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## Voluntary Departure: Stopping the Clock for Judicial Review

### Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law.

# VOLUNTARY DEPARTURE: STOPPING THE CLOCK FOR JUDICIAL REVIEW

*Chelsea Walsh\**

“Deportable aliens should not be faced with the choice between enjoying voluntary departure privilege and securing judicial review of Board determinations.”<sup>1</sup>

## INTRODUCTION

To escape political persecution at the hands of a violent regime, a man flees and enters the United States without permission or the proper documentation. Once in the United States, the man does not violate any laws and works to send money back to his family in his native country. Eventually, however, the United States Immigration and Customs Enforcement discovers his illegal status. The man appears before an immigration judge and concedes deportability. He argues, however, that he should be granted asylum due to the ongoing persecution of members of his political party in his native country. In the alternative, the man requests a voluntary departure order, allowing him to leave the country at his own expense, and removing some of the stigma attached to deportation.

The immigration judge (“IJ”) does not grant the man asylum but grants the request for voluntary departure and orders him to leave the country within sixty days. The alien, still fearful of returning to his native country, appeals the IJ’s decision to the Board of Immigration Appeals, which affirms the decision. The man now faces an important decision. He may either leave the country within the sixty-day period set by the immigration officials or appeal the decision denying asylum to a federal circuit court. The outcome of his case will likely hinge on which circuit court the man appeals to.<sup>2</sup>

The circuits have split on the issue of whether courts have power to grant reinstatements or stays of the voluntary departure periods.<sup>3</sup> As

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1. *Kaczmarczyk v. INS*, 933 F.2d 588, 598 (7th Cir. 1991). The *Kaczmarczyk* court held, however, that the court lacked the power to grant an extension of the voluntary departure period due to the language of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”). *Id.*; see *infra* Part II.A.2.a.ii.

2. This hypothetical is based on *Kaczmarczyk*, 933 F.2d at 590-93.

3. See *infra* Part II.

is often the case, an alien's departure period may run before a circuit court has the opportunity to hear the alien's appeal.<sup>4</sup> Therefore, in the circuits that hold that courts do not have the power to reinstate or stay departure periods, an alien may be forced to choose between having his appeal heard in a circuit court and enjoying the benefits of voluntary departure.<sup>5</sup> Due to the circuit split, the geographic area in which an alien resides may impact his decision to apply for and accept voluntary departure as a relief.<sup>6</sup>

Part I of this Note traces the development of immigration law in the United States and clarifies the voluntary departure order process.<sup>7</sup> Part II discusses various approaches adopted by the federal circuit courts of appeals, and the subsequent circuit split that has developed regarding the circuit courts' power to reinstate departure periods, or to stay departure periods while the alien's appeal is heard in the court.<sup>8</sup> Part III argues that the U.S. Supreme Court should grant certiorari to resolve the circuit split. The Court should determine that, while a circuit court cannot reinstate the departure period as established by statute, it may use its equitable powers to grant a stay of the voluntary departure period while hearing an appeal.<sup>9</sup>

## I. IMMIGRATION LAW IN THE UNITED STATES

This part briefly traces the evolution of immigration law in the United States and then describes the structure by which immigration determinations have been made, both prior to and after the creation of the Department of Homeland Security. It also explains the substantive and procedural aspects of a deportation or removal proceeding, specifically with regard to the relief of voluntary departure.

### A. *Early Development of Immigration Law in the United States*

The United States did not enact extensive federal legislation in the area of immigration law for nearly a century following the nation's founding,<sup>10</sup> and it was unclear whether the Constitution granted the federal government the power to regulate immigration.<sup>11</sup> Although Congress did not generally invoke its power to regulate immigration

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4. See *infra* Parts II.B.2, III.B.

5. See *infra* Parts II.B.2, III.B.

6. See *infra* Part II.

7. See *infra* Part I.

8. See *infra* Part II.

9. See *infra* Part III.

10. See David Weissbrodt, *Immigration Law and Procedure in a Nutshell* 3 (4th ed. 1998).

11. In 1875, the U.S. Supreme Court held state restrictions on immigration unconstitutional as infringements on the federal power over foreign commerce. See *Henderson v. Mayor of New York*, 92 U.S. 259, 270-74 (1875).

before 1875, it did pass a series of acts regulating naturalization.<sup>12</sup> This era of unrestricted immigration led to periods of incredible population growth for the fledgling nation.<sup>13</sup>

As the number of immigrants grew, “[d]iscontent with the open immigration policy” began to emerge.<sup>14</sup> In response to the large number of Catholic immigrants, anti-Catholic groups grew and gained support.<sup>15</sup> In addition, a variety of groups “campaign[ed] for legislation halting immigration.”<sup>16</sup>

The Civil War temporarily halted these groups from pursuing their anti-immigration policies.<sup>17</sup> However, “[a]fter the Civil War, federal law began to reflect the growing desire to restrict the immigration of certain groups, and in 1875 Congress passed the first restrictive statute.”<sup>18</sup> The Immigration Act of 1875 designated, for the first time, “certain classes of aliens as excludable,”<sup>19</sup> and barred convicts and prostitutes from admission.<sup>20</sup>

The Immigration Act of 1882 further excluded “lunatics,” “idiots,” and those likely to become public charges, and imposed a head tax on every arriving immigrant.<sup>21</sup> The Act “mark[ed] the end of the indecision between state and federal jurisdiction over immigration.”<sup>22</sup>

In the years following the Immigration Act of 1882, Congress continued to increase the number of excludable groups, and, by 1907, federal acts excluded the diseased,<sup>23</sup> “paupers,”<sup>24</sup> “polygamists,”<sup>25</sup> the

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12. For example, in 1790, Congress adopted the first act regarding naturalization, which liberally granted citizenship to free white immigrants and established a residency requirement of two years. *See* Act of Mar. 26, 1790, 1 Stat. 103. In 1795, Congress created a five-year residency requirement for citizenship. *See* Act of Jan. 29, 1795, 1 Stat. 414. In addition, in 1798, Congress gave the President the authority to expel dangerous aliens. *See* Act of July 6, 1798, 1 Stat. 577.

13. Until 1820, no official records were kept on the number of immigrants entering the United States, but estimations suggest that 250,000 people arrived between 1790 and 1820, and over ten million people entered the United States between 1820 and 1880. Weissbrodt, *supra* note 10, at 5. Due to “economic devastation” and political pressure, 2.8 million Irish immigrants came to the United States between 1820 and 1880. *Id.* Furthermore, during the European depression of the 1840s, many German Catholics entered the United States. *Id.*

14. *Id.*

15. *See id.*

16. *Id.* Examples of these groups include “social reformers, Protestant Evangelicals, the Nativists, the Order of the Star-Spangled Banner, and the Know-Nothing Party.” *Id.*

17. *See id.*

18. *Id.* at 6; *see* Act of Mar. 3, 1875, 18 Stat. 477.

19. E.P. Hutchinson, *Legislative History of American Immigration Policy 1798-1965*, at 66 (1981).

20. *See* 18 Stat. 477.

21. *Id.*

22. Hutchinson, *supra* note 19, at 83.

23. Act of Mar. 3, 1891, 26 Stat. 1084.

24. *Id.*

25. *Id.*

“insane,”<sup>26</sup> “beggars,”<sup>27</sup> “anarchists,”<sup>28</sup> the “feeble-minded,”<sup>29</sup> those with tuberculosis,<sup>30</sup> and those persons with a “mental or physical defect . . . [that] may affect [their] ability . . . to earn a living.”<sup>31</sup>

Despite these growing limitations, about 8.8 million immigrants were admitted to the United States between 1900 and 1910.<sup>32</sup> In addition, the limitations did not quell the influx of “new immigrants” from areas outside of Northern and Western Europe.<sup>33</sup> Similar to the anti-Catholic sentiment prominent before the Civil War, the immigration measures of the period preceding World War I were influenced by “strongly racist and ethnocentric sentiments.”<sup>34</sup> Historian E.P. Hutchinson explains, “[i]t was a time when beliefs about race and ethnic superiority or inferiority were common, and these beliefs come out strongly in the discussion of immigration questions.”<sup>35</sup>

In response to these growing attitudes, Congress passed the Immigration Act of February 5, 1917.<sup>36</sup> This Act “represents a turning point in American immigration policy, a definite move from regulation to attempted restriction through the final passage of the literacy test.”<sup>37</sup> In addition, the Act prohibited the immigration of all persons from an “Asiatic barred zone defined by latitude and longitude,” marking “an unmistakable declaration of a white immigration policy.”<sup>38</sup>

Dissatisfied with results of these restrictions, Congress looked to modify the nation’s immigration policies to reduce immigration levels and to “change the ethnic composition of those permitted entry.”<sup>39</sup> Therefore, Congress enacted the Immigration Act of May 19, 1921, the nation’s first quota act.<sup>40</sup> The Act “set the annual quota for each nationality group at three percent of the number of foreign-born

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26. Act of Mar. 3, 1903, Pub. L. No. 57-162, 32 Stat. 1213.

27. *Id.*

28. *Id.*

29. Act of Feb. 20, 1907, Pub. L. No. 59-96, 34 Stat. 898.

30. *Id.* at 899.

31. *Id.*

32. Weissbrodt, *supra* note 10, at 8.

33. *Id.*

34. Hutchinson, *supra* note 19, at 157.

35. *Id.*

36. *Id.* at 167; Act of Feb. 5, 1917, Pub. L. No. 64-301, 39 Stat. 874.

37. Hutchinson, *supra* note 19, at 167. A bill proposing a literacy test was introduced in Congress in 1895, and although it passed both houses, President Grover Cleveland “vetoed it, suggesting that the test was hypocritical.” Thomas Alexander Aleinikoff et al., *Immigration: Process and Policy* 50 (3d ed. 1995). For the next twenty-five years, an “active segment of Congress, had been trying to pass such a test . . . and had at last succeeded in spite of many blocks in Congress and four presidential vetoes.” Hutchinson, *supra* note 19, at 167.

38. Hutchinson, *supra* note 19, at 166-67.

39. Aleinikoff et al., *supra* note 37, at 53.

40. Act of May 19, 1921, Pub. L. No. 67-5, 42 Stat. 5.

persons of that national origin enumerated in the 1910 census, excepting the Asiatic barred zone."<sup>41</sup>

Congress viewed this Act as a temporary solution to the immigration problems facing the nation, but extended the Act for another two years.<sup>42</sup> In 1924, Congress passed an act that became known as the "National Origins Act,"<sup>43</sup> and was "heralded as a permanent solution to U.S. immigration problems."<sup>44</sup> The National Origins Act further restricted immigration by reducing the immigration quota to two percent of the 1890 census<sup>45</sup> and provided for the issuance of visas by consular offices abroad.<sup>46</sup>

In 1929, as provided by the National Origins Act, new quotas "based on the contribution of each nationality to the overall United States population rather than on the foreign-born population" took effect.<sup>47</sup> The population of the United States was still chiefly Anglo-Saxon; therefore, the national origins quota placed even greater restrictions on newer immigrant groups.<sup>48</sup> Shortly after the implementation of the national origins formula the Great Depression began,<sup>49</sup> significantly reducing the number of immigrants that came to the United States.<sup>50</sup>

The United States' policies most adversely affected those immigrants attempting to escape Europe before World War II.<sup>51</sup> For example, in 1939, a bill designed to save 20,000 German children from Nazi Germany failed in Congress because the number of children would have exceeded the German quota.<sup>52</sup> In 1940, the State Department did "permit[] consuls outside of Germany to issue visas to German refugees because the German quota sometimes remained unfilled."<sup>53</sup> However, "these measures were too few and came too late to help most of the victims of Nazi persecution."<sup>54</sup>

Following the war, the extent of the "Nazi atrocities" came to light, and a "short period of liberalization of the strict quota laws"

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41. Hutchinson, *supra* note 19, at 180.

42. Aleinikoff et al., *supra* note 37, at 53.

43. Act of May 26, 1924, Pub. L. No. 68-139, 43 Stat. 153.

44. Aleinikoff et al., *supra* note 37, at 53.

45. 43 Stat. at 159.

46. *Id.* at 156-57; *see also* Aleinikoff et al., *supra* note 37, at 53.

47. Aleinikoff et al., *supra* note 37, at 53; 43 Stat. at 153.

48. Weissbrodt, *supra* note 10, at 12. "The national origins quota allotted 85% of the total quota of 150,000 [new immigrants] to countries from the North and West of Europe, while the South and East received only 15% of that total quota." *Id.*

49. *Id.*

50. Aleinikoff et al., *supra* note 37, at 54. "During the 1930s, only 500,000 immigrants came to the United States, less than one-eighth of the number that had arrived in the previous decade." *Id.*

51. *Id.* at 55.

