a).

52. See *id.* 8 U.S.C. § 1182(a)(4) (making public charges inadmissible); *Id.* § 1227(a)(5) (making public charges deportable); *Id.* § 1182(a)(3) (making national security threats inadmissible); *Id.* § 1227(a)(4) (making national security threats deportable). Even there, however, differences persist. A non-citizen is inadmissible if the government determines simply that the non-citizen is a risk of becoming a public charge after entry. By contrast, a non-citizen is deportable as a public charge only if the non-citizen becomes a public charge “within five years” of the date of entry and fails to show that the causes did not arise after entering the United States. *Id.* § 1227(a)(5).

53. See, e.g., Evelyn H. Cruz, *Because You're Mine, I Walk the Line: The Trials and Tribulations of the Family Visa Program*, 38 FORDHAM URB. L.J. 155, 161 n.46 (2010) (“Grounds of inadmissibility do not always mirror grounds of deportability and generally are more expansive.”).

54. See Morawetz, *supra* note 19, at 207.

55. 8 U.S.C. § 1227(a)(2)(B)(i).

56. *Id.* § 1182(a)(2)(A)(i)(II). While the inadmissibility grounds permit an alien to seek a waiver of a conviction involving possession of thirty grams or less of marijuana, the waiver is discretionary, and an alien is eligible only if the conviction occurred more than 15 years before the date of the alien’s application for admission and the alien demonstrates that he or she has been rehabilitated. *Id.* § 1182(h)(1)(A). Moreover, while the government carries the burden of proving that an offense does not involve thirty grams or less of marijuana in a deportation proceeding, the alien bears the burden of proof when seeking a discretionary waiver and must affirmatively demonstrate that the conviction did involve thirty grams or less of marijuana. Compare *Medina v. Ashcroft*, 393 F.3d 1063, 1065 n.5 (9th Cir. 2005) (holding that, in a deportation hearing, “[t]he government bears the burden of establishing that an alien’s conviction does not fall within the exception for possession of 30 grams or less of marijuana.”); *Sandoval v. Ashcroft*, 240 F.3d 577, 581 (7th Cir. 2001); *with, In re Mendez-Morales*, 21 I. & N. Dec. 296, 299–300 (B.I.A. 1996) (holding that the alien bears the burden of proof regarding entitlement to a discretionary waiver of inadmissibility).

Another important difference involves crimes of moral turpitude. This is a broad category that includes virtually any crime that is done knowingly and that is contrary to generally accepted views of morality.<sup>57</sup> An alien generally is inadmissible if the alien has committed a single crime of moral turpitude.<sup>58</sup> By contrast, an alien ordinarily is not deportable unless he or she has been convicted of two crimes of moral turpitude.<sup>59</sup> The only time a single conviction for a crime of moral turpitude will make an alien deportable is if the conviction occurred within the first five years of the alien's admission and was for a crime with a maximum penalty of one year or more.<sup>60</sup> Moreover, if an alien has been convicted of two crimes of moral turpitude that happen to arise out of a single scheme of criminal misconduct, then the alien is not deportable.<sup>61</sup> Furthermore, while an alien who has been convicted of two or more offenses of any type with an aggregate prison sentence, active or suspended, of five years or more is inadmissible, there is no parallel ground of deportability.<sup>62</sup>

In addition, criminal deportability grounds require a higher level of proof than criminal inadmissibility grounds. In general, criminal deportability grounds require proof of an actual conviction.<sup>63</sup> By contrast, an alien will be inadmissible not only if the alien has been convicted of a drug crime or a crime of moral turpitude, but also if the alien admits committing acts constituting such an offense, even if the alien was never tried or convicted.<sup>64</sup> Other inadmissibility grounds do not require the alien to admit any criminal conduct at all. For example, an individual is inadmissible when the government "knows or has reason to believe" that the individual is going to engage in drug trafficking, money laundering, or human trafficking.<sup>65</sup>

Second, there are certain health-related grounds that make an individual inadmissible but not deportable. Specifically, any individual with a communicable disease; a "physical or mental disorder" that may pose a threat to the property, safety, or welfare of others; or a history of drug use or addiction is inadmissible.<sup>66</sup> Because immigration officers may consider a history of alcohol addiction to be a mental disorder, especially if

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57. See, e.g., *In re Franklin*, 20 I. & N. Dec. 867, 868 (B.I.A. 1994) ("Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."), *aff'd*, 72 F.3d 571 (8th Cir. 1995).

58. 8 U.S.C. § 1182(a)(2)(A)(i). The inadmissibility grounds provide for a "petty offense" exception whereby a crime of moral turpitude will not render an individual inadmissible. *Id.* § 1182(a)(2)(A)(ii)(II). However, the exception only applies if (a) the individual has committed no other crime, (b) the crime carries a maximum penalty of one year or less, and (c) the individual was not sentenced to more than six months in prison. *Id.*

59. *Id.* § 1227(a)(2)(A)(ii).

60. *Id.* § 1227(a)(2)(A)(i).

61. *Id.* § 1227(a)(2)(A)(ii).

62. *Id.* § 1182(a)(2)(B).

63. *Id.* § 1227(a)(2). The Section identifies the criminal grounds of deportability and covers aliens who have been "convicted" of the crimes specified in that provision.

64. See *id.* § 1182(a)(2)(A)(i).

65. *Id.* § 1182(a)(2)(C), (H)-(I).

66. *Id.* § 1182(a)(1).

there is evidence that the alien has a history of driving while intoxicated,<sup>67</sup> this ground can provide a broad basis for exclusion.

To be sure, the differences work in the other direction as well. Some criminal convictions may render an alien deportable but not inadmissible. An alien is deportable, but not inadmissible, if the alien has been convicted of an “aggravated felony” and was sentenced to a year or more in prison.<sup>68</sup> The INA definition of an aggravated felony includes a list of various types of more serious crimes.<sup>69</sup> Most aggravated felonies, however, are also likely to qualify as crimes of moral turpitude and thus would render an alien inadmissible notwithstanding the lack of an aggravated felony ground for inadmissibility.<sup>70</sup> The one major exception is firearms offenses, which are deportable offenses but not crimes of moral turpitude, and therefore do not render an individual inadmissible.<sup>71</sup>

In short, an alien’s ability to reside in the United States may turn on whether the alien is subject to inadmissibility grounds or deportability grounds. In many cases, this classification is uncontroversial. For an alien who was lawfully admitted into the United States and is still present there, deportability grounds apply. For aliens who have never been to the United States and are seeking to enter for the first time, inadmissibility grounds apply. Uncertainty arises, however, where an alien who was previously present in the United States is found deportable and removed from the United States, and then seeks to return to the United States after successfully overturning the order of deportation from abroad. As explored in the next part, the federal government repeatedly has taken the position that returning aliens in such circumstances are subject to the more stringent inadmissibility standards than to the deportability standards that applied when the alien was originally removed. The effect is that certain aliens who were unlawfully removed will find that the fact of their mistaken removal will ironically bar them from reentering the country.

### III. THE GOVERNMENT’S ACTIONS AND THEIR EFFECTS

The government’s reliance on invalidated deportation orders to prohibit wrongly deported non-citizens from returning to the United States significantly harms those non-citizens who should otherwise have the option to reenter. According to the government’s public pronouncements, however, this issue should not exist at all. In public statements, the gov-

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67. See Memorandum from William R. Yates, Assoc. Dir. of Operations, U.S. Citizenship & Immigration Servs., available at <http://search.aila.org> (accessed by searching for Doc. No. 04022362; online registration is required).

68. 8 U.S.C. § 1227(a)(2)(A)(iii).

69. *Id.* § 1101(a)(43) (providing a list of criminal offenses that constitute aggravated felonies).

70. See, e.g., *Judulang v. Holder*, 132 S. Ct. 476, 482 (2011) (noting that almost all criminal convictions that make an alien deportable also constitute crimes of moral turpitude).

71. See *In re Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (B.I.A. 1990) (stating that an alien convicted of a firearms offense is deportable but not inadmissible).

ernment has affirmed that aliens who win their cases following deportation should be restored to their prior status. For example, in its briefing to the Supreme Court in *Nken v. Holder*,<sup>72</sup> the government stated that its “policy and practice” is to “accord[ ] aliens who were removed pending judicial review but then prevailed before the courts effective relief by, *inter alia*, facilitating the alien’s return to the United States by parole under 8 U.S.C. § 1182(d)(5) if necessary, and according them the status they had at the time of removal.”<sup>73</sup> Thus, an alien who had a status as an LPR before deportation should, according to the government, be restored to LPR status upon winning his or her appeal. In *Nken*, the Supreme Court specifically relied on the government’s representation regarding restoration of pre-removal status in holding that deportation does not cause irreparable injury that would justify a stay of removal.<sup>74</sup> The government’s statement in *Nken*, however, does not appear to be consistent with actual practice. In contrast to its public statements, the government often has accorded a lesser status to prevailing aliens, and the government’s actions have broad implications for the large number of aliens who challenge deportation orders from abroad.

#### A. THE GOVERNMENT’S PRACTICE

The government’s stated “policy and practice” of restoring aliens to their prior status and facilitating their return seems inconsistent with its actual policy and practice. As extensively documented in a Freedom of Information Act (FOIA) lawsuit filed recently by a coalition of immigrants’ rights organizations, the federal government appears to have acted contrary to its statement in *Nken* that it restores prevailing aliens to their prior status.<sup>75</sup> The complaint, accompanied by numerous affidavits and other documentary evidence, asserted that the government’s statement in *Nken* has no clear basis.<sup>76</sup>

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72. 556 U.S. 418, 418 (2009).

73. Brief for Respondent at 22, *Nken v. Holder*, 556 U.S. 418 (2009) (No. 08-681), 2009 WL 45980, at \*44. See also Respondent’s Opposition to Petitioner’s Motion to Amend the Court’s December 22, 2008 Decision at 11, *Sandoval-Macias v. Mukasey*, 304 F. App’x 558 (9th Cir. 2008) (No. 07-71354) (“[O]nce the Court’s mandate issues in this case, there will no longer be a final order of removal against Sandoval and his status as a lawful permanent resident will be restored, along with his entitlement to evidence demonstrating that status.”).

74. *Nken*, 556 U.S. at 435. Other courts similarly have relied on the government’s statement in *Nken* that an alien is returned to the same status as he had prior to removal when he prevails on a petition for review. See, e.g., *Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 n.3 (5th Cir. 2010); see also *Tapia Garcia v. INS*, 237 F.3d 1216, 1218 (10th Cir. 2001) (finding that if the petitioner prevailed before the court, his “status as a legal permanent resident would be restored and he could return to the United States”).

75. FOIA Complaint, *supra* note 28, ¶¶ 1–6; accord *REALMUTO*, *supra* note 28, at 1 (“There are no formal procedures for arranging the return of someone who has been deported.”).

76. FOIA Complaint, *supra* note 28, ¶ 5. The district court overseeing the FOIA litigation recently ordered the federal government to disclose certain factual information regarding the underlying basis for its statement in *Nken*. See *Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Sec.*, 842 F. Supp. 2d 720 (S.D.N.Y.



It appears that the government has lacked a coherent or consistent policy regarding how to treat aliens who win their petitions for review from abroad. Instead, it seems that government attorneys for the Department of Homeland Security (DHS) have broad discretion to decide what status to accord such aliens. Consequently, in recent years, government attorneys have repeatedly taken the position that such aliens, because they are now outside the United States, are properly classified as arriving aliens who are subject to inadmissibility standards rather than deportability standards. Specifically, the government has taken the position that it cannot restore an alien to the status of being lawfully inside the United States, even if the alien possessed such status prior to the initiation of removal proceedings.<sup>77</sup> In one internal government e-mail communication, a federal official indicated that the only available relief would be to treat the alien as “an arriving alien, which would not be restoring him to the status quo that existed when he was improperly removed.”<sup>78</sup> In a number of cases, the government has asserted that prevailing aliens, including LPRs, should not be allowed to return because they are inadmissible, or it has taken the position that post-deportation proceedings should be dismissed as moot because even if the alien prevailed and regained LPR status, the alien nonetheless would be inadmissible.<sup>79</sup> In another case, an immigration judge found that a prevailing alien who had his deportation order overturned was inadmissible under a statutory provision that makes any previously deported alien inadmissible unless the alien obtains permission to return from the Attorney General.<sup>80</sup> In another case, even where the government agreed that an alien should be restored to his LPR status after successfully showing that his conviction was not an aggravated felony, it took the position that he could not reside in the United States because his conviction was a crime involving moral turpitude.<sup>81</sup> Thus, the government indicated that it was applying the inadmissibility standards that make a single moral turpitude conviction removable rather than the deportability standards that ordinarily require

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2012). The government has decided not to appeal that order. See Dreeben Letter, *supra* note 23, at 2 n.2.

