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Cyrus D. Mehta
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Letter From the Editor-in-Chief

It is disappointing that the Inflation Reduction Act that was recently passed by the Democratic-controlled Senate and House on party lines did not contain one single immigration provision to reduce backlogs; improve immigration processing; legalize unauthorized immigrants, including Dreamers; reform immigration courts; or improve due process. Still, the bill did not include any of the 60 harmful immigrant amendments and this in itself is cause for celebration, according to Greg Chen's blog on *Think Immigration*.[1] It is still sad that we have to celebrate a without any positive immigration provisions although the bill will address the climate crisis, lower prescription drug prices, and reduce the deficit.

Despite the stalemate in Congress, immigration attorneys have no choice but to continue to competently assist their clients even while the U.S. immigration system remains imperfect. The *AILA Law Journal* thus plays an invaluable role by curating high-quality articles that would guide attorneys to advance novel and innovative arguments on behalf of their clients. For this I pay tribute to my predecessor, Shoba Wadhia, who got the *AILA Law Journal* off the ground so successfully, and hope to inspire attorneys, law students, and others, as Shoba did, to contribute articles in the immigration field that will not just benefit attorneys but will also have a positive impact on the law.

The current volume fulfills this aspiration by publishing the articles from a star team of authors. Eric Lee and Sabrina Damast write on the doctrine of consular nonreviewability, which has hampered challenges to visa denials for decades. Most case law has been bad, but a few recent litigation successes should inspire attorneys to consider federal court action when consular officers engage in bad faith. The article includes a review of case law, as well as several recent district court successes and strategic considerations to evaluate when considering litigation.

Curtis F.J. Doebbler and Elisa Fornalé provide an overview of the U.S. practice of detaining asylum seekers and compare the U.S. practice to the international human rights obligations applicable to the United States. This comparison is made in the context of the international movement toward cooperation on matters of migration and refugees evidenced by the Global Compacts on Migration and on Refugees recently adopted under the United Nations auspices. This article concludes that the U.S. practice of detaining asylum seekers is inconsistent both with this general movement toward cooperation and with legal obligations that are applicable in respect of internationally protected human rights.

Martin Robles-Avila provides an in-depth overview and analysis of the statutory schema implicating the three- and ten-year bars—as well as important and largely overlooked legislative history, and also addresses the recent

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announcement that USCIS is amending its policy to no longer require applicants serve the three- and ten-year bars outside the United States, a position contradicted by the statutory text.

Finally, Lory D. Rosenberg, Susan G. Roy, Paul Schmidt, and Rekha Sharma-Crawford aptly point out that international law, criminal law, and even parts of immigration law recognizes that matters involving children cannot be treated in the same way as matters relating to adults. Still, more than a decade after the BIA issued its decisions in three key cancellation of removal cases, the idea that the "best interest of the child" standard should be encapsulated into the establishment of "exceptional and extremely unusual hardship" remains elusive. The best interest of the child is systematically ignored, as a rule, for kids affected by removal proceedings, even as it remains the gold standard in most other legal proceedings relating to children. With all that is now known about the trauma and damage done to children as the result of forced family separations, the BIA must reevaluate and reconsider draconian interpretations that do not align with modern society. It is time to bring cancellation of removal into the twenty-first century and make "best interest of the child" the key for establishing exceptional and extremely unusual hardship when the qualifying relative is a child.

As the new Editor-in-Chief of this *Journal*, I am ever so grateful to managing editor Danielle Polen for so painstakingly shepherding me, along with editor Richard Link, publisher Morgan Morrissette Wright of Full Court Press, and our talented and hardworking editorial board to help select or edit articles for this volume.

Cyrus D. Mehta
Editor-in-Chief

Note

1. *See* Greg Chen, *Why We're Celebrating the Senate's Passage of Legislation Without Immigration*, Think Immigration, August 8, 2022, available at https://thinkimmigration.org/blog/2022/08/08/why-were-celebrating-the-senates-passage-of-legislation-without-immigration/.

Consular Nonreviewability

Fifty Years Since *Kleindienst v. Mandel*

Eric Lee and Sabrina Damast*

Abstract: The doctrine of consular nonreviewability has hampered challenges to visa denials for decades. Most case law has been bad, but a few recent litigation successes should inspire attorneys to consider federal court action when consular officers engage in bad faith. The article includes a review of case law, as well as several recent district court successes and strategic considerations to evaluate when considering litigation.

Fifty years ago this year, the U.S. Supreme Court ruled in *Kleindienst v. Mandel*[1] that the judicial branch may not review the constitutionality of a visa denial made by the executive branch, provided the denial is "facially legitimate and bona fide."

The Supreme Court case came on interlocutory appeal from a panel of the U.S. District Court for the Eastern District of New York, which had enjoined Attorney General John Mitchell from enforcing the Immigration and Nationality Act of 1952 (also known as the McCarran–Walter Act) against Belgian professor and socialist-liberal Ernest Mandel. The district court ruled that the Act's subsections barring entry to visa applicants who believe or teach "the economic, international, and governmental doctrines of world communism" or who circulate, print, display, or possess for those purposes any written articles or books advocating "world communism" violated the First Amendment. Even if the Constitution did not impact the rights of Mandel, the district court held that the subsections violated the free speech rights of six professors who had invited Mandel to speak at a conference at Stanford University in 1969.[2]

In its ruling, the district court heralded a break from the McCarthyite traditions of the recent past. It praised the Supreme Court's decision in *New York Times Co. v. Sullivan*[3] as marking "the emergence in clarity of the view of the First Amendment as a fundamental principle of the form of American constitutional government; accepting the premise that the people, not the government, possess the sovereignty."[4]

The Supreme Court disagreed. In a 6-3 ruling delivered on June 29, 1972, the Court ruled it would not balance the plaintiffs' constitutional rights against the executive branch's interest in controlling visas and immigration. Provided the attorney general[5] could establish the visa denial was "facially legitimate and bona fide," the Court held, the courts have no power to review the constitutionality of the consular officer's decision.

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Justice Blackmun, writing for the majority, explained that this "doctrine of consular non-reviewability" was rooted in "ancient principles of the international law of nation-states."[6] The power to exclude foreign persons is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers," Blackmun wrote.[7] To support these principles, which served as the legal foundation of the Court's decision, Blackmun cited only two cases: *Chae Chan Ping v. United States*,[8] also known as *The Chinese Exclusion Case*, and *Fong Yue Ting v. United States*.[9]

Before the Supreme Court, the Nixon administration argued that the six professors' First Amendment rights were not restricted because there were alternate means of soliciting Mandel's political views for the conference to which he was invited, including through a written speech or recording. The *Mandel* majority rejected this argument, writing that it was "loath to" diminish "any constitutional interest" on the part of the plaintiffs.[10] In fact, the Court wrote that the First Amendment is "nowhere more vital" than in schools and universities, where Mandel was slated to speak.[11]

Although the court was evidently attempting to limit any damage to the First Amendment and moderate its decision, this aspect of the ruling ironically would become the most dangerous and influential. By acknowledging that the denial violated the most cherished constitutional rights of American citizens while also ruling that the fact of the violation "is not dispositive," the majority established that there were no limits to the scale of the constitutional violations that could be shielded by the doctrine of consular nonreviewability, provided the visa denial was "facially legitimate and bona fide."[12] As for the meaning of this exception, the *Mandel* Court ruled that because Congress delegated the power to bar the admission of advocates of world communism to the attorney general, and because Mandel had violated a past visa, the denial was facially legitimate and bona fide. The bar was set exceptionally low.

The decision embodied the ideological shift on the Supreme Court that was by then still in its early stage. Four of the six majority votes in *Mandel* came from Nixon appointees replacing the heart of the Warren Court—Rehnquist replacing Harlan, Powell replacing Black, Blackmun replacing Fortas, and Burger replacing the former Chief Justice himself. Brennan and Douglas joined a prescient dissent penned by Thurgood Marshall, who warned:

> I, too, am stunned to learn that a country with our proud heritage has refused Dr. Mandel temporary admission.... Today's majority apparently holds that Mandel may be excluded and Americans' First Amendment rights restricted because the Attorney General has given a "facially legitimate and bona fide reason" for refusing to waive Mandel's visa ineligibility. I do not understand the source of this unusual standard. Merely "legitimate" governmental interests cannot override constitutional rights. Moreover, the majority demands

> only "facial" legitimacy and good faith, by which it means that this Court will never "look behind" any reason the Attorney General gives. No citation is given for this kind of unprecedented deference to the Executive, nor can I imagine (nor am I told) the slightest justification for such a rule. . . .
>
> All governmental power—even the war power, the power to maintain national security, or the power to conduct foreign affairs—is limited by the Bill of Rights. When individual freedoms of Americans are at stake, we do not blindly defer to broad claims of the Legislative Branch or Executive Branch, but rather we consider those claims in light of the individual freedoms. This should be our approach in the present case, even though the Government urges that the question of admitting aliens may involve foreign relations and national defense policies.[13]

In the 50 years since its issuance, *Mandel* has served as a basis for the creation of an exceptional area of American law where Justice John Marshall's cardinal rule—"it is emphatically the province and duty of the judicial department to say what the law is"—no longer meaningfully applies. In the context of a half century of mass migration, *Mandel* has given the executive branch the power to deny admission to the parents and spouses of countless U.S. citizens without judicial review. Under the auspices of the war on terror, *Mandel* has given the executive branch the power to close the borders and ports of entry to travel from broad sections of the world. In *Trump v. Hawaii*,[14] Justice Roberts relied on *Mandel* to uphold the constitutionality of Donald Trump's Executive Order 9645 banning admission from Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.

From a practitioner's standpoint, the most concerning element of *Mandel*'s legacy is that the courts have rendered its "facially legitimate and bona fide" exception meaningless. Recent litigation reveals that the executive branch is employing *Mandel* to argue for an interpretation of "facially legitimate and bona fide" that would effectively prevent the executive from being burdened by the U.S. Constitution in affairs related to admissibility.

The first part of this article addresses the roots of *Mandel*'s nonreviewability principle in the Chinese and Japanese exclusion cases. The second part offers a retrospective view of how the decision's rationale has broadened far beyond the scope of the facts in *Mandel* to impact the rights of literally tens of millions of U.S. citizens in a manner the *Mandel* majority could not have foreseen. The third part addresses treatment of *Mandel* by the courts and, specifically, Justice Kennedy's controlling concurrence in *Kerry v. Din*.[15] The fourth part reviews arguments made by the executive branch in recent litigation that exemplify the type of constitutional abuse carried out behind *Mandel*'s shield, and the Conclusion speaks to the potential for further abuse of *Mandel* in the context of the climate of anti-immigrant rhetoric spurred by former President Trump.

The Roots of *Mandel* and the Contested Legacy of Chinese Exclusion

It is well established that *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*) is "the fountainhead of the plenary power doctrine" and consular nonreviewability.[16] The racist roots of *Chae Chan Ping* and associated cases (including *Fong Yue Ting v. United States*[17] and *Nishimura Ekiu v. United States*[18] (in which the plaintiff was Japanese)) have been extensively documented in numerous well-researched articles.[19]

Nevertheless, *Chae Chan Ping*, *Fong Yue Ting*, *Nishimura Ekiu*, and kindred nineteenth-century cases limiting judicial review of immigration remain "good law." As referenced above, *Mandel* cited *Chae Chan Ping* and *Fong Yue Ting* in upholding the doctrine of consular nonreviewability on the grounds that the power to exclude foreign nationals is "inherent in sovereignty" because it relates to foreign policy conduct and is necessary for "defending the country against foreign encroachments and dangers."[20] There is no source for the "inherent sovereignty" and plenary power other than the late-nineteenth-century exclusion cases.

Numerous scholars have attacked the ongoing reliance on the Chinese exclusion cases on clear and well-enumerated legal grounds. Stephen Legomsky, in his seminal 1984 article "Immigration Law and the Principle of Plenary Power,"[21] lays out the exceptional character of immigration law and attacks the dated legal theories depriving courts of oversight over immigration matters. He criticizes the theory that the doctrine of consular nonreviewability derives legitimate legal authority from the notion that the right to exclude immigrants is an inherent power of national sovereignty.

Legomsky explains that the doctrine of consular nonreviewability emerged as a product of the nineteenth-century conception that immigration was a matter of purely "foreign affairs" and therefore is the purview of the legislative and executive branches. Immigrants, Legomsky writes, were conceived of well into the twentieth century as merely "guests" who are not entitled to substantial legal rights. Significantly from the standpoint of the *Mandel* case, Legomsky's essay addresses how the doctrine of consular nonreviewability derives its authority from the anti-Communist and xenophobic "red scares" of the 1920s and 1950s, in which right-wing hysteria produced a climate in which immigrants were associated with ideologies that were labeled "anti-American."

In a 2015 article titled "Why Immigration's Plenary Power Is Here to Stay," former Department of Homeland Security Deputy General Counsel David A. Martin acknowledges that "there are many reasons for twenty-first century observers to be deeply troubled by *Chae Chan Ping*," but concludes that "[n]onetheless, the case receives more blame than it deserves" because the Supreme Court's "invocation of sovereignty" as the basis for plenary power was introduced "not to deny rights but instead primarily to answer a federalism

question" and that the doctrine "is hardly the blank check for the executive that is sometimes suggested."[22]

Indeed, the sections of *Chae Chan Ping* asserting the inherent sovereign right of the federal government (as opposed to the states) to regulate immigration, even though no explicit power is enumerated in the Constitution, appear legally sound. Justice Field even acknowledges that these "sovereign powers" are "restricted in their exercise only by the constitution itself . . . which control, more or less, that conduct of all civilized nations."[23]

While Martin is correct that *Chae Chan Ping* and other cases cannot be invalidated simply because the justices held racial prejudices, he fails to consider whether the justices' racial animus (and the animus of the members of congress who passed the Exclusion Act, the Geary Act, and subsequent anti-Chinese measures) was what led them to end judicial review.

The *Chae Chan Ping* court argued that the judiciary did not have power to review immigration decisions on the grounds that they impact foreign policy. However, as Steven Legomsky has noted, "In *United States v. Curtiss-Wright Exporting Corp.*, for example, the power to regulate foreign affairs was held to be inherent in sovereignty. Yet that holding did not prevent the Court in several subsequent cases from invalidating, as violative of individual rights limitations, federal action affecting foreign affairs."[24]

The racist foundation of Justice Stephen Field's majority opinion is not mere dicta. It was precisely the sections that were animated by racial animus that the Supreme Court would later rely on for the proposition that judicial review was improper because it encroached on the elected branches' inherent power to deliberate matters of foreign policy. For example, in *Mandel*, Blackmun cited Field's opinion specifically for this purpose and repeated Field's claim that the executive and legislative branches, and not the judiciary, have the power to "defend[ ] the country against foreign encroachments and dangers."[25] Field raised the inherent sovereignty argument precisely because he viewed the nation as a white civilization facing an existential threat from Chinese laborers.

Field wrote that the act of Congress restricting immigration was "caused by a well-founded apprehension—from the experience of years—that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there."[26] Field ruled that Congress had the right to act to preserve civilization from "the crowded millions of China" who "reside[ ] apart by themselves" because it was "impossible for them to assimilate with our people or to make any change in their habits or modes of living," and this racial horde posed the "great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken" by Congress.[27]

To Field and the unanimous Court, the fact that the Chinese immigrants themselves posed a threat to the nation's sovereignty *on account of their race* endowed the federal government with the right to restrict migration to the

federal government without constitutional oversight. "The presence of Chinese laborers," Field wrote, had "a baneful effect … upon public morals." "Their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization."[28]

The language of war underscores that the Court viewed the "Oriental invasion" as a threat to the very existence of the nation and "our [that is, white] civilization." The immigrant laborers "in fact constituted a Chinese settlement within the State, without any interest in our country or its institutions."[29] Just as the government has the power to stop Chinese laborers, so too "[i]t has power to suppress insurrections, as well as to repel invasions, and to organize, arm, discipline and call into service the militia of the whole country."[30] The need to "preserve civilization" justified not only federal action, but also action without judicial review.[31]

These decisions not only serve as the legal cornerstone of the *Mandel* majority opinion, they inspired (and at times even startled) the jurists of Nazi Germany. In his 2017 book *Hitler's American Model: The United States and the Making of Nazi Race Law*, Yale Law Professor James Q. Whitman explains that Nazi law articles and the notes prepared by lawyers drafting the Nuremberg Acts on racial purity drew heavily from American immigration law in general and Chinese exclusion in particular. It is notable, as Whitman reports, that it was immigration law, and not even Jim Crow racial segregation, that primarily interested Nazi jurists:

> Awful it may be to contemplate, but the reality is that the Nazis took a sustained, significant and sometimes even eager interest in the American example in race law.... It was the most radical Nazis who pushed most energetically for the exploitation of American models. Nazi references to American law were neither few nor fleeting.... Nor, importantly, was it only, or even primarily, the Jim Crow South that attracted Nazi lawyers.... Moreover, the ironic truth is that when Nazis rejected the American example, it was sometimes because they thought that American practices were overly harsh: for Nazis of the early 1930s, even radical ones, American race law sometimes looked *too* racist.[32]

Whitman quotes one Nazi textbook on public law authored by fascist jurist Otto Koellreutter, which reads:

> A further necessary measure for maintaining the healthy racial cohesion of the Volk lies in the regulation of immigration. In this connection it is above all the legislation of the United States and of the British Dominions that has yielded interesting results. Worthy of attention above all is the development of immigration legislation in the United States. Until the 1880s, a liberal freedom-oriented

> conception led the United States to regard itself as the refuge of all oppressed peoples, and consequently limitations on immigration, to say nothing of bans on immigration, were considered irreconcilable with the "free" Constitution. This conception very quickly changed. 1879 witnessed the first bills aimed at banning Chinese immigration.[33]

It is notable that leading Nazi jurists viewed the Chinese exclusion cases as marking the end of the period in which the Constitution applied to immigration. This can only be understood as a reference to *Chae Chan Ping* and its progeny. The justices' rationale was so thoroughly tainted by racial animus it calls into question the legitimacy of the entire legal edifice of consular nonreviewability that stands on its faulty foundations.

The doctrine of consular nonreviewability is the fruit of the poisonous tree. As the Supreme Court has explained in other contexts, "The duty to confront racial animus in the justice system is not the legislature's alone."[34] Racial animus, "odious in all respects, is especially pernicious in the administration of justice."[35] Given that the specific legal origins of the doctrine of consular nonreviewability lie in the racial animus of the Supreme Court of the 1880s and 1890s, and given its impact on masses of U.S. citizens is far broader than those justices could have ever anticipated, the authors contend that the doctrine of consular nonreviewability lacks a legitimate basis in law.

Social Integration and *Mandel*'s Far-Reaching Impact

The justices in the Chinese and Japanese exclusion cases hardly considered the possibility that the rights of such a large number of American citizens could be affected by decisions to bar admission or deport nationals of China and Japan.

First, at the time it was statutorily impossible for Asian immigrants to become U.S. citizens. Second, intermarriage between Asian immigrants and American citizens was consciously discouraged through state and federal policy. Under the 1907 Expatriation Act, Congress stripped American women of their citizenship if they married a noncitizen, with no avenue to apply for naturalization if their husband was Asian. In 1922, the Cable Act restored marriage rights to some women, but it was not until the 1960s that all U.S.-citizen wives of Asian husbands had their citizenship rights restored.