52. *Id.*

53. *Id.*

54. *Id.*

occurred.<sup>55</sup> In 1945, President Harry S. Truman issued a directive admitting 40,000 war refugees.<sup>56</sup> In addition, Congress passed “An Act To expedite the admission to the United States of alien spouses and alien minor children of citizen members of the United States armed forces” in 1945,<sup>57</sup> which permitted alien spouses and children of members of the American armed forces to immigrate to the United States.<sup>58</sup>

### B. *Immigration and Nationality Act*

The Immigration and Nationality Act of 1952<sup>59</sup> (“INA”) “consolidated previous immigration laws into one [coordinated] statute.”<sup>60</sup> The INA acted as a “comprehensive codification” and replaced all earlier immigration laws but has been amended frequently since its inception.<sup>61</sup>

The enabling provision of the INA delegated the authority for administering the INA and enforcing its provisions to the Attorney General.<sup>62</sup> In addition, the Attorney General was authorized and “inescapably required—to delegate responsibilities to officers of [the Immigration and Naturalization Service (“INS”)] and also to other officers . . . of the Department of Justice.”<sup>63</sup>

Although the INA expressly established the INS, it did not delineate its powers, but rather left it to the discretion of the Attorney General.<sup>64</sup> In addition, “[t]he responsibility of the INS Commissioner [was] to determine policy and overall management of the agency. The INS [was] divided into four regions, each of which [was] headed by a

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55. Weissbrodt, *supra* note 10, at 14.

56. Aleinikoff et al., *supra* note 37, at 55.

57. Act of Dec. 28, 1945, Pub. L. No. 79-271, 59 Stat. 659.

58. *Id.*

59. 8 U.S.C. §§ 1101-1537 (2000).

60. Aleinikoff et al., *supra* note 37, at 56. As a consolidation of previous laws, the INA “preserved the national origins quota system.” *Id.*

61. *See id.* at xiv.

62. 8 U.S.C. § 1103(a); *see also* Aleinikoff et al., *supra* note 37, at 100-01. Thomas Aleinikoff and his co-authors note, however, that a tension exists between the dual tasks of administering the INA and enforcing its provisions. *Id.* at 101. Administering a statute “requires the administrators to counsel affected individuals regarding their possible rights, liabilities and future actions . . . and help guide them through the process.” *Id.* On the other hand, “[e]nforcement of a statute . . . might properly call forth an attitude of tough-mindedness and suspicion on the part of the officials involved.” *Id.* Therefore, “[b]ecause the INA is both highly complex and notoriously violated on a broad scale, the tension here becomes particularly acute.” *Id.* For more information on the administration and enforcement of the INA, see Edwin Harwood, In Liberty’s Shadow: Illegal Aliens and Immigration Law Enforcement 25-48, 168-92 (1986).

63. Aleinikoff et al., *supra* note 37, at 101; *see also* 8 U.S.C. § 1103. The structure of the enforcement of immigration law in the United States has changed since the creation of the Department of Homeland Security. See Part I.C. for more information on these changes.

64. Aleinikoff et al., *supra* note 37, at 101-02.

regional commissioner.”<sup>65</sup> A principle function of the INS was the adjudication of “applications for various benefits available under the immigration laws.”<sup>66</sup> In each case, a citizen or alien applied to the INS for a benefit, and the INS officer who reviewed the petition or request had to decide whether the application was “complete and bona fide,” and “whether it me[t] the requirements set forth in the statute and the regulations.”<sup>67</sup>

The Executive Office for Immigration Review (“EOIR”) is separate from the INS, but also under the purview of the Department of Justice. The EOIR consists of the IJ and the Board of Immigration Appeals (“BIA”).<sup>68</sup> The majority of the IJs’ time is spent deciding questions of excludability and deportability.<sup>69</sup> However, the IJs also “conduct proceedings . . . to rescind an admitted immigrant’s adjustment of status . . . , and they may hear challenges brought by aliens ordered *not* to leave the country under the departure control provisions.”<sup>70</sup> The BIA acts as the “administrative appellate body for cases under the immigration laws.”<sup>71</sup>

### C. Current Structure of Implementing Immigration Laws

With the creation of the Department of Homeland Security,<sup>72</sup> the structure implementing immigration law in this country has significantly changed. “[T]he responsibility for providing immigration-related services and benefits” was “transferred from” the

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65. Richard A. Boswell, *Immigration and Nationality Law* 7 (1992).

66. Aleinikoff et al., *supra* note 37, at 103. Examples of this function include determining whether to grant extensions for tourists, handling applications for adjustments of status that occur when a nonimmigrant marries a citizen and settles in the U.S., and determining whether to grant a visa petition filed by a citizen on behalf of a noncitizen family member living in another country. *Id.*

67. *Id.* at 104.

68. See 6 U.S.C. § 521(a) (2000); see also Boswell, *supra* note 65, at 7. The Executive Office of Immigration Review (“EOIR”) was separated from the Immigration and Naturalization Service (“INS”) by the Attorney General in January 1983. See Aleinikoff et al., *supra* note 37, at 110. Criticism by attorneys and the immigration judges, who opposed the pressures put on them by the INS, led to this separation. Boswell, *supra* note 65, at 7 n.5.

69. Boswell, *supra* note 65, at 7. Under the Act, proceedings to remove aliens must be conducted by an immigration judge, who is designated by the Attorney General to fulfill this role. See 8 U.S.C. § 1101(b)(4) (2000) (definitions), § 1225 (inspection), §§ 1226, 1252 (removal proceedings).

70. Aleinikoff et al., *supra* note 37, at 110; see 8 U.S.C. § 1229a.

71. Boswell, *supra* note 65, at 7.

72. Following the attacks of September 11, 2001, Congress passed the Homeland Security Act of 2002, which created the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (to be codified in scattered sections of 6 U.S.C.). The mission of the Department of Homeland Security is to “(A) prevent terrorist attacks within the United States; (B) reduce the vulnerability of the United States to terrorism; (C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States.” *Id.* § 101(b), 116 Stat. at 2142.

INS to the United States Citizenship and Immigration Services (“USCIS”), under the Department of Homeland Security, on March 1, 2003.<sup>73</sup> The USCIS is “responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities.”<sup>74</sup> These functions include the adjudications of “immigrant visa petitions,” “naturalization petitions,” “asylum and refugee applications,” and “[a]ll other adjudications performed by the Immigration and Naturalization Service.”<sup>75</sup>

Furthermore, the United States Immigration and Customs Enforcement (“ICE”) assumed responsibility for the investigation and enforcement of United States immigration laws.<sup>76</sup> Additionally, the United States Customs and Border Protection (“CBP”) is now responsible for managing and securing the nation’s borders.<sup>77</sup> The EOIR, including the IJs and the BIA, however, remains in the Department of Justice under the Attorney General, thus maintaining the separation of the judicial role of immigration courts from the enforcement functions now residing in ICE.<sup>78</sup>

#### D. *Process of Deportation Determinations*

Under both the new and the old structure of immigration enforcement, IJs have the power to make determinations regarding deportation.<sup>79</sup> Deportation is “the removal of an alien who has entered the United States—either legally or illegally.”<sup>80</sup>

##### 1. Substantive and Procedural Aspects of Deportation

Congress has established a list of grounds for deportation and has codified procedures for deportation proceedings.

##### a. *Substantive Aspects of Deportation*

The Supreme Court “has established essentially no limits on Congress’ authority” to define the substantive aspects of

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73. See U.S. Dep’t of Homeland Sec., Immigration & Borders: Serving Our Visitors, Securing Our Borders, at [http://www.dhs.gov/dhspublic/theme\\_home4.jsp](http://www.dhs.gov/dhspublic/theme_home4.jsp) (last visited Feb. 10, 2005).

74. U.S. Citizenship and Immigration Servs., About US, at <http://uscis.gov/graphics/aboutus/index.htm> (last visited March 15, 2005).

75. U.S. Department of Homeland Security Act § 451, 116 Stat. at 2195.

76. U.S. Dep’t of Homeland Sec., *supra* note 73.

77. *Id.*

78. See Executive Office of Immigration Review, United States Dep’t of Justice, Background Information, at <http://www.usdoj.gov/eoir/background.htm>. (last visited Mar. 25, 2005).

79. 8 U.S.C. § 1229a (2000).

80. Aleinikoff et al., *supra* note 37, at 511.

deportation.<sup>81</sup> Upholding the constitutionality of the deportation of prostitutes under the 1907 Act, Justice Holmes wrote:

It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want.<sup>82</sup>

The grounds for deportation are a “historical collection of traits and acts that . . . Congress[] over the past century ha[s] deemed undesirable.”<sup>83</sup>

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81. *Id.* at 512. The deference to Congress is not limited simply to the area of deportation. In general, the history of immigration law in the U.S. has largely been dominated by the plenary powers doctrine, which provides for an “extremely deferential standard that courts will apply in considering the constitutionality of government conduct in this area.” Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 Conn. L. Rev. 1411, 1413 n.6 (1997); see also Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. Mem. L. Rev. 295, 299 (1999); Sonia Chen, *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Another Congressional Hurdle for the Courts*, 8 Ind. J. Global Legal Stud. 169, 169 (2000).

82. *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913).

83. *Aleinikoff et al.*, *supra* note 37, at 535. For example, the statute makes deportable all aliens who were “excludable at time of entry,” which allows the government to expel aliens who entered the country without permission. *Id.* at 537; see 8 U.S.C. § 1227(a)(1). These provisions cover “illegal” aliens who enter the U.S. by evading inspection and those nonimmigrants who stayed beyond the time authorized at their admissions. *Id.* § 1227(a)(1). In addition, 8 U.S.C. § 1227(a)(2) makes the commission of certain crimes deportable. These include “crimes of moral turpitude,” for which an alien may be deported if he is convicted of such a crime within five years, or ten years if granted lawful permanent residence status, of admission to the country, or convicted of a crime in which the punishment is a year or more of incarceration. *Id.* § 1227(a)(2). Black’s Law Dictionary defines “crimes of moral turpitude” as “act[s] of baseless, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” Black’s Law Dictionary 1160 (rev. 4th ed. 1957). In addition, an alien who is convicted of two or more crimes of moral turpitude is deportable regardless of when after admission they took place. 8 U.S.C. § 1227(a)(2)(A)(ii). Also, an “alien who is convicted of an aggravated felony at any time after admission is deportable.” *Id.* § 1227(a)(2)(A)(iii). Furthermore, any alien convicted of an offense involving any controlled substance, or who admits to being a drug addict or abuser is deportable. *Id.* § 1227(a)(2)(b)(i)-(ii). Other deportable crimes enumerated in the statute include: firearm offenses, treason, espionage, sabotage, crimes of domestic violence, stalking, and crimes against children. *Id.* § 1227(a)(2). Aliens who commit security violations, including terrorist activities, or activities in the United States that the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States, may also be deported. *Id.* § 1227(4)(A)-(C). Aliens may also be deported for becoming public charges within five years of entry, *id.* § 1227(5), and for engaging in unlawful voting, *id.* § 1227(6).

### b. *Deportation Procedure*

The filing of a notice to appear begins the removal process.<sup>84</sup> The notice to appear informs the alien of “the nature of the proceedings,” the factual allegations underlying the charge of deportability, and the “statutory provisions alleged to have been violated.”<sup>85</sup> The IJ decides whether the alien is deportable and, if so, whether he is eligible for a discretionary relief measure.<sup>86</sup> The IJ is bound by a substantial evidence standard at the hearing.<sup>87</sup> If the alien is found deportable, the final order may then be appealed to the BIA.<sup>88</sup> Upon a determination of the BIA, the case may be appealed to a federal court.<sup>89</sup>

## 2. Relief from Deportation

Even if an IJ finds an alien to be deportable, or an alien “concede[s] deportability at the outset of the hearing,” various provisions of the INA may grant relief from deportation.<sup>90</sup> Lasting relief measures may be available to nonimmigrants from certain geographic regions through country-specific measures such as the Nicaraguan Adjustment and Central American Relief Act (“NACARA”).<sup>91</sup> In addition, other

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84. 8 C.F.R. § 239.1 (2004).

85. See 8 U.S.C. § 1229(a)(1). The statute lists the specific requirements for a notice to appear: a statement of the nature of the proceeding; the legal authority under which the proceeding is conducted; a concise statement of the factual allegations informing the alien of the “act[] or conduct alleged to be in violation of the law,” and a designation of the “charges against the alien” and “of the statutory provisions alleged to have been violated.” *Id.* In addition, the notice to appear must list the time and place of the hearing. *Id.*

86. *Id.* The INA authorizes the immigration judge to “conduct proceedings for deciding the inadmissibility or deportability of an alien,” and “administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses,” and “decide whether an alien is removable from the United States.” *Id.* § 1229a(a)-(c).