77. See FOIA Complaint, *supra* note 28, exhibit Y (letter from Joseph D. Hardy, Trial Att’y, Office of Immigration Litig., U.S. Dep’t of Justice, to the U.S. Court of Appeals for the Fifth Circuit) (“[T]here is no remedy that can return him to the status he had prior to his removal, *i.e.*, an alien seeking to *remain* in the United States pending adjudication of an application for adjustment of status in conjunction with a discretionary waiver.”).

78. *Id.* exhibit CC.

79. *Id.* ¶ 36 (providing examples); *Id.* exhibit E ¶ 9 (Declaration of Barbara Hines); *Id.* exhibit F ¶ 7 (Declaration of Maile M. Hirota); *Id.* exhibit G ¶¶ 28–31 (Declaration of Joseph Hohenstein); Press Release, NYU Immigrant Rights Clinic, Barriers to Return After Successfully Challenging a Removal Order from Outside the U.S., at 5 (May 16, 2011), available at [http://nationalimmigrationproject.org/legalresources/cd\\_NIP\\_v.\\_DHS\\_FOIA\\_Complaint\\_Summary.pdf](http://nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_Summary.pdf) [hereinafter FOIA Press Release].

80. *In re G-G-M-*, Interlocutory Ruling on Grounds of Inadmissibility, 3–4 (U.S. Immigr. Ct. Oct. 19, 2011) [hereinafter G-G-M- Interlocutory Order] (on file with author).

81. FOIA Complaint, *supra* note 28, exhibit G ¶ 30 (Declaration of Joseph Hohenstein).

two moral turpitude convictions.<sup>82</sup>

Even when the government has consented to an alien's return, it often has taken the position that the only way an alien can return is through what is known as "parole."<sup>83</sup> By entering as a parolee an alien is treated as an arriving alien who must apply for admission.<sup>84</sup> Parole is not an admission at all and does not confer any immigration status on the alien. Rather, it permits a temporary reentry, usually for a period of one year or less, for reasons of exigency—such as the need to participate in legal proceedings or so the alien can obtain urgent and necessary medical care.<sup>85</sup> Once parole expires, the alien loses any right to stay in the United States and is treated as an applicant for admission subject to inadmissibility standards.<sup>86</sup> And if the alien is inadmissible though not deportable, the alien ultimately cannot remain in the United States. In several cases, the government assented to an alien's return only through the issuance of parole.<sup>87</sup>

In short, although it has not done so in every case, the government repeatedly has taken the position that aliens who were lawful residents before removal are now applicants for admission following removal, even though none of these aliens would have been removed but for the faulty deportation orders that these aliens have succeeded in overturning.

As this article was going to press, the government acknowledged in response to the FOIA litigation that, notwithstanding its statements in *Nken*, it had not always restored prevailing aliens to their prior status.<sup>88</sup> As a result, the government announced that it would "take steps going forward to ensure that aliens who prevail on judicial review are able to timely return to the United States."<sup>89</sup> Specifically, the government cited a new directive issued by the Department of Homeland Security's Immigration and Customs Enforcement (ICE) branch in which ICE committed

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82. *Id.*

83. See 8 U.S.C. § 1182(d)(5) (2006).

84. REALMUTO, *supra* note 28, at 4 ("[B]ecause parolees are subject to the grounds of inadmissibility, not deportability, entering as a parolee may negatively impact the charges in the Notice to Appear and the type of relief available.").

85. See, e.g., Amanullah v. Nelson, 811 F.2d 1, 6 (1st Cir. 1987) ("The legislative history of the parole statute, 8 U.S.C. § 1182(d)(5) [(1982)], demonstrates beyond cavil that Congress consistently visualized parole as an indulgence to be granted only occasionally, in the case of rare and exigent circumstances, and only when it would plainly serve the public interest.").

86. 8 U.S.C. § 1182(d)(5) (2006); FOIA Press Release, *supra* note 79, at 5 (noting that "many individuals are returned through parole, which subjects an individual to treatment as an 'arriving alien' and grounds of inadmissibility"); see also Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720, 724 (S.D.N.Y. 2012) (noting that government records "admit that the Government's use of parole would not restore the status that removed aliens had prior to their removal").

87. FOIA Press Release, *supra* note 79, at 5; FOIA Complaint, *supra* note 28, exhibits A, B, E, L, AA, CC, DD, EE.

88. Dreeben Letter, *supra* note 23, at 4 ("[T]he government is not confident that the process for returning removed aliens, either at the time its brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in *Nken* implied.").

89. *Id.*

to facilitating certain aliens' return to the United States, and to treating prevailing aliens "as having reverted to the immigration status he or she held" prior to removal.<sup>90</sup>

These new steps by the government should be applauded, and hopefully they will mitigate the scope of the inadmissibility gap problem. However, the new measures do not guarantee that this problem will disappear. First, by their own terms, the new measures do not apply to all prevailing aliens. Rather, the ICE statement indicates only that "ICE will facilitate the alien's return to the United States if either the court's decision restores the alien to LPR status, or the alien's presence is necessary for continued administrative removal proceedings."<sup>91</sup> However, there are many immigrants, such as individuals who have student or spousal visas, who lawfully reside in the United States but are not LPRs. If such aliens are wrongfully deported and prevail on a petition for review following deportation, it is not clear that the policy requires the government to facilitate their return.<sup>92</sup> Additionally, whether ICE deems an alien's presence in the United States necessary for continued removal proceedings begs the question of what type of proceedings the alien would face. In other words, the government's statement does not appear to determine whether the prevailing alien would face deportability charges or inadmissibility charges upon return. Furthermore, if a government attorney decides that the prevailing alien is inadmissible, that attorney may determine that the alien cannot reenter and therefore his or her presence is not necessary for continued administrative proceedings. Thus, the government's actions, while laudable, also have been criticized as incomplete and deficient for continuing to vest many decisions about an alien's return with the agency's discretion.<sup>93</sup>

Second, although the new policies state that the government will treat prevailing aliens as having been restored to their prior status, restoring an alien to his or her prior status does not on its own solve the inadmissibility gap problem. There are ways in which charging prevailing aliens under inadmissibility standards is perfectly consistent with this policy. As

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90. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DIRECTIVE 11061.1, FACILITATING THE RETURN TO THE UNITED STATES OF CERTAIN LAWFULLY REMOVED ALIENS ¶ 2 (Feb. 24, 2012), available at [http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/11061.1\\_current\\_policy\\_facilitating\\_return.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf) [hereinafter ICE DIRECTIVE 11061.1]; accord Dreeben Letter, *supra* note 23, at 4 (citing the ICE Directive).

91. ICE DIRECTIVE 11061.1, *supra* note 90, ¶ 2.

92. In a "Frequently Asked Questions about ICE Policy Directive Number 11061.1," document, ICE indicates that it will facilitate return of any prevailing alien with a lawful immigration status that has not expired. *FAQS about ICE Policy Directive Number 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens*, ICE, <http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/faq.htm> (last visited July 5, 2012). However, it is not clear that the policy itself requires returning anyone other than lawful permanent residents.

93. See Transcript of Hearing at 19:6–19:17, Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., No. 11-cv-3235 (S.D.N.Y. Apr. 27, 2012) (noting that the new policies "do not ensure effective relief for all individuals who prevail in their cases after deportation" and that the policy "leaves much to the discretion of ICE").

explained below,<sup>94</sup> the government may still assert that aliens who are restored to lawful permanent resident status must be subject to inadmissibility standards by virtue of their length of time away from the United States or their prior criminal record. And the government in fact has done so in prior cases.<sup>95</sup>

Third, the government's new statements never explicitly address the inadmissibility gap problem itself, nor the legality of charging prevailing aliens under inadmissibility standards. The government did not issue its new measures because it felt compelled to do so as a matter of law, under either statute or the Constitution. Rather, the government has suggested this issue "was not addressed by statute."<sup>96</sup> In other words, if the government believes that either option is legally appropriate, then it can revert to its prior practice just as easily as it adopted its new one. As a result, it is important to examine the statutory and constitutional problems with subjecting prevailing aliens to inadmissibility standards.

Furthermore, failing to explicitly address the inadmissibility gap leaves open the possibility that the government can try to accomplish through the back door what it may no longer do through the front door. This is because the deportability standards make an individual deportable if the individual was inadmissible at the time of entering the country.<sup>97</sup> Thus, if an alien who is subject to the inadmissibility gap is treated as reentering the United States (even lawfully) after his petition for review is granted and ICE facilitates return, the government may have grounds to argue that the alien is still deportable by virtue of having committed an inadmissible (but not deportable) offense at the time the alien reentered the United States following a victory in the court of appeals. Even aliens who are restored to their prior status and not charged as arriving aliens could still find themselves unable to return and remain in the United States. While the idea that the government would attempt such an end run may sound farfetched, it has taken such a position before.<sup>98</sup> Thus, at this point, it is still too early to tell what effect the government's new

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94. See *infra* Part IV.B.1.

95. See *id.* In its "Frequently Asked Questions" document regarding the new directive, ICE states that it will not treat a prevailing alien as an arriving alien unless the alien was charged as an arriving alien prior to removal. *FAQs*, *supra* note 92. It is not clear how that statement interacts with statutory provisions in the INA that allow LPRs to be treated as applicants for admission in certain circumstances. See *infra* Part IV.B.1.

96. Dreeben Letter, *supra* note 23, at 2.

97. 8 U.S.C. § 1227(a)(1)(A) (2006) ("Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.").

98. See, e.g., Memorandum from William E. Lore, Senior Attorney, U.S. Immigration & Customs Enforcement, Dep't of Homeland Sec., at 5-6, *In re G-G-M-* (Sept. 28, 2011) [hereinafter DHS Memorandum] (on file with author). In that case, the government argued that even if a prevailing alien lawfully reentered the United States after his removal order was vacated, he should be charged as removable under 8 U.S.C. § 1227(a)(1)(A) for having committed a single crime of moral turpitude and a single drug offense—regardless of whether it involved possession of thirty grams or less of marijuana—prior to his lawful reentry. See *id.*

pronouncements will have and how significantly they will affect the “inadmissibility gap” problem.

#### B. THE EFFECT ON PREVIOUSLY DEPORTED ALIENS

The effects of the “inadmissibility gap” threaten to substantially prejudice the rights of aliens who win their cases after being deported. Aliens who are not deportable but are inadmissible might find themselves unable to return to the United States even though the only reason they were removed was because of an erroneous deportation order. In effect, an alien’s now defunct deportation order may continue to have adverse consequences by preventing the alien from returning to the United States.

From the non-citizen’s perspective, the stakes involved could not be higher. Deportation is one of the most severe punishments that can befall a non-citizen, and the consequences of deportation “often far outweigh those of many criminal convictions.”<sup>99</sup> Deportation is the equivalent of banishment or exile. It results in the forcible removal from one’s home and country of residence, as well as the severance of family, community, and business relationships.<sup>100</sup> According to Professor Peter Markowitz, deportation means that “[l]awful immigrants can face life sentences of banishment from their homes, families, and livelihoods in the United States and can potentially be sent to countries they have not visited since childhood, where they: have no family, do not speak the language, and can face serious persecution or death.”<sup>101</sup> Deported individuals may never see their family again and may be forced to live in a place that often feels like a completely foreign land. Individuals who have been deported while their challenges were pending in court have found that they are unable to integrate into a foreign society and have suffered from unemployment, destitution, homelessness, and physical violence.

Unfortunately, it is impossible to systematically quantify the number of wrongly deported aliens who have been prevented from returning because they fall in the inadmissibility gap. First, the lack of data is due in part to the executive branch’s refusal to disclose information about its policies for dealing with aliens who prevail post-deportation.<sup>102</sup> Immigra-

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99. *Problems with ICE Interrogation, Detention and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int’l Law of the H. Comm. on the Judiciary*, 110th Cong. 77–78 (2008) (statement of Rachel E. Rosenbloom, Human Rights Fellow and Supervising Attorney, Center for Human Rights and International Justice at Boston College).

100. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 759 (1893) (Field, J., dissenting) (“As to its cruelty, nothing can exceed a forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family, and business . . .”).

101. Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301–02 (2011); accord *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (“[D]eportation may result in the loss ‘of all that makes life worth living.’”) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

102. See *Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Sec.*, 842 F. Supp. 2d 720 (S.D.N.Y. 2012) (describing the executive branch’s refusal to

tion advocates and attorneys have requested that the government provide the number, or even a general estimate, of wrongly deported aliens who remain outside the United States, but the government has refused to respond.<sup>103</sup> It is not even clear that the federal government keeps such data.

Nor is it possible to determine the number of wrongly deported aliens who remain outside the United States by searching immigration court or BIA case records. Unlike judicial case records, immigration court records are not public documents. Even if the files were publicly accessible, such files may not always indicate whether or not an individual has been deported or is still in the United States.<sup>104</sup>

What is known and undisputed is that the effects are much greater than anyone anticipated. The reason, as detailed below, is that since the IIRIRA amendments of 1996 the volume of petitions for review challenging deportation orders has exploded with a similarly dramatic increase in appellate court reversals of deportation orders. Moreover, because immigration judges have been criticized by the courts of appeals for being error-prone and engaging in sloppy reasoning, the reversal rate in deportation cases (as much as 40% in some circuits) is much higher than the overall reversal rate in the court of appeals.<sup>105</sup> Federal courts grant more than 1,000 petitions for review a year, a significant number of which

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disclose information regarding its policies for returning aliens who successfully challenge deportation orders from abroad).