The six justices who comprised the *Mandel* majority were not burdened by the same prejudices, but they could not have conceived of the impact their decision would have on the fundamental rights of U.S. citizens in the decades to come.

The *Mandel* decision came at a historic low ebb of immigration to the United States. In 1970, there were nine million immigrants in the United States, making up less than five percent of the population. The idea that the

rights of immigrants would be so closely intertwined with the rights of their U.S.-citizen family members was likely not in the forefront of the justices' minds.

The next 50 years witnessed the largest mass migration in U.S. history. Especially beginning in the 1980s, tens of millions fled to the United States in search of refuge from U.S.-backed dictatorships, war, and poverty levels that were greatly exacerbated by U.S. trade agreements like the North America Free Trade Agreement (NAFTA) and the Central America Free Trade Agreement (CAFTA).

As a result, there are now 45 million immigrants living in the United States, making up nearly a sixth of the population.[36] Some 22 million U.S. citizens live in the same household as an undocumented immigrant. Almost 5 million U.S. citizen children live with an undocumented parent, and 1.7 million U.S. citizens have an undocumented spouse.[37] Over 800,000 undocumented immigrants are young people who were brought to the United States as young children. Given this social reality, it is no longer possible to separate the rights of citizens from the rights of their immigrant spouses, parents, and children.

Critically, today's immigrants rely on the immigrant visa process as a primary path to legality. This process passes through the same consular officers to whom *Mandel* gave the power to deny visas and split families without any meaningful judicial oversight. Only now that power is wielded against tens of thousands more families every year than it was at the time of the *Mandel* decision.

Even the *Mandel* dissent did not consider the possibility that the decision would restrict, without judicial review, the fundamental rights of tens of millions of U.S. citizens who were sponsoring their immediate relatives for permanent residency, only to have their visas denied by a consular officer. Between fiscal year 2007 and 2019, a total of 1,353,830 immigrant visa applicants were deemed inadmissible and were unable to overcome their ineligibility. To give a sense of the vast potential for non-reviewable executive abuse, the inadmissibility statute includes a provision giving the State Department the ability to deny a visa based on an allegation that the individual would enter the United States in order to commit "any other unlawful activity," a phrase whose catch-all meaning is not limited by the statutory context. A total of 1,453 people were found inadmissible under this catch-all provision over this 13-year period, and not a single applicant overcame the presumption of inadmissibility.[38]

Because of *Mandel*, the spouses, parents, and children of these applicants had no right to have a court review a constitutional challenge to the visa denial, even where the denial resulted in the effective termination of their right to enjoy a marriage or the engage in the parent–child relationship. This has created an entire caste comprised of millions of people who are deprived of their fundamental rights because of their family status.

The transformative impact of *Mandel* on millions of U.S. citizens also undermines the rationale of Justice Field in *Chae Chan Ping*, referenced in the

Mandel majority, that matters of "foreign policy" fall under the plenary power of the nonjudicial branches. To the extent immigration was a purely "foreign policy" matter in the 1880s and 1890s, now it has become inextricably linked with the domestic rights of a substantial section of the American population.

As Steven Legomsky notes:

> At no time have the courts gone to the extreme of refusing to review all decisions having possible effects on foreign policy. The courts have been adventurous in cases presenting such sensitive questions as human rights violations by foreign governments, publication of the Pentagon papers, certain passport issues, certain military matters, acquisition and loss of citizenship, and even the legality of a Presidential Order seizing steel mills to avoid disruption of a war effort.[39]

As for the distinction between *Chae Chan Ping*'s federalist principle and the abolition of judicial review, Legomsky adds:

> It can be granted *arguendo* that a nation has unlimited power in international law to exclude and to expel aliens. It does not follow that the courts should refrain from determining whether the manner in which the national legislature exercises that power comports with the constitutional restrictions that the nation as a whole has elected to establish.[40]

As explained above, the racial animus of *Chae Chan Ping* court helps explain the otherwise unexplainable distinction between nonreviewability in the immigration context and constitutional reviewability in the context of international tort, foreign policy, foreign commerce, and even sensitive military secrets. Because of the social transformation of the United States and the unprecedented family integration of citizens with undocumented persons, the question of consular nonreviewability has now become a matter of urgent importance to a substantial portion of the domestic population.

Post-*Mandel* Case Law Renders the Exception Meaningless

In the half century since *Mandel*, district and circuit courts have defined their review of whether visa denials are for "facially legitimate and bona fide" reasons in such a manner as to make it virtually impossible for courts to "look behind" the visa denial and perform constitutional scrutiny.

Courts have repeatedly held that visa denials are "facially legitimate and bona fide" even if they are plainly wrong, no matter the depth of the constitutional violation.

For example, in *Ngassam v. Chertoff*, the U.S. District Court for the Southern District of New York wrote that a court "does not have jurisdiction to review a consular official's decision, even if its foundation was erroneous, arbitrary, or contrary to agency regulations."[41] In *Loza-Bedoya v. INS*, the Ninth Circuit held that the doctrine of consular nonreviewability bars judicial review even when the record reveals that a visa denial was based on clearly erroneous information.[42] In *Hossain v. Rice*, the U.S. District Court for the Eastern District of New York ruled that a visa applicant's "allegations, if true, are troubling," but concluded that the doctrine of consular nonreviewability still barred judicial review.[43]

The Supreme Court addressed the meaning of *Mandel*'s "facially legitimate and bona fide" exception in its 2015 decision *Kerry v. Din*.[44] In *Din*, the plaintiff was the U.S. citizen wife of an Afghan husband who had served as a public employee in Afghanistan's national welfare department at the time the Taliban controlled the country.

Five justices ruled against the plaintiffs, but with split reasoning. Writing for a three-justice plurality, Justice Scalia wrote that the U.S.-citizen wife was not denied due process because she had no fundamental right to live with her husband. A four-justice dissent held that the visa denial violated the wife's fundamental right to "live together and to raise a family" with her husband.

But it was Justice Kennedy's concurrence, joined by Justice Alito, that controlled. Kennedy did not reach the question as to whether the plaintiffs' due process rights had been violated by the visa denial. Kennedy cited *Mandel* and explained that even if the wife's liberty interest was violated, because the visa denial was facially legitimate and bona fide, the Supreme Court was barred by the doctrine of consular nonreviewability from constitutionally scrutinizing the denial.

Kennedy held that the visa denial was facially legitimate because the government cited a valid section of the inadmissibility statute, 8 U.S.C. § 1182(a)(3)(B), which bans admission to individuals engaged in "terrorist activities." Justice Kennedy further added that the plaintiff-husband's past employment provided "at least a facial connection to terrorist activity."[45] Kennedy then ruled that the visa denial was bona fide because the plaintiffs had not made an affirmative showing (with sufficient particularity) of bad faith on the part of the officer who denied the visa.[46]

The *Din* decision overturned the Ninth Circuit decision holding that the visa denial was not facially legitimate and bona fide because "the Government has offered no reason at all for denying [plaintiff's] visa; it simply points to the statute."[47] The Ninth Circuit had ruled that the government's mere citation to the statute was "so broad that we are unable to determine whether the consular officer 'properly construed' the statute."[48] By overturning the Ninth Circuit, the Supreme Court effectively precluded any meaningful interpretation of the *Mandel* exception to the doctrine of consular nonreviewability.

As will be shown below, the government takes advantage of the ambiguity in Justice Kennedy's decision to argue that a mere citation to any subsection of the inadmissibility statute is sufficient to satisfy the "facially legitimate and bona fide" exception, without the need to provide any factual connection between the statute and the conduct of the visa applicant.

Recent Caselaw Developments

Although litigation around visa denials is rare (no doubt due to the consular nonreviewability doctrine), two consular denial cases in the past few years are particularly significant and indicate what positions the Department of Justice is advancing in their litigation related to the doctrine. In addition, several other cases have reached the circuit courts and resulted in published opinions that have continued to limit the scope of review in federal court.

One common argument raised by the government is that only spouses of visa applicants have a liberty interest in the adjudication of the noncitizen spouse's visa application such that they have the ability to challenge the denial of the application.[49] Unfortunately, the government's position may find some support in the recent Ninth Circuit decision in *Khachatryan v. Blinken*.[50] *Khachatryan* involved a visa petition filed by a U.S. citizen on behalf of his father. The consulate denied the father's visa application on the basis of suspected fraud in a past immigration application. The petitioning son then filed a lawsuit in federal court, alleging bad faith by the consulate.

The court found that the adult son lacked a due process interest in the approval of his father's immigrant visa application. "Here, Danuns does not point to any statute or other source of nonconstitutional law that would grant him a protected liberty interest in having his father come to the United States. Rather, his contention is that he possesses a *constitutionally based* interest similar to the one that we recognized for spouses in *Bustamante*."[51] The court went on to note that "the marital relationship is 'unlike any other in its importance to the committed individuals,' and its unique legal status rests on 'related rights of childrearing, procreation, and education.' The relationship between a parent and an adult child lacks these distinctive features."[52]

Practitioners seeking to challenge visa denials using nonspouse plaintiffs (particularly in the Ninth Circuit) will likely need to distinguish this case. Notably, Danuns was a naturalized citizen who had not been raised in the United States by his father. This fact seemed to be of some significance to the court. "Danuns does *not* contend that the Government has directly interfered with an existing domestic relationship within the United States; on the contrary, he contends only that the United States has denied him the ability to *create* such a living arrangement within the United States."[53] The authors of this article are aware of one district court that distinguished *Khachatryan* in the case of a natural-born U.S. citizen who had been raised for some period

of time in the United States by her applicant-mother, finding that the citizen-daughter could demonstrate a liberty interest in her mother's visa application.[54]

Another common argument raised by the government in consular non-reviewability litigation is that the consular officer need only cite a statute of inadmissibility, without providing any factual basis to support that finding, to satisfy a petitioner-relative's liberty interest in the adjudication of a visa application. This statutory citation is, according to the government, all that is required to demonstrate a "facially legitimate and bona fide" denial. Again, this argument unfortunately finds support in caselaw.

Most recently, the Eleventh Circuit issued its decision in *Del Valle v. Secretary of State*, finding that "a citation to a statutory inadmissibility provision meets both prongs [facially legitimate and bona fide] of the standard where the provision 'specifies discrete factual predicates the consular officer must find to exist before denying a visa.' Where a statute provides specific factual predicates that the consular officer must find for a determination of inadmissibility, a citation to the statute 'indicates [that the government] relied upon a bona fide factual basis for denying a visa.'"[55] The court noted that two other circuits had suggested that a mere statutory citation *always* constitutes a facially legitimate and bona fide decision.[56] The Eleventh Circuit declined to reach quite such a broad conclusion, but did find that the fraud inadmissibility statute at 8 U.S.C. § 1182(a)(6)(C)(i) and the false claim to U.S. citizen inadmissibility statute at 8 U.S.C. § 1182(a)(6)(C)(ii) contained specific discrete factual predicates that the consular officer must have found existed to deny the visa application.[57] Because Del Valle did not allege bad faith by the consular officer, the court could go no further in its review of the consular officer's decision.[58]

The *Del Valle* decision illustrates the importance of identifying ahead of time if the inadmissibility provision is one that inherently requires a specific factual predicate, as well as pleading any bad faith by the consular officer, if a litigant wants to survive a motion to dismiss.[59]

In *Muñoz v. State Dep't*,[60] the State Department argued that even a citation to 8 U.S.C. § 1182(a)(3)(A)(ii) is sufficient to satisfy the "facially legitimate and bona fide" test from *Mandel* even though this broad subsection deems inadmissible anyone who a consular officer "knows or has reason to believe" will enter the United States, even "incidentally," to engage in "any other unlawful activity."

There, the State Department deemed an applicant inadmissible, citing only to 8 U.S.C. § 1182(a)(3)(A)(ii) and providing no further basis for the denial. Two years into the litigation, the State Department stated it had concluded the applicant was a member of the gang MS-13, but pointed to no factual supporting evidence. In April 2019, a magistrate judge in the U.S. District Court for the Central District of California denied the government's motion to dismiss under Rule 12(b)(6), finding that the State Department's "mere conclusion" that the applicant was a gang member was insufficient to satisfy the denial was facially legitimate and bona fide. To the best of the authors'

knowledge, this was the first time a plaintiff had prevailed on a motion to dismiss in a consular nonreviewability case.

However, the State Department later stated in the course of discovery that an unnamed law enforcement agency had concluded the applicant was a member of MS-13 and that this formed the basis of the consular officer's denial. The district court granted the State Department's motion for summary judgment, ruling that this law enforcement conclusion was a fact that satisfied *Mandel*. The magistrate judge did rule, however, that a mere citation to § 1182(a)(3)(A)(ii) is insufficient to meet the *Mandel* test because it does not contain a built-in factual predicate. Where the State Department denies an applicant based solely on a citation to this subsection of the inadmissibility statute, *Muñoz* provides an avenue for litigating.

The case is currently on appeal before the Ninth Circuit. In an answering brief filed on September 24, 2021, the State Department argued for a sweeping new rule: "Even if there were no evidence in the record of [petitioner's] association with MS-13, the consular officer's citation to § 1182(a)(3)(A)(ii) provided a facially legitimate and bona fide basis for a denial of his visa petition and satisfied the constitution."[61] The State Department also argued neither the foreign national applicant nor the U.S. citizen spouse has standing to challenge the "any other unlawful activity" statute as unconstitutionally vague. To support this argument, the State Department relied on the Japanese exclusion case *Nishimura Ekiu v. United States*,[62] an opinion signed by six of the justices on the Court when it unanimously decided the *Chinese Exclusion Case* three years earlier. The State Department quotes *Nishimura Ekiu* for the proposition that "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."[63]

One takeaway from this recent caselaw is that unless the denial was based on § 1182(a)(3)(A)(ii) ("any other unlawful activity"), litigants are unlikely to survive a motion to dismiss if they do not plead bad faith by the consulate in their complaints.

Although the litigants in *Khachatryan* lost on the protected liberty interest issue, the Ninth Circuit's analysis of bad faith provides a good road map for attorneys wishing to develop a theory of bad-faith denials by consular officers. Although the *Khachatryan* court noted that a plaintiff pleading bad faith would have to allege more than that the consular officer's information was incorrect, the objective unreasonableness of the officer's actions would be a factor to assess in determining whether the plaintiff had sufficiently pled bad faith.[64]

The court then proceeded to evaluate the objective unreasonableness of the visa denial in light of previous, contrary determinations by U.S. Citizenship and Immigration Services (USCIS) regarding whether Khachatryan had, in fact, engaged in marriage fraud. Specifically, the embassy had indicated that Khachatryan had submitted a false divorce certificate in connection with an earlier visa application. However, "on at least three separate occasions, USCIS specifically examined the allegation that Khachatryan had committed

marriage fraud and had submitted a false divorce certificate, and each time USCIS concluded that this charge was unsubstantiated."[65] Indeed, even after the embassy sent the Danuns' petition back to USCIS due its allegation of marriage fraud, USCIS reaffirmed its approval of the petition. "In *Bustamante*, we concluded that a consular officials' reliance upon information supplied by another agency was a factor that weighed strongly against a finding of bad faith. Conversely, the Embassy's persistent and unexplained *refusal* to accept the repeated conclusions of USCIS—and to do so even after the Embassy had specifically asked USCIS to take another look at the matter—is a factor that weighs in favor of an inference of bad faith."[66]

Litigators can point to the *Khachatryan* case whenever a consular officer renders a visa denial that appears to fly in the face of a prior finding by another agency empowered to administer the immigration laws. For example, the district court in *Blazquez v. Barr* found bad faith to be sufficiently pled when the consular officer cited the alien smuggling inadmissibility ground, but Customs and Border Protection (CBP) (the agency that had investigated the alleged alien smuggling incident 20 years earlier) had not rendered an inadmissibility finding against Ms. Blazquez, and, in fact, had admitted her several times on her border crossing card after the incident.[67] Similarly, Del Valle may have been able to plead bad faith based on USCIS's approval of his provisional waiver of unlawful presence, which would be contraindicated if he was also inadmissible for fraud and/or false claims to U.S. citizenship.[68] However, he did not plead bad faith in his complaint, and as a result, the Eleventh Circuit determined it had no authority to examine who might be wrong (USCIS or the consular officer) in their assessment of Del Valle's admissibility.[69]

Another avenue for allegations of bad faith might be found when the visa denial appears to be purely retaliatory, or when the consular officer otherwise appears to be acting in a dishonest fashion. In *Bustamante v. Mukasey*,[70] the Ninth Circuit rejected an allegation of bad faith premised on U.S. Drug Enforcement Administration (DEA) officials asking the applicant to become a drug informant after the consulate denied his visa application on the basis that there was a reason to believe he was a drug trafficker. The DEA agents told Bustamante that if he cooperated, his visa problems "would go away," but that if he refused, he would never obtain a visa to the United States.[71] The court concluded that the DEA's offer did not constitute bad faith. "[I]f anything, it reflects the official's sincere belief that Jose had access to information that would be valuable in the government's effort to combat drug trafficking. Moreover, the Bustamantes do not allege that Jose was asked to do anything illegal or improper."[72]

Although Bustamante was not successful in alleging bad faith, another litigant might be more successful if the consular officer who denied the visa is the same person promising immigration benefits in exchange for becoming a government informant. An even stronger fact pattern might include an offer of immigration benefits in exchange for knowledge or assistance by the

applicant completely unconnected to the ground of inadmissibility (i.e., a denial based on fraud inadmissibility coupled with a *quid pro quo* offer for a visa in exchange for identifying gang members). Similarly, a promise for an immigration benefit that the consular officer is not empowered to provide (i.e., a grant of asylum status in the United States) might be evidence of a bad faith denial by an officer. A request by the consular officer for the applicant to do something illegal could also be evidence of bad faith. To the best of the authors' knowledge, these fact patterns remain untested in litigation, but are included as ideas for litigators to consider when they undertake consular nonreviewability litigation.

One other avenue of challenge that should be considered is raising the impact of the Homeland Security Act of 2002, and whether it essentially shifts responsibility for determining visa ineligibility from consular officials to Department of Homeland Security officials, thus eliminating (or severely curtailing) the applicability of the consular nonreviewability doctrine. An amicus brief drafted by a group of former consular officers in connection with the *Din* case makes just this argument.[73] This argument was expressly rejected, however, by some courts.[74]

Finally, litigators should always question whether litigation might produce a fruitful settlement for their client, short of litigating the case to conclusion.[75] For example, if the consular decision seems to be based on a prior inadmissibility finding made by CBP, can that finding be challenged under the much more favorable standard of review in the Administrative Procedure Act (APA)? If so, perhaps a litigator should include an APA action against CBP in the same lawsuit and try to negotiate a grant of humanitarian parole for their client. Once in the United States, the applicant would presumably be able to apply for adjustment of status, and any subsequent inadmissibility determination by USCIS would be reviewable either in removal proceedings before an immigration judge or in an APA action in district court.[76] Alternatively, if a consular denial appears to be premised on a prior inadmissibility finding by CBP or USCIS, an APA action against those agencies could result in rescission of the inadmissibility finding, giving the applicant additional evidence to bring to the consulate's attention (and excellent allegations of bad faith if the consulate continues to refuse the visa).

