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Indiana Law Journal

Volume 72 | Issue 3 Article 9

Summer 1997

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Recommended Citation

Underwood, William C.B. (1997) "Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases," *Indiana Law Journal*: Vol. 72: Iss. 3, Article 9.
Available at: https://www.repository.law.indiana.edu/ilj/vol72/iss3/9

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Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases

WILLIAM C.B. UNDERWOOD*

INTRODUCTION

After exploding onto the national political scene in 1994, immigration reform became a cornerstone of the legislative agenda on Capitol Hill.[1] Following nearly two years of acrimonious debate, Congress passed much heralded "landmark" immigration reform legislation.[2] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")[3] aimed to address the public backlash against America's growing population of illegal residents.[4] The sweeping overhaul provides several popular measures which increase border patrol officers and investigative personnel, increase penalties for alien smuggling and document fraud, and improve the verification system for employment. However, "under the popular cover of fighting illegal immigration, Congress [also made] radical changes in the procedures of immigration law[,] cutting back long-established rules that limit abuse and unfairness on the part of the Immigration and Naturalization Service [('INS')]."[5]

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1. *See, e.g.*, Marc Lacey, *Senate Approves Broad Assault on Illegal Immigration*, L.A. TIMES, May 3, 1996, at A1, *available in* 1996 WL 5265796 ("It was California's Proposition 187, the 1994 initiative seeking to bar illegal immigrants from a variety of public services, that catapulted immigration onto the national stage."). Inspired by California's Proposition 187, several movements emerged across the country to implement similar policies. *See, e.g.*, Maria Puente, *States Setting Stage for Their Own Prop. 187*, USA TODAY, Nov. 18, 1994, at 3A, *available in* 1994 WL 11073994.

2. On September 30, 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of Sept. 30, 1996 ("IIRIRA"), Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, as part of a large appropriations bill put together hastily before adjournment and signed shortly thereafter by President Clinton. "This bill . . . includes landmark immigration reform legislation that reinforces the efforts we have made over the last three years to combat illegal immigration." *President Clinton's Statement on Signing Appropriations Bill*, U.S. Newswire, Oct. 1, 1996, *available in* LEXIS, News Library, Wires File.

3. IIRIRA, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570.

4. *See* William Branigin, *Congress Finishes Major Legislation*, WASH. POST, Oct. 1, 1996, at A1, *available in* 1996 WL 12722570.

5. Anthony Lewis, *Abroad at Home; Mean and Petty*, N.Y. TIMES, Apr. 12, 1996, at A31, *available in* LEXIS, News Library, Papers File. "Public discussion of the new [procedural changes] ha[d] been somewhat muted, as debate ha[d] focused on provisions such as the law's doubling of U.S. Border Patrol forces and a proposal, which was withdrawn under threat of a

Clearly, the INS has a formidable task in enforcing the civil and criminal provisions of our immigration laws.[6] We expect both effective enforcement and a system that provides for fair, impartial, and reasoned application of the law to individuals. Maintaining the integrity of the system is inherently problematic as the INS is responsible not only for enforcement, but also has a service role in providing statutorily eligible aliens[7] with various benefits.[8] Due to this dual obligation, the INS must often make decisions which affect the balance between the needs of immigration law enforcement and the compelling human needs of an alien.[9] Such difficult decisions frequently occur in cases involving an alien's request for discretionary relief from deportation.[10]

The Supreme Court has described deportation as "'a drastic measure and at times the equivalent of banishment or exile.'"[11] Courts regularly quote Justice Louis Brandeis's words that deportation may deprive an individual "of all that makes life worth living."[12] Although courts characterize deportation proceedings as civil in nature,[13] they have recognized the penal consequences for those

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White House veto, to allow states to deny public education to illegal immigrant youngsters." Patrick J. McDonnell, *New Law Could End Immigrants' Amnesty Hopes*, L.A. TIMES, Oct. 9, 1996, at A1, *available in* 1996 WL 12744121.

6. The Attorney General delegates responsibility to the INS and other officers and employees of the Department of Justice to administer the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1525 (1994). *See* INA § 103, 8 U.S.C. § 1103 (1994); 8 C.F.R. §§ 2.1, 100.2 (1996).

7. "The term 'alien' means any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1994).

8. As Harwood explains:

> [The INS's service functions] range from such simple clerical operations as helping an alien file a benefit application to the adjudication of more than 30 different kinds of benefit requests. Benefit adjudications include the issuance of travel documents and re-entry permits to authorized aliens and the replacement of lost or stolen alien registration receipts (the I-551 green cards) along with such important immigration benefits as the grant of lawful permanent residence (immigrant visas) and naturalization (U.S. citizenship).

EDWIN HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 26 (1986).

9. *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY 652 (1995).

10. "Deportation . . . is the removal of an alien who has entered in the United States—either legally or illegally." *Id.* at 511.

11. Sana Loue, *What Went Wrong With* Wang*?: An Examination of* Immigration and Naturalization Service v. Wang, 20 SAN DIEGO L. REV. 59, 59 (1982) (citing Tan v. Phelan, 333 U.S. 6, 10 (1948)); *see also* Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963) ("[D]eportation is a drastic sanction, one which can destroy lives and disrupt families . . . .").

12. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); ALEINIKOFF, *supra* note 9, at 685.

13. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893):

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

affected.[14] In recognition of the harsh results that deportation might impose on certain long-term resident aliens, the Immigration and Nationality Act ("INA")[15] allowed for the discretionary cancellation of an alien's deportation in cases where it would be an extreme hardship for the alien to leave the United States.[16] Despite the enormous discretion vested in agency decisionmakers[17] and the erosion of meaningful review,[18] Congress has drastically curtailed this relief and eliminated a fundamental procedural safeguard by categorically prohibiting judicial review.[19] Thus, it appears that Congress has completely insulated potentially abusive and unconscionable decisions.

With the alien's fate at the mercy of the agency's discretion, the necessity of ensuring the fair, impartial, and reasoned exercise of this discretion would seem crucial. However, the discretionary relief afforded by Congress's newly-constructed "cancellation of removal" provision[20] continues to provide no meaningful guidance for its administration. The agency's failure to develop internal guidelines for the exercise of its discretion has preserved the status quo and thus decisional disparity remains inevitable. Worse yet, Congress's prohibition of judicial review removes an essential final measure of control over the agency's discretionary decisionmaking. The unfortunate result is potentially arbitrary and unjust decisions with essentially no possibility of correction. With so much at stake for the individual, should we tolerate such a result?

This Note examines the new cancellation of removal provision and offers some perspectives on its legitimacy by focusing on the unguided and unrestrained discretion vested in the Attorney General and her subordinates in its administration.[21] By revealing the unlimited potential for unjust decisionmaking, this Note demonstrates the need for effective guidance and restraint. Part I presents an overview of the history, process, and statutory eligibility

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14. *See, e.g.*, Lennon v. INS, 527 F.2d 187, 193 (2d Cir. 1975) ("Deportation is not, of course, a penal sanction. But in severity it surpasses all but the most Draconian criminal penalties.").

15. 8 U.S.C. §§ 1101-1255 (1994).

16. *See* INA § 244(a), 8 U.S.C. § 1254(a) (1994), *repealed by* IIRIRA, Pub. L. No. 104-208, §§ 308(b)(7), 309, 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1680, 1697-1701.

17. *See* part II.

18. *See* part III.

19. *See* IIRIRA, Pub. L. No. 104-208, § 306(a)(2), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1666-67 (to be codified at 8 U.S.C. § 1252(a)(2)(B)).

20. IIRIRA, Pub. L. No. 104-208, § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1633-44 (to be codified at 8 U.S.C. § 1229b). "Cancellation of removal" under INA § 240A was formally referred to as "suspension of deportation" as derived from an earlier form of the provision which authorized the Attorney General to "suspend" deportation in certain cases upon a showing of "serious economic detriment" to an immediate relative of a deportable alien. The matter was then reported to Congress, which could disallow the suspension and mandate deportation. As the statute no longer requires congressional participation, and apparently Congress's desire to soften the deportation language, the relief is now termed "cancellation of removal" to reflect the Attorney General's authority to cancel, not merely suspend, "removal" proceedings. *See* ALEINIKOFF, *supra* note 9, at 653.

21. This Note will focus discussion on the former "suspension of deportation" relief components of the new cancellation of removal provision and will refer to the relief as "cancellation of deportation."

requirements for cancellation of deportation relief. Part II investigates the cancellation of deportation decision and reveals the unfettered discretion vested in immigration decisionmakers. Part III reviews the erosion, and Congress's subsequent elimination, of judicial review. Finally, Part IV offers proposals to help achieve better cancellation of deportation decisionmaking and urges Congress to clarify and correct its ill-advised reconstruction of the law.

I. CANCELLATION OF DEPORTATION: AN OVERVIEW

For the estimated five million illegal immigrants in the United States,[22] cancellation of deportation is one of the few avenues available to become a lawful permanent resident.[23] Obviously, most deportable aliens would desire to remain in the United States in a lawful status. Relief from deportation therefore must strike a balance between government interests in enforcing immigration laws and concern for the individual circumstances of the alien.[24] Long-established discretionary relief served to strike that balance by allowing cancellation of deportation only in circumstances where deportation would visit an unbefitting degree of hardship upon long-term residents.[25] Yet, the critical definition of the particular circumstances which fall within that contemplated degree of hardship, and merit such relief, has remained elusive.

A. Cancellation of Deportation Relief: A Historical Perspective

Prior to 1940, our immigration laws inflexibly demanded the deportation of an alien living illegally in the United States.[26] However, the accumulation of

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22. *See, e.g.*, William Branigin, *5 Million Reside Illegally in U.S.*, INDIANAPOLIS STAR, Feb. 8, 1997, at A1.

23. "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20) (1994).

> After admission, immigrants are . . . often referred to as lawful permanent residents (LPRs) or permanent resident aliens, until they obtain citizenship through naturalization. Permanent resident status means quite simply that [such individuals] may stay as long as they wish (provided they do not engage in certain post-entry activities that render them deportable). . . . One may remain in LPR status indefinitely.

ALEINIKOFF, *supra* note 9, at 122 n.1.

24. *See* ALEINIKOFF, *supra* note 9, at 652.

25. *See* INA § 244(a), 8 U.S.C. § 1254(a) (1994), *repealed by* IIRIRA, Pub. L. No. 104-208, §§ 308(b)(7), 309, 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1680, 1697-1701.

26. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 933 (1983):

> The Immigration Act of 1924, [Pub. L. No. 139, 43 Stat. 153] required the Secretary of Labor to deport any alien who entered or remained in the United States unlawfully. The only means by which a deportable alien could lawfully remain in the United States was to have his status altered by a private bill enacted by both Houses and presented to the President pursuant to the procedures set out in Art. I, § 7 of the Constitution.

hardships produced by this unyielding law "led to urgent proposals for amelioration."[27] In the Alien Registration Act of 1940, Congress responded by amending section 19 of the 1917 Immigration Act[28] to allow the Attorney General to suspend an alien's deportation if he could prove five years of residence in the United States with good moral character, and that deportation would result in serious economic detriment to a spouse, parent, or minor child who was a United States citizen or a lawfully permanent resident.[29] Furthermore, a 1948 amendment extended the availability of the suspension process to those aliens without family ties who could establish seven years of residence in the United States.[30]

In the early 1950s, critics claimed that aliens were abusing the suspension of deportation process and "that illegal entrants were being favored excessively."[31] In 1952, Congress responded by restricting eligibility for suspension of deportation.[32] Congress concluded that the "serious economic detriment" standard was too generous and thus authorized suspension of deportation only where it would result in "exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or alien lawfully admitted for permanent residence."[33] Congress intended that such relief be granted only in those circumstances where an alien's deportation would be unconscionable.[34]

In addition to the "exceptional and extremely unusual"[35] hardship standard, Congress further restricted eligibility for suspension of deportation relief by requiring an alien to show "good moral character" and a certain continuous

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27. 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 74.07[2][a] (1988 & Supp. Aug. 1996) ("Confronted with large numbers of compassionate cases, the administrative authorities requested that Congress grant authority to remit deportation."). "In 1936 the Commissioner of Immigration cited nearly 3,000 cases under consideration which involved 'such incredibly cruel family separations . . . so repugnant to every American principle of justice and humanity that deportation was stayed until Congress might take some action.'" Susan L. Kamlet, Comment, *Judicial Review of "Extreme Hardship" in Suspension of Deportation Cases*, 34 AM. U. L. REV. 175, 175 n.4 (1984).

28. Pub. L. No. 64-301, 39 Stat. 874 (1917).

29. *See* Pub. L. No. 76-670, § 20, 54 Stat. 670, 672 (1940).

30. *See* Act of July 1, 1948, 62 Stat. 1206.

31. 3 GORDON, *supra* note 27, § 74.07[2][b]; *see* S. REP. NO. 82-1137, at 25 (1952) (claiming that suspension of deportation was used to bypass conventional immigration channels); S. REP. NO. 81-1515, at 600-01 (1950) (arguing that since each cancellation of deportation reduces the number of visas available by one, it is therefore unfair for those aliens waiting to immigrate through conventional means).

32. *See* Act of June 27, 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214.

33. *Id.*; 3 GORDON, *supra* note 27, § 74.07[5][f].

34. *See* S. REP. NO. 82-1137, at 25 (1952):

> [U]nder the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable.