103. Telephone Interview with Jessica Chicco, Human Rights Fellow & Supervising Attorney, Ctr. for Human Rights and Int'l Justice, Bos. Coll. (Mar. 15, 2012) (statement from Ms. Chicco explaining that the federal government has rebuffed efforts by immigration advocates to determine the number of wrongly deported aliens who have been unable to return to the United States).

104. *See id.* Once a case ends up in federal court on a petition for review, then the court file may be accessed by visiting the courthouse. However, appellate case files are unlikely to have relevant documents because the file will only contain information through the court's final decision on the petition for review. The file therefore will not contain information about whether an alien who wins a petition for review is subsequently charged as being inadmissible. Moreover, while most other case files are electronically searchable through the Public Access to Court Records (PACER) system, Federal Rule of Appellate Procedure 25 restricts the public from electronic access to most portions of immigration case files, including the entire administrative record. *See AMERICAN IMMIGRATION LAW FOUN. LEGAL ACTION CTR., PRACTICE ADVISORY: ELECTRONIC FILING AND ACCESS TO ELECTRONIC FEDERAL COURT DOCUMENTS*, 3–4 (2009), available at [http://www.legalactioncenter.org/sites/default/files/pa-ElectronicFiling\\_20090413.pdf](http://www.legalactioncenter.org/sites/default/files/pa-ElectronicFiling_20090413.pdf).

105. The reversal rate of deportation decisions has been as high as 20%–40% depending on the circuit. *See, e.g.,* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 60 n.95 (2006–2007) [hereinafter Benson, *Making Paper Dolls*] (“The rate of remand or reversal in the Second Circuit is 20%, and has reached as high as 40% in the Seventh Circuit.”). By contrast, the reversal rate is only 8.6% for appeals as a whole and only 13.4% for administrative appeals, of which deportation appeals comprise a large percentage. ADMIN. OFFICE OF THE U.S. COURTS, OFFICE OF JUDGES PROGRAMS, *FEDERAL JUDICIAL CASELOAD STATISTICS* tbl. B-5 (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/B05Mar11.pdf>.

involve previously deported aliens.<sup>106</sup> Moreover, the government's practice has implications for every non-citizen. Every alien who lives in the United States or who may enter in the future could potentially land in the inadmissibility gap, and therefore every alien must live in fear of the possibility of being wrongly deported and then prohibited from returning.

Prior to 1996, petitions for review were relatively rare. For example, in the thirty-year period from 1972 to 2002, the Second Circuit, which has one of the busiest immigration dockets in the nation, received only 2,360 petitions, for an average of just under eighty a year.<sup>107</sup> However, there has been a "well-documented" explosion of petitions for review since the IIRIRA reforms of 1996.<sup>108</sup> One study shows that appeals of removal orders increased by almost 1,000% from 1996 to 2006.<sup>109</sup>

Most commentators ascribe the bulk of the increase to a few causes. One cause was the 1996 amendments themselves. IIRIRA enacted new standards for deportation that were not clearly drafted and therefore inspired a great deal of litigation regarding whether aliens could properly be found deportable under those new standards.<sup>110</sup> IIRIRA also significantly reduced opportunities for discretionary relief where an alien was found deportable.<sup>111</sup> By closing off other avenues for relief, the Act pushed aliens to lodge more challenges to the finding of deportability itself since that increasingly came to represent the only option for staying in the country. In turn, immigration attorneys who had previously limited their practice to the administrative level and shied away from filing petitions in federal court became more comfortable with federal appellate practice and began filing more and more petitions for review.<sup>112</sup>

A second major cause was the adoption of new "streamlining" regula-

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106. FOIA Complaint, *supra* note 28, ¶ 3 ("A significant number of [appellate reversals of deportation orders] involve individuals who challenge their removability from outside the United States.").

107. John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 14 (2006–2007) [hereinafter Palmer, *Nature and Causes*].

108. John R.B. Palmer, *et al.*, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMGR. L.J. 1, 8–9 & n.17 (2005) (citing numerous reports) [hereinafter Palmer, *Challenging Board of Immigration Appeals*].

109. See Benson, *Making Paper Dolls*, *supra* note 105, at 39 (describing a 970% increase in federal court appeals of removal orders since 1996).

110. See Rosenbloom, *Remedies for the Wrongly Deported*, *supra* note 28, 149–50 ("The 1996 legislation was hastily drafted and included numerous ambiguities. In the wake of its passage, government attorneys aggressively pursued broad interpretations of the new laws—interpretations that in many cases were later rejected by the courts.").

111. See *id.* (explaining that the 1996 amendments had the effect of "greatly expanding the grounds of deportability and reducing the availability of discretionary relief").

112. See Benson, *Making Paper Dolls*, *supra* note 105, at 49–55; Palmer, *Nature and Causes*, *supra* note 106, at 28 ("Lawyers who had previously practiced only at the administrative level moved into the courts of appeals for the first time to fill the demand. Lawyers who had never filed more than a handful of petitions for review per year now began filing hundreds.").

tions for the BIA in 2002.<sup>113</sup> In order to reduce a backlog of more than 50,000 appeals, the 2002 regulations allowed single board members, rather than three-member panels, to issue the bulk of decisions, and greatly expanded the authority for board members to issue Affirmances Without Opinion.<sup>114</sup> The regulations also limited the scope of the Board's review powers over immigration judge decisions. Whereas the Board previously could review the entire decision de novo, the new regulations required the Board to review factual findings under a deferential "clear error" standard while preserving de novo review of legal claims.<sup>115</sup> The streamlining regulations also (and perhaps counter-intuitively) reduced the size of the Board from twenty-three members to eleven members, and a number of commentators have suggested that the cuts were politically motivated to remove those Board members who were generally the most sympathetic to aliens' claims.<sup>116</sup>

Consequently, the BIA began deciding more cases and ruled in favor of the government more frequently. Soon after the streamlining regulations went into effect, the BIA doubled its decision rate from 2,000 decisions per month to 4,000.<sup>117</sup> The percentage of BIA decisions in which it ruled against the alien also increased substantially, from 75% in 2001 to 94%–98% for the years 2002 through 2004.<sup>118</sup> The result was a substantial increase in the number of deportations. While the government deported 50,000 individuals in 1996, by 2010 that number increased to 400,000.<sup>119</sup>

Unsurprisingly, the volume of petitions for review filed in the federal courts of appeals increased dramatically. Whereas the two years preceding the streamlining reforms saw around 1,750 petitions filed per year, since the reforms the number of petitions has ranged from a low of 8,446 petitions in 2003 to a high of 13,059 petitions filed in 2006, for an average

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113. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878-01 (Aug. 26, 2002) [hereinafter *BIA Streamlining Regulations*].

114. Palmer, *Nature and Causes*, *supra* note 107, at 18–19. Single-member decisions now account for 94% of all BIA decisions. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1657 (2010).

115. 8 C.F.R. § 1003.1(d)(3)(i)–(ii) (2006).

116. Benson, *Making Paper Dolls*, *supra* note 105, at 61; Susan Benesch, *Due Process and Decisionmaking in U.S. Immigration Adjudication*, 59 ADMIN. L. REV. 557, 560 (2007) (noting that the departing Board members "were widely seen as 'the most immigrant-friendly Board Members'").

117. Palmer, *Nature and Causes*, *supra* note 107, at 19–20.

118. See *id.* at 23–24; Palmer, *Challenging Board of Immigration Appeals*, *supra* note 107, at 55–57; see also Legomsky, *supra* note 114, at 1662 (noting that "the percentage of cases in which the BIA reversed immigration judge decisions dropped precipitously after the 2002 reforms").

119. Rosenbloom, *Remedies for the Wrongly Deported*, *supra* note 28, at 140; see also Maria Baldini-Potermín, *It's Time to Consider Automatic Stays of Removal: Petitions for Review, Motions to Reopen, BIA Regulations, and the Race to the Courthouse*, IMMIGR. BRIEFINGS, Jan. 2010, at 1 (noting that the United States removed 356,739 individuals in 2008 and 369,483 individuals in 2009).



of a five-fold increase.<sup>120</sup> As of 2008, petitions for review of removal orders comprised over 18% of the federal appellate civil docket and more than 88% of all appeals of agency action, though those numbers may have dropped slightly in recent years.<sup>121</sup>

The rise in petitions for review has been matched by a corresponding rise in reversals of deportation orders. Erroneous removal orders have adversely affected a substantial number of aliens. Appellate courts have been reversing or remanding BIA decisions between 20% and 40% of the time, depending on the circuit.<sup>122</sup> The courts are granting more than 1,000 petitions per year and have granted 7,000 petitions since 2005.<sup>123</sup>

In light of the BIA's procedural reforms, a higher-than-average reversal rate is not entirely surprising. Shifting decision making from three judges to one may increase the risk of overlooking errors in a decision at the BIA level. Additionally, with the rising volume of decisions, Board members are issuing so many decisions in such a short period of time that they are bound to make errors. One commentator noted that the BIA's caseload requires each Board member to issue fifty decisions per week, which substantially limits the amount of time a Board member can spend on any particular case.<sup>124</sup> Further, the Department of Homeland Security, which represents the government in immigration matters at the agency level, has been criticized for refusing to exercise prosecutorial discretion, meaning that the agency aggressively pursues expansive pro-deportation interpretations of immigration statutes and pushes weak cases

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120. Legomsky, *supra* note 114, at 1658; *see also* Benson, *Making Paper Dolls*, *supra* note 105, at 47–48 (noting a nearly 357% increase in petitions for review between 2000 and 2005); Lenni B. Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 407–08 (2007) [hereinafter Benson, *You Can't Get There*] (providing similar statistics). The increase reflects both the rise in decisions by the BIA as well as an escalated rate of appeal, which has grown from around 6% prior to the streamlining reforms to around 30% after the reforms. *See* Legomsky, *supra* note 114, at 1659; Benson, *You Can't Get There*, *supra*, at 423; Palmer, *Nature and Causes*, *supra* note 107, at 20.

121. Benson, *Making Paper Dolls*, *supra* note 105, at 47. In some circuits, the percentage of the docket devoted to immigration is even higher. "In fiscal year 2008, immigration cases comprised 41 percent of the entire Second Circuit docket and 34 percent of the Ninth Circuit docket." Legomsky, *supra* note 114, at 1647.

122. *See, e.g.*, Benson, *Making Paper Dolls*, *supra* note 105, at 60 n.95 ("The rate or [sic] remand or reversal in the Second Circuit is 20% and has reached as high as 40% in the Seventh Circuit."). It is not clear whether the reversal rate has always been this high, or whether the rate has been increasing. *See* Palmer, *Challenging Board of Immigration Appeals*, *supra* note 108, at 50. Moreover, the Department of Justice has disputed that the reversal numbers are this high and contends that the reversal rate is no higher than 10%. Benson, *You Can't Get There*, *supra* note 120, at 424–25.

123. *See* OFFICE OF PLANNING, ANALYSIS & TECH., U.S. D.O.J. FY 2010 STATISTICAL YEARBOOK tbl. 2 (2011) (table listing the number of circuit court remands of BIA petitions by year), available at <http://www.justice.gov/eoir/statspub/fy10syb.pdf>; FOIA Complaint, *supra* note 28, ¶ 3 ("Each year, the federal courts may vacate or reverse more than 1,000 removal orders."); *id.* ¶ 20 ("Since 2005, the federal circuit courts alone have vacated or reversed more than 7,000 removal orders."); Baldini-Potermin, *supra* note 119 (providing the number of petitions for review granted each year from 2005 through 2008).

124. Legomsky, *supra* note 114, at 1653–54.

that may be prone to reversal.<sup>125</sup> Wrongful deportations may also result from confusion and uncertainty regarding the grounds for deportation that the 1996 amendments and the subsequent REAL ID Act amendments of 2005 created, which may lead to erroneous interpretations of the law by immigration judges.<sup>126</sup>

Indeed, appellate courts have not been shy about admonishing what they perceive as the poor quality of decision making by immigration judges and the BIA.<sup>127</sup> In *Benslimane v. Gonzales*, the U.S. Court of Appeals for the Seventh Circuit emphasized that the court's "criticisms of the Board and of the immigration judges have frequently been severe" and explained that as a result, "[i]n the year ending on the date of this argument, different panels of this court reversed the Board of Immigration Appeals in whole or in part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits."<sup>128</sup> Other courts have made similar criticisms.<sup>129</sup>

Many of the aliens who successfully obtain a reversal in the court of

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125. A senior colleague of John T. Noonan, Jr., a judge on the U.S. Court of Appeals for the Ninth Circuit, once remarked that "[t]he INS [now DHS] is the only agency in Washington that doesn't exercise discretion." John T. Noonan, Jr., *Immigration Law* 2006, 55 CATH. U. L. REV. 905, 913 (2006).