Conclusion

The executive branch has been able to convince the judiciary not to use or expand the limited exception to the doctrine of consular nonreviewability implied in *Mandel*. The importance of this doctrine was highlighted during the Trump administration in cases that stemmed not from visa denials by consular officials but from executive orders banning foreign nationals from predominantly Muslim countries from gaining admission to the United States.

Beginning in January 2017, the executive branch engaged in a series of unprecedented assertions of executive power, pretextually blocking travel from certain countries. The exception to the doctrine of consular nonreviewability has proven to be a necessary method by which the courts have restrained executive overreach. The Fourth Circuit ruled in 2017:

> The Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action, all in the name of the Constitution's separation of powers. We decline to do so, not only because it is the particular province of the judicial branch to say what the law is, but also because we would do a disservice to our own duties to uphold the Constitution. . . . We are likewise unmoved by the Government's rote invocation of harm to "national security interests" as the silver bullet that defeats all other asserted injuries.[77]

Even the Supreme Court's decision in *Hawaii v. Trump*,[78] affirming Trump's later iteration of the travel ban, did not limit the "facially legitimate and bona fide" test.

The doctrine of consular nonreviewability is an outdated doctrine rooted in Chinese and Japanese exclusion cases that should be considered anti-canon. But there is no sign the doctrine is going away any time soon, which means litigators must be prepared to make careful and nuanced arguments urging the courts to give meaning to the "facially legitimate and bona fide" test by clearly laying out instances where the State Department has not met its burden. In this way litigators can ensure that millions of future visa applicants and their family members can exercise their right to hold the executive branch accountable to the constitution.

Notes

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1. 408 U.S. 753 (1972).
2. The professor-plaintiffs were David Mermelstein, Noam Chomsky, Wassily Leontief, Norman Birnbaum, Robert L. Heilbroner, Robert Paul Wolff, Louis Menashe, and David A. Falk.
3. 376 U.S. 254 (1964).

4. *Mandel v. Mitchell*, 325 F. Supp. 620, 629 (E.D.N.Y. 1971).
5. The named plaintiff, Attorney General Richard Kleindienst, was confirmed by the Senate on June 12, 1972, two weeks before the decision.
6. *Mandel*, 408 U.S. at 765.
7. *Id.* at 766.
8. 130 U.S. 581, 609 (1889).
9. 149 U.S. 689 (1893).
10. *Mandel*, 408 U.S. at 765.
11. *Id.* at 764.
12. *Id.* at 765.
13. *Id.* at 782–83.
14. 138 S. Ct. 2392 (2018).
15. 576 U.S. 86 (2015).
16. David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 Okla. L. Rev. 1, 30 (2015).
17. 149 U.S. 698 (1893).
18. 142 U.S. 651 (1892).
19. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold, Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1 (1998); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 Tulane L. Rev. 703 (1997); Matthew Lindsay, *The Perpetual "Invasion": Past as Prologue in Constitutional Immigration Law*, 23 Roger Williams Univ. L. Rev. 369 (2018); Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 San Diego L. Rev. 887 (1989); Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. Rev. 77 (2017–18); Daniel Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 Geo. Immigr. L. J. 113 (2010); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Northwestern Univ. L. J. 583 (2017); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255 (1984).
20. *Mandel*, 408 U.S. at 765.
21. 1984 Sup. Ct. Rev. 255 (1984).
22. David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 Okla. L. Rev. 1, 31 (2015).
23. *Chae Chan Ping*, 130 U.S. at 604.
24. Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 S. Ct. Rev. 255, 275 (1984).
25. *Mandel*, 408 U.S. at 766 (As cited in Robert S. Chang, Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases, Robert Chang, 68 Case Western Reserve L. Rev. 4 (2018)).
26. *Chae Chan Ping*, 130 U.S. at 594.
27. *Id.*
28. *Id.*
29. *Id.* at 595–96.
30. *Id.* at 605.
31. In his dissenting opinion in *Chew Heong v. United States*, Field wrote: "Thoughtful persons who were exempt from race prejudices saw, in the facilities of transportation between the two countries, the certainty, at no distant day, that, from the unnumbered millions on the opposite shores of the Pacific, vast hordes would pour in upon us,

overrunning our coast and controlling its institutions. A restriction upon their further immigration was felt to be necessary to prevent the degradation of white labor, and to preserve to ourselves the inestimable benefits of our Christian civilization." 112 U.S. 536, 569 (1884).

32. James Whitman, Hitler's American Model: The United States and the Making of Nazi Race Law 5 (2017) (emphasis in the original).

33. *Id.* at 51.

34. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

35. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).

36. Migration Policy Institute, *U.S. Immigration Population Share Over Time, 1850-Present*, https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time.

37. Phillip Connor, *Immigration Reform Can Keep Millions of Mixed-Status Families Together* (Sept. 9, 2021), https://www.fwd.us/news/mixed-status-families/.

38. U.S. Dep't of State, Report of the Visa Office 2007–2019, Statistical Table XX: Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal under the Immigration and Nationality Act).

39. Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 S. Ct. Rev. 255, 265 (1984).

40. *Id.* at 270.

41. *Ngassam v. Chertoff*, 590 F. Supp. 2d 461, 466–67 (S.D.N.Y. 2008).

42. *Loza-Bedoya v. INS*, 410 F.2d 343, 347 (9th Cir. 1969).

43. *Hossain v. Rice*, No. 07-CV-2857, 2008 WL 3852157, at *3 (E.D.N.Y. Aug. 16, 2008) (plaintiff alleged government discriminates in bad faith against Bangladeshi visa applicants).

44. 576 U.S. 86 (2015).

45. *Id.* at 105.

46. *Id.*

47. *Din v. Kerry*, 718 F.3d 856, 861 (9th Cir. 2013).

48. *Id.* at 862.

49. Notably, the Sixth Circuit has found that even spouses of visa applicants lack any constitutional interest in the adjudication of a visa application. *See Baaghil v. Miller*, 1 F.4th 427, 433 (6th Cir. 2021) ("As to Ahmed, the question is whether the visa denials violated his constitutional rights. They did not. American residents—whether citizens or legal residents—do not have a constitutional right to require the National Government to admit noncitizen family members into the country. The same holds true for spouses. An American resident has no right to have his noncitizen spouse enter or remain in the country."). In the Ninth Circuit, *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008), establishes that spouses do have sufficient liberty interest to bring suit.

50. 4 F.4th 841 (9th Cir. 2021).

51. *Id.* at 855 (emphasis in original).

52. *Id.* at 856 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 666–67 (2015)).

53. *Id.* at 857 (emphasis in original).

54. *Blazquez v. Barr*, 2021 WL 4706714, *4 (C.D. Cal. Aug. 12, 2021) (unpublished).

55. *Del Valle v. Sec'y of State*, 16 F.4th 832, 841 (11th Cir. 2021) (quoting *Din*, 576 U.S. at 105) (other internal citations omitted); *see also Khachatryan*, 4. F.4th at

852 (concluding that the fraud-related inadmissibility statute specifies discrete factual predicates the consular officer must find to exist before denying a visa).

56. *See* Baaghil v. Miller, 1 F.4th 427, 432 (6th Cir. 2021); Sesay v. United States, 984 F.3d 312, 316 (4th Cir. 2021).

57. *Del Valle*, 16 F.4th at 842.

58. *Id.* at 843.

59. As discussed in more detail below, Del Valle may have had a plausible claim to bad faith due to seemingly contradictory findings about his admissibility by U.S. Citizenship and Immigration Services and the Department of State, but because he failed to plead bad faith, the Eleventh Circuit did not analyze whether these contradictory findings were sufficient to meet Del Valle's burden at the pleadings stage.

60. 526 F. Supp. 3d 709 (C.D. Cal. 2021).

61. Answering Brief at 28, *Muñoz v. Dep't of State*, No. 21-55365, Docket No. 18.

62. 142 U.S. 651 (1892).

63. *See* Answering Brief at 44, *Muñoz v. Dep't of State*, No. 21-55365, Docket No. 18 (quoting *Nishimura Ekiu*, 142 U.S. at 659). Nishimura Ekiu was a 25-year-old Japanese national who came to the United States on a steamship in 1891 looking for her husband, whose whereabouts she did not know. She was arrested in San Francisco and detained in a church. An immigration official deemed she was too poor to stay in the United States. The Supreme Court affirmed the immigration official's finding.

64. *Khachatryan*, 4 F.4th at 852–53.

65. *Id.* at 853.

66. *Id.* at 854 (emphasis in original).

67. *Blazquez v. Barr*, 2021 WL 4706714, *4 (C.D. Cal. Aug. 12, 2021) (unpublished).

68. Notably, USCIS no longer evaluates whether a provisional waiver applicant is inadmissible on other grounds, so this argument may not have any teeth for more recent waiver approvals. *See* Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 Fed. Reg. 50244, 50254 (July 29, 2016).

69. Del Valle v. Sec'y of State, 16 F.4th 832, 843 (11th Cir. 2021).

70. 531 F.3d 1059 (9th Cir. 2008).

71. *Id.* at 1061.

72. *Id.* at 1063.

73. Brief of *Amici Curiae* Former Consular Officers in Support of Respondent, Kerry v. Din, 576 U.S. 86 (2015) (No. 13-1402), AILA Doc. No. 15012243.

74. *See, e.g.*, *Raduga USA Corp. v. U.S. Dept. of State*, 284 F. App'x 404 (9th Cir. June 30, 2008) (memorandum); *Ruiz-Herrera v. Holder*, No. 1:12-cv-0194-JEC, 2013 WL 1136849, *3 (N.D. Ga. Mar. 15, 2013).

75. As a matter of ethics, a litigator must have a good faith legal basis for bringing a lawsuit, and the authors are *not* suggesting that practitioners file cases devoid of any bona fide arguments that a consular denial is not facially legitimate and bona fide for the sole purpose of trying to negotiate a settlement with another agency.

76. Unfortunately, the recent Supreme Court decision in Patel v. Garland, 142 S. Ct. 1614, 1626–67 (2022), calls into question whether APA challenges to denials of adjustment of status can continue to be brought in district court. Practitioners will need to consider whether there are other benefits to an adjustment of status application, such as possible review in removal proceedings.

77. *IRAP v. Trump*, 857 F.3d 554, 601–03 (4th Cir. 2017).
78. 138 S. Ct. 2392 (2018).

International Human Rights Law and the Detention of Asylum Seekers

Curtis F.J. Doebbler and Elisa Fornalé*

Abstract: In this paper we provide an overview of the U.S. practice of detaining asylum seekers and compare the U.S. practice to the international human rights obligations applicable to the United States. This comparison is made in the context of the international movement toward cooperation on matters of migration and refugees evidenced by the Global Compacts on Migration and on Refugees recently adopted under the United Nations auspices. We conclude that the U.S. practice of detaining asylum seekers is inconsistent both with this general movement toward cooperation and with legal obligations that are applicable in respect of internationally protected human rights.

The U.S. and Relevant International Human Rights Law

The United States is a party to both UN and regional human rights instruments that provide rights for asylum seekers. Several UN human rights treaties create obligations for the United States. These include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[1] the International Covenant on Civil and Political Rights (ICCPR),[2] and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[3] In addition, the United States is party to the Protocol to the United Nations Convention relating to the Status of Refugees (Refugee Protocol),[4] which incorporates articles 2 to 34 of the Convention relating to the Status of Refugees (Refugee Convention).[5] This latter treaty, in article 33, paragraph 1, obliges states not to *refoul* or return any person to a country from which they are seeking protection from persecution, and under article 31, paragraph 1, states that the signatories "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened … enter or are present in their territory without authorization."[6]

The United States has additional international legal obligations as a member state of the Organization of American States (OAS). The Inter-American Commission on Human Rights has held that the provisions of the American Declaration of the Rights and Duties of Man[7] (ADRDM) are part of the international law applicable to the United States.[8]

The United States has justified the detention of noncitizens as a measure to be used if an "alien poses a danger to the community or is likely to abscond" and takes the position that the "current U.S. law fully satisfies the obligations the

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U.S. has assumed" under international human rights law.[9] The brief review of U.S. policy and practices that follows raises significant concerns about whether the United States is acting consistent with its international legal obligations.

The Right to Seek Asylum

Treaties and customary international law[10] as well as U.S. law[11] provide for the right to seek asylum. This right requires the U.S. government to ensure that individuals claiming asylum are provided a fair hearing.[12] The right to seek and receive asylum also requires that an asylum seeker be provided adequate means to present their claim for protection. At the very least, this means access to legal representation, access to necessary communications facilities, and humane treatment. Often the private companies that run the detention centers housing asylum seekers restrict or deny these necessities. In 2001, Erika Feller noted that "[i]ncreased detention, reduced welfare benefits and severe curtailment of self-sufficiency possibilities, coupled with restricted family reunification rights" were indicative of increasingly restrictive asylum policies among states (nation-states).[13] In recent years the United States significantly increased restrictions on asylum by practices that included separating young children from their parents[14] and detaining and prosecuting more entering migrants for illegal entry.[15] These practices made applying for asylum more difficult for many migrants. In addition, the United States implemented Migrant Protection Protocols, agreements signed with other states to allow asylum seekers to be sent abroad to await their hearings, which have restricted access to the right to request and be granted asylum.[16]

Due Process Rights

The right to seek asylum requires a fair process, a human right that is included in numerous widely ratified human rights instruments.[17] Article XVIII of the ADRDM provides for "resort to the courts to ensure respect for . . . legal rights . . . [with] . . . a simple, brief procedure whereby the courts will protect [individuals] from acts of authority that, to [their] prejudice, violate any fundamental constitutional rights" and Article XXVI states that "[e]very person accused of an offense has the right to be given an impartial and public hearing . . ."[18] The Inter-American Commission on Human Rights (IACHR) has made it clear that it understands these fair trial provisions to apply to immigration proceedings.[19] It noted that to deny an alleged victim these protections "simply by virtue of the nature of immigration proceedings would contradict the very object of this provision and its purpose to scrutinize the proceedings under which the rights, freedoms and well-being of the persons under the state's jurisdiction are established."[20] Furthermore, the right to due

process requires that the government respect the special protections, including the rights agreed to in the *Flores Settlement* in federal court.[21]

The IACHR has reiterated that due process protections apply to migrants, stating that "[w]hile many of these guarantees are articulated in a language that is more germane to criminal proceedings, they must be strictly enforced in immigration proceedings as well, given the circumstances of such proceedings and their consequences."[22] Similarly, the United Nations Human Rights Committee (HRC) has held that articles 14 and 26 of the ICCPR require that detention should not continue beyond the period for which a state party can provide appropriate justification; otherwise, it becomes arbitrary.[23]

Although domestic law can never serve as justification for a state's failure to satisfy its international legal obligations,[24] the U.S. government has argued that the length of detention of aliens was reasonable because it has been approved by its Supreme Court.[25] The United States effort to justify action inconsistent with its international legal obligations has been criticized by the U.S. nongovernmental organization (NGO) Human Rights Watch, which points out that the United States subjects immigrants to "prolonged periods of immigration detention" in violation of international law.[26]

Arbitrary Detention

Both the ADRDM in article XXV and the ICCPR in article 9 prohibit arbitrary detention. Detention is arbitrary when there is no legitimate basis for it, including when it occurs after an unfair procedure.[27] Moreover, "'arbitrariness' is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability."[28] The IACHR has also determined that a reasonable length of time is determined based on the facts of each case and that the right to due process requires that individuals are not "unnecessarily" deprived of their liberty.[29]

The HRC has developed substantial jurisprudence on cases concerning arbitrary detention that is based on the understanding that "the fact that detention is lawful under domestic law does not necessarily mean that it is not arbitrary; the notion of arbitrariness includes elements relating to reasonableness, necessity and proportionality, as well as predictability and due process of law."[30] In the case *Baban v. Australia*,[31] which concerned the detention for two years of an Iraqi Kurdish father and his two-year-old son in Australia after they claimed asylum upon arrival, the HRC found their detention arbitrary because the government did not provide sufficient evidence to justify their prolonged detention, nor did the government make any effort to explore alternative measures.[32] The HRC has consistently followed this reasoning.[33] In the HRC's jurisprudence, detention is not considered a proper instrument of migration control unless it is reasonable, proportionate, and serves a legitimate interest of the state.[34]

The UN Working Group on Arbitrary Detention (WGAD), in reviewing the case of a Honduran asylum seeker who was detained for more than five years in the United States without access to legal counsel or adequate means of preparing his case, found the detention to be arbitrary.[35] The WGAD determined that the detention was neither proportionate nor reasonable and that the asylum seeker had not been granted a hearing before an independent tribunal. In a previous report on a country visit to the United States, the WGAD criticized the U.S. policy of mandatory detention of asylum seekers as constituting arbitrary detention.[36] The IACHR has also found the United States' mass detention and deportation of Cuban asylum seekers to be contrary to article XXV of the ADRDM. Although the Commission considered the discretion states have in maintaining their borders, it determined that the detention of the Cuban asylum seekers was not "reasonable and proportionate to the objective sought in the circumstances."[37] The Commission also found that providing access to *habeas corpus* was not a sufficient safeguard as "any relief available from the courts has been predicated upon the absence of any right to liberty on the part of the petitioners."[38]

The Right to Life

The right to life is among the paramount human rights recognized today in article I of the ADRDM and article 6 of the ICCPR.[39] Asylum seekers' right to life may be threatened in several ways. The most obvious is the threat that they will be returned to face death in the country from which they fled. Less obvious may be the threat of dying in detention because the policies and practices of immigration detention threaten the lives of migrants. This latter threat is discussed below in the section on the right to health.

Although the right to life is rarely discussed as a separate right of asylum seekers, the dangers they may face by ill treatment in detention and if returned to the country from which they have fled, often pose genuine threats to their right to life.

The Prohibition of Torture and Inhumane and Degrading Treatment and Security of Person

All individuals under the jurisdiction of the United States are protected against torture, cruel, inhuman, and degrading treatment and punishment under international human rights law. This protection can be found in article 7 of the ICCPR, article 1 of the CAT, article 5 of the Universal Declaration of Human Rights (UDHR), and article XXV of the ADRDM. It appears in virtually almost every human rights treaty. Authoritative statements of U.S. law also recognize the prohibition of torture as customary international law.[40]

Similarly, the right to security of person is guaranteed by articles 7, 9(1), 9(4), and 10(1) of the ICCPR and reiterated in article 3 of the UDHR and articles I and XXV of the ADRDM. The general principles for detention conditions have been outlined by the UN High Commissioner for Human Rights (UNHCR)[41] to include enjoyment of the highest attainable standard of physical and mental health;[42] a basic standard of living, including clothing, bedding, food, water, and space; freedom from cruel, inhuman, or degrading punishment; the right to education; the right to family unit (art. 23); the right of all children to special measures of protection (art. 24); and freedom to practice religion. States have the responsibility to ensure that noncitizen detainees can communicate with the outside world.[43] These provisions of both treaty and customary international law provide obligations to ensure adequate facilities for migrants in detention "with respect for the inherent dignity of the human person."[44] When detained for the purposes of immigration control, migrants should be housed in facilities "specifically intended for this purpose."[45]

The intimidating and threatening environment that exists in some detention centers operated by private contractors creates an inhumane environment and constitutes a *prima facie* claim to inhumane treatment. The fact that the intimidation and threats have sometimes been followed by action only makes the intimidation and threats more credible. Actions that rise to the level of cruel, inhumane, or degrading treatment or punishment or torture are also prohibited by CAT. The United States has a responsibility to ensure that private detention center operators abide by the international commitments the United States has made to ensure the humane treatment of immigration detainees.