87. Boswell, *supra* note 65, at 119.

88. See 8 C.F.R. § 1003.1(b). The BIA has appellate jurisdiction over decisions “in exclusion cases,” “in deportation cases,” “in removal proceedings,” concerning discretionary relief, “involving administrative fines,” “relating to bond, or parole, or detention of an alien,” involving “recession of an adjustment of status,” “in asylum proceedings,” and “relating to Temporary Protected Status.” *Id.*

89. United States Department of Justice, Board of Immigration Appeals, at <http://www.usdoj.gov/eoir/biainfo.htm> (last visited Mar. 12, 2005).

90. Aleinikoff et al., *supra* note 37, at 640.

91. On November 19, 1997, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (“NACARA”), Pub. L. No. 105-100, 111 Stat. 2160 (1997) (codified as amended at 8 U.S.C. § 1101 (2000)). Congress passed NACARA to help refugees of the Nicaraguan civil war and the fall of communism. NACARA provides that eligible Nicaraguans or Cubans can apply for adjustment of status to that of permanent resident aliens. In addition, under NACARA, nationals of El Salvador, Guatemala, the former Soviet Union, and certain Eastern European countries, who entered the United States on or before specifically stated dates, are eligible to apply for suspension of deportation or special cancellation of removal

lasting relief measures apply to aliens who fulfill certain statutory requirements, regardless of their country of origin.<sup>92</sup>

In addition, an alien seeking to avoid deportation based on a concern for his or her safety in the destination country may apply for an application for the withholding of removal<sup>93</sup> or asylum.<sup>94</sup> Withholding of removal requires proof of a clear probability that the “alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”<sup>95</sup> If the alien meets the burden of proof, relief is automatically granted without any exercise of the Attorney General’s discretion.<sup>96</sup>

On the other hand, the decision to grant asylum is within the discretion of the Attorney General.<sup>97</sup> To be eligible for asylum, an alien must prove that he is a “refugee.”<sup>98</sup> An applicant for asylum “may qualify as a refugee either because he or she has suffered past persecution or because he has a well-founded fear of future persecution.”<sup>99</sup> In both situations, the applicant bears the burden of proving eligibility for asylum.<sup>100</sup>

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under more lenient deportation standards. See U.S. Citizenship and Immigration Servs., Immigration Through the Nicaraguan Adjustment and Central American Relief Act (NACARA) Section 203, at [http://uscis.gov/graphics/services/residency/nacara203\\_main.htm](http://uscis.gov/graphics/services/residency/nacara203_main.htm) (last visited Mar. 12, 2005).

92. Lasting relief measures include the cancellation of removal, by granting the Attorney General the power to authorize a cancellation of removal relief in favor of an alien who is inadmissible or deportable from the United States when, among other circumstances, the alien “establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” 8 U.S.C. § 1229b(b)(1)(D). Another lasting relief is the adjustment of status from a nonimmigrant to a permanent resident, which allows the Attorney General to adjust the status of a nonimmigrant to permanent residence if “(1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.” *Id.* § 1255(a). This Note focuses on cases involving alien petitions for asylum; thus, the information that follows relates solely to the permanent relief of asylum.

93. See *id.* § 1231(b)(3)(A).

94. See *id.* § 1158.

95. *Id.* § 1231(b).

96. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

97. *Id.* at 427-28.

98. *Id.* at 423. A refugee is any person who is “unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, [the home] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42).

99. 8 C.F.R. § 208.13(b) (2004).

100. *Id.* § 208.13(a).

### E. *Voluntary Departure*

If an alien is unable to prove eligibility for permanent relief, he will often, in the alternative, request a voluntary departure order.<sup>101</sup> Prior to the commencement or completion of a hearing on the alien's deportability, an alien may be permitted to voluntarily depart from the United States at the alien's own expense.<sup>102</sup> At the conclusion of the hearing, an IJ may enter an order granting voluntary departure if the alien has been present in the United States for at least one year, has been a person of good moral character for at least five years, is not deportable due to a conviction of an aggravated felony or terrorist activity, and has the means to depart from the United States.<sup>103</sup> The district director has the sole authority to extend the voluntarily departure period as specified initially by an IJ or the BIA.<sup>104</sup>

"For the government, voluntary departure expedites and reduces the cost of removal."<sup>105</sup> In addition, the relief of voluntary departure is an important benefit to a deportable alien because he avoids the stigma of deportation, is able to select his own destination, and can leave the United States at his own expense without being subject to the penalties and restrictions that deportation imposes.<sup>106</sup>

#### 1. Requirements of Voluntary Departure

An alien seeking the relief of voluntary departure under 8 U.S.C. § 1229c has the burden of showing that he meets the eligibility

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101. Aleinikoff et al., *supra* note 37, at 640.

102. 8 U.S.C. § 1229c(a)(1).

103. *Id.* § 1229c.

104. 8 C.F.R. § 244.2.

105. *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004) (citing *Rife v. Ashcroft*, 374 F.3d 606, 614 (8th Cir. 2004)). "The willingness of hundreds of thousands of aliens to waive a deportation hearing and leave the United States before a date certainly saves the government untold enforcement resources," and "it is a virtual certainty that the immigration system in this country would break down if all aliens who were apprehended as deportable were to request the deportation hearing the INA provides them." Aleinikoff et al., *supra* note 37, at 641.

106. See *Lopez-Chavez*, 383 F.3d at 651; *Ramsay v. INS*, 14 F.3d 206, 211 n.7 (4th Cir. 1994). Along with these statutory incentives to voluntary departure, Aleinikoff and his co-authors note that the decision to choose voluntary departure as an alternative to deportation proceedings may be influenced by the "inability (or unwillingness) of the United States government to stop the surreptitious entry of aliens across the border. The vast majority of aliens granted voluntary departure are arrested for entering [the U.S.] without inspection and most have no colorable claim of lawful residence." Aleinikoff et al., *supra* note 37, at 642. Therefore, "[m]any of these aliens would rather accept the government's offer of a ride over the border than stay and fight deportation" because "their chances of effecting another surreptitious entry are far greater than successfully contesting deportability in a hearing." *Id.* Thus, they reason that "[t]he availability of voluntary departure, coupled with the realities of law enforcement and the rational decisions of aliens, creates a sequence at the border that is repeated over and over again: unlawful entry, apprehension, detention, return, and another unlawful entry." *Id.*

requirements for such relief prescribed by the statute.<sup>107</sup> To prove that the alien has the means to depart voluntarily, the alien must prove that he will be able to depart within a reasonable period of time.<sup>108</sup> In addition, courts have broadly interpreted the requirement of “good moral character” to include various activities that are either illegal or immoral.<sup>109</sup>

## 2. Punishment for Not Departing Within the Departure Period

If an alien is granted voluntary departure and does not depart voluntarily by the deadline set by the IJ or BIA, he may be subject to penalties as set forth in the INA as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).<sup>110</sup> First, IIRIRA requires that an alien who is granted voluntary departure post a departure bond to be forfeited if the alien fails to depart voluntarily by the end of the departure period.<sup>111</sup> In addition, IIRIRA provides that an alien who fails to depart shall be subject to fine ranging from \$1000 to \$5000.<sup>112</sup> Also, the alien may be ineligible for a period of ten years for any further relief of voluntary departure,<sup>113</sup> or any relief under the sections of the statute granting an adjustment of status from nonimmigrant to permanent resident,<sup>114</sup> an adjustment of status from any nonimmigrant designation to any other

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107. See, e.g., *Hibbert v. INS*, 554 F.2d 17, 19 (2d Cir. 1977); *Aalund v. Marshall*, 461 F.2d 710, 711-13 (5th Cir. 1972); *Shkukani v. INS*, 435 F.2d 1378, 1380 (8th Cir. 1971); *United States ex rel. Ciannamea v. Neelly*, 202 F.2d 289, 292 (7th Cir. 1953).

108. *In re F 9 I. & N. Dec.* 333 (1961).

109. For example, it has been expressly held that the requirement of “good moral character” is not met by an alien (1) who is a habitual drunkard, *Ruiz v. INS*, 410 F.2d 382, 383 (6th Cir. 1969); (2) who has committed adultery, *Brea-Garcia v. INS*, 531 F.2d 693, 694 (3d Cir. 1976); (3) who has knowingly and for gain aided or abetted another alien to enter the United States illegally, *In re Valencia-Barajas*, 13 I. & N. Dec. 369 (1969); (4) who has given false testimony for the purpose of obtaining benefits under the INA, *In re Namio*, 14 I. & N. Dec. 412 (1973); *In re O 7 I. & N. Dec.* 486 (1957); (5) who has been confined in a penal institution for an aggregate period of not less than 180 days following his conviction of a criminal offense, *Ruiz*, 410 F.2d at 382-83; *In re Gantus-Bobadilla*, 13 I. & N. Dec. 777, 780 (1971); *In re B*, 7 I. & N. Dec. 405, 406 (1957); (6) who has engaged in prostitution prior to entry to the United States, *In re G*, 5 I. & N. Dec. 559 (1953); (7) who has been convicted of murder, *Ruiz*, 410 F.2d at 382; *In re Awaijane*, 14 I. & N. Dec. 117 (1972); or, (8) who has been convicted of two petty offenses involving moral turpitude, *Khalaf v. INS*, 361 F.2d 208 (7th Cir. 1966). However, it has been held that an alien who has been convicted of a single petty offense involving moral turpitude is not precluded from establishing good moral character, and thus can be found eligible for the relief of voluntary departure. See *In re Urpi-Sancho*, 13 I. & N. Dec. 641 (1970).

110. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 240B(d), 110 Stat. 3009, 3009-597 (relevant portions codified as amended in scattered sections of 8 and 18 U.S.C.).

111. 8 U.S.C. § 1229c(b)(3) (2000).

112. *Id.* § 1229c(d).

113. *Id.*

114. *Id.* §§ 1255, 1259.

nonimmigrant designation,<sup>115</sup> and the cancellation of removal.<sup>116</sup> The Act further explains that the order permitting the alien to depart voluntarily shall inform the alien of the penalties he will incur if he does not depart.<sup>117</sup>

### 3. Appeal

Courts are expressly denied the jurisdiction to hear an appeal from a denial of a request for voluntary departure and are denied any power to stay an alien's removal while considering any claim involving voluntary departure.<sup>118</sup> However, an alien who is granted voluntary departure after being found removable and denied asylum by the BIA may appeal the decision regarding removability and asylum to a circuit court of appeals.<sup>119</sup> Often, however, in these situations an alien's departure period may end before the court completes its review of the alien's underlying claim application.<sup>120</sup> In these cases, the court must address the issue of whether it has the authority to reinstate or stay a voluntary departure order pending its review of the BIA determinations.

### 4. Circuit Split on the Authority of the Federal Courts to Reinstate or Stay Departure Periods

The circuit courts are presently divided over whether they have authority to reinstate the departure period following judicial review, or stay the departure period pending judicial review.<sup>121</sup> The majority of the courts have held that courts lack authority to reinstate departure periods after completion of judicial review, due to IIRIRA's changes to immigration law.<sup>122</sup> However, the majority of courts have held that the enactment of IIRIRA does not affect their equitable powers, and thus courts retain the authority to stay the departure period pending judicial review.<sup>123</sup>

## II. THE EMERGENCE OF A CIRCUIT SPLIT

This part describes the conflict that has emerged among the circuit courts that have examined the power of federal courts either to

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115. *Id.* § 1258.

116. *Id.* § 1229b.

117. *Id.* § 1229c(d).

118. *Id.* § 1229c(f). The statute states: "No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b) of this section, nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." *Id.*

119. See Aleinikoff et al., *supra* note 37, at 933.

120. See *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1170-71 (9th Cir. 2003).

121. See *infra* Part II.

122. See *infra* Part II.A.

123. See *infra* Part II.B.

reinstate or stay voluntary departure periods. Part II.A discusses the power of the courts to reinstate departure periods. Specifically, Part II.A examines IIRIRA's effect on the analysis of the courts. Part II.B examines the courts' analyses of judicial power to grant stays of voluntary departure pending judicial review, and traces the majority of courts' willingness to grant themselves this authority as an aspect of their equitable powers.

### A. Reinstatement of Departure Periods

The circuit courts have divided on the issue of whether they have the power to reinstate the voluntary departure period pending the completion of the judicial review of the BIA determinations. Reinstatement allows the courts to restart the departure period upon the completion of judicial review.