126. Rosenbloom, *Remedies for the Wrongly Deported*, *supra* note 28, at 149–50 (noting that the 1996 amendments contained numerous ambiguities and that government attorneys "aggressively pursued broad interpretations of the new laws," which were later overturned by appeals courts). In fact, the Supreme Court has repeatedly rejected attempts to interpret the scope of deportable offenses expansively. *See, e.g.*, *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589–90 (2010) (rejecting the view that an alien's second drug conviction for simple drug possession constituted an aggravated felony); *Lopez v. Gonzales*, 549 U.S. 47, 67 (2006) (rejecting the view that a crime defined as a felony under state law automatically qualifies as a felony for purposes of immigration law); *Leocal v. Ashcroft*, 543 U.S. 1, 3–4 (2004) (finding that conviction for driving under the influence of alcohol was not a categorical crime of violence so as to render an alien deportable).

127. *See, e.g.*, Christine B. LaBrie, *Third Circuit Describes "Disturbing Pattern of II Misconduct" in Asylum Cases*, IMMIGRATION DAILY, <http://www.ilw.com/articles/2005,1027-labrie.shtm> (last visited July 7, 2012) (describing the court's decision in *Wang v. Attorney Gen.*, 423 F.3d 260, 267 (3d Cir. 2005), in which the court stated: "Time and again, we have cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings. Three times this year we have had to admonish immigration judges who failed to treat the asylum applicants in their court with the appropriate respect and consideration.").

128. *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005); *see also id.* at 830 (concluding that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice").

129. *See, e.g.*, *Zuh v. Mukasey*, 547 F.3d 504, 513–14 (4th Cir. 2008) (noting "that academic literature and court decisions have grown increasingly strident in their criticism of the immigration review process" and expressing that its decision in granting an alien's petition for review "adds to this rising tide of criticism"); *N'Diom v. Gonzales*, 442 F.3d 494, 500–01 (6th Cir. 2006) (Martin, J., concurring) ("There are no doubt many conscientious, dedicated, and thorough immigration courts across the country. Unfortunately, their hard work is overshadowed by the significantly increasing rate at which adjudication lacking in reason, logic, and effort from other immigration courts is reaching the federal circuits."); *see also* Baldini-Potermine, *supra* note 119 (providing additional examples). In 2006, then-Attorney General Alberto Gonzales issued a memorandum to all immigration judges criticizing them for failing to "produce the quality of work that I expect" from Justice Department employees. Memorandum from Alberto Gonzales, U.S. Attorney Gen., to Immigration Judges (Jan. 9, 2006), <http://www.justice.gov/ag/readingroom/ag-010906.pdf>.

appeals may have already been removed from the United States.<sup>130</sup> Some aliens may file a petition for review but fail to seek a stay of removal. Others may request a stay that the court ultimately denies. Still others may be removed before they have a chance to seek a stay. By statute, an alien has thirty days to file a petition for review, but in many cases the government removes an individual before that thirty-day period has passed. Because a motion for a stay is not a pro forma document in that an alien must make a substantial showing of likelihood of success on the merits and of irreparable injury, an alien may not be able to file a stay application before being deported, especially if the alien has obtained new counsel who needs to become familiar with the case.<sup>131</sup> Finally, some aliens may prefer removal while their petition is pending rather than remain in the United States. Aliens who are detained while their proceedings are ongoing may reasonably decide that rather than spending a year or more in prison under difficult and often unsafe conditions while their petitions are pending, they may stay safer and healthier if they are deported.<sup>132</sup> In short, a significant number of aliens who prevail in a petition for review and who overturn their deportation orders will do so after having been deported.

Moreover, the number of aliens prevailing from abroad stands to increase in coming years. In addition to petitions for review, another potential avenue for challenging deportation orders is to file a motion to

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130. See FOIA Complaint, *supra* note 28, ¶ 20 (noting that a “significant number” of vacated removal orders “involve individuals challenging their removability from outside the United States”).

131. The government has the authority to remove an alien on the same day that the removal order becomes final. Baldini-Potermin, *supra* note 119. A non-citizen cannot obtain a stay “if he or she is removed from the U.S. before the noncitizen or his or her counsel even receives the [BIA’s] decision or has sufficient time to prepare the petition for review and the emergency motion for a stay.” *Id.*; accord Oral Argument at 2:30, *Gracia-Moncaleano v. Attorney Gen.*, 390 F. App’x 81 (3d Cir. 2010) (No. 08-3669), available at <http://www.ca3.uscourts.gov/oralargument/audio/08-3669Moncaleanov.AttyGenUSA.wma> (petitioner’s counsel stated that petitioner was removed almost immediately after he was retained and before he had a chance to review the petitioner’s file); FOIA Complaint, *supra* note 28, ¶ 20 (citing *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011), in which the alien was deported seven days after the BIA’s final decision and before the alien had filed a petition for review, a motion to reopen, or a request for a stay of removal); see also *Coyt v. Holder*, 593 F.3d 902, 904 (9th Cir. 2010) (noting that the alien was deported while his motion to reopen was still pending before the BIA); *Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) (noting that the petitioner was removed while her motion for stay of removal was pending before the BIA). It is also possible that non-citizens, particularly detained non-citizens, will be removed while their motion for a stay is in the mail to the court of appeals. See Baldini-Potermin, *supra* note 119.

132. See Kalhan, *supra* note 45, at 43 (“For many non-citizens, detention now represents a deprivation as severe as removal itself.”). In several cases, non-citizens have chosen to leave the country rather than stay detained. See FOIA Complaint, *supra* note 28, exhibit G ¶ 23 (Declaration of Joseph Hohenstein); Motion to Lift Temporary Stay of Removal and to Withdraw Motion for Stay of Removal Pending Consideration of Petition for Review ¶ 5, *Banuelos-Ayon v. Holder*, 611 F.3d 1080 (9th Cir. 2010) (No. 07-71667) (withdrawing a motion for stay of removal because the petitioner “is incarcerated . . . and given the choice between remaining incarcerated and returning to Mexico . . . , [petitioner] would prefer to return to Mexico”).

reopen with the BIA.<sup>133</sup> Until recently, that option was not available for aliens who had already been deported because, pursuant to federal regulations, an alien's departure, voluntary or otherwise, deprives the BIA of jurisdiction to consider a motion to reopen.<sup>134</sup> While that regulation still exists, a number of appeals courts in recent years have struck down the regulation as an arbitrary and capricious exercise of agency authority.<sup>135</sup> As a result, a greater number of aliens may obtain post-deportation relief now that many aliens can file motions to reopen with the BIA in addition to petitions for review with the courts of appeals.

Finally, not only does the practice of relegating deported aliens to a lesser status even after they overturn their deportation orders directly affect a large number of aliens, but it is also emblematic of a larger problem regarding how to best provide justice to aliens who prevail from abroad. As the current FOIA litigation indicates, the lack of a clear government policy for returning successful aliens means that even those who do not fall within the inadmissibility gap face substantial difficulty returning to the United States. In some cases, it has taken years after a victory for an alien to return to the United States because federal agencies have disclaimed responsibility for facilitating aliens' return or have refused to issue the necessary travel documents to permit return.<sup>136</sup> Although these aliens have no existing deportation order and therefore have a right to return to the United States, agency intransigence places them in limbo where they need authorization from the government to come back, but where no branch of the government claims to have the power to provide such authorization. An additional effect of treating returning aliens as arriving aliens is that they are threatened with or placed in detention of indefinite duration.<sup>137</sup> Detention facilities for immigrants have been widely criticized for overcrowding, inadequate sanitation, and physical and emotional abuse, in addition to the hardships that detention places on an immigrant's family.<sup>138</sup> Furthermore, aliens who obtained release from detention prior to their original removal by posting bond have found themselves again placed in detention following their return, meaning that the alien has to pay the same bond twice (if the alien can afford

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133. See 8 U.S.C. § 1229a(c)(6)–(7) (2006) (conferring a statutory right on aliens to file one motion to reopen with the BIA).

134. 8 C.F.R. § 1003.2(d) (2011).

135. See *Lin v. U.S. Attorney Gen.*, 681 F.3d 1236 (11th Cir. 2012); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 812 (10th Cir. 2012) (en banc); *Prestol Espinal v. Attorney Gen.*, 653 F.3d 213, 224 (3d Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234, 237–38 (6th Cir. 2011); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1074–75 (9th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 594 (7th Cir. 2010); *William v. Gonzales*, 499 F.3d 329, 334 (4th Cir. 2007); see also *Luna v. Holder*, 637 F.3d 85, 102 (2d Cir. 2011) (declining to decide the validity of the departure bar but stating that “the BIA must consider an alien’s motion to reopen even if the alien is no longer in the United States”). For a detailed explanation and criticism of the departure bar, see Rosenbloom, *Remedies for the Wrongly Deported*, *supra* note 28.

136. FOIA Complaint, *supra* note 28, ¶¶ 525–35.

137. Arriving aliens who are charged as inadmissible are subject to mandatory detention for the duration of their proceedings. 8 U.S.C. § 1225(b)(1)(B)(iv).

138. Kalhan, *supra* note 45, at 46–47.

it) to obtain release.<sup>139</sup> None of these impediments would apply to aliens who win their cases while still inside the United States.

Thus, this practice has already affected large numbers of aliens. As the next two parts explain, the statute does not support the government's position, and even if it did, its position may violate both the Due Process Clause and the Equal Protection Clause of the U.S. Constitution.

#### IV. STATUTORY CONCERNS

An analysis of the lawfulness of treating wrongly deported immigrants as arriving aliens when they attempt to return to the United States requires looking first to whether the practice is authorized by statute. Two divergent views exist as to whether this reflects the intent of Congress. One view is that it runs contrary to the purposes of the 1996 IIRIRA amendments, which sought to expedite the removal of aliens and still allow deported aliens to fully vindicate their rights by eliminating both the right to an automatic stay during a petition for review and the bar against pursuing a petition for review from abroad.

The other view is that the authorization for the government's actions comes straight from the text of the INA. The government has claimed in prior cases that the text requires it to treat those aliens who have been removed from the United States following the commission of a crime or who have been outside the United States for more than six months as "arriving aliens," regardless of the reason for their departure. Further, under this view, an alien who cannot return after prevailing from abroad has only himself to blame for not obtaining a stay of removal prior to being deported.

This part carefully reviews each of these arguments. It concludes that where the government has treated prevailing aliens as subject to inadmissibility standards, it has undermined Congress's intent to allow aliens to fully vindicate their rights from abroad. Finally, this part posits that the government has erroneously relied upon textual sections not intended to apply to involuntary deportations which are subsequently invalidated.

##### A. CONGRESSIONAL INTENT

Subjecting aliens who win their appeals from abroad to inadmissibility standards rather than deportability standards is inconsistent with congressional intent in several ways and therefore likely contravenes the INA. First, such a practice encourages aliens to seek stays of removal, which is exactly what Congress was trying to discourage in the 1996 amendments. Treating aliens who prevail from abroad as subject to inadmissibility standards as opposed to the deportability standards under which they were originally charged will substantially delay, rather than expedite, the removal of aliens. If aliens who prevail in their petitions for review following removal find that they have been demoted to a lesser status and are

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139. FOIA Complaint, *supra* note 28, exhibit G ¶ 14.

now subject to inadmissibility grounds, every alien will have the incentive to seek a stay of removal to avoid being prejudiced by a pre-appeal removal and the subsequent application of the more stringent inadmissibility grounds upon reentry. Those aliens who cannot return if they prevail will have stronger grounds for obtaining a stay of removal because they will be able to show irreparable injury from deportation. Thus, under the government's practice, the statute effectively reverts to its pre-IIRIRA structure for aliens subject to the inadmissibility gap.

Additionally, because the fact of deportation renders this class of aliens inadmissible even if an appeals court overturns their deportation orders, deportation operates as a functional withdrawal of the alien's petition for review. Such a situation would thwart IIRIRA's goal of expediting removal by limiting stays of removal and granting aliens the ability to pursue judicial review from abroad.

Second, subjecting prevailing aliens to inadmissibility standards rather than deportability standards undermines the goal of increasing accuracy. If the fact of removal can prevent a successful alien from returning to the United States by subjecting that alien to more stringent inadmissibility standards, then the government has little incentive to ensure that its allegations of deportability are correct. If the government knows that there is a good chance the alien will not be able to reenter even if the alien wins, then the government gets the result it sought even if it lacked legitimate grounds for deporting the individual in the first place. For the alien, winning on appeal becomes a hollow victory. An alien who is improperly removed and finds himself inadmissible as a direct consequence of the improper removal will receive no meaningful relief and will suffer the same fate as if the improper order were never corrected. The only way to maintain consistency with IIRIRA and to promote accuracy is to restore the alien to the precise status the alien possessed prior to removal, which includes being lawfully present inside the United States and subject to deportability grounds rather than inadmissibility grounds.