The HRC, in compiling the List of Issues Prior to Reporting for the fifth periodic report and submitted in November 2021, requested that the United States "provide information on the conditions within immigrant detention facilities."[46] These conditions included detaining children "in overcrowded facilities; in conditions that keep them from sleeping; without the ability to brush their teeth, shower, or access clean clothes or diapers; and [in which they] are often forced to look after one another."[47] NGOs also exposed mistreatment that included forced feeding, other types of physical and psychological coercion,[48] as well as family separations and threatening separation.[49] Women and children have alleged serious mistreatment, including sexual abuse and denial of medical care, during their detention.[50] All of these actions constitute violations of the human right to humane treatment and/or security of person.

The Right to Health

Most states have recognized the universally legal binding nature of the right to health.[51] The right is also reflected in the ADRDM,[52] which requires the United States to ensure that all persons under its jurisdiction can access and benefit from "sanitary and social measures relating to food, clothing, housing

and medical care."[53] While this right can be limited to the "extent permitted by public and community resources,"[54] limitations cannot be based on nationality, especially in relation to life-saving health care. As a result, the U.S. government, as well as its contracted private detention center operators, must ensure the right to health of all detainees, including immigration detainees. This appears to be the position of the U.S. Supreme Court.[55]

According to the U.S. government, the standards of detention centers often fell short of securing an adequate standard of health care.[56] Often, staff were not properly vetted and did not understand how to respect or care for the health of detainees, sometimes even contributing to their mistreatment and subsequent serious health problems.[57]

When the United States was affected by the pandemic of the highly infectious and deadly COVID-19 virus at the start of 2020, the United States acted in ways that caused further harm to detained migrants' health. Immigrant advocates documented conditions at family detention centers that did not ensure the right to health of detainees.[58] Detention centers where families are held continue to have crowded living situations[59] and inadequate precautions for COVID-19.[60] The United States also continues to transfer detainees between detention centers without engaging in the recommended screening process recommended by the Centers for Disease Control and Prevention[61] and without the recommended "intensified cleaning and disinfecting procedures,"[62] often leaving detainees to do their own cleaning without adequate cleaning products.[63] Thus, despite the harrowing scenario of a deadly pandemic, both the executive branch of government and the judiciary in the United States have forced migrants to remain detained in crowded congregate facilities where social distancing is not possible and adequate health precautions are not available.[64]

Women's and Children's Rights

Article 24 of the ICCPR guarantees that every child has "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." The UNHCR has produced several publications outlining the special protections needed for female asylum seekers[65] and even intervened in immigration proceedings when these legal protections were not being observed.[66]

The immigration policies and practices of the United States, particularly in detaining families, have been a constant issue of concern since the country made its first report to the HRC in 1994.[67] Amnesty International more recently described the use of family detention as a measure based solely on migration status to constitute cruel and degrading treatment that "rose to the level of torture in some cases."[68] At family detention centers, interference with women's and children's rights to adequate medical care, denial of adequate

access to legal counsel, and punitive solitary confinement also constitute practices that are inconsistent with the fundamental human right to humane treatment.[69]

The Right to Family Life

Closely related to women's and children's rights is the right to family life. Numerous human rights treaties to which the United States is a party recognize and protect this right.[70] Its customary law expression is reflected in article VI of the ADRDM[71] and article 16(3) of the UDHR,[72] among other treaties ratified by numerous states.[73] The Council of Europe's Committee on Migration, Refugees, and Demography has expressed concern about "the extremely restrictive standards underlying the regulations governing family reunion in the United States of America."[74] The UNHCR has also recognized that "[t]he right to family life and family unity . . . applies to all, including refugees."[75]

The Convention on the Rights of the Child (CRC)[76] specifically protects children's right to remain with their parents in several of its articles. Article 10 of the CRC requires the state to treat family reunification applications "in a positive, humane, and expeditious manner."[77] Article 22, paragraph 1, requires states to ensure that a minor asylum seeker, "whether unaccompanied or accompanied by his or her parents or by another person, receives appropriate protection and humanitarian assistance."[78] And its second paragraph requires states to cooperate with efforts for family reunification, and "[w]here no parents or other family members can be found," to accord a child "the same protection as any other child permanently or temporarily deprived of his or her family environment."[79] The CRC has also opined that "[m]echanisms established under national law in order to ensure alternative care for such children in accordance with article 22 of the Convention, shall also cover unaccompanied or separated children outside their country of origin."[80] The obligations toward unaccompanied children are arguably part of customary international law due to their almost unanimous acceptance by the states through the ratification of the CRC, including the United States, which appears to support the protections for unaccompanied children in its domestic law.[81]

Respect for family life requires that the state not interfere with family life to the extent of separating families for no legitimate reason, and it requires the state to take affirmative action to protect the integrity of families.[82] Family separations intended to discourage migrants from coming to the United States are inconsistent with the right to family life.[83] The right to family life "requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated."[84] Furthermore, a "[r]efusal to allow family reunification may be considered as an interference with the right to family life," and "deportation or expulsion could constitute

an interference with the right to family unity unless justified in accordance with international standards."[85]

The Right to Freedom of Expression

The United States has perhaps shown more respect for the right to freedom of expression in its society and legal forums than any other right.[86] The U.S. proposal for the UDHR, drafted in 1946–48, contained a single right: the right to freedom of expression.[87] This right enjoys significant protection under the First Amendment to the U.S. Constitution, including protecting the right of free speech by migrants. It is also protected in article 19 of the ICCPR and under customary international law, as reflected in article IV (freedom of expression) of the ADRDM. The closely related rights to the freedoms of association and assembly are protected in articles 21 (assembly) and 22 (association) of the ICCPR and under customary international law, as reflected in articles XXI (assembly) and XXII (association) of the ADRDM.

Both detained migrants[88] and their legal representatives[89] have claimed to have suffered retaliation for exercising their freedom of expression.

The Right to Freedom of Movement

The right to freedom of movement is guaranteed by article 12 of the ICCPR and in article VIII of the ADRDM. Although the right to freedom of movement is subject to derogation, when imposed as "mandatory detention" it appears to indicate that the state is acting for reasons of political or administrative convenience and not out of necessity. The CAT in Concluding Observations "notes with concern that, under certain circumstances, the [United States] continues to use mandatory detention to hold asylum seekers and other immigrants on arrival in prison-like detention facilities, county jails, and private prisons."[90] The UN Special Rapporteur on the Human Rights of Migrants recalled that "detention for immigration purposes should never be mandatory or automatic."[91] The Executive Committee of the UNHCR confirmed that detention should "normally be avoided,"[92] and the UNHCR, in its guidelines, highlighted that the use of "detention is, in many instances, contrary to the norms and principles of international law."[93] The United Nations has called "on States to consider alternatives to detention in the context of protection the human rights of migrants and ending arbitrary detention."[94]

While restrictions on asylum seekers' movements might be allowed under limited exceptions, they are not permitted as a mere act of political or administrative convenience.

Justifications

The state responsibility of the United States for an international act requires examining the United States' justification for its actions. Even if the United States has acted contrary to its international legal obligations it can avoid responsibility for violations of international human rights law if its acts are justified.

The U.S. government has attempted to justify its detention of noncitizens with reasons of sovereignty,[95] national security,[96] to prevent unmanageable numbers of immigrants,[97] to protect the public from dangerous persons,[98] and to ensure noncitizens appear for their immigration court hearings.[99]

Concerns of Sovereignty

The U.S. Constitution provides the government authority over immigration and foreign affairs[100] and courts have upheld this understanding.[101] However, in the modern world, immigration is no longer solely a national concern and is limited by both national and international law.[102] Today, "human rights and sovereignty must go hand in hand. Human rights strengthen States and societies and reinforce sovereignty."[103] The IACHR has explained "[t]hat the general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person"[104] and that "the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights."[105]

Reasons of National Security

While national security has been claimed as a justification for detaining noncitizens,[106] under international law a state cannot justify the violation of the right to life or the prohibition of torture on this ground.[107]

Furthermore, the IACHR has recognized that states have enacted controls on noncitizens "based on discriminatory criteria, accompanied by xenophobia in the name of national security, nationalism or national preference."[108]

Unmanageable Numbers of Immigrants

The United States has claimed that the detention of noncitizens is necessary to prevent unmanageable numbers of immigrants from coming to the United States. The U.S. government premises its justification on national security of public order, but like the justifications of sovereignty or national security,

these cannot be grounds for interfering with the non-derogable rights of life and humane treatment that are the basis of asylum seekers' claims.

Protecting the Public From Dangerous Persons

As noted above,[109] the U.S. government has claimed that it is protecting the public from dangerous persons. However, according to U.S. law, being in the United States in a manner that is inconsistent with U.S. immigration laws is not a criminal offense but is merely subject to a civil penalty that may include removal. But the premise of this claim—that noncitizens in the United States are dangerous or cause crime—is debatable. Michael T. Light and Ty Miller have shown that in fact undocumented migration has decreased crime in the United States.[110]

Ensuring Noncitizens Appear for Their Immigration Court Hearings

Perhaps the clearest reason for detaining noncitizens is to ensure they attend their civil immigration hearings. Administrative convenience cannot, however, be a justification for the violation of human rights.

Conclusion

The United States' practice of detaining asylum seekers raises significant concerns about its consistency with international human rights law. Many fundamental human rights are non-derogable. Even when restrictions are allowed, they must be justified as exceptions that are necessary, proportionate, and generally in the public interest.[111] The detention of asylum seekers in the United States is an administrative convenience for the government; it is neither necessary nor proportionate. As states reiterate their aspirations for cooperation on the protection of refugees,[112] it is time that the United States reconsider its detention of asylum seekers.

Notes

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1. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force for the United States on Oct. 21, 1994).

2. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force for the United States on Sept. 8, 1992).

3. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force for the United States on Oct. 21, 1994).

4. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force for the United States on Nov. 1, 1968).

5. Convention relating to the Status of Refugees, July 28, 1951,189 U.N.T.S. 137 (entered into force on Apr. 22, 1954).

6. *Id.* at art. 31.

7. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Apr. 1948, O.A.S. Doc. OEA/Ser.L.V/II.82 doc.6 rev.1 (1992).

8. *Roach and Pinkerton v. United States*, Case No. 9647, Res. No. 3/87, Inter-Am. Com. H.R., at paras. 45–48 (Sept. 22, 1987).

9. International Covenant on Civil and Political Rights, Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, Aug. 24, 1994, CCPR/C/81/Add.4. para. 251.

10. *See supra* note 5; art. 14(1) UDHR, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948), art. 1(1) of the Declaration on Territorial Asylum, G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A16912 (1967) and art. XXVII, ADRDM.

11. *See* 208(a)(1) of the Immigration and Nationality Act, 8 U.S.C.A. § 1158.1.

12. Finding in these treaties "there is recognition of a right of a person seeking refuge to a hearing in order to determine whether that person meets the criteria in the Convention." Para. 155, *Haitian Interdiction v. United States*, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L/V/II.98, doc. 6 rev. (1997). Inter-American Commission also "noted that both prior to and subsequent to the Supreme Court's decision [*Sale v. Haitian Centers Council*, 509 U.S. 155 (1993)] the United States recognized and acknowledged the right of Haitian refugees to seek and receive asylum in the United States." *Id.* at para. 160.

13. Erika Feller, *International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future*, 83 Int'l Rev. Red Cross 843 (2001).

14. Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (January 25, 2017). For a discussion of this policy, *see also* Ediberto Romána and Ernesto Sagás, *A Domestic Reign of Terror: Donald Trump's Family Separation Policy*, 24 Harv. Latinx L. Rev. 65 (2021).

15. *See* Women's Refugee Commission, and Lutheran Immigration and Refugee Service, Kids in Need of Defense (KIND), Betraying Family Values: How Immigration Policy at the United States Border Is Separating Families (Jan. 10, 2017).

16. Inter-American Commission Press Release, *IACHR Conducted Visit to the United States' Southern Border* (Sept. 16, 2019). *But see Johnson v. Arteaga-Martinez*, No. 19-896, 596 U.S. __ (2022), allowing the administration of Joseph Biden to end MPP as it sought to do.

17. *See, e.g.*, ICCPR, arts. 6, 7, 14 (which entered into force on Mar. 23, 1976, and is ratified by 173 of 206 sovereign states in the international community); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 2, 3, 6, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953, and is ratified by 47 European states); American Convention on Human Rights, Nov. 22, 1969, arts. 4, 5, 8, 114 U.N.T.S. 213 (entered into force July 18, 1978, and is ratified by 25 American states); African Charter of Human and Peoples' Rights, June 27, 1981, arts. 4, 5, 7, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986, and is ratified by 54 African States) and the Arab Charter on Human Rights (which entered into force on Mar. 15 2008, and is ratified by 15 states, with two, Morocco and Tunisia, in the progress of ratification as of mid-2021). Together these treaties enjoy more than 300 ratifications.

18. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Apr. 1948, O.A.S. Doc. OEA/Ser.L.V/II.82 doc.6 rev.1 (1992).

19. *See Andrea Mortlock v. United States*, Inter-Am. Comm'n H.R., Report No. 63/08, Case No. 12.534, para. 83 (2008) (Admissibility and Merits, Judgment).

20. *Id.*

21. Stipulated Settlement Agreement at ¶ 6, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997). This settlement was the result of a case brought on behalf of minor noncitizens who had been detained upon entering the United States or shortly thereafter. The settlement required that the government provide care and protection for these children and release them as soon as practical.

22. Inter-American Commission on Human Rights (IACHR), *Report on Immigration in the United States: Detention and Due Process*, O.A.S. Doc. OEA/Ser.L/V/II.Doc. 78/10 (Dec. 30, 2010). *See also* IACHR, *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, Annual Report 2000*, para. 90 (Apr. 16, 2001); *Wayne Smith v. United States*, Admissibility, Inter-Am. Comm'n H.R., Report No. 56/06, Case No. 12.562, para. 51 (July 20, 2006); *Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Rodolfo Izal Elorz v. Mexico*, Merits, Inter-Am. Comm'n H.R., Report No. 49/99, Case No. 11.610, para. 46 (Apr. 13, 1999).

23. *Madani v. Algeria*, UN Human Rights Committee, Comm. No. 1172/2003, views adopted on Mar. 28, 2007, para. 8.4; *C. v. Australia*, UN Human Rights Committee, Comm. No. 900/1999, views adopted on Oct. 28, 2002, para. 8.2; and *Baban v. Australia*, Comm. No. 1014/2001, views adopted on Aug. 6, 2003, para. 7.2.

24. *See* art. 32, UN International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001) ("[t]he principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions." *Id.* at 94.).

25. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001) *and* *Clark v. Martinez*, 543 U.S. 371 (2005).

26. *See* Human Rights Watch, List of Issues Submission to the United Nations Human Rights Committee During Its Periodic Review of the United States of America 9 (Jan. 14, 2019), https://www.hrw.org/sites/default/files/news_attachments/hrw_hrc_submission.pdf.

27. *See, e.g.*, Working Group on Arbitrary Detention, *Methods of Work of the Working Group on Arbitrary Detention*, July 13, 2017, UN Doc. A/HRC/36/38 at p. 3, para. 8(c).

28. *Alphen v. Netherlands*, UN HRC Comm. 305/1998, UN. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8.

29. *Suárez-Rosero Case*, Inter-American Court, Judgment of Nov. 12, 1997, at paras. 70 and 71.

30. Gerald L. Neuman, Chapter 19: Detention as a Last Resort: The Implications of the Human Rights Committee's General Comment No. 35, *in* Protecting Migrant Children 381, 383 (Mary Crock and Lenni B. Benson eds., 2018).

31. *Baban v. Australia*, UN Doc. CCPR/C/78/D/1014/2001, UN Human Rights Committee (Sept. 18, 2001), https://www.refworld.org/cases,HRC,404887ee3.html.

32. *Id.*

33. *Bakhtiyari v. Australia*, UNHRC Comm. No. 1069/2002 (Oct. 29, 2003); *D and E v. Australia*, UNHRC Comm. No. 1050/2002 (July 11, 2006); *FKAG v. Australia*, UN HRC Comm. No. 2094/2011 (July 26, 2013); and *MMM v. Australia*, UNHRC Comm. No. 2136/2012 (July 25, 2013).

34. *See also* UN HRC, General Comment No. 35, para. 18.

35. *Marcos Antonio Aguilar-Rodríguez v. United States of America*, UN WGAD Opinion, UN Doc. A/HRC/WGAD/2017/72 (Dec. 28, 2017).

36. *See* Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention on its visit to the United States of America, July 17, 2017, UN Doc. A/HRC/36/37/Add.2 at para. 92.

37. *Id.* at para. 239.

38. *Id.* at para. 244.

39. *See also* art. 4 of the African Charter on Human and Peoples' Rights, 1520 U.N.T.S. 217 (1981); art. 5 of the African Charter on the Rights and Welfare of the Child, OAU (now AU) Doc. CAB/LEG/24.9/49 (1990); art. 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, OAU (now AU) Doc. CAB/LEG/24.9/49 (1990); arts. 5 and 6 of the Arab Charter on Human Rights (adopted Sept. 15, 1994), reprinted in (1997) 18 HRLJ 151; art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950); art. 4 of the American Convention on Human Rights, 1144 U.N.T.S. 123 (1969); and art. 4 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 33 I.L.M. 1534 (1994).

40. *See, e.g.*, American Law Institute's Restatement (Third) of Foreign Relations Law of the United States § 702(d) (1986).

41. UN Office of the High Commissioner for Human Rights (OHCHR), Human Rights and Prisons: A Pocketbook of International Human Rights Standards for Prison Officials, 2005, HR/P/PT/11/Add.3.

42. UN Committee on Economic, Social, and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, Aug. 11, 2000, UN Doc. E/C.12/2000/4. "States are under the obligation to respect the right to health by, *inter*

alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative, palliative health services." *Id.* at para. 34.

43. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), Art. 12.

44. International Covenant on Civil and Political Rights (ICCPR), Art. 10(1).

45. Working Group on Arbitrary Detention, *Report on the Fifty-Sixth Session*, Dec. 28, 1999, U.N. Doc. E/CN.4/2000/4 Annex 2.

46. See HRC, List of Issues Prior to Reporting, CCPR/C/USA/QPR/5, April 18, 2019, and United States of America: Periodic Report, CCPR/C/USA/5, submitted November 11, 2021.

47. Michael Garcia Bochenek, *US: Separated Families Report Trauma, Lies, Coercion*, Human Rights Watch (July 26, 2018, 7:00 a.m. EDT), https://www.hrw.org/news/2018/07/26/us-separated-families-report-trauma-lies-coercion.

48. *See, e.g.*, American Civil Liberties Union (ACLU) and Physicians for Human Rights (PHR), *Behind Closed Doors: Abuse and Retaliation Against Hunger Strikers in US Immigration Detention* (2021), https://www.aclu.org/sites/default/files/field_document/aclu_phr_behind_closed_doors_final_0.pdf.