#### 1. Federal Courts Holding that They Have the Power to Reinstatement Departure Periods

The U.S. Court of Appeals for the First and Fourth Circuits have held that federal circuit courts may reinstate the voluntary departure period upon the completion of judicial review in certain circumstances.<sup>124</sup> However, both circuits examined this issue prior to the passage of IIRIRA.

##### a. First Circuit

In *Umanzor-Alvarado v. INS*,<sup>125</sup> Florentin Umanzor-Alvarado, a native of El Salvador, sought asylum.<sup>126</sup> He argued that the Attorney General could permit him to stay in the United States since Umanzor proved that he had "a well-founded fear of persecution on account of [his] . . . political opinion."<sup>127</sup> After de novo review of the record of Umanzor's immigration hearing, the BIA decided that he had not shown that "a reasonable person in his circumstances would fear persecution' because of his political opinion."<sup>128</sup> Therefore, the BIA held that Umanzor's request fell outside of the scope of the Attorney General's discretionary powers and denied his request for asylum.<sup>129</sup> Umanzor appealed this decision to the First Circuit.<sup>130</sup> The circuit court denied the petition for review, holding that the BIA "could lawfully find, as a matter of fact, that Umanzor . . . did not show a

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124. See *Ramsay v. INS*, 14 F.3d 206, 213 (4th Cir. 1994); *Umanzor-Alvarado v. INS*, 896 F.2d 14, 16 (1st Cir. 1990).

125. 896 F.2d at 14.

126. *Id.* at 15.

127. *Id.* (alteration in original) (quoting 8 U.S.C. § 1101(a)(42)(A) (2000)).

128. *Id.* (quoting *Guevara-Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986)).

129. *Id.*

130. *Id.*

'well-founded fear' of such persecution within the terms of 8 U.S.C. § 1101(a)(42)(A)."<sup>131</sup> The court reasoned that the BIA "could find that petitioner had failed to show that such persecution was 'more likely than not,' and thus he fell outside the scope of 8 U.S.C. § 1253(h) mandating withholding of deportation."<sup>132</sup>

Umanzor requested, however, in the event of a denial of his petition for review, that the circuit court reinstate the period of voluntary departure that the BIA had granted him.<sup>133</sup> The INS opposed the request, arguing that its regulations required Umanzor to "ask the district director for any extension of a grant of voluntary departure."<sup>134</sup>

The court, however, directed the government to "treat the voluntary departure period as beginning to run on the date this court's mandate becomes effective."<sup>135</sup> The court noted that, although the petitioner's appeal was ultimately unsuccessful, it "was neither obviously meritless nor apparently interposed solely for purposes of delay."<sup>136</sup>

In addition, the court explained that circuit courts "have either held or strongly suggested that the law would forbid the government to deny a reinstatement *solely* because an alien brought such a good faith . . . appeal."<sup>137</sup> Furthermore, the government did not suggest that it would present the district director with any reason for refusing reinstatement.<sup>138</sup> The court reasoned that to require the petitioner to apply to the district director for a reinstatement of the departure period would be "pointless, for the director could not lawfully refuse the reinstatement."<sup>139</sup> The court held that it had the power to grant the extension of the voluntary departure period.<sup>140</sup>

#### b. *Fourth Circuit*

Similarly, in *Ramsay v. INS*,<sup>141</sup> the Fourth Circuit held that the period of voluntary departure should be reinstated.<sup>142</sup> In *Ramsay, Dr.*

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131. *Id.* at 16.

132. *Id.*

133. *Id.*

134. *Id.* (citing 8 C.F.R. § 244.2 (2004); *Farzad v. INS*, 808 F.2d 1071, 1072 (5th Cir. 1987)).

135. *Id.*

136. *Id.*

137. *Id.* (citing *Contreras-Aragon v. INS*, 852 F.2d 1088, 1093-95 (9th Cir. 1988)).

138. *Id.*

139. *Id.*

140. *Id.* Even with the passage of IIRIRA, the First Circuit's opinion in *Umanzor-Alvarado* is still good law. In *Khalil v. Ashcroft*, 370 F.3d 176 (1st Cir. 2004), the court explained that the departure period runs from the date of the court's mandate, as decided in *Umanzor-Alvarado*, and the court noted that it had not revisited that issue since it decided *Umanzor-Alvarado*. *Id.* at 180 n.5.

141. 14 F.3d 206 (4th Cir. 1994).

Graham Ramsay petitioned the Fourth Circuit for review of the decision by the BIA, which found that he was subject to deportation because he entered the United States without inspection, but which granted him the relief of voluntary departure.<sup>143</sup> In the alternative, Ramsay argued that should his petition for review be denied, the court should reinstate the voluntary departure period.<sup>144</sup> The court denied his request for review as barred by the doctrine of collateral estoppel, but held that the period of voluntary departure should be reinstated.<sup>145</sup>

Similar to the argument raised by the government in *Umanzar-Alvarado*,<sup>146</sup> the government in *Ramsay* argued that only the district director of the INS has the power to grant or extend voluntary departures.<sup>147</sup> In addition, the government argued that because the “decision to grant or extend voluntary departure requires several factual findings which a court of appeals is not suited to make,” the court should “refrain” from reinstating the voluntary departure period.<sup>148</sup>

The court agreed that the decision to grant voluntary departure involved several findings of fact that a court of appeals lacked the ability to make.<sup>149</sup> Therefore, the Fourth Circuit declined to follow the approach, which had been adopted by the Ninth Circuit, that “affirming the deportation order necessarily encompassed the reinstatement of the voluntary departure.”<sup>150</sup> Rather, the court in *Ramsay* held that the

142. *Id.* at 213. The Fourth Circuit, however, has recently applied a different standard in light of the changes brought forth by IIRIRA. *See Ngarurih v. Ashcroft*, 371 F.3d 182 (2004). In *Ngarurih*, the court held that a court of appeals lacks the jurisdiction to entertain requests to reinstate voluntary departure. *Id.* at 193. However, the court noted in *Ngarurih*, that “*Ramsay* remains applicable to cases not governed by IIRIRA’s permanent rules, *i.e.*, cases in which removal proceedings were commenced before April 1, 1997.” *Id.* at n.10; *see also infra* Part II.B.1.

143. *Ramsay*, 14 F.3d at 208.

144. *Id.*

145. *Id.* at 211, 214.

146. *See supra* note 134 and accompanying text.

147. *Ramsay*, 14 F.3d at 211.

148. *Id.*

149. *See id.* at 212.

150. *Id.* The Ninth Circuit, in *Contreras-Aragon v. INS*, reasoned that [t]he result of the deportation hearing, including the discretionary determinations, is one final order of deportation reviewable by the courts of appeals. . . . It is clear that a determination concerning voluntary departure is one of those determinations made during the deportation hearing that form a part of the final order of deportation.

*Contreras-Aragon v. INS*, 852 F.2d 1088, 1092 (9th Cir. 1988) (emphasis added) (citation omitted). However, the Ninth Circuit has since held that *Contreras-Aragon* has been superceded by IIRIRA and is thus no longer controlling. *See, e.g.*, *Desta v. Ashcroft*, 365 F.3d 741, 746 (9th Cir. 2004); *Ordonez v. INS*, 345 F.3d 777, 784 n.3 (9th Cir. 2003); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1171 (9th Cir. 2003); *see also infra* Part II.A.2.b.i.

court of appeals should reinstate a voluntary departure granted by the BIA only when: (1) the INS is wielding its discretion to withhold voluntary departure to deter applicants from seeking judicial review of BIA decisions, *or* (2) the [INS] does *not* suggest it will present the district director with any other reason for refusing the reinstatement.<sup>151</sup>

The court held that it would reinstate Ramsay's period of voluntary departure because there was no evidence that the conditions which allowed Ramsay to receive the order of voluntary departure had changed, and the INS had not presented any other basis for refusing the reinstatement.<sup>152</sup> Therefore, the court reasoned that the district director "could not lawfully refuse [Ramsay's] reinstatement."<sup>153</sup>

## 2. Federal Courts Holding that They Lack the Authority to Reinstate Departure Periods

The majority of the circuits, however, have held that courts lack the authority to reinstate departure periods after judicial review.

### a. *Decisions Pre-IIRIRA*

Prior to the passage of IIRIRA, in contrast to the position adopted by the First and Fourth Circuits,<sup>154</sup> the Seventh,<sup>155</sup> Tenth,<sup>156</sup> and Eleventh<sup>157</sup> Circuits held that courts lacked the authority to reinstate departure periods.

#### i. Tenth Circuit

In *Castaneda v. INS*,<sup>158</sup> the Tenth Circuit held that it lacked the authority to review a request for reinstatement of a voluntary departure order, stating that "none of the pertinent statutes . . . provide any basis whatsoever for this court to assume authority for affording the discretionary, administrative relief sought by petitioner."<sup>159</sup> The court explained as follows:

[F]ederal courts are tribunals of limited jurisdiction with only those powers conferred by Congress. Thus, while the heart of judicial authority is article III of the Constitution, the lifeblood of the [federal] court[s] is the contents of the Judicial Code. If an act can be performed by a [federal] court, it is because it was permitted and

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151. *Ramsay*, 14 F.3d at 213 (internal quotations and citations omitted).

152. *Id.*

153. *Id.* (quotation omitted).

154. *See supra* Part II.A.1.

155. *See Kaczmarczyk v. INS*, 933 F.2d 588 (7th Cir. 1991).

156. *See Castaneda v. INS*, 23 F.3d 1576 (10th Cir. 1994).

157. *See Nkacoang v. INS*, 83 F.3d 353 (11th Cir. 1996).

158. 23 F.3d at 1576.

159. *Id.* at 1580.

not because it was not prohibited by Congress. Federal courts operate only in the presence rather than the absence of statutory authority.<sup>160</sup>

Thus, in contrast to the First and Fourth Circuits, which find “*nothing* in the law . . . that *deprives* [courts] of the legal power to order the legally appropriate remedy [of voluntary departure],”<sup>161</sup> the Tenth Circuit explained that this “negative observation” does not mean that the courts are “*affirmatively empowered* to act.”<sup>162</sup> Rather, the court argued that Congress must take some sort of “positive step” in order to grant the courts “jurisdictional authority.”<sup>163</sup>

In addition, the court addressed the concern that the usual thirty-day departure period runs out well before the court has the opportunity to decide the petition for review, thereby making voluntary departure “conditioned on a waiver of judicial review with respect to the underlying deportation order.”<sup>164</sup> Therefore, an alien may choose to voluntarily depart, and give up any opportunity to overturn the deportation order, or dispute the order and lose benefits of voluntary departure.<sup>165</sup>

The court, however, explained that the alien does not “lose” anything when given the ability to depart voluntarily.<sup>166</sup> The court stated that the alien still maintains a right to judicial review but that “his alternative to continued litigation has been made more attractive.”<sup>167</sup> The court compared this to “enticements offered to criminal defendants” in plea bargains.<sup>168</sup> In addition, the court noted that “nothing prevents an alien who pursues judicial review from subsequently seeking an additional voluntary departure period from the district director,” whose decision is subject to the review of the district court.<sup>169</sup>

Furthermore, the court explained that “[s]everal important considerations undermine the facial appeal of [the] practical approach”<sup>170</sup> offered by the First and Fourth Circuits. The court noted that the solution offered by the Fourth Circuit reflected a “misplacement of the burden of persuasion.”<sup>171</sup> The court explained

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160. *Id.* (alterations in original) (quoting *Wyeth Lab. v. United States Dist. Court*, 851 F.2d 321, 324 (10th Cir. 1988) (citations omitted)).

161. *Id.* at 1583 (second alteration in original) (quoting *Ramsay v. INS*, 14 F.3d 206, 212 (4th Cir. 1994)).

162. *Id.*

163. *Id.*

164. *Id.* at 1581.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1582.

170. *Id.*

171. *Id.*

that an alien has the burden of proving that he is both eligible for the relief and that the relief is warranted.<sup>172</sup> However, the approach adopted by the Fourth Circuit forces the INS to disprove the suitability of voluntary departure.<sup>173</sup>

In addition, the Tenth Circuit noted that the approach also “reflects a fundamental misapprehension of the nature of discretionary authority . . . [in] conclud[ing] that because the Board once granted voluntary departure, the district director could not lawfully refuse the reinstatement [thereof].”<sup>174</sup> The court explained that “[t]he very concept of discretion presupposes a zone of choice within which the [decision maker] may go either way.”<sup>175</sup> Therefore, the court declared that the Fourth Circuit incorrectly assumed that the BIA and district director would necessarily have to reach the same conclusion in exercising their respective discretionary powers.<sup>176</sup> On the contrary, the Tenth Circuit explained that “in many cases” the BIA and the district director “could reach different conclusions regarding the exercise of their respective discretionary authority without any indication of impropriety.”<sup>177</sup>

## ii. Seventh Circuit

*Kaczmarczyk v. INS*,<sup>178</sup> involved another example of an appeal of a BIA asylum determination. The petitioners in the case were Polish citizens whose asylum applications alleged that they were part of an organization opposed to the communist government then ruling Poland.<sup>179</sup> All of the petitioners testified that they had been either imprisoned or arrested by the government while in Poland, and that the government still sought information about their location.<sup>180</sup> The BIA affirmed the IJ’s denial of the asylum applications and granted them voluntary departure.<sup>181</sup>

The petitioners argued that the circuit court’s review of BIA asylum decisions “necessarily include[d] the power to extend a grant of voluntary departure so that the period begins on the date when this court’s decision becomes effective.”<sup>182</sup> In addition, the petitioners “contend[ed] that the refusal to suspend the running of the period of voluntary departure pending judicial review of Board decisions will

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172. *Id.*

173. *See id.*

174. *Id.* (fourth alteration in original) (internal quotations omitted).