Third, subjecting prevailing aliens to inadmissibility standards undercuts their statutory right to judicial review of deportation orders. Although the effect of the government's practice on an alien's ability to obtain meaningful judicial review implicates due process concerns as discussed in Part V.A.,<sup>140</sup> it also reinforces how the practice is inconsistent with the INA's statutory scheme. The INA provides a statutory right to seek review of a final deportation order.<sup>141</sup> The Supreme Court has previously refused to interpret the INA in a way that would limit an alien's statutory right to obtain review of deportation orders. In *Dada v. Mukasey*,<sup>142</sup> the Court addressed the interplay of an INA provision allowing for "voluntary departure" within sixty days of a removal order, an INA provision allowing aliens to file a motion to reopen with the BIA,

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140. See *infra* Part V.A.

141. 8 U.S.C. § 1252(a)(1).

142. 554 U.S. 1 (2008).

and a regulation barring aliens from pursuing their motion to reopen following removal.<sup>143</sup> The crux of the conflict was that an alien who is granted voluntary departure must depart within sixty days or face certain penalties, while a motion to reopen often takes longer than sixty days to decide. This meant that an alien who elected to voluntarily depart effectively gave up the right to pursue a motion to reopen, while an alien who refused to voluntarily depart in order to pursue the motion to reopen suffered other adverse consequences.<sup>144</sup> The Court rejected the government's proffered interpretation that an alien who seeks voluntary departure gives up the right to pursue a motion to reopen and held that at a minimum, the alien must be permitted to withdraw the request for voluntary departure so that he or she does not suffer penalties for pursuing the motion to reopen.<sup>145</sup> Although the Court acknowledged that some statutory language supported the government's position,<sup>146</sup> it nonetheless found the government's view "unsustainable" because "[i]t would render the statutory right to seek reopening a nullity in most cases of voluntary departure."<sup>147</sup> Additionally, it found that the purpose of providing review through a motion to reopen was "to ensure a proper and lawful disposition" of immigration charges and determined that Congress would not have intended to eliminate the "important safeguard" of a motion to reopen for a large class of aliens.<sup>148</sup>

The situation regarding aliens who overturn their deportation orders following removal is very similar. The INA expressly authorizes aliens to seek judicial review of final deportation orders by filing a petition for review in the court of appeals,<sup>149</sup> and in fact makes petitions for review the "sole and exclusive means for judicial review of an order of removal."<sup>150</sup> The statute provides several restrictions on the right to judicial review, including prohibiting review of rulings regarding discretionary relief, yet contains no provision restricting relief based on whether or not the alien has been removed.<sup>151</sup>

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143. *Id.* at 5.

144. *Id.* ("[A]n alien who seeks reopening has two poor choices: The alien can remain in the United States to ensure the motion to reopen remains pending, while incurring statutory penalties for overstaying the voluntary departure date; or the alien can avoid penalties by prompt departure but abandon the motion to reopen.").

145. *Id.* at 15–19.

146. *Id.* at 15 (noting that the sixty-day requirement of the voluntary departure provision "contains no ambiguity"). Indeed, the dissenting Justices argued persuasively in dissent that the statutory language regarding voluntary departure is mandatory and does not authorize an alien to withdraw in order to avoid statutory penalties. *See id.* at 23–30 (Scalia, J., dissenting).

147. *Id.* at 16.

148. *Id.* at 18.

149. 8 U.S.C. § 1252(a)(1) (2006).

150. *Id.* § 1252(a)(5).

151. *See id.* § 1252(a)(2)–(3). *See also id.* § 1252(e) (limiting the type of relief a court may order in a petition for review). Although the statute bars aliens convicted of certain criminal offenses, including aggravated felonies, from seeking judicial review, the statute explicitly authorizes courts to address questions of law regarding whether the alien's criminal conviction qualifies as one that would deprive the court of jurisdiction to review the case. *See id.* § 1252(a)(2)(D) ("Nothing in subparagraph (B) or (C), or in any other provi-

If an alien's deportation acts to bar the alien from reentering, even after the deportation order is overturned, then the alien's statutory right to judicial review of the deportation order is nullified.<sup>152</sup> Just as the Court in *Dada* determined that Congress likely did not intend to remove the availability of judicial review for large classes of aliens, it is similarly unlikely that Congress intended for a deportation order, once it has been vacated, to continue to live by taking away the alien's right to reenter the United States.

There is no question that if the alien were never removed in the first place, the alien would be subject to the statute's deportability standards, and the inadmissibility standards never would come into play. The situation should not change simply because an alien prevails after deportation rather than before it. The government should not be able to deport an alien, and then after the deportation order was found to be improper, use the fact of deportation to subject the alien to new inadmissibility grounds that did not apply previously. Doing so runs directly contrary to IIRIRA's purposes of enabling aliens to seek judicial review from abroad and limiting an alien's right to a stay of removal.

#### B. THE STATUTORY TEXT

Although IIRIRA's purposes support allowing aliens who prevail from abroad to reenter the United States and to continue to be subject to deportability standards instead of being newly subject to inadmissibility standards, various sections of the statutory text appear at first blush to support the contrary position that such aliens should be required to apply for admission in order to return to the United States. As explained below, however, it is unlikely that Congress contemplated applying these provisions to an alien who is involuntarily removed pursuant to a deportation order that is subsequently vacated, and to do so would run afoul of the principle requiring courts to avoid interpretations of statutes that lead to absurd results.<sup>153</sup>

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sion of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.").

152. To be sure, overturning a deportation order may bring an alien some ancillary benefits that are not nullified by treating the alien as inadmissible. For example, an alien who succeeds in vacating a removal order by showing that his criminal conviction is not an aggravated felony will no longer be subject to the rule that a previously deported alien cannot seek reentry for a specified number of years, depending on the ground for deportation. See *id.* § 1182(a)(9) (listing the various bars on reentry following deportation). However, these small benefits pale in comparison to the benefit of establishing that the alien is not deportable in the first place, which is likely the primary reason why aliens file petitions for review.

153. See 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.05, at 103, § 46.06, at 119, § 46.07, at 126 (5th. ed. 1992). See also *United States v. Wilson*, 503 U.S. 329, 334 (1992) ("[A]bsurd results are to be avoided.").



1. *Aliens Who Have Been Absent for More than 180 Days or Who Have Committed an Inadmissible Offense*

One textual argument is that the statutory definition of admission requires an alien who wins a petition for review while abroad to submit a new application for admission in order to reenter.<sup>154</sup> The statutory definition of admission generally permits lawful permanent residents to leave and reenter the United States without having to reapply for admission each time.<sup>155</sup> However, the statute contains several exceptions. Of particular relevance here, a returning lawful permanent resident will be required to seek a new admission if he or she “has been absent from the United States for a continuous period in excess of 180 days,”<sup>156</sup> or has previously “committed an offense” that would make the resident inadmissible and has not been granted a waiver for that offense.<sup>157</sup> Relying on these exceptions, the government has argued that an alien whose petition for review took more than two years to reach a decision was restored to LPR status when he won his petition but that he still “was an applicant for admission” because he stayed outside of the United States for more than 180 days.<sup>158</sup>

These statutory provisions, however, should not apply to involuntary removals that result from subsequently invalidated deportation orders. The 180-day provision was Congress’s replacement for the so-called *Fleuti* doctrine, which was a judicial doctrine establishing that aliens who voluntarily leave the United States for brief, casual trips do not have to reapply for admission upon return.<sup>159</sup> Congress’s creation of a 180-day period to replace the *Fleuti* doctrine reflected its view that an alien who takes a trip of more than 180 days is not sufficiently committed to the United States to retain lawful permanent resident status. However, Congress’s concern about an alien’s dedication to the United States does not arise in the situation where an alien is involuntarily removed and attempts to preserve his ability to remain in the United States by challenging the validity of his deportation order.<sup>160</sup> If the 180-day absence is taken literally, then an

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154. The government has made this argument in litigation before. See DHS Memorandum, *supra* note 98, at 5.

155. 8 U.S.C. § 1101(a)(13)(C) (stating that “[a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws” unless a specific exception applies).

156. *Id.* § 1101(a)(13)(C)(ii).

157. *Id.* § 1101(a)(13)(C)(v).

158. DHS Memorandum, *supra* note 98, at 5 (“[T]he respondent was outside the United States for more than 180 days, as [8 U.S.C. § 1101(a)(13)(C)](ii) above provides. Thus . . . he was an applicant for admission . . .”).

159. See *Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963); see generally Michael S. Satow, *A Journey Through the Fog: Due Process Analysis of I.N.A. Section 242(a)(2)*, 5 GEO. IMMGR. L.J., 677, 683–84 (1991).

160. In analogous circumstances, the Sixth Circuit held that the government’s physical removal of an alien from the United States does not constitute an abandonment of the alien’s motion to reopen. See *Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) (“Unlike the cases in which the petitioner either deliberately or inadvertently left the United States, it cannot be said that Madrigal relinquished or abandoned the right to appeal by virtue of her own conduct. Instead, her departure was forced by the government during

alien's ability to retain lawful permanent resident status depends not on any behavior by the alien, but simply on the happenstance of whether the court of appeals takes more than 180 days to rule on a petition for review. Given that the average time from the filing of an appeal to final disposition by the court of appeals is at least eleven months,<sup>161</sup> virtually every LPR who is involuntarily removed and later wins a petition for review will have to seek readmission, even though the alien never would have left the United States but for the vacated removal order.

Viewing the statute as a whole also supports the conclusion that Congress did not intend to allow the government to rely on a subsequently vacated deportation order to render an alien inadmissible. For example, the statute's inadmissibility provisions provide that any alien previously removed is inadmissible and may not reenter without first obtaining permission from the Attorney General.<sup>162</sup> If applied literally, then no alien ordered deported would be allowed to return unless the Attorney General, in its discretion, permits the alien to reenter. The Attorney General's discretion to deny permission to reenter is quite broad and reviewable only under a "very high standard of arbitrariness."<sup>163</sup> The statute also allows the Attorney General to deny permission to reenter for reasons other than whether the alien has committed a deportable or inadmissible offense.<sup>164</sup> Applying this provision would subject aliens who successfully overturn their deportation orders to exactly the same constraints as aliens whose deportation orders remain valid. There is no evidence that Congress intended for this provision to apply to aliens whose removal orders have been overturned. Rather, it is more likely that the provision applies only to aliens with existing removal orders, which is reflected in judicial decisions holding that a ruling vacating a deportation

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the pendency of her appeal, and hence, she did not take any action, either purposeful or unwitting, that can be construed as a waiver of her right to contest the immigration judge's decision.").

161. See *Federal Court Management Statistics*, ADMIN. OFFICE OF THE U.S. COURTS (Sept. 2011), <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2011/Appeals%20FCMS%20Profiles%20September%202011.pdf&page=1>. It is not uncommon for a petition for review to take more than two years from the filing of the petition to the issuance of a final decision. See, e.g., *Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582 (3d Cir. 2011) (petition filed Nov. 19, 2008 and final decision issued Nov. 8, 2011); *Gracia-Moncaleano v. Attorney Gen.*, 390 F. App'x 81 (3d Cir. 2010) (petition filed Aug. 28, 2008 and final decision issued August 13, 2010); *Banuelos-Ayon v. Holder*, 611 F.3d 1080 (9th Cir. 2010) (petition filed Apr. 30, 2007 and final decision issued July 14, 2010). The Ninth Circuit has a sufficient backlog that its local rules discourage attorneys from contacting the clerk's office regarding when the court will schedule oral argument, let alone decide the case, until fifteen months have passed since the completion of briefing. See 9TH CIR. R. 25-2 advisory committee's note (advising counsel that they may contact the court regarding possible delays if "the parties have not received notice of oral argument or submission on the briefs within 15 months after the completion of briefing").

162. 8 U.S.C. § 1182(a)(9).

163. 5 CHARLES GORDON ET AL., *IMMIGRATION LAW & PROCEDURE* § 63.10 [4][b], at 63-128 (2000).