49. Hajar Habbach, Kathryn Hampton & Ranit Mishori, *You Will Never See Your Child Again": The Persistent Psychological Effects of Family Separation*, Physicians for Human Rights (PHR) (Feb. 25, 2020), https://phr.org/our-work/resources/you-will-never-see-your-child-again-the-persistent-psychological-effects-of-family-separation/.

50. Ranjana Natarajan, Denise Gilman, et al., Civil Rights Clinic and Immigration Clinic of the University of Texas, *Report Regarding Grave Rights Violations Implicated in Family Immigration Detention at the Karnes County Detention Center*, Sept. 26, 2014 (updated Oct. 20, 2014).

51. UN Office of the High Commissioner for Human Rights and World Health Organization, *Right to Health*, Fact Sheet No. 31 (June 2008) at 10.

52. American Declaration of the Rights and Duties of Man (ADRDM), Apr. 1948, Art. XI.

53. *Id.*

54. *Id.*

55. *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976) (holding that "elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration").

56. *See, e.g.*, Office of Inspector General, U.S. Department of Health and Human Services, *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody*, Sept. 2019, Report No. OEI-09-18-00431.

57. *See* Inspector General, Department of Health and Human Services, Alien Children Care Provider Facilities Generally Conducted Required Background Checks But Faced Challenges in Hiring, Screening, and Retaining Employees, Sept. 2009, Report No. A-12-19-20001.

58. *See* Physicians for Human Rights, Praying for Hand Soap and Masks: Health and Human Rights Violations in U.S. Immigration Detention During the COVID-19 Pandemic, Jan. 2021.

59. Emergency Verified Petition for a Writ of Mandamus and Complaint for Declaratory and Injunctive Relief, *O.M.G. v. Wolf*, No. 1:20-cv00786 (D.D.C. Mar. 20, 2020), https://www.raicestexas.org/wp-content/uploads/2020/03/O.M.G

.et-al.-v.-Wolf-et-al.-ECF1-20200321.pdf. The case was ultimately dismissed after the U.S. government released many of the petitioners.

60. *Id.* at 9.

61. Lisa Riordan Seville and Hannah Rappleye, *ICE Keeps Transferring Detainees Around the Country, Leading to COVID-19 Outbreak*, NBC News (May 31, 2020, 12:08 p.m. CEST), https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856 ("ICE declined to provide information on how many transfers have occurred throughout the pandemic. But NBC News identified nearly 80 since the pandemic was declared, and that is not a complete accounting.").

62. *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC Centers for Disease Control and Prevention (July 14, 2020), https://stacks.cdc.gov/view/cdc/90546.

63. *Supra* note 58, at 29.

64. *See, e.g.*, *Debnam v. Bexar Cnty. Sheriff*, No. SA-CV-1048-FB, 2020 WL 5416513 (W.D. Tex. Sept. 9, 2020) (Biery, J.) (dismissing habeas petition of pretrial detainee challenging the rules, customs, and procedures of confinement because petitioner could not bring conditions of confinement claims in habeas); *Cleaver v. Ma'at*, No. 1:20-cv-00539-LY, ECF No. 20 (W.D. cognizable in habeas, even with allegations he has not been provided adequate medical care); *Haar v. Carr*, No. 4:20-CV-704-P, 2020 WL 3895298 (N.D. Tex. July 10, 2020) (Pittman, J.) (dismissing federal detainee's habeas claims); *Belton v. Gautreaux*, No. 20-00278-BAJ-SDJ, 2020 WL 3629583 (M.D. La. July 3, 2020) (Jackson, J.) (denying habeas TRO for release of detainee with numerous medical conditions); *Cheek v. Warden*, No. 4:20-CV-677-P, 2020 WL 3637627 (N.D. Tex. July 1, 2020) (Pittman, J.) (dismissing federal detainee's habeas claims). *Compare Dada v. Witte*, 1:20-CV-00458, 2020 WL 2614616 (W.D. La. May 22, 2020) *and Vazquez Barrera v. Wolf*, Case No, 4:20-cv01241, 2020 WL 1904497 (S.D. Tex. Apr. 17, 2020), both cases releasing migrants due to the threats posed to them by COVID-19.

65. *See, e.g.*, UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, UN Doc. HCR/GIP/02/01 and UNHCR, Guidelines on the Protection of Refugee Women, July 1991.

66. *See* Brief in Amicus Curiae the United Nations High Commissioner for Refugees in Support of Respondents in *Matter of A–R–C–G–*, 26 I&N Dec. 388 (BIA 2014).

67. International covenant on civil and political rights, Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, Aug. 24, 1994, CCPR/C/81/Add.4.

68. Amnesty International, Americas: Stuck at the Door—The Urgent Need for Protection of Central American Refugees, Asylum Seekers and Migrants in the Caravans, Nov. 2018, AI Index No. AMR 01/9447/2018 at 8.

69. *Supra* note 47, at 49–58.

70. *See, e.g.*, Art. 23(1), ICCPR, and art. 10(1), ICESCR. *See also* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 U.N.T.S. 3 (1990).

71. Article 23 states:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

72. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), U.N. Doc. A/810 at 71.

73. *See, e.g.*, art. 23(1) of the ICCPR, *supra* note 2; art. 10(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3 (1966); and art. 44 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), 2220 UNTS 3 (1990).

74. Council of Europe, Parliamentary Assembly, *Report on the "Right to Family Life for Migrants and Refugees"*, Doc. 9195 (Sept. 10, 2001), http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9469.

75. F. Nicholson, The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied, Jan. 2018, Legal and Protection Policy Research Series of the Division of International Protection of the United Nations High Commissioner for Refugees.

76. Convention on the Rights of the Child, 1577, UNTS 3 (1989).

77. *Id.* at art. 10.

78. *Id.* at art. 22(1).

79. *Id.* at art. 22(2).

80. United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, Sept. 1, 2005, UN Doc. CRC/GC/2005/6 at para. 40, p. 13.

81. *See* Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, and the *Flores* Settlement, *supra* note 21. Also note that by signing the Convention on the Rights of the Child, on February 16, 1995, the United States bound itself not to take any action that would prevent it from achieving the object and purpose of the treaty. *See* art. 18 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1980) (requiring a state that has signed but not yet ratified a treaty to not to take any action that would be contrary to the object and the purpose of the treaty). Also note that the United States regards the Vienna Convention on the Law of Treaties as "the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st sess., p. 1, 1971.

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83. *April 23, 2018, Memo on Family Separation*, Project on Government Oversight (Sept. 25, 2018), https://www.pogo.org/document/2018/09/april-23-2018-memo-on-family-separation. *Also see* Cora Currier, *Prosecuting Parents—and Separating Families—Was Meant to Deter Migration, Signed Memo Confirms: A DHS Memo Offers a Glimpse into the Still Unfolding Story of How the Trump Administration Justified Family Separation at the Border*, The Intercept (Sept. 25, 2018, 3:00 p.m.), https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/.

84. UNHCR, Summary Conclusions: Family Unity, Expert Roundtable Organized by UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, November 8–9, 2001, *in* Refugee Protection in International Law: UNHCR's Global Consultations on International Protection 604, 605 (Erika Feller et al. eds., 2003).

85. *Id.*

86. Curtis Doebbler, C.F.J., International Human Rights Law: Case and Materials, vol. I at 57 and vol. II at 569 (2004).

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90. Committee Against Torture (CAT), Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, para. 19, Dec. 19, 2014, CAT/C/USA/CO/3-5. *See also* CAT, "List of Issues," CAT/C/USA/QPR/6 (2016).

91. UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau*, Apr. 2, 2012, UN Doc. A/HRC/20/24 at p. 17, para. 68 ("Conclusions and Recommendations").

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94. UN General Assembly Protection of Migrants: Resolution Adopted by the General Assembly (Feb. 25, 2016) UN A/RES/70/147, para. 4(a); Kathryn Allinson, Justine Stefanelli and Katharine T. Weatherhead, *Immigration Detention*, *in* Human Rights of Migrants in the 21st Century 29 (Elspeth Guild et al. eds., 2018); the UNHCR's Revised Guidelines on Detention and Asylum Seekers identify that as a general principle, "asylum-seekers should not be detained"; *see* Office of the UN High Commissioner for Refugees, *UNHCR's Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Feb. 1999.

95. *See, e.g.*, *INS v. Delgado*, 466 U.S. 210, 235 (1984) *and* *Galvan v. Press*, 347 U.S. 522, 530 (1954).

96. *See, e.g.*, *Matter of D–J–*, 23 I&N Dec. 572, 573 (A.G. 2003).

97. *See, e.g.*, *R.I.L–R v. Johnson*, 80 F. Supp. 3d 164, 170, 175 (D.D.C. 2015).

98. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

99. *Id.* at 690.

100. U.S. Const. Art. I, § 8, cl. 3 (1789).

101. *See, e.g.*, cases ranging from *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) to *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

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105. *Id.* at operative para. 8.

106. *See* Shaughnessy v. Mezei, 345 U.S. 206, 215–16 (1953) and *DHS v. Thuraissigiam*, 591 U.S., No. 19-161 (2020).

107. *See Chahal v. UK*, European Court of Human Rights Appl. No. 22414/93 (Nov. 5, 1996) at para. 80.

108. *Juridical Condition and Rights of Undocumented Migrants*, *supra* note 104, at para. 47.

109. *See supra*, note 98.

110. Michael T. Light and Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56(2) Criminology 370 (Mar. 25, 2018), https://doi.org/10.1111/1745-9125.12175.

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At Long Last, USCIS Meets the Moment

A Brief History of the Unlawful Presence Bars

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Abstract: Providing an in-depth overview and analysis of the statutory schema implicating the three- and ten-year bars—as well as important and often overlooked legislative history—this article lends context to USCIS's nascent policy change to no longer require that applicants serve the three- and ten-year bars outside of the United States, a long-held position contradicted by statutory text and architecture.

Introduction

Among a plenitude of provisions marked by their cruelty[1] and created as part of the watershed Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, the so-called three- and ten-year bars[2] are uniquely pernicious; on the one hand, they cause family separation, and on the other, they encourage illegal immigration: better to remain in the United States illegally than risk departure and remain stuck outside, possibly forever. After they were signed into law by President Bill Clinton in 1996, Hillary Clinton campaigned for president in 2016 on a pledge to repeal them, tweeting that the "provisions tear families apart and should end."[3] The statutory bars classify noncitizens as being inadmissible for either three or ten years, depending on the length of unlawful presence. The United States Citizenship and Immigration Services (USCIS) Administrative Appeals Office (AAO), its highest administrative appellate body, and USCIS field offices have consistently interpreted the provisions to require the entire duration of the bars be served *outside* the United States,[4] despite the absence of such a requirement in the statutory text. For an ever-burgeoning class otherwise qualified to obtain legal status—the largest percentage of whom, by virtue of their geographic proximity, are Mexican[5] noncitizens—this interpretation has created a sort of purgatory with no hope for absolution. When they seek permanent residence many years after returning to the United States subsequent to a departure triggering either variant of the bar, USCIS has traditionally deemed these penitent souls inadmissible, compelling them to apply for a hardship waiver.[6] And in the absence of waiver eligibility,[7] these star-crossed migrants are banished to a nearly inescapable limbo.

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In response to a class action challenging USCIS's restrictive (mis)interpretation of the bars filed by the Northwest Immigrant Rights Project,[8] USCIS issued guidance in its Policy Manual, stating that "[a]s long as the noncitizen again seeks admission more than 3 or 10 years after the relevant departure or removal, the noncitizen is not inadmissible under INA 212(a)(9)(B) based on the period of unlawful presence preceding the departure or removal because the statutory 3-year or 10-year period after that departure or removal has ended."[9] As a matter of statutory interpretation, the new policy better reflects the unambiguous text and context of the statute; however, by amending its policy through less enduring subregulatory guidance, USCIS leaves this nascent policy vulnerable to the vagaries of future nativist administrations. USCIS should therefore undertake the further protective maneuver of informal notice-and-comment rulemaking under the Administrative Procedure Act[10] to disadvantage future attempts to dismantle it.

They Say Bad Things Come in Threes

Delineating several grounds of inadmissibility[11] for violations related to unlawful presence and previously removed noncitizens, 8 U.S.C. § 1182(a)(9)[12] encompasses the three- and ten-year unlawful presence bars. The bars are designed to prevent unauthorized immigrants from securing legal status if they have entered the United States without inspection or remained after a period of authorized temporary stay. The focus of this article is on one of those violations, specifically pertaining to the notion of "unlawful presence" contained in subparagraph (B). In order to understand how that subparagraph has been interpreted by the AAO and most USCIS offices, we must explore all three provisions and their provenance.

8 U.S.C. § 1182(a)(9)'s constituent parts include:

> (A) noncitizens previously ordered removed are inadmissible for 5, 10, or 20 years, depending upon the type and timing of the removal proceeding, unless prior permission to enter is obtained;
>
> (B) noncitizens "unlawfully present" (present after entry without inspection, or after expiration of permission to be in the United States temporarily) are inadmissible for three or ten years, depending upon the length of unlawful presence, unless a waiver is granted; and
>
> (C) noncitizens who entered without inspection after at least one year of unlawful presence or after having been ordered removed from the United States are permanently inadmissible, unless prior permission to enter is obtained after more than 10 years from the date of the last departure.

The question left unanswered by the statute is *where* those three or ten years must be spent, once inadmissibility has been triggered by a departure.

The statute merely renders a noncitizen inadmissible if they "again seek[ ] admission within" the barred period; it is agnostic as to precisely what follows when a noncitizen subsequently returns to the United States in a nonimmigrant category, for example, with or without a nonimmigrant waiver, during that span. In the absence of a clear statutory mandate, the AAO simplistically decreed the noncitizen remain outside the United States for the entire period.[13] The AAO exacerbated matters by devising a fanciful tolling provision with no home in the text, discounting time spent in the United States from fulfilling the barred period, thus converting it into a permanent bar.[14] This *ultra vires* conception notwithstanding, the architecture and interplay of the three provisions render stark the ineluctable view that the unlawful presence bars need not be served outside the United States, the former policy now in its death throes. By updating its policy to reflect the statute as written, USCIS will benefit potentially thousands formerly precluded from applying for permanent residence by the inherent cruelty of this rule.[15]

The Statutory Language: "Reembarkation at a Place Outside"

Considering terminology, context and statutory structure, the AAO's position was always bewildering. Subsection (A) posits that noncitizens ordered removed under any type of proceeding (e.g., expedited or removal)—or who have departed the United States while a removal order is outstanding—are subject to a five- or ten-year bar (20 years for any subsequent removal), preventing them from seeking admission (applying for an immigrant visa at a U.S. consulate or for adjustment of status in the United States) during the barred period. This section contains an "exception," making the bars inapplicable for a noncitizen "seeking admission within a period if, prior to the date of the [noncitizen]'s reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the [noncitizen]'s reapplying for admission."[16]

This inelegant phrasing simply means that if the noncitizen is seeking permanent residence "within" the barred 5-/10-/20-year period, they must seek permission to reapply by filing a Form I-212[17] *from outside the United States*. The awkward locution dates back to similar provisions in the Immigration Act of 1917, barring deported noncitizens from admission for one year unless prior to their "reembarkation at a foreign port" the Secretary of Labor "consented to their reapplying for admission."[18] After the barred period has expired, no I-212 from anywhere is at all required. The instructions to Form I-212, which are "incorporated into the regulations requiring its submission,"[19] support this reading.[20] Notably, however, unlike unlawful presence, a departure from the United States is not required to trigger the subsection (A) bar ("ordered removed . . . or departed . . .").

Subsection (B) creates a three-year admission bar for noncitizens unlawfully present for a period of more than 180 days but less than one year, and a ten-year bar for those unlawfully present for one year or longer. What counts as unlawful presence—and there are multiple exceptions—is statutorily defined as any periods of presence after the expiration of a period of authorized stay, or any time subsequent to an entry without inspection. While this subsection does not contain an exception, it does provide for a discretionary waiver. Both unlawful presence bars are waivable where the noncitizen demonstrates that their U.S. citizen or lawfully resident *spouse* or *parent* will suffer extreme hardship in the event of refusal of admission. (The exclusion of children from consideration is perplexing and callous but unremarkable given the punitive nature of IIRIRA.) Importantly, the waiver includes no requirement of an I-212 (consent to reapply), or that the waiver be sought from *outside* the United States. It is simply understood that way because the bar is triggered by departure.

Finally, the severest measure, subsection (C)(i), provides that if the noncitizen has been unlawfully present for an *aggregate* period of more than one year, or has been ordered removed under any provision *and* "enters or attempts to reenter the United States without being admitted" is inadmissible. This provision contains both a waiver and an exception. The waiver applies only to self-petitioners under the Violence Against Women Act (VAWA) who show a tie between their removal, departure, or unlawful reentry and the battery or extreme cruelty rendering them eligible for VAWA relief.

The exception, on the other hand, renders inadmissibility inapplicable *but only if* the noncitizen is "seeking admission more than 10 years after the date of the [noncitizen]'s last departure from the" United States, *and*, as in subsection (A) (for those ordered removed), only if the applicant files an I-212 from a place outside the United States ("prior to . . . reembarkation at a place outside the United States"). Thus, for inadmissibility under both (A) and (C), the statute makes crystal clear that when the applicant is seeking admission within the barred period (eternally, in the case of subsection (C) inadmissibility), they must file an I-212 from outside the United States.

For the harshest infraction, the I-212 must be filed after the passage of more than 10 years from the date of the noncitizen's last departure from the United States. As earlier stated, a departure is not required to invoke inadmissibility under (A); nevertheless, in order to apply for permanent residence *within the barred period*, the noncitizen must file an I-212 outside of the United States. Overcoming inadmissibility for unlawful presence, however, contains no similar "prior to reembarkation at a place outside" filing requirement. The omission of this language is significant, and should result in the two provisions being interpreted differently.[21] Nor does subsection (B)'s "*within* 10 years of the date of [departure]" language mirror subsection (C)'s "*more than* 10 years after the date of the" last departure phrasing. In spite of these textual differences and regardless of the canons of statutory construction, the AAO and most USCIS offices have consistently interpreted the two provisions similarly,

reading 212(a)(9)(B) to include an unstated requirement that the entire three or ten years be served "outside the United States."

The Sordid History of the Bar

Even if the plain text failed to sway those on the fence, the bar's origin story pointed in a singular direction. The genesis of the bar makes clear that the bill passed by Congress in 1996 rejected any such "outside the United States" requirement. The unlawful presence bar was first introduced by former Congressman Lamar Smith as part of a comprehensive immigration reform bill, H.R. 2202, called the "Immigration in the National Interest Act of 1995."[22] That bill contained only the subsection (A) bar—for those ordered removed—and a ten-year bar for unlawful presence[23]: initially, there was no three-year iteration of the bar. The related Senate reform bill, S. 1664, on the other hand, contained no unlawful presence provision at all.[24] Thus, the language that eventually became the law of the land was negotiated by conference committee comprised of House and Senate conferees for the purpose of reconciling the bicameral differences in the legislation. The precise text of the 1995 bill is telling and informs the proper interpretation of the bill that was later signed into law.