175. *Id.* (second alteration in original) (quoting *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 971 (8th Cir. 1984)).

176. *Id.* at 1583.

177. *See id.*

178. 933 F.2d 588 (7th Cir. 1991).

179. *Id.* at 591.

180. *Id.*

181. *Id.* at 591-92.

182. *Id.* at 597.

deter asylum applicants from pursuing their statutory right to appellate review of BIA asylum determinations.”<sup>183</sup> The court disagreed, however, and noted that “8 C.F.R. § 244.2 . . . vests the district director with ‘sole jurisdiction’ to reinstate or extend a grant of voluntary departure.”<sup>184</sup>

However, the court explained that it was “nevertheless concerned that the INS might use its power to grant or withhold voluntary departure to insulate the BIA’s asylum decisions from judicial review.”<sup>185</sup> The court further explained that “[d]eportable aliens should not be faced with the choice between enjoying the voluntary departure privilege and securing judicial review of Board determinations.”<sup>186</sup> In addition, the court noted that if it came to its “attention that the INS is wielding its discretion to withhold voluntary departure to deter applicants from seeking judicial review of BIA decisions, [its] scrutiny of that discretionary exercise might expand.”<sup>187</sup>

### iii. Eleventh Circuit

The Eleventh Circuit, in *Nkacoang v. INS*,<sup>188</sup> similarly found that Congress has not empowered the courts of appeals to reinstate voluntary departure orders that have expired.<sup>189</sup> Adopting the reasoning of the Tenth Circuit in *Castaneda*, the court held that absent explicit congressional empowerment, an appellate court lacks the jurisdictional authority to extend or reinstate voluntary departure.<sup>190</sup>

### b. Decisions Post-IIRIRA

Upon the ratification of IIRIRA in 1996, the approach of the circuit courts in reinstatement cases dramatically changed. The Third,<sup>191</sup> Sixth,<sup>192</sup> and Ninth<sup>193</sup> Circuits have held that Congress has not provided statutory authority for appellate courts to reinstate the voluntary departure period prescribed by an IJ or the BIA, and therefore these courts lack jurisdiction to reinstate an alien’s voluntary departure period. These circuit courts grounded their decisions in the language of the INA as amended by IIRIRA.<sup>194</sup>

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183. *Id.*

184. *Id.* at 598.

185. *Id.*

186. *Id.*

187. *Id.*

188. 83 F.3d 353 (11th Cir. 1996).

189. *Id.* at 357.

190. *Id.*

191. See *Reynoso-Lopez v. Ashcroft*, 369 F.3d 275 (3d Cir. 2004).

192. See *Mullai v. Ashcroft*, 385 F.3d 635 (6th Cir. 2004).

193. See *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166 (9th Cir. 2003).

194. See, e.g., *Reynoso-Lopez*, 369 F.3d at 280-81.

## i. Ninth Circuit

For example, before Congress enacted IIRIRA, the Ninth Circuit, in *Contreras-Aragon v. INS*,<sup>195</sup> held that once voluntary departure is granted by the BIA that privilege automatically “remains in effect throughout the period of our review and for whatever additional period the BIA afforded the alien in the order under review.”<sup>196</sup> Under *Contreras-Aragon*, as long as the Board’s decision was affirmed without qualification, the voluntary departure period ran from the date the court issued its determination.<sup>197</sup>

However, in *Zazueta-Carrillo v. Ashcroft*<sup>198</sup>, the Ninth Circuit noted that IIRIRA undermined the court’s decision in *Contreras-Aragon*. In re-examining the question, the court held that due to the statutory changes, the voluntary departure period begins when BIA enters its order granting the voluntary departure, and the court lacks the power to reinstate the departure period upon the conclusion of its review.<sup>199</sup>

## ii. Third Circuit

The court in *Reynoso-Lopez v. Ashcroft* explained that under the plain language of IIRIRA, “the authority to reinstate or extend voluntary departure falls solely within the discretion of the Attorney General and his delegates at the INS.”<sup>200</sup>

The court then quoted the statute:

Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntary departure if reopening was granted prior to the expiration of the original period of voluntary departure.<sup>201</sup>

Therefore, the court in *Reynoso-Lopez* explained, “the executive branch, not the judiciary, is given the sole authority to determine when an alien must depart.”<sup>202</sup> The court also noted that “in granting

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195. 852 F.2d 1088 (9th Cir. 1988).

196. *Id.* at 1092.

197. *Id.* at 1092-93.

198. 322 F.3d at 1170.

199. *Id.* at 1172-73.

200. *Reynoso-Lopez v. Ashcroft*, 369 F.3d 275, 280 (3rd Cir. 2004).

201. *Id.* (emphasis omitted) (quoting 8 C.F.R. § 1240.26(f) (2004)).

202. *Id.*

the authority to set voluntary departure dates to the executive branch, it is fair to say that Congress intended the authority to be exclusive.”<sup>203</sup>

In addition, the court argued that “IIRIRA specifically limits the role of the courts as to when an alien, under an order of voluntary departure, must leave the country.”<sup>204</sup> The statute provides that “no court shall have jurisdiction to review . . . any judgment regarding the granting of relief’ under section 1229c.”<sup>205</sup> The court reasoned that, although this provision does not deny the court jurisdiction in the present case, since Reynoso is not appealing a denial of a request for voluntary departure, the provisions indicate Congress’s intent to “vest the right to set deadlines for an alien’s voluntary departure solely within the executive branch.”<sup>206</sup> The other circuits that have addressed this issue have used the same analysis.<sup>207</sup>

Furthermore, the court in *Reynoso-Lopez* argued that the court’s lack of ability to grant the reinstatement “does not leave [the alien] without remedy.”<sup>208</sup> The *Reynoso-Lopez* court reasoned that under IIRIRA, the alien “may apply for a reinstatement or extension of voluntary departure directly to the district director.”<sup>209</sup> In addition, the court explained that a statement by the BIA informing Reynoso that any extension of the voluntary departure time period may be granted by the district director indicates that the “BIA has interpreted the INA as giving the district director the sole authority to set and

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203. *Id.* at 281.

204. *Id.*

205. *Id.* (omission in original) (quoting 8 U.S.C. § 1252(a)(2)(B)(i) (2000)).

206. *Id.*

207. *See, e.g.,* *Mullai v. Ashcroft*, 385 F.3d 635, 640 (6th Cir. 2004). The Sixth Circuit used the language of IIRIRA to explain its refusal to reinstate departure periods and noted that its decision is consistent with the approach of the majority of the courts following the enactment of IIRIRA. *Id.* The court explained that “[a]ny judicial order to ‘reinstate’ the departure period ‘would necessarily authorize a new opportunity to voluntarily depart.’” *Id.* Therefore, the court reasoned that, since it offered a new opportunity for voluntary departure, the Attorney General’s office had the sole authority to make this determination under the Act. *Id.*; see 8 U.S.C. § 1229c. In addition, the court noted that this function is explicitly denied to the courts by 8 U.S.C. § 1229c(f) and § 1252(a)(2)(B)(i), which preclude judicial review of any judgment regarding voluntary departure. *Mullai*, 383 F.3d at 640. Under 8 U.S.C. § 1229c(f), “[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b) of this section, nor shall any court order a stay of an alien’s removal pending consideration of any claim with respect to voluntary departure.” 8 U.S.C. § 1229c(f). Additionally, 8 U.S.C. § 1252(a)(2)(B) provides that “no court shall have jurisdiction to review . . . (i) any judgment regarding the granting of relief under . . . [8 U.S.C.] section 1229c [voluntary departure].” *Id.* § 1252(a)(2)(B).

208. *Reynoso-Lopez*, 369 F.3d at 281; see also 8 C.F.R. § 1244.2(f)(2) (2004) (allowing an alien to be granted Temporary Protected Status in certain circumstances); *Castaneda v. INS*, 23 F.3d 1576, 1582 (10th Cir. 1994). The court in *Reynoso-Lopez* explained that “[s]eeking relief from the district director is . . . the procedure that Congress intended for a petitioner . . . to follow.” *Reynoso-Lopez*, 369 F.3d at 281.

209. *Reynoso-Lopez*, 369 F.3d at 283; see also 8 C.F.R. § 1244.2(f)(2).

extend the departure periods.”<sup>210</sup> Therefore, the court reasoned that even if the statutory language is unclear, the court would still be required to “give deference to the BIA’s interpretation of IIRIRA.”<sup>211</sup>

In addition, the court explained that “under IIRIRA, the appellate courts retain jurisdiction to review an alien’s appeal after he voluntarily departs.”<sup>212</sup> This remedy did not exist prior to the passage of IIRIRA because “under the former INA, an appellate court lost jurisdiction once a petitioner left the country.”<sup>213</sup> Thus, the court argued that IIRIRA eliminates the problem of forcing an alien to choose between seeking judicial review and “taking advantage of voluntary departure.”<sup>214</sup>

The court further examined the policy considerations that support the “conclusion that Congress did not intend for appellate courts to have authority to extend voluntary departure orders.”<sup>215</sup> The court noted that the purpose of granting voluntary departure in place of deportation is to encourage the alien’s punctual departure from the country “without further trouble” to the government.<sup>216</sup> Therefore, if extensions are granted by the appellate courts, it does not encourage prompt departure, and in fact may “even encourage frivolous appeals in an attempt to continue extending an alien’s departure date.”<sup>217</sup>

### 3. Analysis of the Circuit Split that Has Emerged Concerning the Courts’ Authority to Reinstate Departure Periods

Due to the varying interpretations of the right of an alien to judicial review and voluntary departure, and the meaning of the statutory provisions governing voluntary departure as amended by IIRIRA, the circuits are divided on the issue of whether they have the power to reinstate departure periods following judicial review.

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210. *Reynoso-Lopez*, 369 F.3d at 283.

211. *Id.* at 281. The Court, in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, held that:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); see also *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1173 (9th Cir. 2003) (explaining that the INA either confirms the BIA’s position that an executive officer must set the departure period, or is unclear and that, “if the statute is unclear, then the BIA’s position is entitled to *Chevron* deference,” as a basic principle of administrative law).

212. *Reynoso-Lopez*, 369 F.3d at 281; see also 8 U.S.C. § 1252(b)(3)(B).

213. See 8 U.S.C. § 1105a(c) (1994) (repealed 1996).

214. *Reynoso-Lopez*, 369 F.3d at 281; see also *Zazueta-Carrillo*, 322 F.3d at 1171.

215. *Reynoso-Lopez*, 369 F.3d at 283.

216. *Id.*; see also *Zazueta-Carrillo*, 322 F.3d at 1173.

217. *Reynoso-Lopez*, 369 F.3d at 284.

a. *Choice Between Voluntary Departure and Judicial Review*

Both the First and the Fourth Circuits expressed concern that an alien would be forced to choose between exercising his right to appeal and taking advantage of voluntary departure.<sup>218</sup> The Third Circuit in *Reynoso-Lopez* explained, however, that the “Fourth Circuit’s concern that the INS may use its discretion over voluntary departure in order to deter judicial review of BIA decisions was eliminated by IIRIRA’s provision that appellate courts retain jurisdiction over an alien’s appeal after he has departed the country.”<sup>219</sup> In this way, the Third Circuit argued that the alien is no longer faced with the choice of departing voluntarily or pursuing judicial review because the alien is able to depart and then continue his appeal in the circuit court from abroad.<sup>220</sup>

However, various courts have responded to this assertion by explaining that “[w]hile aliens in these situations may formally retain their right to appeal under the post-IIRIRA statute after leaving this country, their purpose in seeking an appeal is arguably thwarted.”<sup>221</sup> The courts that have expressed this viewpoint assert the concern that aliens, especially in asylum cases, who voluntarily depart may be “returning to home countries where they are unsafe or, even if safe, will not be allowed to return to the United States should they be successful on judicial review.”<sup>222</sup>

b. *Statutory Provisions*

In addition, the First and Fourth Circuits have argued that there is no reason for an appellate court not to reinstate the initial departure period granted by the IJ or the BIA where the INS had offered no evidence to suggest that the alien had become ineligible for voluntary departure during the course of the appeal.<sup>223</sup> The Third Circuit argued, however, that this approach “conflicts with the specific procedures provided for in the statute.”<sup>224</sup> The Third Circuit explained that the INA is clear that a reinstatement or extension of the voluntary departure period may only be sought from the district director.<sup>225</sup> The court relied on 8 U.S.C. § 1229c(f), which provides

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218. See *supra* Part II.A.1.