164. See *id.* (describing the discretionary factors that the Attorney General can consider).

order removes this particular bar on reentry.<sup>165</sup> Nonetheless, at least one immigration judge relied on this section to find that an alien who won his petition for review while abroad was inadmissible unless the alien first obtained permission to reenter from the Attorney General.<sup>166</sup>

Moreover, refusing to apply the statutory language to involuntary removals is consistent with how courts have drawn distinctions between aliens who leave voluntarily and those who are involuntarily removed when interpreting other portions of the INA, even when the text of those provisions draws no distinction between voluntary and involuntary removal. For example, the INA provides that aliens who apply to naturalize as United States citizens must demonstrate continuous residence in the United States for the five years immediately preceding the date of application and also provides that an absence of one year or longer during that time will break the alien's period of continuous residence.<sup>167</sup> Both the courts and the executive branch, however, have interpreted that provision to mean that only voluntary absences from the United States break the alien's period of continuous residence.<sup>168</sup>

Similarly, at least two courts have refused to apply the plain language of 8 C.F.R. § 1003.4, which bars an alien from pursuing a motion to reopen from outside the United States, to an alien who was involuntarily removed, even though the regulation draws no distinction between volun-

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165. See, e.g., *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818–19 (10th Cir. 2012) (“When the Board grants a motion to reopen, this action vacates the underlying removal order and restores the noncitizen to her prior status. As a result, the noncitizen is no longer subject to the reentry bar under § 1182(a)(9)(A).” (citation omitted)); *Swaby v. Ashcroft*, 357 F.3d 156, 160 (2d Cir. 2004) (“The government claims that petitioner would still be inadmissible under 8 U.S.C. § 1182(a)(9)(A)(ii) [§ 212(a)(9)(A)(ii)] for having been ordered removed after an aggravated felony conviction. This provision, however, would not bar petitioner’s reentry if we were to, as petitioner requests, grant a writ of habeas corpus and vacate his order of removal.”).

*Chong v. Dist. Dir.*, 264 F.3d 378, 384–85 (3d Cir. 2001) (finding that the “reentry bar” of 8 U.S.C. § 1182(a)(9) would not apply if the alien succeeded in vacating his deportation order).

166. G-G-M- Interlocutory Order, *supra* note 80, at 5.

167. See 8 U.S.C. § 1427(a)–(b).

168. See *In re Yarina*, 73 F. Supp. 688, 689 (N.D. Ohio 1947) (“It is evident that the statute which deprives a petitioner of naturalization and the right to citizenship contemplates a voluntary departure from the United States and a subsequent absence for a duration of more than one year within the period of required continuous residence.”); *id.* (“Absence from the United States manifestly means absence voluntarily initiated.”). Although the involuntary absence in *Yarina* was not caused by deportation (the petitioner was working abroad on an island that was attacked by Japanese forces during World War II and became a captive prisoner of war), the executive branch, in its interpretation of the naturalization provision, has not drawn any distinctions between different types of involuntary absences. Instead, it has stated that when “departure from the United States is involuntary and the absence which follows is enforced against the alien, he is considered as never having left the United States, within the purview of the statute, and as never having interrupted continuous residence in the United States. U.S. CITIZENSHIP & IMMIGRATION SERVS., INTERPRETATION 316.1 NATURALIZATION REQUIREMENTS § (b)(4) (2010), available at <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-45077/0-0-0-46756.html>.

tary and involuntary removals.<sup>169</sup> In both cases, the courts found that interpreting the regulation literally would lead to unreasonable results that were inconsistent with Congress's decision to provide a statutory right of review of deportation decisions.<sup>170</sup>

Consequently, while the text of the INA provides that a prior criminal conviction or a prolonged absence of more than 180 days can require an alien to reapply for admission, restricting that text to voluntary absences is the best way to maintain consistency with congressional intent and promote fairness. To hold otherwise risks punishing an alien for the government's error in removing the alien in the first place, especially when the alien has actively asserted his or her right to remain in the United States.

## 2. *Aliens Who Fail to Obtain a Stay of Removal*

A second textual argument is that an alien who wins a petition for review while abroad should not be able to avoid the statute's inadmissibility standards if the alien failed to seek or obtain a stay of removal as authorized by statute.<sup>171</sup> Under this view, an alien who wishes to remain subject to deportability standards should obtain a stay of removal, and any alien who does not obtain a statutorily-authorized stay can point only to his or her own negligence in complaining about being subject to inadmissibility standards.<sup>172</sup> This argument is flawed for several reasons.

First, requiring aliens to seek a stay of removal in order to remain subject to deportability standards creates the very incentives to pursue stays of removal that Congress sought to eliminate when it enacted IIRIRA.<sup>173</sup> Second, even if an alien seeks a stay, there is no guarantee that the alien would receive one. Stays of removal are not automatic.<sup>174</sup> The standard

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169. See *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010); *Madrigal v. Holder*, 572 F.3d 239, 244–45 (6th Cir. 2009). See also *Long v. Gonzales*, 420 F.3d 516, 520 (5th Cir. 2005) (explaining that the regulation contains no exception for involuntary departures).

170. *Coyt*, 593 F.3d at 907 (“It would completely eviscerate the statutory right to reopen provided by Congress if the agency deems a motion to reopen constructively withdrawn whenever the government physically removes the petitioner while his motion is pending before the BIA.”); *Madrigal*, 572 F.3d at 245 (“To allow the government to cut off *Madrigal*’s statutory right to appeal an adverse decision, in this manner, simply by removing her before a stay can be issued or a ruling on the merits can be obtained, strikes us as a perversion of the administrative process.”). Cf. *Long*, 420 F.3d at 520 & n.6 (declining to address whether an involuntary removal would constitute abandonment of a motion to reopen and finding that an alien abandoned his motion by accidentally crossing the border into Mexico). For a more detailed discussion of this issue, see generally Marianna C. Mancusi-Ungaro, Comment, *Defining “Departure” in the Context of 8 CFR § 1003.4*, 76 U. CHI. L. REV. 467 (2009).

171. The INA permits a court to order a stay of removal while a petition for review is pending. 8 U.S.C. § 1252(b)(3)(B) (stating that filing a petition for review “does not stay the removal of an alien pending the court’s decision on the petition, unless the court orders otherwise”).

172. *In re G-G-M*, Master Calendar Hearing, (Sept. 1, 2011).

173. See *supra* text accompanying notes 37–38. See also *Nken v. Holder*, 556 U.S. 418, 435 (2009) (“Congress’s decision in IIRIRA to allow continued prosecution of a petition after removal eliminated the reason for categorical stays, as reflected in the repeal of the automatic stay [provision] . . .”).

174. *Nken*, 556 U.S. at 433 (“A stay is not a matter of right, even if irreparable injury might otherwise result.” (citation and quotation omitted)).

for obtaining a stay is not easily satisfied.<sup>175</sup> If a court denies an alien's request for stay, then the alien will be deported pending the outcome of the petition and will still face the same impediments to reentry as an alien who did not request a stay. Third, requiring an alien to seek or obtain a stay overlooks the fact that aliens may be deported before they have a chance to put together a motion for a stay, before the motion is ruled upon, or before they even receive notice of the decision finding them deportable. An alien can be removed in a matter of days following a final deportation order, and in that time, the alien may be attempting to obtain counsel to file a stay or attempting to file one pro se. Even if an alien can retain counsel, deportation may occur before counsel can obtain the documents necessary to put together a motion, especially since the government has an incentive to deport aliens quickly in order save money on detention costs.<sup>176</sup> Fourth, an alien may understandably prefer to return to his or her home country—which is what the 1996 amendments explicitly authorize—rather than remain incarcerated indefinitely in administrative detention under difficult conditions as the alien's petition for review winds its way through the court system. Thus, determining which substantive standards apply to an alien based on whether the alien obtained a stay of removal does not support Congress's goals of expediting removal and promoting accuracy in removal decisions.

In short, although the language of certain portions of the INA and the availability of discretionary stays of removal may lend support to the government's practice of treating those aliens who seek to return after overturning their deportation orders from abroad as arriving aliens, both the statute's overall structure and the judiciary's reluctance to apply the INA literally to involuntary removals suggest that the INA does not compel the government's practice but instead prohibits it. If a non-citizen happens to be outside the United States solely because of a deportation order that is subsequently held unlawful, the non-citizen should not find that the fact of his removal has erected a new and previously inapplicable barrier to residing inside the United States.

## V. CONSTITUTIONAL CONCERNS

Even if the INA did require subjecting aliens who prevail from abroad to inadmissibility standards rather than deportability standards, such a practice would still be unlawful if it violated the Constitution. Subjecting

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175. *Id.* at 1762 (“A court asked to stay removal cannot simply assume that ordinarily, the balance of hardships will weigh heavily in the applicant’s favor.” (citation and quotation omitted)); accord Baldini-Potermin, *supra* note 119, at 4 (“The standard for a motion for a stay of removal is high and not the type of motion that counsel can generate in 20 or 30 minutes.”).

176. See *supra* notes 130–131 and accompanying text. Some circuits bypass this problem by allowing an alien to file a bare bones motion for a stay of removal and automatically granting a temporary stay until the court can address the substantive grounds for the stay request. See, e.g., 9th Cir. Gen. Orders of the Ct., 2011 US ORDER 0049, § 6.4(c)(1) (C.O. 0049).

prevailing aliens to inadmissibility standards raises serious constitutional concerns under both the Due Process Clause and the Equal Protection Clause. With respect to due process, even if the Constitution does not categorically guarantee aliens a right to seek judicial review of deportation orders, applying the procedural due process balancing test laid out by the Supreme Court in *Mathews v. Eldridge*<sup>177</sup> would likely render the government's practice invalid.<sup>178</sup> With respect to equal protection, it may be difficult for the government to articulate any rational basis for applying different substantive standards based solely on whether the alien happens to succeed in overturning a deportation order while outside the United States rather than inside the United States.

### A. DUE PROCESS

A rule that permits the government to use the fact of deportation, even after the deportation order has been vacated, to bar an alien from returning to the United States risks violating due process in two different ways. First, due process protects against the imposition of arbitrary procedures, and changing the governing legal standards in the middle of the case is exactly that. Second, the rule potentially violates due process by substantially restricting an alien's right to judicial review of a deportation order.

The level of due process protection afforded to aliens is not uniform. Aliens who have been present in the United States are entitled to some level of due process protection while aliens who are seeking to enter the United States for the first time receive no due process guarantees.<sup>179</sup> LPRs, including those who are returning from abroad, receive the greatest due process protections, which include the right to a fair hearing before they can be deported or barred from reentering.<sup>180</sup>

The first due process problem posed by changing the applicable legal standards from deportability to inadmissibility for aliens who succeed from abroad is that doing so arbitrarily changes the rules in the middle of the game. The hallmark of due process is "protection of the individual against arbitrary action of government."<sup>181</sup> One aspect of procedural fairness is the expectation that the relevant rules for deciding a case should not change after the case begins.<sup>182</sup> In particular, the rules should

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177. 424 U.S. 319, 347 (1976).

178. The *Mathews v. Eldridge* framework applies to immigration proceedings. See *Landon v. Plasencia*, 459 U.S. 21, 34–37 (1982).

179. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); accord *Rosenbloom, Remedies for the Wrongly Deported*, *supra* note 28, at 165–66.

180. See *Landon*, 459 U.S. at 32; accord *In re Huang*, 19 I. & N. Dec. 749, 754 (B.I.A. 1988) (holding that "[f]or purposes of the constitutional right to due process, a returning lawful permanent resident's status is assimilated to that of an alien continuously residing and physically present in the United States").

181. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

182. See, e.g., Charles E. Rounds, Jr., *Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity's Maxims*, 42 U. TOL. L. REV. 673, 691 (2011) ("The Anglo-American legal tradition does not take kindly to changing the rules in

not change by virtue of an action by the government—in this case deportation—that is ultimately determined to be improper. Sanctioning the government's attempt to change the relevant standards governing an alien's challenge from deportability standards to inadmissibility standards, and basing the change on the government's own error, is arbitrary and unwarranted. If deportation standards apply to an alien's case when it is first initiated, then those standards should apply throughout the remainder of the proceeding. The government should not be able to take advantage of its own error to apply new rules while the case is still ongoing.

To be sure, reclassifying an alien as an arriving alien might be justified when it is based on the alien's own conduct, such as when an alien commits a crime or is absent from the United States for an extended period of time.<sup>183</sup> But the circumstances are different when an alien is forced to leave even while pursuing all available avenues for relief. Consequently, courts have recognized that limiting an alien's ability to challenge a removal decision as a result of an involuntary removal that the alien was actively protesting violates principles of fundamental fairness and constitutes a “perversion of the administrative process.”<sup>184</sup>

Second, subjecting prevailing aliens to inadmissibility standards risks violating due process by taking away an alien's right to meaningful judicial review of a deportation order. The Constitution does not explicitly guarantee a right to judicial review of all administrative agency decisions. Because aliens do not have a constitutional right to an appeal, either administrative or judicial, it is not clear that limiting judicial review would automatically violate due process.<sup>185</sup> However, once a statute provides a

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the middle of the game . . . .”); *cf. Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992) (vacating arbitration award where the arbitration tribunal imposed a new evidentiary requirement in the middle of the proceeding).

183. See 8 U.S.C. § 1101(a)(13)(C)(ii) (2006) (stating that a lawful permanent resident will be reclassified as an applicant for admission if the resident “has been absent from the United States for a continuous period in excess of 180 days”).

184. See, e.g., *Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) (rejecting a rule under which an alien's involuntary removal would take away the alien's ability to file a motion to reopen the adverse ruling as violating principles of fundamental fairness).