According to section 301(c) of H.R. 2202, "[a]ny [noncitizen] who was unlawfully present in the United States for an aggregate period totaling 1 year is inadmissible unless the [noncitizen] has *remained outside the United States for a period of 10 years*" (emphasis added). The original bill thus plainly required the noncitizen to "remain outside" the United States for the full 10-year period. But that version was never signed into law. Indeed, in the September 24, 1996, conference report that accompanied H.R. 2202 and included the new unlawful presence provisions, the committee also incorporated § 1182(a)(6)(G) ("Student visa abusers"), which provides for inadmissibility "until the [noncitizen] has been outside the United States for a continuous period of 5 years after the date of the violation."[25] The difference in vocabulary should not be disregarded. The AAO's interpretation contradicted the plain language of the statute and ignored the textual clues provided by neighboring provisions—in addition to ignoring the provenance of the provision itself. Thus, both text and legislative history leave little doubt as to its proper interpretation.

Unlike the AAO, the Board of Immigration Appeals (BIA) faithfully applied the statutory text, describing inadmissibility for unlawful presence violations as "temporary," but the subsection (C) inadmissibility bar as "permanent."[26] In its own unpublished opinions, the Board routinely applied the plain language approach,[27] but the AAO consistently subjected applicants to a permanent bar for unlawful presence violations, including tolling the barred period for lawful reentries after departure, the trigger for the inadmissibility period—all *ultra vires* to the statute.

The AAO's Misbegotten Exegesis

Contrary to the statutory structure's modus vivendi and manifold textual clues, the AAO adjudicated the issue based on a statute of its own imagination. For example, in a recent case, the AAO stated,

> [A]lthough more than ten years have *now* elapsed since 2009, the Applicant has spent most of that time in the United States . . . [T]he terms and intent of section 212(a)(9)(B) of the Act require that an individual be subject to the inadmissibility bar until he or she has remained outside the United States for the required period. Thus, the Applicant is inadmissible under 212(a)(9)(B)(i)(II) of the Act until he has remained outside the United States for ten years.[28]

The 10-year bar says no such thing—nor can any such intent be gleaned from the text. The plain text of the rule states that an individual unlawfully present for "one year or more" is inadmissible only if they "again seek[ ] admission within 10 years of the date" of departure or removal from the United States. If the barred period has already lapsed, the applicant is no longer "seek[ing] admission within 10 years." Full stop.

To countenance the AAO's interpretation is to disregard the present tense juxtaposition and temporal limitation of the statute. A noncitizen "is inadmissible" only when they "seek[ ] admission" (present tense) within the barred period. It is a categorical rule precluding admission during the barred period, unless a waiver is authorized. If the bar applied not only to those who *presently seek* admission, but extended to those who *had previously sought* admission within the barred term, the AAO's position would be worth a second look; in that alternate universe, by having *sought* admission in the past within three or ten years of the departure, inadmissibility would be ongoing, ostensibly requiring a waiver in every instance. By way of contrast, the inadmissibility ground for misrepresentation applies not only to those who, by fraud or willful misrepresentation, "seek" (present tense) to procure admission, a visa, or other benefit, but also to those who "ha[ve] sought to procure or ha[ve] procured" the same.[29] In this way, inadmissibility turns not only on present but also past violations.

The complexity was always, of course, in what to do with those noncitizens who had returned to the United States *during* the barred period (or where the noncitizen sought admission during the barred period). Ostensibly, the AAO viewed the written provisions to be "an imperfect proxy for the evil which Congress intended to reach"[30] and simply chose to rewrite them to broaden their punitive scope. However, § 212(a)(9)'s framework already provided an answer to the problem; namely, a temporary bar can very easily transmogrify into a permanent one. If a noncitizen enters or attempts to reenter unlawfully after a departure triggering a 10-year bar, they become subject to a permanent

bar; both (A) and (B) are predicate offenses for the capital offense under subsection (C).

In yet another unpublished disposition, the AAO found an applicant inadmissible under § 1182(a)(9)(B)(i) (three-year bar) even though the barred period had passed since the date of his last departure, finding that he "was required to remain outside the United States for 3 years."[31] The applicant argued he was no longer inadmissible. To advance his position, he introduced two renowned letters from former USCIS Chief Counsels: Robert Divine (July 14, 2006) and Lynden Melmed (January 26, 2009).[32] In the former, Chief Counsel Divine stated that the "section 212(a)(9)(B) inadmissibility period begins to run with the initial departure from the United States that triggers the three-year bar and continues to run even if the [noncitizen] subsequently returns to the United States pursuant to a grant of parole under section 212(d)(5) of the Act." In the latter opinion, Chief Counsel Melmed confirmed that the "inadmissibility period continues to run even if the [noncitizen] is paroled into the United States or is lawfully admitted as a nonimmigrant under section 212(d)(3), despite his or her inadmissibility under section 212(a)(9)(B)."

Both opinions specifically limited their reach, excluding those who either returned unlawfully (which could, of course, implicate the permanent bar) or who remain in the United States after an authorized period, as they could potentially implicate a new inadmissibility bar upon departure. Neither opinion is controversial, however. They follow from a straightforward application of the plain language of the rule—indeed, both address the relatively easy cases for relief.[33]

The AAO disparaged both opinion letters as "not binding authority," attempting to distinguish them on their facts: "In the Applicant's case, he reentered the United States with a nonimmigrant visa and did not obtain a section 212(d)(3) nonimmigrant waiver before entering with the visa. Therefore . . . because the Applicant returned to the United States before the 3-year period of inadmissibility had ended, he remains inadmissible under section 212(a)(9)(B)(i) of the Act and requires a waiver under section 212(a)(9)(B)(v) of the Act." Stated another way, the temporary bar is permanent—not by act of legislature or application of the statute, but by administrative fiat, in spite of the plain language. This position ignores applicatory semantic and contextual canons of statutory interpretation.[34] In spite of syntax and statutory structure, this interpretation has held sway for decades.

Better (25 Years) Late Than Never

Under President Biden, USCIS has evidenced a change of heart. Observing that USCIS had "not previously issued guidance on this specific issue in a policy memorandum, the Adjudicator's Field Manual, or the Policy Manual," the agency issued a policy alert explaining it was only "now issuing this policy

guidance to memorialize clear, express, and public-facing policy guidance in the Policy Manual regarding the impact of returning to the United States" during the statutorily barred period on § 212(a)(9)(B) inadmissibility determinations. The policy alert offered no justification for its past practice, or for its reversal. While allowing that the statute "does not speak to the effect of returning to the United States during" the barred period "without first obtaining a waiver of inadmissibility," USCIS further noted there were no regulations, federal court precedents, or published administrative decisions on the issue.

The agency now takes the position that the three- or ten-year barred period runs from the date of departure without interruption, "regardless of whether or how the noncitizen returned to the United States during" that period.[35] USCIS now deems "immaterial" the location where the noncitizen spent the barred period: no longer will USCIS read a nonstatutory requirement into the provision. "As long as the noncitizen again seeks admission more than 3 or 10 years after" the departure or removal, they are no longer inadmissible under § 1182(a)(9)(B).

At its most maximalist expression, on its website USCIS also addressed untimely motions to reopen prior denials on § 1182(a)(9)(B) grounds,[36] explicitly stating that under its new policy, noncitizens who again seek admission after the barred period are no longer inadmissible under § 1182(a)(9)(B) "even if the noncitizen returned to the United States, with or without authorization, during the statutory three-year or 10-year period."[37] While it is not clear what is precisely meant by "without authorization," it would certainly cover procedurally regular so-called *Quilantan* entries. The Board in *Matter of Quilantan*[38] held that noncitizens need show only procedural regularity in order to establish a lawful entry after inspection and authorization by an immigration officer within the meaning of 8 U.S.C. § 1101(a)(13)(A). Any lawful reentry or parole after a departure triggering either variant of the bar should uncontroversially fall under the new policy's protective penumbra. What matters now is that the applicant's location during the barred period is legally inconsequential and, equally importantly, that the applicant not take any actions that might invoke the permanent bar.

Further suggestive of a maximalist interpretation is USCIS's assertion at footnote 6 of its policy alert that in developing its policy, it "considered the reasoning of" two district court cases, *Neto v. Thompson*[39] and *Kanai v. DHS*.[40] The *Neto* court applied the statute with dispassionate clarity, at one point describing the (B)(i)(II) ground as a "categorical bar" that once having passed, "no longer" applied, *even if the noncitizen* "misrepresented her status" during the barred period, an action that may have "adverse consequences, but that is a separate issue."[41] Of course, the new policy does nothing to ameliorate the disproportionate effects of the permanent bar, as the new policy only implicates (a)(9)(B) inadmissibility. Consequently, an attempted or actual reentry without admission after a departure triggering the 10-year bar will

beget retribution in accordance with (a)(9)(C). A *Quilantan* reentry after the same departure, on the other hand, should not.

Similarly, as the *Neto* court implied, a reentry consummated through fraud or misrepresentation (setting aside false claims to U.S. citizenship) may result in the applicant being found inadmissible, but only under 8 U.S.C. § 1182(a)(6)(C)(i). Such an applicant would be obliged to seek a waiver under § 1182(i), as the statutory schema requires. Factual presentations implicating fraud or willful misrepresentation should be analyzed as any other potential misrepresentation of a material fact under § 1182(a)(6)(C)(i). Thus, entry with a nonimmigrant visa where the noncitizen failed to disclose prior unlawful presence raises the question of whether the misrepresentation was *willful* and satisfies the *mens rea* requirement of knowledge of the falsity.[42]

As earlier noted, USCIS could—and should—do more to crystallize this policy by undertaking notice-and-comment rulemaking, effecting a more durable change impervious to assault by future administrations. While the size of the population affected by this welcome volte-face remains unknown, the new policy will unquestionably change many lives, families, and communities for the better. The new policy also reinforces strategies for nonimmigrant overstays resulting from a shortened I-94 (or some other inadvertence where a *nunc pro tunc* extension has either been denied or is not feasible under the circumstances) and some DACA[43] beneficiaries, many of whom lack a qualifying relative for an unlawful presence waiver; this category of individuals may now secure a nonimmigrant visa with a nonimmigrant waiver[44] and confidently serve out the barred term in the United States. USCIS should be decidedly praised for—at long last—abandoning a devastating and highly problematic interpretation unmoored to text, reality, or the rule of law.

Notes

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1. IIRIRA was key to ushering in the oppressive, modern enforcement era. It spawned, *inter alia*, "expedited removal" (authorizing immigration officers to summarily deport noncitizens without benefit of a hearing before an immigration judge) and mandatory custody, and expanded deportable crimes by broadening the definition of "aggravated felony." It also stripped immigration judges of discretion to grant relief by heightening standards, and established the § 287(g) program (enabling DHS to deputize state and local law enforcement officers to enforce federal immigration law). *See generally* Doris Meissner, Donald M. Kerwin, Muzaffar Chishti & Claire Bergeron, Immigration Enforcement in the United States: The Rise of a Formidable Machinery (2013), https://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery.

2. 8 U.S.C. § 1182(a)(9)(B)(i)(I) (three-year admissibility bar) and (II) (10-year admissibility bar). The 3-/10-year admissibility impediment is triggered by a departure *after* accrual of a specified period of unlawful presence. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905, 910 (BIA 2006) ("Thus, it is the departure of a person who is unlawfully present that triggers inadmissibility, and not the departure of a person who subsequently becomes unlawfully present. In other words, Congress understood the accrual of unlawful presence to be a condition precedent to inadmissibility arising from departure.").

3. Hillary Clinton [@HillaryClinton], Twitter (Feb. 18, 2016, 10:26 p.m.), https://twitter.com/hillaryclinton/status/700521848300302336?s=10&t=veMX6Y0bEIHM4km3Yj-TqQ.

4. *See, e.g.*, *Matter of F–A–C–*, ID#1800373 (AAO 2018) ("The additional legal [Board of Immigration Appeals] decisions cited by the Applicant discuss the accrual of unlawful presence and the temporary nature of the inadmissibility, but do not address whether the bar period can be served inside the United States. The Applicant refers to *Matter of Torres-Garcia*, 23 I&N Dec. 866, 872 (BIA 2006) to show that after the inadmissibility period has elapsed an alien's prior removal no longer stands as a bar to reapplication for admission. However, the Board did not indicate in *Torres-Garcia* that a period of inadmissibility can be served within the United States.").

5. Mexican nationals have an unexampled relationship with immigration law. No other nationality has been more assailed by the unambiguous cruelty of immigration enforcement. *See, e.g.*, *United States v. Carillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021) (finding the illegal reentry criminal provisions of 8 U.S.C. § 1326 unconstitutional because of their racist origins and disparate impact on Mexican and Latinx individuals). For reasons that are perhaps obvious, enforcement of immigration law disproportionately harms Mexican nationals. Because Mexico shares a border with the United States, illegal entry is expedient and returning home to visit family is not only common but expected—and legally devastating from an immigration perspective. "Without doubt," the Supreme Court has observed, "most of the [noncitizens] who had obtained entry into the United States by illegal means were Mexicans, because it has always been far easier to avoid border restrictions when entering from Mexico than when entering from countries that do not have a common land border with the United States." *INS v. Errico*, 385 U.S. 214, 224 (1966).

6. *See, e.g.*, *In re 12732369* (AAO, Mar. 1, 2021) (finding the applicant failed to establish the requisite extreme hardship to her spouse and also concluding she remained inadmissible despite the passage of more than 10 years from her departure, stating that "while it has been more than 10 years since the Applicant's departure from the United States in August 2000, she remains subject to section 212(a)(9)(B)(i)(II) of the Act as inadmissibility under section 212(a)(9)(B)(i)(II) of the Act remains in force until a foreign national has been outside the United States for 10 years.").

7. The discretionary unlawful presence waiver at 8 U.S.C. § 1182(a)(9)(B)(v) requires that the noncitizen demonstrate "extreme hardship" to a qualifying relative—spouse or parent—who is either a lawful permanent resident or citizen of the United States.

8. *See* Class Action Complaint for Injunctive and Declaratory Relief, Velasco de Gomez v. USCIS, No. 2:22-cv-368 (W.D. Wash. Mar. 25, 2022), https://www.nwirp.org/our-work/impact-litigation/assets/velasco/Velasco%201%20Complaint.pdf.

9. USCIS Policy Manual, vol. 8, pt. O, ch. 6.B; *see also* USCIS Policy Alert, *INA 212(a)(9)(B) Policy Manual Guidance* (June 24, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220624-INA212a9B.pdf.

10. Administrative Procedure Act, 5 U.S.C. §§ 551 to 559.

11. Grounds of inadmissibility prevent certain persons from being issued a visa or granted entry to the United States, even if they are otherwise qualified for legal status. Grounds of inadmissibility also apply if a person is seeking to obtain permanent residence by "adjust[ing]" status within the United States. 8 U.S.C. § 1255(a).

12. 8 U.S.C. § 1182(a)(9) contains three subsections covering distinct immigration offenses; however, as the Policy Manual comments, "[t]here are three separate inadmissibility grounds involving the accrual of unlawful presence—the 3-year unlawful presence ground [§ 1182(a)(9)(B)(i)(I)], the 10-year unlawful presence ground [§ 1182(a)(9)(B)(i)(II)], and the permanent unlawful presence ground [§ 1182(a)(9)(C)(i)(I)]." Vol. 8, pt. O, ch. 6.C.

13. *See, e.g.*, *In re 13830458* (AAO, May 5, 2021) ("While it has been more than ten years since the Applicant's departure from the United States, she remains subject to section 212(a)(9)(B)(i)(II) of the Act as inadmissibility under section 212(a)(9)(B)(i)(II) of the Act remains in force until a foreign national has been outside the United States for 10 years.").

14. This is not to be confused with the statute's tolling "for good cause" provision, which acts to toll the accrual of unlawful presence itself, where the applicant's status expires after the filing of a timely request for a change or extension of status.

15. The precise size of this population is unknowable. In its pending class action, the NIRP "estimate[s] there are hundreds of class members and that there will be many more future class members." Class Action Complaint for Injunctive and Declaratory Relief at 19, Velasco de Gomez v. USCIS, No. 2:22-cv-368 (W.D. Wash. Mar. 25, 2022), https://www.nwirp.org/our-work/impact-litigation/assets/velasco/Velasco%201%20Complaint.pdf. The population from which class members could be drawn is large. The Center for American Progress (CAP) recently calculated based on analysis of census data that 1.4 million undocumented immigrants have a U.S. citizen or lawful permanent resident spouse that could sponsor them for a green card, while another 1.1 million may have such an employer. CAP, *Reinstating the LIFE Act and Eliminating Entry Bars Would Allow Millions of Immigrants to Stay With Their Families* (May 27, 2021), https://www.americanprogress.org/article/reinstating-life-act-eliminating-entry-bars-allow-millions-immigrants-stay-families/. Since the AAO has long taken the controversial position that the bars must be served outside the United States, it is likely most eligible noncitizens and their attorneys have not pursued these cases for fear of denial, placement in removal proceedings, and the exorbitant cost of legal representation to prosecute their (heretofore, almost certainly) doomed applications. Who would "even attempt" to pursue the application "at least without an army of perfumed lawyers . . . ?," as Justice Gorsuch colorfully wrote. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016).

16. 8 U.S.C. § 1182(a)(9)(A)(iii).

17. USCIS, *I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal*, https://www.uscis.gov/i-212 ("If you are inadmissible under sections 212(a)(9)(A) or (C) of the Immigration and Nationality Act (INA), use this form to ask for consent to reapply for admission to the United States so you can lawfully return to the United States. Consent to reapply is also called 'permission to reapply.'").

18. Section 3, Immigration Act of February 5, 1917, also known as the Asiatic Barred Zone Act (available at https://www.loc.gov/item/22019016/). Analogous provisions were later incorporated into the Immigration and Nationality Act of 1952 (the

McCarran–Walter Act) with the current language as grounds of exclusion—§ 212(a)(16) (excluded/deported noncitizens seeking admission within one year of deportation); § 212(a)(17) (deported noncitizens, those deported for "hav[ing] fallen into distress," or those removed "as alien enemies"); and the criminal illegal reentry provision, § 276, codified at 8 U.S.C. § 1326.

19. In accordance with 8 C.F.R. § 103.2(a)(1), a "form's instructions are hereby incorporated into the regulations requiring its submission."

20. Under the heading of "Who May Not Be Required to File For Consent to Reapply?," the first entry in the instructions is "You were inadmissible under INA 212(a)(9)(A), but your inadmissibility period has expired . . . ."

21. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

22. H.R. 2202, 104th Cong. (1995) ("Immigration in the National Interest Act of 1995"), a bill "[t]o amend the Immigration and Nationality Act to improve deterrence of illegal immigration to the United States by increasing border patrol and investigative personnel, by increasing penalties for alien smuggling and for document fraud, by reforming exclusion and deportation law and procedures, by improving the verification system for eligibility for employment, and through other measures, to reform the legal immigration system and facilitate legal entries into the United States, and for other purposes"), https://www.govinfo.gov/content/pkg/BILLS-104hr2202ih/pdf/BILLS-104hr2202ih.pdf.

23. H.R. 2202, § 301(c).

24. Immigration Control and Financial Responsibility Act of 1996, S. 1664, 104th Cong. (1996). The Senate bill, instead, contained several provisions related to overstays; for example, section 143 of the bill sought to amend 8 U.S.C. § 1182 by rendering lawfully admitted nonimmigrants who overstayed by more than 60 days ineligible for immigrant or nonimmigrant visas until "3 years after the date the nonimmigrant departs the United States," unless they could establish "good cause" for remaining without authorization. The Senate bill also introduced 8 U.S.C. § 1202(g), voiding nonimmigrant visas upon overstay and obliging applicants to secure a new visa issued by the consular office in the country of the noncitizen's nationality.