35. Congress adopted the stricter "exceptional and extremely unusual" hardship standard over the "extreme and unusual" hardship standard recommended by the Senate Subcommittee on the Judiciary. S. REP. NO. 81-1515, at 610 (1950).

period of residency depending on the seriousness of the deportation grounds.[36] Thus, Congress imposed stricter eligibility requirements on more serious violators of the immigration laws. However, the new hardship standard applied to all of the deportation grounds.[37]

Under this new "exceptional and extremely unusual" hardship standard the Board of Immigration Appeals ("BIA")[38] identified the following basic factors it would consider in determining whether or not to grant relief: (1) length of residence in the United States, including the manner of entry; (2) family ties; (3) possibility of obtaining a visa abroad; (4) financial burden on the alien of having to go abroad to obtain a visa; and (5) health and age of the alien.[39] Although an alien need not present a favorable showing upon all of the factors, an alien should at least present a favorable showing of several of these factors to establish the necessary hardship.[40]

In 1962, amongst severe criticism of the "exceptional and extremely unusual" hardship standard,[41] Congress again revised the hardship standard by dividing the suspension of deportation provision into two categories.[42] For those aliens found

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36. *See* Act of June 27, 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214.

37. *See id.*

38. The BIA is the appellate review body for appeals from the immigration courts. *See* part I.B. (discussing the BIA's role in cancellation of deportation proceedings).

39. *See In re* S., 5 I. & N. Dec. 409, 410-11 (1953).

40. *See id.* at 410.

41. *See* Jonathon P. Foerstel, Comment, *Suspension of Deportation—Toward a New Hardship Standard*, 18 SAN DIEGO L. REV. 663, 667 n.31 (1981).

> Both President Truman and President Eisenhower were critical of the new hardship standard. President Truman, in his veto of the Act of 1952, expressed fear that section 244 "would narrow the circle of those who can obtain relief. . . ." This, he felt, would be unfortunate since other sections of the Act of 1952 would impose harsher restrictions and add to the number deserving relief. H.R. DOC. NO. 520, 82 Cong., 2d Sess. 7 (1952). In a letter to Senator Arthur Watkins, President Eisenhower stated that there would be problems interpreting the exceptional and extremely unusual hardship standard, and therefore, "the laws should more clearly state the standards upon which this discretionary relief may be granted by the Attorney General." 99 CONG. REC. 4321 (1953).

Id. (alteration in original). One of the harshest criticisms of the "exceptional and extremely unusual" hardship standard came from Ben Touster, President of the Hebrew Sheltering and Immigration Aid Society:

> [S]ection 244 [along with §§ 212(c), 245] . . . rob our immigration laws of every vestige of humaneness which has developed since 1917. The hardship attendant upon separating families is not enough to grant suspension. . . . One must measure degrees of suffering and torture, and only those who suffer the anxiety of mental and physical pain to the utmost may be relieved under this law. The rest must suffer exile, a dreadful punishment abandoned by the common consent of all civilized peoples.

Id. at 668 n.34 (quoting STAFF OF PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, 82D. CONG., HEARINGS BEFORE THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 1789 (Comm. Print 1952)) (alterations in original).

42. *See* Act of Oct. 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247; 3 GORDON, *supra* note 27, § 74.07[5][f].

deportable on less serious grounds,[43] Congress changed the standard from "exceptional and extremely unusual hardship" to "extreme hardship" under INA section 244(a)(1). For more serious violators,[44] Congress retained the "exceptional and extremely unusual hardship" standard under section 244(a)(2). Although its reasons for the amendment were not explained,[45] the distinction between these two provisions indicates that Congress intended to lower the hardship standard for those found deportable on less serious grounds.[46]

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43. Under former INA § 244(a), 8 U.S.C. § 1254(a) (1994), *repealed by* IIRIRA, Pub. L. No. 104-208, §§ 304(b)(7), 309, 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1680, 1697-1701, there were two different hardship standards based on the seriousness of deportation grounds. Section 244(a)(1) required a showing of "extreme hardship" for an alien deportable on any other grounds except those specified in § 244(a)(2). Section 244(a)(3) also required a showing of "extreme hardship" for those aliens found deportable on any grounds except those specified in § 244(a)(2) and § 241(a)(1)(G), 8 U.S.C. § 1251(a)(1)(G) (1994) (found to have engaged in marriage fraud). Section 244(a)(2) required a showing of "exceptional and extremely unusual hardship" for aliens found deportable on the following grounds: INA § 241(a)(2)(A)(i)-(ii), 8 U.S.C. § 1251(a)(2)(A)(i)-(ii) (convicted of a crime involving moral turpitude); INA § 241(a)(2)(A)(iii), 8 U.S.C. § 1251(a)(2)(A)(iii) (convicted of an aggravated felony); INA § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i) (convicted of a violation of any law or regulation relating to a controlled substance); INA § 241(a)(2)(B)(ii), 8 U.S.C. § 1251(a)(2)(B)(ii) (found to be a drug abuser or addict); INA § 241(a)(2)(C), 8 U.S.C. § 1251(a)(2)(C) (convicted of certain firearm offenses); INA § 241(a)(2)(D)(i), 8 U.S.C. § 1251(a)(2)(D)(i) (convicted of an offense relating to espionage, sabotage, or treason and sedition); INA § 241(a)(2)(D)(ii), 8 U.S.C. § 1251(a)(2)(D)(ii) (convicted of threatening the President, successors to the Presidency, and friendly nations); INA § 241(a)(2)(D)(iii), 8 U.S.C. § 1251(a)(2)(D)(iii) (convicted of violating any provision of the Military Selective Service Act (50 U.S.C. App. § 451-472) or Trading With the Enemy Act (50 U.S.C. App. §§ 1-6, 7-39, 41-44)); INA § 241(a)(2)(D)(iv), 8 U.S.C. § 1251(a)(2)(D)(iv) (convicted of violating laws relating to the departure or entry of persons in the United States and importing aliens for an immoral purpose); INA § 241(a)(3)(A), 8 U.S.C. § 1251(a)(3)(A) (failure to notify Attorney General of change of address); INA § 241(a)(3)(B), 8 U.S.C. § 1251(a)(3)(B) (convicted of failing to register or falsification of documents); INA § 241(a)(3)(C), 8 U.S.C. § 1251(a)(3)(C) (found violating laws relating to document fraud); INA § 241(a)(4)(A)(i), 8 U.S.C. § 1251(a)(4)(A)(i) (found violating or evading any law prohibiting the export of goods, technology, or sensitive information); INA § 241(a)(4)(A)(ii), 8 U.S.C. § 1251(a)(4)(A)(ii) (found engaging in criminal activity which endangers public safety or national security); INA § 241(a)(4)(A)(iii), 8 U.S.C. § 1251(a)(4)(A)(iii) (found engaging in any activity relating to the control or overthrow of the Government of the United States); INA § 241(a)(3)(B), 8 U.S.C. § 1251(a)(4)(B) (found engaging in terrorist activities); INA § 241(a)(4)(C), 8 U.S.C. § 1251(a)(4)(C) (found presence or activities to have potentially serious foreign policy consequences); or INA § 241(a)(4)(D), 8 U.S.C. § 1251(a)(4)(D) (found assisting in Nazi persecution or genocide).

44. *See supra* note 43 (discussing the more serious grounds for deportation).

45. The bill was merely described as one "to facilitate the entry of alien skilled specialists and certain relatives of U.S. citizens, and for other purposes." H.R. REP. NO. 87-2552, at 1 (1962).

46. *See* Wang v. INS, 622 F.2d 1341, 1345 n.2 (9th Cir. 1980), *rev'd*, 450 U.S. 139 (1981) ("The distinction between these requirements has not been clearly defined, but it is generally agreed that Congress intended to lessen the degree of hardship required for suspension of deportation."); *In re* Hwang, 10 I. & N. Dec. 448, 452 (1964); *In re* Louie, 10 I. & N. Dec. 223, 225 (1963); 3 GORDON, *supra* note 27, § 74.07[5][f].

Prior to 1952, the Attorney General needed to report the decision to suspend deportation to Congress, which could override the decision by passing a concurrent resolution mandating deportation.[47] If Congress failed to do so, the Attorney General canceled deportation proceedings and adjusted the alien's status to that of a lawful permanent resident of the United States. However, Congress thereafter amended the statute to require a resolution by only a single House of Congress to disallow an alien's cancellation of deportation.[48] In the landmark case of *INS v. Chadha*,[49] the Supreme Court declared the one-house veto provision unconstitutional. Nevertheless, the mandatory reporting procedure remained. Thus, all grants of suspension required a detailed statement of facts and reasons to be sent to Congress for review. In 1988, Congress amended the statute to delete its participation in cancellation of deportation decisions and allow the grants of cancellation to take effect upon final approval of an immigration judge or the BIA.[50] Still, the relief under INA section 244(a) remained termed "suspension of deportation" even though the decision in fact "canceled," not merely "suspended," an alien's deportation.

Congress made no substantial changes to the relief provision until 1994.[51] The Violent Crime Control and Law Enforcement Act of 1994[52] added paragraph (3) to INA section 244(a). Section 244(a)(3) created a third category which allowed the Attorney General to cancel the deportation of three groups of aliens subject to abuse: "(1) aliens who were battered or subjected to extreme cruelty by their U.S. citizen or permanent resident spouses; (2) aliens who were battered or subjected to extreme cruelty by their U.S. citizen or permanent resident parent(s); and (3) aliens whose children were battered or subjected to extreme cruelty by their U.S. citizen or permanent resident parent(s)."[53] Congress lowered the eligibility requirements by requiring a showing of only three years of continuous residency and good moral character and thereby expanded the availability of relief for abused spouses and children whose deportation would result in extreme hardship.[54]

Under the popular guise of restricting illegal immigration, Congress radically reconstructed the suspension of deportation provision two years later. The

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47. *See* Act of July 1, 1948, ch. 783, 62 Stat. 1206; *see also* INS v. Chadha, 462 U.S. 919, 933-34 (1983) (discussing the history of Congress's participation in cancellation of deportation proceedings).

48. *See* Act of June 27, 1952, Pub. L. No. 82-414, § 244(b), 66 Stat. 163, 215.

49. 462 U.S. 919 (1983).

50. *See* Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 2(q), 102 Stat. 2609, 2613 (amending INA § 244(c), 8 U.S.C. § 1254(c)).

51. The Immigration Act of 1990, Pub. L. No. 101-649, § 602, 104 Stat. 4978, 5077, and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 307(h), (k), 105 Stat. 1733, 1755-56, reorganized and redesignated the grounds for deportation. Only minor corresponding amendments were made to INA section 244(a) to account for these changes.

52. Pub. L. No. 103-322, § 40703(a), 108 Stat. 1796, 1955.

53. 3 GORDON, *supra* note 27, § 74.07[11]; *see* INA § 244(a)(3), 8 U.S.C. § 1254(a)(3), *amended by* IIRIRA, Pub. L. No 104-208, § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1645-46 (to be codified at 8 U.S.C. § 1229b(b)(2)).

54. *See supra* note 53.

IIRIRA[55] consolidated waiver of deportation relief under INA section 212(c)[56] and suspension of deportation relief under section 244[57] into one provision termed "cancellation of removal" under section 240A.[58] However, after Congress's rabid reconstruction, little remains of former suspension of deportation relief. Current section 240A(b)(1) and (2) replaced the three forms of relief previously available under section 244(a). Although section 240A(b)(2) basically restates the provisions under former section 244(a)(3), section 240A(b)(1) severely circumscribes the relief formerly available under section 244(a)(1) and eliminates altogether relief previously available under section 244(a)(2). Congress essentially transplanted the stricter required showing of "exceptional and extremely unusual hardship" and the ten year period of continuous physical presence and good moral character requirements from prior section 244(a)(2) to its newly-fashioned section 240A(b)(1). In addition, Congress further restricted availability of relief under section 240A(b)(1) and (2) by limiting the number of adjustments to lawful permanent resident status to 4,000 in any fiscal year.[59]

Congress's most radical change, however, was the prohibition of judicial review. INA section 242(a)(2)(B) provides that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review . . . any judgment regarding the grant of relief under section . . . 240A."[60] Proponents of the measure cited frustrations with aliens using litigation as a means to prolong their stays and potentially gain legal resident status.[61] However, despite a 1991 Attorney General report concluding that aliens were not engaging in such exploitation,[62] Congress also placed additional procedural restrictions limiting

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55. Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570.

56. Congress made this type of discretionary relief available to lawful permanent resident aliens who became deportable as a result of certain criminal offenses or other conduct which would make them inadmissible. See 8 U.S.C. § 1182(c) (1994), *repealed by* IIRIRA, Pub. L. No. 104-208, §§ 304(b), 309, 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1650, 1697-1701; Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (concluding that aliens who had never departed from the United States were also eligible for INA § 212(c) relief).

57. 8 U.S.C. § 1254(a) (1994), *repealed by* IIRIRA, Pub. L. No. 104-208, §§ 308(b)(7), 309, 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1680, 1697-1701.

58. IIRIRA, Pub. L. No. 104-208, § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1644-48 (to be codified at 8 U.S.C. § 1229b).

59. *See id.* at 1646, 1648 (to be codified at 8 U.S.C. § 1229b(b)(3), (e)).

60. *Id.* § 306(a)(2), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1667 (to be codified at 8 U.S.C. § 1252(a)(2)(B)).

61. As the House Report indicates:

> Suspension of deportation is often abused by aliens seeking to delay proceedings until 7 years have accrued. This includes aliens who failed to appear for their deportation proceedings and were ordered deported in absentia, and then seek to re-open proceedings once the requisite time has passed. Such tactics are possible because some Federal courts permit aliens to continue to accrue time toward the seven year threshold even after they have been placed in deportation proceedings.

H.R. REP. NO. 104-469 (pt. 1), at 122 (1996); *see, e.g.*, McDonnell, *supra* note 5.