219. *Reynoso-Lopez*, 369 F.3d at 283.

220. See *id.*

221. *Khalil v. Ashcroft*, 370 F.3d 176, 181 (1st Cir. 2004); see also *Zazueta-Carrillo*, 322 F.3d at 1177 (Berzon, J., concurring) (noting that “[a]n alien’s departure in these circumstances could in effect void the asylum appeal”).

222. *Khalil*, 370 F.3d at 181; see also *Nwakanma v. Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003); *Zazueta-Carrillo*, 322 F.3d at 1177.

223. See *Ramsay v. INS*, 14 F.3d 206, 212 (4th Cir. 1994); *Umanzor-Alvarado v. INS*, 896 F.2d 14, 16 (1st Cir. 1990).

224. *Reynoso-Lopez*, 369 F.3d at 283.

225. See *supra* Part II.A.2.b.ii.

that “[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection [b],”<sup>226</sup> and 8 C.F.R. § 1240.26(f), which states that “[a]uthority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director.”<sup>227</sup> Alternatively, the First Circuit has argued that the statute and regulation describe the authority of the Attorney General, and not that of the courts.<sup>228</sup>

In addition to the concern of conflicting with the statute, the Third Circuit has mirrored the reasoning adopted by the Tenth Circuit before the enactment of IIRIRA and explained that the approach adopted by the First and Fourth Circuits “misplaces the burden of persuasion in a petition for extension of voluntary departure, as the INS does not bear the burden of showing an alien to be ineligible for voluntary departure.”<sup>229</sup> Instead, the court argued that “it is the alien who bears the burden of proving statutory eligibility for this form of relief and demonstrating that it is warranted.”<sup>230</sup>

### B. *Stays of Departure Periods*

A circuit split has also emerged concerning whether a circuit court may stay the period of voluntary departure pending the completion of the judicial review of the appeal. Unlike a complete reinstatement of the departure period, a stay allows the circuit court to stay the tolling of the time for departure until the completion of judicial review. After the stay expires, “the clock begins ticking again and the alien has the balance of the days left in which to leave the country.”<sup>231</sup> Therefore, when an alien seeks to stay a voluntary departure period, he “seeks to ensure that if the voluntary departure period expires before the court reaches a decision on the petition for review (which

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226. 8 U.S.C. § 1229c(f) (2000).

227. 8 C.F.R. § 1240.26(f) (2004).

228. *Id.* § 1240.26 (labeling the regulation as “Voluntary departure—authority of the Executive Office for Immigration Review”); *Khalil v. Ashcroft*, 370 F.3d 176, 181 (1st Cir. 2004) (citing 8 U.S.C. § 1229c(b)) (stating that the statutes “describe the authority of the *Attorney General*, not that of the courts”). In addition, the *Khalil* court argued that “[t]he provisions that describe the authority of the *courts* provide instead that “[j]udicial review of a final order of removal . . . is governed only by chapter 158 of Title 28.” *Khalil*, 370 F.3d at 181 (quoting 8 U.S.C. § 1252(a)(1)). In addition, the court explained that:

[C]hapter 158 of Title 28 provides that “[t]he filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition.”

*Id.* (quoting 28 U.S.C. § 2349(b) (2000)).

229. *Reynoso-Lopez*, 369 F.3d at 283.

230. *Id.* (quoting *Castaneda v. INS*, 23 F.3d 1576, 1582 (10th Cir. 1994)).

231. *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 652 (7th Cir. 2004) (citing *Desta v. Ashcroft*, 365 F.3d 741, 743-44 (9th Cir. 2004)).

almost always occurs), [h]e still will be able to depart voluntarily if the petition for review is denied.”<sup>232</sup>

Unlike the split that has emerged over the reinstatement of the departure period, the analysis of the courts has not been significantly effected by the passage of IIRIRA. The First Circuit, following the reasoning established in *Umanzor-Alvarado*, has concluded that it has the plenary authority to reinstate an expired departure period,<sup>233</sup> and thus aliens appearing before the First Circuit are able to request a reinstatement of the departure period rather than simply a stay pending judicial review. Alternatively, the Sixth,<sup>234</sup> Eighth,<sup>235</sup> Ninth,<sup>236</sup> and most recently the Seventh Circuit,<sup>237</sup> have held that federal judges have the authority to pause the voluntary departure period until the appeal is complete. In contrast, the Fourth Circuit is the only circuit to hold that federal judges have no authority over voluntary departure deadlines.<sup>238</sup>

### 1. The Fourth Circuit’s Argument Against Circuit Courts’ Power to Stay Departure Period Pending Judicial Review

Similar to the Third Circuit’s decision in *Reynoso-Lopez*,<sup>239</sup> the Fourth Circuit’s opinion in *Ngarurih v. Ashcroft*<sup>240</sup> focused on the changes to the law made by IIRIRA and concluded that the circuit court lacks the power to stay or reinstate the departure period.<sup>241</sup>

First, the court noted that the Act is “well known for restricting judicial review of discretionary decisions in immigration matters.”<sup>242</sup>

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232. *Id.* (citation omitted).

233. *See supra* Part II.A.1.a.; *see also* *Khalil*, 370 F.3d at 56; *Velasquez v. Ashcroft*, 342 F.3d 55, 59 (1st Cir. 2003); *Umanzor-Alvarado v. INS*, 896 F.2d 14, 16 (1st Cir. 1990).

234. *Nwakanma v. Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003).

235. *Rife v. Ashcroft*, 374 F.3d 606, 616 (8th Cir. 2004).

236. *Desta*, 365 F.3d at 748.

237. *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004).

238. *Ngarurih v. Ashcroft*, 371 F.3d 182 (4th Cir. 2004). The Third Circuit, however, has shown similar leanings in dicta. In *Begum v. Ashcroft*, the Third Circuit explained in a footnote that because of its decision in *Reynoso-Lopez*, the petitioner’s request for a stay of the voluntary departure period must be denied. *See Begum v. Ashcroft*, 104 Fed. Appx. 805, 806 n.2 (3d Cir. 2004). The court did not distinguish between a stay and a reinstatement of the voluntary departure period, but the language appears to cover both. *See id.* The court in *Reynoso-Lopez* did not, however, “expressly address the case of a person who filed a timely motion for a stay, in conjunction with a properly filed petition for judicial review, before the time to depart had expired.” *Lopez-Chavez*, 383 F.3d at 653-54.

239. *See supra* Part II.A.2.b.ii.

240. *Ngarurih*, 371 F.3d at 182.

241. *Id.* at 194.

242. *Id.* at 191; *see also* *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (observing that “many provisions of IIRIRA are aimed at protecting the Executive’s discretion from the courts—indeed, that can fairly be said to be the theme of the legislation”).

In addition, the court explained that prior to IIRIRA, it was “unsettled” whether the circuit courts had the power to reinstate or stay voluntary departure; however, with the enactment of IIRIRA the justifications for granting the circuit courts the authority to make these decisions have been “undercut.”<sup>243</sup>

In addition, the court argued that the Act eliminated an important rationale for judicial intervention in the voluntary departure process.<sup>244</sup> As emphasized by the Third Circuit in *Reynoso-Lopez*, before IIRIRA, aliens who departed from the country voluntarily could not, as a matter of law, continue their appeals of agency decisions.<sup>245</sup> Therefore, the federal courts often issued stays of voluntary departure lest asylum and other decisions of the INS escape review entirely.<sup>246</sup> However, IIRIRA replaced the provision which had limited judicial review after an alien left the country<sup>247</sup> with a “new judicial review provision that does not purport to cut off appellate jurisdiction once an alien leaves the country.”<sup>248</sup> This change allows an alien to continue his appeal from outside the country, and “there is no longer any prospect that the government could manipulate voluntary departure orders to deprive an alien of judicial review.”<sup>249</sup>

In addition, the court explained that after the passage of IIRIRA “it is no longer true that nothing in the law . . . deprives [the court of appeals] of the legal power to reinstate voluntary departure.”<sup>250</sup> The court argued, like the court in *Reynoso-Lopez*, that § 1229c(f), which precludes review of a denial of a request for voluntary departure, and § 1252(a)(2)(B), which deprived courts of the ability to review “any judgment regarding the granting of relief under section . . . 1229c . . . of this title,” combined to deny the circuit courts the power to review any aspect of the voluntary departure determination.<sup>251</sup> The court argued that this conclusion is “consistent with Congress’ expressed

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243. *Ngarurih*, 371 F.3d at 192.

244. *See id.* at 193.

245. *Id.*; *see supra* notes 220-21 and accompanying text.

246. *See Umanzor-Alvarado v. INS*, 896 F.2d 14, 16 (1st Cir. 1990); *accord Kaczmarczyk v. INS*, 933 F.2d 588, 598 (7th Cir. 1991).

247. *See* 8 U.S.C. § 1105a(c) (1994) (repealed 1996).

248. *Ngarurih*, 371 F.3d at 192; *see also* 8 U.S.C. § 1252 (2000); *Moore v. Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001) (noting that “[n]oticeably absent from the permanent rules is any similar language removing federal review jurisdiction in the event an alien departs or is removed”).

249. *Ngarurih*, 371 F.3d at 192; *see also Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1171 (9th Cir. 2003) (explaining that “Congress’s desire to expedite removal by voluntary assent now does not conflict with the alien’s ability to pursue a petition for review”); *Tapia Garcia v. INS*, 237 F.3d 1216, 1217 (10th Cir. 2001) (stating that “deportation no longer forecloses judicial review”).

250. *Ngarurih*, 371 F.3d at 193 (quoting *Umanzor-Alvarado*, 896 F.2d at 16).

251. *Id.* (quoting 8 U.S.C. § 1252(a)(2)(B)).

intention to preserve the exercise of executive discretion in granting voluntary departures.”<sup>252</sup>

Mirroring the reasoning of the Ninth Circuit in *Zazueta-Carrillo v. INS*,<sup>253</sup> the court explained that under IIRIRA, the decision of whether to grant an alien permission to depart voluntarily is “committed entirely to the discretion of the Attorney General.”<sup>254</sup> In addition, the “Attorney General has permitted the INS district director . . . to extend the period initially prescribed for voluntary departure.”<sup>255</sup> Therefore, the court argued, “‘it is the executive rather than judicial officers who decide when an alien must depart,’ and ‘[n]either the statute nor the regulations give courts any designated role in this process of setting the deadline for departure.’”<sup>256</sup> Thus, the court concluded that it could not stay, or reinstate, voluntary departure orders because it lacked the jurisdictional authority to do so.<sup>257</sup>

In addition, the court argued that the “statutory scheme reveal[ed] Congress’ intention to offer an alien a specific benefit—exemption from the ordinary bars on subsequent relief—in return for a quick departure at no cost to the government.”<sup>258</sup> Therefore, “an alien considering voluntary departure must decide whether an exemption from the ordinary bars on subsequent relief is worth the cost of returning to the home country within the period specified.”<sup>259</sup>

## 2. The Majority View: A Circuit Court’s Power to Stay Voluntary Departure

The majority of courts that have addressed this issue, including courts that have held that they lack the power to reinstate departure periods, have held that they have the power to stay the departure period while the case is under judicial review. The Sixth, Seventh, Eighth, and Ninth Circuits have held that courts have the authority to stay voluntary departure orders stemming from their equitable powers, when the stay is issued in order to maintain meaningful judicial review, a power not affected by the provisions of IIRIRA.<sup>260</sup>

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252. *Id.*

253. 322 F.3d at 1166.

254. *Ngarurih*, 371 F.3d at 193; see 8 U.S.C. § 1229c(b)(1).

255. *Id.*; see 8 C.F.R. § 240.26 (20004)

256. *Ngarurih*, 371 F.3d at 193 (quoting *Zazueta-Carrillo*, 322 F.3d at 1172).

257. *Id.* at 195.

258. *Id.* at 194.