25. H.R. Rep. No. 104-828 (1996) (Conf. Rep.) ("To accompany H.R. 2202"), https://www.congress.gov/104/crpt/hrpt828/CRPT-104hrpt828.pdf.

26. *Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006).

27. *See Matter of Jose Armando Cruz*, 2014 WL 1652413 (BIA Apr. 9, 2014) (finding, based on precedent, legislative history, and plain language that the respondent, who accrued more than 180 days of unlawful presence, departed the United States, and then returned illegally was no longer inadmissible because his "application is being pursued more than 3 years after he last departed from the United States"); *see also Matter of [name and A number redacted]* (BIA July 11, 2014), AILA Doc. No. 14072147, https://www.aila.org/infonet/bia-no-need-to-spend-10-year-bar ("[T]here is nothing in the Act to indicate that the 10-year period between the time of removal and the time of seeking admission need be spent outside the United States. While there is an exception to section 212(a)(2)(A)(ii) that suggests that those who seek admission to the United States

within the 10-year period must apply for such admission from outside of the United States, the exception does not apply to the respondent who is applying more than 10 years after his removal.").

28. *In re 19859014* (AAO, Nov. 10, 2021) (emphasis in original).

29. 8 U.S.C. § 1182(a)(6)(C)(i). The same is true of 8 U.S.C. § 1182(a)(2)(D)(i) ("Prostitution and commercialized vice"), which conditions inadmissibility on both present and past events ("coming to the United States … to engage in prostitution, or has engaged in prostitution…."). Thus, when Congress wants to render someone permanently inadmissible or ineligible for a benefit, it certainly knows how to do so; we need look no further than the neighboring provision of (9)(C) or inadmissibility grounds in the broader environs of § 1182(a).

30. *Neto v. Thompson*, 506 F. Supp. 3d 239, 247 (D.N.J. 2020). In a remarkably well-reasoned opinion, the *Neto* court, citing *Kanai v. U.S. Department of Homeland Security*, No. 2:20-cv-05345-CBM-(KSx) (C.D. Cal. Aug. 20, 2020), concluded the "statute simply does not contemplate or address a[ ] [noncitizen]'s readmission following 'departure' or provide that readmission affects the 10-year ineligibility period." 506 F. Supp. 3d at 253.

31. *Matter of D–T–*, ID#155588 (AAO March 13, 2017).

32. Both letters are available on AILA InfoNet as Doc. No. 09012874, https://www.aila.org/infonet/uscis-letter-on-running-of-ina--212a9b.

33. Arguably, neither opinion went far enough, since remaining in the United States unlawfully after a lawful reentry during the barred period would present no additional obstacles for the applicant from the standpoint of the bars (in the absence of yet another departure, which would count towards the "aggregate period" for purposes of the permanent bar). They could also present discretionary and potential eligibility concerns for an adjustment of status application in the absence of either 8 U.S.C. § 1255(i) or (k).

34. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.").

35. USCIS Policy Manual, vol. 8, pt. O, ch. 6.B.

36. USCIS, *Unlawful Presence and Inadmissibility*, https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility. With two provisos, USCIS will accept an untimely motion to reopen a prior denial on § 212(a)(9)(B) grounds: the motion must be filed on or before December 27, 2022, and it must seek reopening of an application denied on or after April 4, 2016, where that was the only basis for the denial. *Id.* (Untimely Motions to Reopen for Certain USCIS Denials).

37. *Id.*

38. 25 I&N Dec. 285 (BIA 2010).

39. 506 F. Supp. 3d 239 (D.N.J. 2020).

40. No. 20-05345, 2020 WL 6162805 (C.D. Cal. Aug. 20, 2020).

41. *Neto*, 506 F. Supp. 3d at 247.

42. USCIS Policy Manual, vol. 8, pt. J, ch. 3.D.1 ("To find the element of willfulness, the officer must determine that the person had knowledge of the falsity of the misrepresentation, and therefore knowingly, intentionally, and deliberately presented false material facts."). As USCIS's decades-long interpretation suggests, unlawful presence is a complex legal fiction that must be explained to the unsophisticated to warrant the opprobrium of inadmissibility.

43. DACA is an acronym for Deferred Action for Childhood Arrivals. *See* USCIS, *Consideration of Deferred Action for Childhood Arrivals (DACA)*, https://www.uscis.gov/DACA.

44. The nonimmigrant waiver at 8 U.S.C. § 1182(d)(3)(A) is purely discretionary, involving a balancing of humanitarian considerations against the adverse factors present. In *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978), the Board delineated the appropriate factors to consider as the risk of harm to society if the applicant is admitted, the seriousness of the applicant's prior immigration or criminal law violations, and the reasons for wishing to enter the United States. This versatile waiver can overcome most grounds of inadmissibility with the limited exception of several security grounds in 8 U.S.C. § 1182(a)(3).

Time for a Child Welfare Approach to Cancellation of Removal

Lory D. Rosenberg, Susan G. Roy, Paul Schmidt, and Rekha Sharma-Crawford*

Abstract: International law, criminal law, and even parts of immigration law recognizes that matters involving children cannot be treated in the same way as matters relating to adults. Still, more than a decade after the BIA issued its decisions in three key cancellation of removal cases, the idea that the "best interest of the child" standard should be encapsulated into the establishment of "exceptional and extremely unusual hardship" remains elusive. The best interest of the child is systematically ignored, as a rule, for kids affected by removal proceedings; even as it remains the gold standard in most other legal proceedings relating to children. With all that is now known about the trauma and damage done to children as the result of forced family separations, the BIA must reevaluate and reconsider draconian interpretations that do not align with modern society. It is time to bring cancellation of removal into the twenty-first century and make "best interest of the child" the key for establishing exceptional and extremely unusual hardship when the qualifying relative is a child.

Cancellation of removal was added to the Immigration and Nationality Act (INA) in 1996. For persons who are not lawful permanent residents, it allows those who have resided here continuously for at least 10 years before being placed in removal proceedings, who are of "good moral character," and who can establish that their removal would result in "exceptional and extremely unusual hardship" to their U.S. citizen or lawful permanent resident (LPR) spouse, parent, or child to receive a waiver of removability, resulting in a green card.

Over the past quarter century, the test for determining this degree of hardship has varied little as applied to the requisite "qualifying relatives"—even when they are children. While demonstrable physical or mental handicaps or debilitating illnesses are often key considerations, the immigration courts, unlike most U.S. courts, have not consistently and uniformly applied a "best interests of the child" test. Unfortunately, this has resulted in so-called healthy U.S. citizen children being either "de facto deported" to completely unsuitable conditions in a foreign country, or clearly traumatized by the forced absence of a supportive parent or parents. The number of children who have been affected, or will be affected, by this draconian standard is not small. As of 2018, 4.4 million minor, U.S. citizen children live with at least one undocumented parent.[1] This outcome serves neither the child's nor society's "best interests."

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Given the sheer number of affected children, and the significant advancement over the past decades in our knowledge of the traumatic, lasting effects of forced family separation and uncertainty about the future on the health and welfare of children, their families, and our communities, it is past time to change how we evaluate the "exceptional and extremely unusual hardship" standard. We should recognize the "best interests of the child" as the keystone for the "exceptional and extremely unusual hardship" standard in cases where children are the requisite "qualifying relatives." And we must do it now!

Abner and His Sons[2]

Abner, who is a native and citizen of Costa Rica, has lived in the United States for nearly three decades. He is a single father of two U.S. citizen children, Cal and Steven. When Cal and Steven were just babies, their mother abandoned them, choosing to return to Costa Rica. Steven has never spoken to his mother; Cal has only spoken to her on a couple of occasions over the past two decades. For these two brothers, Abner is both their father and their mother.

While the family is small, they have had to endure some very large challenges. To begin with, Abner identifies as a member of the LGBTQ community; this remains unknown to his children and his community. Choosing to remain closeted, Abner entered into a long-term relationship with the mother of the children. Still, that relationship was marred with abuse, which Abner endured silently.

Prioritizing his children's needs, Abner keeps his sexual orientation a secret because he is afraid to stack anything else onto his sons' frail psyches. Cal, his older son, has tried to commit suicide numerous times, and this struggle has been particularly daunting for the family. Cal has been hospitalized in a mental health facility, has spent years in an intensive out-patient treatment program, and still seeks therapy services when needed. He still displays symptoms consistent with separation anxiety disorder and major depressive disorder. Cal's brother, Steven, also has mental health problems and has been diagnosed with acute stress disorder. Abner has always been involved in his sons' lives; he attends every doctor appointment, visited his son every day while he was hospitalized, and has always provided them with emotional and financial support.

Abner was placed in removal proceedings in July 2016 after he was charged with child neglect in the fourth degree in violation of New Jersey law. While the offense sounds ugly, the facts were anything but. Abner had been volunteering the entire day at a church event when he, along with the other volunteers, wrapped up the evening with a couple of beers. Abner had not eaten enough and was tired enough that the beer left him intoxicated. Seeing that his father was in no condition to drive, Cal, who was 15 at the time, gave the keys to

his uncle, who Cal thought was less inebriated. Unfortunately, that decision would prove to be a costly mistake. When police stopped the vehicle in which the entire family was traveling, they cited Abner with child neglect for allowing his children to travel in a vehicle being operated by an impaired driver.

Once in removal proceedings, Abner sought cancellation of removal for certain nonpermanent residents under INA § 240A(b)(1). The immigration judge denied relief, determining that the sons' mental health concerns and the numerous hardships they would face if Abner were removed were insufficient to establish the statutorily required level of hardship for cancellation of removal. The immigration judge made no mention of what was in the best interests of the children.

Development of the Current Exceptional and Extremely Unusual Hardship Standard

In 2001 and 2002, the Board of Immigration Appeals (BIA) issued three precedential "signposts" ostensibly intended to guide immigration judges and litigating parties through "typical examples" establishing the contours of "exceptional and extremely unusual hardship." Starting with *Matter of Monreal*,[3] the BIA, while finding that the statutory standard was not satisfied, observed that the qualifying hardship did not have to rise to a level that would be "unconscionable."[4] In *Matter of Andazola*,[5] the BIA reversed the immigration judge's grant of relief and denied cancellation to a single mother with a live-in partner (who also was the father of her two citizen children) despite the fact that the children admittedly would suffer educational and social dislocation if forced to accompany her to Mexico. By contrast, in *Matter of Recinas*,[6] another case involving a single mother from Mexico—who was divorced and solely responsible for the support of her six children (four being U.S. citizens and two Mexican nationals)—the BIA found that "exceptional and extremely unusual hardship" had been established.

Thereafter, the effort to provide practical, case-by-case guidance on the hardship standard came to a screeching halt. In 2003, despite a burgeoning workload, Attorney General John Ashcroft reduced the size of the BIA and "purged" judges appointed by his predecessor, Janet Reno, who were thought to be too "liberal"—that is, fair to respondents.

Having seen what happened to those who dared to buck the "party line," the "surviving" BIA judges abandoned the unofficial "cancellation guidance project." Indeed, the smaller BIA drastically reduced the number of precedent decisions that it issued, concentrating largely on what were deemed to be "uncontroversial issues"—those that were less likely to be career threatening.

Significantly, among those "banished" by Ashcroft were six of the eight dissenting BIA judges in *Andazola*, who would have found "exceptionally and extremely unusual hardship" to the U.S. citizen children. Also, importantly,

two of those dissenters, Judge Cecelia M. Espenoza and Judge Lory D. Rosenberg, specifically concentrated on the issue of "child welfare" while blasting their colleagues in the majority for ignoring the important educational needs of the minor citizen children:

> The decision to remove these citizen children will undoubtedly diminish their ability to be self-reliant and self-sufficient. Whatever the educational opportunity that might exist in Mexico, it will be substandard to that which would exist here. Indeed, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." In short, the removal of the United States citizen children in this case is not merely a return to a country with a lower standard of living and a poor educational system. It is, in essence, a method of depriving the citizen children of the valued education that they currently enjoy in the United States. This, in turn, is likely to result in a lifetime hardship that deprives the children of an opportunity to obtain the skills necessary to meaningfully participate "effectively and intelligently in our open political system."[7]

This invitation to adopt a more child-centered approach to "exceptional and extremely unusual hardship" has remained open for the past two decades, producing uncomfortably inconsistent results. Those immigration judges sympathetic to the best interests of children have invoked *Recinas* and distinguished *Andazola* and *Monreal* to grant cancellation. Those less sympathetic to the rights of children have done the opposite.

The same has held true at the BIA, which has published no significant guidance on this issue over the past two decades. This has resulted in a "roulette" atmosphere. Results in cancellation cases involving the welfare of children often depend less on facts and evidence than they do on which immigration judge or BIA member is assigned to the case.

The BIA and the federal courts have further aggravated the situation by mistakenly treating "exceptional and extremely unusual hardship" as a wholly discretionary determination rather than the mixed-factor statutory standard that it is. Thus, such determinations are rendered unreviewable by some Article 3 courts.[8] While undoubtedly the determination involves some subjectivity, so do the other two statutory requirements for cancellation—continuous physical presence and good moral character.

Indeed, some of our most recognizable legal standards, like "beyond a reasonable doubt," "clear and convincing," "clear error," and "arbitrary and capricious," involve substantial degrees of subjectivity, requiring analytical thinking. Yet nobody has suggested that the need for interpretation makes them "discretionary" and therefore immune from review.

Given the number of cancellation cases now pending within the Executive Office for Immigration Review's (EOIR's) nearly 1.8 million case backlog,[9]

now is the time to establish a uniform, empathetic, and realistic analysis for use in cancellation cases involving children. Here's how and why.

Moving the Standard into the Twenty-First Century

The law, like society itself, is dynamic. Courts have acknowledged and taken this reality into consideration routinely in interpreting, adjusting, and applying the rules that govern society's interactions. In other words, many laws implicitly or explicitly require a decision maker to consider the current conditions and circumstances existing at the time of the adjudication.

However, there is no definition of "exceptional and extremely unusual hardship" found in the INA, nor has it been conclusively defined by caselaw. Indeed, since *Monreal*, *Andazola*, and *Recinas*, the BIA has only issued one precedent decision, *Matter of J–J–G–*,[10] addressing the question of what constitutes exceptional and extremely unusual hardship. However, the BIA still did not provide a bright-line explanation; it merely confirmed that the adjudicator must consider the "totality of the circumstances" when determining whether the hardship standard had been met.

Therefore, the continuing vagueness of the legal standard, some 26 years after cancellation of removal was introduced into the INA and its jurisprudence, demonstrates why it is so necessary to have in place a framework for analyzing what constitutes exceptional and extremely unusual hardship. And nowhere is this more important than in cases in which the qualifying relative is a child, because children are particularly vulnerable, both legally and practically. It also makes practical sense to begin the codification of such a framework in cases involving children, because there is already a reasonable and usable framework already available: the "best interests of the child" framework.

In *Matter of J–J–G–*, the BIA also held, in cases alleging that the hardship was premised upon a medical condition, that such condition and any medical treatment for that condition must be documented in the record. Further, should the qualifying relative return to the country of removal with the noncitizen, it must be shown how the lack of access to the same level of requisite medical care would cause hardship to the relative.[11] This, of course, relates to both mental as well as physical health concerns. While it can be argued that this imposes yet another hurdle to demonstrating eligibility for cancellation of removal, it also shows that the BIA recognizes that a more concrete framework is needed when considering the hardship standard, and that objective evidence of hardship, in this case relating to the qualifying relatives' medical conditions, can be enough to satisfy the standard.

The myriad studies conducted in the past decade that delineate the harms that children suffer when their parent or parents are removed, combined with the requirements set forth in *Matter of J–J–G–*, demonstrate the need to use an objective, already-existing analysis when determining whether a U.S. citizen

child would suffer the requisite level of hardship upon the forced removal of one or both parents.

Explanation of the "Best Interests of the Child" Analysis

There is no statutory definition of the concept of best interests of the child in U.S. immigration jurisprudence, even as this standard is used in every state and territory in the nation in the family law and child advocacy contexts.[12] Among the many factors that the state and territorial courts consider, the most common are the emotional ties and relationships between the child and the parents, siblings, and other family or household members; the ability of the parents to provide a safe home and sufficient food, clothing, and medical care; and the physical and mental health needs of the child.[13] The most common guiding principles include the importance of family integrity, avoiding removing the child from the home, and the health, safety, and protection of the child.[14]

In the international arena, in 2008, the United Nations High Commissioner for Refugees (UNHCR), relying on the legal framework set forth in the Convention on the Rights of the Child (CRC),[15] developed international guidelines on how this concept should be employed. According to the UNHCR, "[t]he term 'best interests' broadly describes the well-being of a child [which] is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, and the child's environment and experiences."[16] UNHCR further advised that the CRC requires that the child's "best interests must be the determining factor for specific actions, notably adoption, and separation of a child from parents against their will; . . . and must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies."[17]

In 2021, in response to the changes in external and internal operating contexts since 2008, updates to essential UNHCR and external legal, policy, and guidance documents, and the fact that case management in humanitarian settings has become a more professionalized area of work, UNHCR published its "Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child." These guidelines are meant to provide a more specific framework by which to determine the best interests of individual children, which should apply to all decisions, actions, services, procedures, and plans that impact directly or indirectly on children made by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies."[18] UNHCR further emphasized that these guidelines apply to key actors such as "[i]mmigration and asylum authorities; civil registration authorities; judicial authorities, police and security actors; education, health and social

welfare actors; people who make decisions on a daily basis for children, such as parents, guardians; and teachers; and local authorities, media or private sector actors."[19]

The BIA historically has taken the position that it will not use the "best interests of the child" standard. Instead, it has stubbornly relied only on its precedent decisions in *Monreal*, *Andazola*, *Recinas*, and more recently, *J–J–G–*. Curiously, the BIA has declined requests to revisit this body of law, despite the growing evidence that all parties, including the public, would be best served by using a child-centered analysis because the best interests of the child is indeed the best interests of society as a whole.

Nevertheless, these cases do illustrate plainly that cancellation cases turn on individual facts and circumstances that must be considered and adjudicated together to determine whether they rise to the specific hardship standard articulated in the statute. In the intervening decades since these decisions, relevant, groundbreaking information has become available regarding the impact that forced separation has on children of all ages, providing insight into the level of damage that occurs within a child that may not be readily visible.

Thus, the adoption of the "best interests of the child" analysis, which is an already-established framework that relies a great deal on objective evidence, would seem to fit neatly into the BIA's new trajectory indicated by *Matter of J–J–G–*. And it would make review of such decisions less frustrating to the federal courts, providing them with a more defined analysis of why the non–U.S. citizen's child would or would not suffer the requisite level of hardship. Finally, using a legally recognized analysis will also help resolve the question of whether the issue of hardship is a finding of fact, finding of law, or both.

The determination that exceptional and extremely unusual hardship will be experienced by a particular child involves the same set of factors to consider as the "best interests of the child" determination, and therefore logically the same analysis should be employed. As our understanding of the complexities of the human experience has grown, studies of forced parent-child separation have demonstrated to a much greater degree of certainty that such occurrences in childhood can and do have a profoundly debilitating and damaging impact on development and adult paradigms. This greater understanding, based on objective and reliable empirical studies, should form the basis of the consideration, along with the facts and circumstances present in an individual case.