62. *See* 68 INTERPRETER RELEASES 907 (1991); ALEINIKOFF, *supra* note 9, at 659

an alien's ability to reopen and reconsider deportation proceedings.[63] Presumably, these new restrictions would relax concerns about potential abuse of the appeals process to forestall deportation.[64] Nevertheless, Congress thought it necessary to strip the courts of jurisdiction to review these decisions, thereby leaving the final word to the INS—an agency with a history of abuse.[65]

By severely circumscribing cancellation of deportation relief and eliminating judicial review, Congress grossly shifted the balance between enforcement and humanitarian concerns. Given Congress's overcorrection, many of the most deserving aliens simply will not be able to meet the stringent new eligibility requirements. Moreover, those few aliens with a colorable claim to relief have no real assurances of a fair and accurate determination. As this Note will

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63. *See* IIRIRA, Pub. L. No. 104-208, § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1643, (to be codified at 8 U.S.C. § 1229(c)(5)); 61 Fed. Reg. 18,904, 18,905, 32,924 (1996) (to be codified at 8 C.F.R. § 3.2) (allowing an alien to file only one motion to reconsider a decision that the alien is deportable and requiring the motion to be filed within thirty days of a final order of removal); IIRIRA, Pub. L. No. 104-208, § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1643 (to be codified at 8 U.S.C. § 1229(c)(6)) (allowing an alien to file only one motion to reopen proceedings and requiring the motion to be filed within 90 days of a final order of removal). A motion to reopen, if granted, allows an alien to present new evidence that was "not available and could not have been discovered or presented at the former hearing." 61 Fed. Reg. 18,904, 32,924 (1996) (to be codified at 8 C.F.R. § 3.2). On the other hand, a motion to reconsider, if granted, allows review of errors of law or fact in the previous order. *See id.*; 8 C.F.R. §§ 103.5, 242.22 (1996); ALIENIKOFF, *supra* note 9, at 658; *see also* part I.B (discussing the cancellation of deportation process).

64. Obviously, the longer an alien lives in the United States, the greater the potential for hardship upon deportation. In addition, an alien may not have resided in the United States long enough to meet the required residency period to establish eligibility for relief prior to deportation proceedings. Thus, an alien has incentives to file motions to reopen proceedings whereby the alien has additional time to establish the residency requirement or possibly new grounds for the requisite degree of hardship under INA section 240A(b). *See* ALEINIKOFF, *supra* note 9, at 657-58. However, filing a motion to reopen does not automatically stay the execution of an outstanding order of removal. The decision whether to grant a stay, as well as the pending motion, is left to the discretion of the immigration decisionmaker. *See* 61 Fed. Reg. 18,904, 18,905, 32,924 (1996) (to be codified at 8 C.F.R. § 3.2); 8 C.F.R. §§ 242.22, 243.4 (1996). Furthermore, for cancellation of removal determinations, section 240A(d)(1) ends the alien's period of residency when the alien is served notice to appear in the initial deportation proceedings. *See* IIRIRA, Pub. L. No. 104-208, § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1647 (to be codified at 8 U.S.C. § 1229b(d)(1)). In addition, section 240(c)(6) requires an alien to submit a motion to reopen proceedings within ninety days of a final order of removal. *Id.* at 1643 (to be codified at 8 U.S.C. § 1229(c)(6)). Therefore, little opportunity remains for an alien to use such dilatory tactics.

65. *See, e.g.*, Ardestani v. INS, 502 U.S. 129, 146 (1991) ("Evidence indicates that the INS has engaged in abusive litigation tactics.") (Blackmun J., dissenting). "[C]ritics point to a history of abuses by the [INS]—abuses they say have been directed not only at illegal immigrants but also at legal immigrants and even U.S. citizens, some of whom have been wrongly detained and even expelled because of their appearance or accents." McDonnell, *supra* note 5. Lucal Gettentag, Director of the National Immigration Project of the American Civil Liberties Union, stated that "[t]he history of the agency over the last 15 years demonstrates repeated and systemic violations of the law and the Constitution." Louis Freedberg, *Government Limiting Ability of Immigrants to Fight INS*, HOUS. CHRON., Oct. 22, 1996, at 3, *available in* 1996 WL 11571448.

illustrate, Congress has unnecessarily tipped the balance too far toward enforcement objectives.

B. The Cancellation of Deportation Process

Generally, the cancellation of deportation process begins with a deportable alien's application for cancellation to the immigration judge in a deportation proceeding.[66] An alien bears the burden of proving statutory eligibility and the basis on which the alien requests a favorable exercise of discretion.[67] If the immigration judge finds that the alien meets the eligibility requirements of INA section 240A(b),[68] the judge may, in her discretion, cancel deportation.[69] If the immigration judge denies the application, the alien may appeal the decision to the BIA.[70] A BIA denial, however, is no longer reviewable by the courts.[71]

After a BIA denial, an alien may file one motion to reconsider the decision.[72] Such motion must be filed within thirty days of the prior decision and must specify errors of fact or law and be supported by pertinent authority.[73] An alien may not, however, seek reconsideration of a decision denying a previous motion to reconsider.[74]

If an alien's circumstances change following deportation proceedings, the alien has one opportunity to reopen proceedings.[75] An alien addresses the motion to the immigration judge unless the alien has already appealed the decision to the BIA in which case the alien must then address the motion directly to the BIA.[76] These motions "shall not be granted unless it appears to the Board [or immigration judge] that evidence sought to be offered is material and was not available and

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66. *See* 8 C.F.R. § 244.1 (1996). A deportation proceeding is an administrative hearing conducted by an immigration judge called a "special inquiry officer." Such an officer is an attorney appointed by the Attorney General. *See* INA § 101(b)(4), 8 U.S.C. § 1101(b)(4) (1994).

67. *See* 8 C.F.R. § 242.17(e) (1996); 3 GORDON, *supra* note 27, § 74.07[2][e].

68. IIRIRA, Pub. L. No. 104-208, § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1644-46 (to be codified at 8 U.S.C. § 1229b(b)).

69. *See id.*

70. *See* 8 C.F.R. § 3.1 (1996) (regulating authority and powers of the BIA); 61 Fed. Reg. 18,909, 21,065 (1996) (to be codified at 8 C.F.R. § 242.21) (authorizing appeals).

71. *See* IIRIRA, Pub. L. No. 104-208, § 306(a)(2), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1667 (to be codified at 8 U.S.C. § 1252(a)(2)(B)). Previously, an alien could seek judicial review by filing a petition with a United States court of appeals within 90 days from the date of the BIA decision. *See* INA § 106(a), 8 U.S.C. § 1105a(a)(1) (1994), *repealed by* IIRIRA, Pub. L. No. 104-208, § 306(b), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1675; 6 GORDON, *supra* note 27, § 143.06[3].

72. *See* 61 Fed. Reg. 18,904, 18,905, 32,924 (1996) (to be codified at 8 C.F.R. § 3.2); 8 C.F.R. § 242.22 (1996).

73. *See* 61 Fed. Reg. 18,904, 18,905, 32,924 (1996) (to be codified at 8 C.F.R. § 3.2).

74. *See id.*

75. *See id.*; 8 C.F.R. § 242.22 (1996); *supra* note 63 (discussing motions to reopen and reconsider).

76. *See* 61 Fed. Reg. 18,904, 18,905 (1996) (to be codified at 8 C.F.R. § 3.2); 8 C.F.R. § 242.22 (1996).

could not have been discovered or presented at the former hearing . . . ."[77] Furthermore, "[s]uch motions will not be granted 'when a *prima facie* case of eligibility for the relief sought has not been established.'"[78] However, even if an alien establishes a prima facie showing of these requirements, the alien's motion may still be denied.[79] Decisions denying motions to reopen and reconsider are also no longer subject to judicial review.[80]

C. Statutory Eligibility Requirements

77. 61 Fed. Reg. 18,904, 18,905 (to be codified at 8 C.F.R. § 3.2); *see also* 8 C.F.R. § 242.22 (1996).

78. INS v. Wang, 450 U.S. 139, 141 (1981) (quoting *In re* Lam, 14 I. & N. Dec. 98 (1972)) (emphasis in original).

79. *See* INS v. Doherty, 502 U.S. 314, 323 (1992) (affirming that Attorney General has broad discretion to grant or deny such motions); INS v. Rios-Pineda, 471 U.S. 444 (1985) (holding that refusal to reopen suspension proceedings was within the Attorney General's discretion).

80. *See* IIRIRA, Pub. L. No. 104-208, § 306(a)(2), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1667 (to be codified at 8 U.S.C. § 1252(a)(2)(B)). Formerly, under INA § 106(a), 8 U.S.C § 1105a(a)(2) (1994), *repealed by* IIRIRA, Pub. L. No. 104-208, § 306(b), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1675, the federal courts of appeals had exclusive jurisdiction to review all final orders of deportation pursuant to administrative proceedings. *See* Foti v. INS, 375 U.S. 217, 232 (1963) (holding that suspension of deportation denials were subject to review in the federal courts of appeals).

Cancellation of removal relief under INA section 240A[81] comes in three forms,

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81. The IIRIRA, Pub. L. No. 104-208, § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1644-48 (to be codified at 8 U.S.C. § 1229b) provides in part:

(a) CANCELLATION OF REMOVAL FOR CERTAIN PERMANENT RESIDENTS.—The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of an aggravated felony.

(b) CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR CERTAIN NONPERMANENT RESIDENTS.—

(1) In general.—The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) SPECIAL RULE FOR BATTERED SPOUSE OR CHILD.—The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(A) the alien has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent);

(B) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application;

(C) the alien has been a person of good moral character during such period;

(D) the alien is not admissible under paragraph (2) or (3) of section 212(a), is not deportable under paragraph (1)(G) or (2) through (4) of section 237(a), and has not been convicted of an aggravated felony; and

(E) the removal would result in extreme hardship to the alien, the alien's child, or (in the case of an alien who is a child) to the alien's parent.

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within sole discretion of the Attorney General.

(3) ADJUSTMENT OF STATUS.—The Attorney General may adjust to the status of an alien lawfully admitted for permanent residence any alien who the Attorney General determines meets the requirements of paragraph (1) or (2).

depending on the underlying ground of deportability and circumstances of the alien. Section 240A(a)[82] is relief formerly known as waiver of deportation.[83] Under section 240A(a), certain permanent resident aliens are eligible for cancellation of deportation if they can establish that they: (1) have been an alien lawfully admitted for permanent residence for not less than five years; (2) have resided continuously in the United States for not less than seven years after being admitted in any status; and (3) have not been convicted of any aggravated felony.[84]

For certain nonpermanent resident aliens, relief is available under section 240A(b). Section 240A(b)(1) is the general relief provision and section 240A(b)(2) is a special provision for battered spouses and children. Under both forms an alien must show: (1) a certain continuous period of physical presence in the United States immediately preceding the date of application; (2) that during all of such period the alien was and is a person of good moral character; and (3) that the alien is a person whose deportation would result in a requisite degree of hardship to the alien or to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.[85] The residency, character, and hardship requirements vary between the forms.

Under section 240A(b)(1), an alien must show good moral character and physical presence in the United States for a period of at least ten years preceding the application for relief. In addition, the alien must show that deportation would result in "exceptional and extremely unusual" hardship. Eligibility requirements are less stringent under section 240A(b)(2) as the alien must show that deportation would result in "extreme" hardship and establish only three years continuous physical presence and good moral character. Under all forms, certain circumstances may deem an alien ineligible for cancellation of removal relief.[86]

> The number of adjustments under this paragraph shall not exceed 4,000 for any fiscal year. The Attorney General shall record the alien's lawful admission for permanent residence as of the date the Attorney General's cancellation of removal under paragraph (1) or (2) or determination under this paragraph.

82. *Id.* (to be codified at 1229b(a)).

83. *See supra* note 56 (discussing former waiver of deportation relief under INA section 212(c)).

84. *See* IIRIRA, Pub. L. No. 104-208, § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1644 (to be codified at 8 U.S.C. § 1229b(a)).

85. *See id.* at 1644-46 (to be codified at 8 U.S.C. § 1229b(b)(1) and § 1229b(b)(2)).

86. INA section 240A(c) provides that the provisions of section 240A(a) and (b)(1) shall not apply to any of the following aliens:

> (1) An alien who entered the United States as a crewman subsequent to June 30, 1964.
>
> (2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 101(a)(15)(J), or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 212(e).
>
> (3) An alien who—

The first and second statutory eligibility requirements for the two forms of relief under section 240(b) are fairly explicit. Congress defines the ambiguous "good moral character" requirement in the negative by reference to certain conduct which precludes such a finding.[87] Although courts once literally

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(A) was admitted to the United States as a non immigrant exchange alien as defined in section 101(a)(15)(J) or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,
(B) is subject to the two-year foreign residence requirement of section 212(e), and
(C) has not fulfilled that requirement or received a waiver thereof.
(4) An alien who is inadmissible under section 212(a)(3) or deportable under section 237(a)(4).
(5) An alien who is described in section 241(b)(3)(B)(i).
(6) An alien whose removal has previously been canceled under this section or whose deportation was suspended under section 244(a) or who has been granted relief under section 212(c), as such sections were in effect before the date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

Id. at 1646-47 (to be codified at 8 U.S.C. § 1229b(c)). In addition, cancellation of deportation relief under section 240A(b)(1) is not available for an alien convicted of an offense under section 212(a)(2), 8 U.S.C. § 1182(a)(2) (1994), section 237(a)(2) (to be codified at 8 U.S.C. § 1227(a)(2)) (criminal offenses involving moral turpitude; crimes with sentences of one year or longer; aggravated felonies; crimes relating to controlled substances; firearm offenses; and crimes involving domestic violence), or section 237(a)(3) (to be codified at 8 U.S.C. § 1227(a)(3)) (failing to register and falsification of documents). *Id.* at 1644-45 (to be codified at 8 U.S.C. § 1229b(b)(1)(C)). Under section 240A(b)(1), relief is unavailable if the alien is inadmissible under section 212(a)(2), 8 U.S.C. § 1182(a)(2) (1994) (criminal and related grounds) or section 212(a)(3), 8 U.S.C. § 1182(a)(3) (security and related grounds); deportable under section 237(a)(1)(G) (to be codified at 8 U.S.C. § 1227(a)(1)(G)) (marriage fraud) or section 237(a)(2) through (4)) (to be codified at 8 U.S.C. § 1227(a)(2) through (4) (criminal offenses involving moral turpitude; crimes with sentences of one year or longer; aggravated felonies; crimes relating to controlled substances; firearm offenses; crimes involving domestic violence; failing to register and falsification of documents; and security and related grounds); or has been convicted of an aggravated felony (as defined by 8 U.S.C. § 1101(a)(43) (1994)). *Id.* at 1645 (to be codified at 8 U.S.C. § 1229b(b)(2)(D)). In 1994, Congress substantially expanded the definition and the list of actions which constitute an "aggravated felony." *See* Immigration and Naturalization Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305.