259. *Id.*

260. See *Lopez-Chavez v. Ashcroft*, 383 F.3d 650 (7th Cir. 2004); *Rife v. Ashcroft*, 374 F.3d 606 (8th Cir. 2004); *Desta v. Ashcroft*, 365 F.3d 741 (9th Cir. 2004); *Nwakanma v. Ashcroft*, 352 F.3d 325 (6th Cir. 2003).

a. *Ninth Circuit*

The Ninth Circuit, in *Desta v. Ashcroft*, explained that “IIRIRA does not specify the circumstances in which we may issue a stay of voluntary departure, and therefore does not act as a bar to the use of our equitable powers.”<sup>261</sup> Although the court acknowledged that IIRIRA deprives courts of jurisdiction to review the decision by the BIA to grant or deny a request for voluntary departure, the court stated that whether a court has the power to grant a stay of the departure period while reviewing an alien’s claim presents a different issue.<sup>262</sup> The court explained that in these cases “we are being asked to stop the voluntary departure clock from running while we consider [the petitioner’s] petition for review, and to allow it to resume after we decide the merits of that petition.”<sup>263</sup>

In addition, the court explained that in a determination of the extent of the court’s authority to grant stays under IIRIRA, it must be guided by two principles.<sup>264</sup> First, the court stated that the sections of IIRIRA which limit judicial review and the exercise of the courts’ traditional equitable powers should be narrowly construed.<sup>265</sup> Furthermore, the court observed that, in interpreting IIRIRA, courts should seek to avoid an interpretation that would lead to an “absurd result, such as the expenditure of unnecessary judicial resources or overly severe consequences toward aliens.”<sup>266</sup>

The court then addressed the severe consequences that may face an alien who is forced to depart from the United States before being given the opportunity for judicial review.<sup>267</sup> As explained by Judge Marsha Berzon in his concurrence in *Zazueta-Carrillo v. Ashcroft*,<sup>268</sup> and later adopted by the Ninth Circuit in *Desta*, aliens who are forced to depart before their appeal is heard may not be able to return to the

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261. *Desta*, 365 F.3d at 747.

262. *Id.*

263. *Id.*

264. *Id.* at 746.

265. *Id.*; see also *Miller v. French*, 530 U.S. 327, 340-41 (2000) (admonishing that “we should not construe a statute to displace courts’ traditional equitable authority absent the ‘clearest command,’ or an ‘inescapable inference’ to the contrary” (citations omitted)); *Andreu v. Ashcroft*, 253 F.3d 477, 481 (9th Cir. 2001) (en banc) (discussing the court’s ability to stay removals notwithstanding IIRIRA’s prohibition on federal courts granting class-wide injunctive relief and citing *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481-82 (1999)).

266. *Desta*, 365 F.3d at 746.

267. See *id.* Each court that has determined that the “courts retain their equitable power to stay voluntary departure” periods while pending judicial review has examined the consequences that may face an alien who departs while his appeal is pending. See, e.g., *Lopez-Chavez v. Ashcroft*, 383 F.3d 350, 653 (7th Cir. 2004); *Rife v. Ashcroft*, 374 F.3d 606, 615 (8th Cir. 2004); *Nwakanma v. Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003).

268. 322 F.3d 1166, 1173 (9th Cir. 2003).

United States, thereby rendering their appeal worthless.<sup>269</sup> Judge Berzon explained that without the courts' "equitable authority to stay the availability of voluntary departure periods, at the time an alien is granted voluntary departure he or she would be faced with having to leave forthwith to preserve the benefits of voluntary departure, risking nonreturn in spite of a potentially meritorious case."<sup>270</sup> This choice may be particularly difficult for an alien seeking asylum who "would have to weigh the dangers of abuse in and/or confinement to the country in which the alien was allegedly persecuted against the penalties attached to forfeiting a grant of voluntary departure."<sup>271</sup> Therefore, if an alien does depart in the prescribed period, and chooses to exercise his right to appeal from abroad, he might not be able to return to the United States if the petition for relief is successful, thereby effectively voiding the asylum appeal.<sup>272</sup>

The Ninth Circuit also noted that courts need not extend the period for voluntary departure in contravention of INS regulations.<sup>273</sup> Rather, the court noted that, unlike a reinstatement, "if a stay is granted, the total time period for voluntary departure remains the same as that granted by the BIA."<sup>274</sup> Therefore, although the court is "stopping the clock from running," it is not "adding more time to that

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269. See *Desta*, 365 F.3d at 746; *Zazueta-Carrillo*, 322 F.3d at 1173.

270. See *Zazueta-Carrillo*, 322 F.3d at 1177 (Berzon, J., concurring).

271. *Id.*

272. *Id.*; see also *Lopez-Chavez*, 383 F.3d at 651. The *Lopez-Chavez* court noted that

aliens who are granted voluntary departure face a difficult choice: either follow the rules, depart voluntarily, and obtain a few benefits, at the price of serious or fatal difficulty in pursuing relief and exposure to intolerable conditions in the country of destination; or break the rules by failing to leave, accept the penalties associated with that failure, and continue to press any appeals.

*Id.*; see also *Rife*, 374 F.3d at 615 (explaining that an alien who has brought an asylum claim, and is forced to depart before the appeal has been heard may "suffer the very persecution [that is] being litigated"); *Ngaruruih v. Ashcroft*, 371 F.3d 182, 196 (4th Cir. 2004) (Gregory, J., concurring in part and dissenting in part) (explaining that if the alien suffers the harm of "death, imprisonment, or inability to depart their native country" after voluntarily departing the United States, a subsequent opinion by the circuit court granting him asylum would be rendered meaningless because the alien would be unable to return to the U.S. to give effect to the court's decision). In *Nwakanma* the court stated as follows:

Asylum applicants with potentially meritorious cases establishing their genuine fear of persecution in their home countries will face either returning to those countries and possibly life-threatening persecution or staying in the United States, letting the clock run out on their voluntary departure periods, and suffering the penalties that attach

*Nwakanma*, 352 F.3d at 327.

273. *Desta*, 365 F.3d at 746; see also 8 C.F.R. § 1240.26(f) (2004) (stating that the "[a]uthority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction" of listed officials within U.S. Immigration and Customs enforcement, or the former INS).

274. *Desta*, 365 F.3d at 747.

clock.”<sup>275</sup> Thus, the court reasoned that there is no statutory bar on the court’s using its equitable powers to stay the departure period.<sup>276</sup>

b. *Seventh Circuit*

Similarly, the Seventh Circuit, in *Lopez-Chavez v. Ashcroft*,<sup>277</sup> rejected the arguments raised by the Fourth Circuit in *Ngarurih*,<sup>278</sup> and held, in agreement with the majority of the courts that have addressed the issue, that federal courts “retain the equitable power to stay voluntary departure orders, notwithstanding the restrictions that exist under IIRIRA, when such an action is taken to preserve meaningful judicial review.”<sup>279</sup>

The court in *Lopez-Chavez* noted that the cases that present issues regarding stays of voluntary departure periods differ from the aforementioned reinstatement cases.<sup>280</sup> The court explained that it had previously held that in reinstatement cases courts “lack[] ‘authority’ to reinstate . . . a voluntary departure period after a decision on a petition for review, because only the immigration service possessed that discretion.”<sup>281</sup> The court further noted that “[f]ull reinstatement . . . is very close in practical effect to an initial grant of the privilege of voluntary departure, and thus those decisions merely reflect an effort not to undermine the immigration service’s authority over initial grants.”<sup>282</sup>

Furthermore, the court in *Lopez-Chavez* explained that it is “unclear” from the reinstatement cases which had been previously heard before the Seventh Circuit whether the circuit “recogniz[ed] a jurisdictional bar or merely a discretionary rule.”<sup>283</sup> The court cautioned that it might “reconsider [its] position should it appear that the immigration service was using its discretion not to extend

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275. *Id.*; see also *El Himri v. Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003) (holding that the district director’s authority to extend voluntary departure does not limit the court’s equitable authority to grant a stay of the voluntary departure time period).

276. *Desta*, 365 F.3d at 748.

277. 383 F.3d 650 (7th Cir. 2004).

278. *Ngarurih v. Ashcroft*, 371 F.3d 182 (7th Cir. 2004); see *supra* Part II.B.1.

279. *Lopez-Chavez*, 383 F.3d at 653.

280. See *supra* Part II.A.

281. *Lopez-Chavez*, 383 F.3d at 652; see *Ademi v. INS*, 31 F.3d 517, 521 (7th Cir. 1994); *Zulbeari v. INS*, 963 F.2d 999, 1001 (7th Cir. 1992); *Kaczmarczyk v. INS*, 933 F.2d 588, 598 (7th Cir. 1991).

282. *Lopez-Chavez*, 383 F.3d at 652; see also *Ngarurih*, 371 F.3d at 197 (Gregory, J., concurring in part and dissenting in part) (concurring in the majority’s decision that IIRIRA divests the court of jurisdiction to reinstate voluntary departure periods); *Garcia v. Ashcroft*, 368 F.3d 1157, 1159 (9th Cir. 2004) (holding that the court could not grant the petitioner’s request to extend his departure period because to do so would contravene INS regulations).

283. *Lopez-Chavez*, 383 F.3d at 652.

voluntary departure periods in an effort to deter aliens from seeking judicial review of immigration decisions.”<sup>284</sup>

Thus, the court in *Lopez-Chavez* held that “in an appropriate case, one that falls under the permanent IIRIRA rules and in which the time for voluntary departure has not yet run, nothing in IIRIRA divests us of the power to grant a stay tolling the time for departure until the completion of judicial review.”<sup>285</sup> The court reasoned that aliens in “deserving cases” should be able to pursue judicial review “without flouting their voluntary departure orders.”<sup>286</sup>

### 3. Comparison of the Circuit Courts’ Approach to Stays of the Voluntary Departure Period

Similar to the split over reinstatements of the departure periods, the circuits are divided on the issue of whether courts have the authority to grant stays of the voluntary departure period pending the completion of judicial review. Due to contrasting interpretations of the provisions of IIRIRA, and differing views of the policy rationales underlying voluntary departure and judicial review of decisions by the IJ and BIA, the circuits have split on this issue.

#### a. Statutory Language

The statutory provisions of IIRIRA clearly indicate that the courts of appeals do not have jurisdiction over the immigration authorities’ initial decision to grant or deny the privilege of voluntary departure.<sup>287</sup> The Fourth Circuit interpreted these provisions of IIRIRA as

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284. *Id.*; see *Ademi*, 31 F.3d at 521 n.8 (stating that “to discourage the right to appeal is to place an unconstitutional burden on the alien’s right to due process”); *Kaczmarczyk*, 933 F.2d at 598 (emphasizing that the court may expand its review of voluntary departure denials if the BIA began to exercise its discretion so as to discourage applicants from seeking judicial review of BIA decisions). The court in *Lopez-Chavez* also explained that, although it held that IIRIRA stripped the court of jurisdiction to review the merits of the immigration service’s decision with respect to voluntary departure, this decision concerned only the possible review of a decision by an immigration official who refused to extend a voluntary departure date. *Lopez-Chavez*, 383 F.3d at 652. Thus, the court did not address the question of its power to preserve “the *status quo* pending judicial review.” *Id.*

285. *Lopez-Chavez*, 383 F.3d at 654.

286. *Id.* In order to be granted a stay of voluntary departure, an alien must satisfy the requirements for a stay of removal. *El Himri v. Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003). For both motions, the standard is the same as that employed in determining whether a litigant is entitled to injunctive relief. The petitioner must show “(1) ‘a probability of success on the merits and the possibility of irreparable injury,’ or (2) ‘that serious legal questions are raised and the balance of hardships tips sharply in the petitioner’s favor.’” *Id.* (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)); see also *Ngarurih*, 371 F.3d at 197 (Gregory, J., concurring in part and dissenting in part).

287. See 8 U.S.C. § 1229c(f) (2004) (“No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure.”).

divesting the circuit courts of the power to review any aspect of the voluntary departure order.<sup>288</sup> In contrast, the Seventh Circuit found that “the question whether the date by which voluntary departure must take place can be stayed to preserve the *status quo* pending judicial review presents a different issue.”<sup>289</sup>

The circuits holding that courts have the equitable power to grant stays of voluntary departure interpreted the language of IIRIRA narrowly. These circuit courts have declared that 8 U.S.C. § 1229c(f) should apply only to forbid courts from reviewing the merits of the underlying decisions on a request for voluntary departure.<sup>290</sup> These courts agree that the provisions restricting the jurisdiction of the federal courts are “best read to restrict judicial review of only *the initial decision* to grant or deny voluntary departure.”<sup>291</sup> Therefore, these circuits have viewed the substantive issues regarding voluntary departure as separate and distinct from the question of whether it is within the power of the circuit court to stay a voluntary departure period once the immigration authorities have chosen to grant the relief.<sup>292</sup> In addition, the courts have explained that, if a stay is granted, the total time period for voluntary departure remains the same, and therefore the courts are not extending the departure period in contravention of 8 C.F.R. § 1240.26(f).<sup>293</sup>

#### b. *Choice of Voluntary Departure or Judicial Review*

In addition to the conflict regarding the interpretation of the statute, Judge Roger Gregory explained in *Ngarurih* that

[a]s the Ninth and Sixth Circuits have noted, asylum appeals will in effect be rendered meaningless if individuals that have fled their native lands based on well-founded fears of persecution are forced to return to countries where they may be killed or imprisoned and

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288. See *supra* Part II.A.1.b.