185. It remains an unsettled question whether the Constitution requires judicial review of a deportation order. On one hand, several courts have held that aliens do not have a constitutional right to an appeal from an administrative decision. See, e.g., *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) (“An alien has no constitutional right to any administrative appeal at all.”) (quoting *Albathani v. INS*, 318 F.3d 365, 376 (1st Cir. 2003); *Dia v. Ashcroft*, 353 F.3d 228, 242 (3d Cir. 2003); see also Benson, *Making Paper Dolls*, *supra* note 104, at 60 & n.96 (“Under current case law, due process may not require review by an Article III court.”). At the same time, courts have expressed discomfort with the notion that aliens might not be able to receive any judicial review of deportation decisions. See, e.g., *Kolster v. INS*, 101 F.3d 785, 790 (1st Cir. 1996) (characterizing the question of whether Congress could preclude judicial review of final removal orders as “thorny”); Nancy Morawetz, *Back to Back to the Future? Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113, 120 (2006–2007) (emphasizing that several courts have expressed concerns that “elimination of all review [of deportation orders] would raise serious constitutional issues”); see also Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1414 (1997) (noting the debate over whether due process

right to judicial review, as the INA does, due process prohibits the government from arbitrarily taking away that right.<sup>186</sup>

Even if limiting judicial review does not necessarily violate due process in all contexts, it likely does in this context. Due process requires that an individual receive the opportunity to be heard “in a meaningful manner.”<sup>187</sup> Aliens facing deportation have a right to a fair hearing, and the three-part balancing test laid out in *Mathews v. Eldridge* governs whether the hearing meets the constitutional minimum for fairness.<sup>188</sup> Under that test, courts assessing the fairness of certain procedures consider: (1) the strength of the interest of the individual who is affected by the government action; (2) the risk of an erroneous deprivation of that interest through the procedures used along with the probable value of additional procedures; and (3) the burdens to the government of different or additional procedures.<sup>189</sup>

It seems likely that under this test, applying inadmissibility standards to aliens who prevail on a petition for review would fall short of these minimum constitutional safeguards.<sup>190</sup> With respect to the first factor, there is

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requires some degree of judicial review of government action). In addressing judicial jurisdiction over deportation questions, the Supreme Court has emphasized “the strong presumption in favor of judicial review of administrative action.” *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). At least with respect to deportation orders that traditionally could have been challenged through habeas corpus proceedings, the Court has found that “some judicial intervention in deportation cases is unquestionably required by the Constitution.” *Id.* at 300 (internal quotation marks and citation omitted). Additionally, Congress amended IIRIRA’s judicial review provisions in the REAL ID Act of 2005 to make clear that courts retained jurisdiction to review legal and constitutional questions relating to an order of deportation. REAL ID Act of 2005, Pub. L. No. 109-13, § 106, 119 Stat. 231 (2005). Part of the motivation for the changes appears to have been the view that, following *St. Cyr*, judicial review of deportation orders may be constitutionally required. See H.R. REP. NO. 109-72, at 175 (2005), reprinted in 2005 U.S.C.C.A.N. 240, 299 (stating that the REAL ID Act would “give every alien one day in the court of appeals, satisfying constitutional concerns”); Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 138–39 (2006–2007) (describing the legislative history of the REAL ID Act).

186. The maxim of *ubi jus ibi remedium* provides that where there is a right, there must also be a meaningful remedy. See *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39–40 (1916). In the due process context, that means the right to a fair hearing also includes “the right to effective redress.” *Catanzano ex rel. Catanzano v. Wing*, 103 F.3d 223, 229 (2d Cir. 1996).

187. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” (internal quotation marks omitted)).

188. *Landon v. Plasencia*, 459 U.S. 21, 34–35 (1982) (applying the *Mathews* test to immigration proceedings).

189. *Mathews*, 424 U.S. at 335.

190. When the Justice Department issued its streamlining regulations in 2002, it questioned whether the *Mathews* test should apply to immigration proceedings given Congress’s unusually broad authority to regulate immigration and “the unique nature of the [INA] as the tool for managing the intersection of foreign and domestic [policy] interests regarding aliens.” Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,882 (Aug. 26, 2002) codified at 8 C.F.R. pt.3. It is not clear whether the Justice Department continues to adhere to that view. While it does not appear that the government’s broad powers require dispensing with the *Mathews* test as applied to immigration, the scope of the government’s authority over immigration matters may be relevant to determining what procedures are considered fair under that test. Cf. *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (“In the exercise of its broad power over



no question that the alien's interest in avoiding deportation, which often means permanent separation from family and uprooting of one's livelihood, is significant.<sup>191</sup> Thus, courts have determined that "the private liberty interests involved in deportation proceedings are among the most substantial" from a due process perspective.<sup>192</sup>

The second factor, the risk of erroneous deprivation, also favors the alien. The issue of which grounds—deportability or inadmissibility—should apply arises only if the alien prevails in showing that the original deportation order was incorrect. In that sense, the risk of erroneous deprivation is not just a risk—it is a certainty. While not every alien who prevails from abroad will fall within the inadmissibility gap and so not every alien will end up unable to return, a substantial number will likely be barred from returning given the various differences in the inadmissibility and deportability grounds. Those aliens will suffer an erroneous deprivation when they prevail on their petitions for review.

Third, the burden on the government is minimal. Rectifying the problems that the inadmissibility gap creates does not require the imposition of additional costly layers of procedure or the creation of new legal standards. Rather, all that is required is to continue to apply the same deportability standards that the government applied the first time around when the alien was still inside the United States. Given that the deportability standards were already applied once, it is hard to see what burden results from applying them again. If anything, it seems easier and less cumbersome for the government to continue prosecuting its original Notice to Appear rather than issuing a new Notice to Appear that asserts new inadmissibility-based charges.

Thus, the *Mathews* factors strongly suggest that allowing the government to use a vacated removal order as a ground for preventing an alien from reentering the United States when that order was the only reason that the alien left in the first place would violate an alien's due process right to a meaningful review of a deportation order. To be sure, such aliens are not being denied judicial review in a formalistic sense. They have the right to file and litigate a petition for review in the federal courts of appeal, and winning that petition may even bring them some benefit by making certain statutory bars on reentering after deportation inapplicable.<sup>193</sup> However, that right to judicial review is not meaningful if an alien can overturn his deportation order through a petition for review and still be barred from returning based on the fact that he was deported pursuant

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naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

191. See *supra* text accompanying notes 98–100.

192. *Padilla-Agustin v. INS*, 21 F.3d 970, 974–75 (9th Cir. 1994); accord *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss of all that makes life worth living." (internal quotation marks omitted)); see also *Landon*, 459 U.S. at 34 (stating that a deported alien "lose[s] the right to stay and live and work in this land of freedom" as well as the right to "rejoin her immediate family, a right that ranks high among the interests of the individual" (internal quotation marks and citations omitted)).

193. See *supra* note 148 and accompanying text.

to the now vacated order. In light of the high stakes for aliens facing deportation, the fact that the issue only arises after the government erred in finding the alien deportable, and the minimal burden on the government of continuing to apply deportability standards to aliens who prevail from abroad, aliens have strong constitutional grounds for challenging the government's practice.

## B. EQUAL PROTECTION

In addition to violating due process, subjecting aliens to inadmissibility standards likely violates an alien's Fifth Amendment right to equal protection by treating aliens who win their cases while abroad differently from those who win their cases while inside the United States.<sup>194</sup> Admittedly, among the arguments against the government's practice, the equal protection argument likely is the weakest. Aliens are not a suspect class and therefore the government's practice would be subject to the highly deferential rational basis review. Despite the difficulty of having government action declared unconstitutional under rational basis review, there are credible arguments that distinguishing between aliens who win their appeals while within the United States from those who win while abroad lacks a legitimate justification.

The Equal Protection Clause protects non-citizens as well as citizens.<sup>195</sup> Specifically, equal protection guarantees apply in deportation proceedings.<sup>196</sup> Because aliens are not a suspect class and Congress possesses broad power to regulate immigration, classifications in immigration matters are acceptable as long as they satisfy rational basis review.<sup>197</sup> Rational basis review is a "minimal" standard of review, which will be satisfied as long as the government can articulate some non-arbitrary reason that Congress would create the distinction subject to challenge, "whether such a reason was articulated by Congress or not."<sup>198</sup>

A related route for challenging the government's practice is to seek to invalidate it under administrative law principles. Under the Administrative Procedure Act, executive branch action will be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>199</sup> While arbitrary and capricious review is narrow,<sup>200</sup> the

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194. The Equal Protection principles of the Fourteenth Amendment also bind the federal government under the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

195. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

196. See, e.g., *Po Shing Yeung v. INS*, 76 F.3d 337, 338-39 (11th Cir. 1995) (finding equal protection violation where an alien in deportation proceedings was denied the right to seek adjustment of status); *Francis v. INS*, 532 F.2d 268, 269 (2d Cir. 1976) (finding equal protection violation where aliens who left the United States prior to removal, proceedings could seek relief from removal but those who never left could not).

197. See, e.g., *Po Shing Yeung*, 76 F.3d at 339.

198. *Arca-Pineda v. Attorney Gen.*, 527 F.3d 101, 105-06 (3d Cir. 2008) (quoting *DeSousa v. Reno*, 190 F.3d 175, 184 (3d Cir. 1999)).

199. 5 U.S.C. § 706(2)(A) (2006). This standard applies to executive branch conduct regarding immigration. See, e.g., *Judulang v. Holder*, 132 S. Ct. 476, 479 (2011).

200. *Id.* at 483.

agency must have a rational basis and provide a reasoned explanation for a court to uphold its conduct.<sup>201</sup> As with the equal protection analysis, agency action will be invalidated when it lacks a rational basis. The primary advantage of an arbitrary and capricious challenge is that unlike an equal protection challenge, which will be upheld even if the court can supply a hypothetical rationale for government action, review is limited to the actual rationale articulated by the agency.<sup>202</sup> Thus, all the reasons that follow suggesting the government's actions violate the Equal Protection Clause also support an argument that the government's conduct is arbitrary and capricious in violation of the Administrative Procedure Act.

A practice of subjecting aliens who prevail while abroad to inadmissibility standards creates two classes of aliens differentiated solely by whether they happened to have been removed from the United States. One class of aliens—those who successfully challenge their deportation order while inside the United States—will remain subject to the Act's deportability standards for any further proceedings, while a second class of aliens—those who successfully challenge their deportation order after having been removed—will be subject to the Act's inadmissibility standards in any further proceedings.

It would be a difficult chore for the government to articulate a legitimate basis for distinguishing these two classes of aliens. This distinction's arbitrary nature can be seen in several ways. First, deportation is the only fact that differentiates these two classes. But the issue of whether to apply deportability or inadmissibility standards only arises when the order that led to the alien's deportation is vacated. While there may be valid reasons for distinguishing between deported and non-deported aliens when a deportation order remains in force,<sup>203</sup> it is hard to see a rational basis for distinguishing between deported and non-deported aliens when the deportation turns out to have been erroneous.

Second, various factors that are unrelated to the merits of the alien's case may affect whether an alien is actually deported following a final deportation order. As Professor Rachel Rosenbloom has identified, "[a]ny 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 desig-

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201. See, e.g., *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626 (1986) ("It is an axiom of administrative law that an agency's explanation of the basis for its decision must include 'a rational connection between the facts found and the choice made.'" (quoting *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983))).

202. See *id.* at 626–27 ("Agency deference has not come so far that we will uphold regulations whenever it is possible to conceive a basis for administrative action. To the contrary, the presumption of regularity afforded an agency in fulfilling its statutory mandate is not equivalent to the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause.") (internal quotation marks omitted)).

203. See, e.g., *Avila-Sanchez v. Mukasey*, 509 F.3d 1037, 1041 (9th Cir. 2007) (rejecting equal protection challenge to a regulation that barred illegally reentering aliens from seeking a special form of relief, finding that "[t]he government has a legitimate interest in discouraging aliens who have already been deported from illegally reentering") (internal citation and quotation marks omitted).

nated for removal, the granting of a stay, or even simply the government's failure to act."<sup>204</sup> Thus, aliens who cannot be repatriated may end up remaining in the United States while their petitions for review are ongoing, while aliens who can be repatriated will end up pursuing their petitions from abroad. It is hard to envision the justification for applying one substantive standard to the former category but a different substantive standard to the latter.