87. According to the statute:

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—
(1) a habitual drunkard;
(2) Repealed. Pub. L. 97-116, § 2(c)(1), Dec. 29, 1981, 95 Stat. 1611
(3) a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

interpreted the continuous physical presence requirement,[88] Congress clarified the meaning by amendment[89] to allow for "brief, casual, and innocent" absences from the United States.[90] However, the IIRIRA[91] placed new restrictions on the treatment of such absences. If an alien has departed from the United States for any period in excess of ninety days or any periods in the aggregate exceeding 180 days, the alien will fail to establish the required continuous physical presence.[92]

The required hardship showing is an almost insurmountable barrier to obtaining cancellation of deportation relief.[93] Congress has never defined the ambiguous "extreme" and "exceptional and extremely unusual" hardship standards. In 1953, the BIA did identify basic considerations it would consider in determining "exceptional and extremely unusual" hardship standard.[94] However, the BIA failed to similarly identify basic considerations for the "extreme" hardship standard for more than thirty years.[95] During this time, "the extreme hardship standard remain[ed] the most nebulous and controversial of the necessary conditions of eligibility for cancellation of deportation."[96]

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(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

8 U.S.C. § 1101(f) (1994). The purpose of this definition was to promote uniformity in interpretation. *See* Kim v. INS, 514 F.2d 179 (D.C. Cir. 1975) (holding that adultery within Immigration and Nationality Act was not defined by the law of the forum state, but by a consistent federal interpretation which included a tendency to destroy the existing marriage); S. REP. NO. 82-1137, at 6 (1952).

88. *See, e.g.*, INS v. Phinpathya, 464 U.S. 183 (1984) (adhering to the plain meaning of continuous physical presence requirement); Sanchez-Dominguez v. INS, 780 F.2d 1203 (5th Cir. 1986) (denying suspension of deportation relief to two otherwise eligible aliens who resided continuously in the United States for twelve years except for a one night stay in Mexico).

89. Immigration Reform and Control Act of 1986, § 315(b), 8 U.S.C. 1254(b)(2) (1994).

90. *Id.*; *see* 3 GORDON, *supra* note 27, § 74.07[5][c].

91. Pub. L. No. 104-208, § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570.

92. *See id.* § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 2647 (to be codified at 8 U.S.C. § 1229b(d)(2)).

93. *See* Foerstel, *supra* note 41, at 664.

94. *See supra* notes 38-40 and accompanying text.

95. Not until *In re* Ige, 20 I. & N. Dec. 880, 882 (1994), did the BIA affirmatively enumerate factors in a published decision relevant to the determination of "extreme" hardship.

96. Kamlet, *supra* note 27, at 180.

Establishing "extreme" hardship was particularly problematic due to the lack of any clear distinction between the two hardship standards. Many courts failed to find "extreme" hardship because aliens failed to establish that the hardship that would result from their deportation would be "unique" or "unusual."[97] However, an examination of the words Congress used to describe these two standards reveals that a requirement of "unusualness" appears only in the "exceptional and extremely *unusual*" hardship standard. For the "extreme" hardship standard, Congress merely used the adjective "extreme" to modify the term "hardship." Thus, it appears that the determination of "extreme" hardship should be a measurement of degree, without additional consideration of whether the hardship is unique or unusual. Still, while the INS has recognized that the intent of Congress was to require a lesser degree of hardship under the "extreme" hardship standard,[98] some courts continue to equate the two standards as one.[99]

Various courts have recognized the difficulty in defining these standards.[100] In *INS v. Wang*,[101] the Supreme Court expressly stated that "[t]he crucial question in this case is what constitutes 'extreme hardship,'" but never attempted to define the term.[102] The Court held that "[t]hese words are not self-explanatory, and reasonable men could easily differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and his delegates . . . ."[103] The Court went further and held that "[t]he Attorney General and his delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so. Such a narrow interpretation is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy."[104] Clearly, the Court deemed the Attorney General to have

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97. *See, e.g.*, Perez v. INS, 96 F.3d 390, 392 (9th Cir. 1996) (defining "extreme hardship" as "hardship that is 'unusual or beyond that which would normally be expected' upon deportation"); Kuciemba v. INS, 92 F.3d 496, 499 (7th Cir. 1996) (finding that given the "exceptional" nature of the suspension remedy, hardship must be "substantially different from and more severe than that suffered by the ordinary alien who is deported"); Vargas v. INS, 826 F.2d 1394, 1397 (5th Cir. 1987) (failing to find "uniquely extreme" hardship).

98. *See supra* note 46.

99. As the Seventh Circuit said:

> [N]owhere do we find concrete support for the proposition that the amendment of "exceptional and extremely unusual" to merely "extreme" hardship entails a broadening of the remedy, much less a departure from norms established by the BIA and approved by the courts. These norms require comparisons of like applications for relief. . . . [I]t is not clear how, if it is supposed that the petitioner is not required to show "unique" hardship, the BIA is then precluded from considering relative claims. We need not now gratuitously extract from ambiguity a construction not warranted by the language or legislative history of the statute.

Hernandez-Patino v. INS, 831 F.2d 750, 753 (7th Cir. 1987).

100. *See, e.g.*, INS v. Wang, 450 U.S. 139, 144 (1981) (per curium); Bueno-Carrillo v. Landon, 682 F.2d 143, 145 (7th Cir. 1982) ("The scope of 'extreme hardship' is not self-explanatory."); *In re* Ige, 20 I. & N. Dec. 880, 882 (1994) ("The phrase 'extreme hardship' is not a definable term of fixed and inflexible content or meaning.").

101. 450 U.S. 139 (1981).

102. *Id.* at 144.

103. *Id.*

104. *Id.* at 145.

considerable discretion in deciding what constitutes "extreme" hardship. However, is it obvious that Congress intended a narrow interpretation?[105] Some courts have interpreted the Court's language in *Wang* as mandating a narrow interpretation.[106]

A general starting point in the analysis of the "extreme" hardship standard is found in the BIA's 1978 decision in *In re Anderson.*[107] In *Anderson*, the BIA addressed a 1975 House Judiciary Committee report discussing criteria with reference to an "unusual" hardship requirement.[108] The Committee suggested that the Attorney General consider the following facts and circumstances among others: (1) the economic and political conditions of the country to which the alien would be returnable; (2) the alien's business or occupation; (3) the availability of other means to obtain permanent residence in the United States; (4) whether the alien was of special assistance to the United States or to the community; (5) the alien's immigration history; and (6) the alien's position in the community.[109] The BIA noted that these new factors were not inconsistent with prevailing interpretations of "extreme" hardship.[110] However, the BIA failed to affirmatively identify these factors as considerations until 1994.[111] Nevertheless, such multi-factor balancing tests are remarkably unenlightening as explications of the law. The factors do "little in the way of providing content to the ambiguous phrase 'extreme hardship.'"[112]

One way to help provide content to the ambiguous standard is for the BIA to publish precedential decisions illustrating factual circumstances which either do or do not establish "extreme" hardship.[113] However, since the standard's

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105. By reserving the ability to override the Attorney General's decision to suspend deportation by legislative veto, Congress may have envisioned a broad interpretation. *See supra* notes 47-49 and accompanying text. *But see* Hernandez-Cordero v. INS, 819 F.2d 558, 562 n.3 (1987) ("The fact that Congress has reserved for itself the right to veto a grant of discretionary relief, but not a denial, is further evidence that Congress meant to narrow the availability of the relief, not expand it.").

106. *See, e.g.*, Najafi v. INS, 1997 WL 15240 (7th Cir.) (holding that since suspension is an "exceptional remedy" the immigration judge is compelled to interpret "extreme" hardship narrowly); Astrero v. INS, 1996 WL 738828 (9th Cir.) ("In determining whether to suspend deportation on the grounds of extreme hardship, the Board construes extreme hardship narrowly . . . .").

107. 16 I. & N. Dec. 596 (1978).

108. *See id.* at 597; H.R. REP. NO. 94-504, at 17 (1975) (commenting on criteria which could form the basis for discretionary relief for certain aliens whose deportation would result in "unusual" hardship).

109. *See* H.R. REP. NO. 94-504, at 17 (1975); Loue, *supra* note 11, at 61.

110. *See Anderson*, 16 I. & N. Dec. at 597. The court noted the "limited significance of legislative committee statements in the area of administrative discretion." *Id.* at 599 n.1; *see also In re* Riccio, 15 I. & N. Dec. 548, 549 (1976) ("Administrative discretion in suspension of deportation cases should be exercised without reliance on such committee reports as assumed indicators of Congressional policy.").

111. *See In re* Ige, 20 I. & N. Dec. 880, 882 (1994).

112. *In re* O-J-O-, 1996 WL 393504 (B.I.A.) (Filppu, Board Member, dissenting).

113. Such designated decisions "shall serve as precedents in all proceedings involving the same issue or issues." 8 C.F.R. § 3.1(g) (1996); *see also* 8 C.F.R. §§ 103.3(c) (regarding Service decisions), 103.9 (1996) (regarding availability of decisions).

inception in 1962, the BIA has done little in this regard. The BIA has published merely twenty some odd decisions adjudicating the merits of an "extreme hardship" claim in cases where respondents have applied for suspension of deportation.[114] Although far from illuminating, these decisions provide the best available guidance regarding the "extreme" hardship standard for immigration decisionmakers as well as the public.

The most extensive treatment of the "extreme" hardship standard is found in the BIA's 1996 decision in *In re O-J-O-*.[115] Unfortunately, the concurring and dissenting opinions tend to raise more issues than they resolve. Furthermore, any light shed on the "extreme" hardship standard has been, for the most part, rendered moot as Congress changed the required hardship showing from "extreme" to "exceptional and extremely unusual" hardship under the new general cancellation of deportation relief provision for long-term nonpermanent resident aliens.[116] In light of the BIA's recognition in *O-J-O-* that the hardship standards were not one and the same, a House Conference report indicated that "[t]he 'extreme hardship' standard ha[d] been weakened by recent administrative decisions . . . . Such a ruling would be inconsistent with the standard set forth in new section 240A(b)(1)."[117] Thus, as the INS began to clarify the "rules of the game" for participants in determining "extreme" hardship, Congress responded by changing the rules. The stricter "exceptional and extremely unusual" hardship standard now remains for the majority of cancellation of deportation determinations.[118]

While the BIA has identified general factors it would consider in determining these hardship standards, these factors merely provide a framework for analysis. The "elements required to establish [the requisite] hardship are dependent upon the facts and circumstances peculiar to each case."[119] The weight and particular relevance given to any one factor is still left to the discretion of individual decisionmakers. Therefore, with no clear guidance from Congress or the INS, the critical definition of the hardship standards, and the determination of whether an alien's circumstances meet those standards, is left to the unguided and unrestrained discretion of "impressionable and fallible human beings at all levels of the administrative hierarchy."[120]

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114. *See O-J-O-*, 1996 WL 393504 (Holmes, Board Member, concurring).

115. *Id.*

116. *See supra* notes 55-59 and accompanying text.

117. H.R. CONF. REP. NO. 104-828, at 213 (1996) (citation omitted).

118. The "extreme" hardship standard remains only for cancellation of deportation decisions involving spouses and children subjected to extreme cruelty by a U.S. citizen or lawful permanent resident. *See supra* notes 53-54, 59 and accompanying text. Let us hope that the INS does not require "extreme cruelty" to be "substantially different from" that experienced by the ordinary spouse or child subjected to cruelty. *See supra* note 99 and accompanying text.

119. *In re* Ige, 20 I. & N. Dec. 880, 882 (1994).

120. Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144, 147 (1975).

II. THE CANCELLATION OF DEPORTATION DECISION

In determining whether to grant cancellation of deportation relief, immigration decisionmakers generally undertake a two-step process. First, a decisionmaker determines whether the alien meets the statutory eligibility requirements. Second, the decisionmaker exercises discretion as to whether she will grant relief. Despite the decisionmaker's express exercise of discretion in the second step, the statutory eligibility requirements in the first step "are themselves awash in a sea of discretion."[121] Due to the vague and open-ended formulations of the "extreme hardship" and "exceptional and extremely unique hardship" requirements, the decisionmaker has the discretion not only to determine whether an alien has met the hardship requirement, but also has the discretion to determine what this requisite degree of hardship is.[122]

Additionally, with no guidance from Congress, the exercise of these discretionary determinations is also left to the discretion of the Attorney General and her subordinates. That is, the manner in which the decisionmaker exercises his discretion (whether determined by established guidelines, rules, or merely by the decisionmaker's whim) is itself discretionary. Hence, these multiple layers of discretion reveal the ubiquitous discretion vested in immigration decisionmakers.