It is no longer possible to dismiss the impact of such childhood experiences by rationalizing that a child's "natural" resilience can ameliorate an unstable or disruptive youth. Rather, we must consider the impact on the particular child, through the lens of these recent studies and in light of the child's nature and circumstances along with numerous other factors in the record as a whole. Only then can we determine whether this individual child is able to satisfy the exceptionally high standard of hardship articulated in the statute.

The BIA's key precedent decisions in *Monreal*, *Andazola*, and *Recinas*—which have provided the only guidance for cancellation of removal cases for

non-LPRs for two decades—are dated. Two of them, *Andazola* and *Recinas*, clearly are in tension. So much so that one judge wishing to grant will cite *Recinas* and distinguish *Andazola*, while on the same or virtually identical facts, a judge wishing to deny relief might well do the opposite.

What Harms Do Children Experience as a Result of Their Parent's Deportation?

Studies demonstrate that the effects on children of losing a parent to deportation are much more severe than anticipated when *Matter of Monreal* and its progeny were decided. Children are fragile. They need a stable, secure environment in order to develop fully and properly. Unfortunately, it has become clear that many children forcibly separated from a parent due to deportation often suffer *extreme* emotional, psychological, and behavioral consequences as a result. This, in turn, negatively affects all aspects of their lives in both the short term and long term, disrupting their psychosocial development.

For example, studies have found that children whose parents were deported often experience "feelings of abandonment, symptoms of trauma, fear, isolation, depression, and family fragmentation." Children separated from a parent were also found to suffer significant behavioral changes—both in the short and long term. Such changes include crying frequently and feeling clingy, withdrawn, angry, or aggressive.[20]

In the nearly two decades since the three controlling precedential decisions, even more reports have been published regarding these negative effects. A report originally submitted to the Inter-American Court of Human Rights (IACHR) explains that it has become more clear that children whose parents are deported or are in immigration custody endure many of the same psychosocial consequences as children of parents who are incarcerated: "The mounting empirical research confirms what social scientists, mental health professionals, and advocates have predicted, based partly on the much more established literature on the impact of parental incarceration on child and family well-being."[21] Specifically, such impacts include a much higher likelihood of the affected child engaging in delinquent behavior, experiencing mental health problems, having substance abuse problems, being unemployed, and experiencing "poor romantic relationships, divorce, and/or separation from their own children."[22]

This is because "[d]eportations involve a double or triple trauma for children, who may witness the forcible removal of the parent, suddenly lose their caregiver, and/or abruptly lose their familiar home environment."[23] As the IACHR report explains, a child's sense of security is "rooted in relationships with familiar caregivers," which is a necessary component in a child's development.[24] Thus, the loss of this sense of security often results in stunted emotional, cognitive, and social development. This is particularly true where

the physical separation between parent and child occurs unexpectedly, such as in the case of a deportation.[25]

A further consequence is that a child whose parent is deported "may experience confusion over whether their parent is a 'criminal'. . . ."[26] This perception is exacerbated by "confusing explanations about what happened," and "messages that the loss should be kept a secret." These factors all make the loss of the parent more traumatic, and "increase the likelihood for adverse psychological effects."[27]

Another study was conducted in 2015, in conjunction with the National Institute for Child Health and Human Development, in an effort to add to the empirical database on how current immigration policy and deportation practices affect the mental health and well-being of citizen-children and their families.[28] Three distinct yet interrelated groups of children were studied: (1) a group in Mexico whose parents were deported, (2) a group in the United States whose parents had been deported or were undergoing deportation procedures, and (3) a comparison group of U.S. citizen children of undocumented immigrant parents with neither detention nor deportation proceedings.[29] The study found that children with a parental history of detention or deportation reported possible attention deficits, U.S. citizen children in Mexico with deported parents displayed more depressive symptoms than the children from the other groups, and that children from all three groups fell within the category of probable anxiety disorders. Notably, children whose undocumented parents were not under removal proceedings had more positive self-concepts and perception than children who accompanied their deported parents to Mexico.[30]

When the groups were collapsed into two categories—children affected by parental deportation or detention regardless of location and children not directly affected by parental deportation or detention—children directly affected were more likely to report higher levels of depressive symptoms and emotional problems (e.g., negative mood, physical symptoms, and negative self-esteem) and lower levels of freedom from anxiety and happiness and satisfaction than their counterparts.[31] Thus, as Zayas et al. note, "these findings point to the probable disruptive effects that parents' detention and deportation can have on the psychosocial functioning of children. Even living under the cloud of the deportability of their parents has a negative effect on children. There is the constant sense of vulnerability to losing a parent and a home if parents are arrested, detained, and deported. The high level of anxiety across all groups of children in our study appears to support this point."[32]

Zayas et al. also specifically reference how these empirical studies can be used in the immigration context:

> There are some implications for immigration enforcement that can be derived from the findings of the detrimental impact that deportation has on the mental health of U.S.-born children of undocumented

> immigrants. First and foremost, immigration enforcement policies and practice should be concerned with the circumstances and wellbeing of citizen-children during the detention and deportation of their parents. These children are, after all, citizens who deserve all the protections to which they are entitled. Prospectively, social, health, and immigration enforcement policies must look at the impact that living under the threat of deportation and the actual deportation process has on citizen-children.[33]

In addition, U.S. citizen or LPR children who are forced to leave with their deported parent also suffer more than may have previously been understood. As was noted by the IACHR report, The Pew Hispanic Center found that 300,000 U.S. citizen children returned to Mexico between 2005 and 2012.[34] Those children reportedly "often feel like exiles, and experience difficulties with language and discrimination."[35] They are also "deprived of the benefits of U.S. citizenship," and the "transition between schooling systems can be a challenge, particularly if returning to a rural area."[36]

As a result, these children suffer not only economically but psychologically as well. These children may lose their scholastic and vocational motivation and may suffer from mental health disorders that go untreated. Finally, these children often find themselves in situations of "extreme poverty" in an unfamiliar country. Simply put, just because a child is young and therefore assumed to be "adaptable" does not mean the child will not suffer mightily upon being forced to leave their country of citizenship for a country that is completely foreign—particularly where the destination country is poor and dangerous.

The American Psychological Association (APA) and the American Academy of Pediatrics, among other U.S. health organizations, have also weighed in on the harms children whose parents have been deported may suffer. Evaluating numerous empirical studies, the Society for Community Research and Action, a division of the APA, found that "the effects of sudden and forcible separation of a parent due to deportation on children are considerable,"[37] and include economic hardship; housing instability; food insecurity; academic withdrawal; behavioral changes such as eating and sleeping habits; and emotional changes such as increased crying, anxiety, anger, aggression, withdrawal, and a heightened sense of fear. The children often feel abandoned, isolated, fearful, traumatized, and depressed. Furthermore, older children in the family often needed to work to help support the family, which affected their school performance and attendance.[38]

Dr. Fernando Stein, President of the American Academy of Pediatrics, issued an even more direct statement on January 25, 2017, in which he said: "Far too many children in this country already live in constant fear that their parents will be taken into custody or deported, and the message these children received . . . from the highest levels of our federal government exacerbates that fear and anxiety. No child should ever live in fear. When children are scared,

it can impact their health and development. Indeed, fear and stress, particularly prolonged exposure to serious stress—known as toxic stress—can harm the developing brain and negatively impact short- and long-term health."[39]

He emphasized that "[t]he American Academy of Pediatrics is non-partisan and pro-children. . . . Immigrant children and families are an integral part of our communities and our nation, and they deserve to be cared for, treated with compassion, and celebrated. Most of all, they deserve to be healthy and safe. Pediatricians stand with the immigrant families we care for and will continue to advocate that their needs are met and prioritized."[40]

In August 2019, the American Academy of Pediatrics reaffirmed its commitment to children of immigrant parents, which, it noted, make up 25 percent of children currently living in the United States.[41] In addition, the Academy published an updated and expanded policy directive regarding medical care for children in immigrant families, first issued in 2013.[42] The Academy recognized that since 2013, "the practice and evolution of immigrant health has gained traction with exploration of evidence-based clinical approaches; the interplay of social determinants of health and biopsychosocial development, particularly as it relates to the legal and political constructs of immigration status; and the importance of advocacy."[43] The Academy recommendations include a federal "[i]mmigration policy that prioritizes children and families by ensuring access to health care, educational and economic supports, keeping families together, and protecting vulnerable unaccompanied children," and the adoption of "policies that protect and prioritize immigrant children's health, well-being and safety."[44]

When such evidence is proffered and presented with respect to the impact of a parent-child separation on the particular child who is the qualifying relative—in terms of the extreme emotional disruption, disorientation, and long-lasting damage developmentally—there is no basis for failing to consider such evidence, giving it primacy in the hardship equation. That would place EOIR jurisprudence more in line with other tribunals that consider hardship to children, such as family courts. The BIA's own precedent requires that all evidence provided as proof of exceptional and extremely unusual hardship must be considered—and it must be considered in the aggregate.[45] The BIA must view critical evidence and review and give appropriate weight to the facts presented concerning the psychological and emotional temperament of children left behind by a deported parent.

Periodic increases in knowledge, investigative testing, and scientific research will alter the impact of different events and circumstances. For example, years ago, when there was little awareness of the irreversible developmental injury caused by ingestion of lead paint, the fact that a child lived in an apartment building that was in a state of disrepair may have been considered unfortunate, but not understood to place them at extreme risk of permanent injury and serious disability, as later discoveries have shown to be the case.

As the result of numerous studies and reports, the understanding of the degree of danger posed by lead paint exposure changed dramatically, so that living in such an environment is no longer considered to meet child safety standards. The particular standard remained constant, but the evaluation of the danger posed by lead paint in that context mandated a different conclusion that reflected the reality. Similarly, the policy against dumping hazardous waste in public places has existed for some time, but with increased understanding of the impact of toxic substances on plant and animal life, certain pesticides, medicines, and other chemicals now may require special handling.

It is well settled that the BIA may take administrative notice of authoritative studies that help determine if the immigration judge properly weighed specific evidence, so there are no statutory or regulatory impediments to it doing so.[46]

To be clear, the BIA cannot *alter* the statutory standard of "exceptional and extremely unusual hardship" in the context of non-LPR cancellation cases. That would require legislative action. Rather, the BIA must reexamine the existing standard based on newly available evidence that indicates that the loss of a family member or members due to forced deportation actually can cause deprivation and damage to a child amounting to exceptional and extremely unusual hardship. It is within this context—determining the degree of damage and injury to a child—that the "best interests of the child" standard is a relevant consideration.

Moreover, to employ a "best interests of the child" analysis, the BIA need not eviscerate the exceptional and extremely unusual hardship standard or discard the concept that this level of hardship requires hardship to a U.S. citizen or LPR child beyond what would normally be suffered upon the deportation of a parent. In many cases, considering the best interests of the child will result in a determination that (1) the hardship to the child is not beyond a normal level of hardship, (2) it is in the child's best interests to relocate with the parent, and/or (3) that it is in the child's best interests to *not* remain with the parent. By employing the "best interests of the child" analysis when considering the requisite level of hardship, the trier of fact is ensuring that the decision does in fact equally consider the best interests of both the qualifying child and society as a whole.

Applying the "Best Interests of the Child" Analysis to Abner's Case

Let's assume, for the moment, that the immigration judge felt constrained by the BIA precedent decisions in *Monreal*, *Andazola*, *Recinas*, and *J–J–G–*. Even still, had she utilized the overlayed consideration of the "best interests of the child" standard in Abner's case, it is far more likely that she would have found that the children losing their only parent, their ability to remain in the

home they had lived in since infancy, and their ability to attend school in the same school district with the same friends, teachers, and guidance counselors, and the fact that both children suffered from significant mental health problems, rose to an exceptional and extremely unusual hardship. Put another way, these hardships would occur whether they remained in the United States without their father or returned to Costa Rica with him.

Moreover, as is abundantly clear from the studies discussed above, generally speaking, it is better for children to live with both parents (assuming no physical, mental, or substance abuse issues). Abner's children had already been deprived of that opportunity—their mother knowingly and willingly abandoned them and returned to Costa Rica. Since infancy, they had been raised by a single parent—their father.

Even though the absence of a second parent often can lead to less financial security, concerns about having sufficient food, clothing, and shelter, and diminished schooling and educational opportunities as a result, none of these concerns were present for Abner's children. Their father, as a single parent, had provided them with stable housing by owning their home, had always been gainfully employed, attended all their school meetings and activities, and had provided them with more than adequate clothing, food, entertainment, and other childhood wants as well as needs.

Nonetheless, *despite* all of this, both of his U.S. citizen sons suffered from significant mental health problems, primarily his older son, Cal, which began years ago and continues to this day. In fact, Cal's depression and anxiety became so acute that he engaged in self-harm, attempted suicide, and had to be placed in an in-patient treatment facility for adolescents. His father steadfastly supported him throughout this ordeal, providing constant emotional and financial support for all his medical needs.

As noted above, when considering all these factors, the immigration judge found that the deportation of the children's only parent in the United States, and in fact the only parent they have anywhere in the world, would not result in hardship beyond what would normally be experienced by a child. But had she viewed these hardships in line with the "best interests of the child" standard, she would have had a clear, objective rubric to use as the basis for finding whether the requisite hardship would be suffered by Abner's children in that case.

Now, let's change the facts a bit. Let's assume that the children's mother did not abandon them willingly, but instead was deported, and has remained in constant contact with them. Abner is still employed, but doesn't earn enough to afford a house, so the family has moved from apartment to apartment, from town to town, from school district to school district. Abner, instead of once being at an event where he became intoxicated, drinks to inebriation at least once a month, and he rarely attends his children's school events or parent-teacher conferences, much less their doctors' appointment—not because he doesn't care, but because he works so many hours, does not have a set work

schedule, and is afraid to miss work because he will lose his job. So, he and his children almost never see each other, and don't often have the chance to spend time together. As a result, the boys have started becoming rebellious, and run the risk of getting into serious trouble because of the companions they have chosen.

Even assuming, in our alternate scenario, that the children have the same mental health problems and have been receiving the same level of medical care, a consideration of the children's best interests might very well lead to the conclusion that they would not suffer exceptional and extremely unusual hardship if their father is deported to Costa Rica, especially if they accompany him there—because their best interests would be better served by reuniting with their mother, and having her constant parental support in person, along with their father's support.

In either scenario, because the immigration judge would have specifically considered the best interests of the children, their welfare would have been addressed; it is more likely that the correct outcome (or at least a reasonable outcome) would have ensued; and, upon review, the BIA and/or the federal court would have a clear road map by which to determine if the hardship standard had been properly applied.

Conclusion

Utilizing the best interests of the child as a framework in the hardship analysis allows judges to have the necessary guidance to consider the plethora of new studies demonstrating the impact that the deportation of a parent may have on a child and to employ them objectively in their determinations. It provides a road map for reviewing tribunals to employ, lessening the need to split hairs over whether the review involves questions of fact, law, or both. It also serves societal interests by balancing the need to require adherence to our immigration laws with consideration and protection of the rights of U.S. citizen or LPR minors.

In sum, adopting the "best interests of the child" analysis serves the interests of justice, judicial economy, and society as a whole, and the BIA should incorporate this concept into its cancellation of removal jurisprudence.

Notes

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1. Randy Capps, et al., *Unauthorized Immigrants in the United States: Stable Numbers, Changing Origins* 9 (Dec. 2020), https://www.migrationpolicy.org/sites/default/files/publications/mpi-unauthorized-immigrants-stablenumbers-changingorigins_final.pdf.

2. The names of all individuals have been changed to protect their identities.

3. 23 I&N Dec. 56 (BIA 2001).

4. It should be noted that, while Monreal had three U.S. citizen children, his youngest child, an infant, had returned back to Mexico with the mother of their three children. Thus, as the BIA correctly noted, Monreal's two older children would likely accompany him to Mexico, where they would all be reunited as a family unit.

5. 23 I&N Dec. 319 (BIA 2002).

6. 23 I&N Dec. 467 (BIA 2002).

7. *Matter of Andazola*, 23 I&N Dec. at 328–29 (Espenoza, Board Member, dissenting).

8. *See, e.g.*, *Hernandez-Morales v. U.S. Att'y Gen.*, 977 F.3d 247 (3d Cir. 2020) (discretionary); *Galeano-Romero v. Barr*, 968 F.3d 1176 (10th Cir. 2020) (discretionary). *But see Gonzalez Galvan v. Garland*, 6 F.4th 558 (4th Cir. 2021) (meeting hardship standard is question of law); *Singh v. Rosen*, 984 F.3d 1142 (6th Cir. 2021) (not discretionary); *Trejo v. Garland*, 3 F.4th 760 (5th Cir. 2021) (mixed question of law and fact).

9. *See* TRAC Immigration, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/.

10. 27 I&N Dec. 808 (BIA 2020).

11. *Id.* at 811.

12. Child Welfare Information Gateway, *Determining the Best Interests of the Child*, https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

13. *Id.* at 2.

14. *Id.*

15. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456.

16. United Nations High Commissioner for Refugees, UNHCR Guidelines on Determining the Best Interests of the Child 14–15 (May 2008), https://www.unhcr.org/

en-us/protection/children/4566b16b2/unhcr-guidelines-determining-best-interests-child.html.

17. *Id.* at 15.

18. United Nations High Commissioner for Refugees, 2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child 32.

19. *Id.* at 33.

20. Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32(3) Hisp. J. of Behav. Sci. 341, 345 (2010). *See* Ajay Chaudry, et al., Facing Our Future: Children in the Aftermath of Immigration Enforcement 41 (Feb. 2010).

21. Kalina Brabeck, et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 Am. J. of Orthopsychiatry 496, 500 (2014).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Luis Zayas, et al., *The Distress of Citizen-Children with Detained and Deported Parents*, 24 J. Child Fam. Stud. 3213 (2015).

29. *Id.* at 3221.

30. *Id.* at 3222.

31. *Id.* at 3218.

32. *Id.* at 3221.

33. *Id.* at 3222.

34. Kalina Brabeck, et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 Am. J. of Orthopsychiatry 496, 501 (2014).

35. *Id.*

36. *Id.*

37. Society for Community Research and Action, *Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, 62 Am. J. Cmty. Psychol. 3 (2018).

38. *Id.* at 5–6.

39. Fernando Stein, *AAP Statement on Protecting Immigrant Children*, https://www.aap.org/en/news-room/news-releases/aap/2017/aap-statement-on-protecting-immigrant-children/.

40. *Id.*

41. J. Raul Gutierrez, *AAP Reaffirms Commitment to Immigrant Children with Guidance on Their Care* (Aug. 19, 2019), https://publications.aap.org/aapnews/news/7013.

42. AAP Council on Community Pediatrics, *Providing Care for Immigrant, Migrant, and Border Children* 131 Pediatrics 2028 (2013).

43. J. Raul Gutierrez, *AAP Reaffirms Commitment to Immigrant Children with Guidance on Their Care*.

44. *Id.*

45. *Matter of O–J–O–*, 21 I&N Dec. 381, 383 (BIA 1996); *see also Matter of Monreal*, 23 I&N Dec. at 63–64; *Matter of J–J–G–*, 27 I&N Dec. at 811.

46. *See* 8 C.F.R. § 1003.2(c)(1).

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