Third, applying inadmissibility standards to aliens who prevail from abroad distinguishes between those aliens who win their appeal at the BIA level and those who win at the circuit court level. Because aliens receive an automatic stay of removal during an appeal to the BIA,<sup>205</sup> any alien who receives a favorable decision from the BIA will remain subject to deportability standards once the case is remanded to the immigration judge, while an alien who prevails at the circuit court level (and who did not receive a discretionary stay) will be subject to inadmissibility standards. One could argue that a rational basis exists for such a distinction because aliens who file petitions for review have already gone through one round of appellate review and the BIA has denied their appeal (or sustained the government's appeal). However, the high reversal rate of BIA decisions and the federal appellate bench's loud criticisms of the often shoddy decision-making of immigration judges and the BIA undercut the force of that distinction.<sup>206</sup>

Finally, this practice arbitrarily discriminates between aliens who obtain a stay of removal while their petitions for review are pending and aliens who do not. One could hypothesize that Congress may have wanted to distinguish between aliens who were able to demonstrate a high likelihood of success on the merits, thus justifying a stay, and those aliens who appeared to have a low chance of success and thus did not receive a stay. The standard for a stay, however, is not whether the alien will succeed on the merits but whether the alien is *likely* to succeed on the merits, and the decision on the stay occurs at an early stage of the appeal before the parties have had a chance to fully brief the issues on the merits. It would make little sense to say that an alien who in fact *did* succeed on the merits should be subjected to more restrictive inadmissibility requirements because the alien did not show at the outset that he or she was likely to succeed. Moreover, any attempt to provide a hypothetical rationale for distinguishing between aliens who receive a stay and aliens who do not runs headlong into Congress's actual rationale for the 1996 amendments, which was to equalize the treatment of aliens inside and outside the United States by removing the automatic stay and permitting aliens to pursue their petitions for review from abroad.

While it is quite difficult to show that a classification fails to satisfy rational basis review, the argument here is not without support. In sev-

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204. Rosenbloom, *Remedies for the Wrongly Deported*, *supra* note 28, at 180.

205. See 8 C.F.R. § 1003.6(a) (2006).

206. See *supra* notes 122–29 and accompanying text.

eral other contexts, federal courts have found that applying different substantive standards to aliens who have not previously left the country than to those who have left the country lacked any rational basis and violated equal protection. In *Po Shing Yeung v. INS*, the Eleventh Circuit found that no rational basis existed for a rule that allowed aliens in deportation proceedings to seek a discretionary waiver for a deportable offense if they had departed and returned to the United States after having committed the offense at issue but that prohibited aliens from seeking that waiver if they had never left the United States.<sup>207</sup> Similarly, in *Francis v. INS*, the Second Circuit found no rational basis for a rule that permitted aliens who committed a removable offense to seek discretionary relief from removal if they had departed and reentered the United States after committing their offense, but that prohibited such relief to aliens who were otherwise eligible but who had not departed the United States.<sup>208</sup> Although it was not required to do so, the BIA subsequently adopted the *Francis* Court's holding as binding throughout the country.<sup>209</sup> While those two cases differ from the distinction created by the government's practice here, in that they both differentiated between aliens who voluntarily took a short trip abroad and those who did not, the logic underlying both decisions applies equally to aliens who win their petitions for review from abroad. If anything, the classification between aliens who prevail after being deported and those who prevail while in the United States has even less justification since in the latter case, the alien's departure from the United States is involuntary rather than voluntary and is predicated on an order of removal that is ultimately determined invalid.

In short, while it may be possible for the government to articulate a rational basis for distinguishing between aliens who prevail from abroad and those who prevail from inside the United States, it is difficult to identify what this basis would be. The lack of any clearly apparent justification for such a distinction renders the government's practice of subjecting aliens who prevail while abroad to inadmissibility standards susceptible to an equal protection or arbitrary and capricious challenge.

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207. 76 F.3d 337, 340 ("To claim, as the INS does here, that Po belongs to a different classification of persons simply by virtue of his failure to depart and reenter, is to recognize a distinction that can only be characterized as arbitrary, and that is without a fair and substantial relation to the object of the legislation." (internal quotation marks and citation omitted)).

208. 532 F.2d 268, 269 (2d Cir. 1976). A number of other circuits have followed *Francis*. See, e.g., *Caroleo v. Gonzales*, 476 F.3d 158, 163 n.3 (3d Cir. 2007), *abrogated on other grounds by* *Judulang v. Holder*, 132 S. Ct. 476 (2011); *Gonzalez v. INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Leal-Rodriguez v. INS*, 990 F.2d 939, 949 (7th Cir. 1993); *Butros v. INS*, 990 F.2d 1142, 1143 (9th Cir. 1993) (en banc); *Casalena v. INS*, 984 F.2d 105, 106 n.3 (4th Cir. 1993); *Ghassan v. INS*, 972 F.2d 631, 633 n.2 (5th Cir. 1992); *Campos v. INS*, 961 F.2d 309, 313 (1st Cir. 1992); *Vissian v. INS*, 548 F.2d 325, 328 n.3 (10th Cir. 1977).

209. See *In re Silva*, 16 I. & N. Dec. 26, 29-30 (B.I.A. 1976).

## VI. SOLUTIONS

The previous sections have attempted to demonstrate the legal and practical problems associated with subjecting aliens who successfully overturn their deportation orders while abroad to more stringent inadmissibility standards rather than to the deportability standards that were applied to them during their original deportation proceedings. This section proposes what is hopefully a simple and easily implemented solution: if the government intends to continue pursuing removal actions against aliens who win their appeals, those actions should be governed by the same deportability standards that governed the proceedings when the alien was originally in the United States. Applying a consistent set of legal standards to an alien, irrespective of whether the alien happens to be inside or outside the United States, makes deportation proceedings fair, ensures consistency with IIRIRA's goal of allowing aliens to pursue their appeals from abroad, and maintains fidelity to the Constitution.

In addition to being doctrinally defensible, a policy of applying deportability standards to aliens who prevail from abroad offers several advantages. First, the policy is easily administered. No new legislation is required. No new procedures need to be implemented. Rather, any continuation of the alien's deportation proceeding would be governed by the same existing standards that governed during the original proceedings.<sup>210</sup> Immigration judges would have the flexibility and authority to apply deportability standards rather than inadmissibility standards in any individual case in which the facts would warrant it.

Second, such a policy promotes general notions of fairness. Fairness principles support providing a remedy that rectifies the harm caused by unlawful conduct and returns the victim to the status quo as it existed (or as close to it as possible) at the time the unlawful conduct occurred. In order to truly rectify the harm a wrongful removal caused, it is essential to restore the alien to his or her precise status before removal, which would be lawful presence in the United States at the time the deportation proceedings were initiated. In other words, it is not sufficient to merely restore the alien to his or her prior immigration status—that is, that of a lawful permanent resident or a valid visa holder. To truly restore the status quo, the alien must also be treated as someone lawfully inside the United States pending the outcome of the deportation proceedings.<sup>211</sup>

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210. There still may be some exceptions to this general rule. For example, Congress could possibly amend the INA's deportability grounds in the period between when the alien is deported and when the alien's petition for review is decided. If Congress makes those amendments retroactive, and if doing so is constitutionally permissible, then in that case the new deportability standards would apply rather than the original standards. This is because the Constitution's Ex Post Facto Clause, which prevents such retroactive application in criminal matters, does not apply to immigration proceedings. *See, e.g.,* *Marcello v. Bonds*, 349 U.S. 302, 314 (1955).

211. For LPRs, it would appear to be required by statute that restoring an alien to LPR status also restores the alien's right to reside in the United States. The INA defines a lawful permanent resident as one who has been accorded "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant

While adding that extra requirement may seem semantic, it is of critical importance. If the alien is simply restored to his or her prior immigration status without being put back in the position of being lawfully inside the United States, then the government might have grounds for keeping a prevailing alien out of the United States even when applying deportability standards. This is because the deportability standards make an individual deportable if the individual was inadmissible at the time of entering the country.<sup>212</sup>

There is no reason why the effect of a federal court decision vacating a deportation order could not include treating the alien as lawfully inside the United States even if the alien is physically outside the United States at the time the ruling is issued. The BIA, however, has suggested that it might not have the authority to treat a departed alien as lawfully inside the United States on the ground that “[r]esponsibility for border security and the inspection and admission of aliens from abroad is delegated to the Secretaries of Homeland Security and State, but *not* to this Board.”<sup>213</sup> Government attorneys also appear to have taken the position that it may not be possible to provide a remedy that effectively places the alien inside the United States.<sup>214</sup> It is questionable whether these views are correct. First, several federal courts have already rejected the BIA’s position that it lacks authority to grant relief to aliens who are no longer inside the United States.<sup>215</sup> Second, it is well-established that both immigration judges and federal judges have authority to grant *nunc pro tunc* relief,<sup>216</sup> meaning relief that is back-dated to the time of injury.<sup>217</sup> *Nunc pro tunc* relief allows a court to make its order effective as of the date of the original deportation order, a time when the alien was inside the United States and had not yet been removed. Third, even if the BIA for some reason

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in accordance with the immigration laws, such status not having changed.” 8 U.S.C. § 1101(a)(20) (2006).

212. See *supra* notes 97–98 and accompanying text.

213. *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 656 (B.I.A. 2008).

214. In one case before the Fifth Circuit, the government asserted that “there is no remedy that can return [the petitioner] to the status he had prior to his removal, *i.e.*, an alien seeking to *remain* in the United States pending adjudication of an application for adjustment of status in conjunction with a discretionary waiver.” See FOIA Complaint, *supra* note 28, at Ex. Y (letter from Joseph D. Hardy, Trial Attorney, Office of Immigration Lit., U.S. Dep’t of Justice, 5th Cir.).

215. See *supra* note 135 and accompanying text.

216. See, *e.g.*, *Iavorski v. INS*, 232 F.3d 124, 130 n.4 (2d Cir. 2000) (The “far-reaching equitable remedy of granting relief *nunc pro tunc* in certain exceptional cases has long been available under immigration law.”); *Batanic v. INS*, 12 F.3d 662, 667–68 (7th Cir. 1993) (affording petitioner the right to apply for asylum *nunc pro tunc*); *In re Rapacon*, 14 I. & N. Dec. 375, 378 (B.I.A. 1973) (application for permission to reapply for admission to the United States after deportation is granted *nunc pro tunc*); see also *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1167–68 (9th Cir. 2005) (If petitioner is eligible to show that he was unlawfully removed from the country, he “will be entitled to the relief available at the time of his original hearing.”).

217. Black’s Law Dictionary defines “*nunc pro tunc*,” which is Latin for “now for then,” to mean “[h]aving retroactive legal effect through a court’s inherent power.” BLACK’S LAW DICTIONARY (9th ed. 2009) (citing 35A C.J.S. *Federal Civil Procedure* § 370, at 556 (1960) (“When an order is signed ‘*nunc pro tunc*’ as of a specified date, it means that a thing is now done which should have been done on the specified date.”)).

lacks the power to assist an alien who is outside the United States, IIRIRA makes clear that the federal courts of appeals do retain jurisdiction over departed aliens. Thus, a court of appeals would have authority to grant relief that places the alien in the position of being lawfully inside the United States, even if the BIA would not.

Of course, requiring the government to apply deportability standards to aliens who prevail from abroad is not the only possible solution to the problem of wrongly deported aliens who fall within the inadmissibility gap. Another solution would be to bring back the automatic stay of removal during the pendency of the petition for review so that aliens do not face the risk of having to seek reentry if they win their petitions. Some scholars and advocates have proposed reinstating the automatic stay of removal.<sup>218</sup> This solution, however, is less practical. First, it would require legislative action to amend the INA, and it is not clear that there is any impetus in Congress to change the INA in this manner any time soon. Second, it fails to account for those aliens who may prefer to be deported pending the outcome of their petition rather than to remain imprisoned in federal detention facilities for up to several years until their petitions for review are decided.<sup>219</sup>

Another solution would be to harmonize the deportability and inadmissibility standards so that there is no inadmissibility gap. Again, however, this would require a substantial legislative overhaul by Congress. Furthermore, it may be that Congress generally has valid reasons for applying different standards to those who are seeking to enter the United States for the first time than to those who have been permitted to enter the United States and the government now seeks to remove. Thus, while the solution of requiring the application of deportability standards to aliens who prevail on their petitions for review from abroad may carry its own set of complications, it may be preferable, or at least more realistic, than other possible solutions.

## VII. CONCLUSION

Deportation is a serious matter. Policies governing deportation should be crafted with care to ensure that individuals who may have a right to remain in the United States do not have their lives irrevocably altered. Unfortunately, the government's practice of creating an inadmissibility gap by applying inadmissibility standards to aliens who successfully challenge deportation orders from abroad does not reflect a level of thoughtfulness commensurate with the significant consequences of deportation. Instead, it causes substantial unfairness for the many aliens who are wrongly deported but then find themselves unable to return to the United States as a result. Consequently, individuals who successfully challenge deportation decisions should be restored to their prior immigration status

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218. See, e.g., Legomsky, *supra* note 114, at 1719; Baldini-Potermine, *supra* note 119.

219. See *supra* note 132 and accompanying text for an explanation of why some aliens may opt for deportation over staying in the country.



as it existed prior to the commencement of deportation proceedings. They should not be relegated to the lesser status of arriving aliens simply because they happened to win their challenge after being deported rather than before being deported. Any other result is inconsistent with the INA, the U.S. Constitution, and general notions of fundamental fairness.