As discretion has become an indispensable necessity in the operation of government,[123] confining that discretion has become critical to avoid the potential for its abuse. Moreover, selecting an appropriate combination of methods to limit discretion is often difficult and complicated.[124] However, in the context of granting discretionary relief, a conception that less safeguards are needed than in the administration of legal rights appears to have simplified this task.[125] In cancellation of deportation proceedings, this rights-privilege distinction holds that although an alien has a right to a discretionary determination, the granting of relief is considered a matter of grace.[126] Accordingly, it follows that an alien

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121. ALEINIKOFF, *supra* note 9, at 653.

122. *See* INS v. Wang, 450 U.S. 139, 144 (1981) (holding that the INA commits the definition of "extreme hardship" in the first instance to the Attorney General and her delegates).

123. *See* 3 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.1 (3d ed. 1994).

124. *See id.*

125. This conception is based upon a dichotomy between "rights" (interests enjoyed as a matter of right) and mere "privileges" (interests created by the grace of the government). *See, e.g.*, LUCY E. SAYLER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 249 (1995) ("The usual explanation for the judiciary's different treatment of immigration cases lies in the distinction between rights and privileges. . . . [Deportable aliens are] seen as clothed merely with suspendible privileges rather than rights."); *see also* Mathews v. Eldridge, 424 U.S. 319 (1976) (setting forth a three-part balancing test to determine what procedures satisfy due process in administrative proceedings); Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that procedural due process protects "entitlements").

126. *See, e.g.*, Jay v. Boyd, 351 U.S. 345, 354 (1956) ("Although such aliens have been given a right to a discretionary determination on an application for suspension, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter

can claim no legal right to fundamental procedural protections in the exercise of that discretion.

Yet, in light of the potentially devastating consequences for the alien,[127] should these discretionary determinations remain wholly unrestrained? The answer lies somewhere in the underlying purpose of the decision and the proper role of discretion. This Note posits that the controlling importance of the cancellation of deportation decision is to administer individualized justice where, although an alien is in violation of our immigration laws, notions of leniency and humanitarianism control to alleviate the most compelling personal hardships. Discretion is thus necessary to allow the decisionmaker to consider unique individual circumstances. However, proper guidance and restraint are essential to minimize injustice from the arbitrary exercise of this discretion.[128]

Professor Koch outlines at least five different uses for the term "discretion" in administrative law.[129] Two of these uses are relevant in examining the use of discretion in cancellation of deportation decisionmaking. What Koch terms "individualizing discretion" appears to identify the discretion needed in cancellation of deportation decisions. "Discretion, used in this way, refers to the discretionary decisionmaker's authority to adjust applicable rules at the margin in order to improve a program's ability to do individual justice."[130] The Attorney General, ideally, uses this kind of discretion when she determines whether to administer justice by granting an alien cancellation of deportation relief. Thus,

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of grace.") (citation omitted). The Supreme Court once stated that it had "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." Board of Regents v. Roth, 408 U.S. 564, 571 (1972). Although the rights-privilege distinction may have been blurred in other areas of administrative law, its vitality appears to remain in the area of immigration law. *See* SAYLER, *supra* note 125, at 250 (suggesting that the "emergence of a unitary standard of administrative due process, applicable to all agencies regardless of the programs they administer [should] result in higher standards of due process in immigration proceedings").

127. Note that the burden of deportation does not fall solely on the alien: "employers may lose productive employees, neighborhoods may lose valued residents, and family and friends may be deprived of significant personal relationships." ALEINIKOFF, *supra* note 9, at 652.

128. For the most thorough treatment of discretionary decisions involving justice to individuals, see KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 142-187 (1969). The Author hopes that this Note is in the vein of further study that Professor Davis envisioned.

129. Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 470 (1986).

> The term *discretion* has at least five different uses in administrative law. The authority to make individualizing decisions in the application of general rules can be characterized as "individualizing discretion." Freedom to fill in gaps in delegated authority in order to execute assigned administrative functions may be called "executing discretion." The power to take action to further societal goals is "policymaking discretion." If no review is permitted, the agency is exercising "unbridled discretion." Finally, if the decision cannot by its very nature be reviewed, the agency is exercising "numinous discretion."

Id. (footnote omitted) (emphasis in original).

130. *Id.* at 472.

decisionmakers in cancellation of deportation cases should use "[d]iscretion [as] a tool, indispensable for individualization of justice."[131]

Although such discretion is a very positive feature of the cancellation of deportation process, it is nevertheless subject to abuse. "Discretion is a tool only when properly used; like an axe, it can be a weapon for mayhem or murder."[132] Discretionary decisionmaking must therefore be "properly confined, structured, and checked."[133] However, Congress has done little to confine or structure the Attorney General's discretion and has done much to remove an essential check.

Although limited, judicial review of "individualized discretion" in cancellation of deportation decisionmaking served as a check on impermissible deviations from perceived norms.[134] By prohibiting judicial review, Congress has vested what Koch terms "unbridled discretion" in cancellation of deportation decisionmakers.[135] "Unbridled discretion is complete. For reasons that have little to do with the potential value of court involvement, the court has no authority over the core decision."[136] Although "individualizing discretion" entails limited review to help assure its proper exercise,[137] "unbridled discretion" is unreviewable. Thus, what once began as benign discretionary power in cancellation of deportation decisionmaking is now potentially abusive.

III. JUDICIAL REVIEW OF CANCELLATION OF DEPORTATION DECISIONMAKING

Arguably, in no other area of the law has the role of the judiciary been circumscribed more than in immigration. The development of "an insidious synergism of doctrines" has severely undermined meaningful judicial review by counseling broad deference to discretionary agency decisionmaking.[138] This Part

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131. DAVIS, *supra* note 128, at 25.

132. *Id.*

133. *Id.* at 26.

134. Although the statutory language of the cancellation of removal provision remains vague, general notions of its administration have developed from a sparse number of published BIA precedents. *See supra* notes 113-14 and accompanying text. Although these notions are generally insufficient to enable a reviewing court to determine the correctness of any given decision, the court can check for the *potential* for error. "The purpose of individualizing discretion is to allow the agency to fine tune the rules—administrative, judicial, or statutory—to do individual justice; the court controls only for extreme risk of error in such judgments." Koch, Jr., *supra* note 129, at 476.

135. *See id.* at 495-502.

136. *Id.* at 496.

137. Three primary tools have developed for courts to assure the proper exercise of cancellation of deportation making discretion: (1) requiring the decisionmaker to consider the evidence presented by the alien regarding the potential hardship; (2) requiring the decisionmaker to consider the evidence cumulatively; and (3) requiring the decisionmaker give reasons for her decision, thus showing a proper consideration for the circumstances. *See* Note, *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. REV. 1286, 1396 (1983).

138. *See* Michael G. Heyman, *Judicial Review of Discretionary Immigrat Decisionmaking*, 31 SAN DIEGO L. REV. 861, 862 (1994).

will review the troubled course that judicial review of cancellation of deportation decisionmaking has followed until suffering its demise at the hands of Congress.

A. The Plenary Power Doctrine

In the context of immigration, the "plenary power doctrine"[139] has historically been invoked to support the argument for broad judicial deference.[140] The doctrine is premised on the notion that immigration decisions relate to delicate foreign policy issues that the political branch of government should resolve.[141] Although the plenary power doctrine technically applies only to constitutional challenges to immigration legislation, its judicial adoption reflects a mood that immigration decisions are largely immune from judicial review.[142]

Hence, by analogy the plenary power doctrine serves as a method to prevent judicial interference in agency decisionmaking. Courts have selectively invoked this doctrine to shield agency decisions from meaningful judicial review.[143] Taken to its extreme, the doctrine lends itself as an intellectual justification for courts to turn a blind eye toward potential abuses and agency excesses.

B. The Decline of the Nondelegation Doctrine and the Rise of Chevron*'s Presumption of Deference*

In theory, the "nondelegation doctrine" holds that Congress may not delegate its legislative powers to administrative agencies.[144] Accordingly, upon

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139. In the late 1800s, the Supreme Court invoked this doctrine to emphasize the extraordinary powers of Congress over immigration. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 705-32 (1893); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889) (holding "[w]hatever license, therefore, Chinese laborers may have obtained previous to the Act of October 1, 1888, to return to the United States after their departure, is held at the will of the Government, revocable at any time, at its pleasure"). For a critique of the plenary power doctrine, see, for example, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

140. *See, e.g.*, INS v. Abudu, 485 U.S. 94, 110 (1988); INS v. Rios-Pineda, 471 U.S. 444, 451-52 (1985); Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909))); Amanullah v. Nelson, 811 F.2d 1, 4 (1st Cir. 1987) ("By statutory enactment, Congress has delegated its unusually broad dominion in the immigration field to the Attorney General.").

141. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952) ("Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").

142. *See* Heyman, *supra* note 138, at 862.

143. *See, e.g.*, *Abudu*, 485 U.S. at 110; *Rios-Pineda*, 471 U.S. at 452; *Fiallo*, 430 U.S. at 792; Mathews v. Diaz, 426 U.S. 67, 81-82 (1976); Hernandez-Cordero v. INS, 819 F.2d 558, 561 (5th Cir. 1987); Achacoso-Sanchez, 779 F.2d 1260, 1264-65 (7th Cir. 1985).

144. The United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1. Since the Constitution grants legislative powers to Congress, any delegation of that power is therefore unconstitutional. *See, e.g.*, Field v. Clark, 143 U.S. 649, 692 (1892) ("That congress cannot

authorizing agency action, Congress must provide standards "adequate to convey to the agency its lawful role and to appropriately confine the agency's discretion 'within banks that keep it from overflowing.'"[145] In practice, however, courts have routinely allowed Congress to delegate extremely broad powers to administrative agencies.[146] Although the Supreme Court has never expressly renounced the nondelegation doctrine, the doctrine has remained essentially dormant for over fifty years.[147]

Clearly, agency decisionmaking must be secured in the language of the statute the agency is authorized to implement.[148] That language provides the standards which guide and define the scope of the agency's decisionmaking power. Yet, "[i]n the absence of adequate standards, it is impossible to judge whether an agency's decisionmaking is in accordance with its authorizing statute."[149] Thus, as a result of vague or excessively broad legislative enactments, "[judicial] deference flows from the simple fact that courts refuse to enforce the nondelegation doctrine."[150]

Granted, it is impossible for legislators to foresee every possible situation that may arise during the life of a statute. Moreover, legislatures are not infallible institutions. Hence, whether drafters worked flawlessly or not, agency-administered statutes are bound to contain ambiguities.[151] Who then is to resolve these ambiguities? Two institutions have assumed the role of giving meaning to agency-administered statutes: (1) the agency charged with responsibility to administer the statute; and (2) a reviewing court.[152] However, an overwhelming trend toward affording deference to administrative agencies has exceedingly restricted the role of the courts. Although this trend can be traced to the demise of the nondelegation doctrine, deference has reached new heights since the Supreme Court's landmark decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.[153]

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delegate legislative power . . . is a principle universally recognized . . . ."). *See generally* 1 DAVIS & PIERCE, *supra* note 123 § 2.6.

145. E.P. Krauss, *Unchecked Powers: The Supreme Court and Administrative Law*, 75 MARQ. L. REV. 797, 799 (1992) (quoting Panama Ref. Co. v. Ryan, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting)).

146. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989) (holding that Congress's broad delegation to the Sentencing Commission to promulgate sentencing guidelines was not an excessive delegation of legislative power). For a critique of the Supreme Court's failure to enforce the nondelegation doctrine, see DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

147. At one time, albeit briefly, the Supreme Court enforced the nondelegation doctrine. *See Panama Ref.*, 293 U.S. at 388; A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

148. *See* 1 DAVIS & PIERCE, *supra* note 123, § 3.1.

149. Krauss, *supra* note 145, at 799.

150. Heyman, *supra* note 138, at 868.

151. *See* 1 DAVIS & PIERCE, *supra* note 123, § 3.1.

152. *See id.*

153. 467 U.S. 837 (1984).

Chevron introduced a new era of broad judicial deference to agency decisionmaking.[154] Section 706 of the Administrative Procedures Act ("APA") provides a reviewing court with the authority to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[155] Nowhere does the APA mention judicial deference to agency determinations of law, yet *Chevron* has clearly shifted the balance in favor of deference to agency interpretations of agency-administered statutes.[156]

In *Chevron*,[157] the Supreme Court set forth the modern test for judicial review of administrative agency interpretations of statutory provisions. The case involved a challenge to the Environmental Protection Agency's ("EPA") interpretation of the statutory term "stationary source." The term was part of the Clean Air Act Amendments of 1977,[158] to authorize and impose limitations on emissions. The EPA regulations interpreted the statute to allow states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble." The District of Columbia Circuit Court noted that the legislation and its history were inexact with respect to whether the term "stationary source" could be interpreted in accordance with the single "bubble rule." The court then performed its own interpretation of the term and set aside the agency ruling.[159]

The Supreme Court unanimously reversed, enunciating a new two-part test for courts to apply to agency action predicated on the agency's authorizing statute. The Court held that if Congress has been silent or ambiguous about the meaning of a statutory term, courts should defer to a permissible agency construction.[160] The Court reasoned that Congress's failure to elucidate a term constituted a delegation to the agency to interpret the law.[161] Finding that the language and legislative history of the statute indicated that Congress had no specific intent about the statutory term, the Court affirmed the EPA's reasonable definition of "stationary source."[162]

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154. *See* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986) (describing *Chevron* as revolutionary and evolutionary). A search for *Chevron* in Westlaw's ALLCASES database produced over 2,500 citations in February of 1997.

155. 5 U.S.C. § 706 (1994).

156. For a critique of this trend, see, for example, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990). For support of this trend, see Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989); Starr, *supra* note 154.

157. *Chevron*, 467 U.S. at 837.