289. *Lopez-Chavez*, 383 F.3d at 651; see *supra* Part II.B.2.

290. See, e.g., *Lopez-Chavez*, 383 F.3d at 652; *Desta v. Ashcroft*, 365 F.3d 741, 747 (9th Cir. 2004) (explaining that IIRIRA deprives a circuit court of the power to review the decision by the BIA to grant or deny a request for voluntary departure under 8 U.S.C. § 1229c(f), but does not speak to the question of whether a circuit court may issue a stay of voluntary departure); *Nwakanma v. Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003) (noting that “in granting a stay of voluntary departure, we do not pass on the substance of the decision to grant voluntary departure; we only stay the immediate effectiveness of the relief already granted by respondent in his discretion, to allow the alien petitioner to receive appellate review”).

291. *Lopez-Chavez*, 383 F.3d at 653.

292. *Id.*

293. See, e.g., *Desta*, 365 F.3d at 747; see also *supra* notes 274-76 and accompanying text.

thus unable to return to the United States if we determine that they are entitled to asylum.<sup>294</sup>

The Fourth Circuit, however, responded to Gregory's view explaining that "[t]his is not so much an objection to review procedures concerning voluntary departure as it is an objection to the procedures for appellate review of immigration cases generally."<sup>295</sup>

The court also declared as follows:

[A]n alien considering voluntary departure must decide whether an exemption from the ordinary bars on subsequent relief is worth the cost of returning to the home country within the period specified. Having made his election, however, the alien takes all the benefits and all the burdens of the statute together.<sup>296</sup>

### III. RESOLVING UNCERTAINTY: THE NEED FOR A UNIFORM APPLICATION OF THE COURT'S AUTHORITY TO REINSTATE OR STAY DEPARTURE PERIODS

Part II examined the various approaches and rationales adopted by the circuit courts on the question of reinstatements and stays of voluntary departure. This part argues that these divergences warrant a determination by the Supreme Court resolving the existing split. This part contends that, although IIRIRA precludes the circuit courts from reinstating the departure period, it does not detract from the courts' equitable powers, and, therefore, the circuit courts retain the authority to grant stays while judicial review is pending.

#### A. Resolution of Circuit Split

As the law currently stands, the geographic area in which an alien resides may have a large impact on his decision to apply for and accept voluntary departure as a relief.<sup>297</sup> Even upon acceptance of voluntary departure, an alien may be forced to choose between

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294. *Ngarurih v. Ashcroft*, 371 F.3d 182, 198 (4th Cir. 2004) (Gregory, J., concurring in part and dissenting in part) (citations omitted); see also *Nwakanma*, 352 F.3d at 327 (observing that asylum applicants are faced with the choice of either returning to countries where they may face persecution or staying in the United States and suffering the consequences attached to staying beyond their departure periods).

295. *Ngarurih*, 371 F.3d at 194. The *Ngarurih* court further stated as follows:

Absent a stay of removal, an alien in an ordinary immigration appeal may be removed to his home country even before his appeal is decided. Even in that case, there is a possibility that the alien will face persecution in the home country rendering him unable to return should he prevail on appeal. The remedy for this concern is the stay of removal, which we retain the option to grant in any case where the alien satisfies the statutory requirements. This relief is just as available to the alien who sought voluntary departure as it is to the alien who did not.

*Id.*

296. *Id.*

297. See *supra* Part II.

departing by the specified date or appealing for judicial review.<sup>298</sup> Therefore, in order to lend uniformity to this area of the law, and resolve the circuit split, the Supreme Court should grant certiorari to hear the issue.

The Supreme Court should honor the language of IIRIRA, and thus follow the reasoning established by the circuit courts that have held that the courts lack the power to grant reinstatements of the voluntary departure periods pending judicial review of a denial of a request for asylum or other forms of permanent relief.<sup>299</sup> However, the Court should hold that the circuit courts retain the ability to stay departure periods pending judicial review due to their equitable powers.<sup>300</sup>

Unlike a stay, when a court reinstates the departure period, the court, in practical effect, takes an action virtually identical to the initial grant of the privilege of voluntary departure.<sup>301</sup> As explicitly stated in IIRIRA, however, this function is assigned to the Attorney General's office by 8 U.S.C. § 1229c,<sup>302</sup> and denied to the courts by § 1252(a)(2)(B)(i).<sup>303</sup>

Furthermore, courts do not have the authority to extend the departure period.<sup>304</sup> The Act states as follows:

Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is *only* within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs.<sup>305</sup>

Therefore, under IIRIRA, courts lack the authority to reinstate the voluntary departure periods set by the IJ or BIA, and the Supreme Court's decision should reflect this statutory prohibition.

#### *B. Circuit Courts Have the Authority to Stay the Departure Period Pending Judicial Review*

Due to the busy dockets of each circuit court, and the small time period normally granted for voluntary departures, the courts' lack of power to grant reinstatements has a negative effect. Lack of judicial power in this area allows immigration officials to pressure those facing voluntary departure to bypass a judicial review of their claim because of the consequences of remaining in the country past their departure

298. *See supra* note 273 and accompanying text.

299. *See supra* Part II.A.3.

300. *See supra* note 280 and accompanying text.

301. *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 652 (7th Cir. 2004); *see supra* notes 281-83 and accompanying text.

302. *See* 8 U.S.C. § 1229c(f) (2000).

303. *See* 8 U.S.C. § 1252(a)(2)(B)(i); *supra* Part II.A.3.b.

304. 8 C.F.R. § 1240.26(f) (2004).

305. *Id.* (emphasis added).

period.<sup>306</sup> As the Seventh Circuit explained, “[d]eportable aliens should not be faced with the choice between enjoying the voluntary departure privilege and securing judicial review of Board determinations.”<sup>307</sup> Although the Third Circuit argues that this problem is remedied because the alien may now have his claim reviewed by the federal court after he voluntarily departs from the country,<sup>308</sup> this “analysis underestimates the difficulty that aliens will likely encounter in pursuing appeals from afar and the possibility that they will be subjected to the persecution that they are trying to avoid before relief on appeal may be granted.”<sup>309</sup>

This argument becomes particularly troubling when viewed in the context of asylum cases. Aliens seeking asylum must show that they are unable or unwilling to return to their country of origin “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>310</sup> Therefore, if an alien is forced to depart before his appeal is heard by a circuit court, he may be subject to the very persecution at issue in the litigation.<sup>311</sup> Although the Fourth Circuit argued that this is part of the choice an alien must make when accepting voluntary departure,<sup>312</sup> the court failed to address the effect that this would have on the court’s decision itself. If the persecution comes “in the form of death, imprisonment, or the inability to depart from [an alien’s] native country, [a court’s] determination that the alien is entitled to asylum is meaningless because the alien will be unable to return [to] the United States to give effect to the decision.”<sup>313</sup>

If, however, an alien chooses to have his appeal heard before the circuit court, and, as in almost every case, the appeal is not heard until after the departure period granted by the IJ or BIA, the alien will be subject to considerable penalties and will lose the benefits of voluntary departure.<sup>314</sup> Failure to depart voluntarily may force the alien to incur penalties such as the relinquishment of any posted bond, a fine between \$1000 and \$5000, and ineligibility for a period of ten years for various forms of immigration relief.<sup>315</sup>

With these concerns in mind, some federal courts have sought a solution to the problems presented by the courts’ inability to reinstate

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306. See *supra* Part II.B.

307. *Kaczmarczyk v. INS*, 933 F.2d 588, 598 (7th Cir. 1991); see *supra* Part II.A.2.a.ii.

308. See *supra* notes 220-21 and accompanying text.

309. *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 653 (7th Cir. 2004).

310. *Melkonian v. Ashcroft*, 320 F.3d 1061, 1064 (9th Cir. 2003) (quoting 8 U.S.C. § 1101(a)(42)(A) (2000)); see *supra* Part I.A.4.b.i.

311. See *supra* note 310 and accompanying text.

312. See *supra* note 297 and accompanying text.

313. See *Ngarurih v. Ashcroft*, 371 F.3d 182, 196 (4th Cir. 2004) (Gregory, J., concurring in part and dissenting in part); *supra* Part II.B.2.b.

314. See *supra* Part I.E.3.

315. 8 U.S.C. § 1229c(d).

departure periods as set forth in IIRIRA. These courts have looked to their equitable and injunctive powers to stay pending matters, and thereby “avoided colliding with the IIRIRA constraints on courts’ jurisdiction.”<sup>316</sup>

The courts that have found that they lack the authority to issue stays of voluntary departure have read this bar into the text of IIRIRA. They read the provisions limiting courts from hearing an appeal from a denial of a request for an order of voluntary departure and courts’ ability to grant extensions of the departure period as an indication that Congress intended to leave all decisions regarding voluntary departure to the discretion of the executive branch.<sup>317</sup>

As the Supreme Court explained, however, statutes should not be construed to displace the traditional equitable powers of the courts absent the “clearest command” or “inescapable inference” to the contrary.<sup>318</sup> Since IIRIRA does not present a clear command divesting the courts of their traditional equitable powers, it should not be viewed as limiting these powers.<sup>319</sup> The language of IIRIRA does not specify when a court may or may not use its equitable powers to stay the departure period. Therefore, the statute cannot be viewed as a bar on the use of equitable powers to stay voluntary departure.<sup>320</sup>

Furthermore, as argued by the Ninth Circuit, the act of granting a stay does not violate any of the provisions of IIRIRA referred to in the reinstatement cases.<sup>321</sup> First, by allowing a stay on the voluntary departure period, courts are not reviewing the decision of the BIA to grant or deny a request for voluntary departure.<sup>322</sup> To the contrary, an alien requesting a stay has already been granted the relief of voluntary departure twice: once by an IJ and then again by the BIA.<sup>323</sup> In these cases, the court is simply being asked to stop the departure period from running while the alien’s petition for review is considered, and then to allow the period to resume after the merits of the petition are decided.<sup>324</sup> It is not being asked to extend the departure period, in contravention of 8 C.F.R. § 1240.26(f). Rather, the total time of the departure period remains the same as that set by the BIA.<sup>325</sup>

Most importantly, a court’s ability to stay the departure period pending its review of the alien’s petition removes the problem inherent in forcing an alien to choose between the benefits of

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316. *Mullai v. Ashcroft*, 385 F.3d 635, 640 (6th Cir. 2004).

317. *See supra* note 289 and accompanying text.

318. *Miller v. French*, 530 U.S. 327, 340-41 (2000) (citations omitted); *see supra* note 266 and accompanying text.

319. *See supra* Part II.B.3.a.

320. *See supra* note 286 and accompanying text.

321. *See supra* Part II.B.2.a.

322. *See supra* notes 292-95 and accompanying text.

323. *See supra* Part I.A.5.

324. *See supra* Part II.B.

325. *See supra* note 276 and accompanying text.

voluntary departure and his or her statutory right to judicial review of his or her claim.<sup>326</sup> Not only does the choice cause possible irreparable harm to aliens, it also threatens to render the decisions of the circuit courts in asylum cases meaningless.<sup>327</sup>

Although it can be argued that an alien who chooses the benefits of the relief of voluntary departure must also accept the burden of losing the opportunity for judicial review, this is a policy determination best left to Congress, which has not explicitly addressed this issue.<sup>328</sup> Thus, absent clear statutory language, which is not found in IIRIRA, aliens with possibly meritorious appeals should not be forced to choose between preserving certain benefits lawfully granted to them under the INA and their own personal safety.<sup>329</sup> Therefore, upon the granting of certiorari to decide this issue, the Supreme Court should hold that IIRIRA does not limit the equitable powers of the circuit courts to stay departure periods while judicial review of the alien's petition is pending.

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326. Cf. *supra* notes 274-77 and accompanying text.

327. See *supra* Part II.B.2.b.

328. See *Ngarurih v. Ashcroft*, 371 F.3d 182, 194, 198 (4th Cir. 2004) (Gregory, J., concurring in part and dissenting in part).

329. See *supra* note 187 and accompanying text.

*Notes & Observations*