158. Pub. L. No. 95-95, 91 Stat. 685 (applicable amendment codified as amended at 42 U.S.C. § 7502(b)(6) (1994)).

159. Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982).

160. *Chevron*, 467 U.S. at 843.

161. *Id.* at 843-44.

162. *Id.* at 864-65.

Thus, the Supreme Court created what has been termed the "*Chevron* Two-Step"[163] analysis for courts to apply to all attempts by agencies to give meaning to the statutes they administer:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[164]

If the answer to the first inquiry is "no," the analysis moves to step two:

> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[165]

On its facts, *Chevron* does not appear to be a significant departure from earlier deferential approaches to judicial review. In *Chevron*, the agency adopted its interpretation by a legislative rule and involved both highly technical matters and difficult policy choices. Traditionally, courts have accorded greater deference to administrative agencies as a practical matter due to factors such as the agency's relative expertise.[166] However, *Chevron* did not only grant mere deference to administrative agencies, it granted *controlling* weight. If *Chevron* provided controlling effect merely to an agency's legislative rule interpreting a highly political and technical term, its holding would not have been so revolutionary. *Chevron*, however, "expanded the class of statutory constructions due controlling effect."[167] The Supreme Court has since approved of its application to adjudication.[168]

Although *Chevron*'s analytical framework seems quite incompatible with the famous pronouncement in *Marbury v. Madison*[169] that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[170] it has been argued that the resolution of an ambiguous statute necessarily involves policy judgment.[171] If Congress fails to elucidate a statutory term, this implicitly

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163. 1 DAVIS & PIERCE, *supra* note 123, § 3.2.

164. *Chevron*, 467 U.S. at 842-43 (footnote omitted).

165. *Id.* at 843 (footnotes omitted).

166. "[S]uch factors [included] whether the agency's interpretation had been consistent over a long period, whether the agency had helped shepherd the legislation through Congress, whether the agency's interpretation was adopted near the time the statute was passed, and whether the agency possessed special expertise." Starr, *supra* note 154, at 297.

167. Kevin W. Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 ARIZ. L. REV. 769, 776 (1988).

168. *See, e.g.*, De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988); 1 DAVIS & PIERCE, *supra* note 123, § 3.5.

169. 5 U.S. (1 Cranch) 137 (1803).

170. *Id.* at 177.

171. *See, e.g.*, 1 DAVIS & PIERCE, *supra* note 123, § 3.2; Pierce, *supra* note 156.

constitutes a delegation to the agency to make policy choices.[172] Presumably, as part of the executive branch, agencies are therefore more accountable than judges to make such choices. In the Court's words:

> Judges . . . are not part of either political branch of the Government. . . . In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[173]

However, an examination of the INS's administration of cancellation of deportation relief raises questions as to whether the agency should be deferred to because of its political legitimacy. First, is it clear that decisionmakers within the agency really are accountable? Agency decisionmakers continue to make cancellation of deportation determinations in low-visibility proceedings through case-by-case adjudication. By not articulating the standards for these determinations through a promulgated rule, "the agency avoids crystallizing the issue for congressional review."[174] Moreover, accountability through congressional oversight is further circumscribed by the fact that legislators can acquiesce to a controversial law without affirmatively taking responsibility for it.[175]

In *Chevron*, the Supreme Court rationalized that the accountability of legislators that is lost through delegation is somehow replaced by the accountability of the President.[176] In the context of immigration, to whom would the President be held accountable? For the most part, those individuals directly

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172. As the Court noted:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

Chevron, 467 U.S. at 843-44 (footnotes omitted).

173. *Id.* at 865-66.

174. SCHOENBROD, *supra* note 146, at 101.

175. As Schoenbrod explains:

> [A] controversial law can take effect only if a sufficient number of legislators support it explicitly and on the record. In contrast, the oversight notion of accountability allows Congress to sustain an agency law through inaction or to change the agency law through informal activity of a few influential members. This enables legislators to accede to a controversial law without having to assume any personal or public responsibility for it.

Id. at 102.

176. *Chevron*, 467 U.S. at 865-66.

affected by immigration decisions are excluded from the political process.[177] Moreover, assuming a majority of the voting public were actually aware of, and objected to, one agency's interpretation of an ambiguous statutory term, it is unlikely that the President will feel much political pressure.[178] We must endorse our President's positions wholesale.[179]

Furthermore, Professor Heyman points out that the Attorney General's decision is spoken of as if "she were really making the[] decisions and building a useful repository of expertise."[180] However, "these decisions are 'made in the depths of the bureaucracy.'"[181] "'[T]he fact remains that [immigration decisionmaking] is exercised by impressionable and fallible human beings at all levels of the administrative hierarchy . . . . [For] in practice decisionmaking has been delegated to and is exercised by a host of lesser officials.'"[182] With the Attorney General so far removed from the actual decisionmaking, surely it is naive to think that immigration judges are politically accountable. Moreover, with no standards, it is unlikely that an agency decisionmaker can be held accountable to anyone. Clearly, it is impossible to sanction someone when there are no standards against which to judge the correctness of that person's actions.

Second, assuming that administering cancellation of deportation relief is a policy matter, would Congress have intended to delegate the power to make policy to individual cancellation of deportation decisionmakers? Immigration decisionmaking mirrors the tug and pull of a multitude of competing interests inherent in the national debate on immigration policy.[183] As Peter Schuck wrote:

> The ideological poles of current debate are easy to categorize. At one end are libertarians and free market purists. They favor not just expansion but essentially open borders . . . .

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177. *See* Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413, 444 (1993) ("'Aliens' are lawfully excluded from the political process.").

178. Johnson explains that:

> Even if a majority of the voting public objects to the executive branch's immigration policies and practices, most citizens are not likely to feel their interests being directly affected. Thus, few might be expected to mobilize politically to change how two relatively obscure administrative agencies, the INS and the Executive Office for Immigration Review, treat noncitizens seeking to immigrate to the United States. Instead, the President, and hence the Attorney General, might only be expected to be subject to distinctly anti-immigrant political pressures, expressed by a vocal minority of citizens calling for increased enforcement efforts based on the belief that they are directly affected by immigration. Such pressures are more likely to surface when (as often happens during a recession) noncitizens are blamed for displacing American workers.

Id. (citations omitted).

179. *See* SCHOENBROD, *supra* note 146, at 106.

180. Heyman, *supra* note 138, at 894.

181. *Id.* (quoting Hernandez-Cordero v. INS, 819 F.2d 558, 567 (5th Cir. 1987) (Rubin, J., dissenting)).

182. *Id.* at 887-88 (quoting Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144, 147 (1975)).

183. *See id.* at 887.

> At the restrictionist end is a melange of groups animated by anxieties about migrants' effects on the environment, labor market competition, population growth, and public services.[184]

Clearly, in cancellation of deportation proceedings, a balance must be struck between the conflicting policies of immigration law enforcement and humanitarian relief. However, should we permit such policy choices to vary with the attitude and personal preferences of those within the bureaucracy? In fact, variation among individual decisionmakers suggests that no uniform policy choice is made at all. By simply failing to legislate with sufficient specificity, Congress has surrendered its role in propounding national policy. *Chevron* effectively "turns the non-delegation doctrine on its head."[185]

Setting aside such policymaking implications and the likelihood that political accountability is more fiction than reality, how would the "*Chevron* Two-Step" analysis apply to the ambiguous phrase "extreme hardship" in cancellation of deportation cases? Notwithstanding the debate as to when a statutory term is ambiguous,[186] it would seem an easy task. Indeed, *INS v. Wang*,[187] which held that the INA committed the "definition in the first instance to the Attorney General and his delegates"[188] was used as support in *Chevron*.[189]

By applying this two-step approach to the statutory phrase "extreme hardship," *Chevron*'s first question as to whether the statute is clear must be answered "no." Clearly Congress has not spoken on the precise question at issue, nor is the intent of Congress clear. Failing an affirmative response on the first inquiry, we move on to step two. Is the Attorney General's interpretation a permissible statutory construction? This determination is much more problematic as the Attorney General and her subordinates have yet to articulate a clear definition of "extreme hardship."

Although the BIA has published a scant few precedential decisions,[190] is the dearth of any clear guidelines or standards a *reasonable* interpretation? What is a "permissible" or "reasonable" interpretation? These terms are not self-explanatory. If Congress has not spoken on the issue, what standards or principles limit a reasonable interpretation? Given the remedial purpose of the

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184. *Id.* (quoting Peter H. Schuck, *The Great Immigration Debate*, AM. PROSPECT, Fall 1990, at 100, 101).

185. Krauss, *supra* note 145, at 820.

186. Even when there is agreement as to the application of the *Chevron* analysis to a particular case, there still may be disagreement as to when the text is clear and what "traditional tools of statutory construction" are available. *See, e.g.*, DAVIS & PIERCE, *supra* note 123, § 3.6; Farina, *supra* note 156, at 460 n.41 (noting the many approaches to legislative history as a "traditional tool of statutory construction" after *Chevron*); Scalia, *supra* note 156, at 520. However, under any approach, it would be difficult to say that the term "extreme hardship" is anything but ambiguous.

187. 450 U.S. 139 (1981).

188. *Id.* at 144.

189. *Chevron*, 467 U.S. at 844 n.13. The footnote was used to illustrate when a legislature implicitly delegates to an agency the authority to interpret a statutory provision, and that a court may not substitute its own construction for a reasonable interpretation made by the administrator of an agency. *Id.*

190. *See supra* notes 113-14 and accompanying text.

provision, is making cancellation of deportation relief virtually impossible to obtain a reasonable interpretation? From the language of the statute, at least one limitation should be obvious. Congress provided two separate hardship standards. Therefore, these standards cannot be the same.[191] Yet, without an affirmative articulation of either standard, how can a reviewing court determine the presence of a permissible interpretation? Could a court have reasoned that "the first instance" for which the agency to define the term had long since passed and thus offer its own interpretation? Probably not, but by failing to develop the requisite hardship standards the agency seems to have abdicated its responsibility. If this is so, who then must assume this responsibility?

In *Hernandez-Patino v. INS*,[192] the Seventh Circuit stated that by "refusing to define 'extreme' hardship fully, [Congress] avoided the substantive policy decision and has deferred to agency expertise."[193] Thus, if Congress is unable or chooses not to decide a policy matter, is it clear that INS employees have a decisive advantage over the courts to do so? As a practical matter, with the absence of agreed policy and a lack of information for decisionmaking, immigration decisionmakers have no obvious advantage of expertise over the courts. Furthermore, if cancellation of deportation decisionmaking is viewed not as a policy matter, but as the administration of individualized justice, oversight by the courts seems particularly appropriate. The institutional characteristics and the traditional concern of the courts (protecting individuals) enhance a judge's ability to "temper what may sometimes be the more narrow interpretive perspective of a single, mission-oriented [immigration decisionmaker]."[194]

Nonetheless, though courts may have a relative expertise with respect to ordinary judicial skills, this expertise is in the application of legal standards to a particular set of facts. If standards for the administration of cancellation of deportation relief are ill-defined or nonexistent, how then can a court provide a meaningful check on agency decisionmaking?

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191. *See* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that the BIA cannot treat two separate but related standards as one); *see also* notes 99-101 and accompanying text (discussing the blurred distinction between the "extreme" and "exceptional and extremely unusual" hardship standards).

192. 831 F.2d 750 (7th Cir. 1987).

193. *Id.* at 753.

194. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 13.1, at 435 (1993).

> By training and experience judges are particularly adept at interpreting legal texts and resolving constitutional and statutory issues. As generalist judges they bring an important added dimension to their interpretive task. They are not part of any administrative agency and have no particular regulatory mission to fulfill. As federal judges in particular, they also have a position with life tenure and a salary that cannot be lowered. Such institutional characteristics enhance the ability of courts to apply their legal, interpretive skills in a relatively objective and independent manner.

Id.; *see, e.g.*, Johnson, *supra* note 177 (discussing the anti-immigrant, pro-enforcement bias of immigration decisionmakers).

C. Unreviewability Law

Section 706 of the APA provides for judicial review of "abuse of discretion."[195] However, the APA also provides a "committed to agency discretion" exception to judicial review.[196] The Supreme Court resolved these seemingly conflicting provisions by construing the "committed to agency discretion" provision quite narrowly.[197]

In *Heckler v. Cheney*,[198] inmates sentenced to death by injection of lethal drugs claimed that the drugs were not in compliance with the laws administered by the Food and Drug Administration ("FDA"). The Court considered whether the FDA abused its discretion by failing to investigate and take enforcement actions. The Court saw the FDA's decision not to act as an instance of prosecutorial discretion unbounded by standards. Affirming a principle from *Citizens to Preserve Overton Park, Inc. v. Volpe*,[199] the Court held that in a narrow range of circumstances "'statutes are drawn in such broad terms in a given case there is no law to apply.'"[200]

A broad reading of *Heckler* suggests that when a statute provides no judicially manageable standards to detect abuse, there is no law to apply. Therefore, the argument goes, with "no meaningful standard against which to judge the agency's exercise of discretion,"[201] a "court obviously cannot conduct this inquiry."[202] Although commentators point out that review is always possible aside from the governing statutes,[203] the contrary view has attracted many.[204]

Is the review of cancellation of deportation cases a situation where there is no law to apply? The disturbing answer may be "yes." Due to the holding in *INS v. Wang*,[205] judicial review is doubly restricted by (1) the discretionary nature of the grant of relief and (2) the lack of a clear articulation of the weight accorded to particular factors in determining the requisite hardship. Without the development of guidelines for the exercise of discretion or the determination of the requisite hardship, some courts will simply defer to the agency because its discretion cannot be tested for error.

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195. 5 U.S.C. § 706(2)(a) (1994).

196. *Id.* § 701(a)(2) (1994).

197. *See* Heckler v. Cheney, 470 U.S. 821, 838 (1985); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

198. 470 U.S. 821 (1985).

199. 401 U.S. 402 (1971).

200. *Heckler*, 470 U.S. at 830 (quoting *Citizens to Preserve Overton Park*, 401 U.S. at 410 (1971)).

201. *Id.*

202. Heyman, *supra* note 138, at 873 (quoting Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 707 (1990) (footnotes omitted)).

203. Reviewing courts can "inquire into such matters as whether an agency misunderstood the facts, departed from precedent, or made an unconscionable value judgment." *Id.*

204. *See id.*

205. 450 U.S. 139 (1981).

D. The "Hard Look" and "Soft Glance" Approaches to Judicial Review of Discretionary Immigration Decisionmaking

In the context of discretionary immigration decisionmaking, we can generally place the judicial approaches toward these foregoing themes into the following two familiar administrative law categories: "hard look" and "soft glance" review.[206] Aside from the historically liberal approach in the Ninth Circuit,[207] we can identify two modestly distinctive approaches as personified in opinions by Judge Frank Easterbrook and Judge Richard Posner of the Seventh Circuit.

As Professor Heyman attests, Judge Easterbrook's opinion in *Achacoso-Sanchez v. INS*,[208] adopts, "in virtually pristine form," the highly deferential judicial attitude limiting meaningful judicial review.[209] Typifying the "soft glance" approach, Judge Easterbrook reviewed the denial of various forms of discretionary relief to a particularly litigious alien. In doing so, he first defined the scope of judicial review with reference to the discretion vested in agency decisionmakers by invoking both the plenary power doctrine and the rationale behind *Chevron*:

> The discretion of immigration officials is exceptionally broad. The Supreme Court recently suggested that it is absolute. The Board's discretion is broad in part because it administers the immigration laws, and "over no conceivable subject is the legislative power of Congress more complete" than with respect to immigration. Congress has the power to make distinctions on account of race, national origin, and other considerations that it would be forbidden to use in drawing distinctions among residents of the country. When Congress does not lay down rules, its power devolves on the executive branch, which then may consider factors of its own choosing.[210]

Judge Easterbrook then elaborated on the limits of judicial review in the absence of standards for judges to use:

> In the language of administrative law, the grant of discretionary relief under the immigration laws is a question on which there is "no law to apply," and when there is no law to apply judicial review is exceedingly constricted. When there is no governing legal rule, it is fatuous to speak of "error" in the disposition of a given case. Judges, specialists in the applications of

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206. The "hard look" doctrine counsels a court to ensure that "the agency has . . . really taken a 'hard look' at the salient problems, and has . . . genuinely engaged in reasoned decision-making." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970). For the Supreme Court's most famous application of hard look review, see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983). *See generally* AMAN, JR. & MAYTON, *supra* note 194, at 504-15 (discussing the origins and application of the "hard look" doctrine).

207. *See, e.g.*, Wang v. INS, 622 F.2d 1341, 1346 (9th Cir. 1980), *rev'd*, 450 U.S. 139 (1981) ("[T]he statute should be liberally construed to effectuate its ameliorative purpose . . . .").

208. 779 F.2d 1260 (7th Cir. 1985).

209. *See* Heyman, *supra* note 138, at 874.

210. *Achacoso-Sanchez*, 779 F.2d at 1264 (citations omitted) (quoting Oceanic Stream Navigating Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

> standards of decision to facts, and in the rooting out of error, have little to contribute.[211]

Thus, the "soft glance" approach "reveals an indisposition to afford meaningful judicial review in the absence of articulated statutory or regulatory standards."[212] As no meaningful standards exist for administering cancellation of deportation relief, "soft glance" review effectively assures but one result.

On the other hand, another approach has emerged where judges appear to demonstrate aggressive oversight over the discretionary determinations of immigration decisionmakers. This "hard look" approach illustrates that such oversight is possible despite the limitations on judicial review noted above. Judge Posner's candid opinion in *Salameda v. INS*[213] exemplifies this approach.

In reviewing a denial of suspension of deportation relief, he first acknowledged the limitations of judicial review: "It is up to the Board to decide what shall count as 'extreme hardship.' Judicial review is limited to making sure that the Board has considered in a rational fashion the issues tendered by the alien's application."[214] He then went on to note the potential impairment on reasoned decisionmaking due to the agency's overwhelming caseload:

> The proceedings of the Immigration and Naturalization Service are notorious for delay, and the opinions rendered by its judicial officers, including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality. The lodgment of this troubled Service in the Department of *Justice* of a nation that was built by immigrants and continues to be enriched by a flow of immigration is an irony that should not escape notice. We imagine that Congress is more to blame than the Department or even the INS itself. The agency is absurdly understaffed. In 1994, . . . the Board of Immigration Appeals had an effective membership of only four—to handle the more than 14,000 appeals lodged with the Board that year.[215]

This statement not only illustrates the heavy burden placed upon immigration decisionmakers, but also reveals something potentially more sinister. Obviously, the mere weight of caseloads can make immigration decisionmakers unsympathetic to an alien's plight. In addition, a seasoned decisionmaker may be slow in finding a particular alien's potential hardship "extreme" after hearing several similar hardship cases. However, critics argue that the agency's increasing caseload burden contributes to an anti-immigrant, pro-enforcement bias.[216] Thus, the underlying agenda of docket-clearing may prevail over reasoned decisionmaking and the interests of the alien seeking relief.

In *Salameda*, Judge Posner went on to hold that the agency failed to offer a rational justification for its order denying suspension of deportation. He explained that the BIA without explanation changed its position on community service as an element of extreme hardship. "[I]n light of the holdings of the other

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211. *Id.* at 1265 (citation omitted).
212. Heyman, *supra* note 138, at 874-75.
213. 70 F.3d 447 (7th Cir. 1995).
214. *Id.* at 449 (citation omitted).
215. *Id.* (emphasis in original) (citations omitted).
216. *See, e.g.*, Johnson, *supra* note 177.

circuits and the Board's apparent acquiescence in the immigration judge's adoption of that position and the government's acknowledgment that it is the Board's position, we think it is the law of this case that community-assistance must be considered."[217]

Judge Posner concluded by noting his exceptional scrutiny and offering his own take on the underlying problem impairing the agency's decisionmaking:

> We may seem awfully picky in remanding a case in which the showing of extreme hardship is as marginal as it is here, and awfully unforgiving of the resource constraints that prevent the judicial officers of the immigration service from doing a competent job. But the government has not argued harmless error, and understaffing is not a defense to a violation of principles of administrative law admitted to bind the Immigration and Naturalization Service. (It would be pretty weird if an agency could get a reduced standard of judicial review of its decisions simply by asking Congress for a reduced appropriation!) The richest nation in the world, which happens to be a nation of immigrants, can afford to staff its immigration service.[218]

Given the restraints on judicial review, Judge Posner focused his concern on whether the INS judicial officers acted in a "rational manner."[219] Even under wholly open-ended statutes, agencies must operate according to "[t]raditional standards of rationality and fair purpose."[220] However, Posner also attempted to provide some uniformity by not allowing inconsistent assertions of what hardship factors need to be considered. He assured that it was "up to the Board to decide what shall count as 'extreme hardship.'"[221] But through his intolerance for procedural irregularities and sloppy thinking, he seems to communicate a desire to help the BIA define its own conception of "extreme hardship."

Certainly, the BIA may still deny cancellation backed by a new explanation crafted to overcome the court's criticism.[222] Nonetheless, perhaps the BIA's next cancellation decision would scrutinize the alien's hardship claim in more detail. Of course, remanding a decision does not ensure closer agency scrutiny, but perhaps requiring the appearance of deliberation will result in real agency deliberation. Although a more straightforward approach seems better, is it not this type of dialogue that is needed to help develop the law?

Professor Davis long ago observed that writings and discussions are primarily focused in areas where decisions are governed by rules and standards rather than by discretion.[223] Thus, rules provide for evenhanded justice. Through case decisions, scholarly articles, and general debate the law governed by rules grows. However, we pay relatively little attention to law which is governed by discretion—where the potential for injustice is greatest. Thus, we leave this area of the law underdeveloped.

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217. *Salameda*, 70 F.3d at 450.

218. *Id.* at 452.

219. *Id.* at 451.

220. Heckler v. Cheney, 470 U.S. 821, 853 (1984) (Marshall, J., concurring).

221. *Salameda*, 70 F.3d at 449.

222. *See, e.g.*, Peter H. Schuck & E. Donald Elliot, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1059-60 (1990).

223. *See* DAVIS, *supra* note 128, at v-vii.

A dialogue between the courts and the agency would help promote that development. Let us not forget that agencies, judges, and legislators alike are engaged in the business of democratic government. They are interdependent and cooperation is necessary to further the law. Through a collaborative approach, this area of the law governed by discretion could mature effectively.[224]

Congress has nevertheless eliminated any such dialogue between the courts and the INS. Given the erosion of meaningful judicial review, perhaps Congress is wise to prohibit it entirely thereby avoiding delay and saving both administrative and judicial resources. "Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably."[225]

Still, even with the manifest shortcomings of judicial review, it should not be summarily dismissed. Legislation that grants such unrestricted power over an individual should alarm those on both sides of the immigration debate. If Congress must eliminate judicial review, then the creation of standards by which the agency is to administer cancellation of deportation relief is critical. As neither Congress nor the INS has developed any such standards, injustices are inevitable.

IV. SUGGESTIONS FOR REFORM

"Chief Ben American Horse of the Sioux Indian tribe once gave the following advice to Alben Barkely, who was then Vice president of the United States: 'Young fellow . . . [b]e careful with your immigration laws. We were careless with ours.'"[226] That advice, considering the source, is illustrative of both the legitimacy and the self-righteousness of our nativist fears. The issue of illegal immigration often raises anti-immigrant sentiments. Indeed, we are frustrated as current legal mechanisms seem incapable of halting illegal immigration. However, since we have failed miserably in protecting the borders, this should not mandate an abandonment of our humanitarian values and the integrity of our immigration system.

Time will tell how effective the IIRIRA is on illegal immigration. However, Congress's new restrictions on cancellation of deportation relief and prohibition of judicial review will do little, if anything, to help deter illegal immigration. In fiscal year 1995, the INS received only 4254 applications for cancellation of deportation relief, and only one-half were granted.[227] The small vulnerable group now precluded from cancellation relief will hardly put a dent in the estimated

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224. *See* Heyman, *supra* note 138, at 908-10.

225. AMAN, JR. & MAYTON, *supra* note 194 § 13.9.1, at 492 (quoting Ethyl Corp. v. EPA, 541 F.2d 1, 69 (D.C. Cir. 1976)).

226. ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 7 (1985) (quoting from *Immigration Report*, FED'N FOR AM. IMMIGR. REFORM, Mar. 1983, at 4).

227. *Testimony June 29, 1995, Anthony Moscato, Director of Executive Office for Immigration Review Department of Justice, House Judiciary Immigration and Claims Efforts to Control Illegal Immigration*, Federal News Service, Jun. 29, 1995, *available in* LEXIS, LEGIS Library, CNGTST File.

300,000 illegal immigrants entering the United States each year.[228] Yet, with any increase in the number of deportations, politicians can proclaim to their constituents that they are tough on illegal immigration.[229]

By prohibiting judicial review, Congress removed a long-standing check on arbitrary agency decisionmaking. Critics have noted that "[t]he idea of immunizing a government agency from being called upon to account in court goes against what most Americans have thought was the theme of our system: government under law. To do it for one of the most troubled of all federal agencies, the INS, is a step so extreme that it is hard to believe . . . ."[230] Indeed, the administration of cancellation of deportation relief contradicts the oft-quoted axiom of our democracy that we have "a government of laws and not of men."[231] As a result of the Supreme Court's failure to enforce the nondelegation doctrine and Congress's prohibition of judicial review, injustices are inevitable because the inescapable reality is that men, not law, govern the process.

The acceptance of Congress's broad delegations has traditionally "rested in part on the assumption that agency action is subject to meaningful review."[232]

> Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory. Nor is that envisioned judicial role ephemeral . . . .[233]

Congress's prohibition of judicial review removes this basic premise and therefore leaves the INS effectively uncontrolled and unaccountable for its actions.

Admittedly, Congress may restrict cancellation of deportation relief, or eliminate it altogether, should Congress deem it wise to do so. However, upon deciding to provide humanitarian relief in whatever form, Congress must take

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228. *See, e.g., Variety of Measures Can Cut Illegal Immigration*, USA TODAY, Jan. 3, 1996, at 10A, *available in* LEXIS, News Library, USA TODAY File.

229. There were 51,600 illegal visitors deported from the United States in 1995, a rise of 15% over 1994 — "a fact trumpeted by the Clinton administration as proof that it [was] serious about fighting illegal immigration." *Id.*

230. Anthony Lewis, *Coming to America Congress' Cruel Provisions Hurt Immigrants and Citizens*, PHOENIX GAZETTE, Sep. 24, 1996, at B5, *available in* 1996 WL 7736909.

231. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). The expression derives from the Massachusetts Constitution of 1780, pt. I, art. XXX, where it refers to the principle of separation of powers. *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

232. Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 189 (1992).

233. Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring), 426 U.S. 941 (1976); *see also* Touby v. United States, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) ("[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds."); American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.").

responsibility for the law it created. Only those individuals for whom Congress contemplated relief be granted should obtain it—no more, no less. Given Congress's annual limitations on the number of grants of relief, ensuring correct determinations becomes all the more important. However, Congress has failed to elucidate what is a correct determination. By not legislating with requisite specificity, Congress avoids accountability for the law it created and leaves a politically powerless group to suffer the consequences.

Congress must take a more responsible and humane approach to illegal immigration reform. A more sensible approach would strive to improve enforcement of our current laws which focus on interdiction at the border and interior enforcement, rather than curtailing humanitarian relief. Perhaps we could proactively reduce hardships through better enforcement of our laws before an illegal alien has children, establishes ties to the community, and generally acclimates to life in the United States. Reducing the opportunity for potentially severe hardships to develop may likewise reduce the need for cancellation of deportation relief.

Nonetheless, Congress continues to ignore the "root cause of the agency's spectacular failure to control illegal immigration"—INS mismanagement.[234] A comprehensive reform of INS procedures, operations, and decisionmaking is therefore essential. Without theses changes, the agency cannot administer our immigration laws effectively. In that vein, the following proposals are offered to improve the agency's administration of cancellation of deportation relief and thereby restore the provision's humanitarian purpose.

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234. Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 GEO. IMMIGR. L.J. 109, 109 (1996).

> Since the 1930s, over twenty-five commissions and congressional oversight committees have proposed major reforms in the federal immigration bureaucracy. In 1981, the Select Commission on Immigration and Refugee Policy described the INS as "among the most beleaguered agencies in the federal government." In 1986, the House Judiciary Committee characterized the INS as "under-manned, ill-equipped, and generally overwhelmed." In 1990, a Congressional commission concluded that "[r]eorganization of the current structure . . . is urgently needed." In 1994, an investigative series in *The New York Times* concluded that the INS is "perhaps the most troubled major agency in the federal government," and "broadly dysfunctional." In March 1995, Congressman Harold Rogers (R-KY) charged that the INS is "the most inept, badly managed federal agency that we have." Rogers concluded that the INS "needs [deep reform] more than any agency I've ever seen." Warren Leiden, Executive Director of the American Immigration Lawyers Association, laments, "[t]he INS needs elementary strategic management. It is so lacking, it is overwhelming." Frank Sharry of the National Immigration Forum says that the INS has "traditionally been one of the most demoralized and least effective federal bureaucracies—and that's saying a lot."

Id. at 110-11 (footnotes omitted).

A. INS: A Call for Managerial Reform

As a result of Congress's inability or unwillingness to provide adequate guidance through legislation, the primary authority over immigration practices and procedures is left to the INS. Therefore, absent a reinvigoration of the nondelegation doctrine, reform must begin with the INS.

The task of improving the quality of justice administered by the INS is not so different from that of other administrative schemes.[235] Jerry Mashaw provides an excellent examination of the inherent difficulty in administering justice under the Social Security disability insurance system.[236] Mashaw defines the justice of an administrative system as "those qualities of a decision process that provide arguments for the acceptability of its decisions."[237] The dominant approach to such acceptability is what Mashaw terms "bureaucratic rationality."[238]

> Given the democratically (legislatively) approved task . . . the administrative goal in the ideal conception of bureaucratic rationality is to develop, at the least possible cost, a system for distinguishing between true and false claims. Adjudicating should be both accurate (the legislatively specified goal) and cost-effective. This approach can be stated more broadly by introducing

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235. Indeed, courts have required agency development of standards for a number of benefit programs. *See* Morton v. Ruiz, 415 U.S. 199, 231 (1974) (Native American general assistance benefits).

> [A]gency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, but also to employ procedures that conform to the law. No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis . . . .

Id. at 232 (citations omitted); *see also* Allison v. Block, 723 F.2d 631, 637 (8th Cir. 1983) (farm loan deferral relief) ("[Statute] requires the development of substantive standards at the agency level to guide the Secretary's discretion in making individual deferral decisions."); White v. Roughton, 530 F.2d 750, 753-54 (7th Cir. 1976) (welfare) (Due process requires that "administrator . . . has the responsibility to administer the program to ensure the fair and consistent application of eligibility requirements. Fair and consistent application of such requirements requires that [administrator] establish written standards and regulations."); Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) (public housing) ("[D]ue process requires that selections among applicants be made in accordance with 'ascertainable standards.'"); Hornsby v. Allen, 326 F.2d 605, 612 (5th Cir. 1964) (liquor license) ("If [court] develops that no ascertainable standards have been established . . . by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licenses under the prevailing system and until a legal standard is established and procedural due process provided . . . ."). Surely, given the enormous stakes involved, these principles should extend to cancellation of deportation decisionmaking.

236. JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).

237. *Id.* at 24-25.

238. *See id.* at 23-40 (discussing and comparing justice models).

> trade-offs between error, administrative, and other "process" costs such that the goal becomes "minimize the sum of error and other associated costs."[239]

Using the bureaucratic rationality model of justice as a guide, the INS can effectively improve cancellation of deportation decisionmaking. Under this model, effective decisionmaking requires at least three things: "an understanding of the values or goals that are to be pursued; knowledge of the relevant facts; and an accurate prediction of the connection between a particular decision, given the factual context, and the accomplishment of one or more of the decisionmaker's goals."[240] Thus, cancellation of deportation decisionmakers must (1) internalize an appropriate definition of the hardship standards; (2) collect information sufficient to allow a determination of whether a particular alien's circumstances meet that definition; and (3) understand the way in which a discretionary grant or denial of relief furthers the statutory goal.[241]

As a first step, the INS must clarify current law. The Attorney General and her delegates should work to develop an agency-wide working definition of both hardship standards. In addition, the agency should develop standards for deciding whether to grant relief when an alien has met the statutory eligibility requirements. The agency has essentially two options to adopt such standards: (1) rulemaking and (2) case-by-case adjudication.

Although the requisite hardships and equities which merit a discretionary grant of relief are difficult to set forth in a hard and fast rule, the agency should have by now developed principles which are the basis for its decisions. The INS could therefore promulgate rules which articulate these principles. Such rules would provide guidance to immigration judges in their exercise of discretion thus promoting uniformity and minimizing arbitrary and erroneous decisionmaking.

If the INS believes that standards for cancellation of deportation decisionmaking are incapable of resolution by general rule, it can develop these standards on a case-by-case basis as experience develops. That is, the agency does not have to formulate some abstract generalization, but can establish standards from answers to recurring issues decisionmakers encounter through adjudication. However, the BIA has moved far too slow in this regard.[242] If the agency must continue in this fashion, it must at least publish more precedential decisions to provide meaningful guidance. Still, exclusive reliance on adjudication inhibits the elaboration of these standards. Therefore, the INS

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239. *Id.* at 25; *cf.* Mathews v. Eldrige, 424 U.S. 319 (1976). *Mathews* established a three part balancing test for assessing the process due a person which requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Id. at 335.

240. *Id.* at 49.

241. *See id.*

242. *See supra* notes 113-14 and accompanying text.

should adopt rules as soon as practicable to supersede the standards developed through adjudication.

Previously, the agency may have felt it had no incentive to develop standards for the administration of cancellation of deportation relief as a reviewing court could hold the agency accountable to its own standards. As Congress has eliminated judicial review, the threat of judicial oversight is no longer a concern. However, by adopting decisionmaking standards, individual agency decisionmakers can conserve valuable time and resources by not having to constantly reexamine recurring issues. Furthermore, exposing the basis on which the agency makes its determinations lends credibility to the agency's decisions and enhances confidence in the fairness of the system.

Development of such standards would not impair flexibility as periodic changes could be made and ought to be encouraged to continuously improve the standards. "Greater precisiveness need not completely straitjacket the adjudicator or limit the range of elements which may properly be considered."[243] The agency should simply seek to continually articulate relevant factors and implement adjudicative guidelines to assist in providing fair and impartial decisions.[244]

Yet, these standards are of little value if not properly communicated throughout the agency. Currently, immigration decisionmakers have very limited direction from INS headquarters on interpreting the law.[245] Sources to aid decisionmakers such as the "Examinations Guidebook" and the "Operating Instructions" are so outdated that they are rarely consulted.[246] Furthermore, the INS has no index of the court decisions interpreting immigration laws.[247] "As a result, the overwhelming majority of decisions have existed in a sort of netherworld."[248]

Managerial reform is necessary to effectuate an agency-wide understanding of the agency's mission and to communicate to each employee his or her respective responsibilities.[249] Permitting unguided decisionmaking is simply poor

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243. Roberts, *supra* note 120, at 165.

244. In 1979, the INS proposed regulations that sought to establish similar guidelines to consider in the exercise of discretion under 8 U.S.C. § 1255 (1994) and other provisions of the statute. However, the project was abandoned. *See* 44 Fed. Reg. 36,187 (1979); 46 Fed. Reg. 9119 (1981); ALEINIKOFF, *supra* note 9, at 679.

245. Sutherland, *supra* note 234, at 116.

246. *See id.*

247. *See id.*

248. Beth Holland, *Laws Under Scrutiny / Decisions Once Guarded Now Yield to Change*, NEWSDAY, Sept. 30, 1996, at A5, *available in* LEXIS, News Library, NEWSDAY File.

249. Following the precepts of the Clinton Administration's "reinventing government" initiative, the INS supposedly initiated "'sweeping organizational reform to address these longstanding problems and reinvent the agency.'" Sutherland, *supra* note 234, at 132 (quoting Accepting the Immigration Challenge: The President's Report on Immigration, The White House, at VII (1994)). Although the Administration did appoint Doris Meissner, "a noted immigration expert who is polished in dealing with Congress and the media," as INS Commissioner, the reform effort "has in fact changed very little about the INS, other than improving its public relations effort." *Id.* at 115-116, 133. Outside observers have noted that "the reinventing government initiative has hardly scratched the surface: 'The Service has a talented management team, on top of a bubble filled with demoralized, poorly trained and badly

management. The INS, as an agency, must develop the standards for the administration of cancellation of deportation relief. With the inherent amount of discretion involved in administering individualized justice, "clear policy statements become of overriding importance as a guide to action."[250] Thus, the INS must develop and communicate that policy throughout the bureaucracy. Individual cancellation of deportation decisionmakers should merely implement policy, not formulate it on a case-by-case basis according to their own subjective notions.

In sum, to improve the quality of justice it administers, the INS must develop standards for cancellation of deportation decisionmaking. Further, it must communicate those standards to individual decisionmakers and maintain control over the exercise of discretion. With the absence of judicial oversight, managerial reform within the agency becomes critical. Indeed, the INS alone will ultimately define justice.

B. Congressional Responsibility

If the Attorney General and her subordinates fail to move swiftly enough to implement internal reforms, Congress must take responsibility for its law. Congress should by amendment establish standards for the administration of the cancellation or removal provision. If Congress is unable, or simply chooses not to do so, it should require the Attorney General to establish procedures necessary to effectuate the fair and efficient administration of the provision. In addition, Congress should provide the INS with necessary resources to provide decisionmakers with appropriate training and information. Congress should then maintain oversight over the agency to ensure that the agency acts in accordance with congressional aims. Without judicial review, these measures are imperative to prevent potential injustices.

However, Congress should also repeal its ill-considered measure stripping courts of jurisdiction. Agency decisionmaking in the shadow of judicial review is apt to be more responsible as it strives to meet the potential objections of a

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managed staff.'" *Id.* at 132 (quoting from a January 5, 1995 interview with Frank Sharry of the National Immigration Forum). Thus, improving the quality of justice the INS administers will require much more. As Mashaw explains:

> The quality of justice provided in such a system depends primarily on how good the management system is at dealing with the set of conflicting demands that define rational, fair, and efficient adjudication. It must translate vague and conflicting statutory goals into administerable rules, without losing the true and sometimes subtle thrust of the program. It must attempt to ensure that decisions are consistent and that development is adequate, without impairing the discretion necessary individualization. It must simplify and objectify the data relevant to adjudication in order to direct action and to monitor outputs, but without so distorting perception that decisionmaking is in fact divorced from a reality that is also complex and subjective. It must deploy appropriate expertise while screening out inappropriate professional bias. It must balance perceptible administrative costs against the less perceptible cost of error . . . .

MASHAW, *supra* note 236, at 172.

250. Roberts, *supra* note 120, at 165.

reviewing court. Furthermore, if the agency does its job, judicial review should be of no concern. A reviewing court merely ensures that the agency plays by its own rules.

Judicial review is also designed to reach beyond the immediate parties through a public dialogue between the courts and the agency to help further the law. This dialogue helps to fill in the details, draw the subtle distinctions, and ultimately get closer to the elusive discretionary standards. Without agency development and articulation of the agency's decisionmaking criteria, judicial review remains an essential tool to promote understanding and awareness of the general bases for relief.

Despite the implementation of such reforms, very few aliens will meet the restrictive eligibility requirements of INA section 240A.[251] Congress must reevaluate the balance it struck between enforcement concerns and the humanitarian purpose behind cancellation of deportation relief. The potentially severe hardships imposed on these relatively few aliens appear grossly disproportionate to the insignificant effects of their deportation on illegal immigration.

CONCLUSION

Congress originally enacted cancellation of deportation relief to ameliorate the harsh effects of deportation on long-term resident aliens. However, under the pretense of getting tough on illegal immigration, the IIRIRA renders this relief illusory. The newly-constructed "cancellation of removal" provision's highly restrictive eligibility requirements remove availability to most aliens thereby imposing extreme hardship on many aliens, as well as their families, friends, and communities. For those aliens who can overcome these seemingly insurmountable hurdles, relief is further circumscribed by the unfettered discretion vested in INS decisionmakers—exacerbated by Congress's prohibition of judicial review. The INS, and ultimately Congress, should move swiftly to correct these ill-advised and irresponsible developments in the law. We should not leave the final word to "one of the least effective and most ridiculed bureaucracies in the nation's history"[252] to unjustly deprive anyone "of all that makes life worth living."[253]

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251. IIRIRA, Pub. L. No. 104-208, § 304(a)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 1570, 1644-48 (to be codified at 8 U.S.C. § 1229b).

252. Sutherland, *supra* note 234, at 110.

253. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).